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Australian Institute
of Criminology

PROSECUTORIAL DISCRETION

Edited by Ivan L. Potas

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Edited by

Ivan L. Potas

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INTRODUCTION

While the importance of prosecutorial discretion in the administration of criminal justice is acknowledged, little academic attention has been given to this topic, particularly in Australia. Accordingly the Australian Institute of Criminology considered it timely to convene a seminar that would focus attention on the principles or theory, as well as the practices, governing the exercise of prosecutorial discretion as seen through the eyes of legal practitioners and other leading experts in the field.

The Director of the Institute, Professor Richard Harding, welcomed the participants and asked the Federal Attorney-General, Senator Gareth Evans, to open the proceedings.

In addition to Senator Evans, the Institute was fortunate to secure, amongst other distinguished presenters, the services of an international expert in the field of prosecutorial decision-making, Dr Jacqueline Tombs. Dr Tombs is Head of the Criminological Research Branch of the Scottish Office in Britain and has occupied research positions at universities in Pennsylvania, USA, and Cambridge, England, and also at the International Institute for the Criminal Services, Syracusa, Sicily.

The early work of Dr Tombs centred on research into aspects of sentencing discretion and disparities in sentencing in the Crown Courts of England. A report of this study was submitted to the University of Chicago Law School for inclusion in the full report to the Ford Foundation in 1976. Since joining the Criminological Research Unit in the Scottish Office in 1977, the main thrust of her research has been directed towards the following topics: public prosecution, prosecution and plea negotiation, tape recorded interrogation, prosecution decision-making and diversion. Her numerous research papers and articles to conferences have principally dealt with a broadly ranging treatment of these matters.

Dr Tombs delivered the seminar's keynote address, entitled 'Prosecution - In the Public Interest?'. In this address she covers such issues as the place of prosecution in the criminal justice system, the nature of public versus private prosecution, the need for accountability in prosecution decision-making, and the role of the public prosecutor in pre-trial diversion.

Another distinguished guest speaker at the seminar was Mr Ian Temby QC, the first Director of Public Prosecutions for the Commonwealth of Australia. His paper 'Prosecution Discretions - Director of Public Prosecutions Act 1983' provides some valuable insights into the development of policy in the newly created

Office of the D.P.P. He discusses a very broad range of matters, commencing with the rationale for the creation of the Office, the D.P.P.'s relationship to the Attorney-General and the powers, and functions of the D.P.P. Much attention is given to the development of new guidelines in prosecutorial decision-making and in this regard the factors that determine whether prosecution is in the public interest are discussed. The powers of the D.P.P. to take over proceedings or bring them to an end, are referred to, together with an outline of the circumstances under which these powers may or should be used.

Other highlights in the paper deal with no-bill applications, witness indemnities and the D.P.P.'s power to issue directions and guidelines to Commonwealth investigative and prosecutorial agencies. The formal part of Mr Temby's paper concludes with a passage from the Australian Law Reform Commission's Sentencing Report, a passage that is cited in a number of other seminar papers. It states as follows:

> The 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. (ALRC Sentencing of Federal Offenders Report No.15, p.61.)

These deficiencies , Mr Temby suggests ,will be less of a problem in the future and, with approbation, he refers to the joint research exercise between this Institute and the Office of the D.P.P. That research exercise is outlined in the preceding paper presented by Ivan Potas and entitled 'Measuring Prosecutorial Discretion'.

Two further original contributions were presented on the first day of proceedings; one by Dr Peter Bayne, Senior Lecturer in Law at the Australian National University, and one by Dr Sandra Egger, Deputy Director of the New South Wales Bureau of Crime Statistics and Research.

Peter Bayne's paper, entitled 'Prosecutorial Discretion and Administrative Law' explores the avenues for reviewing the exercise of prosecutorial discretion through the use of common law remedies such as the prerogative writs, through the procedures established under the Administrative Decisions (Judicial Review) Act 1977 (Cth) by reference to The Administrative Appeals Tribunal Act 1975 (Cth) and by taking action through the Ombudsman. He argues that there needs to be a distinction drawn between grounds upon which review may be sought and the standards to be applied in determining whether a ground of review has been established. Before inroads can be made here, he asserts, the courts must first become more familiar with the prosecution process. He says that the publication of guidelines and accessibility to reasoned decisions will provide a basis for drawing limits to the proper exercise of prosecutorial

discretion. Further, the Freedom of Information Acts, and their implications upon the exercise of prosecutorial discretion are explored, and finally the paper concludes with an examination of a number of different situations that may call for judicial review, and some of the problems in relation to these are discussed.

Sandra Egger's presentation concerned problems associated with the prosecution of sexual assault cases involving children. Amongst other things she suggested that a separate child sexual assault task-force be created and that paramount consideration should be given to the child victim's best interest. In some cases, therefore, prosecution would not be appropriate even though a prima facie case may exist. Whether prosecution should be initiated, she argued, could be resolved by a specially constituted tribunal. The whole system would operate independently of the police.

Dr Egger's paper was not available prior to going to press. Photocopies will be available from the Institute.

On the second day of the seminar the morning session consisted of three presentations, one by Mr Richard Read, Prosecutor for the Queen (Victoria), one by Mr James Glissan, Public Defender (New South Wales), and one by Superintendent Peter Sweeny, Officer in Charge of the Police Prosecuting Branch in New South Wales.

Richard Read's paper entitled 'Prosecutorial Discretion in Victoria' begins with an historical overview of the establishment of the institution of Prosecutors for the Queen in Victoria and then proceeds to discuss the establishment of the Victorian Office of the Director of Public Prosecutions (not to be confused with the Commonwealth Office referred to in Ian Temby's paper). In addition he outlines some innovative legislative reforms designed to expedite court proceedings in that State. He discusses the independence of the prosecutor from the government of the day and from the Attorney-General (the Attorney-General retains his power to enter a nolle prosequi under the Director of Public Prosecutions Act 1982 although the D.P.P. can also enter a nolle) and explains the interesting relationship between the D.P.P., Prosecutors for the Queen and members of the Bar who hold a brief to prosecute. The description of the procedures for accepting a plea of guilty to a lesser charge than that which is charged in the indictment is particularly informative.

James Glissan's paper entitled 'Limitations and Controls on the Exercise by Prosecutors of their Discretion' brings to bear a public defender's perspective to the exercise of prosecutorial discretion. He identifies three areas of prosecutorial discretion, the discretion exercised between committal for trial and trial (seeking a nolle prosequi), the discretion exercised

at trial (including plea bargaining) and the discretion exercised when the Crown Prosecutors formulate the charge laid against the accused (finding a bill). He makes the interesting observation that where a nolle prosequi has been rejected by the Attorney-General, the terms of the Attorney-General's directions to proceed may in certain circumstances prevent the Crown Prosecutor accepting a lesser plea at the trial. He examines in considerable detail the largely unreviewable controls on prosecutorial discretion in accepting lesser pleas and suggests that the English approach, where a degree of judicial control is exercised over such decisions, is to be preferred.

At the trial stage two problems relating to the exercise of prosecutorial discretion are discussed - the failure of the Crown to disclose exculpatory material and the failure of the Crown to call witnesses whose testimony may assist the accused. After examining recent Australian decisions where emphasis is placed on fitting the prosecutor into the adversary mould, once again the English practice of allowing greater judicial intervention is preferred by Mr Glissan. In the end he calls for formal rules or guidelines which would at least make the exercise of discretions more justiciable.

Peter Sweeny's paper entitled 'The Role of the Police Prosecutor in the Magistrates Court System' provides a wide ranging description of the work and function of the Police Prosecution Branch in New South Wales. Amongst other things he discusses the power of arrest, some of the practical problems in the exercise of that discretion, and the controls against the wrongful exercise of that discretion. He also discusses the wide discretion that police have in deciding whether or not to prosecute, and observes that police are not legally bound to declare publicaly the principles upon which they exercise their discretions, nor are they bound to give reasons for their decisions. The circumstances under which police prosecutors may withdraw charges are set out, there is a denial of the existence of the practice of plea bargaining by the Police Prosecuting Branch and it is said that police prosecutors are not permitted to accept pleas of guilty to lesser offences merely on grounds of expediency.

During the afternoon session two further papers were presented. One by Mr Paul Byrne, Law Reform Commissioner of New South Wales and the other by Mr John Willis, Senior Lecturer in Legal Studies at La Trobe University.

Paul Byrne's paper is entitled 'Granting Immunity from Prosecution' and should be read in conjunction with the comments made upon the subject of immunity from prosecution by Ian Temby. He refers to four reasons why the practice of granting immunity against prosecution is undesirable (it is unfair, unreliable, secretive and uncertain in operation) and, leaving these issues to be more fully discussed at the end of his presentation, proceeds to elaborate upon five kinds of situations under which

immunity may be granted. His paper looks at the extent of the practice both overseas and in Australia. Then the separate agencies that may grant immunities (Police, D.P.P., Attorney-General, Courts and National Crimes Authority) are discussed in turn. The grounds for granting immunity and the controls over the granting of immunity are considered, and the paper concludes with 'a new approach whereby disclosures relating to the grant of immunity are made to the trial judge and the defence before cross-examination by the defence, thus safeguarding the accused person's right to have a fair trial'.

John Willis' paper 'Reflections on Nolles' makes the general point that the power to enter a nolle prosequi is a very important discretionary power and one that is used frequently. However, few people are aware of it. When the power is being exercised it is not known whether the decision is in the public interest because such decisions are made in camera. Mr Willis reviews the nature of the power, discusses some Victorian and South Australian statistics relating to the use of nolles, and considers the criteria (and the lack thereof) for granting nolles. In the end he calls for greater public knowledge both as to the existence and nature of the nolle prosequi.

The third and last day of the seminar consisted of the presentation of papers by Dr Susan Hayes, Senior Lecturer in the Department of Behavioural Sciences in Medicine, University of Sydney, and Mr Terry Syddall, a Stipendiary Magistrate from Western Australia. Before the lunch break Dr John Braithwaite, Senior Research Fellow from the Australian National University and Mr Brent Fisse, Reader in Law from the University of Adelaide led the discussion on Prosecutorial Discretion and Corporate Crime. In addition, during the afternoon there was an open forum, chaired by Mr Justice Ray Watson and finally, the seminar concluded with a summing up by Dr Jacqueline Tombs.

The paper presented by Susan Hayes was entitled 'Prosecutorial Discretion and Mentally Abnormal Offenders'. Once again the theme of 'insufficient information', secretiveness and poor documentation is raised in connection with prosecutorial decision-making in this area. Much material is drawn from overseas experience particularly Scottish and Canadian. Dr Hayes asserts that while mental abnormality does play a part in the decision not to prosecute it is not clear what weight is attached to this factor. Furthermore, there is a general lack of training given to criminal justice personnel in recognising the less florid categories of mental abnormality, so that the mildly retarded or depressed person may not be identified. She argues, inter alia, that prosecution is sometimes in the best interests of a mentally disordered offender where it may avoid the possibility of that person being subjected to indefinite incarceration in a mental hospital. Thus the 'system', she says, may equally be unfair to abnormal offenders who are identified as well as those who are not identified. Ultimate solutions involve training of police and prosecutors to recognise various

forms of abnormality, the development of guidelines in order to determine the weight to be accorded to mental abnormality and the provision of adequate community resources to enable diversionary procedures to be used in appropriate cases.

Terry Syddall's paper 'Pre-Trial Diversion: A Magistrate's Perspective' provides numerous examples of cases where the criminal process seems quite inappropriate. There is the case of the drug addict who could scarcely understand the nature of the charge, the female alcoholic for whom treatment and care rather than punishment is appropriate. He gives consideration to the plight of Aboriginal people, a person with a gambling problem, an unfitness to plead case, shoplifters, those caught up in domestic violence situations and socially inadequate people. Basically he argues that the criminal justice process is largely irrelevant and counter-productive in many of these cases. He therefore proposes a system of pre-trial diversion, consisting of a Diversion Assessor (a judicial officer of long standing) assisted by probation officers. The Assessor would weed out inappropriate persons for criminal disposal and seek treatment alternatives for them.

The concluding sessions of the seminar concerned some aspects of prosecutorial discretion and corporate crime. This was followed by an open forum in which some of the broader policy issues concerning the administration of criminal justice were considered. At this stage much attention was directed to the subject of trial by jury and the difficulties this posed for the effective disposal of cases. There was some discussion on whether assessors could be used to speed up the way in which forensic evidence is presented in courts, and the subject of special or expert juries was also raised. In addition there was discussion on pre-trial diversionary schemes and this, together with a number of other general comments made in relation to the criminal trial process led to the final summing up by Dr Jacqueline Tombs.

THE DISCRETION TO PROSECUTE

The Honourable Senator Gareth Evans QC
Attorney-General

We have certainly come a long way in the last ten or fifteen years. Before then, few people in Australia had professionally, academically or otherwise focussed on the issues raised by the existence of prosecutorial discretion. There was a view in some quarters, perhaps, that the community needed the reassurance of thinking that if there was a breach of criminal law the processes of prosecution would be inexorably set in motion. It may be that some who knew about the reality of prosecutorial discretion were unwilling or unable to articulate its parameters. But most just had not addressed the issue.

In the United States, this question had been the subject of research and writing for many years. However, elsewhere - and in particular, in the Anglo-Australian legal world - it remained largely an unexplored area until the publication, in 1969, of Grosman's Canadian study, The Prosecutor: An Inquiry into the Exercise of Discretion. There has been a much greater interest in recent years, stimulated and developed by the work of people like Dr Jacqueline Tombs, whom we are delighted to welcome both to Australia and this Seminar.

My own first awakening to the issues involved came with the publication in 1972 by A.F. Wilcox, a former Chief Constable of Hertfordshire, of The Decision to Prosecute, a very helpful analysis of the processes which influence that decision. Wilcox expressed the view that the lack of published material and discussion about prosecution gave the impression there was something to hide, when in fact there were beneficial effects from the exercise of discretion by prosecuting authorities. In his book he examined reasons for not prosecuting although prima facie evidence of guilt was available, and listed twenty such good reasons in a summary appendix.

In Australia these works were read with interest and the first faltering steps were taken to rationalise our thinking on prosecutorial discretion. The Australian Law Reform Commission in carrying out its Sentencing Reference in 1979/80 conducted a Judicial Survey in relation to plea-bargaining. The findings were not entirely uncontroversial. Quite clearly, judges from some jurisdictions felt uneasy about this practice and in particular about any suggestion that they could or should play any part in it.

The window was most clearly opened in 1982 when my predecessor as Attorney-General - Senator Peter Durack QC - caused to be published a document entitled Prosecution Policy of the Commonwealth. This was a consolidation of guidelines and principles that had previously been followed by persons responsible for Commonwealth prosecutions. Although it did not really contain anything new, it was of very considerable value because it put these principles on the public record - which in my view is where they should always be able to be found. When I became Attorney-General, I immediately accepted the guidelines and principles set out in that document, and I have certainly referred to it on many occasions since.

The need for such a document had been felt more keenly because of the existence of Special Prosecutors' Offices and the likely creation at that time of some form of National Crimes Commission or Authority. To these factors there was added, when the Hawke Government came to office in March 1983, the commitment to set up a Commonwealth Office of the Director of Public Prosecutions (DPP).

The legislation setting up that Office contains two provisions of particular relevance to the subject-matter of this seminar. The first is section 8, whereby the Attorney-General, after consultation with the Director, may by instrument in writing, give or furnish directions or guidelines which 'relate to the circumstances in which the Director should institute or carry on prosecution for offences'.

The second provision to which I refer is section 11 whereby the Director may, 'by instrument in writing, give directions or furnish guidelines' to various Commonwealth authorities or departments possessing statutory powers to conduct prosecutions as to how those powers shall be discharged.

The first of these two powers - my power to direct the Director - has not been exercised to date, nor do I anticipate that it will very often, if ever, be so exercised. The DPP is an independent statutory office-holder, and his officers are well placed to assist him in the development of appropriate policy in this area. I understand that a project by which the exercise of discretion will be internally monitored is being developed by the DPP in conjunction with the Australian Institute of Criminology.

As to the power of the Director to establish guidelines not only for his own Office's activities but also for that of other Commonwealth agencies, it is my understanding that both internal guidelines and guidelines in relation to a major Commonwealth department in the front-line of the battle against white-collar crime are currently in the course of being developed, and will in due course become public through the Director's annual report. I look forward to the possibility of Mr Temby elaborating these matters in the course of his address later today.

There are still some offences (basically those potentially involving national security or high matters of state) where prosecution requires my consent. I also as Attorney-General retain a residual power to enter nolles prosequi in all classes of criminal proceedings, and have the power - not in this instance vested in the DPP - to enter ex officio indictments. In all these matters I exercise my discretion in accordance with the principles set out in the 'Prosecution Policy of the Commonwealth'.

The real difficulties with the decision to prosecute come not so much with the first stage of the process, that is, deciding whether the evidence is sufficient to establish a prima facie case against the defendant, and whether in fact there is a reasonable prospect of conviction.

By far the more difficult issue to confront is the second major stage of the process: determining whether, in the light of provable facts and the whole of the surrounding circumstances, the public interest requires the institution of the prosecution.

One has to take into account here the possibility that the actual bringing of some prosecution might, in itself, work an injustice; and might be in conflict with those matters of community concern that are the real foundation of the legal rule in issue.

As the published Commonwealth guidelines make clear, one has to look at such matters as the seriousness of the offence, the youth, age or special infirmity of the offender, the degree of his or her culpability in connection with the offence, whether or not he or she is a first offender, and the need to provide a deterrent to similar offenders. Obscurity or obsolescence of the law is a further consideration. So is the possible prevalence of the offence. All these must be taken into account.

Having public guidelines on the exercise of prosecutorial discretion helps to bring principle, predictability and fairness to the process. But the process can never be automatic or easy. The most difficult single decision I have made in this respect was that in July last year to enter a nolle in a mercy killing case, where a person with a terminal illness was allegedly killed by a relative who wanted to stop her suffering.

One can never be sure that everyone will be satisfied by decisions thus made, and one set of interests that may have been insufficiently taken into account in the past is that of the victims and their relatives.

Certainly there can be great tension generated in cases where the public authorities see one course of action as desirable, whilst the victim prefers the opposite course. In a recent Scottish rape case the Crown Office declined to prosecute, apparently because the victim was unfit to give evidence. A private

prosecution by the victim succeeded. This left the impression that the discretion was improperly exercised to the detriment of the victim's, and the public's interest. I hope that this Seminar might address the best methods of resolving such potential tensions.

Another distinct issue which I hope might also be addressed by this Seminar is that of under-utilisation of the power to prosecute. Work in progress at this Institute is, I understand, likely to establish such a pattern with regard to laws concerned with such matters as environmental protection, occupational health and safety, and so on. Also, a recently completed study - The Role of Prosecution in Consumer Protection - has concluded that there is 'a deplorable under-utilisation of the criminal sanction in consumer protection enforcement'.

To the extent that claims continue to be made about chronic under-utilisation of prosecutions in particular areas, I would make just two comments. First, they do seem to raise the whole question of whether the criminal law is necessarily, in all social or economic situations, the optimum tool by which to gain compliance with desirable standards. When we are thinking about prosecutorial discretion, I suggest we should also be thinking about the appropriate scope and machinery of the criminal law.

The second point is this: that where practices or principles have evolved within agencies or Departments in relation to prosecutorial policies, these should be put on the public record so that the pros and cons of their application or non-application in particular cases can be studied. This is the course to which the Commonwealth itself is now committed, through the DPP legislation.

Mr Chairman, the program for this Seminar is important and fascinating. The list of participants is wide-ranging. I wish you well in your forthcoming deliberations, and it is with pleasure that I now declare the Seminar open.

PROSECUTION - IN THE PUBLIC INTEREST?

Dr Jacqueline Tombs
Director
Criminological Research Unit
Scottish Home and Health Department
Scotland

INTRODUCTION

The substance of this paper derives largely from my knowledge of the theory and practice of prosecution in Scotland, which differs, not only from the experience in Australia but also, in several important respects from that in England and Wales. I do not, however, propose to enter into the age old argument between Scots and English lawyers about the relative merits of each system, though I will be referring to the English system since England currently stands on the threshold of a very significant change in its criminal justice process. That change will involve the introduction of what the Home Office White Paper refers to as an 'Independent Prosecution System' (Home Office : 1983) for the first time in England and Wales, though Scotland has had independent public prosecutors, known as 'procurators fiscal' since at least the late sixteenth century.

Be that as it may, it is only relatively recently that in Scotland, as well as in England and Wales, we have begun to question in any serious way just what prosecution in the public interest actually involves as well as what it ought to involve. Current debate within the United Kingdom focusses on substantive questions about the principles on which police and prosecutors act, the organisational questions associated with the new prosecution system for England and Wales, and 'decision-making in prosecutions and at the assumptions which underlie the various practices' (Ashworth : 1984: 65).

The questions to be addressed then largely centre around the appropriateness of prosecution and which criminal justice agency should have the powers to decide this. Given the central importance of decisions made at the prosecution stage to the wider criminal justice process, it is clear that the answers we get to questions about the prosecutorial task are, in essence, answers concerning the kind of criminal justice system we have or the kind of criminal justice system we want to have. Thus,

* For ease of expression and continuity of style the word 'he' is used to represent either a male or female person.

questions about whether or not the police should have the power to initiate prosecution as opposed to an independent legally qualified prosecutor involve questions about the function of prosecution. For example, is it primarily to ascertain the truth or to secure convictions? How are we to decide what ought to be prosecuted in the criminal courts? Is it necessary to prosecute accused persons in the criminal courts, even where the offences are relatively minor ones? If it is appropriate to decide against prosecution in more minor cases, who should have the power to make this decision and what alternatives to prosecution would be in the public interest? Are prosecution decisions made in accordance with whatever is regarded as the public interest and how is this public interest defined?

Clearly, there are a host of questions to be explored here and it will not be possible for me to do justice to many of them. Moreover, these fundamental questions of principle cannot be answered in a vacuum. They are inextricably bound up with questions about the nature and purpose of criminal law; questions about what constitutes sufficiency of evidence in prosecution and whether other extra-legal considerations should have more or less weight; questions about the acceptability of plea-bargaining over charges and/or sentence; questions about patterns of law breaking in general and the law enforcement practices of other agencies, notably the police, in particular; indeed, questions about how society wants to deal with law breakers and how high a cost it is prepared to pay in engaging the full panoply of criminal justice to prosecute minor offences through the criminal courts.

In order to explore some of these questions and how prosecution practices serve the public interest, my discussion here draws on how particular prosecution decisions are made in Scotland. After making some preliminary remarks about the centrality of prosecution to the administration of criminal justice in all countries, my discussion will focus on the development and contemporary features of the prosecution system in Scotland and I will describe its principles of operation. Then, in discussing particular kinds of prosecution decisions, notably deciding whether or not to prosecute, deciding on form of procedure and trial court, and negotiating pleas, I will draw attention to how the practice of prosecution is affected by factors other than the principles upon which the system is based. Finally, I will consider some recent developments in prosecution and alternatives to prosecution in Scotland and conclude with some reflections about how such developments might be in the public interest.

THE CENTRALITY OF PROSECUTION

Prosecution decisions and the prosecutor who makes them are central to how criminal justice is accomplished in all societies. The decisions made by prosecutors, whether the prosecutorial task lies largely with the police or with some other prosecuting authority, have a profound effect on the criminal justice

process. In particular, decisions made by the prosecutor at the time of initially deciding whether or not to prosecute; on what particular charge or charges; and by which form of criminal procedure and in which trial court; are of critical importance to all subsequent stages of criminal justice. Moreover, decisions made by prosecutors in negotiating guilty pleas with the defence not only affect the final outcome and disposition of a case (thereby affecting penal and other correctional facilities) but also the way in which criminal justice is viewed by members of the public in general and victims of crime and offenders in particular.

What consitutes prosecution in the public interest then is largely defined by the structural location of the prosecution task within the criminal justice process in any given society. The structural features of any given prosecution system themselves define the respective roles and powers of the police and prosecutors; the amount of discretion afforded to prosecutors; the kinds of decisions which prosecutors can make; the degree to which prosecution decisions are constrained by the pre- and post-prosecution stages in the administration of criminal justice; and how the public interest is served by prosecutorial processes and decisions. Yet, despite the fact that the police and prosecutors are, to a large extent, the gatekeepers of the criminal justice process, prosecution decision-making in most jurisdictions is regulated by very few laws or court rulings - it is, by and large, mainly a discretionary matter, though arguably less so in certain jurisdictions which operate in accordance with the legality principle.

There are, of course, some strong arguments of principle in favour of a system of mandatory prosecution in all cases in which there is sufficient evidence to proceed against a person. In particular, proponents of compulsory prosecution argue that the legality principle acts as a constraint on the considerable powers vested in the prosecutor, and that criminal justice is seen to be administered in an impartial way so that the scope for discrimination and even corruption generated by selective prosecution is avoided.

In common law jurisdictions, however, the general approach has always been in favour of discretion in prosecution, and indeed even those countries which proclaim mandatory prosecution appear to find a variety of ways to avoid the prosecution of certain kinds of offences and offenders (Weigend : 1983). Discretion therefore, however limited, whether by the operation of legality principle or by prosecution guidelines, such as the Attorney-General's guidelines in England and Wales (Attorney-General : 1983), remains within the prosecution task. How this discretion is structured in principle and exercised in practice is of central importance to how prosecution in the public interest is defined and achieved and to the mode of public accountability for prosecution decisions.

In Scotland, we have no mandatory guidelines and the degree of discretion afforded to our prosecutors is considerable. The general focus of my own area of research has been on exactly how Scottish prosecutors exercise their discretionary powers in prosecution, but before going on to discuss some of the issues raised in my earlier (Moody & Tombs : 1982) and subsequent work, some understanding of the principles behind the prosecution process in Scotland is called for.

SCOTTISH PROSECUTION IN PRINCIPLE

Historical Development

The first documented reference to the office of 'procurator fiscal' appears in the Records of the Scottish Parliament for 22 August 1584. While at that time the procurator fiscal appears to have been 'the servant of the inferior judge (the sheriff) and his appointment was a matter for the latter's discretion' (Irvine Smith : 1936: 436), the fiscal's(1) range of responsibilities gradually expanded and, in practice, by the early 19th Century 'criminal prosecution (had to be at the fiscal's) instance, or with his concourse.' (Barclay : 1853: 43). This practice was enshrined in statute under the Sheriff Courts (Scotland) Act 1876. There remained a limited right for injured parties to bring a private prosecution, (a right which still exists though is rarely invoked). (2) The vast majority of all prosecutions were in the hands of the fiscal with the exception of cases dealt with in the lowest courts where, until the District Courts (Scotland) Act 1975, local magistrates appointed their own prosecutors.

The fiscal, originally appointed by the Sheriff, and since 1907 appointed by the Lord Advocate, with the consent of one of Her Majesty's Principal Secretaries of State, held and continues to hold office in the same manner as a judge ad vitam aut culpam (for life during good behaviour).

The development of the office of procurator fiscal was matched throughout this period by an expansion in the office and authority of the Lord Advocate in Scotland. The Lord Advocate is a member of the Faculty of Advocates, the Chief Law Officer of the Government in Scotland, a political appointee and usually a member of the ruling political party. From its earliest recorded days in the fifteenth century this office has been concerned with the prosecution of serious crime and by the ninteenth century practising advocates, called advocates depute, were appointed to assist the Lord Advocate, and Crown Office was established in Edinburgh to provide support facilities and a link between the Lord Advocate and the procurators fiscal appointed in different sheriff court areas. The advocates depute, known collectively as Crown Counsel, were authorised to issue recommendations to the procurator fiscal with regard to all cases of serious crime meriting trial by jury.

The administrative side of Crown Office was firmly established by the end of the nineteenth century. Fiscals were required to make statistical returns to Crown Office and Crown Office guidance circulars and Lord Advocate's directions to fiscals were common practice by the 1860's. Such directions and circulars became embodied in the Book of Regulations, known as the fiscal's bible, and the office of Crown Agent, the head of the fiscal service and in charge of administrative matters at Crown Office, was an accepted feature of the administration of justice in Scotland by the beginning of this century. The final step was taken in 1927 under the Sheriff Court and Legal Officers (Scotland) Act which established a corps of public officials, designated procurators fiscal, to be employed on a full time basis and barred from holding any other office or doing any other legal work.

Contemporary Features and Principles

Today, there are forty-eight district fiscal offices throughout Scotland, ranging from the largest office in the City of Glasgow with a professional staff of over 50 to the smallest on the Isle of Skye with a single procurator fiscal. At present there are 230 procurators fiscal and deputes (3) who are responsible for the prosecution of all criminal offences in all courts. Recruits to the fiscal service are generally law graduates of Scottish universities who have qualified as solicitors in Scotland, though advocates are also eligible and occasionally lawyers from another jurisdiction are appointed. Each procurator fiscal has control over the prosecution of crime within a particular sheriff court area and, in addition, six procurators fiscal have been assigned to particular regions in Scotland. These regional procurators fiscal act in a consultative capacity throughout the Sheriffdom; issue general policy guidelines, attend meetings in Crown Office to discuss policy and similar meetings of all district procurators fiscal; and deploy staff throughout their areas.

The role of Crown Office has expanded considerably over the past 50 years in attempting to create more coherent and uniform prosecution policies in certain areas, for example, at present all cases of obscene publications must be reported to Crown Office. Thus the Lord Advocate and Crown Counsel may shape what constitutes the criminal law in Scotland without recourse to parliament or the judiciary. For example, although homosexuality between consenting adults in private remained an offence in Scotland until the Criminal Justice (Scotland) Act 1980, the Lord Advocate had already issued instructions to fiscals that no prosecutions for such criminal behaviour should be instituted and a policy of non-prosecution in such cases dated back over several decades.

Within this hierarchical structure of the fiscal service, the procurator fiscal is, nevertheless, invested with considerable autonomy in relation to the prosecution of crime in a given area. First, the police are in law subordinate to the fiscal. Thus, although the eight police forces operating in Scotland are under the control of the Secretary of State for Scotland for

administrative purposes only and not part of the machinery of central government, they do enjoy a special relationship with the fiscal service. Police forces are bound to comply with any instructions issued by the Lord Advocate and local police officers are subject to the control of the local procurator fiscal, who has legal title as both prosecutor and investigator of crime.

The fiscal can direct the police to make other enquiries in relation to offences reported by them, and in some cases may take charge of the inquiry from the moment when the offence was discovered. In addition, the fiscal can also examine any witness, and must do so in all cases to be tried on indictment (Sheehan : 1975: 112-3).

In practice, the police collect and sift the evidece in the vast majority of cases and have powers to arrest and charge suspected persons. They do not, however, hold any brief in relation to the actual decision whether or not to prosecute and while they may, and usually do, charge a person whom they suspect of having committed an offence, the charges may be dropped, modified or changed by the procurator fiscal. There are also groups other than the police who report certain types of offences directly to the fiscal, such as the Health and Safety at Work Executive, though over 90 per cent of the reports received by the fiscal are in fact from the police.

Procurators fiscal and their deputes therefore make the initial decision whether or not to prosecute (except in those instances where a fixed penalty system operates). If the fiscal decides to prosecute, he must then determine the appropriate forum for trial subject to cetain statutory restrictions (4) and to review by Crown Counsel in certain cases. The accused has no right to choose the court of trial. The vast majority of criminal matters are tried in courts of summary jurisdiction after the accused has been served with a summary complaint running in the name of the procurator fiscal. The fiscal conducts the prosecution case either before lay justices or stipendiary magistrates in the district court, or legally qualified sheriffs in the sheriff summary court.

Solemn procedure, trial by jury in the High Court or the sheriff and jury court, is reserved for more serious cases. When the fiscal decides that a case warrants trial by jury he prepares a preliminary indictment, called a petition, and lodges it with the sheriff at a petition hearing. Once the accused has been committed for trial, the fiscal investigates the case fully, interviews witnesses and obtains statements form them, called precognitions. The complete file, 'the precognition', is presented to Crown Counsel for their decision and usually the fiscal makes a recommendation. If Crown Counsel decide on the High Court the indictment is prepared and the prosecution case is conducted by an advocate depute. Where the case is to be heard before a sheriff and jury the precognition is returned to the fiscal who deals with it thereafter in court.

If the fiscal decides not to prosecute he may either decide to take no further action, that is to 'no pro' the case or he can take further action. He can ask the police to administer a warning; he can send a warning letter or personally warn the accused; in some instances he can invoke a fixed penalty; or he might divert the accused to some social work or medical agency.

The procurator fiscal is accountable only to his own superiors and the public is not entitled to know the reasons behind the fiscal's decisions. Abuses of discretion are investigated by Crown Office, though the Lord Advocate is answerable in parliament for any malpractices.

Unlike public prosecutors in some European jurisdictions, the fiscal is not bound by the principle of legality so that it is perfectly within his competence not to institute proceedings at all, to abandon proceedings for the trial, or to amend the charge or charges. Although Scottish criminal procedure is adversarial in principle, the vast majority of persons plead guilty and few cases actually go to trial. (5) A substantial number of trials are avoided as the result of plea negotiations between fiscals and defence agents. These negotiations are regarded as both legitimate and essential to the administration of criminal justice and they generally revolve around the nature of the charge or charges.

Perhaps the main principle of the Scottish prosecution system is impartiality on the part of the prosecutor who is obliged, both during the trial and after conviction, to lay before the court any facts known to him but not to the defence which are favourable to the accused. Indeed, this quasi-judicial approach is regarded as the justification for the comparative freedom which the fiscal has in decision-making.(6)

How the prosecutor's discretionary powers are exercised in practice has formed the central theme of my research in this area and, in what follows, I will consider how some of the principles of prosecution actually translate into practice.

SCOTTISH PROSECUTION IN PRACTICE

General Background

What I have to say in relation to the practice of prosecution in Scotland largely derives from detailed research which I have been involved in for some years. (7) In the course of this research, it became clear that while the discretionary powers of the fiscal appear to be fairly extensive, the prosecution task cannot be understood in isolation from the way in which the wider criminal justice system is administered since this defines how the fiscal operates in a number of ways.

First, the fiscal does not collect the information which forms the basis of making decisions at the stage of 'marking'(8) reports with a view to prosecution. This is in practice the prerogative of the police, even though the fiscal is in theory entitled to intervene and direct their investigations. And if some accept the premise that the 'quality of decision-making in most social contexts is directily related to the amount of relevant information available to decision-makers' (Bottomley: 1973: 98), it follows that the role of the police as reporters is a crucial one.

Moreover, in encapsulating an actual event on paper, ambiguities and inconsistencies are usually lost, particularly where the writer is attempting to contain the description within a standard format and to suggest one course of action rather than another (Friedson : 1973). In the case of police reports, most police forces present what they judge to be the relevant information in a similar way. For example, cited cases (reports concerning an accused person who is not in custody) typically state the accused's name, sex, age and address, the charge or charges which the police deem appropriate and a summary of the alleged criminal incident. The report generally focusses on the offence itself and the ingredients deemed necessary for proving that offence. The language is stereotyped and the thrust of the presentation is towards minimising uncertainty and maximising the strength of the case for the prosecution. Fiscals themselves remark that informed decision-making is hampered where police reports are very brief, in particular where the police present information in a standard format, for example, shoplifting pro-formas.

Another aspect of the criminal justice process which shapes the way in which prosecution decisions are made is the volume of work in some offices which leads to a routine processing of cases. In the last ten years, for example, the number of reports received by fiscal offices has more than doubled and some offices, such as Glasgow and other urban offices, now handle over 1,000 reports per week.

In this context there is a tendency for the process itself to take over, encouraging a constant flow of cases, leading ultimately to what some people term a 'conveyor-belt system of justice' (Blumberg : 1967). Moreover, questions about the costs of prosecuting this volume of criminal business are of increasing concern to governments. In particular, it has been argued that the prosecution of relatively minor offences may not serve any worthwhile purpose. Thus procurators fiscal invoke the principle de minimis non curat lex, that the law is not concerned with trivialities, to justify non-prosecution for minor breaches of the law. (Moody and Tombs : 1982: 63.)

The other major, increasingly important, factor which constructs the way in which prosecution decisions are made is the role of Crown Office. There has certainly been a marked tendency in recent years for Crown Office to issue more guidance to fiscals

and for the Lord Advocate to issue more directions in an attempt to 'structure' the exercise of individual fiscals' discretion and to achieve standard practice in certain types of cases. Thus, allegations of rape where no prosecution is instituted must all be reported to Crown Office following the case of Mrs X v. Sweeney and Ors, (1982). Similarly, obscene publications cases are referred to Crown Counsel and cannot be tried in the district court before lay magistrates.

Fiscals report cases to Crown Office which may be of particular public concern or be the subject of controversy at a national level. They also perceive the need to obtain Crown Office approval for decisions in some cases due to the fact that their decisions may be questioned by members of the public or the complainer.

Prosecution discretion is therefore structured not only by the fiscal's interpretation of criminal law and procedure but also by what may be termed the extra-legal factors within the criminal justice process. The police as providers of information, strong bureaucratic pressures to routinise the handling of cases because of the volume of work, and the expanding role of Crown Office in establishing prosecution policies, are all controlling influences as the subsequent discussion of the actual decisions of Scottish prosecutors illustrates.

Deciding Whether or Not to Prosecute

The Bill to introduce an independent prosecution system for England and Wales before the British Parliament this session continues to grant to the police the power to take the initial decision whether to prosecute, whether to administer a formal caution or whether to take no further action. Cases for prosecution will then be sent to the local prosecutor who will have a discretion to discontinue proceedings as well as the responsibility for decisions about how to prosecute a case. Guidelines on prosecution for the police and prosecutors were issued by the Attorney-General in February 1983 and these guidelines deal extensively with questions of prosecution in the public interest.

In Scotland, where the initial decision to prosecute is taken by an independent legally qualified prosecutor, there is no one set of guidelines for prosecution, but rather Crown Office circulars, Lord Advocate's directions and some general criteria regarded as relevant in considering whether or not to prosecute. These criteria, which are contained in the standard text on Scottish criminal procedure, specifically enjoin the prosecutor to weigh up the merits of a prosecution on grounds other than strictly legal criteria:

i Whether the facts disclosed in the information constitute either a crime according to the Common Law of Scotland, or a contravention of an Act of Parliament which extends to that country;

ii Whether there is sufficient evidence in support of these facts to justify the institution of criminal proceedings;

iii Whether the act or omission charged is of sufficient importance to be made the subject of a criminal prosecution;

iv Whether there is any reason to suspect that the information is inspired by malice or ill-will on the part of the informant towards the person charged;

v Whether there is sufficient excuse for the conduct of the accused person to warrant the abandonment of proceedings against him;

vi Whether the case is more suitable for trial in the civil court, in respect that the facts raise a question of civil rights. (Renton and Brown: 1972: 19.)

Despite these criteria, and the fact that fiscals regard the option not to proceed as a legitimate one, procurators fiscal do prosecute in the majority of cases reported by the police. To some extent this presumption in favour of prosecution arises from the fact that the police are selective in reporting cases; to some extent it derives from fiscals' perceptions of the nature and purpose of criminal law and their role in upholding the law; and to some extent from the view that many fiscals hold that the public interest is best served by processing offenders through the criminal courts.

This emphasis on prosecution in Scotland is in marked contrast to how prosecutors in other jurisdictions, notably The Netherlands, exercise their discretion to waive prosecution. In that jurisdiction, less than half of the cases presented to the prosecutor by the police are brought to trial (Van Dijk: 1983). Indeed, in The Netherlands prosecutors ask the question 'why prosecute?' whereas in Scotland the question is 'why not prosecute?' Thus in Scotland it is only when the prosecutor discerns certain unusual features of a case that the option not to proceed is considered.

These unusual features typically centre around legal weaknesses or whether the offence in question is considered to be too trivial to warrant a prosecution. In addition, fiscals often opt

for the 'no pro' option in cases where they perceive a conflict between the victim's wishes and the public interest. Most typically, these are domestic violence cases where two distinct prosecutorial policies are evident in practice. Some fiscals see their role in such cases not so much as prosecutors but rather as mediators between husband and wife. They regard themselves as having a public duty to uphold the institution of marriage whereas other prosecutors regard domestic assaults as offences which warrant prosecution regardless of the victim's wishes since proceedings are necessary to underline the seriousness of the offence (Moody & Tombs: 1982: 68-9).

Another reason for not prosecuting centres around particular characteristics of the offender, for example, that prosecution would cause disproportionate damage to the alleged offender's reputation or that someone's employment might be threatened by the minor transgression. Not prosecuting for such reasons does, of course, threaten the principle of equality before the law and invoke the possibility of discrimination on the basis of employment status. Even in The Netherlands, where prosecutors' guidelines are revised in light of empirical research, the most recent research evaluation demonstrates that prosecutors tend to dismiss cases more readily against persons who are in employment (Van Dijk : 1983).

Deciding on the Form of Trial Procedure

In most cases, however, the fiscal does decide to prosecute and must therefore go on to decide which form of procedure and court of trial is appropriate. In Scotland, there are two distinct modes of criminal procedure: summary where a sheriff or lay justices adjudicate and solemn where a high court judge or sheriff determines the legal issues and a jury of fifteen lay people decide matters of fact. All common law offences can be tried either on summary or solemn procedure with the exception of murder, rape, treason, incest, deforcement of messengers, and breach of duty by magistrates, which can only be prosecuted in the High Court. In the case of statutory offences the relevant Acts which create these prescribe the appropriate form of procedure.

By choosing a particular charge the fiscal may bring a case within the jurisdiction of a particular court though the same set of circumstances if prosecuted under a different charge would be heard in a different court. For example, an offence concerned with obscene publications might be prosecuted in the district court under the Burgh Police (Scotland) Act 1892 or in the sheriff court as the common law crime of shameless indecency.

Therefore, while the fiscal's decisions are regulated to some extent by statutory provisions and are subject in some instances to approval by Crown Counsel, the Scottish prosecutor does exercise a key role in selecting the court of trial. The criteria which the fiscal draws upon in practice in making such decisions are influenced by his views about more general matters

such as the nature of serious crime, sentencing policies and the role of the lay judiciary. The vast majority of cases are, of course, processed by the summary courts and less than two per cent (abour 4,000) of all persons proceeded against for crimes and offences are heard in courts exercising solemn jurisdiction.

There are no specific guidelines for prosecutors in choosing the appropriate form of procedure, even though the procurator fiscal's initial decision to opt for solemn procedure is subject to review by Crown Counsel. The standard texts on Scottish criminal procedure mention a variety of factors which the fiscal may take into account in deciding the appropriate form of procedure - the gravity of the offence; previous record (if any) of the accused person; the sentencing policy of the judge; and justification for the increased public expense, inconvenience, and length of time in solemn procedure. Other factors which fiscals themselves consider in deciding on procedure include the sentence deemed appropriate for a particular offence, and public feeling about certain types of crime.

The assessment of seriousness, the weight to be given to an accused's previous record and procedural matters are not, however, judgements made in a vacuum. There is an underlying rationale which informs such decisions, the goal towards which the fiscal seems to be striving. In theory fiscals have no part to play in either determining or recommending sentence. However, the sentencing structure is such that the selection of a particular form of procedure sets limits on the sentencing powers of judges.

In practice the fiscal in deciding on procedure makes a conscious calculation of what he considers the appropriate sentence for the particular criminal incident in the event of a guilty plea or verdict. This requires some familiarity with individual judges' sentencing policies, particularly in the case of sheriffs (who may sit summarily or with a jury) since, from the fiscal's point of view, there is little point in going to the trouble and expense of a jury trial when a sheriff would have meted out the same sentence had the case been heard on summary procedure. To quote one fiscal: 'My criteria are as follows: is this a crime which is likely to be disposed of or should, in the public interest, be disposed of by imprisonment? If so, are the sheriff's powers, whatever they happen to be at summary level enough or does it have to go on indictment?'

Negotiating Guilty Pleas

The other form of prosecution decision-making central to the Scottish criminal justice process is the practice of plea negotiations. In Scotland trial-avoidance arrangements generally focus on the particular charge or charges, known as charge bargaining, which may be involved in relation to a particular

criminal incident. That is to say, so called sentence bargaining, requiring the active or passive participation of the judge, is not a typical feature of the Scottish criminal justice system, though the fiscal does exert some control indirectly over sentencing both by his choice of charge and by his selection of procedure and trial court. In addition, the fiscal may influence disposition by his verbal utterances or omissions in summing up. However, the judge in Scotland cannot be party to plea negotiations and the English practice of permitting 'sentence discount' as the reward which an accused who pleads guilty may claim is prohibited. (9)

Plea negotiation in the form of charge bargaining is, however, not only permitted but explicitly encouraged and the larger fiscal offices have plea-negotiations sections. In solemn procedure an accused can enter a guilty plea by an accelerated procedure, under Section 102 of the Criminal Procedure (Scotland) Act 1975 as amended by Section 16 of the Criminal Justice (Scotland) Act 1980 , by writing personally or through a defence solicitor to the Crown Agent. And in summary procedure Section 15 of the Criminal Justice (Scotland) Act 1980 introduced a preliminary informal meeting known as an intermediate diet which would provide an early opportunity for plea adjustment. Various other procedural devices, where negotiation between the parties is generally a prerequisite, attempt to ensure that a plea of guilty results in the speedy conclusion of a case.

Plea negotiations in Scotland then may take place from the earliest stages of the prosecution process. In considering both the number of charges and the choice of charges to be libelled on a complaint or petition, the fiscal is aware of the opportunities which the charges selected will afford for subsequent negotiation with the defence. Again, where the law permits the fiscal to choose between the district court or the sheriff court for the trial of summary cases or allows him to take a case on solemn or summary procedure additional scope for plea negotiation is generated.

The forms of charge bargaining vary considerably ranging from major amendments to a complaint or petition to arrangements affecting only the verbal utterances by fiscal or defence. The main modes of charge bargaining are as follows:

1. Reduction of Charge

   Where the fiscal is offered a plea of guilty to a lesser charge than that originally specified in the complaint or petition. Thus, for instance, a criminal assault could be libelled as any one of the following charges at Common Law: attempted murder, assault to the danger of life; assault to severe injury or simple assault.

2. Alternative Charges

Where the fiscal is offered a plea of guilty to the alternative charge libelled. The nature of Scottish criminal law is such that certain charges go in tandem so that an accused could be charged with assault and breach of the peace, for example, and plead to the breach.

3. Deletion of Charges

Where the fiscal is offered a plea of guilty to some charges but not others. This is particularly common where the complaint specifies several road traffic offences or where the accused is charged on several counts for the same offence type.

4. Amendment in the Wording of Charges

Where the fiscal is offered a plea of guilty to all charges provided that certain portions of the charge or charges are deleted. This type of negotiation can only occur in Common Law charges where the style of the charge is not regulated by statute. It is particularly common in assault or breach of the peace charges, for example, the fiscal deletes the words 'cursing and swearing' from a charge; and

5. Amendments to the Fiscal's Motion for Sentence

Where the fiscal is offered a plea of guilty to the complaint as libelled on the agreement that he supports, in his closing speech to the court, the defence agent's plea in mitigation.

The nature of the charges does, of course, allow more or less leeway for plea negotiations and the timing of negotiations depends to some extent on whether the accused is in custody or at liberty and upon whether the case is to be tried on solemn or summary procedure. However, methods of negotiating also depend on matters external to specific cases, such as the degree of pressure on the prosecution and/or the defence to deal with large numbers of cases in a short time, the organisation of work within both fiscals' and solicitors' offices and the extent to which fiscals and defence agents trust each other to play fair.

Indeed, perhaps the most important single criterion which affects the way in which pleas are negotiated is the nature of the relationship which exists between the prosecution and the defence. The degree to which either party is prepared to negotiate with the other depends very much on a mutual exchange of respect and understanding. More fundamentally, if prosecution and defence are to co-operate over the negotiation of pleas, both parties must share a common understanding of their part in the

administration of justice. Fiscals stress that, as members of the legal profession, they share with the defence a common code of ethics and have a special allegiance to the court and the demands of justice. On a practical level, this means that the fiscal expects a fair defence agent not to pursue hopeless cases and to negotiate at an early stage.

The successful management of plea negotiation for both prosecution and defence depends largely on factors other than the legal strengths or weaknesses of individual cases and both fiscals and defence agents argue that they could not function without such arrangements. And, while the timing and content of plea negotiations may vary, there are constant factors which must be present if prosecution and defence are to agree. These centre around the notion of trust resulting in a co-alignment of interests and co-operation between traditional adversaries, while the accused, in the majority of cases where pleas are negotiated, may stand little to gain in material terms.

This is not necessarily to imply that plea negotiations themselves are the cause of injustice in particular cases but rather to suggest that co-operation between prosecution and defence might extend to all stages of the criminal process. In relation to the prosecution system in Scotland, pre-trial disclosure on the part of the prosecution and the defence is currently being encouraged in a variety of ways.

DEVELOPMENTS IN PROSECUTION POLICY

In recent years there have been a number of efforts made to change the direction of prosecution practices in Scotland. In particular, these efforts have focussed on the question of the extent to which the prosecution of alleged offenders in court should be the normal response - not least because of the economic costs associated with criminal prosecution. Various sections of the Criminal Justice (Scotland) Act 1980, in particular Section 6 introducing judicial examination in solemn procedure and Section 16 introducing an intermediate diet in summary procedure, aim to reduce the number of last minute guilty pleas by encouraging earlier plea negotiations, and other sections of the Act encourage more pre-trial disclosure between prosecution and defence. At a policy level, Crown Office and the Lord Advocate are continuing to actively pursue the various options for pre-trial review.

Another major shift in prosecution policy has been the extension of the fixed penalty system for motoring offences. This was recommended by the Stewart Committee on Alternatives to Prosecution in Scotland and given statutory recognition under the Transport Act 1982, which also provides for opting out of the system. When all the sections of this Act are implemented it will have a profound impact on the number of cases the fiscal deals with at the 'marking' stage. For example, at least 40,000 cases per year would be diverted away from the criminal justice process

either by the police or the prosecutor imposing a fixed penalty. There is also current discussion about whether or not it might be appropriate to introduce fixed penalties for minor property offences (Ashworth: 1984: 77-82).

The Stewart Committee further recommended, after reviewing the public prosecutor's power in many European countries to offer the accused a fine instead of prosecution for certain minor offences, that prosecutor's fines should be introduced in Scotland. This recommendation has not yet been given effect and indeed is extremely controversial since fiscals would be able to set a fine within a statutory maximum across a whole range of summary offences including common law matters. The controversy surrounding such fines focusses on whether or not such a quasi-judicial function is appropriate for the Scottish prosecutor.

The other alternative to prosecution recommended by Stewart, namely pre-trial diversion of accused persons from the criminal justice process to social work, medical and other agencies, has been implemented in a variety of fiscal areas throughout Scotland. In the first experimental scheme in Ayr, the procurator fiscal refers cases to the Social Work Department and they decide whether the accused is suitable for diversion. If someone is diverted no proceedings are instituted; the accused does not require to admit guilt but receives voluntary social work support over a period of time not less than 6 months; and, unlike diversion schemes in other jurisdictions, but consonant with Scottish practice, the victim is not consulted and his or her consent is not necessary. The fiscal is not kept informed about the progress of the case although he is told when the case is terminated or if a person re-offends.

In fact the Stewart Committee recommended a deferred prosecution model of diversion which requires an admission of guilt and prosecution for the original offence if the accused re-offends during the diversion period and other fiscal areas in Scotland are currently operating with a deferred prosecution model.

Despite these developments in Scotland, the central question of principle remains about whether such developments are in the public interest and what prosecution in the public interest actually means. This is really at the heart of the debate about what kind of prosecution system we want and how society should deal with minor (and major) forms of law-breaking. Clearly patterns of law enforcement themselves determine the kinds of offences and offenders reported with a view to prosecution or some other alternative and the police in any system make this critical and fundamental decision. Prosecution decisions are made in light of these initial decisions and any reforms in prosecution must take this into account.

This has, of course, been recognised in the Attorney-General's guidelines in England and Wales to prosecutors and senior police

officers, guidelines which are at pains to emphasise the importance of 'public interest considerations'. This is a recognition that 'the role of the independent prosecutor will be not merely as legal technician but also as moral accountant. Moral and social judgements interact with legal judgements at several stages in the criminal process - what offence to charge, which mode of trial to aim for, whether or not to accept a plea to a lesser offence or to fewer offences than charged ... whether to prosecute or not'. (Ashworth: 1984: 84)

In effect, these decisions themselves articulate what constitutes prosecution in the public interest. And whether prosecution guidelines available for public scrutiny in fact tell us more about how prosecution in the public interest actually operates, research on the translation of these guidelines into practice certainly does, as in The Netherlands (Van Dijk: 1983), and, at the very least, the publication of such guidelines opens up the debate on what kind of system of criminal justice we have and the kind of criminal justice system we want to have. This is, after all, surely in the public interest.

N O T E S

1. Fiscal is the generic term used to refer to procurators fiscal and their deputes.

2. Proceedings can only be brought with the consent of the Lord Advocate or the High Court by a person directly aggrieved who must present an application for leave to bring a private prosecution, called a Bill for Criminal Letters. In 1982 this procedure was successfully invoked for the first time in over seventy years by the complainer in a rape case.

3. Procurators fiscal deputes are qualified solicitors employed as Crown servants who assist the procurator fiscal for each sheriff court district in the prosecution of crime.

4. Exclusive jurisdiction has been granted to the High Court in cases of murder, treason, rape, incest, deforcement of messengers, breach of duty by magistrates and in certain statutory offences, for example, under the Official Secrets Act 1911-39. Conversely, some statutory offences can only be tried summarily, for instance careless driving under Section 3 Road Traffic Act 1972.

5. Nearly 60 per cent of accused persons plead guilty in solemn courts and 85 per cent in summary courts.

6. See, for example, McBain v. Chrichton, 1961 JC 25, LJ-G Clyde.

7. A full report of the study is contained in Moody and Tombs, 1982; and other reports can be found in Moody and Tombs, 1983 (a) and (b); and Moody, 1983. In the main study of prosecution decision-making in Scotland information was collected, on a fully national basis, on the 'outcomes' of fiscal decision-making. Thus information was collected on the nature of all reports received by fiscals in all offices over a one week period and on decisions made in relation to these reported offences. Fiscals were observed at work in fiscal offices and courtrooms throughout Scotland; training sessions for junior fiscals and seminars for their seniors were attended; reports and records relevant to every aspect of the prosecutorial task were studied; and a number of offices were selected for indepth study. These offices varied in terms of case load size, numbers of staff and geographical location and, as well as interviewing all fiscals in these offices, interviews were also conducted with police officers and defence agents in the same localities.

8. Marking is an expression used by fiscals to describe the pre-court stage of criminal proceedings when the fiscal decides whether or not to prosecute, on what charges, in which court and by which procedure.

9. See R. v. Turner (1970) 2 All E.R. 281.

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DISCUSSION

Professor Harding commenced the discussion by asking whether in practice, the prosecutor fiscal always revealed exculpatory evidence to the defence. In reply, Jacqueline Tombs said that while that was the principle upon which the present system was meant to operate, her research had shown that impartiality was always present. Work was now being directed towards greater pre-trial disclosure with the onus being placed on the Crown agent and the Lord Advocate. By placing such onus upon the prosecution what was being revealed to the defence was gradually being extended. However, the defence itself was not always pulling its load because while the prosecution was revealing more and more, the defence was exploiting the position by revealing as little as possible.

The discussion then turned to a consideration of pre-trial diversion in Scotland. Jacqueline Tombs referred to a research study in Ayrshire which dealt with cases involving domestic violence, sexual assault and other kinds of property offences. She explained that in that scheme the prosecutor fiscal obtains reports from the police (usually) and then tries to screen out the cases that are thought suitable for diversion. The fiscals refer these cases to the appropriate social agency to determine whether the individuals concerned are potentially acceptable to that agency. If so, a social worker then interviews the person in order to decide whether he or she should be permitted to take part in the program (which would normally last for six months or more). If the person is not accepted for diversion, then the person may or may not be prosecuted, depending on the fiscal's exercise of discretion. Apart from this model of diversion, Dr Tombs spoke of the deferred prosecution model (recommended by the Stewart Committee). It was believed that legal rights were better protected under this model. In general, however, the initiative for the development of the various schemes in Scotland was with the Crown agent, and diversion models were being developed to suit local conditions. She said that in time an evaluation and assessment of the various programs would indicate which schemes worked best.

David Biles asked whether in view of the enormous costs of prosecution, might not a policy of prosecuting only one in ten of the less serious offenders be an appropriate course to follow. This would reduce costs while still retaining some deterrent effect in the process. Jacqueline Tombs also responded by saying that the Stewart Committee had recommended just such a proposal as an alternative to prosecution.

Discussion continued

Jacqueline Tombs agreed. There was always the right to 'opt out' of the diversionary scheme, but there certainly were problems in relation to the 'voluntary' aspects of this decision. The deferred prosecution model attempted to avoid this problem by setting a time limit to the liability for prosecution. She added that some people favoured the use of diversion 'as a last resort', preferring instead to employ fixed penalty systems or forms of compounding fines. Diversion 'as a last resort' would be for persons who could not afford to pay fines, but who nevertheless deserved to be diverted from the criminal justice system.

George Zdenkowski asked the final question on the subject of plea or charge bargaining. He noted that different jurisdictions took different approaches to the problem. Some were formalised systems (with guidelines) others 'under-the-blanket' systems. What were the 'best systems' he asked. Jacqueline Tombs replied to the effect that she preferred formal rather than informal systems because it was possible then, to determine whether the system was working in accordance with the formal structure. If the process was completely informal then such analysis was impossible. However, the whole issue of formality and informality was tied up with the issue of accountability and in turn this had to do with the kind of accountability that the community wanted.

MEASURING PROSECUTORIAL DISCRETION

Ivan Potas
Criminologist
Australian Institute of Criminology
Canberra

In this paper I propose to describe a research project referred to by the Attorney-General in his opening address. The project is still in its formative stages and is concerned with an evaluation of prosecutorial discretion in the newly created Office of the Commonwealth Director of Public Prosecutions.

In recent years we have witnessed great improvements in police and court statistics throughout Australia. Yet it is still true to say that these have been developed in an ad hoc and relatively uncoordinated manner. Because of the fragmentation of criminal justice systems generally and complicated even further by the fact that Australia consists of a federation of Statesand Territories, no national or even State statistics exist tracing the flow of offenders as they are processed through the various stages of the criminal justice systems. Certainly some States, such as New South Wales, Victoria and South Australia have been developing quite comprehensive court statistics, but to date no system of prosecutorial statistics exists - either at State or Commonwealth level.

This is a grave omission as, arguably, the decision to prosecute is as important as any taken in the course of judicial proceedings. A United States judge once observed that 'the prosecutor has more control over life, liberty and reputation than any other person in America'. (1) The decision to prosecute is equally important in the Australian context (2) and it seems obvious that some effort should be taken to examine and analyse this aspect of the criminal justice process.

With the establishment of the Office of the Director of Public Prosecutions there is presented a unique and it is submitted, important opportunity for this Institute to study and evaluate the prosecution process as it relates to federal laws. At the same time the Institute can provide the Director of Public Prosecutions with information that we believe will assist him in carrying out the functions of his office. I would hope also that interstate participants at this Seminar will consider the feasibility of doing similar research, of the kind I shall be describing, in their respective jurisdictions.

My proposal is that an ongoing research project be developed which would accurately monitor the work handled by the office of the Director of Public Prosecutions, analyse it, and then transmit the results back to the office so that, amongst other things, the Director of Public Prosecutions can have a running account of the work that flows through his office.

SOME PRINCIPLES IN THE ADMINISTRATION OF CRIMINAL JUSTICE

Before outlining my research project I propose to make some general observations upon the criminal law and upon the role of the prosecutor. In this regard the first and perhaps most important task is to place the prosecutor in the context of the whole system of criminal justice.

We can begin by reviewing the essential nature of the criminal process. In the first instance there must be an accusation by someone who says that a particular person has committed a particular offence. The way this is done is by charging the offender by reference to a pre-existing crime. Then there must be a test or procedure for determining whether the person who is accused has in fact committed the offence. This testing is done through the medium of a criminal trial. Finally, if the finding is that the person has in fact breached the law, then certain consequences by the way of condemnation or punishment follow. (3) We call this the sentencing stage of the process.

There are within the scheme of things certain general principles of the criminal law and of criminal punishment that serve to protect us from the excesses of the State.

The first principle is that there must be laws proscribing behaviour of a particular kind before a person may be rightfully accused of committing an offence in relation to such behaviour. Crime is a socio-political artifact, a creation of Parliament and of the common law. The recognition of this fact has far-reaching consequences because it means that the level of crime in the community can be increased or reduced at the whim of the legislator. Unfortunately parliaments tend to add to rather than subtract from the list of legislative proscriptions. The overall effect of this, in my opinion, is to generate more crime. For these reasons I think there is much merit in the idea of screening legislation that is in the making with a view to assessing whether the overall impact of such legislation is likely to produce an adverse, unwanted consequence upon the level of crime in the community. One speaker at the 'Mini Summit on Crime' called for 'criminal impact statements' to examine Bills which involved the handing out of 'billions of dollars of public funding'. (4) Such impact statements might not only consider whether the opportunities for crime are likely to increase by the introduction of new legislation, but also whether the criminal justice system, police, prosecutors, courts and corrections can realistically hope to control the level of crime thus generated.

The general principle of legality states there can be no crime without a special law. It also states that there is no punishment without a special law : nulla poena sine lege.

With regard to sentencing it should be noted that the Crown's discretion extends to considerations bearing upon the adequacy of the likely punishment. All jurisdictions in Australia now permit Crown appeals against sentence. Thus prosecutors decide not only upon the nature of the accusation or charges to be tested in the courts and so set the outer limits of possible punishment for particular offences but can also challenge the adequacy of the sentence imposed by the trial judge and have their views tested in a higher court.

Prosecutors, of course, hold the key to the door of the criminal trial process. Apart from the quite exceptional case of private prosecution there is no trial unless the prosecutor initiates legal action against the accused. The prosecutor's authority then, is of pivotal importance in the administration of criminal justice. The fact that prosecutors are conferred with discretion as to whether to proceed or not to proceed to trial, or once the decision to prosecute is taken, whether charges should be dropped, or withdrawn, or other charges substituted, or more serious charges reduced to less serious charges and so on. These decisions bear directly on the possible outcome of a case. In short, these decisions, in partnership with the laws that define crime and prescribe penalties, delineate the outer limits of the State's right to stigmatise and punish offenders. In the most severe cases this authority extends so as to deprive citizens of their liberty.

Generally, and I emphasise generally, because there are exceptions, penalties prescribed in respect of particular laws are intended and are treated as maxima only, and judges or magistrates may impose less severe penalties, different kinds of penalties or no penalties whatsoever depending on the circumstances. This, of course, provides a protection to convicted persons because it places limits upon the degree of punishment that may be imposed by the State. Furthermore, Australian courts by and large have avoided the pitfalls of adopting systems of mandatory sentencing, and mantatory minimum sentencing. Thus, judges do exercise a discretion in sentencing but their discretion is not an unfettered one. They must exercise their discretion judiciously and subject to principles enunciated by higher courts. As Sir Laurence Street observed in Rushby (5) 'The judicial discretion underlying the formulation of a sentence must be exercised with due regard to the principles of law deducible from authoritative decisions'. If due regard is not had to principle then either the Crown or the aggrieved prisoner has grounds for having the matter reviewed in a higher court.

At first blush it may seem anomalous that so much attention is given to the exercise of sentencing discretion and yet the

exercise of the discretion to prosecute, which in effect determines the extent of potential punishment, seems to be so secretive, arbitrary, so devoid of principle.

FINITE RESOURCES LEADS TO 'SELECTIVE' PROSECUTION

When considering prosecutorial discretion it is important to recognise that prosecutors, like the police, or like other investigatory agencies, are a finite resource. Prosecutors cannot, nor in my opinion should they be expected to prosecute all crime. They cannot prosecute all crime because most crime is unreported and does not come to the attention of authorities.

Of the crime that is reported much of it calls for extensive, laborious, time consuming and costly investigation. If a potential accused is identified, then there is the prospect of obtaining the necessary proof, the evidence which will carry weight in court. In many cases nothing short of an admission of guilt by the offender will do. Guilty pleas fortunately, do make up the bulk of all crime that is prosecuted and this greatly relieves the extra burden that might otherwise fall upon police, or other investigative agencies, the prosecutors and the courts.

Those cases that do go to trial are the tip of the criminal iceberg. Gauged against the totality of crime they present but a fraction of the crime that is committed in the community. Their outcomes, however, are of considerable symbolic significance. Occasionally we must step back and ask, are the right people being prosecuted. If the criminal justice system is to be an acceptable vehicle for maintaining relative peace and good order in the community then how it functions, and in the present context, how prosecutorial discretion is exercised, is of critical importance. What is clear is that there must be a process of 'selective prosecution', because it is simply not possible, nor desirable to prosecute for all crime.

PROSECUTORIAL DISCRETION

When considering the meaning of discretion I am drawn to Dean Roscoe Pound's definition. He once said that 'discretion is an authority conferred by law to act in certain conditions or situations with an official's or an official agency's own considered judgement and conscience. It is an idea of morals belonging to the twilight zone between law and morals'. (6) You will recall Dr Tombs' reference to the terms 'legal technician' and 'moral accountant' to describe the work of prosecutors. These expressions fit aptly with the preceding definition.

Discretion is an important tool throughout the criminal justice process. In marginal cases it plays a part in the decision of the police officer to ignore, warn, caution, search, detain, charge or arrest a person. Similarly prosecutors exercise discretion when deciding whether there is sufficient evidence to proceed

with a case. The task of framing charges and 'charge bargaining' are all common problems that call upon an exercise of discretionary judgement. The court itself exercises considerable discretion during the trial process, particularly when it is required to rule upon the admissibility of evidence. At the sentencing stage also, the exercise of judicial discretion within the limits permitted by law plays a vital part in the administration of justice.

BROAD PRINCIPLES OF PROSECUTORIAL DISCRETION

In the recent High Court sentencing decision of Lowe v. Queen (7) Mr Justice Mason stated that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and the community. (8) His Honour also said that the notion of equal justice is fundamental to any rational and fair system of justice, and that unequal treatment is a badge of unfairness.

While Lowe was a sentencing decision it would be curious if the equally important decision to prosecute were not also subject to the same concern for fairness and equal treatment. If then prosecutorial decision making is to be based on a policy of 'selective' prosecutions there must be guidelines determining how selection should be made. But where are the stated principles to be found? Certainly we have come to recognise the importance of the application of principles in the sentencing decision. Judges these days usually give reasons for their decisions, and often are required to justify their sentences. If the reasons they give are erroneous, or if the sentences imposed appear outside the acceptable limits of punishment then there are grounds for seeking leave to appeal. Thus a common law system of sentencing has been developed over the years which accords some degree of control over the exercise of judicial discretion. Certainly the system is far from perfect, but at least it is a public exercise of discretion and at least the decisions are made in open court and challengeable through the well trodden procedures of appellate review. Not so the decision to prosecute. The guidelines for determining these, if they exist in the various jurisdictions, are a mystery to all except those who exercise that discretion.

To be fair it is possible to point to some general principles which are said to apply to Crown Prosecutors. For example, there is the principle that the Crown in a criminal case has a duty to present the case fairly and completely. The Crown must not struggle for conviction but 'is fully entitled and obliged to be as firm as the circumstances warrant'. (9) Crown Counsel must not attempt to persuade a jury to a particular point of view by introducing prejudicial or emotional elements but must present the case adequately having regard to all the circumstances of the case. (10) In general terms then, the prosecutor's discretion must be exercised in a manner which is calculated to further the interests of justice and at the same time be fair to the defence.

Thus prosecutors stand to protect the public interest, by bringing to trial in appropriate cases, those who commit criminal offences. Their task is not limited merely to securing convictions and ensuring that those who cause the greatest havoc are dealt with severely. They also serve to limit the excessively retributive and sometimes emotional sentiments that are expressed by individual members of the public, or by the media, particularly where crimes of violence or other serious crimes are perpetrated. In the words of one distinguished commentator;

> the best protection against abuse of power and the citizens safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humanity. (11)

Deciding whether prosecution is in the best interests of the community is an important feature of a prosecutor's work.

Another important, but sometimes ignored, principle is that the prosecutor should share evidence with counsel for the defence, even though it may tend to negate the guilt of the accused. Collecting scalps on belts or winning, is not the name of the game. Doing what is fair and just is. As Norris and Newton JJ observed in Lucas (12):

> prosecutors are ministers of justice who ought not to struggle for a conviction ... it is their duty to assist the court ... to make certain that justice is done between the subject and the State. (13)

Justice and fairness cannot, however, be plucked out of the air, and for that reason adequate or more particularised guidelines are required.

SECRETIVENESS OF PROSECUTORIAL DISCRETIONS

In the Australian Law Reform Commission's Interim Report entitled Sentencing of Federal Offenders, (14) the Commission stated that it had failed to locate at either State or Federal level 'any public document which prescribes the manner in which prosecutorial discretion should be exercised'. (15) It did manage to unearth the existence of a confidential manual which was used by legal officers of the Commonwealth Crown Solicitors office, but the point is that at least until 1980 members of the public had no access to material which would assist them in understanding how prosecutorial discretion is exercised, whether it is exercised fairly, or equitably or whether it is exercised essentially through unprincipled, arbitrary, seat of the pants decision-making processes.

Prosecutorial decisions are essentially discretionary administrative decisions, but this does not mean that such decisions should not be based on sound principles, nor does it mean that such principles as may exist should be known only to the decision-makers themselves. Surely those who are affected by such decision-making ought to have access to the principles upon which those decisions are based and in certain circumstances be in a position to question the appropriateness of those decisions. I think it fair to say that the process of prosecution at both State and Federal levels continues to be little different to that found by the Australian Law Reform Commission, when it asserted that the process of prosecution was 'the most secretive least understood and the most poorly documented aspects of the administration of criminal justice'. The pamphlet, Prosecution Policy of the Commonwealth, published by the Attorney-General's Department in 1982, appears to be the first step in the right direction, and with the setting up of the new office of the D.P.P. the winds of change are beginning to blow.

GUIDELINES IN PROGRESS

It is encouraging to hear that guidelines for the investigation and prosecution of tax fraud are being drawn up by the Office of the Director of Public Prosecutions in consultation with the Australian Tax Office.

The fact that these guidelines are to be made public also indicates that steps are being taken in the right direction. Hopefully guidelines for prosecution will also be formulated for other agencies, including the police. (16) Related to this is the important function of evaluating complaints prior to the initiation of criminal proceedings. These should not be left to ad hoc judgement, but be based on adequate guidelines and principle. Once again the criteria for this discretionary exercise should be made public. Otherwise how else is it possible to challenge the improper or unfair exercise of prosecutorial discretion. It is simply not good enough expressing concern over the proper exercise of sentencing discretion when gross disparities exist at the charging and prosecuting stages.

Some basic criteria for exercising discretion in the charging decision are set out in the pamphlet Prosecution Policy of the Commonwealth. This publication is currently being reviewed by the Office of the D.P.P. and we must wait and see what changes are to be made to it.

Meanwhile, I return to my main theme. I would like to outline a study which this Institute is in the process of designing, in consultation and with the support of Mr Temby, which will attempt to analyse the work of his office and hopefully assist him in his task of designing guidelines and determining policy. Unfortunately, I am not in a position to offer you any findings, as the data collection phase has not been commenced. What can be given, however, is a description of what is proposed to be done

and what can be achieved by a close examination of the prosecutor's work.

THE PROSECUTOR'S WORK-SHEET

During the course of this Seminar discussions will centre upon the provision of judicial or administrative review of prosecutorial decisions. However, as Peter Sallmann and John Willis remind us in their recently published book Criminal Justice in Australia, we know so little about the prosecution process that particular proposals for review of prosecutorial decisions may seem premature. (17) First, they argue there should be in existence a set of considered and drafted guidelines and the establishment of some basic system of accounting before review mechanisms can be put in place. Of course once guidelines are in place and some satisfactory system of review has been introduced, it would then be possible to streamline the guidelines by applying the experience gleaned from the review process itself, but that is still a long way down the track.

The present task, it seems to me, is to record what happens from the time that cases are first referred for prosecution until they are disposed of. This overview or general description of the prosecution process must include an examination as to why cases are not proceeded with as well as why cases are proceeded with. The prosecutor's work-sheet, appended to this paper, is the principal method for obtaining the relevant data.

The prosecutor's work-sheet attempts to enhance our understanding of the prosecutorial process. The work-sheet asks for some very basic information which, when analysed with the help of a computer, can give us a very useful look at the critical decision-making stages. I think it is important to record the type of offence or offences. Furthermore, the pleas in respect of those counts should also be recorded, as should the ultimate outcome of each case. Clearly it is important to understand why certain decisions are made as they are made during this process and accordingly, some questions of a subjective kind are asked of the prosecutor who has responsibility for handling the particular case.

Of necessity the work-sheet has been kept simple. Inevitably, some omissions will be found, and therefore it is no substitute for a more sustained and searching review of decision-making, that could be accomplished if it were supported by interviewing the decision-makers themselves. Ideally the information derived from the work-sheet could be supplemented by participant observation, but whether such detailed work is warranted may depend upon the success of the present project, the constraints of time and resources and the likely benefits of such further research.

At present the plan is to try out the form in the Victorian Office of the Commonwealth Director of Public Prosecutions. It is anticipated that prosecutors will fill in work-sheets in respect of each case they deal with over a period of two or three months. It is then proposed to select another office, probably Sydney, and run the survey for a similar length of time. Ultimately each jurisdiction will be requested to participate in this exercise.

Using the data obtained from the work-sheets the Institute will analyse the results and feed these back to the participating prosecutors so that each will have a running account of the work of their own office.

As I have indicated, the research results of this project should provide considerable assistance for the formulation of future policy in the Office of the Director of Public Prosecutions.

Furthermore by providing a description of the decision-making processes within the Office it would then be possible for the Director of Public Prosecutions to consider the impact of information so derived, upon the creation of a set of guidelines. In turn this would assist in promoting a consistency of approach to prosecutions throughout the geographically disparate offices of the D.P.P.

SOME THOUGHTS ON DEVELOPING PROSECUTORIAL GUIDELINES

Guidelines might be developed in two stages. The first would be concerned with providing a set of guidelines that describes the present practices of the majority of prosecutors. Then, when this has been done, the question may arise as to whether these guidelines adequately serve the ends of justice. If they do not, the guidelines should be altered and a set of prescriptive guidelines could then be developed and substituted for the descriptive ones. I have used the expression 'set of guidelines', but in fact there may need to be several sets of guidelines that apply specifically to particular types of offences and particular types of offenders.

In developing prescriptive guidelines questions relating to the proper extent of prosecutorial discretion, including issues concerning the desirability of introducing deferred or suspended prosecutorial systems could be canvassed. Similarly, questions concerning the review of the exercise of prosecutorial discretion would need to be considered.

Many of these issues may impinge upon the traditional jurisdiction of the court. In such event the guidelines would need to be supported by appropriate legislation. Perhaps a Sentencing Council, responding to recommendations made by the D.P.P. (assisted by the Australian Law Reform Commission and this Institute) might be an ideal forum for the development of such

guidelines. (18) However, as I have argued, a concerted effort in this direction cannot be undertaken without 'a sustained and unrestricted examination of current practice'. (19) Nor are any improvements likely to succeed without the full co-operation of the prosecutors themselves.

SHOULD PROSECUTION BE MANDATORY?

Should prosecutors exercise a discretion not to prosecute in certain circumstances?

Arguments in favour of mandatory prosecutions are that:

(i) the administration of justice should be even-handed. Selective prosecution suggests that secretive, biased and perhaps corrupt practices may flourish;

(ii) laws are diluted by the prosecutor's failure to proceed to prosecute in clear cases;

(iii) improved general deterrent and denunciatory effects are obtained;

(iv) the public expect those who commit offences to be prosecuted.

For each of these there are counter arguments, the most persuasive one being the fact that the criminal justice system itself is selective. Why should only those who are caught be brought inexorably to justice when there may be good reasons for extending mercy to some of them? Prosecution is no guarantee that the person prosecuted, or indeed others in the same position of the accused will refrain from committing further crimes. There may be cogent humanitarian and cost considerations against proceeding with particular cases and it seems right and proper that some discretion should be retained by the prosecutor.

Here I am reminded of a statement that I believe is attributable to Norval Morris. He once pointed out that discretion, like matter, can neither be created nor destroyed. If the prosecutor has no discretion the discretion shall shift back to the referring agency, or shift forward to the judge, to the jury, or if it proceeds to a conviction, to the sentencer.

In these circumstances it would seem that a discretion in the prosecutor not to proceed with prosecution even though conviction is likely, should be retained. (20) However, it is submitted that the decision not to proceed with prosecutions should be based on guidelines that would ensure that the less desirable features of prosecutorial discretion are minimised.

In the Netherlands, which boasts the lowest imprisonment rates of the western world, less than half of the cases presented to the prosecutor by the police are brought to trial. Prosecutors in this jurisdiction can either refuse to prosecute entirely, or deal with the matter by cautioning, ordering of restitution or community service. The Dutch employ some 200 specialised lawyers who are recruited, trained and even paid like judges. It appears also, that their practice is for the prosecutor to demand a specific penalty if the offence is proved, and while the judge is not bound by this demand, it is generally accepted. (21)

Where resources are scarce it seems only reasonable that all wasteful and ineffective steps should be eliminated from the criminal justice process. In this regard the Michigan system of prosecutorial discretion is worth investigating. That jurisdiction employs a system of statutory guidelines that relates to the charging process itself. As an alternative to formal prosecution they have systems of deferred prosecution and pre-prosecution probation. (22) It is now timely that we should examine our own practices with a view to adopting some of these alternative procedures.

While these procedures have their attractions they are not without risk to civil liberties. Notwithstanding a number of recent Royal Commission Reports, it is foreign to our system of justice to punish those who have not been adjudged guilty according to due processes of law. What may be done by way of diverting persons from criminal proceedings must be carefully watched lest we circumvent the usual protections afforded by the criminal courts and impose coercive recipes in the name of rehabilitation or expediency.

N O T E S

1. Mr Justice Jackson quoted in Kenneth Culp Davis Discretionary Justice, Batton Rouge, Lousiana State University Press, 1969, p.160.

2. Refer generally to the views expressed in the Australian Law Reform Commission's Interim Report No.15 Sentencing of Federal Offenders, Canberra, 1980, pp.61-84.

3. See generally Hyman Gross A Theory of Criminal Justice, Oxford University Press, New York, 1979.

4. National Crimes Commission Conference Record of Proceedings, Parliament House, Canberra, 28-29 July 1983, pp.143-145.

5. (1977) 1 NSWLR 594.

6. R. Pound, Criminal Justice in America, Henry Holt, New York, 1930.

7. (1984) 58 ALJR 414.

8. Few would argue with the statement. His Honour also pointed out that there is no principle of law that sentences must strictly compare, and cited the following cases in support of this proposition R. v. Coe [1969] 1 All ER65; Ball (1951) 35 Cr App R 164; Pitson (1972) 56 Cr App R 391; Street [1974] Crim LR 264.

9. R. v. Thomas. No.2 [1974] 1 NZLR 658.

10. R. v. Roulston [1976] 2 NZLR 644.

11. R.H. Jackson, 'The Federal Prosecutor', (1940) 24 Jam Jud Soc'y, 20.

12. [1973] VR 693.

13. Ibid at 705. See also S.B. Lane 'Prosecutors: Non-disclosure of Exculpatory Evidence', (1981) 5 Crim. L.J., 251.

14. Op cit n 2.

15. Ibid at p.61 ff.

16. See Robert Frank Redlich, Annual Report of the Special Prosecutor 1983-84 at p.45 regarding the need for guidelines and the powers the D.P.P. under section 11 of the Director of Public Prosecutions Act 1983.

17. Sallman and Willis, Criminal Justice in Australia, Oxford University Press, Melbourne 1984.

18. As for the creation of a Sentencing Council, see Sentencing of Federal Offenders, Op. cit. at p.268 ff, particularly at para 451.

19. Ibid at p.67, para 102.

20. See generally Andrew Ashworth, 'Prosecution, Police and Public - A Guide to Good Gatekeeping?' (1984) 23 Howard Law Journal, 65.

21. Jan J.M. van Dijk, 'The Use of Guidelines by Prosecutors in The Netherlands', Ministry of Justice, The Hague, Netherlands, 1983.

22. Leonard and Garber, Screening Criminal Cases, Chicago National District Attorney's Association, 1972.

PROSECUTOR'S WORK SHEET

COMPLETE THE APPROPRIATE SECTIONS OF THIS FORM WHENEVER RELEVANT ACTION IS TAKEN.
ONE FORM ONLY IS TO BE USED FOR EACH CASE.†
(† – refer to explanatory notes on back page)

1. FILE NUMBER:

2. SUBSEQUENT ACTION OFFICER'S CODE: †

2nd
3rd
4th
5th

DATE OF ASSUMING RESPONSIBILITY:

DAY MONTH YEAR

3. REFERRING AGENCY:

.....

(e.g. AFP, Social Security, Tax, Customs, etc.)

4. PROCEEDINGS COMMENCED BY:
(circle appropriate numbers)

1. Summons
2. Arrest

} involving:

1. Summary offence
2. Indictable offence triable summarily
3. Indictable offence only

5. IF INDICTABLE PROCEDURE APPLICABLE:
(circle appropriate number)

Full Committal Hearing: 1. successful 2. unsuccessful

Paper Committal: 3. successful 4. unsuccessful

Ex Officio Indictment: 5.

6. JURISDICTION OF COURT:†
(circle appropriate number)

1. Magistrates/Summary etc.
2. District/County Court
3. Supreme Court
4. Federal Court
5. Other

CONTINUED OVER PAGE

7. DATE OF BIRTH OF ALLEGED OFFENDER:
DAY MONTH YEAR

8. SEX OF ALLEGED OFFENDER:
(circle appropriate number)
1. Male
2. Female
3. Corporation

9. NUMBER OF ALLEGED CO-OFFENDERS:
(exclude alleged offender)

10. CRIMINAL RECORD OF ALLEGED OFFENDER:
(circle appropriate number)
1. No priors
2. Minor prior/s } †
3. Major prior/s }
4. Unknown

11. WAS BAIL SOUGHT BY ALLEGED OFFENDER?:†
(circle appropriate number)
1. Yes
2. *No
3. *Alleged offender not in custody

* Go to 14

12. DID CROWN OBJECT TO BAIL SOUGHT?:†
(circle appropriate number)
1. Yes
2. *No

* Go to 14

13. WAS BAIL GRANTED?:†
(circle appropriate number)
1. Yes
2. No

14. DID ALLEGED OFFENDER APPEAR?:†
(circle appropriate number)
1. Yes
2. No

15. DATE OF ISSUE OF PROCESS:
DAY MONTH YEAR

16. DATE OF COMMENCEMENT OF MAIN HEARING OR TRIAL:
DAY MONTH YEAR

17. DATE OF COURT'S DECISION (verdict):
DAY MONTH YEAR

18. IF APPLICABLE, DATE SENTENCE IMPOSED:
DAY MONTH YEAR

NATURE OF OFFENCE (offence type)

19. ORIGINAL OFFENCES: (see item 35 over page)
(list all offence types in estimated order of seriousness. Indicate Act and Section number in respect of each offence type)†

20. NUMBER OF COUNTS FOR EACH OFFENCE TYPE: (insert actual number)

21. DATE OF (earliest) ALLEGED OFFENCE:

22. ESTIMATED PROBABILITY OF GAINING A SUCCESSFUL CONVICTION:†
1. Little
2. Poor
3. Fair
4. Good
5. Excellent

23. COUNTS NOT PROCEEDED WITH:
(insert number of counts for each offence type)

24. BEST REASON FOR NOT PROCEEDING WITH COUNTS: (see note 1)†

25. ACTION TAKEN UPON COUNTS OR OFFENCES NOT PROCEEDED WITH:†
1. All withdrawn
2. Left on file
3. No prosecution entered
4. Lesser included charge substituted
5. Other

26. PLEAS AT HEARING OR TRIAL:
(insert number of 'g' and/or 'ng' pleas)

27. OUTCOME OF CHARGES AT HEARING OR TRIAL:
1. Acquitted on all counts
2. Convicted on all counts
3. Convicted on some counts
4. Found guilty but not convicted
5. Convicted on lesser included charge
6. Hung jury
7. Other

28. VERDICT:
(insert number of 'g' and/or 'ng' findings)

29. KIND OF SENTENCE FOR EACH OFFENCE TYPE: (see note 2 and enter lowest applicable number)

30. DURATION OF EFFECTIVE SENTENCE FOR EACH OFFENCE TYPE: (in months)†

31. TOTAL EFFECTIVE SENTENCE OF IMPRISONMENT: (in months)†

32. MINIMUM TERM OF IMPRISONMENT SPECIFIED: (in months)†

33. FINE: (total effective amount) $

34. REPARATION ORDER: (total effective amount) $

NOTE 1:

1. Insufficient evidence
2. Death or incapacity of key witness
3. Offence of trivial nature
4. Cost of prosecution exceeds likely benefit
5. Prosecution not in the public interest
6. Prior good character of accused
7. Death or physical infirmity of accused
8. Accused diverted to mental health agency
9. Mistaken identity

	1st	2nd	3rd	4th	(All other misc.)
Act Sec. & Sub-sec.					
DAY MONTH YEAR					
G NG					
G NG					

10. Justice deemed satisfied by prosecution of less serious offence(s)
11. Justice deemed satisfied by prosecution of fewer offence(s)
12. Obscurity or obsolescence of law
13. Offence not prevalent
14. Other (specify. . . . .)

NOTE 2:

1. Full time detention (other than Governor's Pleasure)
2. Periodic/weekend detention
3. Community service/work order
4. Order/bond with probationary supervision
5. Order/bond without supervision
6. Loss or suspension of driver's licence
7. Fine, compensation or restitution
8. Orders relating to children not included above
9. Nominal or no penalty
0. Governor's pleasure

CONTINUED OVER PAGE

35. IF NATURE OF OFFENCES CHANGE AT ANY TIME, INDICATE:

1. At what stage or stages of the process: . . . . . .

2. New charges/counts substituted (give Act and Section number): . . . . . .

. . . . . .

3. Reasons for making the change(s): . . . . . .

. . . . . .

. . . . . .

EXPLANATORY NOTES

A CASE relates to a single person who is being prosecuted or considered for prosecution in respect of one or more charges dealt with as a single matter. Where there are co-offenders one form for each person should be completed.

Item 2: Any officer who assumes responsibility for preparing or prosecuting the case should provide his/her position number and date of assuming responsibility for it.

Item 6: Circle number applicable to the substantive proceedings.

Item 10: If the alleged offender has been sentenced previously to imprisonment for twelve months or more, or has been sentenced to imprisonment on a number of occassions such that cumulatively the sentences exceed twelve months then circle major prior/s.

Item 11-13: If circumstances change, the answer to this and following questions may need to be varied. Do this by striking through original answer/s and write in new number.

Item 14: Indicate whether accused appeared at the final (substantive) hearing or trial.

Item 19: A full description of original charges should be entered here. If the offence is at common law, simply write the name of the offence. Only one offence type should be entered in each of the columns headed 1st to 4th. If there are more than four offence types then the remainder should be added together in the miscellaneous column. When estimating order of seriousness consider which kind of charges are likely to attract the highest penalties and list these in decending order of seriousness across the page. If changes are later made to the original charges see item 35.

Item 22: Estimate the prospects for obtaining a successful prosecution upon at least one count (under each offence type) in accordance with the scale given. This should be done prior to commencement of main trial or hearing.

Item 24: There should always be a reason for not proceeding with charges. Consider the list of criteria in Note 1, and indicate most appropriate one (for each offence type). If the reason applicable is not listed enter fourteen and write the applicable reason in the space provided in Note 1.

Item 25: In the unlikely event that more than one action is applicable, enter highest number. If a lesser included charge is relevant ensure also to complete item 35.

Item 30: 'Sentence' includes bonds, probation orders etc. Terms expressed in years should be converted to months. If the term specified is less than a month enter 'XXX' otherwise round up to the next whole number. If life imprisonment is imposed, enter 'LLL' and for other indeterminate sentences, enter '999'.

Items 31-32: Code as per item 30.

Item 35: Reasons for making the change, or accepting a lesser plea should be given. If necessary a longer note should be attached in order to fully describe the action taken.

PROSECUTION DISCRETIONS - DIRECTOR OF PUBLIC PROSECUTIONS ACT 1983

Ian Temby, Q.C.
Director of Public Prosecutions
A.C.T.

INTRODUCTION

I am pleased to present this paper as the first Director of Public Prosecutions (D.P.P.) for the Commonwealth of Australia. The office is still quite new, and it is therefore unsurprising that the manner of exercise of the various statutory discretions within the new regime is in the process of evolution. What follows should not be looked upon as a definitive statement of D.P.P. policy.

WHY A DIRECTOR OF PUBLIC PROSECUTIONS?

What part need be played by functionaries of the State in discouraging anti-social conduct, and in causing malefactors to be punished for their misbehaviour? Traditionally under the common law crimes were regarded as being committed against a person or his family to initiate a prosecution. That situation was inevitably conducive to abuse and inefficiency. Henry VIII proposed that police prosecutors should be appointed, saying:

> Those laws have been printed 'in our maternal English tongue' and are so available to all; yet they are not put into force unless it be by malice, rancour and evil will. Better it were that they had never been made, unless they should be put in perfect execution. (1)

It was not however until late in the nineteenth century that a Director of Public Prosecutions was first appointed in England. (2) The English D.P.P. 'plays only a very small part, numerically, in the prosecution of crime ... His fundamental role is to undertake prosecutions of importance and difficulty and to advise the police'. (3) The present position in this country is more akin to that which prevails in Scotland, which has had procurators fiscal since 1584. (4)

So too in the American colonies private prosecutions were seen as undesirable as creating a means for revenge and to canvass private grievances. The first public prosecution statute in that country was enacted as early as 1704.

> Henceforth there shall be in every countie a sober, discreet and religious person appointed by the countie courts, to be atturney for the Queen to prosecute and implead in the lawe all criminals and to doe all other things necessary or convenient as an atturney to suppresse vice and immoralitie ... (5)

The Office of D.P.P. was established on 5 March after the uncharacteristically smooth passage of the Director of Public Prosecutions Bill 1983 through the Houses of Parliament. In the course of the second reading speech in the Senate the Attorney-General said this about the rationale for creating the Office:

> The Director of Public Prosecutions Bill now represents an important and historic development in the law and practice governing the prosecution of offences against Commonwealth law. The Bill establishes an Office of the Director of Public Prosecutions with the main functions of conducting Commonwealth prosecutions and exercising discretions in relation to prosecutions. Similar offices of Director of Public Prosecutions have existed in the United Kingdom since 1879 and in the State of Victoria since 1982. The experience of recent years, particularly the revelations of unacceptable delay and other deficiencies in the administration of the Commonwealth criminal law contained in the reports of royal commissions conducted by Mr. F.X. Costigan, Q.C., and Mr Justice Stewart, has made clear the need to revitalise and reorganise Commonwealth prosecution processes. (6)

The features of the Statute that matter for present purposes are that:

- the D.P.P. is appointed for a term, during which he can only be dismissed by the Governor-General for statutory cause. (7)

- the Attorney-General retains ultimate political responsibility for the Office of D.P.P., being empowered to give or furnish directions or guidelines to the D.P.P., which must be made public by being tabled in the Parliament. (8)

- the D.P.P. and his delegates have power to start or stop any prosecution for a Commonwealth offence, whether for a summary or for an indictable offence, and whether commenced by a police officer of other public official or by a private person. (9)

The last matter mentioned represents a radically new situation. Previously the Attorney-General's Department provided services as a solicitor to client Departments, whose views ultimately prevailed.

STATUTORY POWERS AND FUNCTIONS

Under the Director of Public Prosecutions Act 1983 (the D.P.P. Act) many functions are stated and powers conferred. In relation to discretions exercised by prosecutors, the following are of the greatest interest:

- consents to prosecute;
- institution of prosecutions;
- termination or prosecutions;
- witness indemnities;
- the power to issue guidelines or directions.

Consents to Prosecute

Section 6(4) of the D.P.P. Act enables persons, who have the power under various Commonwealth Acts to consent to prosecutions for offences thereunder, to authorise the Director to consent to such prosecutions. As the consent has itself been delegated the Director has to exercise this power personally. (10) This situation is administratively inconvenient, particularly when consent is required at short notice. Its saving grace in the short term is that it is conducive to consistency. Steps have been taken and are being taken to widen the class of persons within the Office of the D.P.P. who cannot consent to prosecutions.

The Attorney-General has agreed that the D.P.P. should be responsible for the majority of matters requiring his consent. He has retained responsibility for some mtters, particularly those which involve high questions of State, for example, under the Crimes (Foreign Incursions and Recruitment) Act 1978.

Under Commonwealth law there are many offences created with respect to which someone other than the Attorney-General possesses the power to consent to prosecutions. At present agreement is being sought from all relevant Government Departments for authorisation to be given to the Office of the D.P.P. to consent to prosecute. The power will be delegated wherever possible to lawyers at appropriate level, depending upon the significance of the offence concerned.

I do not deal in any detail with the manner in which the discretionary power to consent to prosecution is exercised. Speaking broadly, the considerations relevant to the exercise of that power will be about the same as those which pertain to the decision to prosecute generally. It is of course possible that particular statutes will, on a proper construction and interpretation, require that special factors be taken into account, and where Parliament has seen fit to require that a consent be given before a prosecution is launched it behoves D.P.P. lawyers to consider that question with some care.

Institution of Prosecutions

Under the D.P.P. Act, certain functions of the Director are to institute prosecutions for indictable offences, to institute proceedings for the commitment of persons for trial, and to institute proceedings for summary conviction, in each case in respect of the criminal law of the Commonwealth - section 6(1)(a), (c) and (d).

At the present time the Office of D.P.P. follows the guidelines for the making of decisions in the prosecution process which are contained in the 'Prosecution Policy of the Commonwealth' presented to the Parliament on behalf of the then Attorney-General in December 1982. Preparation of new guidelines has been put in hand, and input from various sources are looked for: this Seminar should be of great value in that regard.

Most prosecutions for which the D.P.P. is responsible are commenced by public officials, generally police officers. Except in cases of great weight, they will present a prosecution brief without prior consultation. In some cases an arrest will have been effected or a charge laid before the Office of D.P.P. sees any papers.

In deciding whether to institute or proceed with a prosecution, the first consideration must always be the sufficiency of the available evidence. There must be enough to establish a prima facie case. Additionally, a prosecution will not normally be taken unless there is a reasonable prospect of obtaining a conviction; it should be rather more likely than not that the proceedings will result in conviction. This helps to ensure that limited resources are not wasted pursuing unpromising cases, a corollary of which is that the resources are then left free to pursue with some vigour the cases worthy of prosecution. The policy that it must be 'more likely than not' that a conviction will be obtained also reduces the risk that innocent persons will be prosecuted. (11)

D.P.P. lawyers are also required to pay regard to the public interest: does it require the institution of a prosecution? The concept is a fluid one (12) and speaking without limitation, factors to be taken into account in ascertaining whether the public interest is best served by prosecution include:

- the seriousness of the offence;
- youth, age or special infirmity of the offender;
- degree of culpability in connection with the offence;
- whether or not a first offender;
- the need to provide a deterrent;
- obsolescence or obscurity of the law is also a consideration. (13)

Senator Eagleton, speaking in 1979, said this:

> Perry Mason is always at trial and almost always involved in a murder case. But, statistically speaking, both trials and murders are comparatively infrequent events in the administration of justice. For every murder case there are thousands of other cases; and for every trial there are thousands of cases dropped or plea bargained. For every sensational case that gets the maximum exposure in the press, there are thousands of cases that grind through the machinery of justice. These latter cases will be handled in a routine manner that is usually not possible under the bright lights of publicity. (14)

So far as the great mass of briefs to prosecute are concerned, no difficulty arises in deciding whether there is a sufficiency of evidence, as to the likelihood of conviction, and in relation to the public policy considerations. It is only realistic to say that in almost all cases the decision is to proceed. In cases of doubt the lawyer assessing the brief will discuss the matter with colleagues, and matters of great sensitivity may be sent to the D.P.P. Head Office for decision: if that happens then a recommendation from the Branch Office concerned is required.

There are cases of real difficulty. Suppose, for example, that an allegation of bashing or bribery has been made against a very senior police officer, or a public official is said to have taken a bribe, the facts are generally known, and there is attendant public disquiet. In such a case it may be a justified course to prosecute even if the evidence is not sufficiently strong to make a conviction more likely than not, and the case would not have proceeded against an ordinary citizen. The logic behind this is obvious enough. First, if a decision is made not to prosecute, some people will think there has been a 'cover-up', and public confidence in the prosecution process will be diminished. Second, it is important that the public have confidence in the courts and public officials generally: in particular allegations against police officers go to the heart of the prosecution process, and

they should not be allowed to fester, but should be exposed to the light of day. There is a lot to be said for prosecution in such circumstances, even if it results in an acquittal: that will serve to clear the air. Finally, with particular reference to allegations against police officers, the relationship between those who investigate crime and those who are responsible for prosecutions can be so close as to make it difficult for the latter to view the evidence in an impartial way. For all these reasons the best course may be to institute a prosecution if there is a prima facie case, even if a conviction is reckoned to be unlikely.

There may be contrary considerations which apply to the circumstances of a particular case. Two of them were referred to by Sir Hartley Shawcross, then English Attorney-General, and by Mr T.E.F. Hughes, Q.C., then Attorney-General for Australia, speaking in 1951 and 1970 respectively. In discussing prosecutions which 'involve a question of public policy or national or, sometimes, international concern' the former said:

> In cases like that, the Attorney-General has to make up his mind not as a party politician ... he must in a quasi-judicial way consider the effect of prosecution on the administration of the law and of government rather than in the abstract. (15)

There may well be occasions when in considering the effect on public order and public morale it is best not to proceed. It is also necessary to take into account the danger of further offences occurring if people could by prosecution come to appear as martyrs for a cause. (16)

In explaining why he was not prepared invariably to prosecute persons alleged to be inciting contraventions of the conscription laws Mr Hughes said:

> It is my firm view that if one is considering a prosecution for what is in the nature of a political offence, it is well to be reasonably satisfied of obtaining a conviction before launching a prosecution. (17)

In matters of public controversy the balancing process which must be undertaken to determine where the public interest lies can be a delicate one. A broad view must be taken. So far as allegations aginst persons holding high public office are concerned, it will sometimes be necessary to decide whether to proceed by way of prosecution will on the one hand 'clear the air' or on the other hand simply 'muddy the waters'.

It is appropriate at this juncture to say something about the extent to which reasons should be given for a decision to institute or terminate a prosecution, or to decline to follow either course. The Office of D.P.P. has not at this stage developed a consistent policy in that regard, but I have on odd

occasions given reasons for not proceeding with a prosecution. Speaking generally, I think the public is entitled to know why such a decision is taken, at least where the matter is one concerning which there has been antecedent publicity. There is an attendant difficulty. It would not be fair to an accused person to give reasons for deciding to prosecute, or continue with a prosecution. Accordingly there is a risk that the D.P.P. will be seen as anxious only to justify the actions of his Office where what appears to be soft option, but may be a very tough decision, namely not to proceed, is taken. I think that must simply be borne with fortitude.

Termination of Prosecutions

Under section 9(4) of the D.P.P. Act the Director is empowered to decline to proceed further in a prosecution if a person is under commitment, or has been indicted, on a charge of an indictable offence against a law of the Commonwealth. The D.P.P. may also take over a prosecution on indictment for such a law, instituted by another person, other than the Attorney-General or a Special Prosecutor. Clearly that taking over could be with a view to termination. The D.P.P. is empowered by section 9(5) to take over committal or summary proceedings instituted by another person, and having done so the proceedings may be terminated.

At first glance, the power to take over prosecutions may not appear to have altered the position prior to the D.P.P. Act. That, however, is not the case. It has always been considered highly doubtful whether the Attorney-General has the power to intervene in proceedings for summary prosecutions or committal proceedings. Traditionally, his first involvement was the filing of an indictment or the granting of a no-bill application.

Accordingly formerly in summary prosecutions and committal proceedings the relationship between the Government lawyers and the informant was that of solicitor/client. The Deputy Crown Solicitor's Office would simply act on instructions from the informant. If the lawyers and the informant did not agree as to a matter proceeding, the latter could instruct private solicitors to act. Whilst summary prosecutions and committal proceedings are still commenced by individuals (that is, police informants on the whole) the D.P.P. has the power to take over such proceedings. Once taken over, the D.P.P. can carry on proceedings or, where appropriate, discontinue the proceedings.

Several situations where such a power may be useful come to mind. First, it may be appropriate to take over and carry on or terminate a prosecution commenced by a private informant because of its complexity or importance to the community. (18) I should stress that the power to take over private proceedings - those not commenced by any public official - will be exercised with very great restraint. The right of any citizen to commence criminal proceedings is one which I consider to be a basic safeguard of civil liberties, and it will not be interfered with except in special circumstances.

It is perhaps appropriate to give an example of a recent case which came to my office for consideration. It concerned an artist who was charged on 55 counts of wilfully mutilating Australian Bank notes. The summonses had been issued and served before the matter was brought to the attention of my office. The notes concerned were $1.00 and $2.00 notes which had been cut up and used in the creation of a collage which consisted entirely of notes drawn from the artist's own bank account. He used mainly mutilated notes which, because of their condition, were about to be withdrawn from circulation. I viewed the work. No-one doubted the sincerity of the work, but at present it is an offence to mutilate Australian bank notes. However, the yet to be proclaimed Crimes (Currency) Act 1981 provides that with the consent in writing of the Treasurer, a person may do as our artist did here. The policy behind the new section is that, in certain circumstances, mutilation of notes is permissible. It aims to regulate rather than forbid.

As you are no doubt aware it has never been the rule in Australia or the United Kingdom that all offences brought to the knowledge of the authorities must be prosecuted. However, it would have been dificult to discontinue the proceedings if the defendant intended to continue to break the law. To do so would have effectively granted the artist a licence to continue a course of criminal misconduct.

The interim solution was that the defendant agreed to do no more work on the collage until the Crimes (Currency) Act 1981 is proclaimed. Should he wish to continue the work, he may then apply to the Treasurer for permission to cut up notes.

Once an accused has been committed for trial, then in the normal course an indictment will be preferred and the matter brought before a judge and jury. However, there will be exceptions. That is particularly the case now that 'paper committals' can result in the Magistrate at first instance giving little or no consideration to whether there is a prima facie case. Accordingly from time to time there is an exercise of the power to decline to proceed further after committal, and that might happen as a result of representations from within my office - generally on the simple ground that the evidence is not there - or by solicitors on behalf of the accused persons. Shortly after I took up office the Attorney-General agreed that I should determine no-bill applications that were addressed to him as well as those addressed to the D.P.P.

It a defendant submits that after committal the matter should be abandoned, then some special feature of the case must be pointed out such as to make it truly exceptional. Many applications are made which are clearly without merit, and at best, go towards a plea in mitigation.

Steps have been taken to ensure that this last power, which is of great public importance, is exercised in appropriate manner. In all cases in which a person committed for trial makes a

no-bill application a report is first called for from the D.P.P. Branch which is handling the prosecution. That report will recommend what course should be followed. The matter is then separately assessed by a senior lawyer within the D.P.P. Head Office.

As a matter of good administration I have adopted the practice, in cases where I disagree with the recommendation put to me, of setting out my reasons for deciding to follow a particular course. Accordingly that is done whenever the Branch takes one view and Head Office lawyers take another. I follow the same course whenever I find a matter to be closely balanced, notwithstanding that I ultimately decide to follow the recommendations made to me. In some cases I have made a copy of those reasons available to the solicitors for the accused. A matter which remains to be resolved is whether that course should be followed in all cases.

Witness Indemnities

By section 9(6) of the D.P.P. Act the Director is empowered to give an undertaking that an answer that is given, or statement or disclosure that is made, by a person in the course of giving evidence in proceedings for an offence against the law of the Commonwealth instituted, taken over or carried on by the D.P.P. will not be used in evidence against that person, and if the undertaking is given the answer, statement or disclosure is not admissible in evidence against the person in any proceedings other than a prosecution for perjury. This is what is known as a 'use' indemnity. Only the Attorney-General can grant a 'transactional' indemnity: ordinarily he seeks the views of the D.P.P. and acts upon them.

I acknowledge that in principle it is desirable that the criminal justice system should operate without the need to grant indemnities or pardons to persons who have participated in offences with the view to these persons giving evidence against the principal offenders. This ideal cannot always be achieved and there are some cases where the public interest in breaking a 'conspiracy of silence' about a particular case far outweighs the interest that the public would have in bringing the minor offender before the courts.

The Williams (19) and Woodward (20) Royal Commissions on Drugs have both highlighted the necessity for the authorities to show willingness to issue indemnities where appropriate. One recent case where the use of indemnities has been crucial is that concerning the murders of Donald MacKay and Douglas and Isobel Wilson. These were cases long thought of as insoluble. Two convictions have thus far been obtained, and other matters are still pending.

A very cautious approach is necessary in order to ensure that a witness indemnity is not granted in such circumstances that the witness is free from criminal reponsibility for an offence

as serious as that with respect to which he or she is giving evidence. That will particularly be the case in relation to transactional indemnites. Whenever practicable the course followed is to require that a written submission be prepared in time for it to be carefully assessed, and at least the following matters must be dealt with:

- Do the interests of justice reqire 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? (21)

I anticipate even greater difficulties under section 30(5) of the National Crime Authority Act 1984. The general rule is that a witness called to give evidence before the Authority may refuse to answer questions on the ground of self-incrimination, but the offence of failing to give evidence without reasonable excuse will be committed if the D.P.P. has given a written undertaking that the evidence, or any information obtained as a direct or indirect consequence of the evidence, will not be used in evidence against the witness in a prosecution of an offence against the laws of the Commonwealth, other than perjury proceedings. The D.P.P. is required to state in the undertaking that in his opinion there are special grounds that in the public interest require that answers be given, and the general nature of those grounds. I anticipate that very often the indemnity will be sought as a matter of urgency, and it is no easy thing to see how I can certify as to special grounds existing at a very early stage of an investigation, well before charges have been laid. The matter is one of considerable difficulty, concerning which I have had discussions with members of the Authority, who are aware of my concerns. They are exacerbated by the fact that American experience is that such 'use-derivative use' indemnities tend in practice to amount to transactional indemnities. (22)

Directions and Guidelines

The D.P.P. has power to issue directions and guidelines in relation to prosecutions of Commonwealth offences to the Commissioner of the Australian Federal Police and any other

person conducting criminal investigations or instituting or conducting prosecutions for such offences. (23) If an abuse or undesirable practice comes to the attention of the Office of D.P.P., although the proceedings are not being carried on under the D.P.P. Act, remedial action can be taken. I have made clear in discussions with those potentially the subject of the power that it will not be exercised except with prior consultation, and experience to date indicates that ordinarily discussions can obviate the necessity for either directions or guidelines to be issued. However, as a result of discussions with the Australian Taxation Office it has been agreed that certain general guidelines should be issued in relation to investigation and prosecution of taxation offences. They will provide at least some guide to the public, as it is intended that they should be published for general consumption.

CONCLUSION

I have confined my comments to the statutory discretions specifically conferred by the D.P.P. Act. There are however important discretions exercised by prosecutors which do not derive from statute. An example is the decision whether or not to adduce certain evidence. (24)

Whilst this is outside the scope of the present discussion, I take the view that though most discussion concerning the untrammelled powers of prosecutors relates to pre-trial matters, the discretion exercised by a prosecutor in the course of a trial is subject to less control and review than is commonly thought. For example, the recent High Court decision in The Queen v. Apostilides (25) illustrates that the prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown.

In 1980 the Australian Reform Commission asserted:

> The process of prosecution 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. (26)

To the extent that was true then, I am quite confident that at least in relation to Commonwealth prosecutions much more will be known about the manner in which discretionary prosecution powers are exercised in November of next year than was the case 12 months ago. In that regard could I mention a joint research exercise which is to be undertaken by the Institute of Criminology and the Office of D.P.P. That should tell us much as to the gap between theory and practice, and will assist in adjusting the theory and ensuring that unjustified differences from place to place within the Commonwealth do not persist.

REFERENCES

1. Cited in T.F.T. Plucknett, 19 Historical Society Transactions 119, 126-127 (4th Ser. 1936).

2. Prosecuton of Offences Act (1879) 42 and 43 Vic, c.22.

3. Sir Thomas Hetherington Q.C. 'Speech as D.P.P. to the Media Society', Guardian Newspaper, 2 May 1980. In 1978 only 8 per cent of indictable offences passed throught he Office of the English D.P.P.

4. Moody and Tombs, Prosecution in the Public Interest p.18.

5. The Public Records of the Colony of Connecticut, 1636-1776 quoted in Grosman, The Prosecutor, p.13.

6. Hansard - 10 November 1983 - p. 2496.

7. Director of Public Prosecutions Act 1983, s. 23.

8. Director of Public Prosecutions Act 1983, s. 8.

9. Director of Public Prosecutions Act 1983, ss. 6 and 9.

10. On the basis of the principle 'delegatus non potest delegare'.

11. The U.S.A. experience is that a side-effect of this policy is to lower the incidence of plea bargaining as prosecutors are more confident about the matters proceeding to trial. See 'The Prosecutor's Domain' W.F. McDonald in The Prosecutor, ed. McDonald, at p. 38.

12. See for example D v. National Society for the Prevention of Cruelty to Children (1977) 1 All ER 589.

13. Pamela J. Utz 'Two Models of Prosecutorial Professionalism', in The Prosecutor, ed. McDonald, p. 100-101.

14. See the preface to The Prosecutor, ed. McDonald, p.7.

15. House of Commons (U.K.) Debates 29 January 1951 Vol. 483, cols 681-8.

16. K. O'Connor, 'Controlling Prosecution' in Chapter 6, The Criminal Justice System, edited by J. Basten, M. Richardson, C. Ronalds and G. Zdenkowski at page 158.

17. Speech to Liberal Party Conference, Perth, 1970, extracted in Brett and Waller, Criminal Law: Cases and Text (Sydney, Butterworths, 3rd ed. 1977) 386-397.

Both of these speeches are cited in O'Connor ibid at p. 158.

The Shawcross and Hughes speeches are referred to in K. O'Connor, 'Controlling Prosecutions': in Chapter 6, The Criminal Injustice System, edited by J. Basten, M. Richardson, C. Ronalds and G. Zdenkowski.

18. Sankey v. Whitlam readily comes to mind in this category. (1978) 21 ALR 505.

19. Australian Royal Commission into Drugs (1980) headed by Mr Justice Williams.

20. New South Wales Royal Commission into Drug Trafficking (1980) headed by Mr Justice Woodward.

21. 'Prosecution Policy of the Commonwealth', p. 12.

22. Witness Immunity Act 1970 (U.S.A.). See also in the 1984 Annual Report of Special Prosecutor Redlich, p. 52.

23. Director of Public Prosecutions Act 1983, s. 11.

24. For a good exposition of some of the problems which may arise see W.B. Lane, 'Fair Trial and the adversary system: withholding of exculpatory evidence by prosecutors', Chapter 7, The Criminal Injustice System (1982) edited by Basten, Richardson, Ronalds and Zdenkowski.

25. 19 June 1984, Special Leave Application, Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ.

26. Australian Law Reform Commission, Sentencing of Federal Offenders, Report No. 15, 1980, p. 61.

DISCUSSION

At the conclusion of his paper Mr Temby continued, saying that in relation to the federal prosecution of particular offences variations existed as to how these were dealt with by the courts. Variations existed, for example, between the practices of Melbourne and Perth and after making due allowances for State evidentiary and procedural rules and differing professional attitudes there still appeared to be differences in practice that could not be justified. One example of this related to Crown appeals against sentence. In Western and South Australia courts expect prosecutors to play a very active role in the sentencing process. Yet in other parts of the Commonwealth, particularly Sydney and Melbourne, this was not the case.

Ian Temby expressed the view that the Crown should play a more active part in the sentencing process, but in any event believed at least some degree of consistency of approach was warranted. He said 'we are a national office and we cannot simply countenance these differences which are not, as I say, justifiable on the basis that the law concerning evidence or procedure differs from place to place'.

Professor Harding then directed the discussion at the recent reluctance of the High Court to entertain sentencing appeals from convicted offenders. He asked whether appeals coming from the D.P.P.'s office might change this situation. In response, Ian Temby made two points. First, he said that the right of the Crown to appeal is one which must be exercised with great restraint and secondly, that there was not equality in function between the right of an accused to appeal and the right of the Crown to appeal. In the former case the accused was entitled to chance his luck as far as the law allows in order to attempt to reduce his/her sentence. In so doing the prisoner always runs the (theoretical) risk of having his or her sentence increased rather than reduced. However, the Crown should not take a similar course. It should only appeal where the public interest demanded it, as in the case of a disposition which was patently wrong. Thus the Crown should not lose any appeals against sentence. If it did lose a case in the Court of Criminal Appeal, the Crown should never take the matter to the High Court on the basis of weight of sentence alone. He added that the only Crown appeals to the High Court would be those involving 'a high matter of policy or statutory construction or interpretation, or the like, or conceivably a Crown appeal arising out of a successful appeal by the defendant'. He added that the D.P.P. would not run appeals merely because it did not like the results.

Discussion continued

Finally Ian Temby was asked to indicate whether his Deputies would be afforded a degree of independence, so far as the indicting process was concerned. He replied saying that his general approach was to try to push responsibility downwards and allow those who do the prosecuting to make most of the decisions. His Deputies, the Branch Heads had the power to prefer indictments, and this power was exercised without reference to the Director except in difficult or sensitive cases. In the latter situation he would expect consultation. He pointed out that the Office of the Director of Public Prosecutions would consist of about half a dozen branches with a total staff of 300 people, about half of whom would be lawyers. Although some matters had to be brought to the attention of head office (for example, no-bill application) it was generally up to the branch heads to come forward for advice on a voluntary basis.

PROSECUTORIAL DISCRETION AND ADMINISTRATIVE LAW

Peter Bayne
Senior Lecturer in Law
Australian National University
Canberra

ADMINISTRATIVE LAW: PRINCIPLES AND REMEDIES

Administrative law is the law which may be used to check the actions of persons and bodies which constitute the system of government and administration. The fundamental principles of this law can be found in judicial decisions as far back as the early seventeenth century, and until very recently the regular courts were seen as the major vehicles for recourse to administrative law. In essence, the courts may review any action to determine whether it is in conformity with the law. In so doing, they apply the ultra vires, or alternatively, the jurisdictional principle. A person or body given legal power to take administrative action must not act ultra vires ('beyond power'), or to put it the other way, a person or body with jurisdiction to take action must not act beyond its jurisdiction. Both concepts reflect a more basic principle of legality: that a person or body vested with legal power must act within the bounds of that power (compare C.J. Gibbs in Re Toohey: Ex parte Northern Land Council (1981) 56 ALJR 164, 171).

Thus, when called on to review, the task of the courts is to determine whether the action is within the scope of the power conferred on the administrative body by the authorising law. The authorising law which confers the power will define its extent, both as to matters of substance (what can be done) and as to matters of procedure (how it should be done). Thus, application of the ultra vires jurisdictional principle is essentially a matter of statutory interpretation: what is the scope of the power that has been conferred on the person or body which has taken the action, and has the person or body acted within the scope of this power? The answers to these questions depend ultimately upon the wording of the law which confers the power. However, the courts have developed several principles of interpretation of statutory powers, so that in determining whether a body has acted ultra vires a court may read into the granted power limitations that are not directly expressed in the authorising law. These limitations are to be gathered primarily from the general intent and content of the law, but some principles of interpretation are so well entrenched that their application is always possible. It is these principles which form the principles of administrative law, and they cover matters of both procedure and substance. (The codification of most of these

principles in ss. 5, 6 and 7 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) is adverted to below.)

The remedies available to a person who wishes to challenge administrative action may be divided broadly into three groups. First, there are those available from the courts which enable them to review administrative action to determine whether it is within power or jurisdiction. Such review may be by way of the traditional common law remedies such as the prerogative writs, or by way of new remedies created by legislation such as the ADJR Act.

Secondly, a statute may allow an appeal to a court or to an administrative tribunal. A statute which creates an avenue of redress will usually provide some definition of the persons who have standing to invoke it, the matters in respect of which it may be invoked, and the scope of the power of the court or tribunal which provides that redress. The Administrative Appeals Tribunal Act 1975 (Cth) established the Administrative Appeals Tribunal (AAT) on which has been conferred jurisdiction over a wide range of matters. Generally, the AAT may substitute its decision on the merits of a matter for that of the administrative person or body, and its power of review is not therefore limited to the application of the ulra vires - jurisdictional principle.

Thirdly, persons may make complaint to the Ombudsman concerning administrative action. The Ombudsman may decide to investigate the complaint, but may only recommend that the action or its effects be remedied in some way. The Ombudsman's concept of error is wider than the notion of ultra vires - jurisdictional error, but does not, in theory at least, enable a full review of the merits of the action.

THE FIELD OF PROSECUTORIAL DISCRETION

'Prosecutorial discretion' covers a wide and diverse field of administrative action. It is first involved at the investigation stage, when it must be decided whether to investigate a particular incident or a general class of activity (such as what goes on in certain kinds of clubs), in order to determine, in either kind of case, whether an offence has (or offences have) been committed. This sort of decision is typically taken by members of the police force. There are undoubtedly many cases where the officer on the spot decides to warn a possible offender rather than investigate closely whether an offence has occurred. The decision might, however, be taken as a result of a policy decision (which could be directed to a particular case or to a class of activity) taken by senior police or by a politician whose direction the police are prepared to accept. (See for examples, (i) the policy decision in issue in the first Blackburn case: R. v. Commissioner of Police of the Metropolis, Ex parte Blackburn (1968) 2 Q.B. 118; (ii) the direction to the police by the Queensland Cabinet at issue in R. v. Bjelke-Petersen, ex parte Plunkett (1978) Qd R. 305; and (iii) the examples cited in Waller 1980, and Edwards 1978.)

The second stage at which the need to exercise discretion arises is when it is decided that a person should be charged with an offence. Police may decide to proceed by arrest or by summons, and may decide which offences should be the subject of the charge. Such decisions are subject to very little review in those jurisdictions where the police prosecute summary offences, or conduct the prosecution in a committal proceeding. In Victorian, Commonwealth and A.C.T. prosecutions, the office of the Director of Public Prosecutions (D.P.P.) may determine the course of proceedings in the courts. In such jurisdictions, the charging decisions made by the police are nevertheless of significance. (See O'Connor 1982: 155.)

The decision to charge will therefore overlap with the third occasion for the exercise of discretion: the decision as to what charges should be pursued in the courts. (See generally, Attorney-General 1982: 7-10.)

At this point, the consent of a Minister or the Attorney-General may be required, which introduces a level of political control. (See ALRC WP7 : 115-125; ALRC Sentencing Report: 68-69.) It is also the case that the consent may in some cases be given by a public official, such as an officer of a government department. The proceedings will not be valid unless the requisite consent has been obtained, and the remedies available for the control of administrative action are available to an accused person who claims that the consent has not been given. (See Clyne v. Scott (1984) 52 ALR 405; Murchison v. Keating (No. 2) (1984) 54 ALR 386.)

Where the only issue in such cases is whether the requisite consent has been given, they do not raise difficult legal issues, nor do they provide strong precedents for review where other kinds of the discretion to prosecute are in issue. It should be noted however, that it is in some such situations that the Attorney-General may need to determine whether the public interest would be served by a prosecution. (See ALRC WP7: 119-123.) This question can, however, arise in relation to any charge. (See Attorney-General 1982:7.)

Problems of consent to prosecution aside, the exercise of discretion at the third stage has a number of elements. The prosecutor (the police officer, the Crown Law officer, or the officer of the D.P.P.) can choose which offences will be the subject of the court proceeding. There may be a choice as to the number of offences which should be proceeded with, and where this is so, the prosecutor 'provides a basis for what is known as plea bargaining. What that involves is an offer by the accused to plead guilty to the offence carrying a lesser penalty in return for an undertaking by the prosecutor to withdraw a more serious charge'. (Campbell and Whitmore 1973: 105.)

Further, there may be a choice whether to proceed summarily or by way of indictment. Sometimes this choice may be possible in relation to a single offence; in other situtations it may be a

choice as to which of two or more offences should be prosecuted. Another choice that may be present is whether more than one offence should be joined in the court proceeding, or whether there should be proceedings subsequent to the one in issue. Decisions whether to proceed with conspiracy charges against a number of defendants jointly raise particular problems (see Attorney-General 1982: 8).

The fourth stage at which the exercise of discretion arises is where choices are to be made in relation to the judicial proceedings in the Court of Petty Sessions. The information may be withdrawn, perhaps as a result of a plea bargain with the defendant. Except in Victoria, the Commonwalth and the A.C.T., such decisions are made by the police. In the jurisdictions mentioned, the office of the D.P.P. may determine the course to be followed.

The situation is more complicated where an indictable offence is in issue. It may be decided, by the Attorney-General, or by other officers of the Crown Law Department, that there should not be a committal proceeding, and that, instead, the defendant should be committed for trial directly by means of an ex officio indictment. In Barton v. R. (1980) 32 ALR 449, the High Court has held, at least where such a decision is taken by the Attorney-General, that it is not amenable to judicial review. The trial court, however, can give directions as to the course of the proceedings. This power will in almost all circumstances be used so as to require a preliminary proceeding.

Where the matter does proceed to a preliminary hearing, the magistrate must determine whether the accused should be committed for trial and on what charges. This decision is amenable to judicial review by administrative law remedies, but the courts have indicated that they will review only in exceptional circumstances, such as that a consent to prosecution (see above) had not been obtained. (See Clyne v. Scott (1984) 52 ALR 405, following Lamb v. Moss (1983) 49 ALR 533.)

If the magistrate decides not to commit, the prosecuting authorities (which at this stage will not, formally at least, involve the police), may nevertheless choose in their discretion to proceed by ex officio indictment.

Choices are presented where the magistrate decides to commit. The prosecuting authorities may decide not to proceed further, or to proceed further on different charges (or less than the whole range of charges) in issue at the committal. There may be plea bargaining here. Strategy at the trial presents choices. There may be a decision 'to grant immunities or pardons to persons who participated in offences with a view to those persons giving evidence against the principal offenders'. (Attorney-General 1982: 11.)

There is also the choice of whether to continue a proceeding even after an indictment has been presented. At any stage before final

adjudication of the matter, a nolle prosequi may be entered (ibid 18-19). A nolle prosequi has the status of a formal acknowledgement by the prosecutor that the matter will not then be prosecuted. It is not an acquittal and another indictment may be later presented.

ASPECTS OF THE NATURE OF PROSECUTORIAL DISCRETION RELEVANT TO ADMINISTRATIVE LAW REVIEW

The discretions outlined above are almost entirely made by virtue of authority given to the decision-maker by statute. (Some prerogative powers are vested in the Attorney-General, but there is usually also a statutory power, and where this is so, the prerogative power is put in abeyance.) This being so, there is no reason in principle to suppose that the ordinary principles of public law, including the basic principle of legality, will not apply, or that the remedies to control the exercise of statutory power will not be available. The matter is, however, not so simple, and prior to an examination of how administrative law does bear on prosecutorial discretion, a number of aspects of the process need to be examined.

First, the question arises as to whether it is proper to see the process as involving only a series of decisions made by individual public office-holders (members of the police force, Crown Law Prosecutors, D.P.P. officers, D.P.P.s, Attorneys-General), who exercise their powers without control by others. There are those who hold this to be the proper view. In the first Blackburn case, Lord Denning M.R. said of the Metropolitan Commissioner of Police:

> like every constable in the land, he should be, and is, independent of the executive ... He must decide whether or not suspected persons are to be prosecuted ... [I]n all those things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not ... prosecute this man or that one ... The responsibility for law enforcement lies in him. R. v. Commissioner of Police of the Metropolis, Ex parte Blackburn (1968) 2 Q.B. 118, 135-136.

If this view were accepted, it would be difficult to challenge action by a person which purported to lay down a policy or a guideline or the exercise of powers in particular situations by other persons. It could be argued that in view of the independence of the latter category of persons, a statement of policy by some other person would be ineffective and that external review of the policy was unnecessary (see Campbell & Whitmore 1973: 115).

Lord Denning's view is generally correct as a matter of law in so far as the police officer or the prosecutor is called upon to make a decision in a particular case (see Waller 1980: 260-263).

It is not correct in so far as it suggests that such persons (including, in particular, senior officers such as the Commissioner of Police or the D.P.P.) are not responsible to and may therefore not be called to account to a political figure, such as an Attorney-General or a Minister for Police.

Even as regards decisions to prosecute or not a particular individual, the situation is not simple. As a practical matter, the police officer works in a disciplined force where the commands of senior officers are obeyed. The lawyer-prosecutor works in a system where line authority is respected. Directions from senior officers, whether of a general nature, or in relation to a particular case, will normally be accepted. As a matter of law, there are some controls on the police. The Commonwealth D.P.P., for example, may give a direction to the Commissioner of the A.F.P. with respect to the prosecution of an offence against the Commonwealth in relation to a particular case (ss. 11(1), (2) of the D.P.P. Act 1983). There is also basis in the law for control over policy in relation to whether there should be prosecutions for certain types of offences or of certain types of persons. It is generally accepted that the Commissioner of Police is responsible to the Minister responsible for the police force, and there are many indications that the police will respond to directions, even in particular cases (see generally Waller 1980).

The D.P.P.s are also subject to control. The D.P.P. Act 1982 of Victoria states simply that '[the] Director shall be responsible to the Attorney-General for the due performance of his functions under this Act or any other Act' (s.9(2)). The Commonwealth Act is more elaborate, and grants to the Attorney-General a power to give directions or guidelines in relation even to particular cases (D.P.P. Act 1983, s. 8).

It is indeed clear that the courts will take account of the political responsibility of the Attorney-General or another Minister when evaluating some of the kinds of decisions involved in the prosecution process (see below).

In the second place, the critical importance of prosecutorial discretion in the criminal process needs to be underlined. Sallmann and Willis note that 'decisions at the criminal investigation stage determine the ultimate result of a great many criminal cases' (Sallmann and Willis 1984 : 47). The Australian Law Reform Commission has been concerned in particular with the relation between discretion and sentencing, and quoted with approval a view that '[the] prosecutor's discretion in selecting or recommending the specific charges to be brought and in agreeing to dismiss certain charges for guilty pleas ... effectively determine[s] the range of sanctions which may be imposed for criminal conduct' (ALRC Sentencing Report : 62). The ALRC Sentencing Report offered some general comments on the process of prosecutorial discretion. It was, the Commission said, 'probably the most secretive, least understood and most poorly documented aspect of the administration of criminal justice'

(ibid. 61). Further, 'prosecutorial discretion in Australia remains far reaching, mainly unfettered and largely immune from public or even judicial scrutiny and review' (ibid. 64).

The ALRC Sentencing Report did however note that the Crown Advocate Acts of N.S.W. and Tasmania were apparently designed to insulate the prosecution decisions by the Crown Law lawyers from political control. It should also be noted that the Commission's comments were made before the enactment of the D.P.P. Acts of Victoria and of the Commonwealth. Such legislative measures are no doubt of critical importance as one of the practical steps that can be taken to control the prosecution process, but they are far from complete answers to the problems noted by the Commission.

Thirdly, and by way of introduction to the question of administrative law review, consideration should be given to the attitude of the High Court to the general scope for such review revealed in Barton v. R. (1980) 32 ALR 449. This case in part concerned an application by two persons for declarations of the invalidity of two ex officio indictments presented against them in the name of the Attorney-General of N.S.W., and for an injunction to restrain further proceedings on the indictments. Gibbs and Mason JJ summarised the basis of the challenge:

> [t]he appellant's case is that the ex officio indictments are invalid and that they were presented for an improper and unlawful purpose, capriciously or arbitrarily or at the direction of the Premier ... Another allegation is that what the Attorney-General did was done at the direction of the Premier, involving no real exercise of discretion on the Attorney-General's part. (ibid. 453.)

The Court held that the decision of the Attorney-General to file an ex officio indictment was not subject to judicial review. The Justices also agreed however that the courts have a power to postpone or stay a trial on indictment where necessary to prevent an abuse of process and ensure a fair trial for the accused. Gibbs, Mason and Stephen JJ (Murphy and Wilson JJ dissenting) held, in respect of those proceedings in respect of which the presentation of the ex officio indictment had not been preceded by a preliminary committal proceeding, that the matter should be remitted to the Criminal Division of the N.S.W. Supreme Court for a determination as to whether the trial should be stayed in order for there to be such a preliminary proceeding. The majority indicated that such a procedure should normally be followed.

The High Court judgements indicate a strong opinion that there cannot be judicial review of decisions by the Attorney-General in relation to the presentation of an ex officio indictment, the filing of a nolle prosequi, or the institution of relator

(see too Gibbs C.J., ibid, at 173). It should be noted that Mason J. made it clear that he did not resile from the decision in Barton v. R. (see ibid, 184), but the comment on ministerial responsibility is relevant to other decisions in the prosecution process.

Third, Gibbs and Mason JJ offered a justification which could easily be employed where the discretion was one vested in a person other than the Attorney-General. Their Honours acknowledged that it was 'correct to say that, in cases where a statute confers an administrative discretion which is unlimited in terms, the court must concede to the respository of a discretion unlimited by anything but the scope and object of the statute' (ibid 458). They further held that

> s.5 is very different from an ordinary adminstrative discretion ... [it] is a self-contained provision the scope of which is unaffected by other provisions in the statute. It imposes no duty ... All ... [it] does is to indicate the mode in which a criminal prosecution shall be instituted ... [it] does not limit or restrict the Attorney-General in any way in the consideration which he may give to a particular case. And because the language leaves the Attorney-General at large in deciding what course of action he shall take, it makes his decision immune from judicial review. (ibid)

Such reasoning could be employed in relation to many of the kinds of statutory discretions concerning prosecution, and is not therefore easily distinguishable.

With respect to their Honours, the passage above, if taken as a statement of general application, appears to overstate the position. The courts are generally unwilling to concede that a statutory power is completely beyond review. The tenor of the judgements in the Northern Land Council case support the following comments of Stephen J. in that case.

> Where a Parliament confers powers they will seldom if ever be conferred in gross, devoid of purposes or criteria, express or implied, by reference to which they are intended to be exercised. Unless a Parliament, acting constitutionally, can be seen from the terms of its grant of power to have excluded judicial review, the courts will, at the instance of a litigant examine the exercise of powers so granted, determining whether their exercise is within the scope of Parliament's grant of power. This will be so whether the grant of power be to the representative of Crown, to a Minister of the Crown or to some other body or person. (56 ALJR at 177-178)

In an earlier passage in his judgement, Stephen J. argued that

> [i]t is now well established that both the exercise and non-exercise by Ministers of the Crown of discretionary powers vested in them are subject to judicial review, which extends to the examination of the reasons which led to the Ministers' exercise or non-exercise of his power ...(ibid 177).

The question of the appropriate standards for review of exercises of decisions in the prosecution process is taken up below.

The Justices in Barton v. R. offered a fourth justificaton for abstention by the courts when they were called upon to exercise judicial review by administrative law remedies. Gibbs and Mason JJ argued that:

> [it] has generally been considered to be undesirable that the court, whose ultimate function it is to determine the accused's guilt or innocence, should become too closely involved in the question whether a prosecution should be commenced ... (1980) 32 ALR 449, 458.

(see too Murphy J., ibid 468, and Wilson J., ibid 471). Their Honours added the important qualification that:

> Though it may be that in exercising its power to prevent an abuse of process the court will on rare occasions be required to consider whether a prosecution should be permitted to continue. (ibid 458)

The qualification recognises that the court which hears a matter can control abuse of the prosecution power by reason of its powers to make decisons with respect to the course of the trial. (It was this power which a majority of the High Court found should be considered by the N.S.W. Supreme Court in relation to one of the ex officio indictments in issue in Barton v. R.) The judgements in Barton v. R. indicate that the High court does not have a settled view as to the scope of the abuse of process doctrine (compare Gibbs and Mason JJ at ibid 458-460; Stephen J. at 466-567; Murphy J. at 468; and Wilson J. at 471-473).

The question which presents itself is whether the abuse of process doctrine is a sufficient check on the exercise of prosecutorial discretion. Kirby (1979: 643) appears to approve of the reasons offered by Davis (1969: 190-191) for answering this question in the negative:

> Public accusation and trial often leave scars which are not removed by proof of innocence ... The notion that the tribunal that holds the trial corrects abuses of the prosecuting power is obviously without merit.

Furthermore, the abuse of process doctrine can have little impact on decisions not to prosecute. Davis (1976: 196) has noted of this power that it:

> is not merely the other side of the discretion-to-enforce coin. The negative power is much less controlled than the affirmative power. In that it is usually final instead of interim, it is usually secret instead of intrinsically open, it is much less likely to be governed or guided by standards or principles, and it is much less often supported by findings or reasons.

STANDARDS FOR EXTERNAL REVIEW

I have argued that courts may set limits to the exercise of the statutory discretions involved in the prosecution process. Similarly, other external review bodies, such as the Ombudsman or an appellate tribunal, may also set limits. What however, are those limits? The answer needs to distinguish the grounds upon which review may be sought from the standards to be applied in determining whether an applicant for judicial review has established a ground of review. (This distinction is less relevant where non-judicial review is in question.)

The grounds of possible review are those relevant to the legality of the exercise of any governmental power. Many of the well recognised grounds were expressed in concise form by the Court of Appeal of New Zealand in Kumar v. Immigration Department [1978] 2 NZLR 553. Kumar was acquitted of an offence under the New Zealand Immigration Act 1964. The court was concerned that the reasons offered for the prosecution could have 'applied equally to every transient visitor who entered this country before the exemption order was made' (ibid 558). This led to the court to say that:

> [i]t scarcely needs to be said that discretions reposed in the Executive and in particular the discretion to prosecute, must be exercised on proper grounds and for proper purposes. If the exercise of a discretionary power has been influenced by irrelevant considerations, that is, considerations that cannot properly be taken into account, a court will normally quash the decision. And clearly the courts may and will intervene where a power has been exercised for collateral purposes, unrelated to the objectives of the statute or the prerogative in question. A discriminatory exercise of discretion without authority infringes the fundamental principle of equal treatment under the law and the equal protection of the law for every person which has long been recognised as an essential pillar of the rule of law. (ibid, underlining added).

It is apparent that the Court of Appeal had in mind some form of administrative law review of the selective enforcement decision. The various grounds of review mentioned by the court are among the well accepted common law grounds of review. The common law grounds have been largely (but not wholly) stated in ss. 5,6 and 7 of the A.D.J.R. Act. This Act applies to most of the action taken by Commonwealth and A.C.T. bodies, including persons and bodies concerned with the prosecution process.

The difficulty for the courts will be to formulate standards according to which they can determine that a ground of review has been established. What considerations, for example, will be irrelevant to the exercise of a prosecutional discretion? This kind of problem is one with which the courts must grapple whenever the exercise of a statutory power is reviewed, and the fact that a definitive answer cannot be given is not a reason for abstention. Cases such as Kumar would seem obvious. Beyond them, the courts can deal with the problem once they become more familiar with the prosecution process, and in this respect the publication of guidelines, and accessibility (through the efforts of litigants) to reason for decisions will provide a basis for drawing the limits of the discretions in question. The discussion which follows is necessarily at a general level.

In the first place, a court will of course have regard to whether the statutory provision which confers the discretion indicates any criteria according to which the power should be exercised. A court will have regard to the whole of the statute. A court may also, it is submitted, have regard to the statute under which the offence arises (see Joseph 1975: 146, 161, and the first Blackburn case [1968] 2 Q.B. 118, 139 per L.J. Salmon).

Second, the courts generally assume that statutory powers must be exercised with regard to basic constitutional principles, some of which are germane to the limits of prosecutorial discretion. In Kumar, the court adopted as its standard of review 'the fundamental principle of equal treatment under the law and the equal protection of the laws for every person ...' At the federal level in Australia, the Human Rights Commission Act 1981 buttresses the common law approach. If section 9 of the Act is read together with the preamble, it emerges clearly enough that action taken in pursuance of Commonwealth or A.C.T. law should conform to the human rights specified in the international convenants which are scheduled to the Act. Article 26 ofthe International Convenant on Civil and Political Rights provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

Another New Zealand case, Fitzgerald v. Muldoon [1976] 2 NZLR 615, illustrates the potential impact on prosecutorial discretion of other constitutional principles. The Chief Justice of the Supreme Court made a declaration that a public announcement by the Prime Minister that a law requiring employees to pay superannuation contributions would not be enforced was 'illegal as being in breach of s.1 of the Bill of Rights [1688, England]'. Section 1, (which applies in all Australian jurisdictions), provides:

> That the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall.

The applicant for the declaration established standing by reason that he suffered a small pecuniary loss.

Another aspect of Section 1 of the Bill of Rights needs to be considered. The section provides also:

> That the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath been assumed and exercised of late is illegall.

This statement is qualified by reference to the activities of James II, but it has been assumed that this provision of Section 1 had prospective effect. In R. v. London County Council; ex Parte The Entertainments Protection Association [1931] 2 K.B. 215, the Court of Appeal held that a writ of certiorari should issue to quash an order of the Council to the effect that it would not take action to enforce a condition in a licence which prohibited the showing of films on Sundays. The court held that the Council had no power to dispense with the provisions of the Sunday Observance Act, 1780. L.J. Scrutton commented that 'the London County Council is in no better position than James II and laws cannot be dispensed with by the authority of the London County Council when they cannot by royal authority' (at 229) (see too Cam and Sons Pty Ltd v. Ramsay (1960) 104 C.L.R. 247, 372 per Windeyer, J.).

As the Entertainment Association case illustrates, the discretion not to prosecute may in some circumstances be viewed as a dispensation with the law. But the argument may not be pushed too far, and in Bucocke v. Greater London Council [1971] Ch. 655, 688, Lord Denning M.R. allowed that the principle in the Bill of Rights was subject to qualification.

> When a law has become a dead letter, the police need not prosecute. Nor need the magistrates punish. So also when there is a technical breach of the law in which it would be unjust to inflict any punishment whatever.

In Bucocke it was accepted that the law compelled the driver of a fire engine to stop at a red light, no matter how great the emergency. An order made by the chief officer of the London Fire Brigade directed drivers to proceed against a red light in certain circumstances. The Court of Appeal refused to grant a declaration that the order was invalid. It was held that the order:

> was a sensible compromise in the public interest and was not unlawful; and that where a driver using due care decided to commit an offence in order to save precious seconds in answering an emergency call, it was legitimate for the police, fire and judicial authorities to save him from disciplinary or penal consequences. (ibid; 656 (headnote)

In Bucocke, Lord Denning stated that:

> [t]he commissioner of police may properly in such a case [of technical breach of the law] make a policy decision directing his men not to proceed: see Reg. v. Commissioner of Police of the Metropolis, Ex parte Blackburn [1968] 2 Q.B. 118, 136 where it was said that a chief officer of police can 'make policy decisions and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide' (ibid. 668, and see too Smedleys Ltd v. Breed [1974] A.C. 839, 855-857, per Viscount Dilhorne).

This kind of argument is sometimes justified on the ground that the discretion not to prosecute is necessary to accommodate the tendency of legislatures to 'over criminalise' (see Note, (1975) 49 Aust. L.J. 158-159). It can, on the other hand, be argued that non-selective prosecution will force the legislature to repeal or amend its laws (see Vorenberg 1981: 1548-1552).

GUIDELINES, FREEDOM OF INFORMATION AND REASONS

Although it is possible to invoke broad constitutional limitations, it remains true that there is a lack of precise standards according to which exercises of prosecutorial discretion can be evaluated. It is a problem that may be overcome in part by the publication of those policies which guide the exercise of discretion. This question was addressed by the Australian Law Reform Commission, which in its sentencing report recommended some restructuring of the charging process. It found on the material before it 'that charging decisions are based upon vaguely articulated and unpublished factors which are obscure and hesitant even for those involved in making the decision' (ALRC Sentencing Report; 67). The concept of fairness and equality in the imposition of punishment required that 'as far as possible prosecutorial discretion should be exercised even-handedly' (ibid. 67-68). To this end, the Commission recommended

that the Commonwealth Attorney-General 'should issue guidelines to Federal prosecutors establishing the lawful policy to be adopted by them in exercising their discretion whether or not to initiate criminal proceedings under Commonwealth criminal statutes, and in reviewing and settling charges' (ibid. 68).

In December 1982, the Acting Attorney-General of the Commonwealth presented to the Parliament a statement on the Prosecution Policy of the Commonwealth (Attorney-General 1982). The D.P.P. Acts of Victoria and of the Commonwealth empower the D.P.P. to issue guidelines, and this power could be used to govern the exercise of discretion by their own officers and to some extent by the police. The Commissioners of Police of the several police forces of Australia could issue guidelines to police officers, and to some extent, of course, the General Orders serve this purpose.

A number of issues arise, but can be treated only briefly.

It must be acknowledged that while the concept of guidelines may be easily accepted, there may be wide differences of opinion as to what they should contain. This debate has been canvassed thoroughly in the United States literature (see Beck 1978 and Vorenberg 1981, and the references cited therein).

Guidelines will be of little value to the public unless they are made public. The D.P.P. Acts require publication of guidelines which are furnished by the D.P.P. to the respective Commissioners of Police or to those who prosecute offences in the courts. It is difficult to conceive of circumstances in which a member of the public could by legal action require the D.P.P. to publish guidelines. A court might however, in the course of a trial, suggest the publication of guidelines. Where guidelines are published, their validity might perhaps be challenged, either by means of administrative law remedies, or in the course of a trial. The difficulties in the way of administrative law challenge are considered below.

The Freedom of Information Acts of the Commonwealth and of Victoria require publication of what is generally called the 'internal law' of agencies. Internal law encompasses the manuals, guidelines, precedent books, even single documents used as precedents, which are used by agency officers to administer schemes or enactments for which the agency is responsible, (see Bayne 1984: 29-34, 305-306). But this duty to publish does not extend to those parts of such documents which would be exempt from disclosure. To understand this limitation, it is necessary to have regard to the primary objective of the F.O.I. Acts to create on the part of every person a legal right to have access, on request, to documents of agencies, other than exempt documents. The Acts spell out in detail the categories of documents which are exempt from mandatory disclosure. These provisions also (with some exceptions) limit the duty to publish internal law, a duty which arises from the Acts and which is independent of any request for access to a particular document. The exemptions designed to protect law enforcement will

therefore limit but not entirely exclude the duty of the police, of the D.P.P., or of Crown Law authorities to publish their internal law (see Bayne 1984: 147-162, 315). The documents published by the Australian Federal Police include documents which give some guidance as to the exercise of prosecutorial discretion by the A.F.P. (see Commonwealth Gazette, No. FOI 9, 27 July 1984).

It should be noted that the Victorian F.O.I. Act contains a provision which enables a member of the public to challenge before the County Court the adequacy of an agency's compliance with the duty to publish internal law (Bayne 1984: 306-307). The more straight forward procedure, which is also available under the Commonwealth Act, might be to request an unpublished guideline, etc., and to challenge a refusal to disclosure before the County Court (Victoria) or the Administrative Appeals Tribunal (Commonwealth).

O'Connor has suggested that mechanisms for internal review of police and Crown law discretion would be facilitated were there to be formal recording of the reasons for both decisions to and not to charge. 'If a more organised system for the formulation of policy is developed, it should be relatively simple to link that to an existing or new mechanism for internal review' (O'Connor 1982: 160). The Commonwealth Attorney-General's statement of policy directs that reasons for a decision not to prosecute should be recorded, (Attorney-General 1982: 10), and that a full record should be made of a plea-bargain (ibid 17).

Reasons statements will be significant in other respects. The efficacy of judicial review is also dependent to a large extent on the ability of a litigant to obtain a statement of the reasons for the dcision to be challenged. It is unlikely however that a court would require that reasons must be given for decisions in the prosecution process, (see Nichol v. Attorney-General for Victoria [1982] V.R. 353; Murchinson v. Keating (No. 2) (1984) 54 ALR 386). Furthermore, the obligation of Commonwealth agencies to provide reasons for such of their decisions as may be challenged under the ADJR Act will, by reason of specific exclusion in Schedule 2(e) of the Act, not be applicable to many decisions in the prosecution process.

Reasons statements will however be amenable to access under the F.O.I. Acts, subject of course to exemptions such as those designed to protect law enforcement activities, the deliberative processes of government, and documents which would be privileged from production in legal proceedings on the ground of legal professional privilege.

Finally, it should be noted that a complaint might be made to an Ombudsman concerning a failure by an agency to record reasons for a decision.

INTERNAL REVIEW

Despite the 'new' administrative law of jurisdictions such as the Commonwealth and Victoria, it remains true that the most efficacious means of review will be those which are conducted within agencies. (Although probably only when internal review is coupled with some form of external review.) The brief discussions in O'Connor (1982: 160, 164) is valuable as a guide to some of the possibilities.

OMBUDSMAN REVIEW

This important topic cannot be dealt with in any detail here. It is possible in some jurisdiction to complain to the Ombudsman concerning the police and/or Crown Law or D.P.P. prosecutors. There is however, great variety in the schemes which establish Ombudsmen in the Commonwealth, the States, and the Northern Territory. Where complaint is possible, it may, as a practical measure, be an effective means of challenging an exercise of prosecutorial discretion.

JUDICIAL REVIEW

It must be acknowledged at the outset that there is a strong current of judicial opinion which holds that the courts should not be concerned with the exercise of prosecutorial discretion. For example, in response to a claim by a defendant, arrested at a demonstration outside the United States Embassy in Canberra in 1970, that his arrest had been selective, Kerr J, in Wright v. McQualter (1970) 17 FLR 305, 320, concluded some remarks on the claim with a strong statement of the desirability of judicial abstention:

> ... so far as the courts are concerned, when offences are alleged to have been committed and the police make arrests and prosecutions follow, the role of the courts is simply to decide the question of guilt or innocence and the penalty to be imposed in the event of a finding of guilt. It is for other parts of the structure of democratic institutions in society to deal with the problems, if any, of selective law enforcement.

In one respect, most judges would probably now agree that this is an overstatement. The abuse of process doctrine can be used by the criminal trial court to control abuses in the prosecution process, to the extent even of requiring a prosecution to be withdrawn. On the other hand, there is not a great deal of judicial opinion which supports judicial intervention by administrative law remedies. The opinions of the High Court in Barton v. R. (1980) 32 ALR 449, while directed to a very little

used discretion in the whole process, do nevertheless suggest that there should be abstention from review in respect of other kinds of decisions.

What is said here is therefore tentative, and may appear to be overly optimistic. An analysis must however, take into account the significant shifts over recent years in the law relating to judicial review of administrative action. The courts, in decisions such as the Northern Land Council case, apply the principle of legality to kinds of decisions which were theretofore thought to be immune from review . To some extent, this has been due to an appreciation by the courts that 'other parts of the structure of democratic institutions in society' are not adequate to deal with abuse of governmental power. There have in recent times been well-publicised disclosures in Australia of abuse, or of possible abuse, of decision-making powers in the prosecution process by police, politicians, the legal profession and even by the judiciary. Such disclosures will confirm the view that the process should not be immune from review.

The grounds of review, and the possible standards of review, were analysed above. In considering their application to the prosecution process it is convenient to distinguish a number of different situations.

First, a person may seek review of a decision to prosecute him or her. It will be difficult to persuade a court that the abuse of process doctrine is not adequate to deal with possible abuses of prosecutorial discretion, but, as Kumar illustrates, the highest court in New Zealand appears to have considered otherwise. The recent decision of the Federal Court in Murchison v. Keating (No.2) (1984) 54 ALR 386 seems to provide another example, albeit in a limited context. Murchison sought interlocutory relief to restrain committal proceedings commenced against him until an application under section 5 of the ADJR Act had been determined. The significance of the case lies in the kinds of argument advanced by the applicant to found a claim that a purported consent to the prosecution by the Treasurer (which was required by an Act), was not validly given. Toohey J noted that:

> [h]e alleges a breach of the rules of natural justice, failure to observe procedures required by law, improper exercise of the power conferred by the enactment under which the decisions were made, errors of law, and absence of evidence or other material to justify the decisions (ibid 388).

These grounds were found, on the facts, to be so lacking in merit that the grant of interlocutory relief was not warrranted. But the case does illustrate that a court will countenance an attack on the exercise of a discretion to prosecute in a particular case. Standing to seek relief in such cases should not present a problem (see ibid 388).

Second, a person may seek review of an alleged failure by the police or by other authorities to investigate or charge another person in respect of an alleged offence by the other person. It may be expected that the courts will be loathe to allow the forms of judicial review of administrative action to be used as a means of raising this kind of question. There are obvious dangers of great injustice to the other person concerned. There are nevertheless statements by some of the Lord Justices in the Blackburn cases which appear to leave open the possibility that a court might intervene in an extreme case of non-enforcement [1968] 1 Q.B. 118, 138-139 (per Salmon LJ), 148-149 (per Edmund-Davies LJ), and [1973] 1 Q.B. 241, 258 (per Roskill LJ).

The courts might moreover point to the possibility of a private prosecution as an alternative means for the aggrieved party to pursue the matter. (Compare however comments in the first Blackburn case, [1968] 1 Q.B. 118, 145, and 149.) The case of R. v. Bjelke-Petersen; Ex parte Plunkett [1978] Qd. R. 305 is an instance of an (unsuccessful) attempt to utilise the private prosecution to bring to account the Premier of Queensland, who, it was alleged, had, in breach of the law, directed the Commissioner of Police not to investigate another alleged offence (see Note, (1979) 12 Melbourne University Law Review 284). A difficulty with the private prosecution in that it may, in some jurisdictions, be taken over by public officials. There is a danger that this power may be exercised to prevent embarrassment or worse to those public officials who decided that a 'public' prosecution should not be commenced, or who in some other way did not enforce the law (see Notes in [1976] NZLJ 169 and 268, and compare Fitzgerald v. Muldoon [1976] NZLR 615). Vesting the power to take over private prosecutions in a D.P.P. is not a complete answer to this problem, yet their powers to so act may not be subject to any significant degree of review by the courts, (see Raymond v. Attorney-General [1982] 2 All E.R. 487, 491).

Third, an applicant for judicial review of a prosecutorial discretion may allege that it has not been exercised by reason of a 'policy' decision to not prosecute in any case a certain kind of offence (or, possibility, not to prosecute a general class of persons). In these cases, the attack is directed to the policy decision and is not focussed on the failure to prosecute a particular person.

Two English decisions are authority for the courts' power to review in such cases. In R. v. Commissioner of Police of the Metropolis; Ex parte Blackburn [1968] 2 Q.B. 118, Blackburn sought a mandamus to compel the Commissioner to reverse a policy decision not to prosecute gambling clubs. In another action five years later, he sought to require the Commissioner to enforce the law concerning the sale of pornographic literature ([1973] Q.B. 241). The Court of Appeal of England and Wales did not grant a remedy in either case, but it did allow that such claims could be made, and neither decision denied that a public minded citizen such as Blackburn could seek the remedy of mandamus from a court.

In the first Blackburn case, Lord Denning M.R. distinguished a number of situations:

> Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police of the Metropolis, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction in such a matter. He can also make policy decisions and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide. But there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than 100 Pounds in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law ([1968]) 2 Q.B. 118, 136).

It is possible to read Salmon LJs judgement as leaving open the possibility that a court might intervene to enforce the duty of the police even in a particular case (ibid. 138-139, and Roskill LJ in the second Blackburn case, [1973] 1 Q.B. 241, 258). Salmon LJ also allowed that some policy dcisions would be permissible. The court would resolve the matter by considering whether the policy behind the statute which created the offence in question would be served by the policy decision not to prosecute in certain circumstances ([1968] 2 Q.B. 118, 139). Edmund Davies LJ held that 'the law enforcement officers of this country certainly owe a legal duty to the public to perform those functions which are the raison d'etre of their existence' (ibid. 148-149). His Honour provided a rationale for the duty:

> [i]f there are grounds for suspecting that a grave social evil is being allowed to flourish unchecked because of a set policy and inaction decided upon by a pusillanimous police force, public confidence must inevitably be gravely undermined (ibid. 145).

Why then did Blackburn fail in both cases to have the court issue an order of mandamus to the Commissioner to enforce the law? In the first case, the police undertook during the course of argument to reserve the policy decision, and there was thus little point in the order. There was further problem which the court left unresolved. Lord Denning felt that:

> [i]t is I think an open question whether Mr Blackburn has a sufficient interest to be protected. No doubt any person who was adversely affected by the action of the Commisssoner in making a mistaken policy decision would have such an interest. The difficulty is to see how Mr Blackburn himself has been affected (ibid. 137, and see at 144-145, per Salmon LJ, 149 per Edmund-Davies LJ).

In the second case, the court evaluated the efforts of the police to enforce the law, and took account of the uncertainty in the law. It was held that Blackburn had not established that the police had failed so completely in their duty to enforce the law that the court should intervene (see [1973] 1. Q.B. 241, 254 per Lord Denning M.R.). It is significant, however, that there was no reservation concerning Blackburn's standing to seek the order of mandamus. In Lord Denning's words - 'He comes with his wife out of concern, he says, for their five children' (ibid. 247) - and the court appears to have accepted this as sufficient.

The law of standing may nevertheless present a problem for would-be litigants in this kind of case. It may be that an applicant for review may need to demonstrate some special interest on her or his part which is greater than that of the ordinary member of the public. The extent of this interest may turn on the particular remedy sought by the applicant. Recent cases in England, Australia and New Zealand suggest that the courts are moving to recognise a broad range of interests. Public interest suits of the kind attempted in the two Blackburn cases might be more feasible if the courts liberalise the law of standing.

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DISCUSSION

The discussion commenced with a statement that in Queensland the abuse of process doctrine was used to attack the discretion of the prosecutor to file a nolle prosequi. That occurred in the case of Saunders a female police officer who was charged with conspiring to murder her ex-lover, who was also a police officer. The alleged tape recording of her confession had been recorded some time after she was alleged to have made the confession. The Crown prosecutor conceded that the evidence had been fabricated, but said that he was instructed to file a nolle prosequi with a view to bringing charges at some later stage. The judge said that while he could not interfere with the discretion to file a nolle prosequi he could exercise the inherent power to prevent the abuse of process by simply refusing to give the prosecutor back his indictment. It then remained in the jury's hands and he was able to direct a verdict.

Peter Bayne responded by saying that this reflected the Barton view - you do not interfere with the exercise of the power but you can nevertheless control proceedings. He also said that in the United States jurisdictions there has been a great deal of concern surrounding the oppressive use of the nolle power - that is the use of the power in order to pull out of the case and come back on different charges. The American cases therefore support the sort of action described above.

Another speaker also pointed out that the Canadian courts had used the abuse of process doctrine to attack nolle prosequis saying that it was improper for the Crown to do indirectly what it could not do directly.

PROSECUTORIAL DISCRETION IN VICTORIA

Richard M. Read
Prosecutor for the Queen
Victoria

INTRODUCTION

First, may I say how very grateful I am to have been given the opportunity to speak to you today on the operation of prosecutorial discretion in Victoria. In particular, the exercise of the various discretions entrusted to those who make the ultimate decisions.

I shall first deal briefly with the historical background and the establishment of Prosecutors for the Queen in Victoria, and then the establishment of the Office of the Director of Public Prosecutions by virtue of the Director of Public Prosecutions Act 1982. In conclusion I shall summarise some recent legislative initiatives recommended by Mr. J.H. Phillips Q.C., Director of Public Prosecutions for Victoria, and implemented by the government in legislation. This legislation is designed to identify, and if possible resolve before trial, all matters which might delay or complicate the trial. Statutory rules now provide for pre-trial hearings, and impose time limits within which the Crown must file a presentment and commence the trial.

In Victoria the decision to prosecute ultimately rests with the Director of Public Prosecutions himself, or a Prosecutor for the Queen. No other person in Victoria has the authority to place any member of the community on trial in the Supreme or County Courts. However, in addition to performing their indicting functions Prosecutors for the Queen appear as Counsel for the Crown in criminal trials in the Supreme and County Courts, and in appeals to the Full Court of the Supreme Court and the High Court.

HISTORICAL BACKGROUND

Following the arrival of Captain Phillip and his men in New South Wales in 1788, as you all know he brought with him not only his men and the convicts, but also the law of the United Kingdom. As the years passed more free settlers arrived, and in 1828 the English Parliament provided that offences triable in New South Wales in the Supreme Court were to be 'prosecuted by information in the name of His Majesty's Attorney-General or other officer appointed for such purpose by the Governor' (9 Geo. IV Ch. 83, s.5). We then see the development of the independent system of prosecutions in this country. Because of our history and early

convict background, it was clearly not possible to operate the same type of criminal justice system that then operated in the United Kingdom which provided for indictment by Grand Juries. There was clearly a lack of suitable and qualified people to perform the role of jurors.

The early development of a system of independent prosecutions continued in the colony of New South Wales and the District of Port Phillip in the early half of last century. In 1850 the District of Port Phillip became the Colony of Victoria (13 & 14 Vic Ch. 59, s.1). This Act separating Victoria from New South Wales provided for the establishment of the Supreme Court of Victoria. The office of Crown Prosecutor, as it was known in New South Wales, continued in Victoria, but some time after separation the Victorian Parliament passed the Judicature Act 1874. Sections 19 and 20 of this Act clearly define the role of the Prosecutor for the Queen, and Section 20 reads:

> Subject to the provisions hereinbefore contained, it shall be lawful for Her Majesty's Attorney-General or Solicitor-General for Victoria or for any Prosecutor for the Queen in the name of a law officer to make presentment at the said Central Criminal Court or at any court of Assizes or General Sessions of the Peace of any person for any indictable offence cognizable by such courts respectively, and every such presentment may be in the form contained in the Fourth Schedule to this Act or to that effect and shall be as good and of the same force, strength and effect in the law as if the same had been presented and found by the oaths of 12 men.

Each Prosecutor for the Queen in Victoria now holds office under the Sovereign by virtue of s.352 Crimes Act 1958. This section is worded in very similar terms to the original act of 1874.

Thus each Prosecutor for the Queen in Victoria is the final arbiter in deciding whether an accused person will be placed before a court on a particular charge or charges. In signing the presentment, the Prosecutor for the Queen acts in the place of the grand jury under the English Common Law. He is acting as an independent and impartial officer of the Crown in administering justice.

In Victoria the machinery of criminal justice has never been allowed to become a pawn in party politics or subject to parliamentary pressure. This is still a real problem for governments in other countries. The criminal prosecution system in Victoria is different in many important respects from the English and Commonwealth systems of criminal prosecution. In

Victoria it would be unlawful for an Attorney-General to direct a Prosecutor for the Queen to exercise his prosecutorial discretion in a particular manner, including a manner which might be of advantage to the government of the day.

THE TRADITIONAL INDEPENDENT ROLE OF THE PROSECUTORS FOR THE QUEEN

All State Crown Prosecutions in Victoria in the Supreme and County Courts are presently instituted by the Prosecutor for the Queen who signs the presentment after consideration of the evidence. However, occasionally the Director of Public Prosecutions himself may sign a presentment. Independence from political control and responsiveness to the public interest have been built into the office of Proscutor for the Queen to preclude abuses of the kind to which I have referred. The Prosecutors for the Queen, like the judges, hold their office directly from the sovereign, and they are neither servants of, nor are they responsible to, the Attorney-General in the exercise of their prosecutorial discretion.

In signing the presentment, the Prosecutor for the Queen acts in the place of the grand jury under the English Common Law, acting independently and not as the delegate of the Attorney-General, Solicitor-General or the Director of Public Prosecutions. He files presentments and carries out his duty to make presentment of his own motion and discretion in each particular case. (1) All Prosecutors for the Queen in Victoria are practising barristers and must have practised as an advocate barrister or special pleader in England, Ireland, Scotland or Australia for a period of five years prior to their appointment. (2)

Prosecutors for the Queen are subject to control by the judges in the same way as Counsel in private practice, and are subject to control by the Victorian Bar Council. It is interesting to note that at a general meeting of the Victorian Bar Council held 24 September 1984 the Bar roll was divided into various categories. Division A is comprised of the Victorian practising Counsel, Prosecutors for the Queen, and interstate and overseas practising Counsel. Division B is comprised of Counsel on the role that they have accepted judicial or other public office, including Governors, judges, Ministers of the Crown, Solicitors-General and Directors of Public Prosecutions, Crown Counsel and Parliamentary Counsel and other official appointees. However, it is only practising Counsel in private practice, and Prosecutors for the Queen who are now permitted to stand for election to the Victorian Bar Council or vote for the Bar Council. It can therefore be seen that the Victorian Bar recognises that Prosecutors for the Queen are not only obliged to accept their full responsibilities as practising Counsel, but they also enjoy the full privileges of practising Counsel. It is this advantage that Victoria enjoys over some other systems which employ faceless bureaucrats to exercise prosecutorial discretion.

The system has served Victoria well, and although there was no groundswell of public opinion for any particular change, on coming to office the present Labor Government indicated that it intended taking a further step to ensure the greatest possible independence of the prosecutorial process, separating it from any suggestion of influence by the government of the day.

THE ESTABLISHMENT OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

There appeared in the Melbourne Herald of 30 March 1982 a statement attributed to the then leader of the State Opposition, The Honourable John Cain M.L.A. (as he then was) that the establishment of an office of Director of Public Prosecutions in Victoria was desirable to ensure 'that the prosecuting authority in a democratic society was as independent as possible from the government of the day'. On coming to office, Mr Cain the Premier of Victoria, also held the portfolio of Attorney-General. He wasted no time in enacting the Director of Public Prosecutions Act 1982 which was assented to on 21 December 1982. The Act was fully in operation by 1 June 1983.

Mr J.H. Phillips Q.C., was appointed the first Director of Public Prosecutions in Victoria in January 1983. To allow Mr Phillips time to assess the requirements of his new office, the Act did not become fully operative until 1 June 1983. Mr Phillips took over what was previously known as the Criminal Law Branch of the Crown Solicitors Office. Historically the Criminal Law Branch was staffed by a large percentage of unqualified people and a small number of legally qualified practitioners. By the late 1970's the position had changed, and there was policy in operation of increasing the number of legally qualified people who were appointed to the Branch. Mr Phillips has since brought about significant changes to the staffing arrangements and to the general operationof his office, which was originally the Criminal Law Branch.

The Crimes Act 1958 s.353 provides that the Director of Public Prosecutions or any Prosecutor for the Queen in the name of the Director of Public Prosecutions, may make presentment at the Supreme or County Court of any person for any indictable offence. The section goes on to state that such presentment must be in the form contained in the third schedule or to that effect, and it shall be as good and of the same force, strength and effect in the law as if the same had been presented and found by the oaths of 12 men. In other words as I mentioned earlier, the Director of Public Prosecutions and Prosecutors for the Queen in Victoria perform the same functions as the grand jury once performed.

The Director of Public Prosecutions himself, or any Prosecutor for the Queen, carries out his duty to make presentment of his own motion and discretion in each particular case. No member of the Director of Public Prosecution's staff is authorised to sign a presentment.

It is well recognised that a prosecuting authority in a democratic society should be as independent as possible from the government of the day, and the requirement of independence is not a mere academic point. The abuse of the ex officio information in England, particularly during the seventeenth century, for the purpose of instituting politically motivated prosecutions by governments, has caused the requirement of independence of prosecuting authorities from government control and influence, to become a deeply embedded convention of our criminal justice system. These principles securing the independence of the Director of Public Prosecutions and Prosecutors for the Queen in Victoria were recognised by the Victorian Parliament when it enacted the Director of Public Prosecutions Act 1982. s.10 of the Director of Public Prosecutions Act 1982 empowers the Director to furnish guidelines to Prosecutors for the Queen and other persons acting as Prosecutors for the Crown, members of the police force, and other persons with respect to the prosecution of offences. However, the Director is expressly prohibited from furnishing guidelines 'in relation to a particular case'. Guidelines, if issued, must be published in the Government Gazette (s.10(2)). The section further provides that any guidelines issued shall not prevent the exercise or performance by a Prosecutor for the Queen of any powers or functions given to him by the Crimes Act 1958.

The Director of Public Prosecutions Act 1982 s.9 describes one of the functions of the Director as follows:

> To prepare, institute and conduct on behalf of the Crown, criminal proceedings in the High Court, Supreme Court and County Court.

The Director of Public Prosecutions Act 1982 s.9(2) provides that the Director shall be 'responsible to the Attorney-General for the due performance of his functions under this Act or any other Act'. However, sub-section (3) states that: 'nothing in s.s(2) shall affect or derogate from the authority of the Director in respect of the preparation, institution and conduct of proceedings under this Act or any other Act'.

In a book shortly to be published entitled 'Preparation of Criminal Trials in Victoria' in which the Director of Public Prosecutions, a senior member of his staff and seven Prosecutors for the Queen each contribute a chapter, Mr J.H. Phillips, Q.C., has this to say in his chapter entitled 'The Responsibilities of the Prosecutor':

> It inevitably follows therefore, that the Attorney-General has no authority to give me directions as to whether an individual should or should not be prosecuted and, subject to my overall authority with respect to proceedings on behalf of the Crown pursuant to the Director of Public Prosecutions Act 1982, the Prosecutors for the Queen are afforded an

> independent status consistent with and appropriate to their standing as senior experienced Counsel. However, under the Director of Public Prosecutions Act 1982 the Attorney-General retains his power to enter a nolle prosequi.

The Attorney-General's power to enter a nolle prosequi is preserved by s.14 of the Act, and this section also gives the D.P.P. the power to enter a nolle prosequi. The Act also requires the D.P.P. to report to the Attorney-General on the operations of his office and the Attorney-General is required to lay the report before each House of Parliament. (3) The Director is paid such salary and allowances as are for the time being payable to a puisne judge of the Supreme Court, and the Director is not subject to the Public Service Act 1974. In this respect it is significant to note that Prosecutors for the Queen are also appointed by order of the Governor-in-Counsel and are not subject to the Public Service Act 1974.

Other than appointing an Acting Director during the absence of the Director through illness or other cause or during vacancy in the office, there is no power to appoint Deputy Directors. An Acting Director has the same powers and duties as the Director.

In addition to his major role of instituting and conducting criminal proceedings in the superior courts, when he considers it desirable the Director may prepare, institute and conduct any preliminary examination in the Magistrates' Court or take over and conduct any proceedings in respect of a summary offence or indictable offence tried or being tried summarily, and he may also assist the Coroner. In all cases the Director may appear himself or by Counsel. In practice the Director only appears on special occasions.

THE INDICTING AUTHORITY IN VICTORIA

Notwithstanding the fact that the Director of Public Prosecutions has the power to make presentment, it is the Prosecutors for the Queen who carry out this function on a day to day basis. At present there are 15 Prosecutors for the Queen in Victoria but two have taken up appointments as Counsel assisting the National Crime Authority, leaving only 13 available for normal duties. This number is clearly inadequate. Each month two or three Prosecutors for the Queen are allocated to Chambers to deal with all briefs forwarded to them by the Solicitor to the Director of Public Prosecutions, and to advise Counsel in private practice briefed for the Crown, particularly during the course of a trial. The Prosecutor for the Queen in Chambers (hereinafter referred to as the 'Chambers Prosecutor') is charged with the responsibility of reading the depositions and statements of witnesses taken at the lower court and deciding whether there is sufficient evidence upon which to found a charge. If the Chamber Prosecutor considers that the evidence is insufficient, he will prepare a Memorandum of Advice for the Director of Public Prosecutions advising the entry of a nolle prosequi. Although

the Attorney-General also has the power to enter a nolle prosequi, he has not exercised that power since coming to office. Such references will often be made by the Chamber Prosecutor without any application from the defence.

However, in the vast majority of cases the Chamber Prosecutor will read the relevant material and then sign the presentment. Alternatively if it is inappropriate to sign a presentment at this stage he will return the brief to the Solicitor to the Director of Public Prosecutions with a Memorandum of Advice.

The Chamber Prosecutor will often be called upon to determine whether an indemnity should be granted to a witness. If he considers such an indemnity should be granted, he will forward advice to the Director of Public Prosecutions, whose jurisdiction now extends to the granting or the refusal to grant an indemnity to a witness in criminal proceedings.

Other discretionary questions that frequently arise, such as whether a witness is so unreliable that the Prosecutor may exercise his discretion not to call him; or as to whether disclosure should be made of statements made by Crown witnesses; or whether or not an accomplice should be called as a witness for the Crown; are generally matters that are decided by the Trial Prosecutor whether or not he is a Prosecutor for the Queen. In complex or difficult cases the Trial Prosecutor would be expected to at least discuss the exercise of this type of discretion with a Prosecutor for the Queen.

CONSIDERATION OF THE ACCEPTANCE OF A PLEA OF GUILTY TO A LESSER CHARGE THAN THE ONE ON WHICH THE ACCUSED IS CHARGED IN THE INDICTMENT

Not infrequently, an accused through his Solicitor will intimate to the Director of Public Prosecutions that he is prepared to plead guilty to a lesser count or counts on the indictment. In those circumstances, that communication is referred to the Chamber Prosecutor who will then consider all the material. The procedures which follow between Prosecutors for the Queen, members of the Bar who hold a brief to prosecute and the Director of Public Prosecutions in relation to the consideration of offers to plead guilty to a lesser charge, are now well established in Victoria. The Director of Public Prosecutions has made it clear that an offer of a lesser plea in any case which is serious or potentially contentious, is not to be accepted without his assent or that of his delegate, and furthermore that he is informed by the Chamber Prosecutor of the acceptance of lesser pleas with respect to all other cases. Assessment of a case as serious or potentially contentious depends on all the circumstances and not merely on the offence charged. The charge of common assault or minor theft could be such a case in the light of the identity of the accused or the victim, or the circumstances surrounding its commission. The assessment of a case as such is a matter for the judgement of the particular Prosecutor for the Queen, unless the

Director has given an earlier intimation that he regards the case as serious or potentially contentious.

Counsel at the Bar who are briefed to prosecute are not authorised to accept an offer of a lesser plea without the approval of a Prosecutor for the Queen or the Director of Public Prosecutions. Before consulting the Chamber Prosecutor, the Trial Prosecutor, where appropriate, would obtain the views of the police, and if possible the victim or the victim's relatives. the obtaining of such views is done in such a way as to make it clear that their views are simply being received and noted, as none of these people have any right of veto. The decision of the Chamber Prosecutor as to the acceptance or rejection of such an offer to plead guilty is final.

The results of decisions taken by the Chamber Prosecutor in approving the acceptance of an offer are recorded in a memorandum setting out the circumstances leading to the approval. The original memorandum is then forwarded to the Director of Public Prosecutions and the Chamber Prosecutor makes an entry in a Register which is kept in the Chambers of the Prosecutors for the Queen.

If a Prosecutor for the Queen holds a trial brief and receives such an offer, he does not assent to the offer without first discussing it with a Chamber Prosecutor or the Director. He does not do this for the purpose of obtaining the other's assent or to shift the responsibility for the decision onto the Chamber Prosecutor, but in order that two minds might be brought to bear on the problem. If he accepts the offer, he also makes an entry in the Plea Register, and then prepares a memorandum for the file. In any significant cases a Prosecutor for the Queen would consult the Director of Public Prosecutions. For a full discussion of the principles in Victoria relating to the acceptance or rejection of offers to plead to lesser charges, I refer to the decision of the Full Court in R. v. Marshall (1981) V.R. 725. In that case the court made it plain that there should be no discussions between Counsel and the judge in private and that a judge should no longer give any indication of sentence. The court stressed that the integrity of the Court is of the greatest importance to public confidence in the administration of justice.

APPEALS BY THE DIRECTOR OF PUBLIC PROSECUTIONS AGAINST SENTENCES PASSED ON CONVICTIONS ON INDICTMENT

When a person is sentenced upon being convicted on indictment the Director of Public Prosecutions has authority pursuant to s.567A of the Crimes Act 1958, to appeal to the full court against the sentence passed when he considers that a different sentence should have been passed, and is satisfied that an appeal should be brought in the public interest. This authority has been exercised by the Director on a number of occasions. The practice is for the Prosecutor for the Queen who held the trial brief or

the brief for the plea and sentence, to advise the Director as to whether or not an appeal should be brought. Alternatively, the Chamber Prosecutor's advice is sought if the case is one in which Counsel in private practice had been briefed for the Crown. The Director of Public Prosecutions makes the ultimate decision in each case.

LAW REFORM

Both the Director of Public Prosecutions, and some Prosecutors for the Queen have been involved in advising the government on matters of law reform. Mr J.H. Phillips, Q.C., was concerned that not only were there considerable delays in listing cases for trial when he came to office, but there was no time frame in the criminal justice system within which things had to be done. Mr Phillips tendered advice to the government that time frames should be inserted into the criminal justice system by statute, and the judges of the superior courts, should be vested with jurisdiction to control pending criminal proceedings. That advice was accepted and resulted in the enactment of the Crimes (Procedure) Act 1983.

The act became law on 20 December 1983 and operated from 7 February 1984. The Attorney-General is enpowered to specify statutory time limits by regulation requiring the Crown to file a presentment within a specified time from the date of committal proceedings. The Crown can also be required to commence a trial of an accused person within a specified time from the date of filing the presentment. A judge of the Supreme or County Court may at any time grant an extension of the relevant period, and more than one extension may be granted. These time limits do not apply to cases where an accused has been committed for trial prior to 7 February 1984. (4)

On 11 September 1984 the Attorney-General proclaimed by regulation a time frame of nine months from the date of committal proceedings within which a presentment must be filed, and a time frame of 18 months from the date of committal proceedings within which a trial must be commenced. (5)

(a) Pre-trial Hearings

On 3 September 1984 rules were made to facilitate pre-trial hearings in both the Supreme and County Courts. The Supreme Court (Pre-trial Criminal Procedure) Rules 1984 (S.R. No. 331) and the County Court (Pre-trial Criminal Procedure) Rules 1984 (S.R. No. 314) vest judges of the superior courts with jurisdiction to make binding orders in pending criminal trials before a jury is empanelled. Once again, this suggestion emanated from Mr J.H. Phillips, Q.C., Director of Public Prosecutions who said in his annual report to the Victorian Parliament (supra) at p.11:

> The whole object of this exercise is to identify and resolve - pre-trial - all matters which might delay, interrupt or complicate a subsequent trial, so that when it actually commences before a jury the proceedings are, so far as humanly possible, continued without significant interruption. I am confident we will see many benefits from this system in the near future.

Difficulty had occurred in the past owing to the fact that at common law the trial is deemed to have commenced only after the accused has pleaded and been told to look to his challenges. Therefore, the jury had to be empanelled before legal argument could take place, otherwise any ruling made would not be made in the course of the trial. See R. v. Symons (1981) V.R. 297. The new provisions now contained in s.391A of the Crimes Act 1958 overcome these difficulties. This section permits the judge to:

> ... Hear and determine any question with respect to the trial of the accused person which the Court considers necessary to ensure that the trial will be conducted fairly and expeditiously ...

(b) Hearing and Determining Summary Offences at the Conclusion of a Trial or After a Plea of Guilty to the Substantive Offence

At the conclusion of a criminal trial, an accused is frequently faced with the prospect of returning to the Magistrates' Court so that outstanding summary offences can be heard and determined. This can arise in various circumstances, but it frequently occurs following a drug trafficking trial when an accused has been acquitted of trafficking and faces charges of smoking and possessing the drug, which charges must be determined in the Magistrates' Court. This difficulty has now been overcome by the Crimes Procedure Act 1983 which includes a new section 359AA in the Crimes Act 1958. The new section refers to a 'relevant summary offence' meaning a summary offence which, if it had been indictable, could have been included as an additional or alternative count on the presentment together with the substantive offence.

The judges of the Supreme and County Courts can now hear summary offences in circumstances where the accused person consents to this course and indicates that a plea of guilty to such summary offence will be forthcoming. The application is made by or on behalf of the Director of Public Prosecutions or a Prosecutor for the Queen, and the relevant summary offence is heard by the judge sitting alone.

The practice and procedure of the Magistrates' Court applies. Upon conviction, the judge may make any order that a Magistrates' Court could have made. (6)

(c) Proof of Prior Convictions

The Crimes (General Amendment) Act 1984 introduced important changes to the law relating to an offender's previous convictions. Prior to this enactment, proving an offenders previous convictions could be very difficult, as not infrequently an offender would refuse to admit prior convictions when they were read out to him by the judge's associate after the jury's verdict. In some instances the prior convictions may have occurred outside the State of Victoria or in another country. On those occasions it was necessary to bring a witness from interstate or overseas to give evidence to prove that the offender had been convicted in that other State or country, and to produce the certificate of conviction. There was no procedure available for averring, in the further presentment, (7) that an offender had been convicted in another country. This caused particular problems in cases involving drug trafficking convictions in foreign countries. Furthermore, the Act only permitted the Crown to aver what were in law 'convictions'. Bonds granted to offenders in the Magistrates' Courts, and Children's Court, could not be averred and were not regarded as convictions. However, all previous orders consequent upon a finding of guilt, would normally be matters relevant for the sentencing judge to receive and take into account as part of the antecedents of the offender for the purposes of determining whether the offender (if under 21 years of age), was suitable for Youth Training, or as forming part of the offender's antecedents for the purpose of fixing a minimum term of imprisonment. (8)

Injustice could often occur for the community, when a young man was placed on probation in the Children's court for rape at the age of 16, and having committed his second rape at the age of 19 appears before the County Court as a man without prior convictions. By cumbersome methods the earlier orders could be proved and placed before the sentencing judge, but more often than not earlier orders not amounting to convictions were not proved. (9)

The Crimes (General) Amendment Act 1984 repeals the Crimes Act 1958 s.376 and substitutes a new s.376, which section statutorily defines 'conviction'. The previous conviction includes not only a prior conviction in the traditional sense, but also includes a finding of guilt consequent on which is made an order releasing the offender on a bond or probation. However, this definition does not include a Children's Court Order more than ten years prior to the hearing at which it is sought to be proved. Hence, in Victoria all orders, including adjourned bonds in the

Magistrates' Courts, and a variety of orders made under s.26 of the Children's Court Act 1973, which previously did not amount to convictions, are now placed before the sentencing judge.

The Act further provides for a new procedure for proving previous convictions. This is found in s.395 which sets out a completely new method of proving and dealing with offender's prior convictions. If an offender does not admit a prior conviction where it is read to him by the judge's associate, the prosecutor will need evidence to prove the previous conviction. All questions relating to previous convictions are now determined by the judge sitting alone without a jury. (10)

Previously, if an offender denied a significant prior conviction which the prosecutor wished to prove, the trial jury had to be kept together until the evidence was available to prove the prior conviction. The new section now further simplifies the method of proof, by providing that proof of an offender's previous convictions can be given by a 'certified statement of conviction' being tendered in evidence. (11) This statement specifies the name of the court in which the offender was previously convicted, the date of the previous conviction and the name and date of birth of the offender. It is signed by the Prothonotary or Deputy Prothonotary of the Supreme Court, the Registrar or Deputy Registrar of the County Court or the Clerk of the Magistrates' Court. The procedure also permits proof of previous convictions in other countries and in other States of Australia by tendering a certificate signed by the officer having custody of the records of the court or his deputy. (12) This certificate is prima facie proof of its contents including the identity of the person before the court and the person named in the certificate.

CONCLUSION

It can therefore be seen that by enacting the Director of Public Prosecutions Act 1982, the government took a further step which ensured the greatest possible independence of the prosecutorial process in Victoria, by passing the powers previously exercised by the Attorney-General and Solicitor-General in the day-to-day operation of the criminal justice system, to the Director of Public Prosecutions. Consequently the Director of Public Prosecutions together with the Prosecutor for the Queen, operate completely independently of the government of the day in making the ultimate discretionary judgements, whenever they are called upon to do so.

REFERENCES

1. Crimes Act 1958 (Vic.) s.352 and s.353.

2. Prior to the Director of Public Prosecutions Act 1982, Prosecutors for the Queen signed presentments in the name of the Attorney-General. Presentments are now signed in the name of the Director of Public Prosecutions.

3. Director of Public Prosecutions Act s.16(2)

4. Crimes Act 1958 s.353(2) - (6).

5. Crimes (Procedure) Regulations 1984 S.R. No.346.

6. Crimes Act 1958 s.359 AA (3)(e).

7. Crimes Act 1958 s.376.

8. Community Welfare Services Act 1970 - s.190
Crimes Act 1958 s.476A (prior to its amendment).

9. R. v. Martin (1973) V.R. 854
R. v. Pecora (1980) V.R. 499 at 501-2
R. v. Poulton (1974) V.R. 716 at 719-21.

10. Crimes Act 1958 s.395 (1)(e)(ii)

11. Crimes Act 1958 s.395 (2).

12. Crimes Act 1958 s.395 (4)(a)-(d).

DISCUSSION

The first series of questions put to Richard Read related to police discretion. He said that as far as he was aware nothing in the D.P.P. Act had affected the discretion of a constable of police. However police quite often ask for assistance or advice at the brief-charge stage. He said that there existed an excellent working relationship between the Chief Commissioner of Police, Mr Miller, and the Director of Public Prosecutions. In corporate crime work, for example, police and prosecutors worked hand in hand and the new powers of the D.P.P. had assisted and in no way limited the powers of the police.

All summary matters were prosecuted by the police, although in an exceptional case the D.P.P. could take over the running of a case. Generally speaking all committals in Victoria were still done by the police (in an inquest involving a difficult murder the D.P.P. may be called in at the beginning). However, in rape committals the Act provided that a barrister must appear as counsel for the Crown. In general all the original discretion that the police had prior to the Act had been retained, and Richard Read said he was not aware of any dissatisfaction expressed from the police force since the commencement of the Act.

It was asked whether the voir dire would be done away with and whether questions of admissibility would all be dealt with before the jury was empanelled. Richard Read replied that the voir dire would be retained but that the new procedure would attempt to resolve some issues if it could prior to trial.

LIMITATIONS AND CONTROLS ON THE EXERCISE BY PROSECUTORS OF THEIR DISCRETION

James Glissan
Public Defender
New South Wales

From the point of view of a practising defence trial lawyer one's contact with prosecutorial discretion falls broadly into two areas. Firstly, the exercise of the discretion between committal for trial and trial - that is, seeking a nolle prosequi from the Attorney-General (through his prosecutors); and secondly, the exercise of discretion at trial (including 'plea bargaining').

It is the latter exercise of discretion which is more frequently met and which is subject to few objectively describeable controls, if any.

There is, additionally, a mid-point between those two discretional areas where a third subtle discretion arises for prosecutors which directly affects the conduct of trials; viz, the decision-making process (which in New South Wales is carried out by Crown Prosecutors) of formulating the charge laid in relation to any accused; that process which is known as 'finding a bill'. This does not involve in any sense intervention by the Attorney-General because it occurs in every case whether or not an application that no-bill be found has been made. It is not governed by, nor indeed, where the Crown Prosecutor does his job properly, is it much guided by either the charge originally preferred or that upon which the magistrate has committed. The crown prosecutor here has a broad discretion sometimes exercised alone in chambers; sometimes as a result of discussion and informal plea bargaining.

At trial the discretion to accept a plea to a lesser count can be circumscribed by what has occurred in the process of finding a bill, especially where a 'no-bill' application has been considered by the Attorney-General.

In New South Wales the absolute right of a Crown Prosecutor to accept a plea to a lesser count, so long as it is a true alternative verdict, is enshrined in the Crimes Act; vide s.394A:

> s.394A: Where a prisoner is arraigned on an indictment for any offence and can lawfully be convicted on such indictment of some other offence not charged in such indictment, he may plead not guilty of the offence charged in the indictment, but guilty of such other offence, and the Crown may elect to accept such plea of guilty or may require the trial to proceed upon the charge upon which the prisoner is arraigned.

Where, however, counsel for the accused or his solicitors have made a written application to the Attorney-General for a nolle prosequi it often occurs that the terms of the Attorney-General's direction, where the application is rejected, effectively fetter the jurisdiction of the Crown Prosecutor. For example, where an accused is charged and committed on a count of murder and a no-bill application is made, the Attorney-General may direct either that 'the matter proceed to trial' or that it 'proceed to trial on the committal charge'. In the former case, the crown prosecutor's discretion under s.394A remains and at trial a plea, say, to manslaughter, may be accepted. In the latter case, the practical view adopted in New South Wales is that the Attorney-General's direction binds all the law officers and that the accused must stand his trial for murder. Should this be so? Very often the decision is not clearly that of the Attorney-General. Where a no-bill application is made, the brief is submitted first to a Crown Prosecutor and subsequently to the Solicitor-General or Crown Advocate, finally passing to the Attorney-General, who may simply direct 'I agree with the Crown Prosecutor and so direct'. If one or other of those considering the matter down the line is careless, one substantial and truly valuable area of discretion may be unintentionally abrogated!

Pleading points in relation to indictments have largely gone the way of pleading points in the other jurisdictions and this is, in any event, not the place to discuss them. The form the indictment takes, however, and the charge and/or charges which it contemplates form an important area for those appearing for accused to consider the exercise of the discretion of the prosecutor.

This brings me directly to the major second area of discretion - the exercise of prosecutorial discretion at trials. That discretion arises throughout trials and, although it is subtle and almost invisible for the most part, it is a discretion of enormous breadth and is one not subject to controls which can readily be discerned. It is not a judicial discretion, it is administrative; it is a professional discretion to be exercised in accordance with ordinary professional obligations; it is not the subject of review, at least for the most part, and if one is to be guided by recent decisions of the High Court, the area for review is diminishing rather than expanding.

At trial, the discretion commences from the prosecutor determining that he will or will not accept a plea to a lesser count at the beginning of a trial. The discretion continues throughout, largely uncontrolled and unreviewable. Whether or not the prosecutor will call or make available witnesses for cross-examination or make available their statements; whether or not the prosecutor 'suppresses' evidence in the course of a trial; whether or not he seeks to take technical advantage (as, for example, where an accused raises character obliquely) of matter in the course of trial; are a few examples of its scope.

So that I may make my position clear from the outset, I am firmly of the view that such discretion ought to be subject to clearly defined limits and to the control of appellate intervention where it has been exercised, whether bona fide or not, in such a way as to affect the fair trial of an accused person.

That is not to say that the exercises of discretion briefly subsumed under the three headings above are all of the same kind, nor that they should all be subject to the same juridical overview, for such a suggestion would be nonsense. Nor do I suggest the decision of an Attorney-General in determining whether or not a bill will be presented at all should be subject to administrative or judicial review. Indeed, I propose to say nothing more about the Attorney-General's function in finding bills beyond giving an illustration of that role in action; but to limit myself for the balance of this paper to a consideration of the effect of the exercise of prosecutorial discretion on the course of trial and on the course of appeal.

The case of Robert Golding gives a graphic, if pathetic, illustration of the proper use of the power to no-bill by an Attorney-General. Golding was, for he is now dead, an old and derelict man in Sydney who had been charged and committed for trial with committing an act of bestiality of an unusual kind, that is, as the passive agent.

A brief to appear was delivered to counsel who requested the Attorney-General to proceed no further in the following terms:

> I act for Robert Golding who was committed for trial on 15th July, 1979 at the Central Court of Petty Sessions. The matter is set down for trial on Tuesday next, 18th September. I do not intend to set out the facts at length for a brief perusal of the scanty committal proceedings will suffice fully to inform you. There is no evidence of penetration per anum to found this charge. Mr Golding is perhaps 66 or perhaps 86 years of age.
>
> He is mentally deficient, illiterate and slightly mad. He has a long record of offences for

> bestiality dating from 1959. On all occasions he has pleaded guilty and has been dealt with by way of bond or short sentence of imprisonment, the only effect of which has been to highlight the goodness of the District Court Bench.
>
> It is unfair under the circumstances to punish him. Imprisonment or threat thereof acts as no deterrant to him, and unless I have led a far too sheltered life, I cannot believe that there is any similar offender in this State to be deterred. Whilst I do not maintain that his behaviour on this occasion was not offensive within the meaning of the relevant legislation, it would have shocked anyone of a delicate nature and indeed would surprise even the more hardy.
>
> I would hasten to point out that had he performed this feat in private he would have committed the only arguably victimless crime. I submit that Mr Golding should not be permitted to waste the time of the Court already overloaded with more serious criminal cases while police, psychiatrist, and counsel argue over matters more properly the province of students of abnormal psychology or the writers of scatological limericks.
>
> Mr Golding has, I understand, a home of sorts to go to and has already served two and a half months whilst on remand. I therefore respectfully request that a no-bill be filed and Mr Golding be charged if the arresting policeman's sense of propriety demands it with the relevant street offence, which would more aptly describe his public performance of his peculiar aberration on that occasion.
>
> I wish to point out that I am quite prepared to go to trial on this matter. Mr Golding has given me instructions to plead not guilty and Counsel has no intention of dissuading him from that view. I trust that such a trial will not be necessary.

As one might reasonably anticipate, the matter went no further. Some few months later, however, a further similar charge was preferred and the same counsel again instructed. This second occasion also brought an application for no-bill, in terms so succinct as to be almost terse:

> Mr Golding has done it again. So have the police. They must both stop.

Again the Attorney-General did not proceed further. There is yet a final chapter in the saga of Mr Golding. After a further period of a few months the police preferred still another charge against him. This time counsel wrote, again to the Attorney:

> I act for Mr Golding, who has again been committed for trial for bestiality. I write to inform you that no application for no-bill is to be made on his behalf. He intends to plead not guilty and to proceed to trial. I look forward with interest to hearing the Crown Prosecutor's opening address.

The matter was no-billed and Mr Golding passed from the ken of the criminal law.

Once it is certain that there is to be a trial, the first area of exercise of discretion to be met is that to which I have already referred, viz, whether a plea to a lesser count may be accepted. In New South Wales, as we have seen, the position is governed by the Crimes Act, s.394A.

One question which arises in relation to the taking of pleas to lesser counts is whether the discretion exercised by the Crown Prosecutor should be, as at present, unfettered or reviewable by the judge, as in England.

In England, the matter is in the judge's discretion - see, for example, R. v Soanes, 32 Cr. App. R. 136:

> The applicant was twenty-five years of age, and had already had two illegitimate children. She had worked as a nurse at a home for blind babies. After a normal confinement, the applicant gave birth in hospital to the child which was the subject-matter of the indictment, and stayed there for twenty-four days, a longer time than patients normally stayed after child-birth. She appeared perfectly normal on discharge, and there was nothing to suggest that she was not in possession of all her faculties. A day or two after her discharge she killed the child by fracturing its skull in two places and then throwing it into a canal.
>
> When the applicant had been given in charge of the jury on the charge of murder, her counsel informed the Judge that she was willing to plead guilty to infanticide, and counsel for the Crown expressed his willingness to accept that plea. Singleton, J, however, refused to allow it to be accepted on the ground that there was no indication in the depositions of the circumstances which must exist before a verdict of infanticide can be returned, and the trial for murder proceeded.
>
> She was convicted of infanticide, and was sentenced to three years' penal servitude.

The Court of Criminal Appeal held that:

> Where nothing appears on the depositions which can be said to reduce the offence charged in the indictment to some lesser offence for which a verdict may be returned, the duty of counsel for the Crown is to present the offence charged in the indictment.

In New South Wales s.394A does not, semble, admit of a judicial discretion but reposes the decision in the Crown; but the provision is one which causes difficulties from time to time. See, for example, R. v. Robert John Booth (unreported), Supreme Court of New South Wales, Criminal Division per Cross J 21 April 1983.

The accused was committed for trial on a charge of murder. On indictment for murder before this Court, he pleaded 'not guilty to murder, but guilty to manslaughter', and Senior Counsel for the Crown stated that he accepted that plea in full discharge of the indictment.

The facts were that the accused had been a patient of the deceased for several years prior to the killing. The following evidence was given:

> About 11.30 am on 12th February, 1982, the prisoner went to the surgery of the deceased to keep an appointment he had made the previous day. The deceased was not present at the time and the prisoner waited for a short while and then left, according to him, to have a hair cut. He returned to the surgery, however the deceased was still not available and the prisoner again left and purchased a newspaper. He once again returned to the surgery waiting for the deceased. About 1.25 pm the deceased arrived at his surgery, spoke to the prisoner and escorted him to the consulting room. A short time later, according to the prisoner, he informed the deceased that he had blood in his urine and he anticipated that the deceased upon hearing this statement would divert his attention and make notes on the patient cards. Apparently the deceased did do this and the prisoner then placed a sawn-off .22 rifle on the back of the head of the deceased and discharged one round into the skull. The prisoner then apparently fired a further round from the weapon, which passed through the right temple of the deceased, passing completely through the brain and making its exit on the left hand side. The investigating police are unaware in what order these two shots were fired. The deceased died instantly.

> The prisoner then unloaded his weapon, left the surgery and walked approximately a quarter of a mile to the Parramatta police station where he surrendered himself and the sawn-off .22 rifle to the police. When interviewed the prisoner freely admitted the offence and stated that the reasons for his actions were that it was the only way he could see to 'compromise' the medical profession.
>
> The records maintained by the deceased indicated the prisoner was suffering from paranoid schizophrenia. The prisoner indicated to police that he had outlined the reasons for his action on three tapes that he had recorded. These tapes were recovered and transcribed. These tapes indicate that the prisoner was of the opinion that he was suffering from cancer and had been so for many years. Further, that he had consulted a number of doctors in New Zealand and New South Wales but was unable to convince them that he had cancer. It would appear from these tapes that the prisoner adopted a paranoid attitude towards the medical profession.

The rather bizarre nature of those undisputed facts as to the killings, combined with the rambling and incoherent material appearing in the tendered transcripts of the tape recordings and the fact (revealed by the above evidence) that the accused's own doctor, the deceased who had been treating him for years, had diagnosed him as suffering from paranoid schizophrenia, indicated at least a strong possibility that the accused was mentally ill at the time of the shooting. If so, he would of course be entitled to an acquittal on the ground of mental illness. In the circumstances it became important to have regard to the nature of any medical reports tendered as to the accused's mental condition.

The Crown tendered only one, at the outset of the case, that of Dr C.L. Wong of 17 March 1983.

After reading that report I must confess that I felt some surprise at the confident and unqualified diagnosis of merely 'diminished responsibility' and not of mental illness.

Senior counsel for the Crown informed me that Dr Wong, whose report of only three weeks ago concluded that the accused was not mentally ill at the time of the killing, was one of the very doctors who, twelve months earlier and only a few weeks after the shooting, had committed the accused under a Schedule 3 document pursuant to the Mental Health Act.

The extraordinary circumstances led the court to the view that if this evidence - which was all available - were presented to a jury they would be entitled - though of course not compelled - to find that the accused was insane at the time of the killing. Because of the different consequences to the accused - and, at least as importantly, to the community - of the two available alternative verdicts, a feeling of disquiet arose in the court's mind as to the propriety of the matter proceeding on an agreed basis, that is, agreed to by counsel with the tacit approval of the judge, that it was a case not of insanity but of diminished responsibility.

That feeling of disquiet was deepened by the earlier discussion in court to which I have already made mention. When I discussed with counsel in court whether it might perhaps be desirable to allow a jury to decide the issue, Senior Counsel for the accused, W.D. Hosking QC, the propriety of whose conduct in connection with this matter was of a particularly high standard, informed me that he had felt so concerned at the ethical problems confronting him in this case that he sought the advice of the Bar Council as to his duty in the matter. The transcript makes clear that, as one would expect in the light of the thoroughness with which the public solicitor prepares such cases, the accused's legal advisers arranged independent psychiatric assessment of the accused. Counsel for the accused informed the court that it was his intention not to tender any such report(s) and acknowledge that the court 'will inevitably draw an inference by the failure of me to tender any psychiatric evidence'.

Apparently the Bar Council's advice was that counsel for the accused should accept his client's instructions.

So the position now was that in addition to the bizarre circumstances of the killing itself, the recent report of Dr Wong (which despite the opinion in its final paragraph was suggestive of insanity at the relevant time), the report of the same Dr Wong a few weeks after the killing that the accused was then so mentally ill as to warrant his commitment to a mental hospital, and the even stronger view in that regard then expressed by Dr Arnaud Reid, there was in existence other, independent, psychiatric opinion which almost certainly was to the effect that the accused was insane at the time of the killing. And in the light of all that, I was being asked to put the seal of this court's approval on an arrangement by both counsel that the matter should be dealt with on a different basis - an arrangement which would prevent the possibility that this accused was insane at the time, and thus not subject to any legal penalty being considered, let alone pronounced upon.

On the following day, counsel for the Crown adhered to his original position, that is, that he wished to accept the plea. He submitted - and continued to submit - that as Crown Prosecutor he had the power, under s.394A of the Crimes Act, to accept such a plea. To that proposition this court made, and still makes, no

demur. The statute provides that the Crown may elect to accept such a plea. This court was concerned with two other matters altogether. The first was whether the available psychiatric material in the case was of such a nature that the Crown might wish to reconsider not its right to accept such a plea but whether in the circumstances considerations of the public interest raised doubts as to the propriety of so exercising the Crown's discretion. There was, after all, no compulsion on the Crown Prosecutor to accept the plea. The words of s.394A are clearly permissive, not compulsive.

The second matter was not whether the Crown had the right to accept a plea in such a case by virtue of s.394A of the Act - as I say, the court never disputed that plain fact - but whether this court had power to decline to record a conviction on that plea and instead direct that the trial proceed. The question is, when an accused had pleaded guilty to a charge of less seriousness than that specified in the indictment and the Crown elects to accept that plea under s.394A of the Crimes Act, is the court bound to accept that arrangement? That is, is the court bound to record a conviction and hear evidence and otherwise deal with the matter on that basis or has the court power to decline to record a conviction and instead direct that the trial proceed?

I am of the view that the main determinant in this matter is the public interest (of which group it must be remembered the accused is also a member). To take an extreme case, suppose on an indictment for robbery with striking, the evidence revealed a clear case of the accused punching a man almost senseless and taking his wallet. If an indolent or incompetent prosecutor (if one can imagine such a thing) accepted a plea to mere robbery or even simply larceny in such a case, is the court powerless to intervene? Must it record a conviction? Is it forced to approach the matter on a transparently false basis? Or, as was mentioned in argument, suppose the court had been confronted with five or six reports from different psychiatrists, all of whom were clearly of the opinion that an accused was mentally ill at the time of the killing. Would the court be entitled, indeed bound, to ignore those unanimous and undisputed views, and impose a prison sentence on a person insane at the time of the killing, merely because counsel for the accused and the counsel for the Crown had agreed to a plea of guilty to some lesser charge? In my opinion that would be entirely contrary to the orderly and proper administration of criminal justice and could result in some undesirable lessening of public confidence in such administration.

I am of the opinion that the slight differences in the New South Wales statute from the English position do not affect the relevance, and certainly not the common sense, of this quoted passage. My view was, and is, that the accused, on his indictment for murder in this court had the right to plead in any manner which, after legal advice, he thought best. In that connection he had the power, which he exercised, to plead not guilty to

murder but guilty of manslaughter. The Crown then had the right to decline to accept such a plea - a right it frequently exercises - or it could elect to accept the plea. In my opinion the court then had a further discretion. It could, after hearing the evidence, record a conviction expressly and then move to sentence or record the conviction impliedly by the passing of sentence itself; or, if the evidence established at least a strong possibility that the accused was not mentally responsible for his acts at the time of the killing and was thus not guilty of any act attracting sentence or other penalty, the court could decline to record a conviction and direct that the accused's trial for murder proceed.

This His Honour did, and Booth was duly put to trial for murder; although at a later stage in proceedings, a plea of guilty to manslaughter on the ground of diminished responsibility was accepted.

As a matter of common sense, Cross J, was clearly correct. His Honour's concern that this potentially dangerous and disturbed offender be convicted of manslaughter, when experience and reading the depositions strongly suggested a verdict of not guilty on the grounds of mental illness, was appropriate.

This was especially the case as the latter verdict results in an indeterminate detention.

The ultimate manslaughter conviction led to a nine month non-parole period being imposed, and was followed by some public outcry. This was precisely what, in the public interest, Cross J sought to avoid.

However, it is submitted with deference to the highly experienced judge, that the decision is equally clearly in error. The section is clear; it vests the discretion in the Crown Prosecutor.

The requirements of public justice and the supervisory role of the judge can be rendered meaningless by a privately reached agreement between two opposing counsel, however honest and able they may be.

In this, as in other areas of control of the Crown, I am firmly of the view that the English practice is to be preferred.

Turning now to the discretion once trial has commenced, it must be observed that the great part of the debate which appears in the published material relates to two only of the problems which arise in the exercise by prosecutors of a discretion in the course of, or surrounding, trial. Those areas which have come under the harsh light of academic and judicial examination have been, (i) failure to disclose material which is exculpatory, and (ii) failure to call witnesses whose testimony may assist an accused person. Happily, each of these is rarely met in practice but they nonetheless raise, within the clearly defined and accepted duty to prosecute fairly, a wide range of discretionary areas. It has often been said that the duty of prosecutors is:

> To regard themselves as ministers of justice, and not to struggle for a conviction, as in a case at Nisi Prius - nor to be betrayed by feeling of professional rivalry - to regard the question and issue as one of professional superiority, and a contest for skill and pre-eminence
>
> (R. v. Puddick (1865) 4 F. & F. at 499).

Perhaps the best statement to be found of this principle is still in Maxwell v. D.P.P. (1934) 24 Crim. App. R. at 176 where it was said:

> It must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issue. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed.

In these circumstances, the whole area of prosecutorial decision making is thrown open and the question of accountability in making such decisions arises. One need not range far afield to find areas well outside non-disclosure and failure to call witnesses where decisions of prosecutors can affect the chance of the jury fairly trying the true issue. Examples of such decisions by prosecutors are:

1. Introduction of inadmissible and prejudicial material by prosecutor in final address (Lawrence, (unreported) N.S.W. C.C.A. 19/4/79);

2. Opening to a jury in detail with comments added the contents of a long interrogation of the prisoner after arrest, subsequently rejected as inadmissible (Bathgate (1946) of 46 S.R. 281);

3. Making an inflammatory address to a jury referring to the accused as a liar and a murderer (R. v. Dunn 64 C.C.C. (2d) 253);

4. Amending an indictment which is duplicitous, or otherwise defective (s.365 of the Crimes Act);

5. Accepting a plea to a lesser count in full satisfaction (supra) (s.394A of the Crimes Act).

It is not suggested that this is an exhaustive, or comprehensive, list.

In each of these areas, defence counsel at trial is to a greater or lesser degree dependent upon the responsible exercise by the prosecutor of his discretion. Only one of them is amenable to the supervision of the court (s.365 Crimes Act).

It is a matter of considerable concern to me that the courts are more ready in cases where technical rules of trial, well established and readily apparent, are broken, to interfere by quashing the conviction than they are in areas such as failure to disclose or failure to call witnesses.

Although this is readily understandable on the basis that it is always easier to apply established principle than it is to create or extend principle, it is these latter cases which more readily work injustice.

I would like briefly to look at some examples in the case law of what is referred to above, and the reasoning displayed as to :

(a) the technical rules; and what I call

(b) the retreat from Ziems.

First, the cases on the technical rules. These are usually concerned with speeches made on behalf of the Crown at the commencement or conclusion of the trial. For example, Lawrence, a New South Wales barrister charged with drug offences, was given a new trial at least in part because of the:

> introduction of inadmissible and prejudicial material by Crown Prosecutor in final address (per Lee J.);

and by majority (Street, CJ and Lee, J):

> that terms of the Crown Prosecutor's address were such as to cause the trial to miscarry so as to require a new trial.

As Lee, J. said in his judgement at page 27:

> The first matter to be observed is that there was no basis upon which the learned Crown Prosecutor could make the submission which he did. In the result the effect of what the Crown Prosecutor said was to place before the jury a factual situation involving senior counsel and the accused in relation to instructions allegedly given by the accused to his counsel. It went beyond a mere comment upon the evidence. It was an allegation of fact in relation to the accused and the instructions given by him to his senior counsel.

> The learned Crown Prosecutor placed himself in the positon of an expert witness, able to guide the jury accurately on the matter in question, and invited the jury to consider a factual situation of his own making. However, the matter does not rest there, for as the transcript shows the learned trial Judge not only did not direct the jury to disregard what the Crown Prosecutor had said - and that may well have been sufficient to overcome any mischief that might have been done - but the jury could well have understood that he was endorsing the accuracy of the Crown Prosecutor's remarks.
>
> The circumstances outlined, in my view, amounted to a wrongful enlargement of the evidentiary material upon which the jury were required to determine the matter, (Balenzuela v. De Gail (1958) 101 C.L.R. 226 at 236); and constituted a miscarriage of justice.

And as Street CJ said, at page 18:

> The major significance, however, was in his volunteering to the jury an expert professional statement as to what this line of questioning exposed as the instructions given by the appellant to his counsel. To tell the jury, as the Crown Prosecutor did, that the cross-examination disclosed that Mr Traill's instructions from the appellant were inconsistent with a flat denial of the coaching was, in my view, to mislead the jury. Moreover, it involved misleading the jury on a matter which was of critical significance in their reaching a conclusion upon the guilt of the appellant.

Similarly, Bathgate (1946) 46 S.R. 281 was determined in favour of the appellant where:

> In a murder trial, a Crown Prosecutor (a) in opening to the jury read in detail with comments added, the contents of a long interrogation of the prisoner after his arrest, which were subsequently rejected as inadmissible when tendered by the Crown, (b) upon admittedly incorrect instructions, cross-examined the prisoner, as to a previous conviction of stealing, and (c) tendered evidence of bad character or reputation, the issue of good character not having been raised by the defence.

On appeal against conviction the court held that:

> By reason of the cumulative effect of the above-mentioned irregularities, the trial was unsatisfactory and had resulted in a miscarriage of justice and, consequently, the prisoner was entitled to a new trial.

Another area where limitations are imposed on crown prosecutors in the conduct of trials relates to addressing where an accused is not represented by counsel. The principle finds its clearest formulation in R. v. Ginies (1972) V.R. 394 where the full court of Victoria said (at 401):

> Before parting with this appeal we should say that in his report the learned Judge invited the court to consider the extent to which counsel for the Crown is bound to refrain from a final address when an accused person is unrepresented. Whilst we appreciate only too well that an unusual case like the present one presents the trial Judge with great difficulties in the absence of professional formulation of the Crown case, we think it would be unwise to attempt to relax the existing practice. It is one of long standing both here and in England and is based on the interests of fairness to accused persons. The longer and the more complex the case, the greater would be the likelihood of unfairness to an accused person from such a professional formulation on behalf of the Crown. We think the very reason for the practice would appear to require that it be not relaxed on the score of complexity, length or difficulty of the trial.

However, since that decision the High Court has taken the view that the rule may at times be relaxed, especially where the case is 'not a simple case' (see R. v. Varley 12 A.L.R. 347 at 351 per Barwick, CJ):

> The Court of Criminal Appeal expressed the view that in the circumstances of this case: 'If the Crown Prosecutor had done otherwise he would have failed in his duty to the court, to the presiding judge and to the Crown. Had he failed to address the jury, he would have succumbed to a device which Varley was probably attempting to use for his own benefit, namely, in dismissing the leading Queen's Counsel whose further appearance had been provided for till the end of the trial. Mr Marr told the jury of the tradition among Crown Prosecutors of not addressing in a simple case where an accused person is unrepresented. He made no apology for embarking on his address because the instant case was not a simple case. Mr Marr expressed the view, with which we agree, that it would have been an irresponsible act on the part of the Crown if it

> declined to make a final address, if it declined to direct the jury's attention to those portions of the solid volume of evidence in the case which the Crown felt might assist it ...
>
> I should say at this point that nothing I have read in the papers before the court or heard from counsel in argument would lead me to dissent from these expressions of the Court of Criminal Appeal.

Secondly, the retreat from Ziems. In Ziems v. The Prothonotary (97 C.L.R. 297) the High Court, 'not wishing to unduly limit [the] discretion of Crown Prosecutors', dealt with failure to call an eye witness in the following terse fashion:

> It is difficult to imagine evidence of greater importance than that of Sergeant Phillis. Yet at the trial he was not called as a witness for the Crown. One hesitates, of course, in a case in which the Crown is not represented, to comment adversely on this omission. But no sound explanation of his not being called by the Crown appears either from his cross-examination (when he was called for the defence) or otherwise, and prima facie he ought to have been called by the Crown. There is, of course, no rule of law that a prosecutor for the Crown must call every witness who has been bound over and is available. On the contrary, the discretion of the prosecutor has been recognised in many cases, and was recently asserted in Adel Muhammed El Dabbah v. Attorney-General for Palestine. Any one or more of a variety of reasons may justify a prosecutor in not calling a witness who has given evidence for the Crown before the coroner or before the magistrates, and I would not wish to say anything that might unduly limit his discretion. The present case, however, seems to me to call for a reminder that the discretion should be exercised with due regard to traditional considerations of fairness. (Per Fullagar, J.)

And per Taylor, J.:

> There may have been some legitimate reason why Sergeant Phillis was not called as a witness in the Crown case but if there was it does not appear. He was the one witness who could give evidence of a most material matter for the appellant himself could not ...
>
> The opinion of their Lordships was that 'It is consistent with the discretion of counsel for the

> prosecutor ... that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examination by the defence, and this practice has probably become even more general in recent years, and rightly so, but it remains a matter for the discretion of the prosecutor'.

deciding semble in the course of the appeal that the Crown discretion 'should be exercised with due regard to traditional considerations of fairness' (per Fullagar, J. at 292). It was clearly contemplated that the exercise of that discretion was subject to review and the provision of a 'sound explanation' where there was a failure to call a material witness.

By 1974, however, the court had moved away from the Ziems position so far as to hold:

> Any discussion of the role of the Crown Prosecutor in presenting the Crown case must begin with the fundamental proposition that it is for him to determine what witnesses will be called for the prosecution. He has the responsibility of ensuring that the Crown case is properly presented and in the course of discharging that responsibility it is for him to decide what evidence, in particular what oral testimony, will be adduced. He also has the responsibility of ensuring that the Crown case is presented with fairness to the accused.

And to describe the discretion in the following term:

> It is for the prosecutor to decide in the particular case what are the relevant factors and, in the light of those factors, to determine the course which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused. It is in this sense that it has been said that the prosecutor has a discretion as to what witnesses will be called for the prosecution. But to say this is not to give the prosecutor's decision the same character as the exercise of a judicial discretion or the exercise of a discretionary power or to make his decision reviewable in the same manner as those discretions are reviewable. In the context the word 'discretion' signifies no more than that the prosecutor is called upon to make a personal judgement, bearing in mind the responsibilities which we have already mentioned.

And

> Although the pursuit of certainty may have its advantages, the rigid circumscription of a practical decision to be made by the Crown Prosecutor in the conduct of the Crown case is not to be numbered among them.

The court, it is submitted, read down Fullagar, J.'s remarks in Ziems (cited above) by imposing two limitations:

> First, it should be understood in the sense that it proffers advice to the prosecutor as to how he should approach his task and not as a rule of law formulating a duty owed by the prosecutor to the accused. Secondly, there is room for some debate as to what is meant by the opening words of the statement and it should not be read as inhibiting the discretion which the prosecutor has not to call in the Crown case an eye-witness if he judges that there is sufficient reason for not calling him, as, for example, where he concludes that the witness is not a credible and truthful witness. In this event the prosecutor will ensure that the accused is given the opportunity to call the witness.

That the court in Richardson was prepared to give full effect to tactical considerations in presenting the Crown case is clear from the observation (at 122) that:

> No dictate of fairness to the accused could properly require that she be called as a Crown witness free from cross-examination by the Crown. Proper presentation of the Crown case required that she be called, if at all, by the defence. There was therefore no basis for any criticism of the Crown Prosecutor. (1975) 134 C.L.R. 116 at 122.

The acknowledgement of tactical manoeuvring by the Crown and tacit approach of that course of conduct was taken a step further in Lawless (1978) 26 A.L.R. 161 where the majority held that failure to inform would only found a ground for a new trial where it is demonstrated that:

> The failure was a conscious act designed to prejudice the defence, nor was there a rule of law which compelled the Crown to provide the defence with statements made by persons whom it does not propose to call as witnesses.

The Chief Justice went on to say:

> It is good practice in general for the prosecution to inform the defence of the identity of any witness from whom a statement in the possession of the prosecution has been obtained. But, clearly, there is no obligation of any kind resting on the prosecution to provide the defence with a copy of such statement.

It is submitted that Murphy, J.'s dissenting judgement is to be preferred as a statement of principle. It is respectfully submitted that policy and justice require complete frankness by prosecuting authorities. In the words of Murphy, J.:

> Those prosecuting on behalf of the community are not entitled to act as if they were representing private interests in civil litigation. The prosecution's suppression of credible evidence tending to contradict evidence of guilt militates against the basic element of fairness in a criminal trial. In this case, there was a miscarriage of justice because of the suppression of Mrs T's evidence.

The next opportunity for the court to consider this area of discretion arose in 1983 in Whitehorn v. The Queen (1983) 49 A.L.R. 448. In Whitehorn the court reviewed the general principles governing trial in such a way as to 'revive' much of what had been said in Ziems. For example, Deane, J. said:

> Under the adversary system which operates in a criminal trial in this country, it is for the Crown and not the judge to determine what witnesses are called by the Crown. That is not to say that the Crown is entitled to adopt the approach that it will call only those witnesses whose evidence will assist in obtaining a conviction. Prosecuting counsel in a criminal trial represents the state. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one.

It is respectfully submitted that the return to principle embodied in the following passage of Deane, J.'s judgement in Whitehorn is a clear guide to both the obligations and duties of prosecutors:

> The observance of traditional considerations of fairness requires that prosecuting counsel refrain from deciding whether to call material witness by

> reference to tactical considerations. Whether or not their names appear on the back of the indictment or information, all witnesses whose testimony is necessary for the presentation of the whole picture, to the extent that it can be presented by admissible and available evidence, should be called by the Crown unless valid reason exists for refraining from calling a particular witness or witnesses, such as that the interests of justice would be prejudiced rather than served by the calling of an unduly large number of witnesses to establish a particular point. All available witnesses whose names appear on the back of the indictment or information or who were called by the Crown to give evidence on any committal proceedings which preceded the trial should be called to give evidence, or, where the circumstances justify the Crown in refraining from leading evidence from such a witness, either be sworn by the Crown to enable cross-examination by the accused or, at the least, be made available to be called by the accused. Among the considerations which may justify the Crown in refraining from leading evidence from a particular witness is that the evidence which he or she would give is plainly untruthful or unreliable. If the Crown proposes to refrain from calling as a witness a person whose name appears on the back of the indictment or information or whom it would otherwise be expected to call as a matter of course, it should communicate that fact to the accused or his lawyer a reasonable time before the commencement of the trial. If the accused seeks to be told why the Crown is refraining from calling such a witness, fairness to the accused would ordinarily require that the Crown communicate the reason or reasons.

It is further submitted notwithstanding what the court has since said in Apostilides, that where the Crown's conduct falls short of the high standard required above no conviction should be permitted to stand.

No survey of the law in this area would be respectable without an examination of the reasons given by the full court on 19 June 1984 in R. v. Apostilides, which, as yet, remains unreported except in the Australian Law Journal (57 A.L.J.R. 371).

The court there set out six 'General Propositions' governing the conduct of criminal trials in Australia:

1. The Crown Prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown.

2. The trial judge may but is not obliged to question the prosecutor in order to discover the reasons which lead the prosecutor to decline to call a particular person. He is not called upon to adjudicate the sufficiency of those reasons.

3. Whilst at the close of the Crown case the trial judge may properly invite the prosecutor to reconsider such a decision and to have regard to the implications as then appear to the judge at that stage of the proceedings, he cannot direct the prosecutor to call a particular witness.

4. When charging the jury, the trial judge may make such comment as he then thinks to be appropriate with respect to the effect which the failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial. No doubt that comment, if any, will be affected by such information as to the prosecutor's reasons for his decision as the prosecutor thinks it proper to divulge.

5. Save in the most exceptional circumstances, the trial judge should not himself call a person to give evidence.

6. A decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.

It is my view that the overall effect of those principles are such as to confirm in the prosecutor a discretion which in all but a few, rare, circumstances, is not subject to any control or review. Worse even than this, no guidance is given as to the provision of information by prosecutors. The reference (again) to the adversary system and reliance on the 'sensitivity' of prosecutors to the dictates of fairness where there is no penalty for insensitivity is with respect naive. One may ask, rhetorically, where have prosecutors as 'ministers of justice' gone? For it remains the fact that the guidance given by the High Court most recently in Apostilides still represents an endeavour to fit the duty of the Crown Prosecutor to be 'a minister of justice' into the adversary system by holding that 'the rule is the same in civil and in criminal cases'.

As Sir Daryl Dawson said in his judgement in Whitehorn (supra), there is:

> a clear divergence in this aspect of criminal law and procedure between England and this country.

The six 'rules' (for so they will be perceived in practice) set out above confirm that tactical decisions by Crown Prosecutors are now accepted by the law. They are in my submission not acceptable. The test in rule 6. of miscarriage seems too narrow. By way of testing that proposition, one may ask how would the facts in Ziems, perhaps even Whitehorn, answer that test?

Again, in my view, the English practice is greatly to be preferred. In England, recent decisions confirm that if the prosecution appears to be exercising its discretion with respect to the calling of a witness improperly, the trial judge may intervene and invite the prosecution to call the witness. If the prosecution refuses to do so, the judge himself may call the witness without the consent of either the prosecution or the defence, if in his opinion that course is necessary in the interests of justice (Oliva (1965) 49 Cr. App. R. 298; R. v. Tregear (1967) 2 Q.B. 574). The discretion to call a witness should be exercised with caution (R. v. Cleghorn (1967) 2 Q.B. 584).

It is respectfully submitted that the sanction of 'comment' in the summing-up is surely not sufficient (vide Rule 4.). Stronger control, both at trial and in willingness to interfere an appeal, is required.

In the area of non-disclosure, an accused finds himself in an even more parlous situation. Such authority as there is (for example, Perry 27 S.A.S.R. 166; Van Beelen 9 S.A.S.R. 163) reposes a duty in the Crown and a discretion in the judge, but largely provides no sanction.

Worse, one must know of the existence of the relevant (suppressed) witness to make the application, or, alternatively, failure to be aware of his existence must be such as to allow the evidence to be 'fresh' within the technical rules (Richardson 131 C.L.R. 116).

This amounts to no control at all.

In this regard, I make a strong call for the Australian system to adopt the guidelines provided by the Attorney-General for the United Kingdom in December 1981.

If I may be permitted the digression, Australia's 'independence' from England led it first not to adopt the judge's rules. This caused in New South Wales difficult questions as to the constraints and limits on police interrogation and the admissibility of confessional material obtained in circumstances which fell outside the operation of Crimes Act s.410 but may have been in breach of the judge's rules.

It would, in my view, be a great pity if that same 'independence' of mind were to operate to impede the adoption of a clearly sensible and just approach to dealing with the obligations of prosecutors to make available to the defence all of the material relating to a prosecution. One would wish to echo Christmas Humphreys who said (1955) Crim. L.R. 739 (referring to the powers of prosecuting counsel):

> Not only are the defence entitled to call upon the prosecution to assist them to find witnesses and bring them to Court or even to make wide enquiry for certain evidence believed to exist and to spend public money in the course of that enquiry, but I believe it to be the duty of prosecuting counsel to offer that aid. And why? Because the prosecutor is at all times the Minister of Justice, though seldom so described. It is not the duty of prosecuting counsel to secure conviction nor should any prosecutor ever feel pride or satisfaction in the near fact of success ... The duty of a prosecutor, as I see it, is to present to the tribunal a precisely formulated case for the Crown against the accused and call evidence in support of it ... I consider the duty of prosecuting counsel to assist the defence in every way.

The learned author was there referring to obtaining information, evidence, witnesses and forensic examinations for accused persons to assist in the preparation of the defence. It has never been my experience that such aid is offered, or if sought, is available, to the defence (at least in New South Wales). The question is one of policy. If we are concerned with convictions then this whole paper proceeds upon false premise. If, however, society through the criminal justice system is concerned to bring the guilty to punishment and acquit those whose guilt cannot be proved, the resources of the prosecutor ought properly to be available to the defence, and at the very least the whole of the material available to the prosecution should be subject to scrutiny. As you will know, there have been calls from many quarters, including from justices of the High Court, for forensic and scientific laboratories to be established at public expense so that an independent check upon police evidence in this regard exists and is available to counsel for the defence.

In this context, for courts to be content to say the disclosure or non-disclosure of material is a matter which lies in the unfettered and unreviewable discretion of a prosecutor is an affront to the criminal justice system. The aim of the Attorney-General's Guidelines of 1981 is not to do away with the discretion of the prosecutor but to place it within defined limits which make it the subject of review and of appellate intervention. That such a formalisation of the broad discretion is required is manifestly apparent by taking only a few examples

which, at the risk of being anecdotal, relate to mattersin which I have been involved in the last year, directly or indirectly.

The first such example relates to a charge of sexual assault against Paul Venables in March of this year. The facts are of no significance, but Venables asserted his innocence of the charge and that the complainant had accompanied him and some other men whom he did not know from a hotel to obtain marijuana; that she had returned with him and had consented to sexual intercourse. The complainant denied each of those matters. Two days before the trial was listed for hearing, the brief passed from one Crown Prosecutor to another. That latter Crown Prosecutor rang me and sent by courier copies of statements from each of the two men which were in his brief. They had not been called at committal and statements had not been made available earlier. They corroborated in detail the version given by the accused. An application to the Attorney-General that there be no further proceedings in the matter succeeded at 9.30 am on the day of the trial.

The second matter concerns the so-called Ananda Marga trial. In that case it became known on the second day of the committal proceedings that some conversations between the police informant Richard Seary and Detective Krawczyk had been recorded. At the first trial a subpoena was issued seeking production of the tape recordings and transcripts, if any. A claim of what was then described as Crown privilege was made, the transcript of one tape recording made on the day of the offence was produced. A precis of a number of other tape recordings was made available to the judge. These did not appear to shed any light on the offence and the claim for Crown privilege succeeded. The position in the second trial was little different. Edited copies of transcript of the tapes were subsequently made available to the High Court where an appeal did not succeed.

During the course of an inquiry into the convictions, at present continuing in Sydney, it has emerged that those parts of the tape edited out before the High Court contained material which went not only to the credit of the informer Seary but also bore directly on the issue of guilt or innocence. Additionally, it was not until counsel assisting the inquiry had an independent transcription of the tapes made that the existence of relevant taped material which had never been produced before was revealed.

The final example that I wish to refer to concerns a matter which is at present the subject of proceedings to discipline the barrister in the relevant state. It may be simply stated as follows:

> The accused was aged eighteen at arrest and was charged with murder. His defence was alibi. At the committal proceedings, the Crown case proceeded as

an entirely circumstantial case, there being no eye witnesses to the killing. There was some forensic evidence linking the accused with things found at the scene of the crime. He said he was never at the scene on the night of the murder but he had been there at prior times in the course of his employment.

The accused had received a knife wound to his leg on the night of the murder when he said he was 'skinning a rabbit'. Opinion evidence was given that the knife wound had been made with a knife which could have caused the death of the deceased. The Crown case of murder depended on the forensic evidence and the similarity of the weapon.

In these circumstances the time of death and the time of the wounding of the accused were of critical importance; the time of death was fundamental.

There were five witnesses who established that at the time the accused's wound was sutured the deceased was probably still alive. There were two further witnesses who were capable of giving evidence that at the time when the deceased was certainly still alive the accused had complained of the wound to his leg.

The evidence of all seven witnesses was not disclosed to the defence at committal. The subpoena seeking production of documents which would have included their statements was quashed inter alia because of an affidavit by the Crown authorities that all relevant material necessary for the magistrate to determine the matter had been produced.

Further, an application for bail for the accused was refused on the ground of the strength of the Crown case before committing magistrates.

When the material referred to above ultimately was produced, the accused was admitted to bail by consent. He had spent one year in custody while these matters were being litigated.

The above examples clearly illustrate the reason for adopting the Attorney-General's Guidelines as regulatory of the practice.

It should not be thought the prosecutor's discretion, in the present state of the law, is not subject to controls prior to trial, if they are exercised. Indeed, defence counsel are open to the legitimate criticism that they do not frequently or appropriately use the tools that are available to them such as subpoena, seeking particulars and the like. Nevertheless, a formal act of rules can at least make the exercise of the discretion justiciable.

ATTORNEY GENERAL'S GUIDELINES

DISCLOSURE OF INFORMATION TO THE DEFENCE IN CASES TO BE TRIED ON INDICTMENT

The following guidelines were issued in December, 1981 from the Attorney-General's Chambers.

1. For the purposes of these Guidelines the term "unused material" is used to include the following:—

(i) All witness statements and documents which are not included in the committal bundles served on the defence.

(ii) The statements of any witnesses who are to be called to give evidence at committal and (if not in the bundle) any documents referred to therein

(iii) The unedited version(s) of any edited statements or composite statement included in the committal bundles.

2. In all cases which are due to be committed for trial, all unused material should normally (*i.e.* subject to the discretionary exceptions mentioned in paragraph (6) be made available to the defence solicitor if it has some bearing on the offence(s) charged and the surrounding circumstances of the case.

3. (a) If it will not delay the committal, disclosure should be made as soon as possible before the date fixed. This is particularly important – and might even justify delay—if the material might have some influence upon the course of the committal proceedings or the charges upon which the justices might decide to commit.

(b) If however it would or might cause delay and is unlikely to influence the committal, it should be done at or as soon as possible after committal.

4. If the unused material does not exceed about 50 pages, disclosure should be by way of provision of a copy—either by post, by hand, or via the police.

5. If the unused material exceeds about 50 pages or is unsuitable for copying, the defence solicitor should be given an opportunity to inspect it at a convenient police station or, alternatively, at the prosecuting solicitor's office, having first taken care to remove any material of the type mentioned in paragraph 6. If, having inspected it, the solicitor wishes to have a copy of any part of the material, this request should be complied with.

6. There is a discretion not to make disclosure—at least until counsel has considered and advised on the matter—in the following circumstances:

(i) There are grounds for fearing that disclosing a statement might lead to an attempt being made to persuade a witness to make a statement retracting his original one, to change his story, not to appear at court or otherwise to intimidate him.

(ii) The statement (*e.g.* from a relative or close friend of the accused) is believed to be wholly or partially untrue and might be of use in cross-examination if the witness should be called by the defence.

(iii) The statement is favourable to the prosecution and believed to be substantially true but there are grounds for fearing that the witness, due to feelings of loyalty or fear, might give the defence solicitor a quite different, and false, story favourable to the defendant. If called as a defence witness upon the basis of this second account, the statement to the police can be of use in cross-examination.

(iv) The statement is quite neutral or negative and there is no reason to doubt its truthfulness—*e.g.* "I saw nothing of the fight" or "He was not at home that afternoon." There are however grounds to believe that the witness might change his story and give evidence for the defence—*e.g.* purporting to give an account of the fight, or an alibi. Here again, the statement can properly be withheld for use in cross-examination.

(N.B. In cases (i) to (iv) the name and address of the witness should normally be supplied.)

(v) The statement is, to a greater or lesser extent, "sensitive" and for this reason it is not in the public interest to disclose it. Examples of statements containing sensitive material are as follows:

(a) It deals with matters of national security; or it is by, or discloses the identity of, a member of the Security Services who would be of no further use to those Services once his identity became known.

(b) It is by, or discloses the identity of, an informant and there are reasons for fearing that disclosure of his identity would put him or his family in danger.

(c) It is by, or discloses the identity of, a witness who might be in danger of assault or intimidation if his identity became known.

(d) It contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he was a suspect; or it discloses some unusual form of surveillance or method of detecting crime.

(e) It is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been served upon the supplier—*e.g.* a bank official.

(f) It relates to other offences by, or serious allegations against, someone who is not an accused, or discloses previous convictions or other matter prejudicial to him.

(g) It contains details of private delicacy to the maker and/or might create risk of domestic strife.

7. If there is doubt as to whether unused material comes within any of the categories in paragraph 6, such material should be submitted to counsel for advice either before or after committal.

8. In deciding whether or not statements containing sensitive material should be disclosed, a balance should be struck between the degree of sensitivity and the extent to which the information might assist the defence.

If, to take one extreme, the information is or may be true and would go some way towards establishing the innocence of the accused (or cast some significant doubt upon his guilt or upon some material part of the evidence on which the Crown is relying) there must either be full disclosure or, if the sensitivity is too great to permit this, recourse to the alternative steps set out in paragraph 13.

If, to take the other extreme, the material supports the case for the prosecution or is neutral or for other reasons is clearly of no use to the defence, there is a discretion to withhold not merely the statement containing the sensitive material, but also the name and address of the maker.

9. Any doubt as to whether the balance is in favour of, or against, disclosure should always be resolved in favour of disclosure.

10. No unused material which might be said to come within the discretionary exceptions in paragraph 6 should be disclosed to the defence until (a) the investigating officer has been asked whether he has any objections, and (b) it has been the subject of advice by counsel and that advice has been considered by the prosecuting solicitor. Should it be considered that any material is so exceptionally sensitive that it should not be shown to counsel, the Director of Public Prosecutions should be consulted.

11. In all cases counsel should be fully informed as to what unused material has already been disclosed. If some has been withheld in pursuance of paragraph 10, he should be informed of any police views, his instructions should deal—both generally and in particular—with the question of "balance" and he should be asked to advise in writing.

12. If the sensitive material relates to the identity of an informant, counsel's attention should be directed to the following passages from the judgments of (a) Pollock C.B. in ATTORNEY-GENERAL v. BRIANT (1846) 15 M.W.R. 169, 185 and (b) Lord Esher M.R. in MARKS v. BEYFUS (1890) 25 Q.B.D. 494, 498.

(a) "... the rule clearly established and acted on is this, that in a public prosecution a witness cannot be asked such questions as will disclose the informer, if he be a third person. This has been the settled rule for 50 years, and although it may seem hard in a particular case, private mischief must give way to public convenience ... and we think the principle of the rule applies to the case where a witness is asked if he himself is the informer."

(b) "... if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail."

13. If it is decided that there is a duty of disclosure but the information is too sensitive to permit the statement or document to be handed over in full, it will become necessary to discuss with counsel and the investigating officer whether it would be safe to make some limited form of disclosure by means which would satisfy the legitimate interests of the defence.

These means may be many and various but the following are given by way of example:

(i) If the only sensitive part of a statement is the name and address of the maker, a copy can be supplied with these details, and any identifying particulars in the text, blanked out. This would be coupled with an undertaking to try to make the witness available for interview, if requested; and subsequently, if so desired, to arrange for his attendance at court.

(ii) Sometimes a witness might be adequately protected if the address given was his place of work rather than his home address. This is in fact already quite a common practice with witnesses such as bank officials.

(iii) A fresh statement can be prepared and signed, omitting the sensitive part. If this is not practicable, the sensitive part can be blanked out.

(iv) Disclosure of all or part of a sensitive statement or document may be possible on a counsel-to-counsel basis although it must be recognised that counsel for the defence cannot give any guarantee of total confidentiality as he may feel bound to reveal the material to his instructing solicitor if he regards it as his clear and unavoidable duty to do so in the proper preparation and presentation of his case.

(v) If the part of the statement or document which might assist the defence is factual and not in itself sensitive, the prosecution could make a formal admission in accordance with section 10 of the Criminal Justice Act 1967, assuming that they accept the correctness of the fact.

14. An unrepresented accused should be provided with a copy of all unused material which would normally have been served on his solicitor if he were represented. Special consideration, however, would have to be given to sensitive material and it might sometimes be desirable for counsel, if in doubt, to consult the trial judge.

15. If, either before or during a trial, it becomes apparent that there is a clear duty to disclose some unused material but it is so sensitive that it would not be in the public interest to do so, it will probably be necessary to offer no, or no further, evidence. Should such a situation arise or seem likely to arise then, if time permits, prosecuting solicitors are advised to consult the Director of Public Prosecutions.

16. The practice outlined above should be adopted with immediate effect in relation to all cases submitted to the prosecuting solicitor on receipt of these guidelines. It should also be adopted as regards cases already submitted, so far as is practicable.

DISCUSSION

On the issue of failure of the prosecution to call witnesses to give exculpatory evidence, one questioner asked whether Mr Glissan's position was that the Crown should be under an obligation to introduce such evidence as part of its case.

James Glissan replied that it was not, but that if the Crown is aware of such witnesses they should either tender them for cross-examination or make available their statements. He said there were clearly witnesses whom it would be inappropriate for the Crown to call. However, there should be a penalty for wrongful exercise of the discretion - that is where the Crown obtains a technical advantage by not calling a witness.

When asked what 'technical advantage' meant in this context, James Glissan said, that if the witness is called by the defence he or she cannot be led, or cross-examined by the defence. In short, there was a restriction on the ability to deduce evidence from that witness.

THE ROLE OF THE POLICE PROSECUTOR IN THE MAGISTRATES COURT SYSTEM

Peter H. Sweeny
Superintendent in Charge
Prosecuting Branch
New South Wales Police

INTRODUCTION

Before dealing with this subject I think it appropriate that I should explain and give a short resume of the New South Wales Police Prosecuting Branch, how it came to fruition, its functions and the service it provides to the citizens of New South Wales, the Government of New South Wales and the New South Wales Police Department.

Next year the New South Wales Police Prosecuting Branch celebrates its 75th anniversary, however its small beginning really commenced during the war years, 1941, when the then Commissioner of Police, W.J. McKay, felt a need for policemen with an aptitude for court work to permanently appear in courts of petty sessions to represent police who had arrested persons for various offences, rather than have police prosecute their own cases or have another untrained police officer appear for them.

From this small beginning the New South Wales Police Prosecuting Branch has grown to its present branch of which I am the Superintendent in Charge. I am ably assisted by three commissioned officers, public servants and a large staff of police.

NEW SOUTH WALES POLICE PROSECUTING BRANCH

All prosecutors are serving members of the police force and are subject to the same discipline and responsibilities as other police and forever under the watchful eye of the Ombudsman. The duties of prosecutors are set out in the Police Instructions which provide that:

> Members of the Branch, apart from performing prosecuting duties in the various Courts of Petty Sessions, Coroners Courts and at all Childrens Courts throughout the State, are to assist members of the Force with advice with respect to the following:

(a) Interpretation of the law and court procedure;

(b) Obtaining evidence during an investigation;

(c) Preparation of evidence, already obtained, for presentation to the court; and

(d) Whether adverse decisions in the lower courts should be tested in the higher courts.

There are currently 114 permanent police prosecutors attached to the metropolitan section of the Police Prosecuting Branch and 27 permanent police prosecutors attached to country districts in New South Wales.

Police prosecutors are appointed to cover court circuits, with boundaries identical to those of a stipendiary magistrate. There are also 96 members of the court staff stationed in Sydney, 44 of whom are undergoing training with a view to appointment as permanent police prosecutors.

Police prosecutors are the interceding factor between the police and the courts. Their major duty is to undertake the prosecution of cases ranging from those of a minor nature to the more serious offences on the criminal calendar. They are rostered for attendance in courts of petty sessions, coroners courts, licensing courts, traffic courts and special childrens courts. Other duties include the giving of advice pertaining to court proceedings to any other member of the Service who requests assistance. Lectures in selected courses are conducted at the Police Academy, Australian Police College, Manly, the College of Law, St.Leonards and other government and semi-government instrumentalities.

The functions of police prosecutors in the court system in New South Wales is outlined below:

(a) Court of Petty Sessions

Each stipendiary magistrate in the Metropolitan Courts of Petty Sessions who is dealing with a matter where a police officer is the informant is assigned a police prosecutor and court constable. There are 100 magistrates in N.S.W.

Police prosecutors, unlike barristers or solicitors, have no right of audience in any courts, unless qualified as professional lawyers. A magistrate has a discretion to permit persons, not being the informant or his counsel or attorney, to act as advocates for persons party to the litigation. This discretion is described as administrative rather than judicial, and can be exercised on general grounds common to many cases, or on special grounds in a particular case, in order to secure or promote convenience and expedition in the administration of justice. (1)

The police prosecutor operating in the jurisdiction of the court of petty sessions presents the case for the prosecution in an infinite variety of matters which can be classified as offences of a criminal or quasi-criminal nature. The range of these offences can be from the most serious murder, rape, armed robbery, conspiracy or complicated fraud case, through the intermediate range of offences such as assaults, petty thefts and street offences, and on to traffic offences which range in degree of seriousness from culpable driving, driving with the prescribed concentration of alcohol, to parking. Quite apart from cases which the public would normally associate with the police, the police prosecutor presents the case in prosecutions launched at the instance of various government departments and public instrumentalities. It is, therefore, not unusual to find the police prosecutor handling a case on behalf of the Fisheries Branch of the Department of Agriculture, the Health Commission, the National Parks and Wildlife Service or the Electoral Office, to name but a few.

The scope of the police prosecutor's field of activity indicates the breadth of knowledge of the law required so that they may discharge their duties in the interests and to the best advantage of the community when presenting the variety of cases which come before the courts of petty sessions.

In New South Wales after committal for trial the Crown is responsible for any trial at the Supreme or District Court. By the Statute 9 George IV, Chapter 83 all offences in these courts were to be prosecuted in the name of His Majesty's Attorney-General. Barristers have accordingly been so appointed to prosecute as Crown Prosecutors who are instructed by the solicitor for public prosecutions, who is in fact the solicitor for the Crown with a large staff of qualified persons with expertise in District and Supreme Courts.

(b) Coroners Courts

The coroners are assisted by police prosecutors, who check that the evidence collated by the police officers who carry out the actual investigations is thorough and that every avenue has been explored. The prosecutor is required under the Coroners Act to make a recommendation to the coroner, after consultation on whether an inquest should or should not proceed. At the inquest, the police prosecutor leads the evidence from all witnesses who are able to assist the coroner in determining the cause of death. The police prosecutor also asks witnesses any pertinent questions to clarify any aspect of the case which requires amplification. Members of the legal profession and police

prosecutors are not entitled as of right to appear in the coronial jurisdiction. When leave is sought to appear, however, the coroner rarely refuses such requests. The coroner has a wide discretion in the conduct of the inquest.

Police prosecutors also assist the coroner regarding the cause and origin of fires. As in the case of a sudden death, the police carry out the initial investigation and the police prosecutor checks the evidence and then assists in the presentation of the facts to the coroner.

(c) Licensing Courts

A number of police prosecutors are engaged on a permanent basis to assist the bench of metropolitan licensing magistrates, both in Sydney and in country districts of the State. The licensing court deals with applications for various types of liquor licences.

ENTRY AND TRAINING

Selection of police training for appointment as police prosecutors is made by a special committee of the commissioned officers of the Branch who make their choice after considering the applicant's academic qualifications, service record, appearance and apparent aptitude for this class of duty. The preservation of existing high standards among police prosecutors is the governing factor in selecting trainees. Among the personal qualities desired of trainees is their aptitude to perform this specialised and exacting type of work and being prepared to embark on an extended course of study and training which their peers on general duty are not required to do.

Trainees are only appointed as police prosecutors if the superintendent in charge of the Police Prosecuting Branch, in consultation with the training staff, is satisfied with the rate of progress of each trainee through the various states of the training program, and that the trainee, if appointed, will maintain the standards of integrity and efficiency which members of the Branch have achieved since the inception of the New South Wales Police Prosecuting Branch in 1941.

Throughout their service, members of the Branch are required to keep up-to-date with current decisions in superior courts of Australia, as well as overseas, and to keep themselves abreast of changes in law and procedure in the same manner that could reasonably be expected from a competent and experienced member of the legal profession.

Many of the members of the Police Prosecuting Branch avail themselves of the opportunity to undertake study at tertiary level and subsequently obtain university degrees, diplomas and

certificates in various subjects that are available from universities, the Institute of Technology, and the Colleges of Advanced Education. At the present time 37 per cent of the staff are involved in part-time tertiary studies; for example, B.A., Law, Justice Administration.

DISCRETION TO ARREST

Before dealing with the subject under review I feel that the discretion to arrest should be considered.

'Arrest' is a distinct operational step in the criminal justice process, involving all police decisions to interfere with the freedom of a person who is suspected of criminal conduct, to the extent of taking him to the police station. (2)

The decision to arrest or not to arrest is an issue to be considered because of its pivotal relationship to the administration of criminal justice, to the police function, and because that decision generates work for the entire system. (3)

But, such decisions represent only part of the general influence that police exercise over the prosecution of criminal offences in the pre-trial process in New South Wales.

Police arrest discretion quite likely represents one of the most critical and difficult exercises of police power. But the seemingly commonplace nature of police work does much to obscure the dimensions of the complex problems that face the police decision-maker. Police, ideally, are required to draw a balance in relation to the exercise of individual rights and the apprehension of offenders, and may accordingly be required to exercise their discretionary powers in determining whether or not to invoke an arrest. More often than not, the officer will have insufficient time for long reflection on the course of action to be taken and may be required to operate on the basis of vague and imprecise notions as to the extent of his discretionary power, especially when there are few guidelines within the common law, statute, and formal police policies. (4) The development of Australian law has recognised, up to a few years ago, that police officers needed greater powers than those of the ordinary man. A very strong influence is being brought to bear upon those involved in 'law making' to restrict the police officers discretion and they believe the ideal situation would be for the swearing of a complaint before a justice or other judicial officer who may then issue his process.

The common law recognises that police need greater arrest powers than the ordinary man, and it is important that they realise that their far-reaching powers have grave implications, especially in situations where virtually on-the-spot arrest is made without a warrant. At common law, police have power to arrest persons in a variety of circumstances.

In addition to the wide common law power to arrest, police face a tangle of many legislative provisions contained in many separate Acts, and ranging erratically over felonies, misdemeanours, (5) indictable, (6) non-indictable, serious and trivial alike. They experience much difficulty in learning the intricacies of the law, especially in terms of remembering a myriad of specific instances in which they do or do not have special statutory powers. They have no distinct guidelines to preserve the much sought-after balance between the demands of law enforcement and the preservation of individual liberty. Arrest may be made:

1. To ensure appearance in court;
2. Public order breach of the peace;
3. Prevent continued or other offences;
4. Safety and welfare of public or offender.

Section 352 of the Crimes Act of New South Wales (7) broadens the common law powers of arrest so that a constable or a private person may arrest without warrant. Sub-section (2) gives a constable additional power to arrest any person suspected of having committed an offence. It is appropriate to set out those powers in full.

> 352. (1) Any constable or other person may without warrant apprehend,
>
> (a) any person in the act of committing, or immediately after having committed, an offence punishable, whether by indictment, or on summary conviction, under any Act,
>
> (b) any person who has committed a felony for which he has not been tried,
>
> and take him, and any property found upon him, before a Justice to be dealt with according to law.
>
> (2) Any constable may without warrant apprehend,
>
> (a) any person whom he, with reasonable cause, suspects of having committed any such offence or crime,
>
> (b) any person lying, or loitering, in any highway, yard, or other place during the night, whom he, with reasonable cause, suspects of being about to commit any felony,
>
> and take him, and any property found upon him, before a Justice to be dealt with according to law.

(3) Any constable may, although the warrant is not at the time in his possession, apprehend any person for whose apprehension for a misdemeanour, or an offence punishable as a misdemeanour, a warrant has been issued, and take him, and any property found upon him, before a Justice to be dealt with according to law.

(4) Any constable may, although the warrant is not at the time in his possession, apprehend any person for whose apprehension on any ground other than a charge of felony or misdemeanour or offence punishable as a misdemeanour a warrant has been lawfully issued, provided the issue of such warrant has been certified by telegraph by the Commissioner of Police or by the Justice who has signed such warrant.

The section clearly vests a discretionary power in a constable to arrest or refrain from arresting, as it does a citizen. The common law also admits a discretion to a constable to abstain from arrest.

A BREACH OF THE PEACE

Matter of Errol Howell (1981) 73 Criminal Appeal Reports (36) Lord Justice Watkins read the judgement and said; 'The public expects a policeman not only to apprehend the criminal but to do his best to prevent the commission of a crime'. The common law we believe whilst recognising that a wrongful arrest is a serious invasion of a person's liberty, provided the police with this power in the public interest.

The Crimes Act, as does the common law, gives to police a wide power to arrest without warrant, dependent on individual perception of a situation. Even power to arrest those found committing, or offending, must strictly mean those apparently committing or offending. The validity of arrest cannot depend upon the ultimate determination of guilt or innocence. How much more are his perceptions at risk when he must act in consequence of something he has perhaps not seen, something that could not be seen, or something which has not yet happened. Yet in each instance he must have reason behind his action, and sufficient to withstand review.

'Suspicion' which leads to arrest, arises at the starting point of an investigation, and the obtaining of prima facie proof is the end. If arrest before that were forbidden it could seriously hamper the police in carrying out their functions. To give power to arrest on 'reasonable suspicion' does not mean that it is

always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. Prosecution usually follows, and its initiation will require more than suspicion. Police must obviously tread a fine balancing line, knowing enough to justify arresting a man, but wanting to know more so that a prosecution may be brought, and when brought, succeed.

It may be thought that the police officer has an unbridled discretion as to who he can prosecute, and may ignore policy decisions laid down for his guidance. That is far from the truth, for that would lead to unfairness and would be subject to attack for partiality or for condoning wrong doing. The problem that does arise is that of accountability.

> Members of the Police Force are, in fact members of the public who have accepted the responsibility of their office, receive special training, are subject to the law, strict discipline and supervision. Each officer is responsible for his own actions, and of course, realises the taking of a person's liberty may well be reviewed by the Commissioner or the Court.

There are many established safety checks operating to monitor the police officer's discretion. He is ever conscious of the knowledge that complaints against him will be thoroughly investigated, and that he is under the ever watchful eye of the Ombudsman. He is subject to instructions relating to every phase of his duty, with checks and balances by way of supervisory officers within a disciplined force.

> It is the public opinion that is paramount. The public looks to the policeman as the guardian of their safety and the enforcer of their laws, but they expect him to be more than an instrument for law and order. He is expected to be fair and honest in his application of the law, and by exercising the discretion vested in him, is placed in a position to achieve that aim. How that discretion is exercised and the control placed upon that discretion is the important factor. (ibid, p.41)

Police discretion should then be responsible and it should be flexible.

Police functions are essentially ministerial, and it may well be that if they hesitate too long, when they have proper and sufficient ground for suspicion against an individual, they may lose an opportunity of arresting him, because in many cases steps have to be taken at once in order to preserve evidence. But police are not bound to make doubly sure. If an officer acts in good faith and reasonably, he is entitled to the protection of

the statute. Speaking generally, however, the courts can be relied on to discourage overbearing or unreasonable conduct.

In most professions the limits of discretion are proportionate to the rank held in the professional hierarchy. In the case of police, arrest discretion is more commonly exercised by the lower-ranking personnel, typically the general duty or traffic officer. By using his own discretion, the officer may choose to use force, to arrest, or not arrest, to issue a summons, or even to forego engaging in any of these actions.

THE DECISION TO PROSECUTE

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

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

THE ADEQUACY OF THE PRESENT SYSTEM

It does not follow that there should invariably be a prosecution wherever there is evidence of an offence. But it is material, for example, whether the system enables those who should be prosecuted to escape prosecution through inefficiency, influence, or corruption. In this connection it is essential that the prosecution system should not only operate impartially, but be seen to do so if it is to command public confidence.

Police prosecutors in New South Wales may only withdraw charges in the following circumstances:

- where an offender has been charged with an offence that cannot be substantiated, but another offence is disclosed, the prosecutor can charge the offender with the other offence and withdraw the original charge when the second charge has been finalised;

- where the charge is a 'back-up' charge and the major charge has been finalised the prosecution may offer no evidence in the minor charge; and

- where the Commissioner has advised the prosecution that he has favourably considered representations for the withdrawal of the charge. (8)

Motivations for withdrawal other than those mentioned could only be considered as sinister, and could leave the prosecution open to accusations of partiality and corruption. (9)

Police are obviously not immune to temptation, but the fact that they dominate in the pre-trial process perhaps furthers the possibilities for temptation. But, who is to say that non-police prosecutors would not be open to the same temptations?

TO WHAT EXTENT DOES THE SYSTEM AVOID THE PROSECUTION OF THE INNOCENT?

Prosecution, even if it leads to acquittal, is a distressing, and may be a damaging experience. Of course, it is not to be supposed that any system could wholly avoid prosecutions of people who have not committed the offence with which they are charged. There may be cogent evidence which points, although mistakenly, to guilt. The accused person may have conduced to his own prosecution by misleading the police or even by making a false statement. Consideration must be given to the safeguards provided by the system for minimising the risk of such prosecution.

The law sets forth a less stringent standard for the police in making an arrest than it does for the court in determining the guilt of the accused. If the case meets the arrest standard but not the standard for conviction, and if the defendant does not plead guilty, he will be freed. It is within my knowledge even after a plea of guilty is entered and the facts then disclosed to the court contain additional information which was not previously known, pointing to the innocence of the defendant, the prosecution takes action for the charge to be withdrawn or seeks leave of the court for no evidence to be offered. 'Reasonable suspicion' exists when the facts and circumstances within the arresting officer's knowledge, and of which he has reasonable trustworthy information, are sufficient in themselves to justify arrest. Probabilities are not technical, they are factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act.

If, after the prosecution case as it stands is not sufficient to convict the defendant, a prima facie case is not established and the case will be dismissed. To convict the defendant the prosecution must be able to present evidence that exceeds the 'probable cause' standard. The prosecutor's burden of proof requires not only that he produce evidence of all the elements of the crime charged. He must also persuade the court beyond a 'reasonable doubt' that the crime was committed, and that the defendant is legally accountable for its commission.

Traditionally, prosecutors are said to have a duty not only to convict the guilty but to protect the innocent when enforcing the rights of the public. (10) In the United States prosecutors are described as 'ministers of justice', or as occupying a quasi-judicial position. (11) In the present context, both concepts can be embraced in more contemporary terminology by describing the prosecutor as an 'administrator of justice'. (12)

The Police Prosecuting Branch, like the police informant, has a large responsibility. It may have to decide whether to bring charges; if so, what charges to bring, whether to recommend withdrawal of charges, or whether other action is appropriate in the interests of justice. Since it has the responsibility for what cases are taken into court, it must avoid the appearance of partiality or conflict of interest. The fact that police are advocates for police in the pre-trial process, it has been said, 'casts a shadow over the integrity of their office'.

There is the question whether, given that a certain body of evidence is available, the prosecution deploys it to the best advantage in court. This raises the question of police advocacy in magistrates' courts.

Although the majority of police prosecutors are not qualified lawyers, the training experience and constant working in the field, and the requirement to read related legal material, provides skill and capacity in the law which is not only adequate and sufficient for the purpose concerned, but is also expert. In many cases they are more skilled and competent performers than might be expected from those who have the benefit of legal training and qualifications. The prosecutors, as police personnel, have a great understanding of police work and are perhaps more aware of the requirements necessary for the presentation of prosecutions in the magistrates court system.

Any suggestion for replacing police prosecutors with non-police could not be properly based on any argument of inefficiency or inadequacy on the part of police prosecutors.

WITHDRAWAL OF CHARGES

There are a number of main reasons for not proceeding with a prosecution, notwithstanding that there is prima facie evidence of guilt, including the following:

(a) obsolete laws, not repealed but out of tune with modern thoughts;

(b) technical breaches of the law;

(c) trivial contraventions, not worth the effort of prosecution;

(d) complexity of the law, where the offender could not reasonably be expected to know that he was committing an offence;

(e) prosecutions which in the past have been discouraged by the courts; with reservations the Offences in Public Places and Prostitution Acts N.S.W. Some magistrates were imposing 50 cent fines. Police still arrested and eventually the law was changed;

(f) vexatious, oppressive and malicious prosecutions;

(g) prosecutions which will attract ridicule or bring the law into contempt;

(h) stale offences, detected after a lapse of years or where unreasonable delay has occurred in bringing a prosecution and the unavailability of witnesses;

(i) prosecutions which will bring harm or suffering to witnesses, especially children, and alternate procedures are available (Child sexual assaults);

(j) prosecutions against the wishes of the injured party; each matter must be dealt with on its merits. Domestic Violence Act. The complainant if he or she apply to a magistrate to be excused. Prosecution can continue depending upon supporting evidence;

(k) where the accused has already suffered enough;

(l) where the mental condition of the accused suggests treatment rather than prosecution;

(m) where the youth or old age of the offender deserves consideration;

(n) where the evidence has been obtained by unfair means;

(o) where a defendant agrees to give evidence for the prosecution and an immunity is granted by the Attorney-General;

(p) where alternatives to prosecution are available - self enforcement penalty notices, mitigated penalties, prohibition notices, seizures, or handing the culprit over to disciplinary authorities.

No doubt many of these reasons would operate on the minds of police when deciding whether or not to invoke an arrest; and are also matters which could properly be considered by the Commissioner of Police and the Police Prosecuting Branch as reasons for withdrawal of charges.

Representations for withdrawal which are made by defendants, their legal representatives, or police are quite common. Upon receiving representations the Commissioner forwards them on to the Police Prosecuting Branch for consideration and recommendation. Immediately a full copy of the brief is called for and examined.

The Prosecuting Branch is of the view that matters should only be withdrawn if the evidence is such that a prima facie case cannot be established, or if there are other compelling reasons for discontinuation. Medical reasons are the most common. Matters which are included in representations as reasons for withdrawal are often said to be matters which should be put in mitigation at court, and are considered not to be sufficient to justify withdrawal.

The attitude of a complainant is usually not a matter to be taken into account when indictable matters are being considered for withdrawal. The evidence of the complainant is given in the magistrates court and depending on the quality of such evidence and supporting witnesses there is a committal for trial or discharge. Representations were recently made by a solicitor on behalf of his client on the basis that the complainant had signed a statutory declaration to the effect that she wished the police not to proceed further with a charge of 'sexual assault'. As she was considered both competent and compellable as a witness, the representations were unsuccessful. A conviction followed.

I am of the opinion that the present system of withdrawing matters is operating in the 'public interest'. All decisions are recorded at the Commissioner's Office, and the police informant is notified of the recommendation and allowed comment. As far as I am aware, no complaint has come from any source as to reasons for withdrawing matters. Magistrates question the prosecutor as to the reason for the application to withdraw and when details are supplied they consent to such application.

It could be said that the Commissioner is not the correct person to make decisions about what matters should not proceed to prosecution. The desire for reform in this area was discussed by His Honour, Mr Justice Lusher, in 1981. (13)

DEVELOPMENTS IN NEW SOUTH WALES

A comprehensive review of the separation of functions question was undertaken by the Lusher Report. (14) Lusher J detailed the usual arguments for and against the involvement of police in the

prosecution of cases, and raised three matters not previously addressed in discussions on this question. First, he noted that the Force organised special education and training programs for police prosecutors. He concluded that such activity was not part of the police function, and that it was not in the public interest for such an informal system of legal education to be conducted. Second, he raised the technical question of whether police as prosecutors was consistent with the Legal Practitioners Act restraints, seeking to prevent practice by unqualified persons. In fact, he found that the prosecutors not only conducted prosecutions in court but also gave legal advice to other police. Third, he considered that it was undesirable to use police at the committal stage of corporate and commercial prosecutions.

The Inquiry proposed a reform consisting of two elements. It acknowledged the continued need for the Force to have ready access to advice on law and procedure and proposed the establishment of an internal legal branch, headed by a lawyer and staffed by lawyers. Most significantly, it recommended the immediate phasing out of the existing Police Prosecuting Branch, and the establishment of a prosecutions department under the control of the Attorney-General and consisting of lawyers. Mr Justice Lusher felt that urgent action should be taken to replace police prosecutors with qualified lawyers in the conduct of committal proceedings, and be extended as soon as possible to all prosecutions.

He also recommended that responsibility for the withdrawal of proceedings should be with the prosecuting department to be established.

There is now established in New South Wales a Legal Advising Section staffed by qualified and semi-qualified police and a qualified public servant. Most of the qualified police are former members of the Prosecuting Branch.

In 1978 in the United Kingdom the Royal Commission on Criminal Procedure (15) took a more cautious view of the desirability of permitting formal review of specific prosecutorial decisions. It accepted the need for greater accountability of prosecutorial discretion. But rather than exposing individual cases to judicial or administrative review, the Commission suggested that the local Crown Prosecutor should be accountable, in an explanatory and co-operative manner to a local supervisory authority, in the same way as the Attorney-General is accountable to the parliament. In the opinion of the Commission, to expose prosecutorial discretion to review in individual cases would give rise to very real dangers.

The Chief Justice, Sir Laurence Street, in the Humphries Inquiry made a similar recommendation after praising the police prosecutor for the manner in which the evidence was presented

against Humphries and the arguments advanced for a committal. Mr Justice Stewart also during his commission of inquiry made similar recommendations. (16)

NEGOTIATED PLEA OR PLEA BARGAINING

Unlike our counterparts in the United States of America, so far as the New South Wales Police Prosecuting Branch is concerned the negotiated plea or plea bargaining system does not exist. Under no circumstances are police prosecutors permitted to take pleas of guilty to lesser offences just to dispose of cases as a matter of expediency.

As previously mentioned, for all offences in which a police officer is the informant a prosecution will ensue, except for those instances where successful representations are made to the Commissioner of Police for withdrawal. The Commissioner has the discretion, on the advice from the Police Prosecuting Branch and in conjunction with the Legal Advisings Section, as to whether the matter will proceed or be withdrawn. Each application is dealt with on its individual merit and circumstances.

THE AMERICAN EXPERIENCE

As Sutherland and Cressy (17) point out:

> ... the prosecutor determines whether a particular case shall be prosecuted. He determines whether a compromise shall be accepted. (Generally a compromise means that the defendant pleads guilty to a lesser offence and receives the lesser penalty called for by that offence.) ... He is generally very influential in regard to the disposition of cases, suggesting to the judge or jury the appropriate penalty.
>
> [The] prosecutor is generally elected and this means subservience to the wishes of the politicians ... Small-county prosecutors work on a part-time basis for low salaries that are supplemented by income from private practice, often involving a conflict of interest. The urban prosecutor must be careful not to antagonise any large organised group, and his record must show a large proportion of convictions in cases which go to trial ... They avoid trials unless they are confident of conviction ... Justice William O. Douglas (18) of the Supreme Court has claimed that the quality of prosecutors has 'markedly declined', and ... the prosecutor has a staff of assistants - as many as 200 in Los Angeles and 150 in Chicago. The assistant prosecutors secure their positions in

many cases because they have been active in political organisations ... Almost fifty years ago the Wickersham Commission criticised the prosecutor system on grounds which are still highly relevant:

> Taking the country as a whole, the features which chiefly operate to make the present-day criminal justice in the States ineffective are: want of adequate system and organisation in the office of the average prosecutor, decentralisation of prosecution whereas law and order have come to be much more than local concern, diffusion of responsibility, the intimate relation of prosecution to politics, and in many jurisdictions no provision for a prosecutor commensurate with the task of prosecution under the conditions of today ... The system of prosecutors elected for short terms, with assistants chosen on the basis of political patronage, with no assured tenure, yet charged with wide undefined powers, is ideally adapted to mis-government. (19)

CONCLUSION

Prosecutorial discretion plays a major role in the decision by a police officer to deprive a person of his liberty or to proceed by summons. If members of the police force were to arrest every time they encountered a situation which called for action on their part, the administration of justice would soon grind to a halt.

In my opinion, police in the field exercise a wider prosecutorial discretion than judges, magistrates, the Director of Public Prosecutions or any other official involved in the criminal justice system.

As I have previously indicated, all persons who appear before magistrates courts in New South Wales are prosecuted. The exception to this is where representations are made by the individual or by a member of the legal profession on their behalf for a number of reasons. Irrespective of who makes the representations, each individual case is dealt with on its merits, bearing in mind the offence alleged. The Commissioner of Police has the final decision as to whether the case will proceed for determination by the court, or leave is sought from the court to offer no evidence. All such representations are documented and

investigated. I am unaware of any complaint from any source criticising this procedure.

Prosecutorial discretion for a member of the police force is an immediate decision without the advantage of Hansard which is available to prosecuting authorities, especially those concerned with the filing of bills or indictments following committal proceedings.

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2. W. La Fave, Arrest: The Decision to Take the Suspect into Custody, Little, Brown & Co., Boston, 1965, p.4.

3. J. Fisk, The Police Officer's Exercise of Discretion to Arrest: Relationship to Organisational Goals and Societal Values, Institute of Government and Public Affairs, University of California, 1974, p.7.

4. M. Singer & R. Francis, 'Police Powers of Arrest', Australian and New Zealand Journal of Criminology, 13, 1980, p.63.

5. A 'misdemeanour' Pickup v. Dental Board (1928) 2 K.B. 459.

6. 'An 'indictable offence' is one which carries the right to trial by jury. See Osborn's Law Dictionary, 1976. The same situation in Victoria led to action by the State Parliament Statute Law Revision Committee, whose report formed the basis of the Crimes (Powers of Arrest) Act, Victoria, 1972.

7. Watson & Purnell, Criminal Law in N.S.W., Vol.1 Indictable Offences, p.350. The Law Book Company Limited.

8. Police Instruction 80.96, Book of Police Rules and Instructions, N.S.W.

9. See R. v. Coe (1969) 1 All E.R. 65 at p.67. The prosecution invited summary jurisdiction for indictable matters. Lord Parker CJ held, the prosecution were not acting in the best interests of society by inviting summary trial.

   R. v. Broad (1979) Criminal Law Review 63 - The prosecution sought leave of the court to offer no evidence, this was refused, the trial proceeded and a conviction recorded. HELD inter alia ... 'the interests of justice were not always necessarily synonymous with the interests of the defendant and for the judge to have sanctioned withdrawal would undoubtedly have led to the injustice that a guilty person would have escaped conviction altogether. A judge's task was to hold the scales of justice impartially between the Crown and the accused ...'

10. American Bar Association Code, E.C. 7-13.

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GRANTING IMMUNITY FROM PROSECUTION

Paul Byrne
Commissioner
Law Reform Commission
New South Wales

Writing in about 1650, Sir Matthew Hale, one of the greatest of English writers on criminal law, used strong language to condemn the plea of approvement, an ancient practice whereby an accomplice who turned Queen's evidence was required to give his evidence under pain of death should it not result in a conviction. (1) The plea of approvement is an ancestor of the modern practice of granting immunity from prosecution to persons who give evidence for the Crown. To resort to language which Hale would not have understood, they are 'supergrasses'. Hale's criticisms were not born of concern for the plight of the unfortunate witness but went to a more general objection. He wrote:

> More mischief hath come to good men ... by false accusations of desperate villains than benefit to the public by the discovery and conviction of real offenders. (2)

In my view, that cautionary note should be kept very firmly in mind. I was pleased, if I might say so with respect, to hear Mr Temby express similar sentiments when he mentioned this subject in the course of his address to this Seminar yesterday. (3)

The practice of granting immunity from prosecution to persons who are apparently guilty of some wrongdoing is in my view an undesirable practice for at least four reasons. I will elaborate upon these later but I should make brief reference to them now. My objections to this practice are based on the fact that it is in my opinion unfair, it is unreliable, it may be used secretly and it is uncertain in its operation. Whilst I regard it as undesirable, I acknowledge that the practice does indeed have legitimate applications.

The rationale for the practice of granting immunity from prosecution is to avoid the consequences of the rule which allows a person to refuse to answer a question on the ground that it may incriminate him, or in other words, allows him to invoke the right to silence.

The impact of these rules is that it will sometimes not be possible for investigators to obtain information which will incriminate another, because the same information incriminates the person being questioned. The operation of the practice put simply is: If you answer questions, we will use your evidence

for one purpose (namely, to prosecute some other person) but not to prosecute you. The arrangement thus reached allows probative evidence, which would otherwise be unavailable, to be put before the court. Whilst that is, in simplistic terms, what is involved, the current practice of granting immunity, or indemnity as it has come to be called, encompasses four or perhaps five different situations. First, at an informal level, the police may effectively grant an immunity to a person who they are satisfied is guilty of some offence. In my experience, this is done by police as part of the general exercise of their discretion as to whether or not a charge will be laid. Second, what is known as a 'use' immunity where the agreement is in effect that incriminating evidence obtained from a witness will not be used against that witness in subsequent proceedings. Third, a 'transactional' immunity which effectively means that no charges will be laid which derive from the circumstances being investigated by the prosecution. This type of immunity has been described by Mr Robert Redlich, formerly Special Prosecutor, as a 'complete absolution for past misdeeds'. (4) He has proposed what might be regarded as a fourth type of immunity, which he describes as a 'use-derivative use' indemnity. You will recall that this type of arrangement was referred to by Mr Temby yesterday. It precludes the prosecution from leading any evidence which has been discovered as a result of the testimony given by the witness but does not prevent a subsequent prosecution of that witness so long as the prosecution is not based on evidence directly or indirectly provided by that witness.

Separate, but closely related, arrangements to be considered are those in which an inducement is offered to an accomplice that he or she may be charged with a lesser offence, or may be liable to a lesser penalty, by virtue of the fact of his or her co-operation with police being regarded as a mitigating factor justifying such reduction.

Each of these five practices effectively involves some sort of arrangement between either the police or a prosecutor and a person who is considered to be guilty of a crime of some kind. The way in which these practices work is probably best illustrated by reference to factual situations which have occurred in specific cases.

THE EXTENT OF THE PRACTICE

The incidence of prosecuting agencies granting formal immunity to accomplices or persons who are themselves liable to criminal sanctions is difficult to determine, since it is a practice which is not made public in every case. In some cases, it is of course quite obvious and no attempt is made to hide the fact of the arrangement.

In the United States, it is said that the practice occurs frequently. In the United Kingdom, no statistics are formally

released but one reply to a questions asked in Parliament suggests that it is unusual. In 1976, it was used on four occasions, and in 1977, six. (5) Interestingly, some of the cases in which immunity has been granted have attracted great public interest.

First, in the trial of several accused arising out of the death of Mr Asia, which involved an exposure of the international drug dealing of Terrence Clark, several of the witnesses for the prosecution were people who were formerly involved in the network of criminal activity associated with that enterprise.

Second, the public identification of Sir Anthony Blunt as the fourth person of the group of Englishmen who had spied for Russia, (4) a group which included Philby, Burgess and McLean, was accompanied by the revelation that he had been granted immunity from prosecution in 1964, and that this decision had been ratified by different Attorneys-General in 1972, 1974 and 1979. There was no attempt to suggest that this was a routine occurrence. The Prime Minister said in the course of a debate in the House of Commons on this issue that 'it is not unusual for the Attorney-General to be asked to authorise immunity from prosecution in return for co-operation in pursuit of inquiries. It happens from time to time in the course of criminal investigations'. (6)

Public awareness of the activity of informers from within a criminal organisation has been heightened by the use in Northern Ireland of 'converted terrorists' as witnesses. Smith (7) quotes from the 1982 Annual Report of the Chief Constable of the Royal Ulster Constabulary which acknowledges that the use of granting immunity from prosecution as a tactic against terrorists is on the increase. According to the report, more than 80 people have been convicted on the strength of the evidence of informers. One person was granted immunity after being involved in the murder of a postmistress - his evidence was given in the trial of 14 members of an outlawed group. (8) Another witness serving a ten-year sentence gave evidence for the prosecution in trials which resulted in the conviction of 35 people. His sentence was remitted, and he was granted immunity for his own part in serious crime. (9)

The practice of granting immunity has been more vividly revealed in the United Kingdom by the recent development of the concept of the 'grasser' or 'supergrass' as he is more commonly described. This underworld term now has a commonly understood meaning after some spectacular trials in the United Kingdom in which large gangs or 'firms' responsible for multiple offences of armed robbery were convicted on the evidence of a former member of the association. Similarly, in Northern Ireland the supergrass has been increasingly relied upon in prosecutions for terrorist activities in that country. The derivation of the term might not be immediately obvious. It has its origins in the rhyming slang of East London where 'one who gives information to police' was known as a 'copper' or in their language a 'grasshopper'.

In Australia, there have been, so far as I am aware, few significant cases where immunity has been granted to a witness in exchange for information or evidence. It appears, however, that we may be following the trend which is emerging overseas. The McKay case appears to have similar ingredients. (10) Mr Temby mentioned this case in this context, but I am not aware of just what has occurred. There is one other important case about which I cannot say very much since it is currently the subject of a judicial inquiry in New South Wales - the Ananda Marga Trial. (11) From the material revealed at that inquiry and published in the press, it seems that the witness Seary, upon whose evidence the Crown case effectively depended, was favourably treated by the police in the sense that he was paid by them to infiltrate the Ananda Marga Sect and gather evidence. Much of the relevant information was not before the jury. The inquiry is not yet complete, but it may be that its findings will shed some light on the practice of granting immunity to police informers, at least so far as New South Wales is concerned.

In that State, one individual was prosecuted recently on several charges of conspiracy to defraud insurance companies, (12) matters which arose indirectly from the investigations carried out in the social security fraud charges which involved members of the Greek community. Four witnesses against the accused were brought from Greece on the understanding that they would not be prosecuted for offences which they had admitted. Whilst the arrangement between the witnesses and the prosecution was in quite specific terms, it was not revealed to the defence or to the court of trial. The existence of the agreements only emerged after these witnesses were cross-examined by counsel for the accused.

In the Greek Conspiracy Case (13) itself, a large number of persons were prosecuted, almost all of them unsuccessfully. The chief witness for the prosecution was a paid informer, that is to say that he was paid by the police to obtain information about the people who were charged and was maintained by the police pending the outcome of the prosecution. In the course of the hearing of the charges, this person's credibility was severely challenged by counsel for the defence and it was only after searching cross-examination that the fact and the nature of his association with the police emerged. His evidence was the subject of adverse comment made by the magistrate.

There is one other practice which falls within this subject which is worthy of consideration. Each of you will have probably seen the standard notice, usually displayed in police stations, which offers a reward for information leading to the solution of an unsolved crime. The offer of a reward is usually accompanied by an offer to accomplices, not primarily or directly responsible for the offence, in terms that they will be granted a pardon in exchange for information. Despite the hundreds of such reward notices that must have been posted over the years, no one to whom I spoke was able to recall a case in which this had in fact been done. Whilst it may seem a potentially large source of the grant

of immunities, in practice it is not.

In commenting on the extent to which the practice of granting immunity is used, Smith concluded:

> Although the practice of granting immunities is too shrouded in secrecy to permit confident judgements to be passed, the conclusions to be drawn at least provisionally is that the practice of granting 'formal immunity' is highly unusual if not wholly exceptional. What has clearly not occurred in this country [United Kingdom] is the wholesale grant of compulsory immunity, given in order to buy testimony, as has happened in the United States. (14)

The same can probably be said of Australia, although there are, like the United Kingdom, no statistics disclosed or information revealed to the public of the use which is made of this practice.

WHO GRANTS IMMUNITY FROM PROSECUTION?

There are five agencies to be considered:

(i) the police;
(ii) the Director of Public Prosecutions;
(iii) the Attorney-General;
(iv) the courts; and
(v) the National Crimes Authority.

The Police

Within the system of prosecution and investigation there are two distinct stages at which a grant of immunity from prosecution might be made. At the investigation stage, the police have a largely unfettered power to make informal 'deals' with people who are in some way implicated in criminal activity. This is particularly so in the case of crimes which are of a carefully organised nature, drug-trafficking, armed robberies and terrorist activities, where the evidence of an accomplice may be crucial in the prosecution of an alleged ringleader or 'crime boss'. It may be difficult to discover the extent of this practice, since criminal intelligence obtained from informers may be of great value in cases in which it is not necessary for the informer to give evidence openly. When it is intended to use the informant as a witness, the practice is at least partly revealed, since it will generally be available to the courts to examine and discover the status of the witness, the nature of any agreement and accordingly to determine the quality of the evidence.

The more formal part of police role in this area is to make applications to the Crown law authorities to grant immunity from prosecution. In New South Wales, almost all such applications considered derive initially from the police.

Director of Public Prosecutions

Mr Temby, when he addressed this Seminar yesterday, made it, I think, clear that the use of this practice should be infrequent. He said, and I quote:

> I acknowledge that in principle it is desirable that the criminal justice system should operate without the need to grant indemnities or pardons to persons who have participated in offences with the view to these persons giving evidence against the principal offenders. This ideal cannot always be achieved and there are some cases where the public interest in breaking a 'conspiracy of silence' about a particular case far outweighs the interest that the public would have in bringing the minor offender before the courts. ... A very cautious approach is necessary in order to ensure that a witness indemnity is not granted in such circumstances that the witness is free from criminal responsibility for an offence as serious as that with respect to which he or she is giving evidence. (15)

I agree with that statement of general principle.

Attorney-General

Once the investigation is complete, the more formal exercise of granting immunity at an executive level is traditionally a matter for the Attorney-General acting on the advice of Crown law officers. It is, again, a practice which is not revealed to the public in every case and is not open to public scrutiny. It will, of course, be obvious in some cases but it would seem that these are limited to cases in which the person granted immunity is both known to the person being prosecuted and is called to give evidence for the prosecution.

In places where the office of Director of Public Prosecutions has been established, (16) the Attorney-General retains the traditional power.

The Courts

In Western Australia (17) and the Australian Capital Territory, (18) the function of granting immunity may also be exercised by a court. This is, however, an exceptional situation - the role of the court in granting immunity is not normally prescribed by statute.

As we shall see, the courts do retain a supervisory jurisdiction in the sense that they retain the right to comment.

Before talking of the National Crime Authority, I should note that the report of the Stewart Royal Commission into drug trafficking appears to suggest that the National Crimes Commission should have the power to grant immunities. This would have been a significant change from the traditional position where such formal powers are the exclusive reserve of the highest levels of the executive government and are not made by agencies essentially investigative in nature.

National Crime Authority Act

Under the Act, (19) the Commonwealth Director of Public Prosecutions is empowered to give a written undertaking that the evidence of a witness before the Authority will not be used against that witness in the prosecution of a Commonwealth offence. This special provision is designed to overcome the general rule under the Act that a witness may refuse to answer questions on the ground of self-incrimination.

Mr Temby expressed his concern about his power in the following way:

> I anticipate that very often the indemnity will be sought as a matter of urgency, and it is no easy thing to see how I can certify as to special grounds existing at a very early stage of an investigation, well before charges have been laid. The matter is one of considerable difficulty, concerning which I have had discussions with members of the Authority, who are aware of my concerns. They are exacerbated by the fact that American experience is that such 'use-derivative use' indemnities tend in practice to amount to trans-actional indemnities. (20)

I would agree with those reservations. Mr Robert Redlich, former Special Prosecutor, in his Annual Report 1983-84, (21) stresses the need to have a power to grant 'immunity and protection' to witnesses, but reinforces Mr Temby's observation that these powers should be exercised with great care. He reaches this conclusion on the basis of his study of 'the American experience'.

I would merely observe that it is misleading to speak in terms of 'immunity and protection' as if they were the same thing. Protection of witnesses from intimidation is obviously desirable and raises none of the problems caused by granting immunity to them.

THE GROUNDS FOR GRANTING IMMUNITY

The grounds upon which immunity from prosecution should be given have not until relatively recent times been the subject of public comment. The Blunt affair (22) gave rise to public disquiet that a person who had confessed to treason, or at least a lesser offence of a serious kind, should apparently be allowed to bargain his way to freedom and avoid the consequences ofhis wrongdoing. If his actions justified a degree of leniency being extended to him, then it would be better that this be done by the courts in open session rather than by a more or less secret administrative arrangement made by an agency which was not fully accountable for its decisions. As a result of questions asked in the House of Commons, the Attorney-General of the day, Sir Michael Havers, explained his current practice in the following terms:

> Immunity from prosecution can only be granted by the Attorney-General or the Director of Public Prosecutions because it is only with them that there lies the power to stop any prosecution. Each application made to either the Director of Public Prosecutions or myself is treated separately on its merits, and it is not possible to set out any comprehensive set of rules.
>
> The criteria which we apply include:
>
> (i) whether in the interests of justice it is of more value to have a suspected person as a witness for the Crown than as a possible defendant;
>
> (ii) whether in the interests of public safety or security the obtaining of information about the extent and nature of criminal activities is of greater importance than the possible conviction of an individual;
>
> (iii) whether it is very unlikely that any information could be obtained without an offer of immunity and whether it is also very unlikely that any prosecution could be launched against a person to whom the immunity is offered.

> True immunities are uncommon because it is now the practice not to go further than an undertaking that any confession obtained as a result [of questioning following a promise of immunity] will not be used against the maker. If other evidence to justify his prosecution becomes available then proceedings may be brought. (23)

To paraphrase what is said immediately above into terms which I have previously referred to, the Attorney-General in the United Kingdom is not in the practice of granting 'transactional' immunities, but is prepared to grant 'use' immunities.

In December 1982, the Acting Attorney-General for the Commonwealth published a short paper (24) designed to establish guidelines for the making of decisions in the prosecution process and the considerations upon which these decisions are made. The following questions were regarded as relevant in determining whether an immunity from prosecution should be granted:

> 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? (25)

In my view the most crucial of the questions to be considered is the likelihood that the evidence to be given by the person concerned will be accepted by the tribunal of fact. The matters of character, record and the offer of an inducement are clearly directed towards that issue, but not spelt out as such.

Since I have referred to that document published in 1982, I would point out that there is nothing in it regarding the obligation of a prosecutor to inform the defence of the existence and nature of any agreement which may exist between the prosecution and a witness whom it proposes to call. In a document which purports

to set out guidelines for the making of decisions in the prosecution process, this is in my view a glaring omission.

CONTROLS OVER THE GRANT OF IMMUNITY

Discussing this topic, I do not wish to traverse the ground which Peter Bayne covered so comprehensively and so skilfully in the paper which he presented yesterday afternoon. (26) Much of what he said about the review by the courts and other agencies of administrative actions would, it seems to me, be applicable to the review of decisions relating to the grant of immunity.

I think however, that it will be instructive to refer to some comments made by the English courts which reflect upon the relationship between the courts and the Director of Public Prosecutions - there are some interesting insights.

Whilst the courts by definition have no direct jurisdiction over matters where a decision has been made not to prosecute, they do of course hear those cases in which witnesses for the prosecution have been granted immunity. This gives the courts the opportunity to exert an indirect influence over the formulation of prosecution policy. 'Guidance' (if not instruction) was offered by the Court of Appeal in B.J. Turner (27) in the following very forthright terms by L.J. Lawton, after the Director of Public Prosecutions (United Kingdom) had given immunity to the first and perhaps the most notorious of the so-called 'supergrasses', Bertie Smalls:

> The spectacle of the Director recording in writing, at the behest of a criminal like Smalls, his undertaking to give immunity from further prosecutions, is one which we find distasteful. Nothing of a similar kind must ever happen again. Undertakings of immunity from prosecution may have to be given in the public interest. They should never be given by the police. The Director should give them most sparingly; and in cases involving grave crimes it would be prudent of him to consult the Law Officers before making any promises. In saying what we have, we should not be taken as doubting the well-established practice of calling accomplices on behalf of the Crown who have been charged in the same indictment as the accused and who have pleaded guilty.

Turner's petition to the House of Lords for leave to appeal was dismissed, but their Lordships did apply something of a corrective. Lord Salmon said:

> What I think is a little disturbing is that if that comment of Lord Justice Lawton was not justified it should be left standing, because it might put considerable inhibition on the Director in future, if exactly similar circumstances arose. (29)

Viscount Dilhorne went further, saying:

> I am wondering to what extent it is right for any court to give directions to the Director as to how he should conduct his business. The Director of Public Prosecutions works under the Attorney-General; he does not work under any judges at all, and any directions he receives as to the way in which he does his work surely must come from the Attorney-General. I would have thought it quite wrong for it to come from any judicial authority at all. He may be condemned for what he has done but he must not be told what he has got to do in the future. (30)

Viscount Dilhorne was, it should be noted, a former Attorney-General.

Whether as a result of these remarks or not, on two later occasions when the matter has arisen, the lower courts have treated the Director's decision to grant immunity with far more deference. In G.E. Turner, (31) where a convicted plaintiff brought an action against the Director complaining of the decision to give a Crown witness at the plaintiff's earlier trial for robbery a written undertaking that he would not be prosecuted, it was held that it is impossible to argue that the Director's decision was unlawful or ultra vires and, there being no allegation of bad faith, the statement of claim was dismissed as vexatious. In arriving at this decision, J. Mars-Jones was influenced by 'the effect on future criminal investigations or proceedings if a witness giving evidence for the prosecution in these circumstances could not rely upon the undertaking of the Director of Public Prosecutions and his co-operation in ensuring that such a witness would be protected against a private prosecution of this kind'. (32) Indeed, the opinion was expressed that it clearly was in the public interest to have prevented a prosecution in a case such as this.

CRITICISMS OF THE PRACTICE

I said earlier that I regarded the practice of granting immunity to persons who were guilty of some wrongdoing as being an undesirable one for four significant reasons. The first of those is that it is essentially unfair. It is realistically open only to the prosecution to engage in such a practice. Where such a powerful weapon is available to only one side, this tends to create an imbalance in the respective strengths of the parties in adversary proceedings. This runs contrary to the general belief that a criminal trial should be a contest between more or less equally placed parties. It has been commented upon by an unidentified author as follows:

> The defendant in a criminal trial may not bribe or threaten a witness in order to obtain testimony favourable to his case. Save through ties of loyalty or clever examination by his cousel, he cannot legally influence the content of a witness' testimony at all. This is as it should be; justice is best served when witnesses testify according to their perception of the truth and not according to the wishes of a party. It is therefore anomalous that, if a potential witness is himself legally vulnerable, the prosecutor is allowed to influence the content of his testimony through promises of favourable treatment, such as a grant of immunity, premised on the witness' 'co-operation'. These promises are permitted on the assumption that they remove obstacles preventing probative evidence from reaching the trier of fact. At the same time, however, they create an incentive for the witness to stretch the truth or even lie so as to appear co-operative and please the prosecutor. (33)

Another factor which is unsavoury about this practice is that it allows wrongdoers to escape punishment. I readily acknowledge that this may be beneficial in the long run, and especially where the relative culpability of the witness and the person charged varies greatly.

There is, however, something unsatisfactory about condoning a practice which enables a wrongdoer to use the fact of his wrongdoing to bargain his way to freedom.

In Turner, (34) the practice of calling Queen's evidence to prove serious crimes was described by Lord Justice Lawton this way: 'It is distasteful, and it has been distasteful for at least 300 years'. (35)

The second general ground of objection to be made to this practice is that it is unreliable. A witness whose evidence is forthcoming only upon a promise of favourable treatment must for that reason alone be of questionable credibility.

General rules have been developed for the reception in court of evidence given by accomplices. These rules apply whether or not the accomplice has been given a promise of, or been given favourable treatment. The mere fact that an accomplice is promised immunity, mitigation of punishment, or other favourable treatment, in consideration of his giving evidence at the trial of another, does not render that witness incompetent to testify for the prosecution. The fact that a witness is an accomplice goes to his credibility, and, whilst his testimony may not be disregarded merely because he is an accomplice, such testimony should be received, and acted on, with caution after being closely scrutinised by the tribunal of fact. (36)

It is because accomplices as witnesses may have a special interest of their own to serve by giving evidence that their testimony is to be weighed with care and accepted with caution. (37)

The motives of an accomplice in giving evidence, and the influence under which his evidence is given should be considered in determining the credibility of his evidence and the weight to be given to it. In most jurisdictions the trial judge is required to instruct the jury that it is dangerous to convict on the uncorroborated evidence of an accomplice, (38) but that they may nevertheless do so if the evidence satisfies them of the guilt of the accused to the requisite standard of proof. Is that sufficient protection?

There appears to me to be a very significant dilemma arising: on the one hand, evidence of a confessional statement which is made by an accused person in response to an inducement of the mildest form held out by a person in authority is inadmissible (39) at least partly because it is, by reason of the inducement, of dubious probative value. (40) On the other hand, evidence given by a witness in response to a very substantial offer of reward, is regarded as admissible.

The third ground of objection is that the process is essentially a secret one. There is no obligation upon the Crown to reveal publicly, or to anybody, the existence of the agreement and, a fortiori, its nature. Little is known about this practice in Australia because there is very little revealed about it. It may be that there is in fact little to be revealed. Overseas practice would appear to imply that this is unlikely.

The report of the Royal Commission into Criminal Procedure in the United Kingdom (the Phillips Commission) identified 'openness' as one important characteristic which should be a feature of a criminal justice system. The manner in which arrangements between the prosecution and witnesses are presently made does not satisfy that particular requirement.

The fourth ground of objection is that the practice of granting immunity is uncertain in its operation. Various problems may be encountered in practice. I would simply point to some of those without suggesting what the answers might be. I leave that open with the observation that the resolution of these issues is by no means simple. First, is the grant of immunity binding upon successive holders of executive office? The Blunt case referred to above would appear to suggest that the original decision to grant immunity made in 1964 was reviewed by subsequent Attorneys-General.

Second, what consequence might flow from the witness' failure to give evidence after a formal immunity has been granted or the promised favourable treatment has already been given? To put it quite bluntly in practical terms, if these men who have seemingly

been given relatively favourable treatment by the courts and the police in anticipation of their giving evidence for the prosecution in the McKay case now simply say that they will co-operate no further, what action might be taken against them?

Third, do rules relating to confessional evidence make 'use' immunity an unnecessary practice? In my view the 'use' immunity, which is sometimes referred to as a 'confessional' immunity, is something of a doubtful necessity. The general law requires that statements of a confessional nature must be made voluntarily (41) before they are admissible against the person who made them. In short, the 'use' immunity is hardly necessary since it would appear likely that the confession which is obtained pursuant to a promise of favourable treatment would not be admissible against the person who made it in any event. On that view, the person apparently granted immunity from prosecution is in fact granted no greater protection than the current law already gives.

A NEW APPROACH

I would like to suggest now at least one area in which reform of the law relating to the granting of immunities can and should be made.

At a minimum, prosecutors should be required to disclose to the defence and to the judge at trial, prior to cross-examination by the defence, and in detail, any favouritism shown or promises of favourable treatment made to prosecution witnesses.

Defence counsel is then placed in the position to decide what approach should be taken to the evidence given. The trial judge will be in a position to exercise, in an informed manner, his discretion to ensure that the proceedings are conducted fairly.

This disclosure may be made by memorandum in writing or by the prosecution eliciting the relevant evidence from the witness in examination in chief. This latter approach may be better from a tactical point of view since it avoids any suggestion being made by the defence, and any inference being drawn by the jury, that the prosecution is trying to conceal an important aspect of the evidence in the case. It is, of course, necessary for a record to be kept by the court of the details of the arrangement made between the witness and the prosecution in order that any review of the proceedings will be made by referring to all the relevant material in the case.

Having mentioned appellate review, I would propose that in all cases in which arrangements have been made between the prosecution and its witnesses for favourable treatment of those witnesses, and where those arrangements have remained undisclosed to the court of trial, the appellate court should be charged with the task of determining whether there is any reasonable likelihood that the undisclosed evidence could have affected the judgement of the jury. In order to make such a determination the

appellate court would need to be satisfied of two things, first, that the disclosure of the information could have affected the credibility of the witness in the estimation of the jury and, second, that the evidence of the witness was significant in the overall prosecution case. In other words, the failure to disclose an arrangement of the kind referred to should result in a conviction being quashed unless the evidence against the accused person was so strong that a conviction would have resulted in any event. (42)

There appears to me to be no good reason for a prosecutor not to disclose any promise of favourable treatment that has been given to a witness whom he proposes to call. If the witness' evidence is unimportant, disclosure will not in any way harm the prosecution case. If the evidence is important, then it would seem crucial, if the jury is to make a legitimate estimation of the weight that evidence carries, that the jury be informed of the relevant circumstances in which that evidence was given. It can be fairly evaluated only when that background is revealed.

The compulsory disclosure of the nature of 'deals' struck between the prosecution and the witness is an essential measure in order to protect the integrity of the criminal justice system and to preserve the right of the accused to have a fair trial.

N O T E S

1. II Hale, Pleas of the Crown, Chapter 29, p.225 referred to in A.T.H. Smith, Immunity from Prosecution [1983], Cambridge Law Journal, 229.

2. II Hale, Pleas of the Crown, p.226.

3. I. Temby, QC, Statutory Discretion and the Directorate of Public Prosecutions, 7 November 1984.

4. Annual Report of the Special Prosecutor 1983-84, R.F. Redlich (AGPS, Canberra), p.52.

5. H.C. Debates, Vol. 945, Col. 15 (1978) noted in Smith at p.315, n.79.

6. H.C. Debates, Vol. 974, Col. 405 (1979) noted in Smith at p.299, n.3.

7. Page 325 at n.18.

8. Ibid, from The Times, 12 April 1983.

9. Ibid, from The Times, 5 August 1983.

10. Prosecutions in Victoria arising from incidents surrounding the disappearance from Griffith, N.S.W. of Mr Donald McKay.

11. Inquiry pursuant to s.475 of the Crimes Act into the convictions of Alister, Anderson and Dunn.

12. I am grateful to Mr J.L. Glissan, Public Defender (N.S.W.) for drawing my attention to this case.

13. Ditto.

14. See note 1. above, at p.311.

15. Taken from paper referred to at note 3. above.

16. Here I refer to Victoria, the Commonwealth D.P.P. and the United Kingdom.

17. 'A National Crimes Commission?', Policy Discussion Paper issued by the Commonwealth Government in June 1983, p.25.

18. Ditto.

19. Section 30, National Crime Authority Act 1984.

20. See above, note 3.

21. See above, note 4.

22. The revelation in 1979 of the spying activities of Sir Anthony Blunt.

23. H.C. Debates, Vol. 12, Col. 12 (1981) cited in Smith at p.302.

24. Prosecution Policy of the Commonwealth, published by the Department of the Attorney-General, December 1982.

25. Id, p.12.

26. P. Bayne, Prosecutorial Discretion and Administrative Law, 7 November 1984.

27. (1975) 61 Cr. App. R. 67. This material is extracted from Smith, p.313.

28. Ibid.

29. Id. p.314, citing unreported speeches made in the House of Lords.

30. Ibid.

31. (1978) 68 Cr. App. R. 70, noted in Smith at p.314.

32. Smith at p.314.

33. (1981) 94 Harvard L.R. 887.

34. (1975) 61 Cr. App. R. 67.

35. Ibid.

36. See generally Halsbury's Laws of England, 4th edn, Vol. 11, para. 457.

37. R. v. Prater [1960] 1 All E.R. 2981 at pp.299-300.

38. Davies v. D.P.P. [1954] A.C. 378.

39. See, for example, s.410 Crimes Act, 1900 (N.S.W.)

40. R. v. Priestley (1966) 50 Cr. App. R. 183.

41. R. v. Prahim [1914] A.C. 599.

42. See, for example, Criminal Appeal Act, 1912 (N.S.W.), s.6.

DISCUSSION

The first question related to whether an undertaking not to prosecute by the prosecution is binding upon the Crown. Mr Byrne said that so far as he was aware that issue had not been tested, but he suggested that the court had an overriding discretion to ensure that there was no abuse of process (refer to Peter Bayne's paper).

One speaker questioned whether the police had power to offer immunities in criminal trials at all. Paul Byrne agreed with this statement but qualified this by pointing out that police did have considerable discretion up to committal proceedings and they did have power to charge people. The immunity granted by the police is an informal process. For example, there may be clear evidence of guilt in relation to a person who could be charged with harbouring an escapee. The police could decline to prosecute (grant informal immunity) in return for that person's co-operation.

Ross Lay, a probation officer, commented on the informal discretion not to report breaches of probation or parole even though there was clear evidence that offences had occurred. For example, probation officers were often involved in taking urine tests from addicts. Sometimes a positive reading was found (a case of self-disclosure on the part of the person concerned) and then there was discretion on how the probation officer should handle this problem.

REFLECTIONS ON NOLLES

Dr John Willis
Senior Lecturer
Department of Legal Studies
La Trobe University
Victoria

INTRODUCTION

Although there is a growing awareness of the central role of prosecutorial discretion in the criminal justice process and a substantial body of literature dealing with various aspects of this discretion, comparatively little attention has been given to one of the most potent discretions available to the prosecution - the decision not to proceed with a charge or, as it is generally known, the nolle prosequi.

A nolle prosequi (or, more briefly, a nolle) is a formal statement by the Crown that it does not intend to proceed with a particular charge. In theory, a nolle with regard to a particular charge merely stays proceedings, which can be recommenced at any time in the future; but in practice the entry of a nolle virtually always means that no further action will be taken. A nolle is thus tantamount to a pre-trial acquittal.

Nolles can be broadly divided into two groups - the first group consists of those cases where nolles are entered on some of the charges arising out of a certain incident or related series of incidents, but other charges relating to the same incident or series of incidents are proceeded with; the second group consists of those cases where nolles are entered on all of the charges arising out of a certain incident or related series of incidents, and the matter never reaches the courts. This first group can be seen as part of what is often regarded as the substance of charge bargaining - the abandonment of certain charges (generally the more serious) in return for a plea to less serious, related charges. While discussion of this group of nolles might be seen, therefore, as better undertaken in the context of charge bargaining generally, it is nevertheless true that the decision to enter a nolle represents one of the more tangible outcomes of the bargaining process and provides a solid base for analysis of some of the important issues of policy and principle that are central to charge bargaining generally.

The second group of nolles - those where no charges are proceeded with - while sharing many of the characteristics of the first group, has features that make it significantly different. This group is the ultimate or, if you like, the extreme example of charge bargaining; here the charges are not merely lessened,

they are eliminated. The practical finality of the result in these cases raises in an acute way a range of very basic questions about such matters as the original police decision to charge, the efficiency of committal hearings and the appropriate criteria for filing presentments or indictments. There are in addition other issues of some moment. The vesting of the power to grant nolles in the Attorney-General of a jurisdiction can raise delicate questions of propriety in cases which have strong political connotations, since in the Australian system Attorneys-General are both members of the government and the chief law officers responsible for prosecutions. The very low level of visibility of most of these decisions and the general lack of information about the area are also matters of some concern. While for many of the decisions where there are strong political connotations, parliament and the media will provide mechanisms of surveillance and accountability, the same is not true of decisions in the more run-of-the-mill cases. Granted that this is an area of considerable sensitivity, it is also true that there is considerable scope for abuse of the power. There are cogent grounds for arguing that this area of prosecutorial discretion should be opened up to more public scrutiny and analysis than has as yet occurred in Australia.

I propose in this paper to outline the nature of the power, the procedure adopted for its use and to set out, and offer some preliminary analysis of, some factual material about the use of nolles in certain Australian jurisdictions. I propose then to discuss some of the more significant issues of policy and principle which are suggested by this material.

THE POWER TO GRANT A NOLLE PROSEQUI

The power to enter a nolle prosequi is part of the broad power exercised at common law by the Attorney-General as the chief legal representative of the Crown. (1) The entry of a nolle with respect to an offence does not constitute a ban to a later indictment for the same offence. In practice, however, the entry of a nolle nearly always means that no further action will be taken with respect to that offence. The power to enter a nolle is not subject to control or review by the courts, (2) the only form of accountability being through parliament. The power applies only to indictable offences which are to be heard in the higher courts. Generally, therefore, it comes into play only after a person has been committed for trial at a committal hearing; however it is also available in those infrequent cases where there is an ex officio indictment. In cases where an indictment has been filed, a nolle can be entered at any time before judgement. While there is a distinction between those cases where the Attorney-General decides not to file an indictment with respect to an offence for which a person has been committed for trial, and those cases where an indictment has been filed and the Attorney-General later decides not to proceed, for

the purposes of this paper both situations will be treated as nolles. It would appear that the great majority of nolles involve cases where the Attorney-General decides not to file an indictment in respect of an offence for which a person has been committed for trial. In some Australian jurisdictions, other officials have been given by statute concurrent authority with the Attorney-General to enter nolles. Thus in Victoria the Director of Public Prosecutions has been given the same power to enter a nolle as the Attorney-General. (3)

THE PROCEDURE FOR ENTERING A NOLLE

The following is a general account of the procedure adopted in jurisdictions where the major responsibility for entering nolles remains with the Attorney-General. After the committal hearing at which a person has been committed for trial, the depositions and exhibits from the committal hearing are forwarded to the prosecution branch of the Law Department where they are reviewed by the officers of that Department, and a brief prepared for a Crown Prosecutor. At this stage, it is common for further information and evidence to be sought from the police informant. If the Crown Prosecutor, who has the power to prefer an indictment, is of the opinion that the charge or charges should not be proceeded with, he prepares an opinion giving a summary of the case and his reasons for recommending that the matter not be proceeded with. The file together with this opinion is reviewed by the Solicitor-General. If the Solicitor-General decides that the case should be prosecuted, he returns the file with a direction that an indictment be preferred. If the Solicitor-General agrees with the Crown Prosecutor's assessment that the case should not be prosecuted, he forwards the file together with his opinion to the Attorney-General for his decision. If the Attorney-General decides not to proceed, the police and the defendant are informed and a defendant in custody is released. In some jurisdictions, formal announcement of the Attorney-General's decision is made in court; in other jurisdictions it would seem that this is not the case.

Disagreements between the Solicitor-General and Crown Prosecutors as to whether a case should be proceeded with do occur, but there is no readily available information about their frequency or the reasons for the disagreements. Likewise, disagreements between Solicitor-General and Attorney-General occur although, it would appear, only rarely. The time spent by the Solicitor-General in examining 'nolle' files is considerable - in New South Wales normally amounting to about a third of the Solicitor-General's workload and on occasions quite a deal more.

In Victoria, where the Director of Public Prosecutions has been given authority to enter nolles, the procedure is basically the same, with the Director of Public Prosecutions making the decision whether or not to proceed after consideration of the file and the Crown Prosecutor's opinion. (4) There is no

intermediary review similar to that carried out by the Solicitor-General. In terms of bureaucratic efficiency (quite apart from political considerations), it is not obvious what benefit is served by having such cases reviewed twice at a very senior level (as occurs, for example, in New South Wales).

SOME FACTUAL DATA

There is not a great deal of data available about the use of nolles in Australian jurisdictions, and much that is available is too general to allow of detailed analysis or reliable interpretation. Nevertheless, the data does provide some information and suggests a range of useful lines of inquiry.

Victoria

Table 1 sets out information on the disposition of cases finalised in the Victorian County Court in the years 1978-1982. The table refers to persons, not to individual charges.

Table 1 : Persons whose cases were finalised in the Victorian County Court 1978-1982 (5)

	Total Persons	Guilty Pleas	Trials	Nolles	Nolles as a % of Total Persons
1978	1290	853	379	58	4.50
1979	1387	936	376	75	5.41
1980	1409	950	390	69	4.90
1981	1339	893	367	79	5.90
1982	1418	927	400	91	6.42
Totals	6843	4559	1912	372	5.44

Although the information available does not specify whether the persons classified as nolles were indicted on other charges relating to the same incident, it would appear that the great majority of persons classified as nolles were in fact completely discharged with regard to the incident from which the original charge or charges arose. It would appear also that in the majority of cases, the major reason for the entry of a nolle was lack of evidence. Table 1 also indicates that the number of nolles has increased over the period, and that the trend has been for a greater percentage of persons to have their case finalised by a nolle. Whether this trend will continue cannot be determined. It would appear, then, that about five per cent of persons whose cases come before the County Court after an initial charge and a committal hearing were granted a nolle, generally because there was insufficient evidence to support the charges.

One special group of nolles in Victoria is worth special mention, namely those entered after an accused has been tried but the jury have failed to reach agreement. It would seem that the use of a nolle in these cases is quite frequent. For the years 1977 and 1979 and for the first six months of 1980, figures are available for Victoria setting out the number of jury disagreements which occurred in these periods and the subsequent action taken to dispose of these cases. For those two and half years, there were 69 persons whose trials in the County Court resulted in jury disagreements, and the Crown granted nolles to 20 of those persons. It may be (although it seems unlikely) that this was a very atypical period, but the number of nolles does seem quite high. (6)

New South Wales

Table 2 sets out the number of persons whose cases were disposed in the Supreme and District Courts of New South Wales for the period 1979-1982.

Table 2 : Persons whose cases were disposed of in the Supreme and District Courts of New South Wales 1979-1982 (7)

	Total Persons	Guilty Pleas	Trials	No-Bill Filed etc	No-Bill filed as a % of Total Persons
1979	3,876	2,989	684	203	5.24
1980	4,182	3,236	697	249	5.95
1981	4,980	3,873	858	249	5.00
1982	5,196	4,051	773	372	7.16
Totals	18,234	14,149	3,012	1,073	5.88

The column heading 'No-Bill Filed etc.' includes the classification 'no-bill filed, nolle prosequi or declined to proceed, and other'; but would seem to consist almost wholly of cases where the Attorney-General decided not to proceed with charges. It would appear also that most decisions not to proceed are based upon lack of evidence and that the majority of such decisions cover all charges on which the accused has been committed for trial. As for Victoria, the percentage of persons whose cases were disposed of by a nolle (or no-bill) was around the five per cent mark for 1979 to 1981. However, 1982 presents a very different picture with the number increasing by almost 50 per cent, and amounting to over seven per cent of the cases

disposed of in the higher courts. This trend has apparently continued at least in 1983 and would seem to be a matter worthy, if not of concern, at least of investigation.

South Australia

Table 3 sets out information on the disposition cases finalised in the South Australian Supreme and District Courts for the calendar years 1980-1982. The information refers to persons, not to individual charges.

Table 3 : Persons whose cases were finalised in the South Australian Supreme and District Courts 1980-1982 (8)

	Total Persons	Guilty Plea/s	Trial/s	Nolles	Nolles as a % of Total Persons
1980	1,597	1,204	336	57	3.57
1981	1,481	1,105	318	58	3.92
1982	1,321	838	366	91	7.03
Total	4,373	3,147	1,020	206	4.71

Of these figures, the 1982 data are the most significant because the nolles represent only cases where the accused was completely discharged. Data provided by the South Australian Office of Crime Statistics for the calendar year 1982 provides two sub-categories of nolle prosequi:

(a) guilty of another offence; and

(b) accused discharged.

For 1982, there were 53 persons who received a nolle on the major offence, but were found guilty of another offence; and 91 persons who received a nolle and were discharged. Thus, in 144 of the 1295 cases finalised in 1982 (or over 11 per cent of cases) a nolle was entered in respect of the major charge, and in 91 of these cases (or just over seven per cent), the accused was discharged.

The information provided by the Office of Crime Statistics provides a breakdown of the cases where nolles represented a complete discharge of the accused. Table 4 sets out for 1982 the class of offences where the accused was cleared of all charges by entry of a nolle.

Table 4 : Offence classification where accused cleared of all charges by entry of nolle (1982)

Offence Type	Total No. of persons charged	Persons cleared of all charges by nolle
Offences against person	239	20
Robbery and extortion	71	1
Sexual offences	135	21
Drug offences	259	8
Fraud and deception	114	9
Break and enter	321	9
Other offences (including larceny and receiving)	182	23
Total	1,321	91

Perhaps, the most significant of these offence groups is 'sexual offences' where the proportion of nolles representing a complete discharge is quite high (over 15 per cent). Of the 'sexual offences' group, 51 were rape, and of those 51, nolles leading to a complete discharge of the accused were entered in 11 cases (over 20 per cent). This seems a very high proportion and may suggest that the special rules in South Australia with regard to the committal hearing of rape charges need some reconsideration. (9)

The foregoing data indicate that nolles play a significant, though not substantial, part in the disposition of cases in the higher courts. The 1982 figures, particularly in New South Wales and South Australia, show a substantial increase in the number of nolles - an increase that is not due simply to the fact that more cases are being processed. It is not possible at this stage to determine whether 1982 was an exceptional year or whether it represents a trend towards increased use of nolles. However, even on the pre-1982 figures, the number of nolles constitutes a phenomenon of sufficient size and importance to merit careful scrutiny.

CRITERIA USED FOR GRANTING NOLLES

It is not possible within the limits of this paper to explore in any detail all or even most of the complex issues of policy and principle that are involved in the discretionary decision to enter a nolle. I propose to look at certain key issues that seem of major importance.

It is important to note at the outset that the decision to enter a nolle is but one facet of the whole area of decision-making with regard to initiating prosecutions and that decisions with regard to nolles will be largely determined by the criteria used in deciding to prosecute. Decisions to grant nolles are the negative side of the positive decision to prosecute.

The United Kingdom Royal Commission on Criminal Procedure (10) adopted for its assessment of the prosecution system the criteria of fairness, openness, accountability and efficiency, and explained those criteria in the following way:

> Is the system fair in the sense that it brings to trial only those against whom there is an adequate and properly prepared case and who it is in the public interest should be prosecuted (that is, tried by a court) rather than dealt with in another way (by cautioning, for example) and secondly in that it does not display arbitrary and inexplicable differences in the way that individual cases or classes of case are treated locally or nationally? Is it open and accountable in the sense that those who make the decisions to prosecute most can be called publicly to explain and justify their policies and actions as far as that is consistent with protecting the interests of suspects and accused? Is it efficient in the sense that it achieves the objectives that are set for it with the minimum use of resources and the minimum delay? (11)

These criteria provide a useful basis for analysing prosecutorial decision-making. The criterion of 'fairness' as defined by the United Kingdom Royal Commission contains three major elements which can be described as:

(a) the adequacy of the case;
(b) public interest considerations; and
(c) consistency in approach.

These elements need some discussion.

As has already been noted, the major reason for the entering of nolles is stated to be lack of sufficient evidence to justify prosecution. But this reason needs further explanation. Does it mean that the relevant decision-maker believes that there is not even a prima facie case, or does it mean that he does not believe that there is 'a reasonable prospect of conviction'? This latter test - 'a reasonable prospect of conviction' - is the criterion adopted by the Director of Public Prosecutions in England and recommended by the United Kingdom Royal Commission on Royal Procedure. (12) It is also the test laid down in the guidelines issued by the former Commonwealth Acting Attorney-General, Mr N. Brown Q.C. and adopted by the present Attorney-General, Senator G. Evans. (13) It would seem, too, that this test is in use in

New South Wales. In Victoria, however, the position is not so clear. Mr J. Phillips Q.C., the Director of Public Prosecutions, in commenting on the 'reasonable prospect of conviction' test, has written:

> For my part, I do not believe that satisfaction that a conviction is more probable than not is appropriate in all cases of the exercise of the discretion to prosecute. There are cases, particularly in the notoriously complex area of white-collar crime, which should clearly go to trial in the public interest, but when no-one in good conscience could say that a conviction is more probable than not. The most one could say is that a conviction is reasonably open on the evidence. These cases have a background where considerable public alarm has been occasioned by persistent suggestions of wrong doing by persons in high places and legitimate public concern would never be allayed in these circumstances if prosecutions did not take place. (14)

This passage would appear to suggest that the normal test is 'reasonable prospect of conviction', but that this test can in certain cases (especially white-collar crime) be overridden by wider public interest considerations. On the available evidence, then the normal evidentiary test in Australian jurisdictions would seem to be that of 'reasonable prospect of conviction'.

Mr Phillips justifies a special approach to cases of white-collar crime on the grounds of 'public interest', which he sees as requiring prosecution even if the best that one can say is that 'conviction is reasonably open on the evidence'. Mr Phillips in spelling out his view of the 'public interest' in these cases has not only advanced the cause of openness in prosecutorial decision-making, but he has also demonstrated the complexity of the notion of 'public interest'. For, it can be strongly argued that prosecutions undertaken with no great hopes of conviction are an unwarranted use of scarce resources of judicial officers, court space and money, subject those accused to unreasonable stress and stigma, and, especially if unsuccessful, can be seen as persecution of the wealthy and respectable. Mr Phillips' confidence that such cases 'should clearly go to trial in the public interest' may well not be shared by all. Nevertheless, the expression of this position is most useful, because it enables some public analysis and discussion of the issue.

The notion of 'public interest' is remarkably vague and open-ended. It includes what Ashworth refers to as 'humanitarian reasons' (15) - the age, youth, or infirmity of the offender; the psychological impact on the offender of his crime (for example, the negligent motorist who kills his only child); the seriousness of the offence, the effect of prosecution on the victim, the victim's or the offender's family (for example, domestic

violence, incest). It can also include assessment of possible consequences of unsuccessful prosecution - for example, an unsuccessful prosecution of a publisher for obscenity may have the unwanted consequence of providing free publicity for the allegedly obscene material and greatly increased sales. Certain offences may be considered obsolete or at least obsolescent; others may be perceived as having little community support. In one Australian jurisdiction, it was apparently unofficial prosecution policy to nolle charges of misprision of felony and of perjury arising from evidence given at court hearings.

The foregoing illustrations of what can be encompassed by the term 'public interest considerations' illustrate both the complexity of the issues and the need for developing some consistent approach towards these matters. The potential for varying and inconsistent decisions in this area is considerable and inconsistency is clearly undesirable. There is much to be said for the production of detailed guidelines setting out the proper approach to these issues. (16) At present there are no written guidelines to assist prosecutors in Victoria or New South Wales. The Commonwealth has produced a set of guidelines which are at least a step in the right direction. There is no doubt that the development of a careful, comprehensive set of guidelines will be a most difficult and demanding task. It is, nevertheless, one that should be undertaken. Not only would it provide direct assistance to prosecutors and those entrusted with the task of making key prosecutorial decisions, it would also provide some measure of publicity and accountability in this area, which in turn could enable amendments and improvements to be made to the guidelines.

IMPLICATIONS OF NOLLES FOR THE CRIMINAL JUSTICE SYSTEM

The existence and frequency of nolles have clear implications for other aspects of the criminal justice system, and in particular for police charging decisions and committal hearings. The great majority of nolles are entered after a person has been charged by the police and committed for trial. If, as appears to be the case, most nolles are entered because of lack of evidence, questions must be asked about the initial decision to charge and the committal hearing.

Nolles and the Police

The fact that a case is nolleed does not necessarily mean that the initial police decision to charge was wrong. Witnesses whose evidence seemed reliable may have performed badly at the committal hearing; further evidence may have come to light since the charge was laid; and the decision to nolle may have been based on grounds other than insufficiency of evidence. Nevertheless, it would appear that in a significant number of cases where a nolle was entered, the initial decision to charge was incorrect.

Such errors cause unnecessary stress to the accused and involve the expenditure of scarce resources of court time and money at committal hearings. They can also lead to undesirable tensions and friction between police and prosecuting authorities. More generally, it seems clear that prosecution policy should as far as possible be uniform throughout any jurisdiction. If, for example, there was what amounted to a prosecution policy of generally not proceeding on certain offences, it would seem desirable that this was communicated to the police. There is a strong case to be made for on-going, regular consultations on these matters between the prosecution branch of the law department, Crown Prosecutors and police.

Nolles and Committals

Committal hearings are generally considered to serve two main functions: first, to act as a filter to remove prosecutions where there is insufficient evidence, and second, to give the accused general notice of the case against him and the opportunity to test that case by cross-examination. (17) It is doubtful whether committal hearings are performing either of these functions with great efficiency. In the first place, the basic legislative criterion for committal, namely, sufficient evidence to warrant the accused being sent for trial, (18) would appear to be lower than the test most commonly applied in determining whether to file an indictment, namely reasonable prospect of a conviction. The structure of prosecution thus creates two tiers of evidentiary adequacy: sufficiency of evidence, and reasonable prospect of conviction. The committal hearing will not remove cases where there is a sufficiency of evidence, but not reasonable prospects of conviction. The distinctions between these tiers of evidence may in many cases be more theoretical than real, but the fact remains that the basic criterion for committal does seem lower than the standard test used for filing an indictment. If cases are to be removed before trial, it is desirable that as far as possible this is done at an open hearing rather than by secret administrative decision. There is a strong case for re-examining the criteria presently established for committal. More basically, it would appear that in too many cases persons are committed for trial for offences when there is very little evidence. The structure of the system with final responsibility for the decision whether or not to file an indictment resting after committal with prosecution authorities must provide a real temptation to magistrates and justices to simply commit and leave the decision to the prosecution. At present, it is not at all clear how much weight is attached by the prosecution authorities to the fact that a person has been committed for trial on certain offences. Prosecution authorities frequently seek further evidence from the informant before determining what, if any, charges are to be prosecuted. The charges on which a person has been committed are often not the charges on which he is indicted. The Commonwealth prosecution guidelines state:

> ... 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 features 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 receive no more than a nominal penalty. (19)

Regardless of whether Commonwealth authorities comply with that guideline, it certainly does not seem an accurate description of prosecutorial practice in various State jurisdictions.

Second, it must be doubted whether committal hearings in many cases are fulfilling their role of providing the accused person with adequate notice of the case against him and giving him an opportunity to test that case by cross-examination. As already noted, prosecution authorities often seek evidence additional to that presented at the committal hearing. Notices of extra witnesses are by no means an uncommon feature of criminal trials. Moreover, the capacity to properly explore and test the prosecution case presented at the committal will generally demand the skills of legal counsel. Jurisdictions where legal aid is not available for most committals make that impossible for the great majority of accused. Moreover, the decisions by Legal Aid authorities to deny aid for most committals, while no doubt representing the problems of insufficient resources, would also seem to indicate that committal hearings are seen as of comparatively minor importance. Mention should be made of the special provisions in South Australia dealing with committals in sexual cases. (20) Under these provisions, it is only in exceptional cases that the alleged victim can be called to give evidence. These provisions substantially limit the capacity of an accused to test the strength of the prosecution case by cross-examination. It may well be that the quite high number of nolles entered with respect to rape charges in South Australia is largely attributable to these provisions.

While the High Court in Barton (21) has affirmed the importance of the committal hearing, it is not at all clear that the actual conduct of committal hearings in many jurisdictions reflects that importance. The committal hearing is too often not filtering out the weak cases and likewise too often not providing the accused with 'full notice, not only of the charge against him but also of the evidence which will be called to support the charge.' (22) These failings are, perhaps, most clearly evidenced by the number

of nolles being entered; but the entry of a nolle is really the tip of the iceberg - the frequency with which charges on which persons have been committed are changed for indictment and the common practice of collecting further evidence after committal would suggest that committal hearings are often treated more as some kind of provisional, interim hearing for the presentation of evidence rather than as a key, public decision-making point in the criminal justice process.

The unsatisfactory performance of committal hearings raises further questions of cost and efficiency. Committal hearings take up valuable court space, occupy judicial officers, court personnel, witnesses and the police (to say nothing of the accused) and cost money. To the extent that they do not fulfil their objectives, the time, money and resources expended are being inefficiently used. The tight budgets allocated to criminal justice demand the best use of scarce resources. It cannot be said that this is presently occurring. There is a clear and pressing need for a thorough reappraisal of the whole committal system.

THE ACCUSED

Many of the issues that have been dealt with have their major impact on the accused. The initial decision to charge a person with a serious offence will impose great stress on an accused, a stress that will be accentuated if he is later committed for trial. It can also have considerable consequences on his family life, his employment and his liberty. The nature of the offence charged can significantly affect the likelihood of his obtaining bail or of obtaining bail on conditions that he can finance. In the Victorian Bail Act 1977, for example, the nature and seriousness of the offence is one of the matters which must be taken into account when a decision as to the granting or refusal of bail is being made. (23) Moreover, for certain serious offences - those involving drugs and those involving offences aggravated by the use or threatened use of offensive weapons - the onus is cast on the accused to show why he should not be remanded in custody. (24) A person charged with and committed for trial on one of these offences who is later indicted for a less serious offence (and one where there is no reverse onus on bail) has real grounds for grievance if he has been remanded in custody for months essentially because of the offence with which he was originally charged. The situation is far worse if having been remanded in custody he is discharged by the entry of a nolle prosequi effectively clearing him of all charges. (25) Such situations do occur and are a blot on a criminal justice system.

CONCLUSION

This paper has not explored whether or not nolles are being entered in the right cases. Indeed, various parts of this paper have operated on the implicit assumption that decisions about nolles are being properly made. But the fact is that we do not know whether this is the case; nor do we know in any detail for most jurisdictions the criteria on which such decisions are made. The nolle prosequi is, as Sallmann and Willis wrote:

> ... a very important power; it is used frequently; it is discretionary, virtually invisible and very few people, even within the legal system are aware of it, and, in particular, of its implications. The scope for misuse is clear; it is an act of faith that the power is used in the public interest ... (26)

Australia, however, is not a very religious country and acts of faith do not come easily. The public interest, an overworked phrase in this area, would be well served by greater public knowledge of the existence and nature of the nolle. Let me conclude by recalling Bentham's comment:

> Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice. (27)

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2. Barton v. R., (1980) 32 ALR 449.

3. Director of Public Prosecutions Act 1982 (Vic.); Crown Advocate Act 1973 (Tas.).

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14. J. Phillips, op. cit., pp.28-29.

15. A. Ashworth, 'Prosecution, Police and Public - A Guide to Good Gatekeeping?' (1984) 23 The Howard Journal, p.65, at p.68.

16. The Australian Law Reform has made similar recommendations. See Australian Law Reform Commission, Sentencing of Federal Offenders Report No.15 Interim, A.G.P.S. 1980, pp.67-71.

17. 'The purpose of committal proceedings is two-fold. Primarily, it vests in the justice hearing the committal proceedings the duty of deciding whether there is sufficient evidence against the accused to put him upon his trial ... It has come to be recognised as the second purpose of committal proceedings that they give to the accused full notice, not only of the charge against him but also of the evidence which will be called to support the charge.' The Criminal Law and Penal Methods Reform Committee (The Mitchell Committee), Court Procedure and Evidence, Third Report, South Australia, 1975, p.71. See also Barton v. R. (1980) 32 ALR 449.

18. For an analysis of criteria for committal, see J. Seymour, 'The Criteria Governing the Decision to Commit for Trial in Australia' (1979) 3 Crim L. J., pp.3-12.

19. Prosecution Policy of the Commonwealth, para. 43, p.18.

20. Justice Act (S.A.) s.106 (6a). For an examination of these provisions see P.A. Sallmann & D. Chappell, Rape Law Reform in South Australia (Adelaide Law Review Research Paper No.3), 1982, Ch.4.

21. Barton v. R. (1980) 32 ALR 449.

22. The Mitchell Committee, op. cit., p.71.

23. s.4(2) and (3).

24. s.4(4).

25. s.357 of the Crimes Act (Vic.) makes provisions for that occurrence.

26. P. Sallmann & J. Willis, Criminal Justice in Australia, Oxford University Press, 1984, p.63.

27. Quoted by Lord Shaw of Dumferline in Scott v. Scott [1913] A.C. 417, at 477.

DISCUSSION

Superintendent John Murray commenced the discussion by saying that it was never intended that police act as judge and jury. Police required no more than a 'reasonable cause to suspect' that a crime had been committed. A decision to prosecute on the other hand required a prima facie case and a reasonable likelihood of success in the judicial process that followed it. There were circumstances on the street where reasonable cause to suspect was the appropriate level of legislative backing. This criterion was less onerous than proof beyond reasonable doubt that a prosecution authority had to apply. A decision not to prosecute was far better than entering a prosecution that was unlikely to succeed.

John Willis inter alia argued that perhaps the committal standard should be higher than it was at present. Perhaps committals should be replaced by a proper pre-trial exercise. In many cases charges were not supported by the evidence. He said that even after reading the record of interview it was often not apparent why the defendant was being charged. If the committals do not filter out such cases, then it was likely to happen at a later stage of proceedings.

John Murray referred to a problem police have in eliciting evidence from witnesses such as young children. He gave an example of a sexual offender who continually sought after younger and younger victims in the knowledge that they would be less likely or capable of providing cogent evidence .In these circumstances the police might be quite justified in arresting him on the grounds of 'reasonable cause to suspect' that an offence had been committed, yet it might not be appropriate to proceed to trial because of evidentiary problems.

Another speaker suggested that the rules of evidence in such cases might be looked at. John Willis' point was simply that while the rules of evidence were as they were it was important that hopeless cases should not be proceeded with.

PROSECUTORIAL DISCRETION AND MENTALLY ABNORMAL OFFENDERS

Dr Susan Hayes
Senior Lecturer
Department of Behavioural Sciences in Medicine
University of Sydney

INTRODUCTION

The process of prosecution has been described as 'secretive ... and poorly documented', (1) whilst at the same time being acknowledged as an extremely important aspect of the criminal justice process. (2) The lack of research and documentation is even more apparent in the area of mental abnormality. There is almost no information available concerning the effect that mental abnormality on the part of the alleged offender has upon the prosecutorial decisions as to whether to file charges, the level of charge (and therefore, whether the case is to be heard summarily or on indictment), and the possibility of diversion out of the criminal justice process. There is no doubt that mental abnormality is taken into consideration. It is generally accepted that:

> [w]hile the primary factor involved is the prosecutor's view of the accused's guilt, consideration is given to other factors, such as whether the accused is intellectually or emotionally impaired. (3)

Some of the influences upon the prosecutorial decision concerning a mentally abnormal offender include (4):

- the availability of an agency prepared to take responsibility for the mentally abnormal person, and to provide appropriate services;
- recognition of the fact that the person has already been dealt with harshly by social, educational, or employment-related institutions - in effect, that the person has not received a 'fair deal' in the past;
- uncertainty on the prosecutor's part as to whether a conviction will be secured, because of possible findings of unfitness to plead, or inadmissibility of evidence (particularly a confession), or the introduction of defences such as insanity or diminished responsibility; and

- the desirability of proceeding with a charge in the hope that appropriate community agencies can thereby be forced to provide services for the mentally abnormal accused. (5)

THE INCIDENCE OF CASES INVOLVING MENTAL ABNORMALITY

A Scottish study (by Moody and Tombs) (6) reported that the average annual figure for cases which are abandoned at some point in the proceedings is eight per cent. Of these, approximately one-sixth are not proceeded with because the case is perceived as a mental health or social work matter, rather than as suitable for prosecution. (7)

In the jurisdiction under study, it would appear that in only a very small percentage of cases is mental abnormality taken into consideration when deciding not to proceed.

The proportion of no pro decisions related to mental abnormality can differ markedly from jurisdiction to jurisdiction, however, one of the important determinants being whether or not accused persons undergo a mental examination prior to appearing in court or early in the proceedings. One Canadian study (8) of 518 people referred by the court for mental examination found that 65 per cent were sent back to court as 'fit', whereas 33 per cent were diverted to hospital under various orders (30 per cent) or had charges withdrawn (three per cent). (Unfortunately, it is not clear from the description of the method of study whether the original sample of 518 included all persons arrested during a given time period, or whether some form of 'criterion' of mental abnormality was operating in the court - it is implied elsewhere in the report of this study that some form of selection by the court was operating.)

It is important to note that in many instances where accused persons are found, upon psychiatric examination, to be suffering from some form of mental illness, the majority are not considered so deranged as to be unfit to stand trial. A series of Canadian studies shows that more than 80 per cent of persons undergoing court-ordered psychiatric examination were found to be fit, although approximately 95 per cent had a diagnosable mental abnormality. (9)

THE IMPLICATIONS FOR MENTALLY ABNORMAL OFFENDERS

From these sometimes confusing and contradictory data emerge a number of issues concerning the exercise of prosecutorial discretion in relation to mentally abnormal offenders:

1. While it is clear that mental abnormality is a factor which plays a part in a no pro decision, the weight accorded to mental abnormality is not clear, or consistent.

2. Since police officers, prosecutors and other court personnel are not trained in the recognition of mental abnormality, in jurisdictions where mental examination prior to trial is not automatic, prosecutorial discretion may be exercised only in cases where the abnormality is of a variety which is easily recognised by lay people - the less 'florid' categories (including persons suffering from mild mental retardation, or depression) may not be readily distinguished.

3. There is not a strong link between the presence of mental abnormality and unfitness to plead. Where prosecutors are making a no pro decision because they feel that a conviction may not be secured (owing to the accused's unfitness, or the possible introduction of the defence of insanity, for example), they may be overestimating both the numbers of accused persons who have a severe mental abnormality, and the degree of mental abnormality itself.

RECOGNISING THE MENTALLY ABNORMAL OFFENDER

Police and Crown law prosecutors are unlikely to recognise signs of mental abnormality in an accused, owing to their lack of training and expertise. The first indication of mental abnormality may come when the accused person's solicitor brings a history of mental illness to the attention of the prosecutor. (10)

This raises the issue of whether or not an accused is prejudiced by not having legal representation. One study found that accused persons without legal representation were more likely to be referred by the court for a psychiatric examination, but that the presence or absence of legal representation had no effect on the decision as to whether the person was sent back to court or diverted to hospital. (11) It would seem, therefore, that whatever the criteria relied upon by the court in suspecting mental abnormality, it is not solely information brought forward by the solicitor. Indeed, the court may tend to overcompensate in ensuring that an unrepresented accused has an opportunity for psychiatric examination. Nevertheless, the combination of lack of legal representation and a guilty plea can place any accused, mentally abnormal or not, at a disadvantage. (12)

The research evidence pertaining to whether or not the nature of the offence implies mental abnormality, and therefore influences a no pro decision, is difficult to unravel. One study indicates that the nature of the offence appears to have little effect upon the court's decision to refer the accused for psychiatric examination; but in presenting the evidence for this statement, the researchers merely indicated that offenders referred for psychiatric examination had allegedly committed a wide variety of crimes including sexual, property, assault and other criminal offences - but failed to provide a comparison with overall rates for each type of crime. (13)

Another study (14) of the type of crime committed by mentally abnormal offenders found that retarded delinquents were often charged with extremely minor offences, such as 'theft of a tree' or 'stole two pigeons'. The researcher reflected upon the degree of commonsense evidenced by the constabulary in pursuing such trivial charges. This finding tends to support the argument that it is not the nature of the offence, but rather the nature of the offender and the other aims (such as social work support) held by police and prosecutors, which determine whether or not the prosecution goes ahead.

Other research findings on the nature of the offence committed by mentally abnormal offenders indicate that as the severity of the crime increases, so the no pro or diversionary options decrease. An early study in the field, conducted in a number of high security prisons in the United States of America found that nearly two out of five of the offenders found to be retarded were sentenced for criminal homicide (not necessarily first-degree murder). (15) A significantly higher proportion of the retarded prisoners in the maximum security prisons had committed homicides and other crimes of violence when compared with the total population of these prisons. Furthermore, retarded prisoners had more previous convictions, and had spent a greater number of years in prison previously, than the non-retarded prisoners.

It is highly unlikely that these figures can be interpreted as meaning that retarded people are more likely to commit violent crimes and homicide than the general population. Indeed, subsequent studies bear out the point that retarded people are not more likely to commit murder and mayhem, but are more likely to be apprehended, to confess, and be found guilty; that they are often viewed as troublesome prisoners, and are unlikely to earn remission or early parole. (16)

More germane to the criteria for exercising prosecutorial discretion is the finding in this same study that whilst a pre-sentence report had been submitted to the court in 40 per cent of cases involving retarded prisoners, fewer than half of the reports referred to the offender's mental impairment, in fewer than 9 per cent was any issue raised as to competency to stand trial, and in none of the cases was expert psychiatric or psychological evidence introduced for the defendant. (17)

When the research evidence is assembled, it would appear that in cases involving mentally abnormal offenders, when prosecutors are exercising their discretion (whether in terms of diverting the person out of the criminal justice process, or deciding not to proceed, or deciding to recommend that the case be dealt with in a higher court (18)) they are doing so in the absence of informed and expert professional advice as to the nature and degree of mental abnormality. Prosecutors are relying upon information provided by the defendant's solicitor, or upon the prosecutor's or the police officer's awareness of the presence of mental abnormality. This is a situation which can be extremely unfair

to defendants who do not have legal representation, or do not have flamboyant or easily recognisable symptoms of mental abnormality.

ENSURING FAIRNESS

The recent United Kingdom Royal Commission on Criminal Procedure (19) stated that two of the criteria for ensuring that the prosecution system is fair should be:

- that it brings to trial only those who it is in the public interest should be prosecuted rather than dealt with in another way; and

- that it does not display arbitrary and inexplicable differences in the way that individual cases or classes of cases are treated.

First, in examining the issue of whether it is in the public interest that mentally abnormal offenders be prosecuted, the answer cannot be an unqualified 'No'. Certainly, in cases where the abnormality is so severe that the individual is incapable of understanding the nature and effect of the alleged crime, or the proceedings against him, prosecution is not in the public interest and diversion out of the criminal justice process is desirable. The diversionary process is not necessarily in either the public interest or the interests of the accused. An individual may suffer from a mental abnormality which had no influence upon the commission of the crime, and he may be in no way unfit to stand trial. It is in the public interest to prosecute such an accused, determine guilt or innocence and, if guilty, sentence appropriately. Otherwise, our mental institutions become simply another branch of corrective services and our system of justice becomes unnecessarily paternalistic towards the 'unfortunate' mentally abnormal accused. In the interests of 'normalisation' of mentally abnormal people, it is necessary that they be allowed to make mistakes and take responsibility for their mistakes, in the same way as other citizens. (20)

It is often in the best interests of a mentally abnormal accused to be prosecuted, because a court-determined sentence will be clear and finite, whereas diversion into a mental hospital or detention at the Governor's pleasure (as a consequence of unfitness to plead, or an insanity verdict) may mean indefinite incarceration with little hope of rehabilitation or release. (21)

The other aspect of fairness of the prosecution system, that is, that there are no arbitrary and inexplicable differences, is clearly not being fulfilled for mentally abnormal offenders. The research evidence, skimpy and erratic as it is, reveals grave inconsistencies and lack of clear criteria.

The present 'system' of prosecutorial discretion is not always fair to the mentally abnormal offenders who are identified, and cannot be fair to those who are not identified.

One solution, an extreme one, would be to remove consideration of mental abnormality from the realm of prosecutorial discretion entirely, and to proceed with prosecution regardless of the accused's mental abnormality. This is an unacceptable solution in a legal system which places great emphasis upon the mental element of a crime. It is also unacceptable on the grounds of humanitarian, ethical, and pragmatic arguments - not the least of which is the further clogging up of our courts with cases which should not be prosecuted.

The other solution - the more acceptable, more humanitarian, and more pragmatic solution - is the fairer exercise of prosecutorial discretion in relation to mentally abnormal offenders. Implementation of this solution would necessitate a number of inputs, not the least of which would be an initial increase in funding for some of the purposes which will be outlined below:

1. Training of Personnel - police officers, police prosecutors, and Crown law prosecutors would require further training in the recognition of various forms of mental abnormality, and skill in administering basic screening tests alerting them to the need for extensive professional assessment.

2. The Weight of Mental Abnormality - in conjunction with expert mental health professionals, a priority would be the development of guidelines for the weight which would be accorded to mental abnormality. The mere presence of a mental abnormality is not in itself sufficient to excuse an accused from taking responsibility for his or her actions. Factors such as time of onset, chronicity, likelihood of cure or improvement, and availability of management programs should be considered.

3. Community Resources - it is unacceptable that the legal system be used as a lever to compel a response from community resources if that is the only reason for proceeding with a prosecution. On the other hand, an accused should not have to run the risk of being sentenced inappropriately to a custodial sentence because of the lack of community resources. Greater funding for a co-ordination of community resources (including Probation and Parole Services) is vital, if appropriate diversionary procedures or sentences are to be available for mentally abnormal offenders.

CONCLUSION

The magnitude of the problem of mentally abnormal offenders is much greater than is currently recognised. Prosecutorial

discretion with regard to this group of offenders is exercised in a manner which is unfair to the offenders who are 'missed', to some who are identified as abnormal, and to those who are sentenced inappropriately. The solution lies in the provision of training programs for prosecution and court-room personnel, and in the provision of appropriate community resources for diversion, sentencing and rehabilitation.

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10. Moody & Tombs, footnote 5, p.65.

11. Arboleda-Florez, footnote 8, p.473.

12. Sallmann & Willis, footnote 2, p.69.

13. Arboleda-Florez, footnote 8, p.473.

14. W.I. Fraser. A Retrospective and Cross-Sectional Investigation of a Deviant Subcultural Group, American Journal of Mental Deficiency, 1970, 75(3), pp.298-303.

15. R.C. Allen. Legal Norms and Practices Affecting the Mentally Deficient, American Journal of Orthopsychiatry, 1968, Vol.38(4), pp.635-642.

16. S.C. Hayes & R. Hayes, Simply Criminal, Law Book Co. Ltd., 1984, p.23ff.

17. Allen, footnote 15, p.641.

18. Moody & Toombs, footnote 5, p.93.

19. The Royal Commission on Criminal Procedure, Report, U.K. 1981, Cmnd 8092, pp.127-8, as quoted in Sallmann & Willis, footnote 2, p.54ff.

20. For definition of the term 'normalisation' and its implications, see S.C. Hayes & R. Hayes, Mental Retardation: Law, Policy and Administration, Law Book Co. Ltd., Sydney, 1982, p.5ff.

21. See Hayes & Hayes, footnote 16, p.120ff, for discussion of length of detention and release from detention of Governor's pleasure detainees.

22. Hayes & Hayes, footnote 16, p.13ff.

DISCUSSION

Dr Susan Hayes commented that the United Kingdom Royal Commission (which inquired into the problem of the mentally disordered offender) came up with the solution that there should be a trial of the facts in unfitness to plead cases. A procedure similar to this was being adopted in New South Wales. This was intended to stop the indefinite incarceration situation where a person could be held in custody for a longer period than that which would have been obtained if that person had been sentenced in the normal course of events.

Susan Hayes stressed that gaol has not been shown to be worse for mentally abnormal offenders than other forms of institutions. Sometimes patients become more disturbed in the hospital setting than in the gaol setting where they mixed with non-retarded and non-abnormal people. One could not assume that gaol was always the worst option.

Susan Hayes pointed to the difficulty of finding suitable facilities for those needing treatment and control (for example, Jabanardi case in the Northern Territory). 'Buck passing' was a common consequence of inadequate resources. Normally, however, the 'buck' ended in corrective services - so probably corrective services ended up with most of the mentally abnormal people who committed offences.

Finally there was a question concerning whether mentally retarded offenders functioned differently from normal offenders. To this Susan Hayes replied that some such offenders may have difficulty in knowing the difference between right and wrong behaviour, but that it was not so much a difference in functioning but rather one of up-bringing, family norms, etc. and chance that made the difference. There was also the problem of generalisation. A mentally retarded offender may know that he or she 'must not take X's brief case', but he or she may not appreciate that it was 'wrong to take Y's brief case as well'. It was essentially a matter of adequate socialisation. She said there was no clear evidence that such persons functioned differently any more than there was evidence that delinquents who committed crimes functioned differently from normal adolescents.

PRE-TRIAL DIVERSION : A MAGISTRATE'S PERSPECTIVE

Terry Syddall M.B.E. LLB (Hons) S.M.
Stipendiary Magistrate
Perth Western Australia

It is now almost four years since a man was helped, almost carried, into the dock at East Perth Court to face me on charges of importation of drugs and of being in possession of drugs with intent to sell or supply to another. Both are indictable offences and could not be dealt with in a court of summary jurisdiction. He had been an addict for many years and had a long criminal history. He bore all the signs usually associated with an addict sliding down a drug-lined slope to an early inevitable death and seemed scarcely to understand the nature of the complaints when I read them to him. He was altogether a pathetic sight.

I sent for Gay Stevens, a former drug addict and counsellor at Cyrenian House, a newly established drug addict centre in Perth to examine him and advise me as to what should be done, at least in the short term, to facilitate his return to normality. I held out little hope but to my surprise Gay, in her direct and somewhat laconic manner, reported that she would be able to fix him. I took a chance and released him on bail in his own recognisance conditional upon his residing at Cyrenian House and submitting himself for such treatment and counselling considered by the staff to be necessary. For the first few weeks he came before me regularly for the renewal of his bail and his transformation was as gratifying as it was astonishing. A short time later I committed him for trial to the District Court and extended his bail to appear in that court some four months in the future. During that period he attended the East Perth Court regularly with other counsellors from Cyrenian House and was actively involved in counselling patients at that Centre.

You will, of course, accept that I was surprised when, one morning, he was brought before me to be dealt with on charges of simple possession of drugs. These were fresh charges which the police had substituted for the indictable offences in respect of which he had previously been committed for trial. His conduct and recovery had greatly influenced the authorities in making this decision. Anyway, he pleaded guilty and I placed him on probation for three years conditional upon his continuing his activities with the counselling of drug addicts and now no one would suspect that he had ever been involved with the criminal law. He is a good citizen and still contributes a great deal of his spare time to rescuing drug addicts from their habit.

At about the same time a girl of 18 with a long history of alcoholism, prostitution and dishonesty, came before me for disorderly conduct or some such offence. I remember her mother weeping bitterly and asking that something be done about her child's problem. The girl spat at her mother and used some colourful gutter language as if to lend emphasis to her disgusting action. I told the girl, after her plea of guilty was entered, that she could choose between Serenity Lodge, (an establishment with an outstandingly high success rate in the treatment of alcoholism and located about 50 kilometres south of Perth) and prison and, in bad grace, she accepted the former. About six weeks later she stopped me in the passage leading to the Court and, although I have a very good memory, as many will attest, I did not recognise her. The evil had left her and in its place an open goodness radiated from her face. She remained at the Lodge for a few more weeks and was then reunited with her family. She is now happily married and a mother; she sent me a photograph of her young son last Christmas.

I remember an old man charged with stealing from parked cars. He was on parole, and had I sent him to prison, he could quite easily have ended his life there. It was clear that he was an alcoholic simply by looking at his face - never mind his record of criminal convictions. The Salvation Army took him away to keep him for three weeks whilst a pre-sentence report was prepared. At the end of that period he was still sick and I postponed sentence for a further three weeks. I spoke to him in chambers on the return date and he was proud to tell me that he had been using his carpentry tools at the Citadel for the first time in years. He is now back with his family. Anyone previously familiar with that man would not now recognise him.

In 1971 whilst serving in the Kimberley I was concerned about the large amount of anti-social behaviour amongst Aboriginal people at Wyndham. With a fine man named Stan Davey I spoke to the Aboriginal community leaders about the matter. They said that much of the trouble stemmed from the fact that Forest River Mission (now known as Umbulgarri) had closed down and, because of that, people had been forced to leave their spirit country for the Wyndham Reserves. Anyone who knows anything about Aboriginal people will understand how devastating it is for traditional people to be moved from their country and whenever that happens anti-social behaviour results. Stan Davey obtained permission from the Anglican Church to use what facilities remained on Forest River for the benefit of those Aborigines who wished to return there. At the time I was experimenting with the use of Aboriginal leaders sitting with me as court advisors and through them those defendants who belonged to Forest River were given the opportunity of returning there or being dealt with by way of fine or imprisonment. Many went back and anti-social behaviour in Wyndham was considerably reduced. I wish I could report that Umbulgarri is now a thriving community, but I cannot. When I last heard, it was under the control of well-intentioned whites who measure success according to European rather than Aboriginal values.

A man charged with stealing a large sum of money came before me and agreed that over a period of a few months he had defrauded his employer of about $25,000. He told me that he was aware of his gambling problem but was unable to control it. Some years ago after having almost gambled away his house, his wife had delivered to him the ultimatum that he either ceased gambling or she would leave. He abstained for a while until he was persuaded to invest in the office Melbourne Cup sweep and that had been sufficient to re-awaken his latent weakness. I sent for a member of Gamblers Anonymous who assured me that the defendant's problem was extremely common, that a considerable number of people were helpless over their gambling impulses, and that the condition was treatable. I placed the defendant on three years probation upon condition that he attended Gamblers Anonymous meetings twice weekly. Reports indicate that he is still doing well and that his domestic situation is better now than it has ever been.

Quite recently, I spent a full day listening to the evidence at a preliminary hearing concerning a man charged with a number of break, enter and steal offences. He had, according to the evidence, broken into places and stolen such items as a can of cool drink or a packet of cigarettes or a small quantity of sweets. He was patently unfit to plead, although the report from the mental health psychiatrists to whom he had been referred averred to the contrary, and he could not, because of his mental state, instruct counsel. Consequently, the procedures for election for summary jurisdiction or for dispensing with preliminary hearings could not be used and he was treated as if he had stood mute. Doubtless when he goes before the District Court a jury will be empanelled to try his sanity. If he is found to be unfit to plead it will be contrary to the view of the experts who believe he is simply mentally handicapped and thus he will be detained in a wholly unsuitable place. If he is found fit to plead, the charade will continue in the form of a criminal trial. Conceivably he will be sent to a prison where, despite the endeavours of the staff, he will be subjected to physical, mental and sexual abuse by other prisoners. If he is found not guilty it will be because of his mental state which we all know about already. I cannot believe all this to be necessary.

Having spent some 15 years as a stipendiary magistrate, I have had the opportunity of seeing many shoplifters come through the system and noticed too that a disproportionately large number of elderly and middle-aged women are represented, almost all of whom are first offenders. Supermarkets are, more often than not, the victims of these thefts. These establishments spend huge amounts persuading people to patronise them and engage psychologists to advise them on packaging and other selling techniques to render goods irresistible to their patrons. Having done this, they complain when a proportion of their wares are stolen by people who are subverted by these advertising and sales practices. Why do we reserve our condemnation for those who, for one reason or another, obey these sales stimulations and impulsively take goods

they cannot pay for, and pander to the complaints of the tempters who categorise all shoplifters as criminals when the truth is that only the minority make a business of stealing.

Domestic violence is something I deal with every day between 8.30 am and 10.30 am when injured parties apply for restraining orders against their partners. Since this legislation was proclaimed in the middle of last year I have dealt with an average of six applications a day - most from terrified and helpless women, the victims of physical and mental savagery. One wonders what the courts can possibly contribute to situations such as these. May I suggest that in most situations of domestic disharmony, the formal judicial system is not simply irrelevant; it is counter-productive.

In recent years there has been a large number of violent and ferocious clashes between Aboriginal families in the urban areas of Western Australia and these disputes are continuing to occur at increasingly frequent intervals. There is no question that these feuds have their bases in traditional pay-back procedures. Imprisonment or fines for Aboriginal people who are convicted of acts done under a perceived compulsion to act in accordance with the dictates of their laws seems to me at least to be of doubtful utility, except perhaps to satisfy the wider Australian public's corporate desire for vengance against a non-conforming minority.

It is not my intention to spend the rest of this paper reminiscing about my daily life as a stipendiary magistrate, although I am sure you could be forgiven for believing that it is. What I have endeavoured to do is to provide you with examples of cases involving socially inadequate people, that is, people who, for one reason or another, seem to be unable to cope with the pressures and stresses of modern life and whose welfare is all-too-often ignored or sacrificed for the benefit of a chaotic mob of gold-greedy gannets whose philosophy of life is egocentric competitiveness and unbridled individualism. Mary Midgley is right when she says:

> ... every age has its bias ... and the bias that distorts our thinking today is an unbridled, exaggerated individualism ... an unrealistic acceptance of competitiveness as central to human nature. People not only are selfish and greedy; they hold psychological and philosophical theories which tell them they ought to be selfish and greedy. (1)

The Renaissance brought remarkable changes to our civilisation. The cultural strings which bound the individual to his family, church, and state, prior to its advent slowly frayed as the philosophy of enlightenment fostered and encouraged people to think and act for themselves. But the fathers of the new learning could never have foreseen the extent to which their germinal

ideas would grow and ultimately smother almost to extinction the caring, social component of human nature which they had always taken for granted. Nor could they have foreseen the wide-spread betrayal of that fundamental obligation to 'love your neighbour as yourself'. Nor could they have foreseen the disastrous effect on humanity of the combination of several centuries of concentration on individual liberties and the supposed endorsement by the Darwinian theory of egocentric competitiveness and the present excesses of commercial free enterprise.

Many benefits have accrued to society by the application of the free enterprise system but the cost in terms of human suffering has not been and is not inconsiderable. I propose now to look at some of the matters which feature regularly in the courts and for which responsibility must in no small part be shared by society at large.

DRUG ABUSE

Some medical practitioners seem to have adopted the chemical companies' motto of 'better living through chemistry' and, in thinking this way, they have helped to develop and condition a population which accepts that it is never necessary to feel despondent, depressed, sad or anxious and that a pill is the only appropriate treatment for such conditions. 'What medication can I use to solve this problem?' is today's slogan and from this it is easy to assume that drugs, legal or illegal, may validly be used hedonistically, to escape from reality, as an aphrodisiac, or simply to free the mind from the constraints of the mundane world.

I am not of course suggesting that the medical profession is wholly responsible for this great stoned age but it must bear some of the responsibility. After leaving medical school most general practitioners receive very little post-graduate instruction on drugs and what information they do receive is from the pedlars - the chemical companies.

> Advertising sells drugs in the same way that it sells anything else. The medical profession is reached by series advertisements which support the numerous publications that make up the specialised medical press. A high proportion of pages will be devoted to advertising copy that is lavish, colourful, slickly produced and very persistent. Most medical publications exist purely on this wealth of advertising revenue; for example, it brings the Journal of the American Medical Association seven million dollars each year ... Doctors also receive sales literature directly from drug companies ... some of it is no doubt very informative, perhaps even helpful, but every piece is designed to sell a particular product ... The

> resources used to produce this mountain of promotional material and the cost of circulating it, are phenomenal ... [In addition] the physician is confronted by the drug company's detailmen, its super sales representatives. Their job is to promote the use of, and to sell ethical drugs and other pharmaceutical products to physicians, dentists, hospitals and retail and wholesale drug establishments ... Dr Dale Console has written:
>
> > The primary purpose of the detailmen is to make a sale, even if it involves irrational prescribing and irrational combinations.

and he has summarised the technique involved as:

> If you can't convince them, confuse them.

Bearing in mind the tremendous pressure under which most general medical practitioners work, it is understandable that sometimes they are less attentive to detail than they ought to be, but bearing in mind the terrible consequences which can result from their negligence, surely it is not too much to ask that the medical profession adopt a more responsible approach to drugs and the community. They, more than any other body, can influence the policies of the governments and the drug companies, and I believe that positive action is urgently needed from them in that regard because it is not the illegal drugs which are the major problem in this society but the minor tranquilisers like Valium and Librium which, incidently, earns Roche (the producers) millions of dollars annually. In the United States last year the total drug sales were $35 billion. If you have any doubts about the depths to which business and government will sink in order to line their pockets, then I suggest you read again the history of the opium war and the American drug experience during the early part of this century.

The two most abused drugs of this present age are Valium and alcohol and, although both are the direct causes of individual and social problems, they retain respectability through clever marketing propaganda.

It may pay for a few moments to examine some of the techniques used by the alcohol industry in advertising their products. In order to determine whether a person has an alcohol dependency problem, the following seven questions are often put by medical practitioners:

1. Do you ever look forward to a drink?
(We have all seen the television advertisement showing the end of a tennis match and the 'I've earned and been looking forward to this beer' message delivered by attractive young people.)

2. Do you drink quickly?
(The stockman having finished mustering downs a can of beer in one go.)

3. Do you use alcohol as a tranquiliser?
(Most advertisements contain this message, including the two I have just mentioned, but the one I have in mind is the advertisement which depicts a sophisticated couple enjoying a Tia Maria in elegant and comfortable surroundings whilst the attributes of the beverage are extolled by a smooth and seductive voice.)

4. Do you use alcohol by yourself or go into hotels or clubs alone?
('Set 'em up Joe' of Sinatra fame is the situation which here comes to mind. It seems to be endorsing the use of alcohol in situations of melancholy. But the advertisement which exploits this idea is the one in which Minder picks a bird up at a bar.)

5. Do you ever use more alcohol than you had intended?
(The advertisement which is put out as a public service is here relevant. It depicts a party where one man has had more than he should have and is told that he ought to stay the night rather than drive. It is an interesting advertisement because it does not discourage excessive drinking, nor driving and drinking, but merely driving under the influence of drink.)

Questions 6. and 7. relate to increased tolerance to alcohol and alcohol amnesia and I am sure that if I thought long and hard enough I could find some direct or indirect reference to one or the other of these criteria in advertising.

What is important, to my mind, is that alcohol producers are prepared not simply to sell their products but also to sew the seeds of addiction in the minds of potential customers by using the very criteria of addiction in their advertisements. But it does not stop there. 'Special Light' (a low-alcohol beer available in the West which looks and tastes like ordinary beer) is sold in milk bars, and I have a great deal of evidence that it is sold to children. Get 'em young and you've got 'em for life! That product is also advertised in conjuncton with driving and children and deliberately sets out to soften the urgent message that drinking and driving is socially unacceptable.

It is pleasing to learn of the Australian Broadcasting Tribunal's proposals to limit alcohol advertising and it is interesting to read and listen to the nonsense churned out by the Advertising Federation of Australia in defence of such advertising. There may be something in their argument that advertising people are not sorcerers who exert their powers on whole communities, but it is clear that they profoundly affect the weakwilled and socially inadequate.

The statutory offence of driving with a blood-alcohol content in excess of 0.08 per cent gives some insight into the attitude of governments towards drinking and driving. 'Drink and drive by all means' they seem to be saying, 'but please drink in moderation'. Is it, however, reasonable in view of our knowledge of the causal connection between the use of alcohol and the road toll that the public should be put at risk by leaving it to the subjective notion of a person who, because of his prior indulgence in alcoholic liquor is, ex-hypothesi, incapable of making a sober rational decision either as to his state of sobriety or his fitness to drive? If they are dinkum about drinking and driving why do governments pass such legislation unless it is to pander to the needs of the liquor industry? You think that is going too far? Then why are hotels in Western Australia required to have huge car parks as a condition precedent to the granting of an hotel licence?

We are all aware of the relationship of alcohol abuse to road deaths and injuries, industrial accidents and loss of production, domestic and other violence, and criminal and anti-social activities, to say nothing of disease, and yet we support the proliferation of alcohol outlets and the easing of restrictions on its use. We rely heavily on the criminal law to try to alter drunken comportment, knowing full well that the criminal law is primarily designed to deal with the proscribed intentional criminal acts and not the acts which emanate from befuddled minds.

ABORIGINES

Save for the people who came out of the Central Desert on 18 October, it would be difficult in 1984 to find Aborigines who have not to some extent become acculturated, because there is little of Australia which has not been visited by the white-man since the advent of Captain Cook. However, a significant number of Aborigines have clung to their tribal ways and rejected the use of English as a tool for survival. These people, therefore, have little or no knowledge of European ways, language, or concepts, and very often breach our laws in total ignorance. Moreover, even if they are aware that their actions will constitute a breach of the general law, they often feel constrained to obey a conflicting customary rule notwithstanding - and one can hardly blame them for that. There has, even in remote communities, been a break-down in social control amongst Aborigines because European contact has resulted in removing from Aboriginal people

many of the controls and sanctions formerly used to restore peace where disputes occurred. It is not just sanctions of death, spearing and physical violence which have been removed but also less dangerous but very effective sanctions are falling into desuetude because of European intolerance. Thus, traditional 'growling' has become 'disorderly conduct' in the eyes of a European police officer if conducted in public, and often results in the least culpable person being arrested and punished. Similarly, potentially volatile situations are nipped in the bud by a boomerang thrown as a warning. To an unenlightened observer this would be an assault. Women have been arrested, charged and convicted for indecency for removing their clothing and placing themselves between combatants to diffuse dangerous and volatile situations; and countless number of men have been charged with obstructing police in the execution of their duty when all they were doing was fulfilling their roles as 'men who take and hold', or policemen. Consider too the confusion in the minds of Europeans and Aborigines in relation to the law of family obligations. Our duty to provide necessaries relates exclusively to people related by consanguinial and affinal ties but this is not necessarily the criterion in Aboriginal law. I have often cited the case of the dole cheque to emphasise something which is at the core of this misunderstanding and frequently causes Aboriginal men to be punished in courts for neglect. Many Aboriginal men in receipt of unemployment benefits honestly believe that no obligation exists in them to support their families with monies received from that source. However, their attitudes change when it is pointed out that cheques received by them are indelibly marked with the names of persons for whose benefit they were drawn in exactly the same way as the Aboriginal law prescribes the method of distribution of a kangaroo carcass - each portion is earmarked according to law to designated kin. Failure to comply with that law is actionable. What is equally important is the education of Europeans in the customs and usages of Aboriginal people. It is important in the extreme that those of us who come into daily contact with Aboriginal people be made fully aware of the implications of the kinship system and of the consequences of status in Aboriginal society.

MENTALLY HANDICAPPED

In Western Australia there are no special formal or informal procedures for dealing with mentally handicapped people nor, so far as I am aware, are there any security facilities for holding handicapped people whose anti-social behaviour warrants their being kept out of circulation. These people pose special problems for those of us who administer the criminal law because usually they are unable either to understand the nature of the charge or to give instructions to counsel. Very often, judicial officers strain and bend the law in order to secure justice for accused persons in individual cases. No one should ever be put in that position, let alone a judge, and it is time that the law was altered to alleviate the situation.

SHOPLIFTERS

I have already given you some indications of my views on what I call the voluntarily-assumed risk of self service store proprietors so far as a large number of shoplifters are concerned. If firms are to be allowed to continue using this method of retailing goods then it must be done responsibly, with the knowledge that their stores are open to children, weak-willed and hungry people as well as crooks, and we ought not, if we believe in justice, lump them all together into one criminal category.

DOMESTIC VIOLENCE

This is a major social problem of contemporary society and I should know because of my personal experience with the restraining order legislation. The majority of women who obtain interim orders because of the violence of their spouses very rarely come back to court to have orders confirmed. Often, it seems, the fact that a woman has been willing and able to obtain a restraining order (which carries a sentence of six months' imprisonment for any breach) is enough to make a violent husband rethink his situation and behave in a less aggressive manner towards her. Marriage guidance, alcohol and community welfare cousellors together with the expertise available at the various women's refuges and advice centres are better equipped than the criminal justice system to cope with domestic problems. Moreover, they are, because of their expertise and flexibility, more efficacious than any court could possibly be in dealing with family difficulties.

GAMBLERS

With regard to gamblers, let me simply quote from the Daily News of Western Australia 23 October 1984:

> When the pressures of his addiction became too great, one compulsive gambler fled his family. Days later, his pre-school child found him hiding under the house. Another was physically ill whenever he did not bet. Such pathetic instances of the desperate circumstances of gamblers are not rare. It has been estimated that one per cent of Western population are compulsive gamblers. In Australia that represents about 100,000 people. And every gambler is thought to affect ten others adversely. In 1979, a British Royal Commission on gambling found that the nation spent nearly $11,000 million on gambling every year. This compared with $8,600 million on defence and $10,000 million on health. It is ironic, therefore, that the compulsive

> gambler puts little if any value on money. Money is central to his addiction, yet for most, as one gambler said, 'It may as well be monopoly money, chicken feed or rabbit dung.'
>
> Governments are aware of the effects of gambling on society and are against it unless, of course, they can have a share in the action. Human greed is exploited by advertising agencies and the gambling industry continues to develop at an alarming rate despite the dreadful social consequences.

I am confident that I have said enough to convince most of you that many people are unjustly brought to trial and these are the social inadequates - the victims of the excesses of commercial free enterprise and unbridled exaggerated individualism. We cannot continue relying on the criminal law as a means of dealing with social problems because, amongst other things:

(a) it punishes in cases where treatment is called for and that is repugnant to the oath taken by all judicial officers 'to do justice to all';

(b) it does nothing to prevent the offender re-offending;

(c) it does little or nothing to help the victim;

(d) it brings the courts into disrepute when the community sees that law - not justice - is being administered;

(e) it tends to inhibit research into the social problems which result in breaches of the law;

(f) it tends to weaken the fabric of society by making the community rely too much on big brother to resolve its problems;

(g) it is wasteful of money and other resources and fills the courts and the prisons unnecessarily; and

(h) prevents potentially good citizens from living full and productive lives.

It is, it seems to me, essential that a proper system of pre-trial diversion be adopted to ameliorate some of the shortcomings in our present criminal justice system and to bring about, thereby, beneficial results to the community at large as well as to the individuals whose conduct has offended the laws of the land.

What is generally understood by the term 'pre-trial diversion' has been well expressed by C.R. Bevan (3):

> ... put simply, the kind of diversion system envisaged for Australia is one in which it would be practicable for a crown or police prosecutor to suspend prosecution, before trial but after charge, in order to consult with some other agency in the community (be it community based or statutory), and undertake an arranged program of counselling, instruction, acquisition of skill, or the payment of restitution or compensation to the victim, to make a final decision about prosecution upon the successful completion of the contract. Failure to complete the 'diversion' arrangement would result in prosecution on the original charge'.

A great deal has been written about pre-trial diversion and I am not, therefore, going to spell out how a system of diversion should operate but there are a few matters I should like to cover.

Public confidence in the administration of any diversion program is essential to its success and, bearing in mind the opportunity such a scheme would present for corruption, neither the police nor any organisation, government or non-government, who could, or could be thought to, benefit from the treatment or counselling of arrestees, should be involved in the selection process. The position of diversion assessor should be reserved for an independent person of integrity, qualified and experienced in the law with an ability to weed out those who are unsuitable for diversion and also those who are being pushed to plead guilty because the case against them is not strong. In my view the ideal assessor would be a judicial officer of long standing. The assessor would have the assistance of probation officers, already experienced in reporting on matters relevant to assessment for diversion and who are (at least in Western Australia) available in all urban and rural areas.

Who should be diverted is a difficult question to answer. I agree completely with George Malinganis (4) when he says that greater emphasis should be placed upon the offender than the offence, but it is not easy to see how a system of pre-trial diversion could work in summary matters using that single criterion of eligibility. Disposal of summary matters would be delayed if a central assessor had to be briefed on the offence, antecedents, character and mental and physical condition of every individual arrested and charged at every police station, and it would not be practicable or desirable to have assessors in every country town. Police prosecutors could not be relied upon to make objective selections, especially in the country where the arresting officer is usually the prosecutor. But even where full-time prosecutors are involved they seem, in my experience, to be unable to exercise any sort of discretion. I have had octogenarians, mentally handicapped and bush Aborigines before me charged with simple offences when clearly they ought not to

have been brought before any court, and whenever enquiries have been made the answer has been 'the court must decide'.

Of course, it would be possible to divert only those charged with indictable offences and to exclude summary matters altogether, but that would be ridiculous because it would delay any chance of treating an individual's disease or problem until he had committed a serious offence. The only feasible way, it seems, is to require by statute that the diversion assessor (or his delegate) be notified immediately of the arrest of any person charged:

(a) who is an alcoholic;

(b) who is a drug addict;

(c) who is a shop lifter;

(d) who is a mental defective;

(e) who is a traditionally-oriented Aboriginal;

(f) who has committed an act of domestic violence;

(g) who is a compulsive gambler; and

(h) is a person who, in the opinion of the prosecutor or the arresting officer, is in need of assessment.

Upon receipt of that information the diversion assessor would cause an investigation to be made into the arrestee's background, habits, mental and physical health, antecedents, family background, criminal history and all other matters considered by the assessor to be relevant. If the arrestee admits his guilt to the assessor and if the assessor is satisfied that the arrestee is a suitable candidate for diversion, then the arrestee should be required to undertake whatever program is fixed by the assessor in accordance with principles contained in the statute. If the arrestee is not diverted or if he fails to fulfil the program set by the assessor then he would be returned to the courts to be dealt with according to law for the original offence. However, the arrestee should not be prejudiced in any trial by any admission or confession made to the assessor during the period of the assessment program.

With regard to indictable offences, the criteria for diversion should be wider because the diversion assessor could without difficulty be afforded the opportunity to examine all cases before they go for trial. In Western Australia, when a person first appears in court charged with an indictable offence he is informed that the hearing will be adjourned to enable the prosecutor to serve copies of the statements of all witnesses who will give evidence against him, together with a copy or description of all documents or exhibits to be used by the prosecution at his trial. These are served at least four days

before the resumption of the hearing. It would be a simple matter to serve a copy on the diversion assessor as well to enable him to determine whether an arrestee is likely to be a suitable candidate for diversion. If he is, diversion proceedings could be commenced, given that the arrestee admits his guilt and agrees to be diverted. Further, an arrestee should have the right to apply to be diverted but his acceptance into the program would be at the discretion of the diversion assessor.

Upon successful completion of the program, the diversion assessors should have the absolute power to order that no further action be taken against an arrestee for the offence in respect of which he was diverted.

Pre-trial diversion could be a useful tool in the treatment and rehabilitation of offenders and, if my experiences with post-trial diversion is any indication, we could expect to receive the full co-operation of the various people and institutions who have helped so well in the past. However, there are always a few people who, for reasons best known to themselves, will overlook breaches by persons in a diversion program, and nothing is more destructive to a program of diversion than the ability of offenders to beat the system and defy the authorities by escaping both treatment and punishment. If pre-trial diversion is to be adopted, all those involved in its implementation must be prepared to function in accordance with prescribed rules, otherwise the scheme would be wide open to abuse and manipulation.

In conclusion, I will adopt the words of Colin Bevan:

> The success of any diversion scheme would be severely jeopardised if it were to be regarded as a panacea, an affliction which has served to damage other useful penal measures attempted in the past. No one measure is suitable for all offenders - no parole, work-release, attendance centres, periodic detention, prison, probation, diversion, or any other. Because of our new understandings of the nature of crime and its causes, it is obvious that the criminal justice system must continue to seek diverse ways of dealing with its offenders. A diversion program is one more way which, if used selectively with intelligence and other careful preparation, could provide a useful means of effectively preventing alienation and recidivism in some offenders, of relieving some of the pressures from courts, prisons, probation authorities and the like, and of encouraging the community to look more keenly at the extent of its direct responsibility for the quality of the criminal justice system it calls its own.

N O T E S

1. J.P. Wiley writing of Mary Midgley, Philosopher, University of Newcastle-upon-Tyne, Smithsonian, February 1982.

2. A. Melville and C. Johnson. 'Cured to Death', New English Library, 1983.

3. Diversionary Programme for Adult Offenders, C.R. Bevan, 1981.

4. Adult Pre-Trial Diversion, George Malinganis, 1982.

DISCUSSION

The question was raised as to how much 'treatment' was in fact punishment. Mr Justice Watson stated that he was shocked at the way treatment authorities have taken over and warned that there was a need for judicial checks in any diversionary scheme. There was then some discussion on the issue of 'consent' to diversion and Mr Syddall pointed out that consent would be an essential feature of diversion programs.

One speaker raised the issue of double jeopardy. What if the person refused to co-operate in the diversion program proposed? Would the magistrate be more harsh? What if the person drops out of the program? It was important not to present diversion as a panacea. It might work in some cases and not in others.

Dr Jacqueline Tombs addressed the concept of a diversion assessor, preferring the independent prosecutor system that existed in Scotland or the Netherlands. In any event much information as to the need to divert offenders would come from police reports and therefore the police would need to be educated as to the possible available options. A new system along the lines proposed would require considerable attention to the whole area of human rights. She spoke of the two models of diversion:

(i) the deferred prosecution model (this raised double jeopardy considerations); and

(ii) a decision simply to drop proceedings under way whether or not the person did complete the suggested program.

Under (ii) most people did complete the program that was set for them - but she said that the pilot diversion program (that has operated in Scotland) was too small a scale and the prosecutors were too busy to allow an adequate evaluation of the scheme. She added that as the bulk of cases were dealt with in courts of summary jurisdiction the real question was 'should we be processing all these cases?' Was the criminal law the appropriate vehicle in the first place? Prosecutors she said should be left to dealing with the more difficult cases.

Similarly David Biles commented that although Mr Syddall had argued that he was angry because many of the problems that came before him were social problems rather than criminal problems, in the early part of his address he gave examples where he handled social problems very well indeed. David Biles said he would prefer to put his trust in Mr Syddall and his colleagues to handle cases such as those because even if mistakes were made, the decisions were reviewable and the decisions were made publicly. He also said that governments would be reluctant to introduce a further tier of public officials (assessors) between the police and the magistrates.

Discussion continued

Reference was made to the South Australian diversion scheme for juveniles. This scheme had been in existence for about two years. A screening panel (consisting of a policeman and a social worker) would receive a copy of the police or prosecution brief and decide whether the matter should go to court or to a children's aid panel. The latter consisted of the same classes of persons but they were also aided by a report from a social worker from the Department of Community Welfare. The powers of this panel were limited to counselling and warning the child and could invite the child and parents to enter into an undertaking to receive counselling for a period of up to six months. Some success of this system was claimed. Juvenile court lists were becoming shorter in South Australia and the rate of recidivism reducing substantially. The system was borrowed from Scotland where (according to Dr Tombs) the system of juvenile diversion was also well.

CONCLUDING SESSIONS

PROSECUTORIAL DISCRETION AND CORPORATE CRIME

Dr John Braithwaite and Mr Brent Fisse led the discussion on crimes by corporations, or more particularly, offences committed on behalf of corporations, such as environmental offences, offences against health and safety regulations, tax offences , trade practice offences and so on. In his brief address, John Braithwaite makes the point, a point already made by previous speakers in relation to the discretions to prosecute generally, that discretion to prosecute in corporate crime areas is necessary because it would be quite impractical to prosecute in all cases. He points out that many regulatory agencies do prosecute - they detect many thousands of cases each week but it would be a fiscal impossibility to proceed against all such detected criminals. On the other hand,he also expresses the view that in many areas of corporate crime, there is insufficient prosecutorial action, that prosecution is a grossly under utilised practice and hence little deterrence is achieved. He argues there should be more prosecution in some areas but equally that excessive prosecution is not called for. Applications of alternatives to prosecution may be even more important. For example, seizing of assets, the factory inspector's power to close down mines unless safety procedures are implemented - these have a greater incapacitative effect than prosecution. Such techniques are likely to be more effective than traditional law enforcement measures.

John Braithwaite expressed concern that Mr Temby's prosecutorial guidelines may lead to a belief that prosecution is the ultimate effective sanction. It may overlook alternative (more effective) strategies. He submitted that client agencies may be in a better position for deciding the most effective means of enforcement than by reliance upon prosecution guidelines issued by the Office of the Director of Public Prosecutions.* Next, he made the salient point that remedies taken by the Departments themselves, such as negotiated compliance, licence suspensions or cancellation, injunction, seizure recall of products, mandated management restructuring or some other sanction, may in many cases be more appropriate than the more conventional criminal justice remedies.

* Dr Braithwaite overlooks the fact that the formulation of guidelines is a matter which is determined after a process of consultation with the various client departments or governmental agencies - hence guidelines would not preclude input on the part of these agencies themselves.

John Braithwaite pointed to the merits of 'inhouse' lawyers to handle their own prosecutions. He stated that most prosecutors are not well equipped to meddle in business regulatory strategies. They are not sufficiently familiar with the workings of particular industries. Lawyers should restrict their roles to making judgements about the quality of the evidence. They should be support staff for substantive policy makers.

Brent Fisse, Reader in Law at the University of Adelaide, discussed the 'slide away' from individual accountability to corporate liability. His revised presentation is presented below.

DISCUSSION SESSION

PROSECUTORIAL DISCRETION AND CORPORATE CRIME

Brent Fisse
Reader
Faculty of Law
University of Adelaide
South Australia

I would like to address an extremely important issue of corporate crime and prosecutorial discretion. The particular issue is the risk of a slide away from individual accountability under our present law given that we have two forms of criminal liability available, namely individual and corporate criminal liability. Because we have these two options available and because the easy route for prosecutors to take is to proceed against corporations primarily perhaps even exclusively, there is a very substantial risk of individual accountability being neglected. In other words, a major worry about corporate criminal liability is that it can be used for a fast and cheap substitute for individual criminal liability thereby severely compromising the value traditionally placed on individual accountability as a means of social control. As Harry Truman said so famously, 'the buck stops here'. The reality in the criminal justice system at the moment is that the buck often stops with merely a corporate payout: the corporation is prosecuted, not individuals, the corporation pays the fine and often that is the end of the matter.

Contrary to what I have just said, it is often claimed by enforcement agencies that their priority is always to proceed against individuals rather than against the corporate entity. However, this seems more a fond hope than an expression of practical truth. There is in fact a stream of cases in which a corporate defendant has been proceeded against either alone or together with merely a small handful of the officers and employees who had participated in the decision-making process leading to the alleged offence. There are few reported statistics on this but corporate crime watcher's pile of newspaper clippings is likely to contain numerous examples. Let me instance a couple of cases.

First, consider the McDonnell Douglas case which came to a head in the early 1980s. McDonnell Douglas was subject to a grand jury investigation in 1973, and eventually the grand jury returned an indictment against McDonnell Douglas and four of its executives on charges of fraud arising out of bribery payments made in relation to a Pakistan Airline deal with DC10s. Ultimately, proceedings were dropped against the four executives in relation to the fraud charges, the trade-off being a plea of

guilty by the company, McDonnell Douglas. McDonnell Douglas copped a fine of $55,000, but the executives got off without any criminal charges proceeding against them for fraud.

Another example, on the Australian scene, is the microwave case in 1975, Hartnell v. Sharp Corporation. You may recollect that Sharp advertised, quite falsely, that its microwave ovens had Australian Standards Association approval. Sharp was proceeded against under the Trade Practices Act for misleading advertising. None of the executives was prosecuted despite the fact that, at least in the opinion of one of the judges at the trial, it was 'a gross and wicked attempt to swindle the Australian public'. No grossly wicked individual swindlers were ever proceeded against and the pattern as far as Trade Practices prosecutions is concerned, has been that very few individuals have been proceeded against.

The cynic might well at this stage agree with this piquant observation of one commentator, John Clark, in his book, The Japanese Company, that 'in the West, decision making is presented as individualistic until adversity proves it collective'. At the same time I think one should be sympathetic to the position of enforcement agencies like the Trade Practices Commission. It is readily understandable why they tend to lean too heavily upon prosecutions against corporate entities. For instance, in the Ford Pinto reckless homicide trial in Indiana, only Ford Motor Company was prosecuted. Why? The prosecutor laid it on the line. He said that Ford Motor Company was 'all that we could handle. To go further and take the next step which may be individuals, would have to be taken by somebody with far more resources than we have'. Mention may also be made of a very dismal headline in the New York Times about the special review committee looking into the allegations of bribery and corruption at McDonnell Douglas. The headline went like this:

McDonnell Douglas: Interviews for one and a half years.

The diehard individualist response to the risk of the slide away from individual criminal liability is simply to abolish corporate criminal liability in the hope of thereby pressurising prosecutors to proceed against individuals. That seems to me to be an absolutely forlorn solution. There is no getting away from the fact that corporate criminal liability has proved to be an expedient means of coping with the massive investigative task of examining accountability for offences committed on behalf of large sprawling enterprises, whether we are talking about BHP, McDonnell Douglas or any other large or mid-sized company.

At least in theory, reliance on corporate criminal liability does make some sense. The theory is that by convicting a corporation and subjecting it to a sanction, now almost invariably a fine, the corporation will respond by conducting a disciplinary enquiry

and hence ultimately individual accountability will be imposed. In practice, of course, a corporate defendant can simply take the easy way out by accepting a relatively light fine and not bother to spend the time and resources necessary to mount an effective disciplinary enquiry.

Another reason why I think it forlorn to suggest that we simply abolish corporate criminal liability is that there are cases (quite a few, one suspects, in practice) where no individual is blameworthy but where the relevant harmdoing or risktaking stems from blameworthy corporate conduct as opposed to blameworthy individual conduct. A very good example of this is the Mt Erebus disaster. There was a communication breakdown at Air New Zealand which led substantially to that disaster. The navigational co-ordinates notified to the crew on the DC10 were not those which had been fed into the DC10's on-board navigational computer. According to the findings of the Royal Commission, the air crew at the relevant time believed it was heading up the middle of McMurdo Sound, whereas in fact it was on track towards Mt Erebus. One finding of the Royal Commission was that the accident had stemmed not from any individually blameworthy action but from 'the incompetent administrative airline procedures which made the mistake possible'. In a case like that, it might be entirely justifiable to prosecute the corporation for manslaughter by gross negligence, whereas to prosecute any individual for that offence would be extremely inappropriate. As it happened, Air New Zealand was never prosecuted for manslaughter. By a quirk of definition, corporations cannot be convicted of unlawful homicide under the New Zealand Crimes Act. It should also be remembered that Air New Zealand is owned entirely by the New Zealand Government.

The solution which is typically put forward is that prosecutorial discretion be relied upon in order to achieve an appropriate balance between individual and corporate criminal liability.

The suggestion of the Canadian Law Reform Commission in 1976 is worth noting here. The Commission conceded that there was a risk of a slide away from individual accountability and it suggested that appropriate prosecutorial guidelines be formulated and published. This is the kind of suggestion made in another context by Ian Temby in his paper.

That proposal seems to me to be rather fatuous. What does it mean unless we know the relevant policy to be adopted and unless we know exactly the precise content of any guidelines that are to be formulated? I am deeply sceptical about the efficacy of prosecutorial discretion in this context. My own guess is that if and when such guidelines are formulated one will find a nostrum such as this:

> Proceedings shall be taken against individuals wherever possible and as a matter of top priority.

That is the kind of prosecutorial direction that has in the past been issued by the United States Justice Department, and by other enforcement agencies in the United States. Yet experience has shown that, in many instances, proceedings are taken primarily against corporations and not primarily against individuals. I am not a believer, I hasten to confess, in the religion of DPPism, but, in the tradition of Ian Temby, that of course does not mean that I express or have any views on the matter.

Given the need then to come up with some satisfactory policy in this area and to make it stick, what shall we do? There are a number of suggestions which I have raised elsewhere and which I do not propose to rehearse here. It seems to me that the most promising approach is what I call Enforced Self-Reaction*. I cannot provide a fully armoured account of this model here but let me attempt to describe some basic features.

Under this approach a corporation against which a violation is proven civilly in the first instance, would be required to prepare a compliance report. A major item in this report would be the disciplinary action taken by the company in response to the proven violation. The aim of this mandatory requirement would be to promote individual accountability by exerting clear and specific pressure on a corporation to activate its internal disciplinary system. In the event of unsatisfactory compliance (as in the event of an unsatisfactory compliance report being returned or no report being made) the criminal law would be invoked at that stage and liability could be imposed on the basis essentially of contempt. Liability could be imposed on the individual executives primarily responsible for the task of ensuring compliance, and where necessary, liability could also be imposed on the corporation itself.

Enforced Self-Reaction is not the same approach as that which has been described here in previous sessions as pre-trial diversion. Let me spell out two of the more important differences.

First, under the model that I have set out, the charges laid at the outset would not be criminal charges: the initial enforcement track would be civil.

Second, the relevant program of remedial or responsive action would not be voluntary as it is under one of the prime models of pre-trial diversion: the corporate defendant would be compelled, essentially by means of an injunctive order, to prepare a compliance report.

As far as practical background is concerned, the approach that I have suggested takes off very much from the experience of the Securities and Exchange Commission in the mid-seventies in the

* An adaptation of John Braithwaite's model of Enforced Self-Regulation.

United States. The S.E.C. was faced with the formidable task of investigating widespread foreign bribery and corruption. Approximately 500 companies were under suspicion and in each of these companies, all of which were large, there were thousands of individual suspects. What did the S.E.C. do? Stanley Sporkin, the head of enforcement there at the time, put it to all of the companies under suspicion that they should fully investigate their bribery payments and prepare compliance reports detailing the internal disciplinary response. The companies went away and conducted their internal disciplinary enquiries and reported back to the S.E.C. It was made clear to them that if they played the game there would not be any criminal prosecution. If they did not play the game, however, the wrath of Stanley Sporkin would descend upon them and the United States Justice Department would almost certainly proceed with prosecutions.

At the end of the day, the general reaction (and certainly Stanley Sporkin's appraisal) was that this campaign had been successful. The vast majority of companies apparently did play the game and all sorts of juicy details were reported. Heads rolled as a matter of internal discipline, as in the case of Gulf Oil where there was a very extensive compliance report prepared by John J. McCoy, former U.S. Ambassador to Britain and a prominent Wall Street lawyer. Some enterprising folk picked up a copy of this compliance report from the U.S. District Court and within a matter of weeks published it as a paperback. It became a best seller largely because of the spicy information contained about the role of various executives in the great foreign bribery scandal.

There are various advantages, potentially at least, of Enforced Self-Reaction. First and foremost, much of the burden of investigation and enforcement conceivably could be transferred to corporate violators rather than left in the hands of the State. At least under the gospel according to Bob Hawke, corporate regulation should be abandoned unless it is cost-efficient and if we apply the canon of efficiency there is obviously much to be said in favour of forcing corporations to investigate their own activities rather than imposing what is obviously a very considerable financial cost upon State enforcement agencies. In Ecospeak, we might say that this is a means of internalising the social cost of investigation.

One further advantage would be to allow judicial control of the balance between the individual and corporate accountability. Prosecutors would no longer be able to use corporate criminal liability as a fast lane for whipping through their case load because a mandatory preliminary factor always to be taken into account would be the adequacy or otherwise of a corporation's internal disciplinary efforts in response to the proven violation.

There are also potential disadvantages. One is the risk of scapegoating. As John Braithwaite has pointed out, the spectre of the vice president responsible for going to gaol is not a figment of the imagination. In John's book, Corporate Crime and the Pharmaceutical Industry, you will find his account of a number of companies which offered this splendid sacrifice to the government, the hope being to avoid action against the company or other officers. This is a worry but my own view is that this problem, along with others - secrecy, cover-up, evasion and so on - is manageable.

The responses of a corporation would obviously need to be scrutinised very carefully, and here we run into a number of difficulties including that of diverting scarce resources from the probation service. What we need, and this is a proposal recently put forward by the American Bar Association, is special judicially-appointed masters, to supervise and to monitor compliance within large organisations. The other thing I would stress is that the model of Enforced Self-Reaction would not work unless it were made very clear to corporations that, if they did not play the game by investigating their activities properly, they will be hit and hit hard by appropriate sanctions. At the moment the sanctions used against corporate entities are usually very weak. Fines are used almost invariably, and often the fines imposed are paltry. We need to consider other possibilities such as adverse publicity, community service, punitive injunctions and other possibilities that are on the drawing boards in certain quarters. That is the type of development that I regard as essential before this approach could be expected to work.

To conclude, if we are serious about the value of individual accountability as a means of controlling corporate crime, I do not see much future in prosecutorial discretion as a means of upholding that value. What I have suggested instead is another possible approach, the approach of Enforced Self-Reaction. This would bring individual accountability within judicial control and thereby help to avoid the real risk of abuse of executive discretion.

DISCUSSION

The chairperson, Ms Jenny David introduced the discussion by referring to an article in which the author claimed that some companies were now exercising a pre-prosecutorial discretion by not reporting crimes. Instead these cases were being dealt with informally by the companies themselves thus keeping them out of the criminal justice system. A question to the speakers related to whether they saw a role for the jury in prosecuting security companies, particularly in environmental cases. Brent Fisse replied that he believed that the main emphasis should be upon civil means of enforcement like the Trade Practices Act, and that juries would be less effective and involve excessive delay and cost considerations. Another speaker asked whether issuing agencies with on the spot fines, such as $10,000 a day for continuing breaches might be a good solution. This would allow the company to go to court if it did not feel that the fine was justified, as in the case of some customs and taxation prosecutions. Brent Fisse replied that subject to appropriate constraints he was generally in favour of that kind of approach.

Ian Temby's Deputy, Peter Clark then addressed the issue of prosecutorial guidelines. He pointed out that if a government department had a particular problem, its administration could approach the Office of the Director of Public Prosecutions and by way of consultation and liaison, a set of guidelines could be prepared to overcome a particularly difficult situation. This approach would be helpful where a particular industry group, or group of politicians was exerting pressure on that department, and the issue of guidelines might assist in solving that particular problem. It was not the object of the Office to tell government agencies how to run their departments and any steps taken would be 'on a consultation and liaison basis'. He further explained that the prosecutor's function was to prosecute offences against particular pieces of legislation, not all legislation. Thus part V of the Trade Practices Act fell within their concern but not other parts of that Act. The Office was only concerned with punitive matters.

Peter Grabosky asked whether by virtue of being a central prosecuting authority it might be possible to thwart the regulatory policies of the client agency? Peter Clark replied that this was not likely to be the case because the Office would not interfere with, but would rather encourage administrative reforms in the client departments. To suggest that prosecution guidelines would solve all such problems was ridiculous. While the prosecuting authority would not interfere with the administrative arrangements of the client department, it might nevertheless refer to changes that might be seen as beneficial in the D.P.P.'s annual report.

OPEN FORUM

Mr Justice Watson chaired the final session of the seminar. He commenced by suggesting that the criminal justice system was increasingly anachronistic, that it was a 'Rolls Royce' system and therefore asked whether it still served the community and whether it was relevant today.

Mariette Read referred to the system in the Netherlands where three judges sat in complicated cases. There was no jury and complicated commercial trials took no more than two days to complete. A two day trial was unusually long. For example, a complicated rape trial would take half a day in the Netherlands. She questioned whether our jury system should be continued.

Mr Justice Watson responded by suggesting that it may not be the fault of juries but the lead up to the trial that was important in cutting down the length of trials.

Mariette Read agreed, but added that the jury system also meant that difficult issues had to be explained to lay audiences and the removal of the jury greatly simplified (and speeded up) the procedure.

Mr Justice Watson then remarked that he doubted whether Australians would be prepared to abandon trial by jury in every case.

Peter Clark pointed out that in Victoria under the County Court and Supreme Court rules there was provision for the appointment of a referee, or umpire or arbitrator. The parties were brought before a judge on a directions hearing. They were obliged to direct their attention to matters requiring expert examination of opinion as to whether a structure had been built properly or not. They were required to appoint somebody who would prepare a report for the trial judge. A set of questions were drawn up (the judge may direct the questions himself) and those questions were then referred to the arbitrator (or whatever title he has) to consider and report back to the trial judge.

Mr Justice Watson said that that procedure seemed to be in the right direction.

Terry Syddall changed the direction of the discussion slightly by observing that in remote areas of Western Australia he had been involved in situations where the group (of Aborigines) assisted in making the decisions and were also involved in the sentencing process. This worked well and was like the 'grand jury' system, and was a constructive meaningful process.

Mr Justice Watson expressed the opinion that if a poll were taken asking Australians if the jury system should be retained for those crimes affecting the ordinary person, particularly offences against the person or against property (in the direct sense)

there would most likely be an overwhelming response in favour of retaining the jury. The ordinary person would see the jury as its protection against arbitrary activity on behalf of government, police and authorities.

Mr Justice Cox added that he was firmly of the belief that the community was very anxious to ensure that justice is publicly administered and further that if they participate as jurors, then this would ensure that justice was administered publicly. This need for public administration of justice also meant that pre-trial 'diversion' had its dangers. (To interpolate further upon what His Honour said, judges and magistrates could just as easily exercise a wide span of alternative dispositions, and unlike pre-trial diversion schemes, the action taken would be done publicly (and the courts would be far more accountable, defendants could appeal, etc.) and this would provide a greater protection to the civil liberties of individual offenders and reduce the likelihood of abuse.)

Jacqueline Tombs then confronted the issue of whether there should be an independent prosecution system. She pointed out where the decision to prosecute lay in the hands of the police that was a different system to one where the primary decision was made by the prosecutor. Most criminal cases were heard in courts of summary jurisdictions. Most offenders plead guilty. In Scotland the approach had been piece-meal dealing with practical problems such as overloading the courts. She emphasised the importance of getting back to matters of principle. She asked 'What do we really see as the function of the criminal courts? What kinds of offences are serious enough to be dealt with by a jury trial? Is it appropriate to use the criminal sanction in areas where other courses might be more efficacious?' These for her were the important issues to be confronted.

Mr Justice Watson then focused the discussion on the issue of pre-trial pleading - 'Does our system of proof beyond reasonable doubt require a system where the accused can sit back and see whether the Crown can prove its case?' he asked. His Honour pointed out that there were problems with requiring every accused to give evidence and suggested that the accused ought to be heard without the risk of cross-examination, to speak without interruption from lawyers. That was a different issue to having him disclose his defence before trial. In the Family Court, the rules of evidence were not binding and he said 'Sometime, usually before cross-examination begins I stop the lawyers and I ask the mother or the father, just tell me in you own words why you think little Jimmy will be better off with you rather than with the other party. What comes out in the next ten or twenty minutes is very fascinating. Lawyers have tried to rehearse them but they cannot really overcome this. Now that is the human being. What are we interested in then; in a criminal trial? in a game of chess? or in the human context, particularly in the human context of the accused and the victim?'

SUMMING UP

Dr Jacqueline Tombs summed up by making the following comments.

She believed that there were virtues in having an independent prosecution system. This she pointed out was the path that Britain was taking and she argued that at the present we may be expecting too much of the police. Their primary task after all was to investigate crime and therefore the decision whether to prosecute might best be left to an independent prosecution service.

She observed that there had been no feeling expressed at the seminar to the effect that prosecutorial discretion was an undesirable feature of criminal justice procedures. There had been no expression by participants favouring some form of compulsory or mandatory system of prosecutions. Thus it could be taken that prosecutorial discretion per se, was not considered to be a bad thing.

Equally, however, she observed that the views that had been expressed indicated that the prosecutor's discretion should be subject to some form of control and also subject to some form of review. There had been various suggestions regarding the most appropriate forms this might take, and in this regard the role of administrative review as discussed in Peter Bayne's paper had provided some interesting possibilities.

She also observed that the provision of guidelines was referred to in several papers. For example, the Attorney-General had committed himself to the development of guidelines for prosecutors. Guidelines of course were no panacea for everything. They would only be of use if they were drawn-up on the basis of knowledge of existing practice.

This led her to a further theme that had been echoed throughout the seminar proceedings - the need for more research, more knowledge about what was happening. She commented that the kind of work being done by Ivan Potas for the Commonwealth was in the right direction. The notion of developing guidelines, not for the sake of having guidelines, but for the purposes of opening up an area which had previously not been the subject of mush discussion or concern. If reforms and changes in the administration of justice were to be made, and made in the public interest, then the public needed to know how the system worked.

Jacqueline Tombs went on to refer to a basic question of principle that arose out of both the formal and informal proceedings of the seminar. This basic question of principle concerned the vast bulk of routine cases. For example, a wide range of minor economic offences could be dealt with in a way that was similar to the way in which the Taxation Department

operated. That is, penalties could be administered before the question of introducing criminal procedures were considered. There may be lessons here. In the result she said, 'It was time to re-think what our whole system of criminal justice was all about'. She said that the criminal courts should surely be reserved for the more serious cases - to illustrate the seriousness of the offences. The credibility of the system depended on not trivialising the criminal justice process. Thus developing alternatives to prosecution not necessarily limited to pre-trial diversionary schemes was important. She argued that perhaps there was more scope for using fixed penalties. Shoplifting, for example, could be dealt with by forms of compounding fines (based of value of goods stolen).

In conclusion, Dr Jacqueline Tombs said she personally had found the seminar very thought provoking as well as informative, and that if other participants had also found it so, then the seminar had achieved what it had set out to do.

APPENDIX I

SEMINAR PROGRAM

AUSTRALIAN INSTITUTE OF CRIMINOLOGY

PROSECUTORIAL DISCRETION
7-9 NOVEMBER 1984

WEDNESDAY 7 NOVEMBER

10.00	Morning Tea
10.30-10.45	Welcome and Introduction Professor R. Harding, Director Australian Institute of Criminology
10.45-11.00	Opening The Honourable Senator Gareth Evans Attorney-General
11.00-12.15	Dr. J. Tombs: Prosecution - In the Public Interest?
12.15- 1.00	I. Potas: Measuring Prosecutorial Discretion
1.00- 2.00	Luncheon (Working)
2.00- 3.30	I. Temby QC: Prosecution Discretions - Director of Public Prosecutions Act 1983
3.30- 3.45	Afternoon Tea
3.45- 4.45	P. Bayne: Prosecutorial Discretion and Administrative Law
4.45- 5.30	Dr S. Egger: Discretion to Prosecute in Respect of Child Victims of Sexual Assault

THURSDAY 8 NOVEMBER

9.30-10.45	R. Read: Prosecutorial Discretion in Victoria
10.45-11.00	Morning Tea
11.00-12.00	J. Glissan: Limitations and Controls on the Exercise by Prosecutors of Their Discretion
12.00- 1.00	Supt. P. Sweeny: The Role of the Police Prosecutor in the Magistrates Court System
1.00- 2.00	Luncheon (Working)
2.00- 3.15	P. Byrne: Granting Immunity from Prosecution
3.15- 3.30	Afternoon Tea
3.30- 5.00	J. Willis: Reflections on Nolles

FRIDAY 9 NOVEMBER

9.30-10.30	Dr S. Hayes: Prosecutorial Discretion and Mentally Abnormal Offenders
10.30-10.45	Morning Tea
10.45-12.15	T. Syddall SM: Pre-Trial Diversion: A Magistrate's Perspective
12.15- 1.15	Discussion introduced by B. Fisse and J. Braithwaite: Prosecutorial Discretion and Corporate Crime
1.15- 2.00	Luncheon (Working)
2.00- 3.00	Open Forum
3.00- 3.30	Summing Up by Dr J. Tombs
4.00	Bus leaves for Airport

APPENDIX II

PARTICIPANTS LIST

AUSTRALIAN INSTITUTE OF CRIMINOLOGY

PROSECUTORIAL DISCRETION

7-9 November 1984

PARTICIPANTS

Mrs Maria Barbayannis	Senior Tutor Faculty of Law Monash University Wellington Road CLAYTON VIC. 3168
Mr Peter Bayne	Senior Lecturer in Law Faculty of Law Australian National University CANBERRA A.C.T. 2601
Mr Col Bevan	Assistant Director (Training) Australian Institute of Criminology P.O. Box 28 WODEN A.C.T. 2606
Mr David Biles	Deputy Director Australian Institute of Criminology P.O. Box 28 WODEN A.C.T. 2606
Ms Greta Bird	Senior Tutor Faculty of Law Monash University Wellington Road CLAYTON VIC. 3168
Inspector Louis Brain	Officer in Charge Prosecution Section Police Headquarters LAUNCESTON TAS. 7250
Dr John Braithwaite	Senior Research Fellow Department of Sociology Research School of Social Sciences Australian National University G.P.O. Box 4 CANBERRA CITY A.C.T. 2601
Mr Alan Brush	Regional Director (Metro North) Department of Corrective Services Probation and Parole Suite 202, 2nd Floor 3 Kildaire Road BLACKTOWN N.S.W. 2148

Mr Paul Byrne	Commissioner Law Reform Commission of N.S.W. Goodsell Building 8-12 Chifley Square SYDNEY N.S.W. 2000
Mr Ronald Cahill	Stipendiary Magistrate Magistrate's Chambers Law Courts Knowles Place CANBERRA CITY A.C.T. 2601
Mr Ian Campbell	Senior Lecturer Law School Queensland Institute of Technology George Street BRISBANE QLD 4001
Mr Anthony Cavit	Crown Prosecutor for Northern Territory Department of Law Wells Building Mitchell Street DARWIN N.T. 5790
Ms Janet Chan	Law Reform Officer Australian Law Reform Commission P.O. Box 3708 SYDNEY N.S.W. 2001
Mr Ted Clancy	Senior Assistant Director Office of the Director of Public Prosecutions Hinkler Building Kings Avenue BARTON A.C.T. 2601
Mr Peter Clark	Senior Deputy Director of Public Prosecution Office of the Director of Public Prosecutions Hinkler Building Kings Avenue BARTON A.C.T. 2601
The Hon. Mr Justice William Cox	Judge - Supreme Court of Tasmania Judges Chambers Salamanca Place HOBART TAS. 7000
Ms Jennifer David	Lecturer Faculty of Law University of Sydney 173 Phillip Street SYDNEY N.S.W. 2000

Mr James Derrick	Regional Director Metropolitan South Regional Office Probation and Parole Service 12-14 Ormande Parade HURSTVILLE N.S.W. 2220
Dr Sandra Egger	Deputy Director N.S.W. Bureau of Crime Statistics and Research P.O. Box 6 (G.P.O.) SYDNEY N.S.W. 2000
The Hon. Senator Gareth Evans	The Attorney-General Robert Garran Offices Crn. National Circuit & Kings Avenue BARTON A.C.T. 2600
Mr Brent Fisse	Reader Faculty of Law University of Adelaide North Terrace ADELAIDE S.A. 5000
Ms Barbara Fraser	Investigative Officer Office of the Ombudsman 14/175 Pitt Street SYDNEY N.S.W. 2000
Ms Susan Gibb	Principal Research Officer High Court P.O. Box E435 Queen Victoria Terrace CANBERRA A.C.T. 2600
Mr Kelvin Glare	Assistant Commissioner of Police 380 William Street MELBOURNE VIC. 3000
Mr James Glissan	Public Defender Selborne Chambers 3/174 Phillip Street SYDNEY N.S.W. 2000
Mr Matthew Goode	Senior Lecturer Faculty of Law University of Adelaide North Terrace ADELAIDE S.A. 5000
Mr Geoff Gray	Principal Legal Officer Office of Director of Public Prosecutions Hinkler Building Kings Avenue BARTON A.C.T. 2601

Professor Richard Harding	Director Australian Institute of Criminology P.O. Box 28 WODEN A.C.T. 2606
Dr Susan Hayes	Senior Lecturer Department of Behavioural Sciences in Medicine University of Sydney SYDNEY N.S.W. 2006
Ms Kayleen Hazlehurst	Senior Research Officer Australian Institute of Criminology P.O. Box 28 WODEN A.C.T. 2606
Mr Peter Hennessy	Senior Law Reform Officer Australian Law Reform Commission G.P.O. Box 3708 SYDNEY N.S.W. 2000
Ms Fran Hill	Management Assistant Probation and Parole Department of Corrective Services Level 15 Roden Cutler House 24 Campbell Street SYDNEY N.S.W. 2000
Mr Alastair Hope	Senior Crown Counsel Crown Law Office Law Department 39 Murray Street HOBART TAS. 7000
Mr Roderick Howie	Director Criminal Law Review Division Department of Attorney-General Level 19 Goodsell Building Chifley Square SYDNEY N.S.W. 2000
Sgt. Bo Janic	Policy Sergeant South Australian Police Department 202 Greenhill Road EASTWOOD S.A. 5063
Mr Graham Kenny	Lecturer/Barrister Department of Law University of Queensland ST LUCIA QLD 4067

Mr Ross Lay	Officer in Charge Probation and Parole P.O. Box 1013 TAMWORTH N.S.W. 2340
Mr Dave Lewis	Assistant Commissioner Enforcement Co-ordination Australian Taxation Office Langton Street PARKES A.C.T. 2620
Mr Peter Loof	Chairman Board of Management Justice Division Attorney-General's Department Robert Garran Offices National Circuit BARTON A.C.T. 2600
Snr. Sgt. Brian Loomes	Police Prosecutor Police Prosecution Branch N.S.W. Police Department G.P.O. Box 45 SYDNEY N.S.W. 2001
Mr Donald McDonald	Assistant Commissioner of Police Police Headquarters Makerston Street BRISBANE QLD 4000
Mr George Masterman	Ombudsman 14/175 Pitt Street SYDNEY N.S.W. 2000
Mr Dolf Matthews	Prosecutor Office of the Director of Public Prosecutions Law Society Building CANBERRA A.C.T. 2601
Ms Jane Mugford	Senior Training Officer Australian Institute of Criminology P.O. Box 28 WODEN A.C.T. 2606
Supt. John Murray	Prosecution Services South Australian Police Department G.P.O. Box 1539 ADELAIDE S.A. 5000

Ms Christine Nash	Barrister 39 Martin Place SYDNEY N.S.W. 2000
Ms Margaret Oates	Executive Officer Australian Taxation Office Langton Street PARKES A.C.T. 2620
Mr Justin O'Halloran	Crown Solicitor's Office Australian Government Solicitor's Office 99 Gawler Place ADELAIDE S.A. 5001
Mr Herbert Palmer	Public Defender for the A.C.T. Legal Aid Office Acton House ACTON A.C.T. 2601
Mr Ivan Potas	Criminologist Australian Institute of Criminology P.O. Box 28 WODEN A.C.T. 2606
Ms Margaret Quirk	Legal Officer Office of the Director of Public Prosecutions Hinkler Building Kings Avenue BARTON A.C.T. 2601
Mrs Mariette Read	Research Officer Law Reform Commission of Victoria 7th Floor 160 Queen Street MELBOURNE VIC. 3000
Mr Richard Read	Prosecutor for the Queen Prosecutors Chambers 271 William Street MELBOURNE VIC. 3000
Mr Mark Richardson	Research Director Law Reform Commission of N.S.W. Goodsell Building 8-12 Chifley Square SYDNEY N.S.W. 2000
Ms Zelma Rudstein	Legal Officer Office of the Director of Public Prosecutions - Melbourne G.P.O. Box 21A MELBOURNE VIC. 3001

Mr Anthony Schapel	Senior Assistant Crown Prosecutor Crown Solicitor's Office S.G.I.C. Building 11th Floor 211 Victoria Square ADELAIDE S.A. 5000
Mr Bill Stefaniak	Senior Legal Officer Office of Director of Public Prosecutions Law Society Building London Circuit CANBERRA A.C.T. 2601
Supt. Peter Sweeny	Officer in Charge Prosecutors N.S.W. Police Headquarters 14 College Street SYDNEY N.S.W. 2000
Mr Terry Syddall	Stipendiary Magistrate of W.A. Central Law Courts 30 St George's Terrace PERTH W.A. 6000
Mr Ian Temby Q.C.	Director of Public Prosecutions Hinkler Building Kings Avenue BARTON A.C.T. 2601
Dr Jacqueline Tombs	Director Criminological Research Unit Scottish Home & Health Department St. Andrew's House Edinburgh EH1 3DE SCOTLAND
Mr John Van Groningen	Professional Advisor State Law Department 221 Queen Street MELBOURNE VIC 3000
Ms Anna Vicic	Australian Government Solicitor's Office 99 Gawler Place ADELAIDE S.A. 5000
Mr Thomas Wakefield	Crown Counsel/Acting Chief Crown Prosecutor Solicitor General's Office Comalco House Crn. George & Ann Street's BRISBANE QLD 4000

Mr John Walker	Criminologist Australian Institute of Criminology P.O. Box 28 WODEN A.C.T. 2606
The Hon. Mr Justice Ray Watson	Judges Chambers G.P.O. Box 4055 SYDNEY N.S.W. 2001
Mr Alex Watt	Principal Programmes Officer Australian Institute of Criminology P.O. Box 28 WODEN A.C.T. 2606
Dr John Willis	Senior Lecturer Department of Legal Studies La Trobe University BUNDOORA VIC. 3083
Mr Christopher Wright	Solicitor-General of Tasmania 39 Murray Street HOBART TAS. 7000
Mr George Zdenkowski	Commissioner Australian Law Reform Commission 99 Elizabeth Street SYDNEY N.S.W. 2000

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