Accountability and Ethics in Public Prosecuting

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This paper reviews the legal and ethical framework that governs public prosecutions in Australia, and briefly sets out the available accountability mechanisms with a focus on costs.

I have tended to reference Northern Territory legislation and policy, but these are similar to their interstate counterparts. Citations and other references are in the published paper.

Let me make it clear at the outset that those parts of the paper that focus on rights of an accused in a criminal trial, as opposed to victim's rights, are not intended to suggest that the latter are unimportant. Having worked in public prosecutions over the past 18 years, 12 years within a DPP office and subsequently at the private bar, I have had the privilege of working closely with many victims of sexual assault and child sexual abuse. I witnessed firsthand the trauma occasioned by the offending itself, as well as by 'the system'.

However, the impetus for this paper is the current environment in which there is an apparent increasing tension between victim's rights and structural parts of the criminal justice system including the independence of public prosecutors and the right of accused persons to a fair trial. It seems to be in the area of sexual assault cases that the tension is at its highest.

While I was getting myself tied up in knots about how to articulate this to a room full of lawyers including a sizable prosecutor cohort, a recent episode of *Insiders* provided some assistance. Journalists Sean Kelly and Samantha Maiden were

discussing the new Federal Government advertising campaign about consent, Kelly said:[1]

> Theoretically we know the idea that consent can be withdrawn at any time. And yet on the other hand, when you have someone who is charged with a sexual assault in the context of what might be a relationship or a drunken night out or something that starts consensual and then changes, people find it very hard to wrap their heads around, so, you know, there's a lot of discussion and debate and there's a lot of, issues around that, but I think we're still grappling with <u>as a society</u>. [emphasis added]

In that context Maiden noted:[2]

> Judges are pushing back against cases that they think should not have been run, and in very many cases, those cases involve these issues of consent, and so you have some judges, not all, saying, those cases shouldn't be run. And these issues are at the core of them, because <u>the DPP is pushing in a lot of States, in a different direction</u>. [emphasis added]

DPP's pushing in a particular direction is something that has the capacity to undermine the proper administration of justice and should be a matter of grave concern to practitioners and Judges alike.

Anecdotally there is considerable disquiet in the legal community about this issue and the types of cases that are being taken to trial where there is pretty clearly no reasonable prospect of conviction. The disquiet is not limited to the defence bar, nor is it limited to a couple of judges in NSW.

We seem to be in a situation where sexual assault complainants have a high level of expectation of a criminal justice response even in cases where there are clearly no reasonable prospects of conviction.

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[1] 'Adam Bandt – Greens Leader', *Insiders* (Australian Broadcasting Corporation, 26 May 2024) (emphasis added).
[2] Ibid.

Police are now rarely prepared to exercise charging discretion against sexual assault complainants for fear of criticism.

This means that public prosecutors are shouldering the load and prosecutorial decision making in these types of nuanced consent cases can be very difficult. It is timely to review the reasons why neutrality and independence in that office is so important to the proper operation of the criminal justice system.

There is a real question as to whether we need to be smarter in terms of how our justice system deals with these cases where there are real difficulties with the consent issues and prospects of conviction. Of course, there has been significant substantive and procedural law reform in this area over the past decades and the prosecution of properly instituted sexual assault cases is vastly improved. The ALRC is currently examining justice responses to sexual violence other than through the criminal justice system. This includes civil litigation, restorative justice processes and compensation schemes.

What is a Public Prosecutor?

In Australia a prosecutor is usually a public sector / Government employed solicitor. In some jurisdictions including the Northern Territory the designation of 'Crown Prosecutor' is simply a public service Job Title. In other jurisdictions the role is statutory. Notwithstanding employment or appointment arrangements, public prosecutors now operate under a *Director of Public Prosecutions Act,* with a Director who is an independent statutory authority able to delegate their statutory powers and functions to the employed or appointed lawyers.[3] The DPP can prosecute either in the name of the Crown or as the DPP.

The main function of a DPP is to bring and conduct prosecutions for indictable offences whether on Indictment or summarily. DPPs also have responsibility for

[3] *Director of Public Prosecutions Act 1990* (NT) s 32: 'The Director may, in writing, delegate to any suitable person any of the Director's powers and functions under this or any other Act.'

the prosecution of non-indictable matters, and the ability to take over privately instituted prosecutions.[4]

Theoretically a DPP is fully independent. In reality, the DPP, in the NT at least is usually appointed for a 5- or 7-year period notwithstanding that the Act allows otherwise. Furthermore, the DPP is dependent upon "the Department" and Treasury for its resources and when 'Winter is Coming'[5] the Director's ability to responsibly discharge the duties of his office is necessarily compromised. Prosecutors with untenable workloads don't have time to properly consider whether or not a case should be continued. In the Northern Territory the DPPs pension was just slashed by the legislature which also impacts on the independence of the officeholder.

The decision to prosecute

Directors issue statutory "guidelines" intended to be followed by prosecutors in the performance of the DPP's statutory functions.

In the Northern Territory as in other jurisdictions there are published Guidelines[6].

The Guidelines deal with numerous aspects of the prosecutor's role including the discretion to commence or continue a prosecution.

It has been observed:[7]

> While it has been accepted that a degree of discretion in decision making is required, these decisions can have a significant impact on a defendant and reverberate through every component of the criminal justice system.

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[4] For example, see ss 12 and 13 of the *Director of Public Prosecutions Act 1990* (NT).

[5] Reference to the Conference Opening Remarks of the Chief Justice of the Supreme Court of the Northern Territory, the Hon Michael Grant AO KC.

[6] *Guidelines of the Director of Public Prosecutions 2016* - these can be found online at https://dpp.nt.gov.au/__data/assets/pdf_file/0005/574124/DPP-Guidelines-Current-2016.pdf

[7] Kenny Yang, 'Public Accountability of Public Prosecutions' (2013) 20(1) *Murdoch University Law Review* 28, 32 (citations omitted) <https://classic.austlii.edu.au/au/journals/MurdochULawRw/2013/3.pdf>

> They can mean the difference between justice and injustice. Prosecutorial discretion is indeed 'at the heart of the State's criminal justice system'.

The Guidelines expressly recognise at 2.8 that "*the resources available for prosecuting are finite and should not be expended pursuing inappropriate cases*".[8]

Inappropriate cases are those which do not meet the test set out in the rest of Guideline 2.

The decision to prosecute is dealt with in Guideline 2 which provides:[9]

> The prosecution process should be initiated or continued whenever it appears that there is a reasonable prospect of conviction, and it is in the public interest.

It is not the law in Australia that each allegation made to police will be the subject of a criminal prosecution. There is a test that is required to be met. The reasons for this include the substantial cost of public prosecution and the finite resources that are available for it.

Back to Guideline 2:

> The question whether or not the public interest requires that a matter be prosecuted is resolved by determining whether:
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> (1) the admissible evidence is capable of establishing each element of the offence; (if there is a prima facie case, this includes consideration of whether there is the ability to disprove any defence raised on the evidence).

[8] *Guidelines of the Director of Public Prosecutions 2016* (NT) r 2.8.
[9] Ibid, r 2.1.

(2) whether it can be said that there is no reasonable prospect of conviction by a reasonable jury (or other tribunal of fact) properly instructed as to the law; and

(3) discretionary factors dictate that the matter should or should not proceed

As to no reasonable prospect of conviction, the Guidelines provide:[10]

> This requires an exercise of dispassionate judgment which will depend in part upon an evaluation of the admissibility and weight of the available evidence and the persuasive strength of the Crown case. [emphasis added]

It stands to reason that this part of the assessment can only be conducted by a sufficiently experienced prosecutor with carriage of the case who has intimate knowledge of the case, the evidence and the weaknesses of each. Importantly that person must have sufficient trial experience to understand what is actually meant by "*the persuasive strength of the Crown case*". Guideline 2 also provides that

> The resolution of disputed questions of fact is for the court and not the prosecutor. The assessment of prospects of conviction is not to be understood as usurping the role of the court but rather as an exercise of discretion in the public interest. It is a test appropriate for both indictable and summary charges.[11]

The discretionary matters are numerous. Their applicability and weight will vary depending on the case.

Prosecutors as lawyers are additionally bound by statutory Conduct Rules, as well as special ethical rules that apply to them.

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[10] Ibid, r 2.4 (emphasis added).
[11] Ibid, r 2.4 (emphasis added).

In the Northern Territory the relevant excerpts of both the NT Barristers and Solicitors conduct Rules are included as part of the Guidelines as are the International Association of Prosecutors Rules. Those special ethical rules cover important matters aspects of the public prosecutor role including the obligation of disclosure, special duties to the Court and the necessity of objectivity and impartiality in the conduct of Court proceedings in terms of the evidence that is presented and the submissions that are made. Further [12]

> In the institution of criminal proceedings, they [i.e., prosecutors] will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible and will not continue with a prosecution in the absence of such evidence.

Prosecutorial Guidelines and Rules have special provisions in relation to victims which I will come to. However, the Guidelines make it clear that exercise of the prosecutor's discretion must not be influenced by sympathy for a victim.[13]

Independence and Neutrality DPPs

The Northern Territory Guidelines provide:[14]

> The Office of the Director of Public Prosecutions (ODPP) is independent and represents the community and not any private or sectional interest.

DPPs provide "*a service that exists for public prosecution not private vengeance*".[15] This is related to the concepts of crime as something that is injurious to the public welfare, and the criminal law as a branch of public law rather than one which is focussed on private interests (as Justice Crowley

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[12] International Association of Prosecutors, *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* (23 April 1999) Article 4, Rule 4.2(d); *Guidelines of the Director of Public Prosecutions 2016* (NT) app C, r 4.2(d).

[13] *Guidelines of the Director of Public Prosecutions 2016* (NT) r 2.7(2): 'A decision whether or not to proceed must not be influenced by: … the personal feelings of the prosecutor concerning the offence, the offender or a victim …'

[14] Ibid, r 1.1.

[15] John McKechnie, 'Directors of Public Prosecutions: Independent and Accountable' (1996) 26 *University of Western Australia Law Review* 268, 283 <https://www4.austlii.edu.au/au/journals/ UWALawRw/1996/14.pdf>

reminded us yesterday). The DPP prosecutes individuals on behalf of the state and their independence and neutrality are critical aspects of the criminal justice system.

The significance of prosecutorial independence has been emphasised by the Courts and is fundamentally about the constitutional separation of powers and particularly judicial independence from the executive.

The DPP Act provides:[16]

> An act or omission of the Director or a person acting on his behalf must not be called in question or held to be invalid on the grounds of a failure to comply with statutory guidelines.

The non-reviewability of prosecutorial decision making has also been emphasised by the Courts.

In the case of *Price v Ferris*[17], the DPP had taken over a private prosecution. The reason for the DPP's power to do so was considered by Kirby P on appeal:

> It is to avoid the suspicion that important prosecutorial discretions will be exercised otherwise than on neutral grounds. It is to avoid the suspicion, and to answer the occasional allegation, that the prosecution may not be conducted with appropriate vigour. Analyses by law reform and other bodies have demonstrated conclusively how vital are the decisions made by prosecutors. Decisions to commence, not to commence, or to terminate, a prosecution are made independently of the Courts. Yet they can have the greatest consequences for the application of the criminal law. It was to ensure that in certain cases manifest integrity and neutrality were brought to bear upon the prosecutorial decisions that the Act was passed by

[16] *Director of Public Prosecutions Act 1990* (NT) s 25(3).
[17] (1994) 74 A Crime R 127, 130 (emphasis added).

> Parliament affording large and important powers to the DPP who, by the Act, was given a very high measure of independence.

In *Alister v The Queen*[18], Justice Murphy referred to the power wielded by the prosecutor within the criminal justice system in emphasising the importance of independence and neutrality:

> In the eyes of the jury the prosecutor is the State and takes on much of its authority and prestige. "The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says. The same power and force allow him, with a minimum of words, to impress on the jury that the government's vast investigatory network, apart from the orderly machinery of the trial, knows that the accused is guilty or has non-judicially reached conclusions on relevant facts which tend to show he (or she) is guilty". Respect for the office of prosecutor reflects confidence in the system of justice and induces the jury to regard the prosecutor as unprejudiced and impartial. Therefore, the prosecutor must refrain from doing anything which might improperly influence the jury and deny the defendant a fair trial. "It is not the duty of prosecuting counsel to secure a conviction … (his) duty … is to present to the tribunal a precisely formulated case for the Crown against the accused and to call evidence in support of it … the prosecutor is fundamentally a Minister of Justice …"

Justice Sofronoff touched on the practical reasons why it is critical that prosecutorial discretion be exercised responsibly and ethically in a recent Inquiry report to the ACT government on the operation of the criminal justice system in that territory:[19]

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[18] (1984) 154 CLR 404, 429-430 quoting *Hall v United States* (1969) 419 F (2d) 582, 583-584 and Christmas Humphreys, 'The Duties and Responsibilities of Prosecuting Counsel' [1955] *Criminal Law Review* 739, 740-741.

[19] Walter Sofronoff, *Board of Inquiry – Criminal Justice System* (Final Report, 31 July 2023) [716] (citations omitted) <https://www.justice.act.gov.au/__data/assets/pdf_file/0003/2263980/ACT-Board-of-Inquiry-Criminal-Justice-System-Final-Report-31-July-2023.pdf>

> The state exists to serve and to protect the individuals who comprise the community. A person who has been officially accused of committing an offence will inevitably suffer some painful consequences. Employment may be suspended and, as a practical matter, the loss of employment may be permanent. The accused person generally cannot refute the charges before trial, which may be months or, even, years away. Even if guilt is never proven, the public humiliation associated with the charge may be permanent. Such a person may experience insult, persecution, rejection, and betrayal.

These considerations can sound unpalatable to victims of crime, victim survivor interest groups, policy makers and the public at large who struggle to understand or accept the system's focus on fairness to an accused. No doubt that is understandable from a lay perspective. But prosecutors, as Ministers of Justice acting in the public interest, must never overlook or treat lightly or with disdain the substantial adverse consequences that their decisions on behalf of the State can have on the individual accused. In the days of trial by media and reducing legal aid, a criminal allegation can be and very often is emotionally, reputationally and financially devastating to individual defendants and an acquittal is often a hollow victory

Prosecutorial decision making is by and large non-reviewable by the Courts. I referred earlier the section 25 (3) of the NT DPP Act. The purpose of non-reviewability is to preserve the independence of the judiciary:[20]

> It has never been the rule in this country ... that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first Regulations under which the Director of Public Prosecutions worked provided that he should ... prosecute 'wherever it appears that the offence

[20] United Kingdom, *Parliamentary Debates*, House of Commons, 29 January 1951, vol 483, col 68 (Sir Hartley Shawcross QC, UK Attorney General and former Nuremburg trial prosecutor).

> or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest'. That is still the dominant consideration.

Cases discussing non-reviewability of prosecutorial decision making and the rationale thereof include *Maxwell v R* [1996] HCA 46 and *Likiardopoulos v the Queen* [2012] HCA 37. The issue was revisited more recently by the Victorian Court of Criminal Appeal in *DPP v Tuteru* [2023] VSCA 188.

In Tuteru the Trial Judge permanently stayed an indictment on abuse of process grounds. The defendant was being prosecuted for an offence against the heavy vehicle national law ("HVNL") for recklessly permitting an unfit driver to drive. That driver had fallen asleep at the wheel and there was a collision that killed 4 police officers. It was a high-profile case. The DPP had originally charged Mr Tuteru with manslaughter meaning that the case was listed in the Supreme Court. That charge was discontinued after approximately 2 years. The ultimate charge was one that could have been dealt with by a Magistrate. Over the course of nearly 3 years the DPP filed 5 separate indictments and changed their case a number of times and in relation to the HVNL charge sought to introduce evidence that had not previously been disclosed. All of this had caused considerable delay. The Judge had been particularly critical of the DPP in failing to provide either the Court or the public with any reasons for discontinuing the manslaughter charge after such an extended period of time. He expressed the opinion that there had never been a viable case for manslaughter, and that the DPP had shown indifference and a lack of respect to the Court in not providing reasons.

The stay decision was appealed by the DPP on numerous grounds.

In upholding the Director's appeal, the Court observed that reasons for discontinuance are generally unknown outside of the DPPs office, that there is no obligation by the DPP to provide reasons, noting the important constitutional

reasons for the same, applying *Maxwell*,[21] where Justices Gaudron and Gummow JJ had said:[22]

> It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a *nolle prosequi*, to proceed *ex officio*, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process – particularly, its independence and impartiality and the public perception thereof – would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.

The Court found there was an insufficient basis for stating that there had never been a viable case for manslaughter. The Court noted there was an obvious difference between that situation and an inept prosecution that had been launched in good faith.[23]

In *Yates v Wilson* (1989) 168 CLR 338, the High Court dismissed an application for judicial review of a Magistrate's decision to commit for trial in the following unequivocal terms:[24]

> It would require an exceptional case to warrant the grant of special leave to appeal in relation to a review by the Federal Court of a Magistrate's decision to commit a person for trial. The undesirability of fragmenting the

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[21] *DPP v Tuteru* [2023] VSCA 188, [79]-[82] (Beach, Walker and Taylor JJA).
[22] *Maxwell v The Queen* (1996) 184 CLR 501, 534 (citations omitted).
[23] *DPP v Tuteru* [2023] VSCA 188, [78] (Beach, Walker and Taylor JJA).
[24] Mark Weinberg, 'Judicial Oversight of Prosecutorial Discretion: A Line in the Sand?' (Speech, Prosecutions Division of the Department of Justice of the Hong Kong Special Administrative Region, 26 October 2015) 5-7, quoting *Yates v Wilson* (1989) 168 CLR 338, 339 (Mason CJ and Toohey and Gaudron JJ) <https://www.supremecourt.vic.gov.au/for-the-media/judicial-oversight-of-prosecutorial-discretion-a-line-in-the-sand>

> criminal process is so powerful a consideration that it requires no elaboration by us. It is a factor which should inhibit the Federal Court from exercising jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and as well should inhibit this Court from granting special leave to appeal.

In *Likiardopoulos v the Queen* [2012] HCA 37, the appellant had been convicted of murder in relation to his role in a multi-defendant assault on an intellectually disabled young man resulting in death. The DPP and the Court had accepted pleas of guilty from a number of the appellants co-offenders for the lesser offence of manslaughter. In issue on the appeal were the directions of law in relation to accessorial liability. However, it was additionally argued by the Appellant that his prosecution for murder in light of the manslaughter pleas was an abuse of process on the basis that it had the tendency to bring the administration of justice into disrepute. This was rejected. The majority found that there had not been any abuse of process and confirmed that the DPPs decision to accept the manslaughter pleas was not reviewable by the Court.[25]

Chief Justice French agreed with the majority, but went on to state:[26]

> The statutory character of prosecutorial decision-making in Australia today does not lessen the significance of the impediments to judicial review of such decisions, which are created by the constitutional and practical considerations referred to above. However, the existence of the jurisdiction conferred upon this Court by Section 75(v) of the Constitution in relation to jurisdictional error by Commonwealth Officers and the constitutionally protected supervisory role of the Supreme Courts of the States raise the question whether there is any statutory power or discretion of which it can be said that, as a matter of principle, it is insusceptible of judicial review.

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[25] *Likiardopoulos v The Queen* [2012] HCA 37, [37] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[26] *Likiardopoulos v The Queen* [2012] HCA 37, [4].

> That question was not argued in this case and does not need to be answered in order to decide this case. It involves a question arising under the Constitution. I would not wish my agreement with the reasons given in the joint Judgement to be taken as acceptance of a proposition that the exercise of a statutory power or discretion by a Prosecutor is immune from judicial review for jurisdictional error, however limited the scope of such review may be in practice.

The Court retains the ability to check the power of the DPP to prevent an abuse of its processes. However, as pointed out by Dawson and McHugh JJ in *Maxwell v The Queen*: '*the need for a court to exercise its inherent power to protect its own process should in this context rarely, if ever, arise. A mere difference of opinion between the court and the prosecuting authority could never give rise to an abuse of process*'.[27]

In more recent times, other quasi review mechanisms have been removed, particularly in the case of sexual assault prosecutions.

For example, indicatable cases are reviewed for sufficiency of evidence at committal stage. It has been said that this process is an inadequate filter as the Court usually has insufficient evidence to determine the real merits of the case. In the Northern Territory a sexual offence complainant cannot be cross examined at all at committal stage. The allegation, so long as it addresses the elements of the offence, is not subject to any review at all by the Court and committal is a foregone conclusion.

Additionally, since the 2019 High Court decision in *Director of Public Prosecutions Reference No 1 of 2017*,[28] judicial discretion to invite the jury to

[27] *Maxwell v The Queen* (1996) 184 CLR 501, 513.
[28] [2019] HCA 9.

acquit an accused in appropriate cases using a *Prasad* direction has been abolished. So that type of 'review' is no longer available.

In this landscape it is critical that prosecutors understand their role and responsibilities as Ministers of Justice and not shirk the very heavy burden of their office. They must engage in dispassionate and responsible administrative decision making regarding the commencement and continuation of all prosecutions including sexual assault prosecutions.

The fact that the decisions are non-reviewable makes independence and neutrality more (not less) important.

In this context it should be noted that: -

- Prosecutors have an extraordinary amount of discretion in terms of what prosecutions will be commenced or continued.
- They are generally not trained in proper administrative decision making.
- Their decision making is non-transparent – reasons for commencing or discontinuing prosecutions attract client privilege and that privilege is generally speaking jealously maintained.
- The decisions are effectively non-reviewable by the Courts.
- Their decisions can have substantial adverse consequences for the individuals that are prosecuted (and individual victims).
- Prosecutors are not victim advocates, but they are vulnerable to pressure from policy makers, the media, vocal interest groups, the views of victims who have high expectations for a criminal justice response and the ever present 'tough on crime' popular punitivism and politics. Prosecutors are vulnerable if they are working in an office with an unwritten policy of pushing certain types of cases before the Court, they are vulnerable if they

have untenable caseloads that do not afford them time to properly discharge their duties.

Is there a mismatch between prosecutorial independence and victims' rights?

According to the NT DPP Website, victim's rights are set out in the Director of Public Prosecutions Guidelines for prosecutors and in the Northern Territory Charter for Victims of Crime.[29]

I mentioned that the Guidelines make various provisions in respect of victims of crime. These are limited to discrete areas of the criminal justice process

- As discretionary factors, their "attitude" towards a prosecution or entitlement to orders such as compensation or reparation
- In terms of whether a plea offer to a lesser charge should be accepted – their views must be considered but are not determinative
- In terms of a negotiated statement of facts for sentencing – their views are required
- Their right to be advised whenever discontinuation of a prosecution is being considered. Victims have an opportunity to furnish additional evidence in this situation (which can be bit of a can of worms and must be handled appropriately)
- Their views are to be noted in a discontinuance report to the Directors Chambers
- Right to be informed if a prosecution is discontinued and other matters set out in the Guidelines including reasons for decisions

[29] *Northern Territory Charter of Victims' Rights* (issued pursuant to the *Victims of Crime Rights and Services Act 2006* (NT) s 30).

- Guideline 11 provides for victim consultation and makes clear that a victim's views are not alone determinative in prosecutorial decision making It is the public, not any private individual or sectional interest that must be served

- Legislative obligation on the prosecutor to present Victim Impact material to the Court on sentencing of an offender – victims are to be consulted under the Guidelines about manner of presentation, and assisted in the preparation of the statement

As regards the *Northern Territory Charter of Victim's Rights*, it says the following:[30]

> The Northern Territory Government puts the rights of victims first, by ensuring they have a stronger voice in our justice system with better protections and access to vital services.
>
> The Charter of Victim's Rights clearly directs that every reasonable resource will be used to support the safety and welfare of victims, their families and their property.
>
> Access to simple and quick services in a coordinated and respectful manner is critical to victims of crime and their families. Providing opportunities for victims to be more involved in the justice process also acknowledges the interests of victims of crime and their integral role in the criminal justice system.
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> The Northern Territory Government's key principles:
>
> 1. Victims' rights are a priority.

[30] Ibid.

> 2. The safety and welfare of victims, their families and their property is our number one concern.
>
> 3. Every reasonable resource will be used to support victims.
>
> 4. Access to services will be simple, quick, coordinated and respectful.
>
> 5. Victims have a right to be heard by the justice system.

To the extent that this applies to the prosecution service provided by the Northern Territory Government, these principles sit somewhat uncomfortably with a service that prosecutes primarily in the public interest with recognised finite resources. The statement that victims have a right to be heard by the justice system is arguably at odds with the requirements of Guideline 2. If a decision is made not to continue with a prosecution, then a victim is not going to be heard within the criminal justice system. At the very least these things should be made clear to victims so that their expectations are managed consistently,

In his final report, Justice Sofronoff described this mismatch in examining criticisms that had been made of the Commissioner for Victims of Crime during the Lehrmann prosecution. He observed that *'[t]here is an innate paradox in the existence of an office that accepts the victimhood of a person at the hands of an accused, but which has to operate within a criminal justice system that presumes the innocence of the accused'*.[31]

His Honour accepted a submission from the Government solicitor representing the Commissioner that a 'victim of crime' was a concept that did not require proof of an offence. A victim in the criminal justice system, at least prior to sentencing,

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[31] Walter Sofronoff, *Board of Inquiry – Criminal Justice System* (Final Report, 31 July 2023) [700] <https://www.justice.act.gov.au/__data/assets/pdf_file/0003/2263980/ACT-Board-of-Inquiry-Criminal-Justice-System-Final-Report-31-July-2023.pdf>

is essentially a witness. Usually, they are a material witness. Additionally, they are a witness accorded special rights under the DPP Guidelines.

It is suggested that these important distinctions should be expressed in both the Victims Charter and the DPP Guidelines.

Victims have the right to know that important decisions can be made against their wishes and the matters such as the fairness of a trial, admissibility of evidence, safety of a conviction, persuasive strength of a case based on their evidence, public interest considerations and finite resources may mean that their voice will not necessarily be heard in a trial setting.

Recent Criticisms of DPP's failure to exercise discretion appropriately

R v Martinez [2023] NSWDC 552.

In this case a sexual assault complainant had engaged in sexual intercourse with a friend during a period of alcoholic blackout. She mistakenly believed that because she did not recall consenting to sexual intercourse she must have been raped. The Crown expert explained the phenomenon of alcoholic blackout which interferes with memory but does not equate with incapacity in decision making. The defendant was acquitted by a Jury and sought his costs which are available in NSW for indictable matters. In the course of the costs decision his Honour Judge Newlinds SC was critical of the DPP:[32]

> 87 Justice has not been served and will not be served by repeated cases being prosecuted based on the obviously flawed evidence of the Complainant, and I say it is flawed evidence because the Complainant just does not understand the legal definition of consent or lack of consent, to the great cost of the various Accused and the

[32] *R v Martinez* [2023] NSWDC 552.

community and the waste of a tremendous amount of the scarce resources of this Court.

…

90 It seems to me that if those who had made the decision to commence these proceedings had fully understood the Complainant's idiosyncratic and wrongheaded application of the law to the facts that she understood them to be, then that person or persons would have given absolutely no weight to the fact that she was alleging sexual misconduct, but rather would have judged the matter on the objective evidence such as it was which should have led to a very different conclusion. If no effort was made to work that out, then the prosecutor failed to perform the important role of filtering hopeless cases out of the system and has thus been the primary cause of this Applicant spending 8 months in gaol for a crime he did not commit.

91 Any lawyer with any experience and common sense knows firstly, that objective surrounding circumstances must be considered when assessing the strength or weakness of a case where at its heart there is a contest between two witnesses. Second, more fundamentally and critically, any lawyer with any experience and common sense knows that there are some witnesses who in conference or whilst giving a statement are so obviously unreliable (either in the sense that they are lying or are just unreliable) that a case should not be commenced on the strength of that evidence.

…

95 I am left with a deep level of concern that there is some sort of unwritten policy or expectation in place in the Office of the Director of Public Prosecutions of this State to the effect that if any person

alleges that they have been the subject of some sort of sexual assault then that case is prosecuted without a sensible and rational interrogation of that complainant so as to at least be satisfied that they have a reasonable basis for making that allegation, which would include to at least being satisfied that the complainant has a correct understanding of the legal definition of sexual assault or sexual intercourse without consent.

R v Smith (a pseudonym) [2024] NSWDC 41

Whitford SC, DCJ:

67 The similarities between that trial [i.e., *R v Martinez*] and this are substantial. On any reasonable view, the prosecution case in the present matter was even weaker than the one with which his Honour was concerned.

68 It is at least the recent experience of this Court that time and time again proceedings are brought without apparent regard to whether there might be reasonable prospects of securing a conviction. It is made plain in many of those cases, that they are brought, and maintained, on the instructions of "the Director's chambers", whatever the entity so described might embrace by way of decision-making, without apparent regard to any views which might be held by the person likely best placed to assess the strengths and weaknesses and merits otherwise of the prosecution, being the Solicitor Advocate or Crown Prosecutor, salaried or otherwise, briefed in the matter.

69 I make these observations for the purpose of endorsing some of the remarks of Newlinds SC DCJ in *Martinez* as to the difficulties to

which this trend gives rise in the efficient conduct of the business of the Court and the problems generally to which it gives rise in the administration of criminal justice in this State.

70 His Honour's observations warrant some express support, in my view, in circumstances where in the absence of clear recognition of a problem by judges, there is a substantial risk that it will go unremedied. Leaving aside any question of expression, lest it be thought that his Honour's observations somehow represented idiosyncratic and unwarranted criticism of the conduct of matters before this Court, it seems to me important that the issues be exposed wherever they are encountered in individual cases.

71 There were two significant problems highlighted by his Honour.

72 The first concerns the intolerable conflict with which representatives appearing in trials are burdened, between their instructions on the one hand and their obligations to the Court and by extension to the administration of criminal justice generally on the other. Those representatives are, as his Honour remarked, professionally obliged to form their own individual, subjective views, as to whether proceedings should be commenced and continued, and have an obligation (regardless of instructions) not to commence or proceed with cases if they form the view that they have no prospects of success.

73 The second relates to the fact that for all practical purposes prosecutorial discretion is, in the majority of cases, the sole "check and balance", as his Honour described it, in ensuring that scarce public resources are not needlessly devoted to futile prosecutions. Far too frequently, not just in this case, or in the case of Martinez,

but also in numerous others, including some that have been the subject of reported public and private comment elsewhere, one cannot help but conclude that any reliance upon the Director's own published guidelines has been abandoned, or at least abandoned in some categories of case, in favour of simply letting a jury (or a judge sitting alone) decide the merits of a case, without any professional examination of either the reasonable prospects of securing a conviction or the public interest in pursuing the prosecution.

74 The Court's accumulating experience suggests there was nothing frivolous, nor indeed unique, about the deep level of concern expressed by Newlinds SC DCJ that there has developed within the Office of the Director of Public Prosecutions of this State some sort of unwritten policy or expectation to the effect that certain categories of case are now prosecuted without, or perhaps in spite of, a rational, professional, interrogation of the merits of the case and the prospect of securing a conviction. I share that concern. The concluding remark in the passage from the transcript in this case which I have earlier recited (at paragraph [66] above), offers some implicit support for that conclusion. If that conclusion is correct, it is a matter of profound concern for the administration of criminal justice in NSW. There is something disturbingly Orwellian, even surreal, about a significant public institution publishing guidelines, expressed to transparently reflect the general principles according to which it is said to operate in its core function, only then to operate in that core function by reference to opaque, even secret, policies which appear to be dissociated from, and to undermine, the published guidelines.

75 The expense of a criminal trial, not to mention the time which members of the community are called upon to devote to it as jurors, cannot be overstated. A criminal trial demands the expenditure of an enormous amount of predominantly public funds. Furthermore, each meritless proceeding that is conducted delays the resolution of other matters with a more worthy claim on that public expense and the devotion of the time of the Court and members of the community and the legal profession.

76 It also should not be overlooked that the only experience many community members have of the criminal justice system is through serving as a juror. If they are called upon to spend days, sometimes even weeks, resolving a matter that is patently without merit, they leave with an unfortunate, to say the least, view of the criminal justice system. There is a real risk that the commencement and maintenance of cases that have no reasonable prospect of succeeding risks drawing the criminal justice system into disrepute.

77 There is also a risk of significant and inappropriate stress and disruption being caused to an accused, sometimes over a long period and even extending to a deprivation of liberty as occurred in Martinez, from the initiation and maintenance of prosecutions which have no merit.

78 Equally, perhaps in many cases more, significant, is the fact that the anxiety, stress, humiliation and distress that will frequently be associated with a complainant's involvement in the criminal justice system can be profound. In many cases, that involvement necessarily will be sustained for long periods as a matter proceeds through the courts. Quite properly, in recent years much has been done to ameliorate the difficulties confronting complainants. The reality,

> however, is that there are limits to what can be done, if the conduct of a fair trial for persons accused of serious crimes is a consideration, as it must be. I do not think it is an overstatement to suggest that it is bordering on cruel to subject a complainant to the experience of a criminal trial, if a reasoned and objective professional assessment of the prospects of securing a conviction concludes that the prospects are less than reasonable.
>
> 79 For all these reasons, it seems to me that problems in the administration of criminal justice in the State, where they exist, need to be exposed. If judges remain silent in individual cases where a prosecution without reasonable prospects has been brought and maintained, then there is likely no prospect of a remedy for a problem that appears now to be endemic.

These cases have (apparently) prompted the relevant DPP to conduct an audit of cases within her office[33]. It is suggested that individual prosecutors ignore such remarks from the bench at their peril.

What accountability mechanisms are in place

A defendant who is convicted in cases where the prosecutor's discretion has miscarried or they have otherwise misconducted the prosecution will have a right of appeal.

A defendant who is acquitted has very limited avenues for redress.

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[33] See for example ABC online story *NSW director of public prosecutions orders review of every sexual assault case committed for trial following criticism from judges* at https://www.abc.net.au/news/2024-03-07/nsw-sexual-assault-cases-trial-review/103556852

One avenue of redress is for a defendant to claim damages for malicious prosecution. However, to succeed in such an action they must establish

(1) that proceedings of the kind to which the tort applies (generally, as in this case, criminal proceedings) were initiated against the plaintiff by the defendant;

(2) that the proceedings terminated in favour of the plaintiff;

(3) that the defendant, in initiating or maintaining the proceedings acted maliciously; and

(4) that the defendant acted without reasonable and probable cause.[34]

Without going into detail, these are difficult matters to prove.

Another avenue is via complaint to the regulator of the legal profession for ethical or conduct rule breaches. This is also difficult and it is questionable whether those bodies would have the necessary expertise or appetite for properly examining the exercise of prosecutorial discretion in circumstances where the Courts have emphasised non-reviewability. The same may be said of ICAC type bodies which do have jurisdiction.

It is suspected that complaint about public prosecutors to these types of complaint bodies are rare.

Costs is one avenue for redress and has provided a useful accountability measure in jurisdictions where costs of a successful defendant are available. An ability for an acquitted defendant to recover at least some of their legal expenses in appropriate cases is becoming increasingly important if it is the case that DPPs are pushing certain cases to trial despite them not meeting the test for public prosecution. It is arguably the *only* real avenue for redress.

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[34] *A v New South Wales* [2007] HCA 10, [1] (Gleeson CJ and Gummow, Kirby, Hayne, Heydon and Crennan JJ), citing Edward Bullen & Stephen Leake, *Precedents of Pleadings* (Stevens and Sons, 3rd ed, 1868) 350-356.

In a summary proceeding generally there is a right to claim the costs successfully defendant a charge. However, in some jurisdictions, including the Northern Territory, these are statutorily limited.

Most sexual assaults are prosecuted on Indictment before a Jury. Costs against the Crown were not available at common law and remain unavailable for matters prosecuted on Indictment in most jurisdictions including the Northern Territory. The Australian Law Reform Commission looked at this issue in 1995 and it may need to be revisited. In its report the Commission noted that most responses supported the introduction of a single set of costs rules for summary proceedings and trials. This was on the basis that:[35]

- committal proceedings are an inadequate filter as the Magistrate usually has insufficient evidence to determine the real merits of the case;
- screening of cases by the DPP may not be a reliable filtering process because some cases are prosecuted as a matter of policy even though there may not be enough evidence to convict;
- a significant number of Defendants in indictable matters do not qualify for legal aid and may suffer substantial hardship in presenting their case;
- the risk of an adverse costs order will not affect the administration of justice by deterring the prosecution from bringing appropriate cases to Court.

These matters apply with equal if not greater force today.

If costs were available for indictable matters they would act as an important avenue for redress for acquitted defendants as well as a much needed check and

[35] Australian Law Reform Commission, *Costs Shifting – who pays for litigation* (Report No 75, 20 October 1995) [7.15] <https://www.alrc.gov.au/publication/costs-shifting-who-pays-for-litigation-alrc-report-75/>

balance on the DPP as is demonstrated in the recent NSW decisions. I would commend investigation of this to the policy makers here with us at the conference.

In closing I leave you with the words of the Hon. John McKechnie AO KC, former WA DPP and Justice of the Supreme Court of that State:

> The system depends upon prosecutions being conducted by counsel of ability, independence, moderation, firmness, and restraint. On the other side, to respond to all the resources of the state marshalled against a citizen accused of crime, the system requires defence counsel of integrity, ability, courage of purpose, judgement, and independence. The system is in equipoise, and **if the balance is out on either side then injustice will most surely follow**.[36] [emphasis added]

[36] John McKechnie, 'Directors of Public Prosecutions: Independent and Accountable' (1996) 26 University of Western Australia Law Review 268, 285 (emphasis added) <https://www4.austlii.edu.au/au/journals/UWALawRw/1996/14.pdf>