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Tāhū o te Ture

Examining the Prosecution Systems of England and Wales, Canada, Australia and Scotland

A background document to the Review of Public Prosecution Services in New Zealand

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Introduction

As part of the Review of Public Prosecution Services in New Zealand, the Ministry of Justice Secretariat was asked to provide the Independent Reviewer, John Spencer, with information on the operation of prosecution services in comparable jurisdictions.

The secretariat undertook extensive research on the public prosecution landscape in England and Wales, Canada, Australia, and Scotland. To ensure the accuracy of this document, contributions were sought from members of the public prosecution services in England and Wales, Canada and Australia. Scotland has experienced only minimal change to its prosecution system in the past 500 years and for this reason we considered the official information sources to be adequate for this research paper.

Each country has been addressed in separate chapters. Chapters are divided into three or four sections: Historical Background, Current Roles, Inter-relationships and (in relation to all but Scotland) Identified Areas of Concern. It is hoped that this research will be a useful reference tool both for other jurisdictions, and for future reviews in New Zealand.

Part One: England and Wales

Historical background[1]

Until the nineteenth century there was no public official or body responsible for ensuring that crimes were prosecuted in England and Wales. Instead, that responsibility fell on the shoulders of private individuals. Victims were expected to initiate prosecutions by bringing actions before the courts which, in legal form, were similar to civil actions.

In 1829 a national professional police force was established. As the police developed and their powers increased, they became convenient substitutes for private prosecutors. No specific legislation was passed to regulate police prosecutions; instead the police gradually evolved their own systems based on the model of private prosecutions. Eventually, many police forces set up their own in-house departments of prosecutors or employed local barristers to act on their behalf in the courts.

By the 1870s concern was mounting about the lack of structure surrounding police prosecutions. This resulted in the Prosecution of Offences Act 1879. This Act created the Office of the Director of Public Prosecutions (the DPP). The DPP took over responsibility from the police for prosecuting the most complex and serious criminal cases. However, the Act also retrospectively legitimised the prosecution system that had been developed by the police. Further, it ensured that the vast majority of prosecutions remained under police control.

A hundred years later there was a resurgence of concern about the police prosecution system. A series of official reports in the 1970s criticised the system, arguing that it lacked objectivity, national consistency, transparency and accountability. In particular, attention was drawn to the inherent difficulties of one organisation both investigating and prosecuting crime. To rectify those issues, the Prosecution of Offences Act 1985 was enacted. This created a national Crown Prosecution Service (the CPS), headed by the DPP and formally accountable to the Attorney-General. The CPS was divided into regional areas (which matched police force boundaries) and smaller local branches.

The CPS was designed to take over responsibility for conducting all prosecutions initiated by the police. Initially, this involved reviewing the original charging decisions and preparing cases for trial by collating the necessary evidence and organising the witnesses and exhibits. Local barristers would then be briefed to present the trials in Crown court. Both CPS staff and local lawyers appeared in the magistrates' court. The CPS was also designed to provide legal advice to the police on criminal matters. The decision was made however

[1] This historical summary was compiled using: Dr Despina Kyprianou "Comparative Analysis of Prosecution Systems (Parts I): Origins, Constitutional Position and Organisation of Prosecution Services" (2008) 6 Cyprus and European Law Review and "Comparative Analysis of Prosecution Systems (Parts II): The Role of Prosecution Services in Investigation and Prosecution Principles and Policies" (2008) 7 Cyprus and European Law Review; House of Commons Justice Committee *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System* (Ninth Report of Session 2008-09, 2009); and Law Commission *Criminal Prosecution: A Discussion Paper* (NZLC PP28, 1997).

not to give the CPS any role in police investigations or any role in relation to prosecutions initiated by other agencies, such as the Department of Trade and Industry or the Health and Safety Executive.

From its inception until the present the CPS has faced extensive criticism. For example, in the early days of CPS, judges made numerous "wasted costs orders" against CPS staff due to poor case management wasting court time. In a related issue barristers complained that CPS lawyers were not briefing cases until the last minute, thereby leaving them little or no time to prepare. The CPS felt they were poorly served by the Bar who often returned briefs at the last minute when they had been in Chambers for months. In addition, concerns were raised by the Police about the CPS being too slow in providing advice. The CPS also experienced problems in obtaining evidence of sufficient quality from the police.

As a result of these criticisms the CPS has been the subject of numerous reviews and piece-meal reforms. These reforms have mainly tried to clarify the relationship between the CPS and the police. The Criminal Justice Act 2003, for example, radically reformed this relationship by transferring the initial charging decision in more serious cases from the police to the CPS, although this has recently changed once more so the police are now charging more cases. The Criminal Justice Act also gave the CPS the power to conditionally caution an offender instead of continuing with a prosecution.

Another significant development occurred in 1999 when the Access to Justice Act 1999 removed the existing prohibition on non-barristers from appearing in Crown Courts (where indictable trials take place). Prior to this Act, only self employed barristers had a right of audience in these Courts, meaning the CPS had no option but to instruct self-employed barristers to conduct criminal trials. However, after the removal of the prohibition, the CPS increasingly used in-house counsel and solicitors to present prosecutions in court.

Current roles

Attorney-General

In England and Wales the Attorney-General is a criminal justice Minister and the Minister of the Crown who is primarily accountable to Parliament for public prosecutions. The Attorney is not a member of the Cabinet but may attend when his or her responsibilities are on the agenda. He or she is a senior practicing lawyer and may act as an advocate for the Crown in the courts.

The exact nature of the Attorney-General's role has recently been reviewed.[2] At present, he or she is the senior Law Officer; the chief legal adviser to the government; superintends or oversees all of the prosecuting authorities within England and Wales; and has a number of independent public interest functions.

The Attorney-General is expected to safeguard the independence of all prosecutors in making prosecution decisions and to issue guidance to prosecutors on the conduct of their functions.[3]

Solicitor-General

The Solicitor-General in England and Wales is also a criminal justice Minister and a senior practicing lawyer. The Solicitor's role is largely defined by reference to the Attorney-General's role.

The Solicitor-General is the junior Law Officer and supports the Attorney across the range of his or her responsibilities.[4] By virtue of section 1 of the Law Officers Act 1997 the Solicitor-General may exercise any function of the Attorney-General and in doing so his or her actions have the same effect as if they had been done by the Attorney.

Crown Prosecution Service

The Crown Prosecution Service (the CPS) is the government department responsible for prosecuting criminal cases investigated by the police in England and Wales. As the principal prosecuting authority the CPS are responsible for advising the police on cases for possible prosecution; reviewing cases submitted by the police; determining any charges in all but minor cases; preparing cases for court; and presenting cases at court.

The CPS is headed by the Director of Public Prosecutions (the DPP). The DPP is supported by a Chief Executive who is responsible for running the business on a day-to-day basis. This allows the Director to concentrate on prosecution, legal issues and criminal justice policy.

The CPS is divided into 13 geographical areas across England and Wales. Each area is led by a Chief Crown Prosecutor (CCP). Each CCP is supported by an Area Business Manager (ABM), and their respective roles mirror, at a local level, the responsibilities of the DPP and Chief Executive. Administrative support to areas is provided by Area Operations Centres. A 'virtual' 14th area, CPS Direct, is also headed by a CCP and provides out-of-hours charging decisions to the police.

Two specialist casework groups - Central Fraud Group and Serious Crime Group - deal with the prosecution of all cases investigated by the Serious & Organised Crime Agency, UK Borders Agency and Her Majesty's Revenue & Customs as well as serious crime, terrorism, fraud and other cases that require specialist experience.[5]

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[2] House of Commons Justice Committee *Draft Constitutional Renewal Bill (Provisions Relating to the Attorney-General)* (Fourth Report of Session 2007-08, HC 698, 2008).
[3] Attorney-General's Office "The Law Officers" (2011) <www.attorneygeneral.gov.uk>
[4] As above n 3.
[5] Crown Prosecution Service "Our Organisation" (2011) <www.cps.gov.uk>

In January 2010, the Revenue and Customs Prosecution Office (the RCPO), previously a stand-alone prosecuting department, was merged with the CPS.

To give an idea of scale, in 2007-2008 the CPS completed 96,992 Crown Court cases and the RCPO completed 270.[6] Further, in 2009-2010 CPS spent £736 million on delivering their public prosecution service. This figure includes £54 million in administrative costs (salaries, other staff related costs, accommodation etc) and £590 million on Crown prosecution and legal services (fees for barristers, witnesses, experts etc).[7]

Serious Fraud Office

The Serious Fraud Office (SFO) was created in 1988 and is the government department that investigates and prosecutes serious or complex fraud, and corruption. In considering whether an alleged fraud is sufficiently serious or complex for the SFO to become involved, the SFO will consider whether: the value of the alleged fraud exceeds £1 million; there is a significant international dimension; the case is likely to be of widespread public concern; the case requires highly specialised knowledge; and whether there is a need to use the SFO's special investigative powers.[8] There is a considerable overlap in the prosecution of fraud which is divided between the work of the SFO, CPS, the Financial Services Agency, and the Department for Business Innovation and Skills (formerly DTI).

In 2007-2008 the SFO completed 16 Crown court cases.[9]

Service Prosecuting Agency

The Service Prosecuting Authority (the SPA) is responsible for the review and prosecution of cases referred to it for trial by court martial in respect of persons subject to service law or discipline who are accused of a criminal offence. Its territorial jurisdiction is worldwide. The SPA is headed by the Director of Service Prosecutions (DSP) who is a civilian. The Deputy Director of Service Prosecutions (DDSP) is an Army Brigadier.

The SPA was formed by the incorporation of the Navy, Army and Royal Air Force Prosecuting Authorities into one single tri-service organisation in January 2009.[10]

In 2009, 1,227 cases were referred to the SPA (including appeal matters). Of those, 795 cases were directed for trial by Courts Martial and 29 were dealt with in the Service Civilian Court.[11]

Other prosecuting organisations

The Crown Prosecution Service (CPS) handles most, but not all criminal prosecutions. There is a right to private prosecution, so there is no definitive list of organisations that initiate prosecutions in England and Wales. Many government departments and agencies prosecute, along with charities (such as the RSPCA) and commercial companies (such as train operating companies). The common law power to instigate private prosecutions is preserved by section 6(1) of the Prosecution of Offences Act 1985 and it is used by a number of organisations who do not otherwise have the statutory power to prosecute.

A number of government departments employ their own prosecuting lawyers. This includes the Health and Safety Executive (which completed 565 prosecutions in 2007- 2008); the Department for Business, Innovation and Skills (which completed 277 prosecutions in 2007-2008); the Department for Work and Pensions; the

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[6] House of Commons Justice Committee *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System* (Ninth Report of Session 2008-09, 2009) at para 117.

[7] Crown Prosecution Service "Resource Accounts 2009-2010: Financial Report" (2011) <www.cps.gov.uk>

[8] Serious Fraud Office "Serious Fraud Office (SFO) Criteria" (2011) <www.sfo.gov.uk>

[9] As above n 6.

[10] Service Prosecuting Authority "Home" (2011) <www.spa.independent.gov.uk>

[11] HM Crown Prosecution Service Inspectorate *The Service Prosecuting Authority: The Inspectorate's Report on the Service Prosecuting Authority* (2010) at 10.

Department for Environment, Food and Rural Affairs; the Civil Aviation Authority; the Maritime and Coastguard Agency; the Financial Services Authority; and the Office of Fair Trading.[12] The Prosecutors Convention gives guidance to prosecutors about how they should work together.[13]

The self-employed bar

As explained in paragraph 8 above the CPS has gradually increased the court work undertaken by its in-house advocates. However, the vast majority of serious criminal trials are still presented in court by independent barristers.

CPS figures from 2008-2009 illustrate this fact. In that year CPS in-house advocates presented 85.6% of the cases conducted in the Magistrates' Court (which deals with summary prosecutions and committals).14 By contrast only 21.3% of the cost of advocacy in the Crown Court (which deals with indictable trials) was met by CPS staff. [15] The above figures do not include the costs of running the most serious and high cost CPS cases which are accounted for separately.

The advocacy work that is not undertaken within CPS is briefed to self employed barristers who, from October of this year, will need to be members of a new, quality controlled CPS Advocate Panel.[16] Private barristers are paid by CPS under the graduated fee scheme (GFS). The GFS is a formulaic scheme which uses a range of measures to determine the fee, including offence category, pages of evidence, numbers of witnesses, outcome type etc. Although fee rates have remained unchanged in recent years the growth in the size of evidence bundles (due to increasing computer and mobile phone evidence) and a government focus on bringing more serious crimes to justice has created upward pressure on the fees that CPS pays.[17]

The SFO has its own panel of independent barristers, who present all SFO prosecutions in court.[18] Other prosecuting departments make their own arrangements.

Her Majesty's Crown Prosecution Service Inspectorate

Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) is the independent inspectorate for the CPS which reports to the Attorney-General. Inspectorates in England and Wales undertake programmes of inspections and audits, and, by publishing reports on their findings, provide assurance to the public on the quality of work being undertaken by public bodies.

HMCPSI inspectors look at the quality of CPS casework, its management, use of resources and other issues which impact upon the quality of work or the ability of a CPS office to contribute to the aim and objectives of the Service. Inspectors also make recommendations for improving the quality of casework, and identify and promote good practice.

HMCPSI publishes four different types of reports: Area Reports, which assess the performance of the CPS in each of the 42 geographical areas (or sub-areas); Thematic Reports and Audits, which report on how the CPS handles specific aspects of its work; Joint Inspections, which are written in conjunction with other Inspectorates in the Criminal Justice Sector; and the Chief Inspector's Annual Report, which assesses the performance of the CPS as a whole.

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[12] As above n 6.
[13] http://www.attorneygeneral.gov.uk/SiteCollectionDocuments/Prosecutors%20Convention%202009.pdf.
[14] HM Crown Prosecution Service Inspectorate *Thematic review of the quality of advocacy and case presentation* (2009) at para 7.18 .
[15] As above n 13 at para 7.10.
[16] Crown Prosecution Service "CPS Advocate Panels" (2011) <www.cps.gov.uk>
[17] As above n 7.
[18] Serious Fraud Office "What we do and who we work with" (2011) <www.sfo.gov.uk>

The Attorney-General may also ask HMCPSI to inspect the other prosecuting organisations that the Attorney-General is responsible for, to inspect bodies where they are agreeable to voluntary inspection, and to undertake reviews of high profile cases.

In the past the HMCPSI has provided reports on the Service Prosecuting Agency, the RCPO, the Service Prosecuting Authority and the Customs and Excise Prosecution Office.[19]

The Police

There are 43 separate regional police forces across England and Wales. Each police force reports to its own Police Authority, normally consisting of three magistrates, nine local councillors and five independent members. The Authorities have a duty under law to ensure that their community gets the best value from their police force. National oversight is provided by the Home Office but the focus has traditionally been at the local level. This has led to concerns about inconsistency and recently to calls for a significant re-structure and for the smaller forces to merge.[20] As part of re-structuring, legislation is currently before Parliament to replace the Police Authority with Independent Policing and Crime Commissioners.

The police forces are responsible for the investigation of crime, collection of evidence and the arrest or detention of suspected offenders. Once a suspect is held, in minor cases the police decide whether to caution them, take no further action, issue a fixed penalty notice, or refer the suspect to the CPS for a conditional caution. In the more serious cases the police send the papers to the CPS, so that the CPS can decide whether to lay charges and conduct a prosecution.[21]

The Police in England and Wales may prosecute some traffic cases without referral to the CPS. However, the Police generally do not lay any charges without first consulting with the CPS. In all cases, the CPS is responsible for these cases after a not guilty plea is entered.

[19] Her Majesty's Crown Prosecution Service Inspectorate "Other Organisations" (2011) <www.hmcpsi.gov.uk>
[20] Her Majesty's Inspectorate of Constabulary *Closing the Gap* (2005).
[21] Crown Prosecution Service "The Criminal Justice System" (2011) <www.cps.gov.uk>

Inter-relationships

Between the Attorney-General and the prosecuting organisations

The Attorney-General superintends the prosecution functions of all of the prosecuting organisations. This superintendence is either statutory or a more informal form of oversight.

In broad terms, the Right Honourable Lord Goldsmith QC (the Attorney-General between 2001 and 2007) has suggested that 'superintendence' can be said to encompass: "setting the strategy for the organisation; responsibility for the overall policies of the prosecuting authorities, including prosecution policy in general; responsibility for the overall 'effective and efficient administration' of those authorities, a right for the Attorney-General to be consulted and informed about difficult, sensitive and high profile cases; but not, in practice, responsibility for every individual prosecution decision, or for the day to day running of the organisation."[22]

Statutory superintendence by the Attorney-General

The Attorney-General superintends the CPS and the SFO on a statutory basis. Collectively the CPS and the SFO are known as the 'prosecuting departments'. The RCPO was also a prosecuting department, until it was merged with the CPS in 2010.

In July 2009 a protocol was issued clarifying the relationship between the Attorney and the prosecuting departments.[23]

OVERVIEW OF THE PAPER

The Attorney-General receives the budget for the prosecuting departments and, in conjunction with the two Directors, sets their strategic direction and their high level objectives. The Directors then draft their business plans and organise their Departments to achieve those objectives.[24]

REPORTING

The Directors regularly report to the Attorney on their progress in relation to their performance goals and budget. This includes the provision of formal annual reports that the Attorney lays before Parliament.[25]

ACCOUNTABILITY

The Attorney is not informed of, or involved in, the vast majority of individual prosecutions conducted by the prosecuting departments. However, he or she is accountable to Parliament for the work of the directors and the departments and is responsible for safeguarding the independence of departmental prosecutors in taking prosecution decisions. Further, the Attorney is responsible for ensuring that when government policy is developed due account is given to the role of prosecutors, of the impact of policy proposals on prosecution and of the contribution prosecutors can make.[26]

GUIDANCE

In light of these responsibilities the Attorney may, in his capacity as a Law Officer, issue general guidance to prosecutors on the conduct of their functions. Recent examples of such guidance include: Guidance to prosecutors on asset recovery (2009); Background note on guidance to prosecutors on asset recovery (2009); Code of Practice Issued Under Section 377A of the Proceeds of Crime Act 2002; Prosecutors Convention 2009;

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[22] House of Commons Constitutional Affairs Committee *Constitutional Role of the Attorney-General* (Fifth Report of Session 2006-07, 2007) at para 6.

[23] Attorney-General's Office *Protocol between the Attorney-General and the Prosecuting Departments* (2009).

[24] As above n 24.

[25] As above n 24.

[26] As above n 24.

Plea discussions in cases of serious or complex fraud; Witness Anonymity Orders; Acceptance of Pleas; Acceptance of pleas and the prosecutor's role in sentencing (revised 2009); Conspiracy to Defraud; Disclosure (updated April 2005); Intercept, Section 18 RIPA, England And Wales; and Points for Prosecutors.[27]

The DPP must also consult the Attorney about any proposed changes to the Code for Crown Prosecutors.[28]

MONITORING

Monitoring of the CPS is conducted through HMCPSI, which reports directly to the Attorney-General. In future it is proposed that HMCPSI will also conduct inspections of the SFO.[29]

Oversight by the Attorney-General

The Attorney-General oversees the functions of the Treasury Solicitor's Department (TSol) and the Services Prosecuting Authority.[30] This relationship is sometimes described as general or light superintendence (as opposed to statutory superintendence).

The Attorney's oversight of TSol has wider ramifications as the Chief Executive of TSol is also the Head of the Government Legal Service (GLS).[31] The GLS recruits and joins together over 2000 lawyers across almost all the major departments of state, regulatory bodies and other governmental organisations (excluding the prosecuting departments).[32] The GLS Secretariat, a unit within TSol, supports the Treasury Solicitor (the Permanent Secretary) in his role as the Head of GLS. This role involves providing leadership and strategic direction to the Service and ensuring consistency with the overall direction of the Civil Service.[33]

FUNDING

The GLS is funded by the Parliamentary Vote.[34] However, individual government lawyers are not employed by the GLS. They are employed by their particular organisation and the cost of their services is borne by that organisation.

The Service Prosecuting Authority is not part of the GLS. It receives its funding as part of the Defence Budget.[35]

REPORTING

The Attorney-General is responsible for setting the policy and resources framework within which TSol operates. He or she sets the overall objectives and approves the Agency's Corporate Strategy and Business Plans. This includes setting efficiency, financial and quality of service targets. TSol regularly reports to the Attorney about its progress in achieving those targets, including in an annual report that is laid before Parliament.[36]

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[27] Attorney-General's Office "Attorney-General's Guidelines" (2011) <www.attorneygeneral.gov.uk>
[28] As above n 24.
[29] Attorney-General's Office *Annual Review 2008-09* at 20.
[30] As above n 30, at 4.
[31] As above n 6, at para 126.
[32] Government Legal Services "About Government Legal Services" and "GLS Departments" (2011) <www.gls.gov.uk>
[33] Treasury Solicitors Department "Legal Structure" (2011) <www.tsol.gov.uk>
[34] Treasury Solicitors Department, *Framework Document 2008-2012* at para 1.6.
[35] Service Prosecuting Authority "Finance" (2011) <www.spa.independent.gov.uk>
[36] As above n 33, at paras 3, 5 and 7.

The Director of the Service Prosecuting Authority (the DSP) attends regular meetings with the Attorney-General to discuss issues upon which he or she might need to report to Parliament, and for him or her to render advice and support to the DSP when required.[37]

ACCOUNTABILITY

The Attorney-General is answerable to Parliament for the general conduct and efficiency of both TSol and the Service Prosecuting Authority. However, this does not extend to the financial performance of these agencies.[38]

GUIDANCE

The Attorney-General has sponsored common approaches across the GLS to sharing expertise, guidance and training, for example through a shared Prosecution Action Zone on the GLS intranet. The Attorney and Solicitor General also attend the annual GLS conference and visit legal departments across government to boost morale and reinforce the need for a common approach.[39]

In 2009-2010 one of the objectives for the Attorney-General's Office was to report to the GLS on whether the current model for GLS prosecutions remains the most appropriate to deliver a high quality service to departments and to maintain an effective skills base for GLS lawyers.[40] A report has since been presented to the GLS Board, and as a result, some prosecution departments have entered into discussions about a merger.

The guidance provided directly to the Service Prosecuting Agency is provided through the DSP and appears to occur on a more ad hoc basis.

MONITORING

The SPA has already been the subject of an HMCPSI inspection. TSol however, is subject to external audits by the Comptroller and Auditor General.[41]

Between the prosecuting organisations themselves

COLLECTIVE GROUPINGS

The Whitehall Prosecution Group brings together the main prosecutors CPS, SFO, the AG's Office and the smaller prosecutors. This Group is a coming together of senior members of the various governmental prosecuting authorities for the purpose of sharing knowledge, discussing and co-ordinating action on issues of mutual concern and acting as a voice for its members.[42]

THE PROSECUTORS' CONVENTION 2009

In 2008-2009 the Attorney-General sponsored a project to refresh and re-launch the Prosecutors' Convention, a document to which a wide range of prosecutors, in addition to the main prosecuting departments, are signed up. Its purpose is to require prosecutors to be proactive in overcoming the problems that can arise where more than one prosecuting authority wishes to proceed against the same individual or company for related offences. It encourages prosecutors to co-ordinate their interests and develop an agreed prosecutorial strategy with, wherever possible, one prosecutor in the lead and a single (joint) prosecution. The Convention was signed in July 2009 by 17 prosecuting organisations.

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[37] Service Prosecuting Authority *First Report and Business Plan* (2009) at 10.
[38] TSol's Chief Executive is the Accounting Officer – this means that he is directly accountable to Parliament's Public Accounts Committee, as well as to the Treasury, for TSol's financial performance.
[39] As above n 30, at 15.
[40] As above n 30, at 21.
[41] As above n 37.
[42] As above n 6, at paras 127-9.

In addition to the Convention, there are supplementary protocols concerning work-related deaths, financial offending, third party disclosure and the interface between civilian and military prosecutions.[43]

THE CODE FOR CROWN PROSECUTORS

The DPP is required by law to issue a Code for Crown Prosecutors. The Code gives guidance on general principles to be applied in determining whether proceedings for an offence should be instituted or discontinued and which charges should be preferred. It also provides guidance on dealing with youth offenders, modes of trial, accepting guilty pleas and the prosecutor's role at sentencing.[44] The DPP consults with the Attorney-General and the Director of the SFO about any proposed changes to the Code.

The Code is viewed by other prosecuting organisations as a broad series of well-tested standards which ought to guide all public prosecutions. Some prosecutors are obliged to make their prosecution decisions in accordance with the Code and if a prosecution decision were to be challenged by way of Judicial Review the Court would have regard to the Code in assessing the decision.[45] If a prosecution decision was contrary to the Code then it would be open to the DPP to take over the prosecution and discontinue it. This happens from time to time.

Between the investigating and prosecuting organisations

THE POLICE AND THE CPS

The relationship between the police and CPS has changed markedly in the last five years. As explained above, the CPS is now responsible for determining more serious charges. This involves a police officer discussing the case with a CPS lawyer and receiving advice on the appropriate charge(s) before any charge is laid. CPS Direct and charging centres provides out of hours charging advice to the police over the telephone. Once charges are laid the prosecution is the sole responsibility of CPS.

Increasingly, the CPS is also becoming involved in giving legal advice and providing direction at the investigation stage in serious cases.

THE SERVICE POLICE AND THE SERVICE PROSECUTING AUTHORITY

Under the Armed Forces Act 2006, more serious cases within the Armed Services must be notified to the Service Police (that is, the internal Police forces in the Army, Navy and Air force), and once investigated, must be passed directly to the independent Director of Service Prosecutions (DSP) for a decision on whether to prosecute and for presentation of the case in Court. In other cases the Commanding Officer (CO) will consider whether to deal with the matter summarily (if it is within his jurisdiction) or to refer the case to the DSP with a view to proceeding to a trial by the Court Martial. In all cases where it is intended there should be a trial by the Court Martial, it will be the DSP who makes the decision to prosecute and determines the charge or charges. A SPA lawyer will then present the case in Court.[46]

Prosecuting organisations that also investigate offending

THE SFO

Once the SFO accepts a case, it is allocated to a specialist case team of internal accountants, investigators, lawyers, IT experts and other support staff as well as police officers. The team is led by a case manager who is responsible for all aspects of the investigation and for any ensuing prosecution.

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[43] The Prosecutors Convention 2009 (July 2009).
[44] Crown Prosecution Service "Code for Crown Prosecutors" (2011) <www.cps.gov.uk>
[45] As above n 6, at paras 132-3.
[46] Service Prosecuting Authority "About Us" (2011) <www.spa.independent.gov.uk>

Case team members examine the evidence and arrange it into a compact and coherent form to present to the court. Case meetings involving all members of the case team are held at regular intervals throughout the investigation. Independent prosecuting counsel (instructed from the SFOs panel), are usually engaged at an early stage and attend these case meetings as well.

Once the case has been investigated, the case team will apply the Code for Crown Prosecutors to determine whether to initiate a prosecution. The independent counsel will then present the case in Court.[47]

OTHER PROSECUTING ORGANISATIONS

Other prosecuting organisations, such as the Health and Safety Executive have cases prosecuted by individual inspectors and by their prosecutors. Investigators are often the same people who make the decision as to whether to initiate a prosecution and prepare the case for court. On occasion, in-house or external counsel are used to present the case in court.

[47] Serious Fraud Office "How we work" (2011) <www.sfo.gov.uk>.

Areas of concern

Issues of quality identified

On 15 July 2009 the House of Commons Justice Committee issued a report entitled *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System*.[48] As well as examining the role of the CPS the report also looked at the role of public prosecutors in general. The following areas of concern were identified in the report:

THE DEFINITION OF ROLES

The Committee considered that continual piecemeal reforms to prosecution services in England and Wales had resulted in ill-defined roles. It expressed an expectation that the Attorney-General and the DPP should show clear leadership in defining the role of the public prosecutor in the wider criminal justice system.

THE RELATIONSHIP BETWEEN CPS AND THE POLICE

The Committee considered that the increasingly close relationship between the police and the CPS was a positive development. It approved of the fact that charging decisions had been transferred to CPS but noted concerns about delays in providing charging advice. It also noted concerns about the CPS' prosecutorial independence being compromised by increasing involvement at the investigative stage. It stated that in practice this did not seem to be the case. Nevertheless, it felt that there was no need for the CPS to be given statutory powers to direct the police during the investigation (as is the case in Scotland).

The Committee also highlighted public perceptions that the CPS under-charges to improve conviction rates and/or over-charges to facilitate plea bargaining. Regardless of their truth, these perceptions were felt to be damaging. The Committee therefore suggested that the Attorney-General closely monitor the data relating to charging and plea bargaining as well as ensuring that appropriate safeguards are in place.

The Committee recommended systematic scrutiny of out of court disposal of cases, especially of conditional cautions, to ensure consistency and transparency.

THE RELATIONSHIP BETWEEN THE CPS AND THE BAR

The increase in CPS advocacy was highlighted as an area for cautious development. The Committee noted that the CPS was not originally designed with advocacy in mind. It further noted the benefits of advocates conducting both prosecution and defence work (as the independent bar has traditionally done) and the argument that independent barristers are more removed from political influence, than government employed lawyers.

On the other hand, the cost savings of advocacy being conducted in-house were recognised by the Committee and the Committee felt that the concerns expressed by the Bar about the quality of CPS advocates were not entirely warranted. It felt that those concerns could be met by better case management by CPS rather than being an argument against CPS advocacy generally.

CONSISTENCY AND LOCAL DISCRETION

The Committee identified inconsistency in CPS delivery as a clear theme in the evidence it received. It stressed that there is conflict between the need for local responsiveness when it is in the public interest and the need for national consistency. It recommended that the Attorney-General should make a clear statement explaining how these principles can be made compatible.

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[48] As above n 6.

PUBLIC PROSECUTION MORE BROADLY

The Committee expressed concern that the Attorney-General's role in relation to prosecuting organisations other than the prosecuting departments was not well understood prior to the review of the Attorney's role in 2007-2008. It recognised that there were already good lines of communication across prosecuting organisations but stated that the Attorney should guide discussions to ensure greater consistency. It also identified that HMCPSI could play a significant role in ensuring consistency by conducting a wider range of inspections and that CPS should take on a leadership role as the owners of the Code of Crown Prosecutors.

The Committee concluded that England and Wales should not move towards the Scottish model (discussed in chapter 4) of a single prosecuting authority. It believed that there were more pressing priorities for CPS management than such a major change, but, given the diverse structure of prosecuting authorities it regarded co-ordination and the sharing of best practice as essential.

Issues of cost-effectiveness

The Government's Comprehensive Spending Review (CSR) 2010 settlement for the four years from 2010 to 2015, required the Attorney-General's Office and all Law Officer Departments (TSol, CPS, RCPO, SFO, HMCPI) to impose a resource reduction of 25%.

This has meant a programme of reform and reorganisation within the CPS and other departments in order to allow them to live within the CSR settlements. The prosecutors are working closely with other Criminal Justice System (CJS) partners who are working under the same resource restraints to improve the efficiency of the CJS.

Part Two: Canada

Historical background[49]

Present day Canada is a federal state that consists of 10 largely self-governing provinces (Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta and Newfoundland and Labrador) and three territories administered by the federal government (the Northwest Territories, Yukon and Nunavut). Canada is also a democratic, constitutional monarchy and the Head of State is the British Queen.

To understand the modern prosecution system in Canada it is necessary to first have a basic understanding of the following:

1. The formation of Canada in the 19th century;
2. The development of the criminal law; and
3. The general trends underlying the development of the various prosecution systems.

[49] This historical summary was compiled using: Library and Archives Canada Canadian Confederation website (2011) <www.collectionscanada.gc.ca>; the Canada Act 1982; the Constitution Act 1982; Eugene A Forsey *How Canadians Govern Themselves* (6th ed, Library and Archives Canada, 2005); Philip C. Stenning *Appearing for the Crown* (Law Commission of Canada, Cowansville, Quebec: Brown, 1986); *The Federal Prosecution Service Deskbook*; Law Reform Commission of Canada *Controlling Criminal Prosecutions*: *The Attorney-General and Crown Prosecutors* (Working Paper 62, Otawa, 1990); Bruce A MacFarland QC *Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency* (2002) 45 Criminal Law Quarterly 272; and Marvin R. Bloos *The Public Prosecutions Model from Upper Canada* (1990) 32 Criminal Law Quarterly 70.

The formation of Canada in the 19th century

PRE-CONFEDERATION

Up until the 18th century a significant proportion of present day Canada was part of the French Colony of New France. Gradually however, the British took control of this region beginning in 1583 when Britain formally claimed the area that would later become New Foundland and Labrador. In 1713 after a long struggle with France the areas that would become Nova Scotia, New Brunswick and Prince Edward Island were ceded to the British Empire by virtue of the Treaty of Utrecht. Further, the French agreed to recognise the administrative authority of the Hudson's Bay Company (a British Trading Company) over the area of Hudson Bay. The rest of New France was acquired by the British in 1763 as the Province of Quebec (now the provinces of Quebec and Ontario).

The American Revolution followed and resulted in an influx of British Loyalists into the Province of Quebec. To ease tensions, the Province was divided in 1791 into predominantly English speaking Upper Canada and predominantly French speaking Lower Canada. These regions formally merged again in 1840 and became the Province of Canada but the division between Canada West (formerly Upper Canada) and Canada East (formerly Lower Canada) was still recognised.

An important political development occurred between 1848 and 1855 as the regions of Nova Scotia, New Brunswick, the Province of Canada, Prince Edward Island and New Foundland all secured responsible governments. That is, each region established its own elected legislative assembly governed by a Cabinet that was in turn removable by the assembly. By this stage each of these regions had also appointed their own Attorney and Solicitor General, both of whom performed largely the same functions as their English counterparts at that time. This included responsibility for all criminal prosecutions. Of particular note however was the greater involvement of these Attorney-Generals in prosecutions that, in England, would have been pursued privately.

A further important development in this region was that by 1858 Britain had formally colonised mainland British Columbia and Vancouver Island. These two colonies were merged together in 1866.

CONFEDERATION

Between 1864 and 1866 delegates from Nova Scotia, New Brunswick and the Province of Canada met at three conferences to discuss the idea of a union that would bind their colonies together.[50] Each colony wanted to maintain its own identity but also considered that some form of union was necessary to protect against the threat of American invasion or economic strangulation and to enable economic growth and development. These conferences culminated in the British North America Act 1867 (which was renamed the Constitution Act 1867 in 1982).

The Constitution Act 1867 created the federal Dominion of Canada consisting of Nova Scotia and New Brunswick and the newly formed provinces of Quebec (previously Canada East) and Ontario (Canada West). The term dominion was chosen to reflect Canada's status as a self-governing colony of the British Empire. Canada was not given full independence though. The British Queen was retained as the Head of State, foreign policy remained in British hands and the power to amend the Constitution Act 1867 was given to the British Parliament.

The structure of the new nation was as follows: for the nation, there was a federal Parliament, with a Governor General representing the Queen, an appointed Upper House (the Senate), and an elected Lower House (the House of Commons). A new position of Attorney-General of Canada was also created. For every province

[50] Delegates from Prince Edward Island and New Foundland attended one of these conferences each. However both colonies decided not to join the Confederation at this time.

there was a legislative assembly with a Lieutenant Governor representing the Queen[51] and the provincial Attorney and Solicitor Generals continued to hold their offices as before.

Another important feature of the Constitution Act was that it enabled the federal Parliament to create new provinces and to change provincial boundaries within Canada with the consent of the provinces concerned.

These powers were used in 1870 when the Hudson's Bay Company sold Rupert's Land and the Northwest Territory to the Dominion of Canada. Initially the federal Parliament divided this newly acquired land into two provinces: Manitoba and the Northwest Territories (which included the areas that are now Yukon, Saskatchewan, Alberta and Nunavut). The creation of these new provinces meant that British Columbia was no longer geographically isolated from the other British colonies. As a result British Columbia joined Canada in 1871. Prince Edward Island followed suit two years later.

The federal Parliament carved the territory of Yukon and the provinces of Alberta and Saskatchewan from the Northwest Territories in 1898 and 1905 respectively. In 1949 New Foundland finally joined Canada and the last modern Canadian territory to be created was Nunavut, which came into being in 1999. [52]

FEDERAL VERSUS PROVINCIAL RESPONSIBILITIES

In relation to the criminal law and the administration of justice, the Constitution Act 1867 provided as follows:

- Subsection 91(27) gave the federal Parliament exclusive jurisdiction over the criminal law, including criminal procedure; and
- Subsection 92(14) gave the provincial legislatures exclusive jurisdiction over the administration of justice in the Provinces, including the constitution, maintenance, and organisation of Provincial criminal courts.

The effect of this division of powers was that, from 1867 onwards, the federal Parliament was responsible for enacting criminal laws and the provincial legislatures were responsible for the conduct of prosecutions.

The development of the criminal law

CRIMINAL LAW

Prior to 1867, each of the four founding provinces of Canada had developed their own distinct criminal law.

After Confederation, the federal Parliament began the task of unifying and consolidating Canadian criminal law. This resulted in the Criminal Code of 1892. The Criminal Code reduced the criminal law to an orderly written system of offences and procedures, but it was not comprehensive. Parts of the common law of each province remained in force, as did certain federal and imperial statutes. In 1953 the federal Parliament revised the Criminal Code and abolished all common law offences, offences under imperial acts and offences under pre-Confederation acts. However, offences created by other federal criminal statutes were retained. The structure of Canadian criminal law remains in this state today.

In addition to the federal criminal law, there is also a body of provincial laws which may be described as "quasi-criminal" or "penal". Section 92 of the Constitution Act 1867 assigned jurisdiction to the provinces over a variety of subjects outside of the criminal law, including property and civil rights. In order to enable enforcement, section 92(15) then specifically allowed for the provinces to enact offence and penalty provisions in relation to these subjects.

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[51] Initially many of the provinces also had an appointed Upper house however all provincial Upper Houses were later abolished.

[52] The province of New Foundland was renamed New Foundland and Labrador in 2001.

JURISDICTION FOR PROSECUTION

As originally enacted the authority to prosecute offences under the Criminal Code 1892 was given to the provincial Attorney-Generals. These Attorneys were also responsible for prosecuting the quasi-criminal or penal offences described above. The only role for the federal Attorney-General (the Attorney-General of Canada) was that he was deemed to be the Attorney-General for the Northwest Territories (and later Yukon and Nunavut) and, as such, had responsibility for all prosecutions in the territories.

This position gradually changed. Amendments to the Code gave the federal Attorney-General jurisdiction over:

- Proceedings initiated by the Canadian government for offences created by federal acts other than the Criminal Code, such as drug trafficking and tax evasion;
- Prosecutions for war crimes and crimes against humanity under the Code;
- Prosecutions for terrorism offences under the Code; and
- Prosecution of criminal organisations under the Code.

Further, it is worth noting that some Code prosecutions require the consent of the federal Attorney-General before proceedings can be instituted or continued.

The general trends in developing prosecution systems

There is no single, uniform prosecution system in Canada. Instead each of the provinces has developed their own systems over time. This also occurred in the federal jurisdiction. Underlying the various modern prosecution systems are three general trends, two of which began in the 19th century and one that began in the 1980s, namely:

1. The changing roles of the Attorneys and Solicitors General;
2. The appointment of public officials as prosecutors; and
3. The development of independent prosecution services.

THE CHANGING ROLES OF THE ATTORNEYS AND SOLICITORS GENERAL

Immediately after Confederation the federal Parliament enacted An Act Respecting the Department of Justice 1866. This was the first piece of legislation in Canada to outline the functions of an Attorney-General. However, the Act created just one portfolio, that of the Minister of Justice. The Minister was to be a cabinet member and the head of the Department of Justice. The Act then stated that the Minister was to be ex-officio the Attorney-General of Canada as well.

As the Minister of Justice, the Minister was given responsibility for providing legal advice to the federal government; ensuring that the administration of public affairs was conducted in accordance with the law; and the superintendence of all matters connected with the administration of justice on a federal level. As Attorney-General, the Minister was charged with the same powers and duties as his or her counterpart in England including responsibility for all Crown litigation and superintendence of prisons and penitentiaries. In addition, when the North-West Mounted Police were established in 1873, supervision of the force was assigned to the Department of Justice.

As can be seen from this description the role of the Minister of Justice in Canada incorporated, but was considerably broader than, the traditional role of the Attorney-General in England and included oversight over all federal prosecutions.

To assist the federal Minister of Justice in his or her duties the office of federal Solicitor-General was created in 1887. The Solicitor's role was simply described as being: "to assist the Minister of Justice in the counsel work of the Department of Justice." This changed in 1966 when the federal Solicitor-General was also given separate responsibilities for the first time, namely responsibility for the Royal Canadian Mounted Police, prisons and penitentiaries, and parole and remissions. This was a further departure from the traditional English model.

After 1887, all of the provinces followed the federal model of creating a Department of Justice (or a Department of the Attorney-General) headed by a Minister of Justice who was also the Attorney-General (although in several instances different terminology was used). Further, five of the provinces followed the federal model of giving the Solicitor-General separate responsibility for the police.

PUBLIC OFFICIALS AS PROSECUTORS

In the first half of the 18th century the Attorney or Solicitor-General for each of the British colonies in Canada were expected to personally conduct the Crown's business in Court. This was seen to include criminal prosecutions. In this respect (as explained above) the law officers in the colonies played a much more active role in prosecutions than their English counterparts from the very beginning.[53]

As the populations of the colonies grew and the court systems expanded, the attendance of one of the law officers at every criminal prosecution became untenable. Accordingly, the law officers began appointing counsel on an ad hoc basis to represent them in court. These counsel were referred to as King's or Queen's counsel or as Crown Counsel. They appeared in the courts as representatives only and could not exercise the prerogatives of the law officers. This meant that if a prerogative power, such as a stay of proceeding, was to be used a law officer would still have to attend court personally.

In 1857 the legislature for Upper Canada (later Ontario) enacted the Upper Canada County Attorneys Act. This Act was designed to address the fact that the provincial law officers were no longer able to oversee every prosecution personally. It did so by allowing for the Lieutenant Governor of each Province to appoint a resident member of the bar as the County Attorney.

The County Attorneys were expected to conduct the Crown's prosecution work in the County courts, at first, on a part time fee for service basis. This involved receiving evidence relating to all criminal charges from the Justices of the Peace, Magistrates or Coroners; assessing the evidence; laying charges; arranging for the attendance of witnesses; conducting trials or hearings in relation to all but the most serious criminal, quasi-criminal and penal charges on behalf of the Crown (the most serious trials were handed back to the law officers); taking over private prosecutions where this was considered to be in the public interest; and providing legal advice to the courts upon request.

Over time the title of County Attorney changed to Crown Attorney. Further, the workload became such that Crown Attorneys began to conduct prosecution work on a full time basis. In recognition of the increased workload the option of paying Crown Attorneys by salary was introduced in 1899 and in 1921 allowance was made for the first appointment of Assistant Crown Attorneys and for other support staff. As the population of Ontario continued to grow further changes were made in the 1960s and 70s. For instance, additional appointments of provincial Crown Attorneys and provincial prosecutors were made. Further, legislation was

[53] Possible reasons for this difference include: There was no long standing tradition of private prosecutions in the fledgling colonies and as such private individuals were less inclined to initiate prosecutions; there were few private lawyers in the colonies to assist individuals in bringing prosecutions, instead most lawyers held public offices making public prosecutions more logical; Americans who fled to the colonies following the American Revolution brought with them the concept of public prosecutors; there was growing dissatisfaction within England with their system of private prosecution; political instability in the fledgling colonies necessitated a more active role of Government in keeping the peace.

passed to provide that all Crown Attorneys would be paid by salary and for central control of Crown Attorneys through the Ministry of the Attorney-General.

Following Confederation, similar duties to those originally given to Crown Attorneys in Upper Canada were given to officials referred to as Prosecuting Officers, Crown Attorneys or Crown Counsel in the other Canadian provinces. The theoretical degree of independence varied among the provinces: in some provinces the local prosecutor was legally under the complete control of the provincial Attorney-General, while in other cases the Crown Attorneys enjoyed the rights and privileges of the Attorney-General and Solicitor-General when carrying out their prosecution functions. In other provinces, where there was no statutory recognition of Crown Attorneys or public prosecutors, they still exercised prosecutorial authority as counsel, agents or delegates of the Attorney-General.

The result of these historical developments was that, up until at least 1990, all Crown prosecutors in Canada were public officials and salaried employees of their respective Ministry or Department of the Attorney-General.

THE DEVELOPMENT OF INDEPENDENT PROSECUTION SERVICES

In 1990 Nova Scotia became the first jurisdiction in Canada to establish an independent prosecution service, that is, a prosecution service created by statute as a separate entity from any government department. In 2005 and 2006 Quebec and the federal jurisdiction adopted the Nova Scotia model and set up independent prosecution services of their own.

The move towards establishing an independent prosecution service in Nova Scotia began in the 1980s as a result of the Donald Marshall Jr. case.

In 1983 the Nova Scotia Court of Appeal overturned the murder conviction of Mr Marshall Jr. (an Aboriginal person) that had been entered in 1971. This result came after a police review, an appeal to the Court of Appeal, two further police reviews, a formal police re-investigation and finally a reference to the Court of Appeal. The case caused considerable controversy and a Royal Commission was appointed to conduct a public inquiry.

The Royal Commission released a report in 1989 that found that the criminal justice system had failed Mr Marshall at every turn. It identified serious errors made by the police, the Crown prosecutor, defence counsel, the trial Judge, both appellate counsel, the Court of Appeal and the Deputy Attorney-General. In order to prevent such errors from occurring again the Commission made numerous recommendations. This included a recommendation that an independent position of Director of Public Prosecutions (DPP) be created by statute.[54]

This recommendation resulted in the Public Prosecutions Act 1990, which created the position of DPP and established the Nova Scotia Public Prosecution Service (the PPS): the first statutorily-based independent prosecution service in Canada. Under the Act the Attorney-General retained ultimate responsibility for prosecutions however measures were put in place to ensure that the DPP could perform his or her or her functions independently.[55]

In 2005 Quebec established an independent prosecution service, closely following the Nova Scotia model. Then in 2006 the federal Parliament established the federal Director of Public Prosecutions and the Public Prosecution Service of Canada. All three systems are discussed in more detail below.

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[54] Royal Commission on the Donald Marshall Jr., Prosecution *Commissioner's Report: Findings and Recommendations* (Halifax, 1989).

[55] Parliamentary Information and Research Service *The Possible Establishment of a Federal Director of Public Prosecutions in Canada* (2006).

Current roles and inter-relationships

Introduction

As indicated above two general models of prosecution systems have developed in Canada: the prosecution service within the Attorney-General's Ministry or Department and more recently the independent prosecution service. These two models are examined below in order of their historical development.

Given that there are 11 separate prosecution services in Canada, a detailed review of each service is beyond the scope of this paper. Accordingly, government prosecution services are discussed by way of a detailed analysis of the system in Ontario as a case study, a brief summary of the unusual system in British Columbia and a table summarising the systems in the remaining jurisdictions. Independent prosecution services are discussed by way of a detailed analysis of the federal system as a case study and a table summarising the systems in Nova Scotia and Quebec.

Government prosecution case study: Ontario (population 13,282,400)[56]

CURRENT ROLES

Attorney-General

The Attorney-General of Ontario is a Cabinet Minister and governs the Ministry of the Attorney-General - the department responsible for the oversight of the justice system within the province.

The Attorney is responsible for all criminal prosecutions and for the conduct of criminal proceedings in general. The Attorney also provides legal advice to, and conducts litigation on behalf of, all government ministries and many agencies, boards and tribunals; provides legal advice on all legislation and regulations; and administers court services throughout Ontario.[57]

Deputy Attorney-General

The Deputy Attorney-General is appointed by the Lieutenant Governor in Council for the province and serves as the Deputy Head of the Ministry.

Assistant Deputy Attorney-General – Criminal Law

The Assistant Deputy Attorney-General – Criminal Law (ADAG – Criminal Law) is the head of the Criminal Law Division in the Ministry. He is one of six Assistant Deputy Attorneys General who report, through the Deputy Attorney-General (the chief public servant in the Ministry), to the Attorney-General.

The Criminal Law division is in turn divided into 12 branches. For present purposes eight are relevant: The Crown Law Office – Criminal, the Criminal Law Policy Branch and the six Regional Directors of Crown Operations.

The Crown Law Office – Criminal is responsible for appellate work and has some Crown Counsel who conduct complex or high profile trials. This branch also conducts prosecutions of justice related officials, such as police officers.

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[56] Estimate as at 1 January 2011 rounded to the nearest hundred, Statistics Canada "Canada's Population Estimates: Table 2 – Quarterly Demographic Estimates" (2011) <www.statcam.gc.ca>

[57] Ontario Ministry of the Attorney-General "Roles and Responsibilities of the Attorney-General" (2011) <www.attorneygeneral.jus.gov.on.ca>.

The Crown Law Policy Branch was established in 2001 and provides guidance to Crown prosecutors on the exercise of Crown discretion. It is also responsible for creating and updating the Ontario Crown Policy Manual, which contains directives and guidelines for Crown Counsel, and for advising Crown Attorneys on case law or statutory changes affecting their responsibilities. This branch also provides advice on criminal law policy, such as proposed amendments to the Criminal Code.

Finally there are six Regional Directors of Crown Operations. Crown Attorneys report directly to these regional directors.[58]

Crown Attorney Offices

There are numerous Crown Attorneys Offices throughout Ontario. Each one is headed by a Crown Attorney and staffed by Deputy Crown Attorneys, Assistant Crown Attorneys, provincial prosecutors, articling lawyers (i.e. trainee lawyers), summer clerks and/or support staff. All staff in Crown Attorney Offices are employed as public servants by the Ministry of the Attorney-General and are paid by annual salary.

Crown Attorneys are appointed under the Crown Attorneys Act 1990 by the Lieutenant Governor in Council. Once appointed, the Crown Attorney is responsible for the conduct of all criminal trial prosecutions and summary conviction appeals that arise in the geographical area that is assigned to them. Their duties are outlined in section 11 of the Act and are fairly similar to those originally assigned to County Attorneys in the Upper Canada County Attorneys Act 1857.

Under the Crown Attorneys Act the Lieutenant Governor may also appoint Deputy Crown Attorneys and Assistant Crown Attorneys to assist the Crown Attorneys in performing their duties. These Deputies and Assistants report to the Crown Attorney. All three must be members of the bar to qualify for their appointments. In practice Crown Attorneys are increasingly occupied with administrative duties such as decisions relating to hiring, promotion, performance evaluation and the supervision and oversight of major cases. Nonetheless all Crown Attorneys appear in court, notwithstanding these administrative duties.

In addition, Crown Attorneys supervise and direct provincial prosecutors. Provincial prosecutors are authorised to conduct prosecutions by the Attorney-General through section 6 of the Crown Attorneys Act. Their duty is to conduct prosecutions for provincial offences (i.e. regulatory offences) and offences punishable on summary conviction that are delegated to them by the Crown Attorney.

The Ministry also employs per diem counsel to act as Crown Counsel and provincial prosecutors on a temporary basis as needed.

When performing their duties under the Act all Crown Attorneys and provincial prosecutors are acting as agents for the Attorney-General for the purposes of the Criminal Code (section 10 of the Act).[59]

In 2009 the Ministry employed 58 Crown Attorneys, 23 Deputy Crown Attorneys and at least 619 Assistant Crown Attorneys. The ranges of their annual salaries were as follows:

- Crown Attorneys were paid between $128,400 and $203,000 a year. The majority were paid around $200,000.
- Deputy Crown Attorneys were paid between $153,900 and $203,700 a year.
- Assistant Crown Attorneys were paid between $74,000 and $207,000 a year, with only 12 receiving the highest amount which is based on salary plus performance review.[60]

[58] The Honourable G Norman Glaude, Commissioner R*eport of the Cornwall Inquiry, Chapter 11: Institutional response of the Ministry of the Attorney-General* (2009).
[59] As above at n 10, and Crown Attorneys Act 1990.

Municipal prosecutors

Responsibility for prosecuting provincial offences is shared between the Attorney-General and municipalities in Ontario by virtue of Part X of the Provincial Offences Act. This Part allows the Attorney-General to transfer the responsibility for carrying out court administration, prosecution and enforcement functions in relation to provincial offences to any municipality. In practice, transfer agreements now exist for every municipality in Ontario.

Provincial offences are basically summary, regulatory offences created under provincial statutes. They include motor vehicle regulation, occupational health and safety laws, environmental protection, the regulation of controlled substances such as liquor and tobacco, and general public order and safety regulation such as trespass and fire prevention.[61]

Under the transfer agreements the municipalities are responsible for the conduct of prosecutions under Parts I and II of the Provincial Offences Act. These prosecutions are either initiated by certificates of offence or relate to parking infractions. Municipalities employ municipal prosecutors to conduct these prosecutions. These prosecutors do not act as the Attorney-General's official agents.

More serious provincial offence prosecutions are conducted under Part III of the Act. These prosecutions are not covered by the transfer agreements and are routinely conducted by provincial prosecutors.

The Police

There more than 67 police forces in Ontario as each municipality is responsible for organising its own police service under the Police Services Act 2006. One police force, the Ontario Provincial Police, provides policing services throughout the Province including in 141 municipalities that have contracted their services. Oversight of all of the police forces is provided by the Ministry of Community Safety and Correctional Services.[62]

INTER-RELATIONSHIPS

The Attorney-General and Crown Counsel

The Attorney-General is accountable to the legislature for the entire process through which justice is administered in the province. Because of this accountability, which includes specific cases, a continuum of responsibility within the Ministry has been established. Each Crown Counsel or Assistant Crown Attorney reports to a Director or a Crown Attorney. Crown Attorneys in turn report to Directors, while Directors report to the ADAG - Criminal, who reports to the Deputy Attorney-General.

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[60] Ontario Ministry of Finance "Public Sector Salary Disclosure 2010 (Disclosure for 2009): Ministries" (2011) <www.fin.gov.on.ca>. Notably only salaries over $100,000 are published. The salaries for 619 Assistant Crown Attorneys were published. However, given the cap on publishing several more Assistant Crown Attorneys may be employed by the Ministry and the pay band is likely to be much broader. The report does not include salaries for provincial prosecutors or any other employees in Crown Attorneys Offices, so presumably they earn less than $100,000.

[61] Law Commission of Ontario *Modernising the Provincial Offences Act: A New Framework and Other Reforms* (Interim Report, 2011).

[62] Ontario Ministry of Community Safety and Correctional Services "Policing Services" (2011) <www.mcscs.jus.gov.on.ca>

The Attorney-General provides advice and guidance to Crown Counsel through the Crown Policy Manual which sets out the overall philosophy, direction, and priorities of the Ministry. The Manual is divided into three components: Policies, Practice Memoranda and Confidential Legal Memoranda.

- Policies are brief statements of principle that provide general guidance on important areas of Crown practice and discretion. They cover broad topics such as media contact by crown counsel, the relationship between the police and Crown Counsel, charge screening, disclosure, specific types of prosecutions, procedural issues and trial practice. Policies are made readily available to the public.

- Practice Memoranda provide specific policy direction and detailed legal and practical guidance to Crown Counsel. They are issued by the ADAG – Criminal Law and are publicly available.

- Confidential Legal Memoranda supplement policies and practice memoranda with detailed legal advice and guidance. These are issued by the ADAG – Criminal Law and are privileged.

The Attorney-General, Deputy Attorney-General, Assistant Deputy Attorney-General, Directors, Crown Attorneys, Assistant Crown Attorneys, Crown Counsel, per diem crowns, and provincial prosecutors are all subject to the policies and advice provided in the Crown Policy Manual.[63]

The Attorney-General and municipal prosecutors

Municipal prosecutors are not subject to the Crown Policy Manual however the Attorney-General still exercises a degree of oversight. Under the transfer agreements the Attorney has reserved the right to intervene in any proceeding and assume the role of prosecutor at any stage, including on appeal.[64] Further, under s11 of the Crown Attorneys Act, a Crown Attorney may conduct proceedings in respect of any provincial offence or offence punishable on summary conviction where in his or her opinion the public interest so requires.

Crown Counsel and the police

The relationship between the police and Crown Counsel is discussed in one of the policies in the Crown Policy Manual. It states that the police have the sole responsibility for charging decisions except where the consent of the Attorney-General is required by statute. Crown Counsel are then solely responsible for reviewing the evidence and determining whether a charge is to proceed once it has been laid. However the Manual notes that the police may seek advice from Crown Counsel concerning legal issues arising during an investigation. Further, Crown Counsel may ask the assistance of police in conducting further investigations and providing further information. In these circumstances it simply states that the independence of roles and responsibilities must nonetheless be respected, particularly when dealing with long and complex criminal investigations and / or specially created task forces.

[63] Ontario Ministry of the Attorney-General "Role of the Crown, Preamble to the Crown Policy Manual and The Crown Policy Manual: Access and Structure" (2011) <www.attorneygeneral.jus.gov.on.ca>

[64] Provincial Offences Act 1990, s 162(1)(b).

Unusual system: British Columbia (population 4,554,100)[65]

In British Columbia the prosecution service is within the Attorney-General's Ministry. However, in practice it has developed as a hybrid of the two main prosecution systems in Canada.

Like Ontario, the prosecution service forms part of the Ministry of the Attorney-General. In British Columbia this is known as the Criminal Justice Branch of the Ministry. The Assistant Deputy Attorney-General (ADAG) is the head of the Criminal Justice Branch and by virtue of the Crown Counsel Act 1990 is responsible for the administration and day to day operations of the prosecution service. The ADAG reports through the usual bureaucratic hierarchy to the Attorney.

However, like in the independent prosecution services, there are strict statutory rules governing the independence of the ADAG. The Attorney or Deputy Attorney-General may give direction in a specific case only if it is in writing and published in the British Columbia Gazette. Any general policy directions must also be in writing. Further, in cases raising significant public interest the ADAG may appoint an independent lawyer to be a 'special prosecutor'. A decision of the special prosecutor on whether or how to proceed in the case may then only be overruled by the Attorney or Deputy Attorney-General in writing, again with publication in the Gazette. [66]

The ADAG's role includes oversight of all Crown Counsel. In British Columbia Crown Counsel are responsible both for laying charges in appropriate cases and for conducting prosecutions. The prosecution service is divided into 40 offices across five regions, each headed by a Regional Crown Counsel – North, Interior, Fraser, Vancouver and Vancouver Island-Powell River. Provincial headquarters is in Victoria. There are criminal appeals and special prosecutions offices in Vancouver and Victoria. In 2009/2010 the Criminal Justice Branch opened 50,088 prosecution files, it employed approximately 844 FTE staff (including approximately 460 Crown counsel) and spent a total of $122,126,395.

[65] Ministry of the Attorney-General *BC's Prosecution Service Annual Report 2009-2010*.

[66] Parliamentary Information and Research Service *The Possible Establishment of a Federal Director of Public Prosecutions in Canada* (2006).

The other government prosecution services[67]

	New Brunswick	Manitoba	Prince Edward Island	Saskatchewan	Alberta	Newfoundland and Labrador
Population[68]	753,200	1,243,700	143,500	1,052,100	3,742,800	509,100
Ministry responsible for prosecutions	Office of the Attorney-General (Department)	Manitoba Justice	Department of Justice and Public Safety/Office of the Attorney-General	Ministry of Justice and Attorney-General	Alberta Justice	Department of Justice
Ministry structure	Four branches headed by the Deputy Attorney-General (DAG) (the CEO)	Seven divisions headed by the Deputy Minister of Justice/Deputy Attorney-General (the CEO)	Eight divisions headed by the Deputy Attorney-General (DAG) (the CEO)	Six divisions headed by the Deputy Minister of Justice/Deputy Attorney-General (the CEO)	Six divisions or services headed by the Deputy Minister /Deputy Attorney-General (the CEO)	Six branches or divisions headed by the Deputy Minister /Deputy Attorney-General (the CEO)
Division responsible	Public Prosecution Services Branch	Manitoba Prosecution Service (MPS) (a division) – 213 FTE staff[69]	Crown Attorneys' Office (a division) – 13 staff[70]	Public Prosecutions Division	Criminal Justice Division	Public Prosecutions Division – 43 lawyers, 3 articling students and 23 support staff

[67] The information for this table has been gained from the websites of each of the Ministries' responsible for prosecution in the various provinces and from their Annual Reports. See New Brunswick: <www.gnb.ca> and Office of the Attorney-General *2009-2010 Annual Report*; Manitoba: <www.gov.mb.ca> and Manitoba Justice *Annual Report 2009-2010*; Prince Edward Island: <www.gov.pe.ca> and Office of the Attorney-General *Annual Report 2008-2009*; Saskatchewan: <www.justice.gov.sk.ca> and Ministry of Justice and Attorney-General *2009-2010 Annual Report*; Alberta: <www.justice.alberta.ca> and Alberta Justice *Annual Report 2009-2010*; and Newfoundland and Labrador: <www.justice.gov.nl.ca> and Department of Justice *Annual report 2008/2009*.

[68] As above n 8.

[69] Four management, 122 legal and 86 support staff.

[70] The DPP, three administrative assistants, two senior Crown Attorneys, five Crown Attorneys and two Assistant Co-ordinators.

	New Brunswick	Manitoba	Prince Edward Island	Saskatchewan	Alberta	Newfoundland and Labrador
Division structure	Headed by the Director of Public Prosecutions (DPP)[71] who oversees a central office and 13 regional offices	Headed by the Assistant Deputy Attorney-General – Prosecutions ADAG – Prosecutions) who oversees a central office and six regional offices	Headed by the Director of Public Prosecutions (DPP) who oversees two offices	Headed by the Executive Director who oversees a central office and 10 regional offices (the two largest regional offices also have one satellite office each)	Headed by the Assistant Deputy Minister (ADM) who oversees a central office and 14 regional offices	Headed by the Director of Public Prosecutions (DPP)[72] who oversees a central office and 10 regional offices
Central Office Structure	Three sections: Management, Family and Justice and Specialised Prosecutions	Four branches: Winnipeg Prosecutions; Regional Prosecutions and Legal Education; Specialised Prosecutions and Appeals; and Business Operations	The DPP's office	Two branches: Appeals, and Operational oversight and policy	Four branches: Office of the ADM, Strategic and Business Services, Specialized and Appeals, and Education and Policy	Two branches: Office of the DPP and the Special Prosecutions Office
Regional Offices	13 Crown Prosecutors Offices	Six Regional Prosecutions Offices	Two offices: Charlottetown and Summerside	10 Prosecution District Offices – 111 prosecutors and 65 support staff	14 Crown Prosecutors Offices – 317 prosecutors and 309 support staff	10 Regional Crown Attorneys Offices

[71] Also referred to as the Assistant Deputy Attorney-General.
[72] Also referred to as the Assistant Deputy Minister (Criminal Division).

	New Brunswick	Manitoba	Prince Edward Island	Saskatchewan	Alberta	Newfoundland and Labrador
Regional Office Structure	Headed by six Regional Crown Prosecutors (RCP). The offices are staffed by Crown Prosecutors and support staff	Each office is headed by a Regional Crown Attorney (RCA) and staffed by Crown Attorneys and support staff	Each office has a Senior Crown Attorney and is staffed by Crown Attorneys and support staff	Each office is headed by a RCP supported in some cases by an Associate RCP. The offices are staffed by Senior Crown Prosecutors, Crown Prosecutors and in two instances Traffic and Safety Prosecutors as well as support staff	Each office is headed by a Chief Crown Prosecutor (CCP), Crown Prosecutors , Provincial Prosecutors and support staff (including paralegals and legal assistants)	Each office has a Senior Crown Attorney and is staffed by Crown Attorneys and support staff
Person Accountable to Parliament	Attorney-General (AG)	AG	AG	AG	AG	AG
Person with functional oversight	DPP	ADAG - Prosecutions	DPP	Executive Director	ADM	DPP
Reporting lines	Crown Prosecutors to RCP to DPP to DAG to AG	Crown Attorneys to RCA to ADAG – Prosecutions) to AG	Crown Attorneys to SCA to DPP to AG	Crown Prosecutors to RCP to Executive Director to AG	Prosecutors to CCP/Executive Director to ADM to AG	Crown Attorneys to SCA to DPP to AG
Guidance	Public Prosecution Services Operational Manual	A series of individual policies. Those of public interest are published online	The Guidebook of Policies and Procedures for the Conduct of Criminal Prosecutions	Policy Manual and Guidebook	Crown Prosecutors ' Policy Manual	Public Prosecutions Guidebook
Indication of caseload	NA	In 2009/2010 MPS opened 46,896 prosecution files	In 2008/2009 4,588 prosecution files were opened for Criminal Code offences and there were 29 appeals	In 2009-2010, police laid 68,642 criminal charges in Saskatchewan	In 2010-2011 the Alberta Pros. Service opened 113,448 criminal files.	In 2008/2009 the Public Prosecutions Division prosecuted over 8,300 cases
Pre or post charge screening	Pre charge	Pre charge	Post charge (but pre charge discussions are encouraged)	Post charge	Post charge	Post charge (but pre charge discussions are encouraged)

	New Brunswick	Manitoba	Prince Edward Island	Saskatchewan	Alberta	Newfoundland and Labrador
Prosecutions expenditure 2009/2010	NA	$24,929,000	NA	$18,065,000 ($750,000 over budget)	$82, 947,000	NA
Indication of salaries	Historically pays the lowest salaries to prosecutors	NA	NA	In 2009/2010 RCPs were paid between $138,096 and $148,380 a year. Crown Prosecutors were paid on average around $70 - 80,000.	Salaries for prosecutors range from $73,524 to $176,628.	NA

Independent prosecution case study: Federal (population 34,238,000)[73]

INTRODUCTION

Up until 2006 public prosecutions at the federal level were conducted by the Federal Prosecution Service (FPS). The FPS was a national entity within the Department of Justice. It comprised a central component, the Criminal Law Branch, and had components throughout the country in each of the Regional Offices of the Department. The regional component of the FPS was made up of in-house prosecutors. In addition, the FPS regularly hired agents to conduct prosecutions on its behalf, on a fee for service basis.

In 1990 the Law Reform Commission of Canada reviewed this system and published a working paper entitled: *Controlling Criminal Prosecutions: The Attorney-General and the Crown Prosecutor*. The working paper recommended that: "To ensure the independence of the prosecution service from partisan political influences, and to reduce potential conflicts within the Office of the Attorney-General, a new office should be created, entitled the Director of Public Prosecutions. The Director should be in charge of the Crown Prosecution Service, and should report directly to the Attorney-General." Further recommendations were also made in relation to the proposed structure of the revised prosecution service.

The Commission felt that the creation of an essentially independent position of Director of Public Prosecutions (DPP) would reduce the risk of public and political pressure on the federal Minister of Justice, who also serves as the Attorney-General and as a member of Cabinet.

Ultimately, the Commission's recommendations resulted in the enactment of the Director of Public Prosecutions Act 2006 (the DPP Act).

CURRENT ROLES

Attorney-General

As explained above the federal Minister of Justice is a member of Cabinet and is also ex officio the Attorney-General of Canada. The responsibilities accorded to the Minister have not changed markedly since this

[73] This summary was compiled using the Public Prosecution Service Canada website <www.ppsc-sppc.gc.ca>, the Director of Public Prosecutions Act, the Department of Justice Act, the Public Prosecution Service *Annual Report 2009-2010*, and the *Federal Prosecution Service Deskbook*.

position was originally created in 1886 (although he is no longer responsible for prisons).[74] These responsibilities include the delivery of prosecution services in Canada at the federal level.

Director of Public Prosecutions

The DPP Act created the role of the DPP for Canada. The DPP, acting "under and on behalf of the Attorney-General", is responsible for:

1. Initiating and conducting federal prosecutions;
2. Intervening in proceedings that raise a question of wider public interest;
3. Issuing guidelines to federal prosecutors;
4. Advising law enforcement agencies or investigative bodies on general matters relating to prosecutions and on particular investigations that may lead to prosecutions;
5. Communicating with the media and the public on all matters respecting the initiation and conduct of prosecutions;
6. Exercising the authority of the Attorney-General of Canada in respect of private prosecutions; and
7. Exercising any other power or carrying out any other duty or function assigned by the Attorney-General that is compatible with the office of the Director.

The DPP is appointed by the Governor in Council on the recommendation of the Attorney-General, following approval by a parliamentary committee. The Director may hold the office for up to seven years but no longer. A similar process is followed for the appointment of a Deputy Director.

To assist the DPP in carrying out his or her functions, the Act allows for the appointment of federal prosecutors and support staff under the Public Service Employment Act. The DPP Act also allows the DPP to retain the services of barristers or advocates to act as federal prosecutors on a fee for service basis (with the approval of the Treasury Board).

When carrying out his or her functions set out in the DPP Act, the DPP is deemed to be the Deputy Attorney-General of Canada.

Public Prosecution Service of Canada

The Public Prosecution Service of Canada (PPSC) is the independent government organisation that was created in 2006 to assist the DPP to perform his or her functions under the DPP Act. Therefore, in practice, it is the PPSC that conducts the actual prosecutions at the federal level in Canada.

As an organisation the PPSC is directly responsible for prosecuting offences under numerous federal statutes and provides prosecutorial advice to law enforcement agencies. Cases prosecuted by the PPSC include those involving drugs, organised crime, terrorism, tax law, money laundering and proceeds of crime, crimes against humanity, war crimes, Criminal Code offences in the three territories and a large number of federal regulatory offences. Recently the PPSC was also given responsibility for prosecutions under the Canada Elections Act and the Financial Administration Act.

[74] The roles assigned to the Minister of Justice and the Attorney-General are now defined by sections 4 and 5 of the Department of Justice Act RSC 1985. However these provisions are virtually identical to the original legislation.

As of 31 March 2010, the PPSC had 920 employees across Canada, the majority of whom were prosecutors. PPSC headquarters is located in Ottawa and the organisation maintains a network of offices across Canada, which includes regional offices in Vancouver, Edmonton, Saskatoon, Winnipeg, Toronto, Ottawa, Montreal, Halifax, Iqaluit, Yellowknife, and Whitehorse each headed by a Chief Federal Prosecutor. There are also several sub-offices in smaller cities.

The total PPSC caseload in 2009-2010 numbered 76,292 prosecution files. This figure includes cases opened as well as those carried over from the previous year, both from staff counsel and from private sector agents. This caseload included:

- 55,996 files relating to the Controlled Drugs and Substances Act;
- 9,620 files relating to regulatory offences; and
- 9,909 files in the territories, 8,990 of which involved Criminal Code prosecutions.

Agents

The PPSC uses agents (private-sector lawyers) in areas where it does not have a regional office, or where it is impracticable or otherwise not cost-effective for cases to be handled by staff counsel.

Agents are retained on fixed term agreements. They record their time in accordance with the PPSC's Prosecution Code Set and are then paid on a fee for service basis. Their level of remuneration is between $96 and $126 per hour, depending on the agent's level of experience.

In 2009-2010 the PPSC retained approximately 600 agents who handled approximately 39,700 prosecution files (roughly, just over half).

The Royal Canadian Mounted Police[75]

The Royal Canadian Mounted Police is the Canadian national police service and an agency of the Ministry of Public Safety Canada.

The RCMP provides a total federal policing service to all Canadians and policing services under contract to the three territories and eight provinces (all except Ontario and Quebec).

[75] Royal Canadian Mounted Police "About the RCMP" (2011) <www.rcmp-grc.gc.ca>

INTER-RELATIONSHIPS

The Attorney-General and the DPP

The DPP Act states that the DPP acts "under and on behalf of the Attorney-General of Canada". However, the relationship is not one of strict sub-ordinance; instead it is based on the dual principles of respect for the independence of the prosecution function and the need to consult on important matters of public interest.

Safeguarding the DPP's independence is the requirement that all instructions from the Attorney must be in writing and published in the Canada Gazette. In turn, the Director must inform the Attorney-General of any prosecution or planned prosecution that may raise important questions of general interest, allowing the Attorney-General the opportunity to intervene in, or assume conduct of, a case, or to issue a directive in respect of a specific case (to date no such directive has been issued). Additionally, the DPP must provide the Attorney-General with an annual report for tabling in Parliament.

The DPP and the PPSC

The DPP is the head of the PPSC and all federal prosecutors (both in-house and agents) work pursuant to delegations issued by him under the *DPP Act*.

In order to provide guidance to prosecutors the DPP is responsible for maintaining and updating the Federal Prosecution Service Deskbook. The Deskbook deals with matters of prosecution policy and includes parts entitled: principles surrounding Crown Counsel's conduct, proceedings at trial and on appeal, policy on certain types of litigation, policy on certain evidentiary issues, employment related issues, and resources available to Crown Counsel. At 57 chapters the Deskbook is fairly comprehensive and guides the conduct of both in-house PPSC prosecutors and agents. It does not however, have any particular legal status.

In order to monitor the effectiveness of the PPSC an internal audit committee was created in 2009-2010. This committee is chaired by the DPP and it assesses the effectiveness of the organisation's processes and makes recommendations to ensure that PPSC meets its objectives.

The PPSC and agent prosecutors

The Agent Affairs Program within PPSC handles the management of agent prosecutors. Its objective is to ensure that agents provide quality legal services at a reasonable cost. Each regional office (with the exception of the Northern regional offices) has an Agent Supervision Unit to handle the day-to-day supervision of agents and to support them in their work.

The Agent Affairs Program has existed since 1996 however in 2008-2009 substantial changes were made to the rules and guidelines that govern agent relationships with the PPSC.

One major change was the introduction of fixed term agreements. The services of agent prosecutors used to be retained pursuant to indeterminate appointments. However under the new regime agents are subject to fixed term agreements that can apply for a maximum of five years. When an opening becomes available in a jurisdiction the PPSC will publish a Notice of Opportunity inviting interested private sector lawyers and law firms to apply. Applicants will then be screened in a similar way to applicants for in-house counsel positions.

A second major change was that the Agent Affairs Program conducted a comprehensive review of the Prosecution Code Set used by agents to record their time in an effort to lessen the administrative burden and increase transparency.

The PPSC and investigating organisations

The PPSC is not an investigative organisation. It prosecutes when a charge has been laid pursuant to an investigation by the RCMP or some other police force or investigative agency (for example the Canada Revenue Agency or the Competition Bureau) in violation of federal law.

In relation to the RCMP, the relationship is governed by a formal Memorandum of Understanding (2002). This outlines the roles and responsibilities of each party. In relation to the decision to prosecute the memorandum notes that there are regional variations as to whether the PPSC reviews the evidence and circumstances of a case before or after the charges are laid. [76] Nevertheless, it is the police who actually lay the charge.

Recently the PPSC has been working to improve its relationship with the RCMP by creating a guide to the preparation and organisation of the formal Report to Crown Counsel/Crown Brief (the RTCC). The RTCC is prepared by police officers when handing cases over for prosecution. It is an analysis and presentation of the police theory of the case, supported by the evidence. The PPSC guide has been successfully piloted in British Columbia and work is now underway to roll it out nationally.

A Memorandum of Understanding (2005) also exists between the PPSC and the Canada Revenue Agency. Again this addresses each party's roles and responsibilities including the decision to prosecute. In relation to the Canada Revenue Agency the PPSC provides advice on charges before they are laid.

The PPSC also provides advice and assistance to other investigators at the investigative stage and works closely with them, particularly in terrorism, criminal organisation, proceeds of crime, money laundering, market fraud and mega cases. In some instances, such as the Competition Bureau in the National Capital Region, this co-operation extends to PPSC staff prosecutors being co-located with investigators.

[76] In three provinces (Quebec, New Brunswick and British Columbia) the police require Crown approval prior to laying a charge. They are referred to as "pre-charge" approval jurisdictions.

The other independent prosecution services [77]

	Nova Scotia	Quebec
Population[78]	943,400	7,943,000
Independent Prosecution Service	Nova Scotia Public Prosecution Service (PPS)	Office of Director of Criminal and Penal Prosecutions
Head of the Prosecution Service	Director of Public Prosecutions (DPP)	Director of Criminal and Penal Prosecutions (DCPP)
Central Office Structure	Three branches: Senior Management, Special Prosecutions and Appeals.	The Office of the Director and nine specialised offices: External Affairs, Security and Development; Quality of Professional Services; Administrative Services; Criminal Affairs and Youth; Penal Affairs; Montreal Youth; Proceeds of Crime; Service Desk Consultant; and Organised Crime.
Central Office Staff	DPP, Deputy DPP, two Chief Crown Attorneys, 15 Crown Attorneys and 7 support staff (total 26)	Throughout the entire Office: Two senior management, 53 management, 494 professional, 37 technicians, 210 support staff (total 796)
Regional Offices Structure	Four offices headed by Chief Crown Attorneys (CCA): Halifax Region, Western Region, Central Region and Cape Breton Region. The Dartmouth office in the Halifax Region is headed by an Administrative Regional Crown Attorney. 12 offices headed by Senior Crown Attorneys.	Seven regional head offices headed by Chief Prosecutors: South, East, West, North, Central, Montreal and Quebec. Below them are Assistant Chief Attorneys, Criminal and Penal Prosecuting Attorneys and support staff.
Regional Office Staff	Four CCA, one ARCA, 58 Crown Attorneys and 37 support staff (total 100)	(See Central Office Staff)
Person accountable to Parliament	DPP submits an Annual Report directly to Parliament	DCPP submits an Annual Report to the Minister of Justice who presents it to Parliament
Role of the Attorney-General	May provide guidance generally or in relation to a specific case only if the DPP is consulted first and the guidance is published in the Gazette. Must meet with the DPP 12 times a year.	May provide guidance generally or in relation to a specific case only if the DPP is consulted first and the guidance is published in the Gazette. The DCPP must advise the AG of any Supreme Court Appeal and all Court of Appeal cases of interest

[77] The information for this table has been gained from the websites of each prosecution service and from their Annual Reports. See Nova Scotia: <www.gov.ns.ca> and Nova Scotia Public Prosecution Service *Annual Report 2009 – 2010* and Quebec: Justice Quebec "Government bodies" (2011) <www.justice.gouv.qu.ca> (in English), <www.dpcp.gouv.qc.ca> (in French) and *Rapport annuel du Directeur des poursuittes criminelles et penales (2009-2010)* (in French).

[78] As above n 8.

	Nova Scotia	Quebec
Reporting lines	Crown Attorneys to CCA for each region to Deputy DPP to DPP	Prosecuting Attorneys to the Chief Prosecutor for each region to the Deputy DCPP to the DCPP
Guidance	Crown Attorney Manual: Prosecution and Administrative Policies for the PPS	Directives of the Director
Indication of caseload	In 2009/2010 PPS dealt with 43,980 criminal charges, 7,629 provincial statute matters and 25 appeals	In 2009/2010 the Office of the DCPP dealt with 169,920 criminal cases, 519,451 penal cases (i.e. provincial statute matters) and 18,515 youth matters.
Pre or post charge screening	Post charge	Pre charge
Prosecutions expenditure 2009/2010	$19,418,000	$76,346,300
Indication of salaries	The current advertised range for a Crown Attorney or Senior Crown Attorney is $56,096 - $113,195[79]	The highest paid prosecutor in Quebec is paid $102,000

[79] See the current advertisements for Crown Attorney or Senior Crown Attorney in Halifax and Dartmouth on Career Beacon (2011) <www.careerbeacon.com>

Areas of concern

Issues arising from increasingly long and complicated trials

In British Columbia, Ontario, the federal jurisdiction, Saskatchewan and New Brunswick recent reports have stressed that in the last 20-30 years criminal trials have become longer and increasingly complex. The "Report of the Review of Large and Complex Criminal Cases and Procedures" prepared for the Ontario Government in November 2008 suggested that three major events have played a significant role in this transformation: The passage of the Canadian Charter of Rights and Freedoms, the reform of evidence law by the Supreme Court of Canada, and the addition of many new complex statutory provisions to the Criminal Code and other related statutes. [80] In addition, the emergence of new technology has affected the nature of modern evidence.

The increasing complexity of trials has led to a corresponding increase in the workloads of the prosecution services. This has led to extra pressures on staff and on funding. In New Brunswick, this is a particular concern as the prosecution service is too small to be able to adequately cope when individual prosecutors are occupied by months on end preparing and prosecuting one complex case.[81] In British Columbia the Criminal Justice Branch is focusing on training, leadership and management to combat these concerns.[82] In Ontario the Ministry of the Attorney-General has introduced mandatory peer review of large and complex criminal trials by a specialist committee, is actively encouraging the police to obtain legal advice at the investigative stage of such cases and is working towards legislative change.[83]

As a related issue the PPSC has identified that a small percentage of highly complex cases are currently absorbing a disproportionate share of its total resources. By way of example, drug mega cases and drug cases of high complexity represented 1.33% of the litigation caseload in 2009-10 but approximately 22% of the recorded litigation time of PPSC counsel and paralegals. Given this discrepancy, efficient case management of such cases has become a particularly important objective.[84]

Issues of remuneration

The prosecution services in the federal jurisdiction, Quebec and New Brunswick are all facing current difficulties with recruiting and retaining staff due, in large part, to comparatively low levels of remuneration.

In all jurisdictions in Canada, associations of Crown Prosecutors negotiate collective agreements. The issues which may form the basis of collective bargaining can vary depending on the jurisdiction. The co-operative approach between these associations means that the levels of remuneration for Crown Prosecutors are relatively well known. Historically, New Brunswick has paid the lowest salaries to Crown Prosecutors across Canada. The Attorney-General's Office is particularly worried at present as it anticipates that a high number of current Crown prosecutors will retire in the next few years.[85]

The next lowest paid Crown Prosecutors are those in Quebec. Dissatisfaction with this position has led to prosecutors in Quebec engaging in industrial action and strikes in the last few months.

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[80] Ontario Ministry of the Attorney-General "Report of the Review of Large and Complex Criminal Case Procedures" (2011) <www.attorneygeneral.jus.on.gov.ca>

[81] New Brunswick Office of the Attorney-General *2009-2010 Annual Report* at 20.

[82] Ministry of the Attorney-General *BC's Prosecution Service Annual Report 2009-2010*.

[83] Ontario Ministry of the Attorney-General "Annual Report 2008-2009" (2011) <www.attorneygeneral.jus.on.gov.ca>

[84] Public Prosecution Service Canada "Departmental Performance Report 2009-2010" (2011) <www.ppsc-sppc.gc.ca>

[85] As above n 33.

The PPSC is also currently concerned about staffing issues. It launched a recruitment strategy in February 2010 in an effort to ease staffing concerns in Nunavut and the Northern Territories. These areas have proved unpopular for Crown prosecutors as they face stressful working conditions due to factors such as isolation, cultural differences, lengthy travel and elevated rates of violent crime. In addition, the PPSC struggles to recruit and retain staff in those provinces where the salaries paid to provincial prosecutors exceed those paid to PPSC lawyers.[86]

Issues of quality

In its Public Prosecutions Guidebook the Newfoundland and Labrador Department of Justice identifies the need for continuing training and development of prosecutors as a current area of concern for all of the jurisdictions in Canada. In support of this proposition it cites three high profile cases of wrongful convictions across Canada, each of which resulted in public recommendations relating to prosecutor training.

In addition, the Guidebook cites a report released in June 2006 by a former Chief Justice of Canada, which inquired into three prosecutions that led to injustices in Newfoundland and Labrador. Among the many recommendations of this report was a call for continuing education and a requirement that the DPP strive to establish and maintain a Crown culture that is sensitive to opportunities to avoid injustice as well as to obtain convictions.

[86] As above n 36.

Part Three: Australia

Historical background

The Commonwealth of Australia is a constitutional monarchy and the Head of State is the British Queen. It consists of six largely self-governing states (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia), three territories that have been granted a limited right of self-government (the Australian Capital Territory, the Northern Territory and Norfolk Island) and seven territories that are administered by the Commonwealth Government.[87]

This paper looks at the Commonwealth, the six states, the Australian Capital Territory and the Northern Territory. The two territories are included because they are often treated like states in Australia due to their size and their degree of self-government.

Present day Australia has a federal system of government, meaning that powers are divided between the central and regional governments.

To understand the modern prosecution system in Australia it is necessary to first have a basic understanding of:

1. How the Commonwealth was originally formed;
2. The division of responsibilities between the central and regional governments; and
3. The trend towards establishing independent prosecution offices.

The formation of the Commonwealth of Australia

COLONISATION

From the early eighteenth century onwards, one of the primary methods for punishing crime in Britain and in Ireland was to transport convicts to penal colonies. At first convicts were sent to the colonies in North America and the Caribbean. However, the American Revolution put an end to this practice. As a result, the British decided to establish penal colonies in newly discovered Australia. [88]

The first area of Australia to be formally colonised by the British was New South Wales (at the beginning of its history New South Wales covered most of Australia, as well as the islands off its eastern and southern coasts). It was established as a penal colony in 1788 and remained as such until 1823. During this time the colony was mainly populated by convicts, marines, and wives of the marines, although free settlers began arriving in

[87] Ashmore and Cartier Islands, Australian Antarctic Territory, Christmas Island, Cocos (Keeling) Islands, Coral Sea Islands, Jervis Bay Territory and the Territory of Heard Island and McDonald Islands.

[88] Bruce Kercher "Perish or Prosper: The Law and Convict Transportation in the British Empire, 1700-1850" (2003) 21(3) Law and History Review at 527.

1793.[89] The Colony was governed by a series of Governors who had extensive authority to control the population.[90]

Due to the penal nature of the Colony, the administration of British law in New South Wales was quite different from legal practice in England. Although the original Letters Patent establishing the Colony provided for the establishment of civil and criminal courts, these were more like military tribunals than English courts of law. Private individuals were still expected to initiate prosecutions but there was no trial by jury and those who sat in judgement were generally naval or marine officers who had little practical knowledge of the law.[91] Further, policing was provided by ex-convicts who were generally corrupt.[92]

By the 1820s there was general dissatisfaction with the administration of the Colony. This resulted in the British Parliament enacting the New South Wales Act 1823 (UK). The Act authorised the establishment of a Legislative Council and a Supreme Court in New South Wales, as well as a Supreme Court in Van Diemen's Land (now Tasmania). The new law also provided that, by an Order-in-Council, Van Diemen's Land could become a separate Colony. This occurred in 1825.

Both of the new Supreme Courts were given civil and criminal jurisdiction. Further, the Act authorised the creation of Courts of Quarter Sessions to try crimes not punishable by death. [93]

The British Parliament did not, however, consider that New South Wales was ready for representative Government. Accordingly, the Act provided that members of the new Legislative Council would be appointed by Britain's Secretary of State rather than elected. This gradually changed and by 1855 the New South Wales Constitution Act had established a bi-cameral parliament with an elected Legislative Assembly and an appointed Legislative Council. It provided for wide powers over domestic matters, including revenue raising and land. However, Britain still retained the power to disallow colonial legislation.

The Act also provided for the New South Wales Governor, acting on the advice of the Executive Council, to make appointments to public office. While 'responsible government' (with Ministers of State drawn from the Parliament) was not expressly included, this was clearly intended. [94]

Between 1829 and 1859, Britain established four more Australian colonies bringing the total to six. Western Australia and South Australia were created whilst Victoria and Queensland were separated from New South Wales to become colonies in their own right. Notably, South Australia was initially called a province to distinguish it from the other colonies as it was never a penal colony.

Originally the six colonies were not constitutionally connected to each other, but to Britain. Each Colony had a parliament, courts and a constitution similar to those enacted for New South Wales, and the laws of each were subject to the laws of the British Parliament.[95]

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[89] Australian Government "European discovery and the colonisation of Australia" (2011) <www.australia.gov.au>

[90] As above n 2, at 542-543.

[91] State Library New South Wales "Law & Justice in Australia" (2011) <www.sl.nsw.gov.au>

[92] Dr Chris Corns "Police Summary Prosecutions: The Past, Present and Future" (History of Crime, Policing and Punishment Conference, Canberra, 9-10 December 1999).

[93] National Archives of Australia "Commentary on the New South Wales Act 1823 (UK)" (2011) <ww.foundingdocs.gov.au>

[94] National Archives of Australia "Commentary on the New South Wales Constitution Act 1855 (UK)" (2011) <www.foundingdocs.gov.au>

[95] National Archives of Australia "Places" (2011) <www.foundingdocs.gov.au>

FEDERATION[96]

From the 1850s onwards there were discussions between the six colonies in Australia about joining together in a federation. Among the strongest arguments advanced for federation were the need for a united approach to defence and the need for a common policy to restrict the numbers of Chinese people entering the colonies. As the labour movement gathered strength in the 1890s, so did the opposition to Chinese immigrants, seen as a threat to achieving a fair standard of wages and conditions.

After a series of Conventions and Conferences in the 1890s the six colonies agreed on a draft Constitution for the Commonwealth. Each colonial Parliament then passed legislation agreeing to become part of the Commonwealth and held a referendum to allow all electors to have a direct vote on the issue. This process eventually resulted in the British Parliament enacting the Commonwealth of Australia Constitution Act 1900 (the Constitution Act), which came into force on 1 January 1901.

The Constitution Act set up the institutions for the new Commonwealth government in Australia. The chief institutions were first the Parliament, consisting of the Queen, a Senate, and a House of Representatives. Second, the Act provided for the appointment of a Governor-General as the representative of the Crown, and set out the powers of the Governor-General and the Executive Council and the functions of the public service departments. Third it provided for the judicial institutions with the High Court as the superior court of the Commonwealth.

The Constitution Act preserved the constitutions, the powers of the parliaments, and the laws in force of each of the colonies (although the colonies were now to be referred to as States). It also created the external territory of Norfolk Island. Ten years later two new territories were formally created as part of the Commonwealth: The Australian Capital Territory was surrendered to the Commonwealth by New South Wales and South Australia surrendered the Northern Territory. At first, all three territories were governed entirely by the Commonwealth government, however between 1978 and 1988 they each gained a degree of self-government.

Since its enactment, the Constitution Act has only been amended eight times as each amendment needs to be approved by a nation-wide referendum.[97] Accordingly, it remains in much the same form today as it was 110 years ago.

FEDERAL VERSUS STATE AND TERRITORY RESPONSIBILITIES[98]

Section 51 of the Constitution Act lists 39 areas of federal responsibility and gives the Commonwealth Parliament the power to legislate in relation to these areas. These areas include taxation, defence, foreign affairs, fisheries, customs and immigration.

Section 52, however, lists the matters over which the Commonwealth Parliament has exclusive power to legislate. This is limited to certain matters concerning the administration of the Commonwealth Government.

The distinction between sections 51 and 52 means that the states and territories may legislate in relation to any of the areas listed in section 51 but section 109 makes it clear that if a state law is inconsistent with a federal law, the federal law prevails.

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[96] National Archives of Australia "Commentary to the Commonwealth of Australia Constitution Act 1900 (UK)" (2011) <www.foundingdocs.gov.au>

[97] The amendments occurred in 1907, 1910, 1929, 1946, 1967 and three in 1977. They related to the term to be served by Commonwealth senators, state public debts, the legislative powers of the Commonwealth Parliament, the status of aboriginal peoples, the remuneration of High Court Justices and the method for amending the Constitution.

[98] Australian Government "About Federal Criminal Justice" (2011) <www.ema.gov.au>

Under the Constitution the power to make general criminal laws and laws of criminal procedure rests with the states and territories, not with the Commonwealth.

At present, the core legislation relating to the criminal law in each of the states and self-governing territories in Australia is as follows: The Crimes Act 1900 (NSW); the Crimes Act 1958 (VIC); the Criminal Code Act 1899 (QLD); the Criminal Law Consolidation Act 1935 (SA); the Criminal Code Act 1924 (TAS); the Criminal Code Act 1913 (WA); the Criminal Code 2002 (ACT); the Criminal Code 2010 (NT); and the Criminal Code Act 2007 (NI).

Despite this, many federal Acts of Parliament contain criminal offence provisions to serve the objectives of the particular pieces of legislation. For example taxation, customs and environmental protection legislation all contain criminal offence provisions.

The Commonwealth Criminal Code 1995 contains the most serious offences against the Commonwealth. Offences in the Code include: treason, sedition, espionage, terrorism, fraud against the Commonwealth, genocide, slavery, sexual servitude, people trafficking, serious drug offences, dangerous weapons, money laundering and offences relating to postal services, telecommunication services, computers and financial information.

The trend towards independent prosecution services

COLONIAL PROSECUTION SYSTEMS

The offices of Attorney-General and Solicitor-General were transplanted to the Australian colonies with the reception of English law. They were originally appointed by the UK Government as ex officio members of the Legislative Councils. Australian Attorney-Generals inherited largely the same responsibilities as their English counterparts (including the responsibility for conducting prosecutions) but they tended to play a much more substantial role in politics. As in England, Solicitor-Generals were expected to assist the Attorneys in carrying out their duties.

In New South Wales and Van Diemen's Land the office of the Attorney-General was formally established by statute in 1823. Three years later the Australian Courts Act 1828 (UK) gave some statutory recognition to the role of the Attorneys in prosecutions. It provided that all crimes, misdemeanours and offences tried in the new Supreme Courts should proceed by way of an 'information' (and from 1883 onwards by way of an 'indictment') signed by the relevant Attorney-General. This resulted in the Attorneys-General being personally responsible for initiating and conducting prosecutions in serious criminal cases.[99] The Solicitors-General and appointed Crown Solicitors assisted them in this task.[100] Similar legislation was enacted in relation to the other colonies.

Less serious crimes however were seen as outside the jurisdiction of the Attorneys- General.[101] At first private citizens were responsible for initiating and conducting the bulk of these prosecutions in the lower courts. This reflected the practice in the United Kingdom at the time. However, as police forces began to form and centralise in the Colonies, they began to take over the role of prosecuting summary criminal offences. Permanent and specialist police prosecutors soon emerged and by 1896 Australia's first police prosecution

[99] This was a contrast to the system of grand juries in the UK and was initially introduced as a temporary measure. This was because it was felt that the ex convict population made the grand jury system inappropriate. See Griffith "The Office of Attorney-General in New South Wales" (2007) 11 Legal History at 79.

[100] Lawlink New South Wales "More History of the NSW Crown Solicitor's Office" (2011) <www.lawlink.nsw.gov.au> and Keith Mason QC "The Office of Solicitor-General for New South Wales" (1988) The Journal of the NSW Bar Association at 22.

[101] As above n 13, at 90.

department had been created in Van Diemen's Land.[102] Again, this mirrored developments in the United Kingdom.

PROSECUTION SYSTEMS FROM 1901 TO 1973

On federation, the Commonwealth Attorney-General was one of the seven original Ministers appointed by the Governor General pursuant to section 64 of the Constitution Act. The Attorney was given responsibilities as the chief law officer, a Minister (sometimes holding numerous portfolios), the head of a government department and was usually a cabinet member as well. Primarily this was seen as a political role.

In practice, the principal responsibility for the prosecution of offences against Commonwealth law during this period rested with the Commonwealth Crown Solicitor, a public servant, who in turn was responsible to the Attorney-General. The position of the Crown Solicitor as a member of the public service was first created in 1903. The Crown Solicitor became the head of the Crown Solicitor's Division within the Attorney-General's Department. This Division came to consist of a central office in Canberra and eight subsidiary offices in the capital cities of each State and Territory. The central office was personally overseen by the Crown Solicitor and each subsidiary office was under the supervision of a Deputy Crown Solicitor.[103] This structure of prosecution system was similar to those that developed in Canada.

Similar divisions (often called Crown Law Offices) responsible for prosecutions were established within either the Attorney-General or the Solicitor-General's Department in each State of Australia.[104] These divisions provided day to day prosecution services in relation to serious crimes that were charged by indictment.[105]

Summary prosecutions and committals continued to be conducted by police prosecutors who were employed in the prosecuting departments of the various police forces across Australia. The one exception to this was in the Australian Capital Territory where responsibility for conducting summary prosecutions was transferred from the Police to the Deputy Crown Solicitor's Office in 1973.[106]

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[102] As above n 6.

[103] Australian Law Reform Commission *Sentencing of Federal Offenders* (Report 15, 1980) at 62.

[104] By this stage the office of Solicitor-General had been recognised throughout Australia as a non-political one.

[105] Commonwealth Department of Public Prosecutions "Damian Bugg QC, The Role of the DPP in the 20th Century, speech given at the Judicial Conference of Australia in Melbourne on 13/11/1999" (2011) <www.cdpp.gov.au>

[106] As above n 6, at 8.

THE DEVELOPMENT OF INDEPENDENT PROSECUTION SERVICES

By the 1970s there was growing concern in Australia about the increasingly political activities of the Attorney-Generals and their control over prosecution services. As Attorney-Generals became more active in the law-and-order debates, and in sponsoring legislation which had an impact on criminal justice, support grew to remove the actual decisions regarding prosecutions from them and to place them in independent hands, in order to prevent the perception or reality of political influence.[107]

This concern coincided with more general concerns about the process of prosecutions in Australia at both the state and federal levels, which was described by the Australian Law Reform Commission in 1980 as: "probably the most secretive, least understood and most poorly documented aspect of the administration of criminal justice." The Commission went on to comment that: "It is also one of the most sensitive aspects of criminal justice. The private prosecution of a former Prime Minister of Australia, Mr Whitlam, and certain of his cabinet colleagues, illustrates this assertion." It further noted that: "prosecutorial discretion in Australia remains far reaching, mainly unfettered and largely immune from public or even judicial scrutiny and review".[108]

In 1973 Tasmania became the first state to take active steps towards establishing an independent prosecuting office by enacting the Crown Advocate Act 1973. The Act created the position of Crown Advocate which was intended partly to remove the process of prosecution from the immediate control of politicians and to place it in a public servant who retained a substantial degree of independence. However, the Act provided little direction as to the relationship between the Attorney-General, the Solicitor-General and the Crown Advocate and it did not provide the Crown Advocate with a power to publish or issue guidelines.109 Nonetheless, the independence of the Crown Advocate was demonstrated in 1979 when he successfully prosecuted several members of the Tasmanian Parliament, including the Premier, for breaches of the Electoral Act 1907. Many of the politicians were fined and new elections were conducted.[110]

In 1982 a Bill was introduced by the Victorian Government to establish the first Director of Public Prosecutions in Australia. It was noted that: "a major aim of the Bill is to remove any suggestion that prosecutions in this state ... can be the subject of political pressure".[111] It was also hoped that the changes would result in a more efficient, transparent and generally improved prosecution system. The Bill became the Director of Public Prosecutions Act 1982. By 1983 the Director of Public Prosecutions in Victoria headed an office staffed by 45 legal officers, handled 6,000 matters a year and had a budget of $5.5 million.

Between 1984 and 1992, the Commonwealth and all other states and territories followed the lead set by Victoria and established Directors of Public Prosecutions appointed by statute.[112] In these early years the Directors in all jurisdictions were called upon to consider controversial and notorious matters for prosecution, including numerous matters involving politicians.[113]

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[107] John McKechnie QC "Directors of Public Prosecutions: Independent and Accountable" (1996) 26 Western Australian Law Review 266 at 271.

[108] As above n 17, at 61. The prosecution was initiated by a Sydney barrister in 1975.

[109] As above n 19, at 3.

[110] As above n 17, at 64.

[111] Director of Public Prosecutions *The Pursuit of Justice – 25 years of the DPP in Victoria* (2008).

[112] This occurred in the Commonwealth and Queensland in 1984, in Tasmania and New South Wales in 1986, in the Australian Capital Territory in 1990, in Western Australia and the Northern Territory in 1991 and finally in South Australia in 1992.

[113] As above n 21, at 270.

Current roles and inter-relationships

Introduction

As indicated above, in the last thirty years every jurisdiction in Australia has established an independent prosecution service headed by a Director of Public Prosecutions.

Given that there are nine separate prosecution systems in Australia, a detailed review of each is beyond the scope of this paper. Accordingly, below is a detailed analysis of two systems: the Commonwealth (as a representative study) and Victoria (which has a slightly unusual system). The systems in the other jurisdictions are summarised in table form.

Representative case study: Commonwealth [114](population 22,407,700) [115]

CURRENT ROLES

Attorney-General

The Attorney-General, as First Law Officer, is responsible for the Commonwealth criminal justice system and remains accountable to Parliament for decisions made in the prosecution process, notwithstanding that those decisions are made independently by Office of the Commonwealth Director of Public Prosecutions (CDPP).

Director of Public Prosecutions

The Director of Public Prosecutions (DPP) is the head of the CDPP and is appointed by the Governor General for a statutory term of up to seven years. The DPP must have had at least five years of legal experience before being appointed to the position and his or her salary is set by the Remuneration Tribunal. His or her position is governed by the Director of Public Prosecutions Act 1983 (the DPP Act).

Commonwealth Office of the Director of Public Prosecutions

The CDPP is the independent prosecuting service, which prosecutes all alleged offences against Commonwealth law, and conducts proceeds of crime proceedings. The Office was also created by the DPP Act.

In 2009-2010 the CDPP spent $101.735 million in performing its statutory functions and dealt with 6,692 defendants. This work involved 5,058 summary prosecutions, 679 indictable prosecutions, 675 committals, 192 summary appeals and 81 indictable appeals.

The CDPP Head Office is in Canberra and it has Regional Offices in Sydney, Melbourne, Brisbane, Perth, Adelaide, Hobart and Darwin. There are also sub-offices of the Brisbane Office in Townsville and Cairns. The structure of each Office depends on the particular issues in each region but the branches that appear in most offices of the CDPP are the Prosecutions Branch, Tax Branch, Commercial Prosecutions Branch, Counter Terrorism Unit, and the Criminal Assets Branch.

As at 30 June 2010 the CDPP had 623 staff members: The Director, 45 senior executives, 38 executive officers, 304 legal officers and 235 public service support staff.

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[114] This summary was written using the Annual Report of the CDPP for 2009-2010, the Director of Public Prosecutions Act 1983 and the information on the CDPP's website: <www.cdpp.gov.au>

[115] This is the population as at 30 September 2010. This data and the population data that follows is rounded to the nearest hundred and is from the Australian Bureau of Statistics "Population of states and territories" (2011) <www.abs.gov.au>

Head Office provides advice to the Director, coordinates the work of the Office across Australia, and conducts the case work in ACT and southern NSW. The CDPP Regional Offices are each headed by a Deputy DPP and are responsible for conducting prosecutions and confiscation action in the relevant region.

CDPP lawyers

CDPP lawyers are involved at all stages of the prosecution process. They appear on mentions, bails, summary matters, trials and appeals. This differs somewhat from the States and Territories where the police prosecute summary matters.

CDPP lawyers are divided into four salary bands. As at 30 June 2010 the salary bands were as follows: Legal Officer 1 ($54,769-$59,412), Legal Officer 2 ($61,410-$73,509), Senior Legal Officer ($84,227-$102,343) and Principal legal Officer ($111,666-$116,475).

Other prosecuting agencies

Most Commonwealth prosecutions are conducted by the CDPP. However there are a few areas where Commonwealth agencies conduct straightforward regulatory prosecutions by arrangement with the CDPP. In 2009/2010 the Australian Taxation Office conducted prosecutions in which offences were found proved against 3,082 people. The Australian Securities and Investment Commission prosecuted 499 offenders and the Australian Electoral Commission also prosecuted some offences. State or Territory agencies sometimes conduct Commonwealth prosecutions, usually for reasons of convenience.

Investigating agencies

The CDPP regularly accepts briefs of evidence from over forty referring agencies. For the most part, these investigative agencies and departments are Commonwealth entities. Agencies such as Centrelink,[116] the Australian Federal Police, the Australian Crime Commission, the Australian Customs Service and the Australian Taxation Office refer large numbers of matters to the CDPP every year. Other referring investigative agencies include Australia Post, Medicare Australia, the Civil Aviation Safety Authority, the Australian Maritime Safety Authority, the Department of the Environment and Heritage, and the Department of Immigration and Citizenship.

Centrelink consistently remains the highest referral agency with 4,684 defendants (4,616 summary and 68 indictable) dealt with through out the 2009-2010 year. By comparison the AFP referred 699 defendants (338 summary and 361 indictable).

INTER-RELATIONSHIPS

The Attorney-General and the DPP

Under the DPP Act, the DPP must present an Annual Report to the Attorney-General as soon as is practicable after 30 June of each year. The Attorney then has 15 days to present the Report in Parliament.

The Act also gives the Attorney-General the power to issue guidelines and directions to the CDPP. However, any guidelines or directions must be tabled in Parliament and there must be prior consultation with the DPP.

The DPP and CDPP lawyers

CDPP lawyers report to their Deputy Director (there are three Deputy Directors in Head Office and five regional Deputy Directors) who in turn report to the First Deputy Director.

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[116] Centrelink is an Australian Government statutory agency that aims to help Australians become self-sufficient and assists those in need by providing health and social services including education and employment assistance.

The Director and all of the Deputy Directors meet twice each year to discuss policy and management issues. There are also regular meetings of an executive management group comprising senior officers from Head Office and a number of the Regional Offices.

The CDPP and other prosecuting agencies

Under the DPP Act, the DPP has the discretion to take over any prosecution for an offence against Commonwealth law that has been initiated by another agency.

The CDPP and the investigating agencies

The CDPP depends upon the referring agency to investigate offences and prepare briefs of evidence to support prosecution and assets recovery. The CDPP has no investigative role and will leave investigative decisions to the agency in question. However the CDPP will provide advice during the investigative stage if requested, particularly in complex cases. It also provides general advice upon request.

The main role of the CDPP is to review briefs of evidence, determine whether to lay charges or whether the matter should be continued, and to present the case in Court.

Under the DPP Act the DPP may give directions or furnish guidelines to any investigating agency, including the AFP, with respect to the prosecution of offences against Commonwealth law. These may specify an offence or a class of offence, which are to be referred to the CDPP for prosecution.

Further, section 13 of the DPP Act specifies that the Director may request the assistance of the Commissioner of the AFP in conducting further investigations in any matter and the Commissioner must comply as far as practicable. This power, although significant, is very rarely exercised.

Unusual system: Victoria (population 5,567,100) [117]

In Victoria the distinction between solicitors (who prepare cases for hearing or trial) and barristers (who present cases in court) has largely been retained.[118] This is evident in the prosecution system that has developed in the State.

As in the other Australian jurisdictions Victoria has a Director of Public Prosecutions (DPP) who is an independent statutory officer, appointed by the Governor in Council under the Public Prosecutions Act 1994 (PP Act). The DPP is paid the same salary as a Supreme Court Judge, is responsible for all indictable prosecutions and has the discretion to take over any summary matters. He provides an annual report to the Attorney-General, who presents it in Parliament. The DPP is also obliged by statute to consult with the Attorney-General in particular (rare) circumstances.[119]

Unlike the other jurisdictions though, Victoria has two additional statutory officers who assist the DPP in performing his or her functions: the Solicitor of Public Prosecutions (SPP) and the Chief Crown Prosecutor (CCP).

The SPP is the head of the Office of Public Prosecutions (OPP). He manages the Office and controls its budget. The OPP prepares cases for the DPP and presents them on his or her behalf in court by using in-house solicitor advocates or by briefing salaried Crown Prosecutors or private barristers. In 2009 the OPP employed 285 staff including solicitors, legal executives, legal support and corporate services staff. Most of these employees are involved in the conduct of prosecutions with the remainder of the legal staff working in appeals or in policy and advice.

The CCP is responsible for managing the Crown Prosecutors' Chambers and is paid the same salary as a County Court Judge. The Crown Prosecutors' Chambers consists of barristers who have been appointed to the position of Crown Prosecutor or Senior Crown Prosecutor by the Governor in Council. Crown Prosecutors are routinely briefed by the OPP to present criminal cases on the Crown's behalf in the Courts. They also provide advice on prosecuting cases and make decisions about whether an accused should be presented for trial.

In 2009 the Chambers consisted of nine Senior Crown Prosecutors (all being Queen's Counsel or Senior Counsel) and 17 Crown Prosecutors. Four law graduates were undertaking legal traineeships. The Crown Prosecutors are paid a salary and are expected not to engage in any other legal work.

OPP cases that are not presented by in-house solicitor advocates or Crown Prosecutors are briefed to private barristers. To give an idea of scale, the OPP spent $48.462 million on performing its statutory functions in the financial year that ended on 30 June 2009 and 21% of this figure was spent on briefing court appearances to private barristers. This represented a five-year low.

The current process for briefing private barristers is governed by a briefing fee structure and a briefing service level charter, both of which are widely published. This contractual arrangement was created in consultation with the Criminal Bar Association and involves an agreed up-front fee calculation for particular appearances

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[117] This summary was written using the Joint Annual Report of the OPP, DPP and Committee for Public Prosecutions 2008-2009, the Public Prosecutions Act 1994 and the information on the OPP's website: <www.opp.vic.gov.au>

[118] This is similar to the situation in the United Kingdom but different from New Zealand and Canada where individual lawyers are qualified to (and often do) undertake both roles. It seems that in Australia, New South Wales and South Australia have also retained this distinction.

[119] For example, the DPP must consult with the Attorney, before prosecuting an offence against any other Australian jurisdiction's law; if he proposes to make a "special decision" contrary to the advice of a Director's Committee (consisting of the Chief Crown Prosecutor and the prosecutor(s) in charge of the case); or if he considers that he has a conflict of interest in a particular case.

and associated preparation. Before a case may be briefed to a private barrister, the SPP must receive approval from the DPP, however, the DPP may provide guidelines on the classes of case that may be routinely briefed.

All prosecutors representing the Crown in Victoria are governed by guidelines that are issued by the Committee of Public Prosecutions. The Committee consists of the DPP, SPP, CPP and an additional person appointed by the Governor in Council under the PP Act. In addition to issuing guidelines the Committee provides advice on the criminal prosecution system generally.

Summary prosecutions in Victoria are generally conducted by the prosecution department of the Victorian Police. Other investigative agencies such as Consumer Affairs Victoria and the Environmental Protection Authority also conduct summary prosecutions; however they often request the assistance of the DPP in doing so.

The other prosecution services[120]

Brief summaries of the other prosecution services are presented in two tables below. The first table shows Queensland, Tasmania, Western Australia and South Australia. The second shows the Northern Territory, New South Wales and the Australian Capital Territory.

Table one

	Queensland	Tasmania	Western Australia	South Australia
Population	4,532,300	508,500	2, 306,200	1,647,800
Independent Prosecution Service	Office of the Director of Public Prosecutions (ODPP) The office is a business unit of the Department of Justice and Attorney-General.	Office of the Director of Public Prosecutions (ODPP) The ODPP is part of Crown Law. Crown Law provides the administrative framework to support the statutory officers (the Solicitor-General and the DPP) and encompasses the Office of the Crown Solicitor.	Office of the Director of Public Prosecutions (ODPP)	Office of the Director of Public Prosecutions (ODPP)
Head of the Prosecution Service	Director of Public Prosecutions (DPP)	Director of Public Prosecutions (DPP)	Director of Public Prosecutions (DPP)	Director of Public Prosecutions (DPP)

[120] The information for these tables has been gained from the websites of each of the offices responsible for prosecution in the various States and Territories, from their Annual Reports and from their enabling legislation. See Queensland: <www.justice.qld.gov.au>, Office of the Director of Public Prosecutions *Annual Report 2009-2010* and Director of Public Prosecutions Act 1984, Tasmania: < www.crownlaw.tas.gov.au>, Director of Public Prosecutions Tasmania *Annual Report 2009-2010* and Director of Public Prosecutions Act 1973; Western Australia: <dpp.wa.gov.au>, Office of the Director of Public Prosecutions *Annual Report 2009-2010* and Director of Public Prosecutions Act 1991; South Australia: <www.dpp.sa.gov.au>, Office of the Director of Public Prosecutions *Annual Report 2009-2010* and Director of Public Prosecutions Act 1991; Northern Territory: <www.nt.gov.au/justice/dpp>, Director of Public Prosecutions *Annual Report 2009-2010* and the Director of Public Prosecutions Act 1990; New South Wales: <www.odpp.nsw.gov.au>, Office of the Director of Public Prosecutions New South Wales *Annual Report 2009-2010* and the Director of Public Prosecutions Act 1986; and Australian Capital Territory: <www.dpp.act.gov.au>, Director of Public Prosecutions *Annual Report 2009-2010* and the Public Prosecutions Act 1990.

	Queensland	Tasmania	Western Australia	South Australia
Central Office Structure	The ODPP is headed by the DPP and a Deputy DPP. There are also four Assistant DPP's who, in addition to their court work, manage the following practice areas: Major Trials and Specialist Functions; Appeals and High Court Matters; the South East Queensland Chambers and the Northern Queensland Chambers.	The ODPP is headed by the DPP and its Head Office appears to be in Hobart. The structure in relation to the rest of the staff is unclear.	The ODPP is arranged into two distinct sections: The Legal Practice Division (headed by the Deputy DPP) and the Corporate Services Division. The Legal Practice division is in turn divided in two: The Consultant State Prosecutor (senior) manages four Consultant State Prosecutors and the Legal Policy and Projects Branch, while the Director of Legal Services manages four prosecution teams, a children's court team and a confiscation team.	The DPP and the Associate DPP manage the ODPP. The Office is divided into the Solicitor Section; the Prosecution Section (which provides counsel for trials, appeals and complex legal arguments); the Witness Assistance Service and the Administrative Support Team.
Regional Offices Structure	There are nine Regional Offices throughout the State including one sub office.	There appear to be two Regional Offices. One in Launceston and one in Burnie.	NA	There are no regional offices.
Office Staff	The ODPP employs 368.3 full-time equivalent staff: The DPP, the Deputy DPP, four Assistant DPPs, a business manager, 72.9 Crown Prosecutors, 10 practice managers/solicitor advocates, 97.4 legal officers, 127.6 legal support staff, 37.4 Corporate Services & administration staff and 16 Victim Support Staff.	The ODPP employs 23 legal practitioners, eight specialist law clerks and seven administrative staff.	In 2009/2010 the ODPP employed 256 staff members in total: 122 were legal staff, and 134 were non-legal staff.	In 2009/2010 the ODPP employed 145.88 full time equivalent staff: 88.23 were legal staff, 43.05 were administrative staff and 11.6 were Witness Assistance Officers.
Uses external agents	NA (probably not often)	NA (probably not often)	Yes – to manage work overflow. In 2009/10 259 trials were briefed to private barristers (26%) at a cost of $1,413,298 and in 2008/2009 268 trials were briefed out (24%) at a cost of $1,104,8331.	Yes – to manage work overflow. In 2009/10 this cost around $850,000 and in 2008/09 it cost $600,000. This was described as a "significant" number of the total trials.

	Queensland	Tasmania	Western Australia	South Australia
Person accountable to Parliament	The DPP must present an Annual Report to the Attorney by 31 October of each year. The Attorney then has 14 sitting days to table the report in Parliament.	The DPP must present an Annual Report to the Attorney by 30 September of each year. The Attorney then has 10 sitting days to table the report in Parliament.	The DPP submits an Annual Report to the Attorney-General who must lay it before the house of parliament within 14 days of receipt.	The DPP submits an Annual Report directly to the Attorney-General.
Role of the Attorney-General	The DPP is responsible to the Attorney-General for the performance of his or her statutory functions. The Attorney may issue general guidelines to the DPP concerning the use of examination orders under the Criminal proceeds Confiscation Act. These must be published in the Gazette and tabled in Parliament.	The DPP is responsible to the Attorney-General for the performance of his or her statutory functions. The Solicitor-General or the Attorney may initiate a prosecution and, in those circumstances the DPP has no power to discontinue or take over the prosecution.	The DPP is responsible to the Attorney-General for the functions of the office. The DPP Act specifies that the DPP is not generally subject to any direction by the Attorney-General, unless the DPP seeks direction on his or her functions.	The Attorney-General is responsible for oversight of the ODPP. Under the DPP Act the Attorney-General may make specific directives if he/she wishes. No directives were made by the Attorney-General in the 2009/2010 year.
Reporting lines	Crown Prosecutors report, through their relevant Assistant DPP, to the Deputy DPP, who in turn reports to the DPP.	NA	It appears that State Prosecutors report through their relevant Consultant State Prosecutor to the Senior State Prosecutor who in turn reports to the Deputy DPP and the DPP.	ODPP Solicitors and Prosecutors report to one of four Prosecuting Managers who are in turn accountable to the Deputy DPP and the DPP.
Guidance	The Director issues guidelines to all ODPP staff, anyone acting on his or her behalf and the Police to assist in the exercise of making prosecution decisions. These are published (including any amendments) in the ODPP's Annual Report.	The DPP issues Prosecution Guidelines, which are published on the ODPP website.	The DPP may issue guidelines, which must be reported in the Gazette. At present these guidelines are: The Statement of Prosecution Policy and Guidelines 2005.	The DPP may issue directives to ODPP staff which are reported each year in the annual report. He may also issue directives to the Commissioner of Police regarding the summary prosecution process.

	Queensland	Tasmania	Western Australia	South Australia
Indication of caseload	Between 1 July 2009 and 30 June 2010 investigating agencies referred cases relating to 11,246 accused to the ODPP for prosecution. During that year, as a result of the 43,053 offences referred to the ODPP, 1,951 matters were disposed of summarily in the Magistrates Courts and 4,525 indictments were presented in the superior courts. ODPP prosecutors conducted 1,028 trials, and prosecutors and legal officers appeared at 5,473 sentences.	In 2009-2010 the ODPP disposed of 605 indictable criminal matters: 430 defendants were convicted, 31 were acquitted and 144 were discharged. In addition, Counsel appeared on 90 bail applications, finalised 52 summary prosecutions and completed 41 Lower Court appeals.	In 2009-2010 2183 committals were received in the District and Supreme Courts and this resulted in 987 listed trials. The ODPP dealt with the vast majority of these matters although 259 trials were briefed to private barristers at a cost of $1,431,298.	In the 2009-10 reporting the ODPP ran 314 District Court and Supreme Court trials in Adelaide and a further 57 matters proceeded to trial in the Circuit Courts. A number of trials were also briefed out to private Barristers (figure unknown) at a cost of around $820,000.
Pre or post charge screening	Post charge	Post charge	Post charge (although sometimes pre charge)	Post charge
Prosecutions expenditure 2009/2010	The ODPP spent a total of $36,588,307.	NA	Total expenditure on prosecutions was $31,709,037 and the average cost of each prosecution was $14,525.	Operating budget of $18,295,000 for the 2009/2010 year.
Indication of salaries	NA	The DPP is to be paid 90% of the salary of a Supreme Court Judge. He has no control over the salaries paid to ODPP staff, who are employed by the Department of Justice.	Legal staff are divided into seven levels. In 2009-2010 their salaries started at $69,621 and extend in bands up to $193,667. The Consultant State Prosecutors and the Director of Legal Services are paid between $238,986 and $302,027. The DPP earns $351,545.	NA
Agency primarily responsible for committals	The Queensland Police (except in Brisbane and Ipswich where it is the ODPP)	The Tasmanian Police	ODPP	ODPP

	Queensland	Tasmania	Western Australia	South Australia
Agency primarily responsible for summary prosecutions	The Queensland Police	The Tasmanian Police	WA Police (the ODPP has jurisdiction to initiate and conduct summary prosecutions but only does so at present if there is an overwhelming public interest in such an approach).	SA Police (except in complex cases when they will be transferred to the ODPP)

Table two

	Northern Territory	New South Wales	Australian Capital Territory
Population	230,000	7,253,400	359,700
Independent Prosecution Service	Office of the Director of Public Prosecutions (ODPP)	Office of the Director of Public Prosecutions (ODPP)	Office of the Director of Public Prosecutions (ODPP)
Head of the Prosecution Service	Director of Public Prosecutions (DPP)	Director of Public Prosecutions (DPP)	Director of Public Prosecutions (DPP)
Central Office Structure	Head Office consists of the DPP, a Deputy and an Assistant Director, General Counsel, a Practice Manager, Crown Prosecutors, Summary Prosecutors, a Witness Assistance Service and administrative support.	There are four basic components to the Central ODPP: the DPP, the Deputy DPPs and their legal and administration staff; the Crown Prosecutors (incl. administration staff); the Solicitors for Public Prosecutions (including solicitors, witness assistance officers and administration staff); and Corporate Services.	The basic structure of the ACT ODPP is: the DPP and two Assistant DPPs who each oversee a Senior Advocate a Practice Manager and two teams of prosecutors. In addition there is a Senior Policy Officer, Witness Assistance Service and Corporate Services.
Regional Offices Structure	There are two regional offices: One in Alice Springs and one in Katherine.	In addition to Head Office there are three other offices in Western Sydney and six regional offices in Lismore, Newcastle, Gosford, Wagga Wagga, Dubbo and Wollongong.	There are no regional offices.
Office Staff	In 2009-2010 there were 66.37 full time equivalent staff at the ODPP: 33.4 of these were legal staff, 10.5 Witness Assistance Scheme Staff and 22.47 support staff, all spread across the regional and head offices.	As at 30 June 2010, the DPP employed a total of 600 staff. Of these, 300 were lawyers, 92 were statutorily appointed or senior executive service positions and 210 were administration and clerical staff. Each regional office includes a team of Crown Prosecutors, Solicitors, a Witness Assistance Office and administrative and support staff.	66 staff were employed by the ODPP in the 2009/2010 year: 50 permanent and 16 temporary. The total figure includes 30 prosecutors, four professional officers, 12 legal support staff, three executive officers, two senior officers, one statutory officer and 14 administration staff.
Uses external agents	Yes – They retain a Register (or panel) of private barristers who are regularly briefed.	NA (probably not often)	Not often – In 2009/2010, $36,854 worth of work was briefed to one barrister.
Person accountable to Parliament	The DPP submits an Annual Report to the Attorney-General who must lay it before the general assembly.	The DPP submits an Annual Report to the Attorney-General who must lay it before Parliament as soon as practicable.	The DPP must submit an annual report to the Attorney for tabling in Parliament along with a report of any guidelines he has issued.

	Northern Territory	New South Wales	Australian Capital Territory
Role of the Attorney-General	The Attorney-General has ultimate responsibility for the actions of the DPP, but has no involvement in the day to day running of the office. The DPP may request direction from the Attorney on a specific case but this only occurs rarely. All directions must be recorded in the DPP's Annual Report.	The DPP is responsible to the Attorney-General. The Attorney-General may issue guidelines to the DPP and may exercise some of the same statutory powers as the DPP in individual cases. However, if the Attorney wishes to exercise any of these powers he must formally notify the DPP and the DPP must place that notification in the Annual Report.	The DPP has complete decision making independence, and control of the ODPP. The Attorney-General has a right to consult with the DPP about the functions of the Office. After consultation the Attorney-General may issue general guidelines in relation to the circumstances in which prosecutions should be conducted, or the circumstances of the giving of an undertaking.
Reporting lines	Crown and Summary prosecutors in each region report to a manager who is responsible to the Deputy DPP and the DPP.	Crown Prosecutors report to Regional and Head Office Deputy Senior Crown Prosecutors who in turn report to the Senior Crown Prosecutor who is accountable to the DPP. Solicitors report to Regional and Head Office Assistant Solicitors who in turn reports to one of two Deputy Solicitor who report to the Solicitor for Public Prosecutions and ultimately to the DPP.	Prosecutors are arranged in teams that are overseen by supervising lawyers who are then accountable to their corresponding Senior Advocate and Practice Manager. In turn the two Senior Advocates and the two Practice Managers are accountable to the Assistant DPPs who report to the DPP.
Guidance	The DPP is empowered by statute to issue guidelines to ODPP staff and, due to a memorandum of understanding such guidelines will apply to police prosecutors. The Guidelines for the prosecution of offences in the Northern Territory are regularly updated and are published on the ODPP website.	The DPP is empowered by statute to issue general guidelines to the Deputy DPP, the Solicitor of Public Prosecutions and Crown Prosecutors. These must not relate to any specific case. The DPP may also set guidelines for the Commissioner of Police after consulting with the Attorney-General. All guidelines must be published in the DPP's annual report.	The prosecution policy is a set of Guidelines issued by the DPP. These may be issued to the Commissioner of Police or any other person involved in prosecutions.

	Northern Territory	New South Wales	Australian Capital Territory
Indication of caseload	In 2009/2010 the ODPP dealt with 1,603 new matters. It completed 1,284 summary or youth court prosecutions, and 365 prosecutions in the Supreme Court.	In 2009/2010 452 Summary Prosecutions were completed by the ODPP in the Local Court, 1,818 trials were completed in the District Court, and 87 Supreme Court Trials were completed.	The ODPP conducted 66 appeals; 30 Supreme Court trials, 191 Supreme Court sentencings, 456 people were committed for trial in the Magistrates Court, and 5,479 charges were proved in the Magistrates Court.
Pre or post charge screening	Post charge	Post charge	Pre charge
Prosecutions expenditure 2009/2010	NA	The ODPP's total prosecution expenditure in 2009/2010 was $93,979,000.	Total Prosecution expenditure on indictable and summary offences was $8,795,000.
Indication of salaries	NA	In 2009/2010 the six Senior Executives were paid salaries of between $144,800 and $292,050.	NA
Agency primarily responsible for committals	ODPP	ODPP	ODPP
Agency primarily responsible for summary prosecutions	Northern Territory Police Prosecutors. However the ODPP has taken over contested summary prosecutions in Darwin and summary prosecutors in Katherine and Alice Springs often appear on behalf of the Police.	Shared between the ODPP and the New South Wales Police	ODPP

Areas of Concern

Resource pressures

In their 2009/2010 Annual Reports, the DPPs in the Commonwealth, Tasmania, South Australia, New South Wales and the Australian Capital Territory all emphasised the growing resource pressures on their organisations in their Director Overviews.

Transparency and independence

The transparency of decision making and independence from political influence, both remain as highly important objectives within all of the Australian prosecution services. In Victoria, this has resulted in the DPP introducing a new policy of giving reasons for the discretionary decisions that he makes. Upon request, these reasons will be provided to those who have a legitimate interest in the matter. A similar initiative has recently been introduced in the Northern Territory as well.

Responsibility for summary prosecutions

The question of who should be responsible for summary prosecutions has also remained topical in Australia. The DPPs have taken over responsibility for committals in almost all jurisdictions in Australia but the police remain responsible for the majority of summary prosecutions. The exception is the Australian Capital Territory. Despite this, the police are subject to guidance and oversight by the DPPs. Increasingly, Crown prosecutors are conducting the more serious summary prosecutions as well. This shift is evident in the Northern Territory, New South Wales, Western Australia and South Australia. The DPP in New South Wales even noted in his 2009-2010 Director's Overview, that a future goal for the ODPP should be to conduct all criminal prosecutions in the State.

The basic argument against the police acting as prosecutors is that prosecutorial decision-making should be in the hands of an agency which is not only independent and impartial as a matter of fact, but also seen to be independent and impartial. By definition, it is argued that the police cannot be independent and impartial if they are both the investigators and the prosecutors. Apart from the issue of lack of independence, it is suggested that it may also be more efficient and cost effective for the one agency (ODPP) to conduct all prosecutions.[121]

[121] As above n 6.

Part Four: Scotland

Historical background

Scotland was the world leader in developing an independent prosecution service. The Scottish system has been the benchmark for the development of independent prosecution services throughout the Commonwealth, and is demonstrative of a mix of adversarial and inquisitorial practices. Interestingly, the Scottish system has undergone minimal change since its inception in 1587, and the changes it has seen have focused more on the clarification of roles rather than major change to the system.

The system of rule introduced to England by William the Conqueror in 1066 was established in Scotland by King David I (reigned 1124-53). King David maintained his own court, and heard important cases and appeals from the lower courts. Cases in localities outside the King's Court were dealt with by Jusiticiars who went on circuit. King David also introduced the Office of the Sheriff. The Sheriff was appointed by the King and was responsible for hearing lesser cases in the Sheriff's Court.[122]

In the 13th century, a Scottish parliament was established. It evolved from the King's court, which derived into a Supreme Court where counsel would sit for discussion.[123] Historically, prosecutions in Scotland were initiated privately, although in the 15th century, to assist in the administration of criminal justice, the office of the King's Advocate was established. The King's Advocate appeared in all but the most serious cases (which remained private prosecutions). Private prosecutions were usually initiated by the victim or the victim's family for the purpose of revenge.[124]

In 1587 legislation passed by the Scottish Parliament formally acknowledged the King's Advocate as having responsibility for prosecuting crimes independent of the wishes of the victims and their family.[125] Essentially this Act marked the establishment of an independent Scottish Prosecution Service. The King's advocate later became known as the Lord Advocate.

In 1603 King James VI of Scotland ascended to the Scottish and English thrones**.** Despite initial concern that the nations might be unified under his rule, Francis Bacon, a Knight and advisor to the King, advised the King against the assimilation of the British and Scottish legal system for fear of a bad Scottish reaction. For this reason, no initial merger was attempted.[126] The issue of assimilation died down over the next few decades with the advent of the English Civil War. By 1706, there was a formal merger of the Scottish and English Kingdoms in the Treaty of Union. The Treaty created a single English parliament for both nations, but preserved the independence of the Scottish legal system in Articles 18 and 19.[127]

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[122] "Queen and the Law of Scotland" <www.royal.gov.uk>

[123] Ibid.

[124] Bernard M Dickens "Control of Prosecutions in the United Kingdom" (1973) 22 The International Law and Comparative Quarterly at 19.

[125] As above n 1, at 19.

[126] T Smith "English Influences on the Law of Scotland" (1954) 3(4) American Journal of Comparative Law 522 at 524.

[127] As above n 3.

In 1800, Scotland and Ireland both became part of the official union of the United Kingdom. As part of the union, the United Kingdom governed Scotland, but once again the independence of their legal system was retained.

Gradually the influence of the Lord Advocate over the prosecution system grew, and by 1824 the role had developed into one that had the power of veto over all prosecutions. This resulted in the ability to bring private prosecutions being severely restricted.[128]

The Lord Advocate was not the only person involved in prosecutions. Statutory prosecutors (e.g. health and safety investigators and customs officers) and private prosecutors were still involved to an extent. Private prosecutors could still be involved if they acted with the consent of the appropriate local public prosecutor, however, the role was also restricted by the requirement that they must have a personal interest in the case e.g. relative of a victim.[129]

During the next 100 years, in light of the success of this system, and distractions of war and United Kingdom politics, there were no significant changes to the prosecution system. The 1990s was characterised by a push for Scotland to be self governing, and in 1999, Scotland elected its first Government. The effect of this has been to change the roles of Lord Advocate and Solicitor-General to political roles with terms that end with the Government. Despite this, the prosecution system itself remains largely as it was at its conception in 1587.

[128] As above n 1, at 20.
[129] As above n 1.

Current roles

Introduction

Scotland's judicial system is mainly adversarial and there are three separate types of court. The High Court will hear the most serious matters, the Sherriff's Courts the next most serious, and the District Courts the least serious.

District Courts are usually presided over by a Justice of the Peace or a Stipendary Magistrate, both of whom have very limited powers. The other courts are presided over by a judge. Criminal matters with maximum penalties of up to three years will be heard in the Sherriff's Court; these cases are known as solemn proceedings and both a judge and jury will sit on these cases. If the criminal matter is less serious, and subject to a penalty of less than three months (some exceptions apply), it is known as a summary offence and the case will be heard by a judge alone in the Sherriff's Court. Serious cases are heard in the High Court and trials may be run with a jury as well as a judge.[130]

In Scotland, the Crown Office and the Procurator Fiscal Service (COPFS) are responsible for the prosecution of crime and investigating sudden/suspicious deaths and complaints against police. There are 11 divisions of COPFS across Scotland and each area has its own Procurator Fiscal Office.[131] Investigations of offences in Scotland are generally carried out either by police or by one of the other specialist reporting agencies (for example, the Health and Safety Executive, the Maritime and Coastguard Agency, or the Local Authority Departments). [132]

In the 2010/2011 year, the Scottish public prosecution system disposed of 186,729 cases.[133]

An interesting feature of this centralised system is the retention of centralised power by the COPFS. The COPFS has the ability to dictate the application of laws and/or policies by choosing whether or not to prosecute certain types of offences and they can affect the way in which a certain offence is dealt with even if legislation does not exist, or does not accommodate that type of offending.[134]

Lord Advocate

In Scotland, the Lord Advocate is the Ministerial head of the COPFS, the system of criminal prosecution and the system of investigation into deaths. The Lord Advocate is politically accountable for the actions of the prosecution service; however, the Lord Advocate's duties are exercised independently of other Ministers, and any other persons.[135] For this reason, the Lord Advocate issues practice and policy guidance to both the prosecution agents and the police.[136] The independence of the role was affirmed in the Scotland Act 1998. The Lord Advocate (or Her Majesty's Advocate) is appointed by the Queen on recommendation of the Prime Minister. He is responsible for virtually all prosecutions in Scotland (which are on behalf of the Crown).[137]

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[130] Keith Bryett and Peter Osborne *Criminal Prosecution Procedure and Practice: International Perspectives* (Criminal Justice Review Group, Ireland, 2000) 23.

[131] Crown Office "About Crown Office and Procurator Fiscal Service" (2001) <www.crownoffice.gov.uk>.

[132] Crown Office "About Specialist Prosecutors" (2011) <www.crownoffice.gov.uk>

[133] Crown Office and Procurator Fiscal Office "Case Processing Financial Year 2010/2011" (2011) <www.copfs.gov.uk>

[134] As above n 1, at 22.

[135] Scottish Government "Roles and Functions of the Lord Advocate" (2001) <www.scotland.gov.uk>

[136] As above n 7, at 30.

[137] As above n 121.

Solicitor-General

Second in charge of the COPFS, and deputy to the Lord Advocate is the Solicitor-General. The Solicitor-General carries out all the Lord Advocate's duties when the Lord Advocate is absent or the role is vacant. The Solicitor-General may also act in any case on the Lord Advocates behalf when so requested; a role that is affirmed in section 2 of the Law Officers Act 1944.[138] The Solicitor-General is a member of the Scottish Executive.

Crown Agent

The Crown Agent is the Legal Advisor to the Lord Advocate on prosecution matters. He or she is also the head of the COPFS, and responsible for management of these offices.

Crown Counsel/Advocate Deputes

Crown Counsel is the collective term given to the Advocate Deputes in Scotland. Appointed by the Lord Advocate, usually part time for periods of three years, Crown Counsel are experienced practicing members of the bar who hold a commission to prosecute on behalf of the Lord Advocate.[139] The role of Crown Counsel is apolitical, and does not turnover with a change of Government. Generally, Crown Counsel will prosecute the more serious offences in the High Court.[140]

The Crown Office

The Crown Office is responsible for carrying out the remainder of the Lord Advocate's functions, particularly the management of the Procurator's Fiscal.[141]

Procurators Fiscal

The Procurators Fiscal (Fiscals) prosecute all cases in their local area. Appointed by the Lord Advocate, Fiscals are controlled by the COPFS and handle the majority of cases heard in the Sheriff Courts.142 They are responsible for the investigation of offences and act as agents of the COPFS in this capacity.143 Generally the role is highly discretionary, but Fiscals are guided by the direction and formal General Instructions of the Lord Advocate.[144]

In recent years, to ensure the department can adapt to the prosecution of more complicated technological and scientifically advanced cases, specialist lawyers within the Fiscals who specialise in areas such as environment and wildlife have been introduced.[145]

Public Prosecutors

The lowest courts in Scotland are the District Courts (historically the Burgh Courts and the Justice of the Peace Courts). District Courts have jurisdiction over the most minor offences, and have their own public prosecutors who are not accountable to the Lord Advocate.[146] The Lord Advocate still retains the ability to control these prosecutions as he can direct them to be heard in a higher court by a Procurator Fiscal, over which he does have jurisdiction.[147]

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[138] As above n 12.
[139] As above n 7, at 23.
[140] As above n 7, at 28.
[141] As above n 1, at 20.
[142] As above n 1.
[143] As above n 1.
[144] As above n 1.
[145] As above n 9.
[146] As above n 1, at 20.
[147] As above n 1, at 20.

Police

A distinct and defining feature of the Scottish Prosecution system is that the police have very little involvement in prosecutions and by law are not required to be involved in investigation of offences. This limited role of the police can be contrasted to the extensive involvement of the police in prosecutions in Canada and Australia and New Zealand.

The role of the Scottish Police is set out in the Police (Scotland) Act 1967, and includes responsibility for preventing offences, preserving order and protecting life and property. They may use all lawful measures open to them, and must present a report to the prosecutor to enable the offender to be brought to justice.[148] This reporting process is the most important role the police hold, as their decision whether or not to report an offence, and to which court it should be reported dictates whether or not an investigation and potentially a prosecution will be commenced. As a matter of convention, although the Police Act does not require police to be involved in the investigation stage, they often are and Fiscals will only take over the investigative stage in very serious or very complicated cases. [149]

When the police carry out this investigative function in relation to offences that come before the public prosecutor, they must follow any director or rules the public prosecutor sets in regards to that investigation.[150] Specifically, section 12 of the Police Act allows the Lord Advocate to consider giving instructions regarding the manner in which officers report offences. A further aspect to the role of police is that, subject to instructions, they may take an investigation up to the charging stage - the decision whether or not to prosecute still resting with the Fiscals.[151]

[148] Police (Scotland) Act 1967 (UK), s 17(1)(b).

[149] Dr Despina Kyprianou "Comparative Analysis of Prosecution Systems (Parts I): Origins, Constitutional Position and Organisation of Prosecution Services" (2008) 6 Cyprus and European Law Review at 22.

[150] As above n 1, at 21.

[151] As above n 1, at 21-22.

Inter-relationships

Reporting

Each of the 11 Fiscals report to the Chief of Strategic Delivery who reports to the Crown Agent and Chief Executive (currently both of these roles are held by one person).

The Head of Communications, Operations Business Manager, Head of Appeals, Head of Civil Recovery and International Co-operation Units, Head of National Casework Division, and the Head of High Court Operations report to the Director of Operations. In turn, the Director of Operations reports to the Deputy Crown Agent, who reports to the Crown Agent and Chief Executive.

Managers of the policy, finance, HR and Information divisions report to the Deputy Chief Executive who in turn reports to the Crown Agent and Chief Executive.

In turn the Crown Agent and Chief Executive are responsible to the Solicitor-General and the Lord Advocate for the functions of the office.

Oversight

There is no external body that provides oversight of the Scottish prosecution service. There is also no avenue by which a decision to prosecute (or not) can be challenged. The role of maintaining fairness and equity is therefore largely left to the courts to enforce. However, the prosecution service must still have regard to the European Convention on Human Rights when exercising its functions, and this acts as a check and balance on the exercise of discretion throughout the service. [152]

Monitoring

The reality of having the Fiscals involved in the early stages of the investigation process is that the number of cases failing at the prosecution stage is lower than it would be in other jurisdictions where police are responsible for the first stage of the process.

Furthermore, the involvement of Crown Counsel in the more serious cases in the High Court acts as another check and balance on the earlier decisions by the Fiscals as to whether or not to prosecute.[153] Having separation between the stages of prosecuting ensures that consistency can be maintained at each step.

In terms of efficiencies, and in maintaining transparency, a service-wide computerised case management system operates to ensure each aspect of the service is able to share information and enhance the case management process.

[152] As above n 7, at 30.
[153] As above n 7, at 30.

Funding

Since the 1970s, the Scottish Secretary of State has been responsible for funding the court system, and since 1981 funding of judicial salaries and the prosecution system has been the responsibility of the Lord Advocate.[154]

In the 2009/2010 year, the Lord Advocate received a salary of £112,309 per annum. The Solicitor-General received £96,904. The Senior Managers and Crown Agents received salaries with a range of £105,000-135,000. Other managers received a salary within a £70,000-120,000 range. An overall total of £67,670,000 was spent on the prosecution service in the 2009/2010 year (including the salaries of the officials noted above).

This total also includes the salaries of 1,614 prosecutors (of which two are Ministers and seven are senior management), 95 victim support members and 67 death investigators.

Guidance

A set of prosecution guidelines are published by the COPFS. 155 As well as being considered by those working within the prosecution service, they may also be considered by the police. The Lord Advocate will also publish separate guidelines for the police when he or she considers it necessary, an example of these are guidelines on the prosecution of racially aggravated crime, and guidelines on the investigation and reporting of sexual offences.[156]

The operation of the prosecution service in Scotland is also guided by strict timelines specifying the speed in which a case must be disposed of. An indictment must be served with 80 days of an accused being remanded in custody, a trial in the Sherriff's Court must start within 110 days of committal and a preliminary hearing in the High Court must occur within 110 days of committal, with trial required to begin within 140 days of the hearing.[157]

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[154] Crown Office and Prosecutor Fiscal Service "Queen's and Lord Treasurer's Remembrancer" (2011) <www.copfs.gov.uk>

[155] As above n 1, at 23.

[156] Other examples include the Lord Advocates guidelines to Chief Constables for incidents during sporting events, guidelines on the incidence of child abuse and guidelines for investigating and reporting sexual offences, accessible on <www.copfs.gov.uk>.

[157] Crown Office and the Procurator Fiscal service "110/140 Day rule" (2011) <www.copfs.gov.uk>

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