# HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

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DANIEL TAYLOR PLAINTIFF

AND

ATTORNEY-GENERAL OF THE COMMONWEALTH DEFENDANT

*Taylor v Attorney-General (Cth)*
[2019] HCA 30
*Date of Order: 19 June 2019*
*Date of Publication of Reasons: 11 September 2019*
M36/2018

**ORDER**

*The questions stated in the revised special case filed on 26 November 2018 be answered as follows:*

1. *Is the defendant's decision to refuse to consent under s 268.121 of the* Criminal Code *(Cth) to the prosecution of Ms Suu Kyi insusceptible of judicial review on the grounds raised in the amended application?*

   *Answer: Unnecessary to answer.*

2. *If "no" to question 1, did the defendant make a jurisdictional error in refusing consent under s 268.121 of the* Criminal Code *to the prosecution of Ms Suu Kyi on the ground that Australia was obliged under customary international law to afford an incumbent foreign minister absolute immunity from Australia's domestic criminal jurisdiction (the asserted immunity) for one or more of the following reasons:*

   a. *Under customary international law as at the date of the defendant's decision, the asserted immunity did not apply in a*

*domestic criminal prosecution in respect of crimes defined in the Rome Statute?*

*b.* *By reason of:*

*i.* *the declaration made by Australia upon ratifying the Rome Statute;*

*ii.* *Australia's treaty obligations under the Rome Statute; and/or*

*iii.* *the enactment of the* International Criminal Court Act 2002 *(Cth) and the* International Criminal Court (Consequential Amendments) Act 2002 *(Cth),*

*the obligations assumed by Australia under international law were such that the defendant was not entitled to refuse, on the basis of the asserted immunity, to consent to the domestic prosecution of Ms Suu Kyi in respect of crimes defined in the Rome Statute?*

*c.* *By reason of:*

*i.* *the declaration made by Australia upon ratifying the Rome Statute;*

*ii.* *Australia's treaty obligations under the Rome Statute;*

*iii.* *the enactment of the* International Criminal Court Act *and the* International Criminal Court (Consequential Amendments) Act*; and/or*

*iv.* *the* Diplomatic Privileges and Immunities Act 1967 *(Cth), the* Consular Privileges and Immunities Act 1972 *(Cth) and the* Foreign States Immunities Act 1985 *(Cth),*

*the defendant was not entitled under Australian domestic law to refuse, on the basis of the asserted immunity, to consent to the domestic prosecution of Ms Suu Kyi in respect of crimes defined in the Rome Statute?*

*Answer: Does not arise.*

3. *If "no" to question 1, did the defendant make a jurisdictional error in refusing consent to the prosecution of Ms Suu Kyi on the ground that he failed to afford the plaintiff procedural fairness?*

   *Answer: Does not arise.*

4. *What relief, if any, should be granted?*

   *Answer: None. The amended application should be dismissed with costs.*

5. *Who should bear the costs of the special case?*

   *Answer: The plaintiff.*

**Representation**

R Merkel QC with R J Sharp and M A J Isobel for the plaintiff (instructed by Human Rights for All Pty Ltd)

S P Donaghue QC, Solicitor-General of the Commonwealth, with T M Begbie, K M Evans and C Ernst for the defendant (instructed by Australian Government Solicitor)

## CATCHWORDS

### Taylor v Attorney-General (Cth)

Criminal practice – Private prosecution – Authority to prosecute – Where private citizen sought to commence criminal proceeding for offence of crime against humanity contrary to s 268.11 of *Criminal Code* (Cth) – Where offence located within Div 268 of *Criminal Code* – Where s 268.121(1) provides that proceedings under Div 268 must not be commenced without Attorney-General's written consent – Where Attorney-General did not consent – Where s 268.121(2) of *Criminal Code* provides that offence against Div 268 "may only be prosecuted in the name of the Attorney-General" – Where s 13(a) of *Crimes Act 1914* (Cth) provides that any person may "institute proceedings for the commitment for trial of any person in respect of any indictable offence against the law of the Commonwealth" unless contrary intention appears – Whether s 268.121(2) expresses contrary intention for purpose of s 13(a) – Whether s 268.121(2) precludes private prosecution of offence against Div 268.

Words and phrases – "commencement of proceedings", "committal", "consent", "consent of the Attorney-General", "contrary intention", "crime against humanity", "in the name of", "indictable offence against the law of the Commonwealth", "private prosecution", "prosecuted in the name of the Attorney-General", "relator proceeding", "right to prosecute", "summary proceedings", "trial on indictment".

*Crimes Act 1914* (Cth), s 13(a).
*Criminal Code* (Cth), ss 268.11, 268.121.
*Judiciary Act 1903* (Cth), ss 68, 69.

1 KIEFEL CJ, BELL, GAGELER AND KEANE JJ. On 16 March 2018, the plaintiff, a private citizen, attended the Magistrates' Court at Melbourne. There he lodged a charge-sheet together with a draft summons. The charge-sheet alleged that Aung San Suu Kyi, the Minister of the Office of the President and Foreign Minister of the Republic of the Union of Myanmar, had committed a crime against humanity in contravention of s 268.11 of the *Criminal Code* (Cth). Section 268.11, which is located within Div 268 of the *Criminal Code*, creates an offence punishable by imprisonment for up to 17 years. By operation of ss 4G and 4J of the *Crimes Act 1914* (Cth), an offence against s 268.11 is an indictable offence incapable of being heard and determined summarily.

2 The plaintiff lodged the charge-sheet and draft summons in purported reliance on s 13(a) of the *Crimes Act*, in an attempt to invoke the procedure for the commencement of a criminal proceeding set out in Pt 2.2 of the *Criminal Procedure Act 2009* (Vic).

3 By these steps, the plaintiff attempted to commence a proceeding commonly and appropriately described as a private prosecution. Section 13 of the *Crimes Act*, which operates to the exclusion of the common law in relation to prosecutions for Commonwealth offences[1], provides:

> "Unless the contrary intention appears in the Act or regulation creating the offence, any person may:
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> (a) institute proceedings for the commitment for trial of any person in respect of any indictable offence against the law of the Commonwealth; or
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> (b) institute proceedings for the summary conviction of any person in respect of any offence against the law of the Commonwealth punishable on summary conviction."

4 Part 2.2 of the *Criminal Procedure Act* provides for a criminal proceeding to be commenced by methods which include filing a charge-sheet with a registrar of the Magistrates' Court[2]. On application by the person so commencing a criminal proceeding, a registrar must issue a summons to answer the charge directed to the accused if the registrar is satisfied that the charge discloses an

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**1** *Brebner v Bruce* (1950) 82 CLR 161 at 169-170, 174-175; [1950] HCA 36.

**2** Section 6(1)(a) of the *Criminal Procedure Act*.

offence known to law[3]. The summons to answer the charge needs then to be served on the accused[4]. In a case where the charge is of an indictable offence unable to be heard and determined summarily under Ch 3 and no direct indictment has been filed, the Magistrates' Court must then hold a committal hearing under Ch 4[5]. At the conclusion of the committal hearing, the Magistrates' Court must commit the accused for trial of the offence charged if it is of the opinion that the evidence is of sufficient weight to support a conviction for the offence[6]. If the accused is committed for trial, the trial can only occur after the filing of an indictment in the Supreme Court or in the County Court in accordance with the procedure set out in Ch 5[7]. The filing of an indictment does not commence a new criminal proceeding against the accused[8] but is rather a continuation of the proceeding commenced by the filing of the charge-sheet.

5 In accordance with the policy of the Magistrates' Court in relation to private prosecutions, the Registrar of the Magistrates' Court at Melbourne did not immediately file the charge-sheet or issue the summons. The Registrar instead referred the charge-sheet and draft summons for review by a Magistrate.

6 On the same day as he lodged the charge-sheet and draft summons, the plaintiff sent an email to the defendant, the Attorney-General of the Commonwealth, requesting his consent under s 268.121(1) of the *Criminal Code* to the commencement of the prosecution. Section 268.121 provides:

> "(1) Proceedings for an offence under this Division must not be commenced without the Attorney-General's written consent.
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> (2) An offence against this Division may only be prosecuted in the name of the Attorney-General.

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**3** Section 12(1)(a) and (4)(a) of the *Criminal Procedure Act*.

**4** Section 16 of the *Criminal Procedure Act*.

**5** Section 96 of the *Criminal Procedure Act*.

**6** Sections 141(4)(b) and 142(1)(b) of the *Criminal Procedure Act*.

**7** Section 158(a) of the *Criminal Procedure Act*.

**8** Section 162 of the *Criminal Procedure Act*.

(3) However, a person may be arrested, charged, remanded in custody, or released on bail, in connection with an offence under this Division before the necessary consent has been given."

7 The defendant did not consent to the prosecution. The defendant communicated his decision to the plaintiff in a letter three days later.

8 On 23 March 2018, the plaintiff commenced a proceeding against the defendant in the original jurisdiction of the High Court under s 75(v) of the *Constitution*. The principal relief sought by the plaintiff in his amended application in that proceeding was a writ of certiorari quashing the decision of the defendant not to consent to the commencement of the prosecution and a writ of mandamus compelling the defendant to reconsider the plaintiff's request for consent. The grounds on which that relief was sought were that, in deciding not to consent, the defendant failed to comply with implied conditions on which the Attorney-General's power to give written consent is conferred by s 268.121(1) of the *Criminal Code* by adopting an erroneous view of the content of international law and by denying the plaintiff procedural fairness.

9 By special case in the proceeding, the parties agreed in stating questions for the consideration of the Full Court. The questions, set out in full at the conclusion of these reasons, asked whether the defendant's decision was susceptible to judicial review on the grounds on which the plaintiff relied and, if so, whether those grounds were made out.

10 Having heard argument on the logically anterior question as to whether s 268.121(2) of the *Criminal Code*, by providing that an offence against Div 268 "may only be prosecuted in the name of the Attorney-General", exhibits a contrary intention for the purpose of s 13 of the *Crimes Act*, we formed the view that it was not necessary to answer all of the questions stated by the parties in order to determine the plaintiff's entitlement to relief in the proceeding. In the circumstances, we considered that it was inappropriate to do so. In our view, s 268.121(2) of the *Criminal Code* does exhibit a contrary intention for the purpose of s 13 of the *Crimes Act* so as to preclude the private prosecution of an offence against Div 268 and the amended application was for that reason to be dismissed. These are our reasons.

11 The construction of s 268.121 of the *Criminal Code* needs to be considered within the context of Div 268 of the *Criminal Code*, which was introduced by the *International Criminal Court (Consequential Amendments) Act 2002* (Cth) ("the *Consequential Amendments Act*") in consequence of the enactment of the *International Criminal Court Act 2002* (Cth). The principal object of the *International Criminal Court Act* is to facilitate compliance with

Australia's obligations under the Rome Statute of the International Criminal Court (1998) ("the Rome Statute")[9].

12 Enactment of the *Consequential Amendments Act* was against the background of the Preamble to the Rome Statute "[r]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and "[e]mphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". The Second Reading Speech for the Bill for the *Consequential Amendments Act* explained the main purpose of its enactment in terms of facilitating exercise of Australia's international rights under and pertaining to the Rome Statute. The main purpose was said to be to create as offences against Australian law each of the offences against international law over which the International Criminal Court ("the ICC") had been given jurisdiction under the Rome Statute and thereby to enable Australia to "take full advantage of the principle and protection of complementarity"[10]. The Explanatory Memorandum accompanying the Bill further explained that "[b]y creating crimes in Australian law that mirror the crimes in the [Rome Statute], Australia will always be able to prosecute a person accused of a crime under the [Rome Statute] in Australia rather than surrender that person for trial in the ICC"[11].

13 The purpose of facilitating exercise of Australia's international rights is manifest on the face of the *International Criminal Court Act*, which states with reference to Div 268 of the *Criminal Code* that the *International Criminal Court Act* "does not affect the primacy of Australia's right to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC"[12].

14 More importantly for present purposes, the purpose of facilitating exercise of Australia's international rights is manifest on the face of Div 268 of the *Criminal Code* and informs the structure of the Division. Introducing Div 268 is s 268.1, which is headed "Purpose of Division". Section 268.1(1) states that "[t]he purpose of this Division is to create certain offences that are of

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**9** Section 3(1) of the *International Criminal Court Act*.

**10** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 25 June 2002 at 4326.

**11** Australia, House of Representatives, *International Criminal Court (Consequential Amendments) Bill 2002*, Explanatory Memorandum at 4.

**12** Section 3(2) of the *International Criminal Court Act*.

international concern and certain related offences". Section 268.1(2) expresses "Parliament's intention that the jurisdiction of the International Criminal Court is to be complementary to the jurisdiction of Australia with respect to offences in this Division that are also crimes within the jurisdiction of that Court". Section 268.1(3) spells out the consequence that the *International Criminal Court Act* "does not affect the primacy of Australia's right to exercise its jurisdiction with respect to offences created by this Division that are also crimes within the jurisdiction of the International Criminal Court".

15 Consistently with the purpose of facilitating exercise of Australia's international rights so manifested in s 268.1, s 268.120 provides that "[t]his Division is not intended to exclude or limit any other law of the Commonwealth or any law of a State or Territory". Contrary to a submission of the plaintiff, s 268.120 has no bearing on whether the Division expresses or implies a "contrary intention" for the purpose of s 13 of the *Crimes Act*.

16 The specific provisions in s 268.121 concerning the particular procedure for the prosecution of offences under Div 268 of the *Criminal Code* need to be understood against the background of the general procedure for the prosecution of offences under Commonwealth law for which provision is made in ss 68 and 69 of the *Judiciary Act 1903* (Cth). That general procedure for the prosecution of offences under Commonwealth law also forms the background to s 13 of the *Crimes Act*.

17 Section 68(1) of the *Judiciary Act* operates in general to apply State and Territory criminal procedure in respect of persons charged with Commonwealth offences in respect of whom State and Territory courts are invested with federal jurisdiction under s 68(2). Section 68(1) does so by picking up specified categories of State and Territory laws. It provides:

> "The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:
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> (a) their summary conviction; and
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> (b) their examination and commitment for trial on indictment; and
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> (c) their trial and conviction on indictment; and
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> (d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;
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> and for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged

with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section."

18 The first three paragraphs of s 68(1) recognise the distinction, well enough illustrated by the structure of the *Criminal Procedure Act*, between the procedure typically applicable under State and Territory laws to offences heard and determined summarily and the procedure typically applicable to offences tried on indictment. "There is", as Dixon J said in *Munday v Gill*[13] in words which remain as true today as they did at the time of enactment of the *Judiciary Act*, "a great distinction in history, in substance and in present practice between summary proceedings and trial upon indictment". Trials on indictment are in traditional parlance "pleas of the Crown": proceedings in form and in substance between an individual and the State. A prosecution for an offence punishable summarily is in contrast "a proceeding between subject and subject"[14].

19 The second and third paragraphs of s 68(1) recognise the traditional distinction, again well enough illustrated by the structure of the *Criminal Procedure Act*, between two distinct stages of the procedure typically applicable to offences tried on indictment: examination and commitment for trial on indictment, and trial and conviction on indictment. In *R v Murphy*[15], it was held that these two distinct stages form part of the one curial process that results in the resolution of the "matter" in respect of which federal jurisdiction is conferred by s 68(2). In the language of that case[16], "[e]ven though they are properly to be regarded as non-judicial in character, committal proceedings themselves traditionally constitute the first step in the curial process, possibly culminating in the presentation of the indictment and trial by jury" such that "[t]hey have the closest, if not an essential, connexion with an actual exercise of judicial power".

20 Speaking to the second of those two distinct stages of the procedure traditionally applicable to offences tried on indictment, s 69(1) of the *Judiciary Act* provides:

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**13** (1930) 44 CLR 38 at 86; [1930] HCA 20.

**14** (1930) 44 CLR 38 at 86.

**15** (1985) 158 CLR 596; [1985] HCA 50.

**16** (1985) 158 CLR 596 at 616.

> "Indictable offences against the laws of the Commonwealth shall be prosecuted by indictment in the name of the Attorney-General of the Commonwealth or of such other person as the Governor-General appoints in that behalf."

21 The language of s 69(1) of the *Judiciary Act* can be traced to the prescription in s 5 of the *Australian Courts Act 1828* (Imp)[17] that "all Crimes, Misdemeanors, and Offences ... shall be prosecuted by Information, in the Name of His Majesty's Attorney General, or other Officer duly appointed for such Purpose by the Governor". With reference to s 5, it was explained in *Commonwealth Life Assurance Society Ltd v Smith*[18] that, "[w]hen an accused person [was] committed for trial, it [was] for the Attorney-General to consider whether the accused should be put on his trial and for what precise offence, and this he [did] by filing or refusing to file an indictment". Subject only to the proviso in s 6, which has no counterpart in the *Judiciary Act*, s 5 was held to confer on the Attorney-General for New South Wales and appointed officers an exclusive power not merely to determine whether or not to initiate a trial by filing an indictment[19] but, where an indictment was filed, to control the conduct of the further prosecution of the matter[20]. Whosoever was authorised to conduct the prosecution, conducted the prosecution in law "for the Crown"[21].

22 In *Daley v The Queen*[22], Green CJ succinctly stated the corresponding operation of s 69(1) of the *Judiciary Act* in terms that it "vests the right and duty to prosecute ... indictments exclusively in the Commonwealth Attorney-General or in appointed officers". The exclusive nature of the right and duty vested in the Attorney-General or in an appointed officer by s 69(1) of the *Judiciary Act* is confirmed by the carve-out from its operation by s 69(2A), which provides:

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**17** 9 Geo IV c 83.

**18** (1938) 59 CLR 527 at 543; [1938] HCA 2.

**19** *See Barton v The Queen* (1980) 147 CLR 75 at 88, 93-94; [1980] HCA 48.

**20** *R v Lang* (1859) 2 Legge 1133 at 1134.

**21** *R v Walton* (1851) 1 Legge 706 at 707.

**22** [1979] Tas R 75 at 79. See also *R v Bright* [1980] Qd R 490 at 500.

"Nothing in subsection (1):

(a) affects the power of the Director of Public Prosecutions to prosecute by indictment in his or her official name; or

(b) affects, or shall be taken to have affected, the power of a Special Prosecutor to prosecute by indictment in his or her own name;

indictable offences against the laws of the Commonwealth."

Section 69(2A)(a) alludes to the power conferred on the Director of Public Prosecutions by s 9(1) of the *Director of Public Prosecutions Act 1983* (Cth) to prosecute offences against Commonwealth laws "by indictment in his or her official name" or "in any other manner". The power to prosecute "in any other manner" enables the Director of Public Prosecutions to prosecute in the name of "the Queen"[23] and, in an appropriate case, to prosecute in the name of "the Attorney-General". Section 69(2A)(b) alludes to the substantially identical power conferred on a Special Prosecutor by s 8(1) of the *Special Prosecutors Act 1982* (Cth).

23 The exclusive nature of the right and duty vested in the Attorney-General or in an appointed officer by s 69(1) of the *Judiciary Act* is also recognised in s 13 of the *Crimes Act*. Where it is applicable, s 13(a) goes no further than to allow a person other than the Attorney-General or an appointed officer to institute proceedings for the commitment for trial of a person in respect of an indictable offence against a law of the Commonwealth. Where a person is committed for trial, filing or refusing to file any subsequent indictment is outside the scope of the capacity to prosecute conferred by s 13(a) of the *Crimes Act* and solely within the province of the Attorney-General or appointed officer under s 69(1) of the *Judiciary Act* subject only to the carve-out in s 69(2A) of the *Judiciary Act*. So much was accepted by the plaintiff.

24 By providing that an offence "may only be prosecuted in the name of" a designated office-holder – the Attorney-General – s 268.121(2) of the *Criminal Code* adopts a form of words recognised by the Australian Law Reform Commission in 1985 as having commonly been used in Commonwealth legislation to impose an "absolute restriction upon the right to prosecute"[24].

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**23** *R v Gee* (2003) 212 CLR 230 at 247 [34]; [2003] HCA 12.

**24** Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985) at 194 [365].

25 The earliest variant was in s 245 of the *Customs Act 1901* (Cth) and s 134 of the *Excise Act 1901* (Cth), which respectively provided that customs prosecutions and excise prosecutions "may be instituted in the name of the Minister" and in specified circumstances "may be instituted in the name of the Collector"[25]. In *Christie v Permewan, Wright & Co Ltd*[26], Griffith CJ identified the object of s 245 of the *Customs Act* as being "to define who is to be the prosecutor". The holding in that case was that the Minister or Collector did not need to prosecute personally but that another person (even if an officer of customs) could prosecute only if authorised by the Minister or Collector to prosecute for and on behalf of the Minister or Collector[27]. In *Bainbridge-Hawker v The Minister of State for Trade and Customs*[28], Dixon CJ said that "[t]he point of the material words of the provision is the designation by the section of the responsible officer of the Crown who is to sue on behalf of the Crown".

26 One year after enactment of the *Crimes Act*, a similar form of words was adopted in s 6(3A) of the *War Precautions Act 1914* (Cth)[29]. Section 6(3A) provided:

> "An offence against this Act shall not be prosecuted summarily without the written consent of the Attorney-General or the Minister for Defence, or a person authorized in writing by the Attorney-General or the Minister for Defence, and an offence against this Act shall not be prosecuted upon indictment except in the name of the Attorney-General."

The section can be seen to have had two distinct limbs. The first, speaking to the subject-matter of s 13(b) of the *Crimes Act*, provided that an offence "shall not be prosecuted summarily without the written consent of the Attorney-General or the Minister for Defence, or a person authorized in writing by the Attorney-General or the Minister for Defence". The second, speaking to the subject-matter of s 69

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**25** See *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161; [2003] HCA 49 with respect to the nature of customs and excise prosecutions.

**26** (1904) 1 CLR 693 at 698; [1904] HCA 35.

**27** (1904) 1 CLR 693 at 700.

**28** (1958) 99 CLR 521 at 546; [1958] HCA 60.

**29** Introduced by Act No 39 of 1915.

of the *Judiciary Act*, provided that an offence "shall not be prosecuted upon indictment except in the name of the Attorney-General".

27 In *McDonnell v Smith*[30], the first limb of s 6(3A) of the *War Precautions Act* was held to mean that a summary prosecution was not to be begun without the requisite consent having first been given. Gavan Duffy J observed in the course of argument[31] that "[a] prosecution begins as soon as the first step is taken, and continues until completion". The Court went on to provide in its reasons for judgment that "the prosecution is begun when the information is laid"[32].

28 In *R v Judd*[33], Isaacs J later explained the structure and operation of s 6(3A) of the *War Precautions Act* by reference to s 13(b) of the *Crimes Act* and s 69 of the *Judiciary Act*:

> "[W]hen the Commonwealth legislation existing at the time sec 6(3A) was passed is looked at, a reason is found for the form in which sec 6(3A) is enacted. The legislation then existing related both to summary procedure and to procedure by way of indictment. As to summary procedure, that was provided for by sec 13 of the *Crimes Act* 1914, which allowed any person to institute proceedings; and as to indictment, that was found in sec 69 of the *Judiciary Act*, which provided that indictments should be in the name of the Attorney-General or of some person commissioned by the Governor-General."

29 Turning to the purpose and effect of s 6(3A), Isaacs J continued[34]:

> "When the Act No 39 of 1915 was passed, the law was amended in a way which allowed the Executive to take steps for the safety of the Commonwealth and of the Empire which might be of a very drastic character, and the enforcement of regulations made under that Act might involve a great deal of discretion on the part of the public authority. The Legislature, while giving those powers, provided by sec 6(3A) a safeguard

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**30** (1918) 24 CLR 409; [1918] HCA 26.

**31** (1918) 24 CLR 409 at 411.

**32** (1918) 24 CLR 409 at 412.

**33** (1919) 26 CLR 168 at 172; [1919] HCA 9.

**34** (1919) 26 CLR 168 at 172.

> to the individual in this way, that no prosecution should be instituted either summarily or by indictment, except by executive authority. To carry that out, they provided that summary procedure should be with the written consent of a Minister of State, either the Attorney-General or the Minister for Defence, specially named, or some person under the written authority of one of those Ministers of State; and that in the case of an indictment it should be in the name of the Attorney-General, cutting out for the purpose of the Act the provision in sec 69 of the *Judiciary Act* as to a person who was commissioned by the Governor-General. That left the whole thing really in the hands of the Executive Government."

30 Consistently with the reasoning of Isaacs J, Gavan Duffy J in *R v Judd* said of the second limb of s 6(3A) that it "gives no new power to the Attorney General, but in certain cases forbids prosecution by indictment in the name of any person other than the Attorney-General"[35].

31 The unanimous holding in *R v Judd* was that, by force of s 19 of the *Acts Interpretation Act 1901* (Cth), the reference in s 6(3A) to "the Attorney-General" was taken to include any Minister for the time being acting for or on behalf of the Attorney-General, with the result that the Minister for Defence was "at liberty to act for [the Attorney-General] in prosecuting by indictment"[36].

32 The language and structure of s 6(3A) of the *War Precautions Act* were repeated in other legislation including s 15(4) of the *Defence (Transitional Provisions) Act 1946* (Cth) and s 21(4) of the *Public Accounts Committee Act 1951* (Cth)[37]. By providing that an offence "shall not be prosecuted upon indictment except in the name of the Attorney-General", the second limb of each of those provisions limited, in the manner indicated by *R v Judd*, who could prosecute an offence on indictment under s 69 of the *Judiciary Act* but plainly said nothing to limit who might institute proceedings for the commitment of a person for trial in respect of an indictable offence under s 13(a) of the *Crimes Act*. The language of the second limb of each of those provisions was also adopted, in a slightly altered form, in s 7(6) of the *Geneva Conventions Act 1957* (Cth).

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**35** (1919) 26 CLR 168 at 173.

**36** (1919) 26 CLR 168 at 174.

**37** See also s 10(4) of the *National Security Act 1939* (Cth); s 6(4) of the *War Damage to Property Act 1948* (Cth); s 8(4) of the *Defence Preparations Act 1951* (Cth).

33 With the enactment of the *Director of Public Prosecutions Act*, the *Director of Public Prosecutions (Consequential Amendments) Act 1983* (Cth) amended each of s 15(4) of the *Defence (Transitional Provisions) Act*, s 21(4) of the *Public Accounts Committee Act* and s 7(6) of the *Geneva Conventions Act* to refer to prosecution in the name of the Attorney-General "or of the Director of Public Prosecutions". The then Minister for Trade, Mr Bowen, referred to the amended provisions as provisions "which vest in the Attorney-General an exclusive right to commence or conduct prosecutions or prosecutions of a particular kind" and explained that a "like right" was given by the amendments to the Director of Public Prosecutions[38].

34 The precise form of s 268.121(2), in providing that an offence "may only be prosecuted in the name of the Attorney-General", derives more immediately from s 12 of the *War Crimes Act 1945* (Cth), which was inserted by the *War Crimes Amendment Act 1988* (Cth). Section 12 provides that "[a]n offence against this Act may only be prosecuted in the name of the Attorney-General or the Director of Public Prosecutions". The Explanatory Memorandum accompanying the Bill for the *War Crimes Amendment Act* explained that the purpose of s 12 was to provide a contrary intention for the purposes of s 13 of the *Crimes Act*. It explained that "[t]he nature of the offences" in the *War Crimes Act* made it "desirable to exclude the possibility of private prosecutions"[39].

35 Against the background of the consistent use of references to prosecutions "in the name of" to connote the exclusivity of the vesting of authority to prosecute, the aptness of the language in s 268.121(2) to define exhaustively who can prosecute an offence against Div 268 of the *Criminal Code* is evident. By providing that an offence against Div 268 "may only be prosecuted in the name of the Attorney-General", the section confines persons having capacity to prosecute an offence against Div 268 to: the person for the time being holding or occupying the office of Attorney-General[40]; such other Ministers or members of the Executive Council as the Attorney-General might authorise to prosecute[41]; and such other persons who might have authority conferred on them to prosecute

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**38** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 November 1983 at 2883.

**39** Australia, House of Representatives, *War Crimes Amendment Bill 1987*, Explanatory Memorandum at 8.

**40** Section 34AAA of the *Acts Interpretation Act 1901* (Cth).

**41** Section 34AAB of the *Acts Interpretation Act 1901* (Cth).

in the name of the Attorney-General, including the Director of Public Prosecutions under s 9(1) of the *Director of Public Prosecutions Act*. The operation of s 268.121(2) is narrower than s 12 of the *War Crimes Act* insofar as it precludes even the Director of Public Prosecutions from prosecuting in his or her own official name under s 9(1) of the *Director of Public Prosecutions Act*.

36 By defining exhaustively who can prosecute an offence against Div 268 of the *Criminal Code*, s 268.121(2) of the *Criminal Code* operates in like manner to s 12 of the *War Crimes Act* to express a contrary intention for the purpose of the whole of s 13 of the *Crimes Act*. In particular, it excludes the capacity of any other person to commence any prosecution of any offence under Div 268.

37 The plaintiff argued that the exclusory operation of s 268.121(2) was confined to the second stage of the procedure applicable to offences tried on indictment, so as to permit a private prosecution to proceed, with the consent of the Attorney-General, up to and no further than the committal stage. On the plaintiff's construction, the word "prosecuted" in s 268.121(2) would be read as though it were "prosecuted upon indictment" or "prosecuted by indictment".

38 There is no justification in the text or context of s 268.121(2) for confining its operation in the manner for which the plaintiff contended. The words "upon indictment" or "by indictment" are absent from the provision. In this respect the provision differs from the model established by s 6(3A) of the *War Precautions Act* but mirrors s 12 of the *War Crimes Act*.

39 The prosecution to which s 268.121(2) refers is the totality of the prosecutorial process beginning with the commencement of proceedings for an offence against Div 268 to which s 268.121(1) refers. In the case of an indictable offence against Div 268 sought to be prosecuted in a Victorian court in accordance with the procedure in the *Criminal Procedure Act* picked up by s 68(1) of the *Judiciary Act*, the prosecution to which s 268.121(2) refers accordingly includes the commencement of the proceeding by filing a charge-sheet with a registrar of the Magistrates' Court[42].

40 The reference in s 268.121(1) to "[p]roceedings for an offence under this Division" must be read as limited to proceedings for an offence against Div 268 that are permitted to be brought consistently with s 268.121(2). The Explanatory Memorandum to the Bill for the *Consequential Amendments Act* indicates that it

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**42** Sections 6(1)(a) and 162 of the *Criminal Procedure Act*.

is only "such proceedings" as require consent under s 268.121(1) that are to be prosecuted in the name of the Attorney-General under s 268.121(2)[43].

41 That construction of s 268.121(2) does not render the requirement for consent under s 268.121(1) redundant. What the belt of s 268.121(1) adds to the brace of s 268.121(2) is that it ensures that proceedings for an offence against Div 268 that are permitted to be brought consistently with s 268.121(2), including such proceedings as might be brought by the Commonwealth Director of Public Prosecutions in the name of the Attorney-General, are not commenced without the written consent of the Attorney-General given in respect of the particular proceedings. Consistently with the holding in *McDonnell v Smith* in relation to s 6(3A) of the *War Precautions Act*, that consent must be given prior to the commencement of the proceedings.

42 Were the operation of s 268.121(2) confined in the manner proposed by the plaintiff, the section would add nothing of substance to s 69(1) of the *Judiciary Act*. Moreover, for a private citizen to be free to bring a private summary prosecution or a private prosecution up to the committal stage, and for that purpose to seek out the consent of the Attorney-General, would do nothing to advance the legislative purpose of facilitating exercise of Australia's international rights. It would instead have the real potential to embarrass Australia internationally.

43 It follows that the power conferred on the Attorney-General by s 268.121(1) does not extend to giving consent to the commencement of a private prosecution of the kind the plaintiff sought to commence. The decision in fact made by the defendant not to consent to the prosecution was the only decision legally open. The relief sought by the plaintiff in the amended application could only be refused.

44 For completeness, we add that s 268.121(3) is best seen, as the Commonwealth Solicitor-General submitted, as a provision inserted for the avoidance of doubt rather than as a provision which qualifies the operation of either s 268.121(1) or s 268.121(2). The processes of arrest, charge, remand in custody and release on bail to which s 268.121(3) refers are limited to processes

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**43** Australia, House of Representatives, *International Criminal Court (Consequential Amendments) Bill 2002*, Explanatory Memorandum at 16.

answering those descriptions occurring before the commencement of proceedings[44].

45 For these reasons, having heard argument only on the construction of s 268.121 of the *Criminal Code* and its relationship with s 13 of the *Crimes Act*, we answered the questions of law raised by the special case as follows:

1. Is the defendant's decision to refuse to consent under s 268.121 of the *Criminal Code* to the prosecution of Ms Suu Kyi insusceptible of judicial review on the grounds raised in the amended application?

Answer: Unnecessary to answer.

2. If "no" to question 1, did the defendant make a jurisdictional error in refusing consent under s 268.121 of the *Criminal Code* to the prosecution of Ms Suu Kyi on the ground that Australia was obliged under customary international law to afford an incumbent foreign minister absolute immunity from Australia's domestic criminal jurisdiction (the **asserted immunity**) for one or more of the following reasons:

   a. Under customary international law as at the date of the defendant's decision, the asserted immunity did not apply in a domestic criminal prosecution in respect of crimes defined in the Rome Statute?

   b. By reason of:

      i. the declaration made by Australia upon ratifying the Rome Statute;

      ii. Australia's treaty obligations under the Rome Statute; and/or

      iii. the enactment of the *International Criminal Court Act* and the *Consequential Amendments Act*,

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**44** See Australia, House of Representatives, *International Criminal Court (Consequential Amendments) Bill 2002*, Explanatory Memorandum at 16.

the obligations assumed by Australia under international law were such that the defendant was not entitled to refuse, on the basis of the asserted immunity, to consent to the domestic prosecution of Ms Suu Kyi in respect of crimes defined in the Rome Statute?

c. By reason of:

i. the declaration made by Australia upon ratifying the Rome Statute;

ii. Australia's treaty obligations under the Rome Statute;

iii. the enactment of the *International Criminal Court Act* and the *Consequential Amendments Act*; and/or

iv. the *Diplomatic Privileges and Immunities Act 1967* (Cth), the *Consular Privileges and Immunities Act 1972* (Cth) and the *Foreign States Immunities Act 1985* (Cth),

the defendant was not entitled under Australian domestic law to refuse, on the basis of the asserted immunity, to consent to the domestic prosecution of Ms Suu Kyi in respect of crimes defined in the Rome Statute?

Answer: Does not arise.

3. If "no" to question 1, did the defendant make a jurisdictional error in refusing consent to the prosecution of Ms Suu Kyi on the ground that he failed to afford the plaintiff procedural fairness?

Answer: Does not arise.

4. What relief, if any, should be granted?

Answer: None. The amended application should be dismissed with costs.

5. Who should bear the costs of the special case?

Answer: The plaintiff.

46 NETTLE AND GORDON JJ. We regret that we are of a different view from the majority. For the reasons that follow, we do not accept that s 268.121(2) of the *Criminal Code* (Cth) ("the Code") excludes the right of a private person to seek the consent of the Attorney-General of the Commonwealth under s 268.121(1) of the Code to commence proceedings for an offence against Div 268 of the Code, or, if the Attorney-General grants consent, the right of that person under s 13 of the *Crimes Act 1914* (Cth) to commence those proceedings.

**Facts and relevant statutory provisions**

47 The facts of the matter sufficiently appear from the judgment of the majority, whose summary we gratefully adopt. Before proceeding further, however, it is convenient to restate the substance of the relevant statutory provisions.

48 Section 13 of the *Crimes Act* provides as follows:

> "**Institution of proceedings in respect of offences**
>
> Unless the contrary intention appears in the Act or regulation creating the offence, any person may:
>
> (a) institute proceedings for the commitment for trial of any person in respect of any indictable offence against the law of the Commonwealth; or
>
> (b) institute proceedings for the summary conviction of any person in respect of any offence against the law of the Commonwealth punishable on summary conviction."

49 Section 68(1) of the *Judiciary Act 1903* (Cth) provides in effect that, except as otherwise provided, State or Territory laws with respect to the procedure for summary conviction, examination and commitment for trial on indictment, trial and conviction on indictment, and the hearing and determination of appeals therefrom must be applied, so far as applicable, to those persons charged with offences against any Commonwealth law in respect of whom the courts of that State or Territory have jurisdiction under s 68(2).

50 Section 69 of the *Judiciary Act* provides in effect and so far as is relevant that indictable offences against any Commonwealth law shall be prosecuted by indictment in the name of the Attorney-General or any other person appointed in that behalf by the Governor-General, but that the power of the Director of Public Prosecutions, and of a Special Prosecutor, to prosecute by indictment in his or her own name is unaffected.

51 Sections 268.120, 268.121 and 268.122 of the Code provide as follows:

"**268.120 Saving of other laws**

This Division is not intended to exclude or limit any other law of the Commonwealth or any law of a State or Territory.

**268.121 Bringing proceedings under this Division**

(1) Proceedings for an offence under this Division must not be commenced without the Attorney-General's written consent.

(2) An offence against this Division may only be prosecuted in the name of the Attorney-General.

(3) However, a person may be arrested, charged, remanded in custody, or released on bail, in connection with an offence under this Division before the necessary consent has been given.

**268.122 Attorney-General's decisions in relation to consents to be final**

(1) Subject to any jurisdiction of the High Court under the Constitution, a decision by the Attorney-General to give, or to refuse to give, a consent under section 268.121:

(a) is final; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari.

(2) The reference in subsection (1) to a decision includes a reference to the following:

(a) a decision to vary, suspend, cancel or revoke a consent that has been given;

(b) a decision to impose a condition or restriction in connection with the giving of, or a refusal to give, a consent or to remove a condition or restriction so imposed;

(c) a decision to do anything preparatory to the making of a decision to give, or to refuse to give, a consent or

preparatory to the making of a decision referred to in paragraph (a) or (b), including a decision for the taking of evidence or the holding of an inquiry or investigation;

(d) a decision doing or refusing to do anything else in connection with a decision to give, or to refuse to give, a consent or a decision referred to in paragraph (a), (b) or (c);

(e) a failure or refusal to make a decision whether or not to give a consent or a decision referred to in a [sic] paragraph (a), (b), (c) or (d).

(3) Any jurisdiction of the High Court referred to in subsection (1) is exclusive of the jurisdiction of any other court."

**The presumption under s 13 of the *Crimes Act***

52 Section 13 of the *Crimes Act* replaced the long-established common law right of a private person to institute criminal proceedings with a statutory presumptive right adapted to the modern procedures for commitment for trial and summary determination.

53 Under the "common law"[45] as received in Australia, whether and how a private person might initiate criminal proceedings depended primarily on the nature of the offence, including its characterisation as a felony or misdemeanour[46], and, where it was triable summarily, on the public interest in the wrong[47]. But as Fullagar J observed[48] in *Brebner v Bruce*, the cases classifying offences for this purpose were "perhaps not very satisfactory". Against that background, s 13 of the *Crimes Act* both generalised the common law right and adapted it to modern criminal procedure. Under it, general probabilities of intention based on the nature and terms of the legislation in

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**45** See *PGA v The Queen* (2012) 245 CLR 355 at 370 [20]-[22] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ; [2012] HCA 21. See also Leeming, "Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room" (2013) 36 *University of New South Wales Law Journal* 1002.

**46** See [59]-[60] below.

**47** *Cole v Coulton* (1860) 2 El & El 695 at 702-703 per Cockburn CJ [121 ER 261 at 264].

**48** (1950) 82 CLR 161 at 172; [1950] HCA 36.

question cannot displace the prima facie position that any person may initiate criminal proceedings; exclusion of the right of private prosecution must now appear in express terms or at least as a matter of necessary implication. As Fullagar J explained[49]:

> "s 13 is really directing us to look, without reference to cases decided in its absence, at each particular statute to see whether a 'contrary intention' appears from express words or from necessary implication".

**The text of s 268.121 of the Code**

54 Section 268.121 of the Code does not expressly state that a private person may not commence a proceeding for an offence against Div 268 of the Code. Nor does it imply as much.

55 Section 268.121(1) provides that proceedings for such an offence must not be commenced without the Attorney-General's written consent. That implies that a private person may bring proceedings if the person first obtains the consent of the Attorney-General. Section 268.121(2) provides that an offence against Div 268 may only be prosecuted *in the name of* the Attorney-General. That is consistent with the right of a private person to bring proceedings with the consent of the Attorney-General.

56 The Solicitor-General of the Commonwealth contended that s 268.121(2) should be read as if it stated that proceedings for such an offence may only be brought *by* the Attorney-General or *by* one of the Attorney-General's delegates. That contention should be rejected. So to construe s 268.121(2) would fly in the face of its text. If the drafters of s 268.121(2) had intended to convey the meaning that proceedings can only be brought *by* the Attorney-General or *by* a delegate of the Attorney-General, they would surely have specified, in terms, that proceedings can only be brought *by* the Attorney-General or *by* a delegate of the Attorney-General. Instead, they chose a form of words which, in its natural and ordinary meaning, contemplates action "[c]iting the authority of" or "on behalf of" another[50]. As will be explained, that form of words also imports a long-established, and substantially consistent, meaning in English and Australian law.

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**49** *Brebner* (1950) 82 CLR 161 at 174.

**50** Oxford English Dictionary, online, "name", phrase 2, sense d, available at <https://www.oed.com/view/Entry/124918>, which also explains the reflexive expression "in one's own name", meaning "on one's own behalf, independently, without the authority of another".

## The historical background

*English laws*

57 According to the strict logic of the common law, all "pleas of the Crown" were prosecuted "*pro rege*", or in the "name or right" of the King or Queen, "as the common *vindex* of public injuries or crimes"[51]. As Wilmot LCJ proclaimed[52] on behalf of all the Judges present in the House of Lords in *Wilkes v The King*:

> "By our constitution, the King is entrusted with the prosecution of all crimes which disturb the peace and order of society. He sustains the person of the whole community, for the resenting and punishing of all offences which affect the community; and for that reason, all proceedings 'ad vindictam et poenam' are called in the law, the pleas or suits of the Crown; and in capital crimes, these suits of the Crown must be founded upon the accusation of a grand jury; but in all inferior crimes, an information by the King, or the Crown, directed by the King's Bench, is equivalent to the accusation of a grand jury, and the proceedings upon it are as legally founded; this is solemnly settled and admitted. As indictments and informations, granted by the King's Bench, are the King's suits, and under his controul; informations, filed by his Attorney General, are most emphatically his suits, because they are the immediate emanations of his will and pleasure. They are no more the suits of the Attorney General than indictments are the suits of the grand jury."

58 Although brought in the name of the Crown, however, the conduct of a prosecution *pro rege* was, in the typical case, left to the victim of the crime or his or her agent[53]. As Sir Patrick Devlin remarked[54], "the great majority of prosecutions are in theory private", but "even the prosecution that is initiated and conducted by a private individual is brought in the name of the Crown".

59 Thus, generally speaking, a bill of indictment for felony or misdemeanour was "preferred ... in the name of the king, but at the suit of any private

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**51** Hale, *The History of the Pleas of the Crown* (1736), vol 1, *proemium*.

**52** (1768) Wilm 322 at 326 [97 ER 123 at 125].

**53** Chitty, *A Practical Treatise on the Criminal Law* (1816), vol 1 at 1. See also Hay, "Controlling the English Prosecutor" (1983) 21 *Osgoode Hall Law Journal* 165 at 168.

**54** Devlin, *The Criminal Prosecution in England* (1960) at 16-17.

prosecutor"[55]. Thereafter, the grand jury, or jury of presentment – which ordinarily "comprised 23 persons summonsed by the sheriff to consider whether there were grounds for suspicion that the person presented had committed an offence" – acting by majority, would return the bill endorsed as a "true bill", "upon which the accused was put on his trial", or with the word *ignoramus* ("we do not know"), "upon which no further proceedings were taken"[56].

60 Alternatively, in respect of misdemeanours, a private person was generally entitled to procure an information directly "for the punishment of public crimes"[57] albeit that that right was perennially subject to statutory regulation. In the aftermath of the Revolution of 1688, s 2 of 4 & 5 Will & Mar c 18 was passed to check abuses by requiring prosecutors to obtain the leave of the court before an information was exhibited[58]. Then, from the late 18th century, Parliament began to provide against the same mischief by requiring that informations to enforce penalties under particular Acts be prosecuted "in the Name of his Majesty's Attorney General"[59]. Provisions[60] to that effect in laws on "Corresponding Societies" have since been described[61] as having "introduced a requirement for the consent of the Attorney-General to any penal actions for sedition, or its encouragement".

61 Such requirement for consent, however, in no sense excluded the right of private prosecution. In that respect, the decision of the powerfully constituted

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**55** Blackstone, *Commentaries on the Laws of England*, 9th ed (1783), vol 4 at 303.

**56** Bell, "Section 80 – The Great Constitutional Tautology" (2014) 40 *Monash University Law Review* 7 at 16, fn 78, citing Holdsworth, *A History of English Law*, 7th ed (1956), vol 1 at 321-323.

**57** Blackstone, *Commentaries on the Laws of England*, 9th ed (1783), vol 4 at 313. See also vol 3 at 161-162, describing these actions as "*popular*", "because they are given to the people in general", and "*qui tam*", "because ... brought by a person '*qui tam pro domino rege, &c quam pro se ipso in hac parte sequitur*'" ("who prosecutes this suit as well for the lord king, etc as for himself").

**58** *Liston v Davies* (1937) 57 CLR 424 at 433-434 per Dixon J; [1937] HCA 22.

**59** *Lottery Act 1793* (33 Geo III c 62), s 38.

**60** *Printers and Publishers Act 1839* (UK) (2 & 3 Vict c 12), s 4; *Seditious Meeting Act 1846* (UK) (9 & 10 Vict c 33), s 1.

**61** Hay, "Controlling the English Prosecutor" (1983) 21 *Osgoode Hall Law Journal* 165 at 178-179.

Divisional Court in *R v Kennedy, a Metropolitan Magistrate*[62], concerning ss 34 and 38 of the *Roman Catholic Relief Act 1829* (UK)[63], is instructive. The former provision created the extraordinary offence of being a Jesuit which, upon conviction, rendered the offender liable to be banned from the Kingdom for the term of his natural life. The latter provided that "all Penalties ... shall and may be recovered as a Debt due to His Majesty, by Information to be filed in the Name of His Majesty's Attorney General". At first instance, the Magistrate held that, having regard to the very peculiar nature of the offence, s 38 should be taken to mean that proceedings could only be instituted *by* the Attorney-General acting as such. On appeal, the Divisional Court held unanimously that the Magistrate was wrong. Lord Alverston CJ stated[64] that:

> "Its provisions are, of course, unique, and we have no practice under it, which can be said to be any contemporaneous exposition or interpretation of it ... For myself I wish to say that I by no means suggest that it is any legal bar to proceedings in the case that they are taken by a private individual. If the magistrate had proceeded upon the view that the Crown, and the Crown only, could take proceedings, I think he would have been wrong".

Likewise, Darling J held[65]:

> "I think [the Magistrate] did express in one part of his judgment the opinion that proceedings could not under this Act of Parliament be initiated at the instance of a private person, but only by the Attorney-General acting as such. In that I desire to say I think he was wrong. If he held that opinion, and I think he did, and I think in one place he expressed it, I think he was wrong. To my mind it is clear that the Act is open to enforcement by a private individual".

To the same effect, Channell J said[66]:

> "as [s 34] is put in the form of a criminal offence, it appears to me that a private individual is entitled to prosecute for it. ... [I]t is an important

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**62** (1902) 86 LT 753.

**63** 10 Geo IV c 7.

**64** (1902) 86 LT 753 at 757.

**65** (1902) 86 LT 753 at 757.

**66** (1902) 86 LT 753 at 759.

> constitutional principle that a private individual may set the criminal law in motion – at his own risk in certain cases, of course, but that he may do so. ... [E]xcept where the special terms of the Act of Parliament direct the contrary (of which there are some instances) a private individual may institute criminal prosecutions".

62 At the same time, the Attorney-General continued to enjoy the privilege of prosecuting grave misdemeanours by an *ex officio* information in the King's Bench, a process that "eliminated the grand jury, could allow the careful packing of a special jury, and saddled the defendant with heavy costs even if the Crown lost"[67].

*Colonial Australian laws*

63 From the outset, the position in Australia was largely the same[68]. As was observed in *R v Walton*[69]:

> "In England the Queen prosecutes; a county may prosecute, or a single individual, but still in every case the Crown really prosecutes; and even the Grand Jury prosecutes for the Crown. After the information is filed, if a private prosecutor comes into Court, he may be permitted to prosecute for the Crown. But when a bill has been found, it is unnecessary for any person to conduct the prosecution ministerially. We are just in the same position here with regard to a prosecution after the bill is found as they are in England."

64 In the Colony of New South Wales, the functions of the Attorney-General with respect to the prosecution of criminal offences derived from Imperial

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**67** Hay, "Controlling the English Prosecutor" (1983) 21 *Osgoode Hall Law Journal* 165 at 168.

**68** See *Davis v Gell* (1924) 35 CLR 275 at 283 per Isaacs A-CJ; [1924] HCA 56, quoting *Gaya Prasad v Bhagat Singh* (1908) ILR 30 All 525 at 533-534 per Sir Andrew Scoble for the Privy Council.

**69** (1851) 1 Legge 706 at 707 per Stephen CJ.

statutes[70]. Notably, in 1828, the Imperial Parliament enacted the *Australian Courts Act 1828* (Imp)[71], of which s 5 provided that:

> "until further Provision be made as hereinafter directed for proceeding by Juries, all Crimes, Misdemeanors, and Offences, cognizable in the said Courts respectively, shall be prosecuted by Information, in the Name of His Majesty's Attorney General, or other Officer duly appointed for such Purpose by the Governor of New South Wales and Van Diemen's Land respectively ..."

Section 6 provided relevantly and in substance that any person might also exhibit a criminal information against another person in the name of the Attorney-General by obtaining the leave of the Supreme Court.

65 In *Beckett v New South Wales*, French CJ, Hayne, Crennan, Kiefel and Bell JJ described[72] the purpose of s 5 of the *Australian Courts Act*, insofar as it conferred power on the Attorney-General to prosecute offences on *ex officio* "indictment"[73] and to enter a *nolle prosequi*, as being to arm the Attorney-General for New South Wales and Crown Prosecutors appointed by him with a power in all respects similar to that enjoyed by the Attorney-General in England. In respect of indictable offences, s 5 also operated as "an interim measure pending the constitution of grand juries"[74], vesting in the Attorney-General the function of the grand jury to find or ignore a bill[75]. In that respect, as Stephen CJ noticed[76] in *R v Macdermott*, the enactment of s 5 meant

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**70** *Beckett v New South Wales* (2013) 248 CLR 432 at 446 [30] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; [2013] HCA 17, citing *New South Wales Act 1823* (Imp) (4 Geo IV c 96), s 4 and *Australian Courts Act 1828* (Imp) (9 Geo IV c 83), s 5.

**71** 9 Geo IV c 83.

**72** (2013) 248 CLR 432 at 446 [30], citing *Barton v The Queen* (1980) 147 CLR 75 at 92 per Gibbs A-CJ and Mason J; [1980] HCA 48.

**73** In part because of this provision, the words "information" and "indictment" had become synonymous in this context: see *Fraser v The Queen [No 2]* (1985) 1 NSWLR 680 at 690-691 per McHugh JA; *R v Hull* (1989) 16 NSWLR 385 at 388-390 per Gleeson CJ (Grove and Studdert JJ agreeing at 396).

**74** *Grassby v The Queen* (1989) 168 CLR 1 at 13 per Dawson J; [1989] HCA 45.

**75** *R v Shanahan* (1861) 2 Legge 1454 at 1454 per Stephen CJ.

**76** (1844) 1 Legge 236 at 237.

that "until the establishment of a Grand Jury, the powers and functions of that body [were] vested exclusively in one officer, without supervision, limitation, or control".

66 As events later transpired, no provision was ever made in New South Wales for the establishment of a grand jury – with the result, consistently recognised[77] in early decisions of the Supreme Court of New South Wales, that, in "giving the power to the Attorney-General to prosecute", s 5 of the *Australian Courts Act* provided in effect that "the Attorney-General, or the person who stands in his place, signs the bill, that is to say, like a Grand Jury he finds *billa vera*". Approving this line of authority, in *Commonwealth Life Assurance Society Ltd v Smith* a majority of this Court stated[78] that "[u]nder the law of New South Wales there is no grand jury, and the Attorney-General discharges a duty analogous to or replacing that which, under the common law, was performed by a grand jury".

67 Although the Attorney-General for New South Wales thus came to occupy the dual "functions of a grand jury and of a public prosecutor"[79], each function remained distinct. The statutory imperative that offences "be prosecuted by Information in the Name of His Majesty's Attorney General" in no sense required that, if the Attorney-General found a bill and filed an information in his former capacity, he should thereafter maintain the conduct of the prosecution in his latter capacity[80]. True it was that, having found a bill and filed an information, the Attorney-General was entitled to maintain the conduct of a prosecution to the exclusion of any private prosecutor, and the Supreme Court "had no power to interfere with this exercise of such duty"[81]. But as was stated[82] in *R v Shanahan*:

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**77** *Walton* (1851) 1 Legge 706 at 707 per Stephen CJ. See *R v Cummings* (1846) 1 Legge 289 at 292 per Stephen CJ; *R v Ellis* (1852) 1 Legge 749 at 749-750 per Stephen CJ, Dickinson and Therry JJ; *R v Lang* (1859) 2 Legge 1133 at 1134 per Stephen CJ; *Shanahan* (1861) 2 Legge 1454 at 1454 per Stephen CJ; *R v McKaye* (1885) 6 LR (NSW) L 123 at 127 per Martin CJ; *R v Baxter* (1904) 5 SR (NSW) 134 at 135 per Darley CJ; *R v Woolcott Forbes* (1944) 44 SR (NSW) 333 at 337 per Jordan CJ. See also *R v Canan* [1918] VLR 390 at 391 per Cussen J.

**78** (1938) 59 CLR 527 at 543 per Rich, Dixon, Evatt and McTiernan JJ; [1938] HCA 2.

**79** *Lang* (1859) 2 Legge 1133 at 1134.

**80** See *Macdermott* (1844) 1 Legge 236 at 237 per Stephen CJ.

**81** *Lang* (1859) 2 Legge 1133 at 1135 per Stephen CJ.

> "the filing of the information was a distinct act from its after prosecution by counsel for the Crown. The Attorney-General, or other representative of the Crown, having placed the information upon the files of the Court his statutory functions ceased, and he might, if he thought fit, hand over the further prosecution of it to the parties concerned."

Where that occurred, the prosecution was continued by the private person in the name of the Attorney-General[83].

68 Moreover, where the Attorney-General declined to exercise his power under s 5, the private person could apply to the Supreme Court for leave to file a criminal information "in the name of" the Attorney-General under s 6[84]. And although "the exercise of that jurisdiction" was "always held to be purely discretionary"[85], its existence provides a further early demonstration of the fact that anyone duly authorised to proceed in the Attorney-General's name could do just that.

*Commonwealth laws*

69 Section 69 of the *Judiciary Act* has been described[86] as providing the "same general system" for the institution of prosecutions for Commonwealth offences as s 5 of the *Australian Courts Act*. As Taylor J held[87] in *Bainbridge-Hawker v The Minister of State for Trade and Customs*, it "contemplates the use of the personal name of the Attorney-General or of such other person who may have been so appointed".

70 The relationship between s 69 of the *Judiciary Act* and s 13 of the *Crimes Act* was described[88] by Isaacs J in *R v Judd* in the following terms:

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**82** (1861) 2 Legge 1454 at 1454 per Stephen CJ.

**83** See, eg, *Walton* (1851) 1 Legge 706 at 707 per Stephen CJ.

**84** See and compare 4 & 5 Will & Mar c 18, s 2.

**85** *McKaye* (1885) 6 LR (NSW) L 123 at 125-126 per Martin CJ.

**86** Pannam, "Trial by Jury and Section 80 of the Australian Constitution" (1968) 6 *Sydney Law Review* 1 at 8.

**87** (1958) 99 CLR 521 at 558; [1958] HCA 60.

**88** (1919) 26 CLR 168 at 172; [1919] HCA 9.

> "As to summary procedure, that was provided for by sec 13 of the *Crimes Act* 1914, which allowed any person to institute proceedings; and as to indictment, that was found in sec 69 of the *Judiciary Act*, which provided that indictments should be in the name of the Attorney-General or of some person commissioned by the Governor-General."

71 The matter in issue in *Judd* concerned the effect of s 6(3A) of the *War Precautions Act 1914* (Cth). It provided that:

> "An offence against this Act shall not be prosecuted summarily without the written consent of the Attorney-General or the Minister for Defence, or a person authorized in writing by the Attorney-General or the Minister for Defence, and an offence against this Act shall not be prosecuted upon indictment except in the name of the Attorney-General."

72 Isaacs J held[89] that the purpose of s 6(3A) was to provide "a safeguard to the individual", by ensuring that:

> "no prosecution should be instituted either summarily or by indictment, except by executive authority. To carry that out, they provided that summary procedure should be with the written consent of a Minister of State, either the Attorney-General or the Minister for Defence, specially named, or some person under the written authority of one of those Ministers of State; and that in the case of an indictment it should be in the name of the Attorney-General, cutting out for the purpose of the Act the provision in sec 69 of the *Judiciary Act* as to a person who was commissioned by the Governor-General. That left the whole thing really in the hands of the Executive Government."

73 Likewise, Gavan Duffy J observed[90] that:

> "Sec 6(3A) ... gives no new power to the Attorney General, but in certain cases forbids prosecution by indictment in the name of any person other than the Attorney General."

74 It is arguable that the combination of s 268.121(1) and (2) of the Code is similar in effect to s 6(3A) of the *War Precautions Act*. By its reference to an offence being *prosecuted* only in the name of the Attorney-General, s 268.121(2) may be seen to maintain what Dixon J described[91] as the "great distinction in

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**89** *Judd* (1919) 26 CLR 168 at 172.

**90** *Judd* (1919) 26 CLR 168 at 173.

**91** *Munday v Gill* (1930) 44 CLR 38 at 86; [1930] HCA 20.

history, in substance and in present practice between summary proceedings and trial upon indictment" – the former being "a proceeding between subject and subject" and the latter being concerned with the "highest crimes by which the State may be affected and the gravest liabilities to which a subject may be exposed", which must be brought in the Attorney-General's name as a "plea[] of the Crown ... solemnly determined according to a procedure considered appropriate [thereto]".

75 If so, in the case of summary proceedings (relevantly, for an indictable offence triable summarily) or proceedings for the commitment of an accused for trial on indictment, s 268.121(1), like the first part of s 6(3A) of the *War Precautions Act*, would require that the informant first seek and obtain the Attorney-General's consent to the commencement of the proceeding and, in the case of indictable offences, s 268.121(2), like the latter part of s 6(3A) of the *War Precautions Act*, would forbid prosecution by indictment in the name of anyone other than the Attorney-General. Neither sub-section would exclude the right of private prosecution.

76 It is also arguable, however, that the omission of the words "by indictment" from s 268.121(2) should be taken to signify that s 268.121(2) extends to summary proceedings which are alternative or preliminary to a prosecution upon indictment. But if so, there would still be no exclusion of the right of private prosecution. For there would be no reason to suppose that s 268.121(2) (any more than s 6(3A) of the *War Precautions Act* or s 5 of the *Australian Courts Act*) excludes the ability of a private person to seek the consent of the Attorney-General to commence proceedings for summary conviction or commitment or the ability of the Attorney-General to permit a private person to conduct a prosecution, whether summarily or on indictment, in the name of the Attorney-General. Of course, whether or not the Attorney-General would choose to do so is another matter, but it is evident that s 268.121(2) was intended to leave that option open to him or her.

77 The point is emphasised by the observations of Griffith CJ in *Christie v Permewan, Wright & Co Ltd*[92], being one of the earliest decisions in this Court considering the effect of Commonwealth legislation specifying that a proceeding could be instituted only in the name of a designated officer:

> "It is to be observed that sec 245 [of the *Customs Act 1901* (Cth)] only requires prosecutions to be instituted *in the name of* the Collector. It does not require any particular person to lay the information personally any more than it requires the Minister to go into Court to institute the

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**92** (1904) 1 CLR 693 at 700; [1904] HCA 35.

prosecution. There is nothing in the *Customs Act* to say that the power conferred on the Collector cannot be exercised by some other person for and on behalf of the Collector."

78 Such legislation stands in contrast to provisions which impose "an absolute restriction upon the right to prosecute". As the Australian Law Reform Commission noted[93] in its 1985 Report into Standing in Public Interest Litigation:

> "365. *Consent Provisions in Australia.* A search by the Commission has identified a number of instances of Commonwealth Acts and regulations and Ordinances of the Australian Capital Territory requiring official consent to prosecution. These are listed in Appendix B. In most cases the provision requiring consent refers to several, if not all, offences under the relevant Act, regulations or Ordinance, so that the number of offences covered by consent provisions is more extensive than is indicated by this figure. In most cases the official empowered to consent to prosecution is the Attorney-General, although in some cases it is the Treasurer, another Minister or a senior public servant, such as the Secretary to the relevant department. Often the consent may be provided by an officer so authorised by the designated official. *In other cases legislation places an absolute restriction upon the right to prosecute, permitting prosecution only in the name of the designated official, whether it be the Attorney-General, the Director of Public Prosecutions, the Minister or a senior public servant, such as the Commissioner of Taxation*. This absolute restriction most often appears in legislation relating to taxation. Appendix B provides a list of the relevant Acts. Under the Director of Public Prosecutions Act 1983 (Cth) persons having the power to consent to prosecutions for particular offences may authorise the Director to consent to prosecutions for those offences without surrendering their own power to give such consent. Certain of the Acts containing consent provisions are amended by the Director of Public Prosecutions (Consequential Amendments) Act 1983 (Cth) so as explicitly to empower the Director, usually in addition to the Attorney-General, to consent to prosecutions."

**The contextual indications**

79 Those conclusions are fortified by the fact that, at the time of drafting s 268.121, the drafters would almost certainly have had in front of them the

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**93** Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985) at 194 [365] (footnotes omitted; emphasis added).

forms of legislation earlier enacted in New Zealand, the United Kingdom and Canada to give effect to those countries' respective obligations under the Rome Statute of the International Criminal Court (1998). Tellingly, the New Zealand legislation barred proceedings commenced "without the consent of the Attorney-General"[94], and, yet more tellingly, the United Kingdom legislation barred proceedings instituted otherwise than "by *or* with the consent of the Attorney General"[95]. As might be expected, the latter form of provision has since been interpreted[96] in England to mean that proceedings cannot be commenced without the consent of the Attorney-General. Canada's legislation was alone in providing in terms that such proceedings could be "conducted only *by* the Attorney General"[97] or counsel on his or her behalf. And since the drafters did not adopt the Canadian form of words, but rather combined the United Kingdom and New Zealand pattern with a provision, long familiar in this country, for the institution of proceedings in the name of the Attorney-General, the logical conclusion is that they eschewed the Canadian approach in favour of the more orthodox United Kingdom and New Zealand course of retaining the private right of prosecution and subjecting it to a requirement first to obtain the Attorney-General's consent.

80 If s 268.121(2) were to be read as restricting prosecution to that by the Attorney-General in the manner of the Canadian provisions, it is difficult to see why s 268.121(2) excludes private prosecutions but does not also prevent prosecutions by the Commonwealth Director of Public Prosecutions, the police and any Special Prosecutor – there are no stated exceptions for these entities in s 268.121(2). That the Director of Public Prosecutions might, under s 9(1) of the *Director of Public Prosecutions Act 1983* (Cth), bring proceedings "in any other manner" than in his or her own official name does not address the issue: the Director of Public Prosecutions is not the Attorney-General. Indeed, the police, at least, are expected to play some role under s 268.121, as contemplated by s 268.121(3), which permits actions such as arrest and charge before the Attorney-General's consent has been given. For these reasons, as well, the better construction is that s 268.121(2) does not exclude prosecutions by persons other than the Attorney-General.

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**94** *International Crimes and International Criminal Court Act 2000* (NZ), s 13(1).

**95** *International Criminal Court Act 2001* (UK), s 53(3) (emphasis added).

**96** *R v Jones* [2007] 1 AC 136 at 162 [28] per Lord Bingham of Cornhill.

**97** *Crimes Against Humanity and War Crimes Act 2000* (Can), s 9(3) (emphasis added).

81 That conclusion is in turn reinforced by the fact that, had s 268.121(2) been intended to have the effect that proceedings can only be brought *by* the Attorney-General, there would be little point in expressly providing in s 268.121(1) that proceedings cannot be commenced without the *consent* of the Attorney-General; and, although there might be several reasons for providing in s 268.122 that a decision of the Attorney-General to grant or withhold consent is not reviewable, the most likely explanation of it is surely that it was intended to prevent a private person who wishes to take proceedings for an offence against Div 268 disputing a decision by the Attorney-General not to consent.

82 The Solicitor-General contended that the probable explanation of the inclusion of s 268.121(1) is that, under s 17(2) of the *Law Officers Act 1964* (Cth), the Attorney-General may either generally or otherwise by writing under his or her hand delegate all or any of his or her powers and functions, and thus that it is possible that the Attorney-General may delegate his or her powers to prosecute persons for offences against Div 268. It was submitted that, in view of the nature of the offences proscribed by Div 268, it may be inferred that Parliament considered it desirable that the Attorney-General maintain individual control over such proceedings, and hence that the likely purpose of s 268.121(1) is to ensure that delegates seek individual consent before the institution of each such proceeding.

83 That contention is unconvincing. If that were the point of the consent requirement, it is only to be expected that s 268.121(1) would be directed specifically to delegates or would be drafted in terms which require the Attorney-General to make a delegation of power to prosecute Div 268 offences subject to a requirement that the delegate obtain consent before the institution of proceedings. It is unlikely that s 268.121(1) would be drafted, as it is, in a form which has been interpreted repeatedly over centuries as one directed to private persons seeking to institute criminal proceedings with the consent of a designated Law Officer.

84 The Solicitor-General also referred to s 12 of the *War Crimes Act 1945* (Cth), which provides that:

> "**Who may prosecute**
>
> An offence against this Act may only be prosecuted in the name of the Attorney-General or the Director of Public Prosecutions."

85 The Solicitor-General contended that it is apparent from the similarity between the form of s 268.121(2) of the Code and the form of s 12 of the *War Crimes Act*, coupled with the meaning which the Explanatory Memorandum to the *War Crimes Amendment Bill 1987* (Cth) ascribed to s 12 of the *War Crimes Act*, that s 268.121(2) of the Code was intended to have the same meaning as the

Explanatory Memorandum to the *War Crimes Amendment Bill* ascribed to s 12 of the *War Crimes Act*.

86 That contention should also be rejected. On any view, s 12 of the *War Crimes Act* achieves the specific purpose identified in its heading – to regulate "[w]ho may prosecute" – because some lawful authority must be necessary to proceed in the name of the Attorney-General. Beyond that, however, the heading does no more than point to the question identified above as to what "prosecute" means in this context. What is far more telling is that s 12 of the *War Crimes Act* is in a form which, as has been explained, has long existed and long been understood to do no more than forbid particular proceedings in the name of any person other than the Attorney-General.

87 It is true, as the Solicitor-General contended, that the Explanatory Memorandum to the *War Crimes Amendment Bill* stated that the effect of s 12 of the *War Crimes Act* is that proceedings for an offence against that Act may be brought only *by* the Attorney-General or the Director of Public Prosecutions. But that can hardly be regarded as a sufficient indication of its meaning. For the reasons given, s 12 of the *War Crimes Act* is not ambiguous or obscure. Nor could it be said that its natural and ordinary meaning, supported by centuries of experience, leads to any manifestly absurd or unreasonable result. Hence, s 15AB of the *Acts Interpretation Act 1901* (Cth) supplies no basis for considering this extrinsic material, much less attaching dispositive weight to it. And, although this Court has acknowledged[98] a role for context in the first instance, it has also steadfastly maintained[99] that the meaning of the statutory text cannot be displaced by legislative history and extrinsic materials, much less one without the other. The function of the Court is to give effect to the will of the Parliament as expressed in the law, not to bend it to accord to what an officer of the executive may have conjectured to be its meaning[100].

88 Furthermore, even if s 12 of the *War Crimes Act* had the meaning for which the Solicitor-General contended, s 268.121 is very different in form and

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**98** *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; [1997] HCA 2.

**99** *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39] per French CJ, Hayne, Crennan, Bell and Gageler JJ; [2012] HCA 55.

**100** *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ; [1987] HCA 12; *Singh v The Commonwealth* (2004) 222 CLR 322 at 336 [19] per Gleeson CJ; [2004] HCA 43. See also Frankfurter, "Some Reflections on the Reading of Statutes" (1947) 47 *Columbia Law Review* 527 at 533.

context from s 12 of the *War Crimes Act*: in particular, s 268.121(1) expressly provides that a proceeding is not to be commenced without the *consent* of the Attorney-General, and s 268.122 expressly provides, in a most elaborate form, that a decision of the Attorney-General to consent or not to consent is not reviewable. The inclusion of those features in ss 268.121 and 268.122 compared to their absence from the *War Crimes Act* supports the conclusion that s 268.121(2) is intended to have its natural and ordinary meaning: relevantly that, if the Attorney-General consents to a private person commencing a proceeding for an offence against Div 268 of the Code, the proceeding may thereafter be commenced only in the name of the Attorney-General.

89 The Solicitor-General argued that the special nature of the offences created by the *War Crimes Act* and by Div 268 of the Code is a powerful indication that Parliament intended that such offences be prosecuted only by the Attorney-General or, in the case of offences under the *War Crimes Act*, by the Attorney-General or the Director of Public Prosecutions and, therefore, that s 12 of the *War Crimes Act* and s 268.121(2) of the Code should be construed as having that effect.

90 That contention is not persuasive either. It may, at the outset, be doubted whether the nature of the offences in Div 268 is any reason for reading s 268.121(2) as not permitting private prosecutions. The purpose of Div 268 is "to create certain offences that are of international concern and certain related offences"[101]. In the international law context, these offences, which include crimes against humanity and genocide, are sometimes called crimes of universal jurisdiction[102]. Parliament could readily have viewed the importance of ensuring prosecution of these crimes – because they are of such general concern – as supporting, rather than detracting from, the desirability of private prosecution.

91 While it may be accepted that the offences created by the *War Crimes Act* and Div 268 of the Code are special, even apart from s 13 of the *Crimes Act* it is unlikely that the special nature of the offences would be regarded as a sufficient indication of intention to exclude the right of private prosecution. It will be recalled that the Divisional Court in *Kennedy* was unanimous in holding that the special nature of the offence there in issue was not sufficient to exclude the right of private prosecution.

92 Moreover, and more importantly, whatever may have been the position prior to the enactment of s 13 of the *Crimes Act*, as has been observed, the

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**101** Code, s 268.1(1).

**102** Crawford, *Brownlie's Principles of Public International Law*, 8th ed (2012) at 467-468.

consequence of the enactment of s 13 is that general probabilities of intention based on the nature of the legislation in question are not sufficient to displace the presumption created by s 13 that any person may institute criminal proceedings. To exclude the right of private prosecution afforded by s 13 requires express terms of exclusion or exclusion as a matter of necessary implication. And here the nature of the offences in issue does not so imply. Given the manner in which they have been dealt with in the United Kingdom and New Zealand, and that s 268.121 appears as substantially based on a combination of those provisions with a form of words having an established meaning retentive of the right of private prosecution, there is very good reason to conclude that the nature of the offences was not considered sufficient to take away the right of private prosecution.

93 The special nature of the offences created by Div 268 of the Code is relevant, however, in another and more significant respect. Because those offences are the result of Australia giving domestic effect to international crimes recognised by the Rome Statute, Parliament had reason to consider it important that, where proceedings are taken by a private person, the Director of Public Prosecutions or a Special Prosecutor, the defendant should "know from the summons" (or at least any later indictment[103]) "that the proceedings were both authorized and taken in the name of the Attorney-General"[104], as the first Law Officer of Australia.

94 In the absence of contrary indication, a requirement that proceedings not be commenced "without the consent of" the Attorney-General, or only "with the sanction of" or "on the fiat of" the Attorney-General, would not necessarily imply that proceedings to which the Attorney-General has given consent, sanction or fiat must then be commenced in the name of the Attorney-General[105]. Hence, but for s 268.121(2), proceedings to which the Attorney-General had consented under s 268.121(1) might be commenced in the name of a private prosecutor under a State or Territory law[106] applied by s 68 of the *Judiciary Act*, and then prosecuted by indictment in the name of the Director of Public Prosecutions or a Special Prosecutor under s 69 of the *Judiciary Act*. Against that background, it appears most likely that the purpose of s 268.121(2) is to ensure that, where the Attorney-General has consented to proceedings under s 268.121(1), the fact that the proceedings are authorised by and taken in the name of the Attorney-General

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**103** See [74]-[76] above.

**104** *Key v Bastin* [1925] 1 KB 650 at 654 per Avory J.

**105** See *Key v Bastin* [1925] 1 KB 650 at 653-654 per Lord Hewart CJ.

**106** See, eg, *Criminal Procedure Act 2009* (Vic), ss 5, 6.

will be apparent from the face of the instrument under which the defendant is prosecuted.

**Conclusion**

95 For these reasons, we should have been disposed to hear the plaintiff's argument as to whether the Attorney-General's refusal to grant consent was reviewable on the grounds alleged. But of course we say nothing as to the merits of that argument.

EDELMAN J.

**The preliminary issue**

96 Is an offence "prosecuted in the name of the Attorney-General" if, with the consent of the Attorney-General, a private person prosecutes the offence in the name of the Attorney-General?

97 This question was essentially a preliminary issue in this case. It concerns the meaning of s 268.121(2) of the *Criminal Code* (Cth). Division 268, which contains this provision, was inserted into the *Criminal Code* in 2002 in connection with Australia becoming a party to the Rome Statute of the International Criminal Court (1998)[107]. Despite the literal connotation of the expression "in the name of the Attorney-General", and despite the history of the expression, I was attracted during the hearing to the view reached by the majority that the answer to this preliminary question is "no". This was due to the international context in which s 268.121(2) arose, particularly an earlier Canadian provision to which regard was had in drafting s 268.121(2), and which appears to exclude prosecution by private persons in the name of the Attorney-General. But, in the absence of consideration and treatment of the context of the provision in light of the provenance of the expression "in the name of the Attorney-General", I would have reserved my decision on this preliminary issue and would have permitted further argument upon the substantive issues in the special case.

98 I have now considered the preliminary issue in detail and I conclude that the nearly unique international context does not sufficiently reveal an intention by the Commonwealth Parliament to depart from the plain semantic and historical meaning of the words used in s 268.121(2). That meaning, long-established throughout the civil and criminal law, includes the prosecution of a relator proceeding by a private person, albeit controlled by the Attorney-General, for whom, and on behalf of whom, the prosecution is brought.

**Introduction**

99 Section 268.121(2) of the *Criminal Code* provides that "[a]n offence against this Division may only be prosecuted in the name of the Attorney-General". As I discuss below, this expression has been used, "from the earliest times"[108], to describe proceedings that are commenced, and, subject to the

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**107** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 25 June 2002 at 4369; see also at 4326, 4349.

**108** *Gouriet v Union of Post Office Workers* [1978] AC 435 at 477.

Attorney-General's control, conducted at the instigation of individuals to enforce public rights.

100 As the majority explain in their recitation of the background to this special case, Mr Taylor's case concerns his attempt to procure the consent and use of the name of the Attorney-General in order to bring a prosecution of Aung San Suu Kyi. At the heel of the hunt, and towards the conclusion of his written submissions, the Attorney-General of the Commonwealth raised a new point. He submitted that s 268.121(2) "excludes the bringing of a private prosecution under s 13 of the *Crimes Act* [*1914* (Cth)] ... because it reveals a contrary intention for the purposes of that section". Following a letter to the parties, this issue was heard as a preliminary issue and the special case was resolved, and questions answered, on the basis of this issue by a majority of this Court.

101 The meaning of s 268.121(2) must be understood with the background of a long history of relator proceedings as well as in its immediate context and in light of its purpose. The history of relator proceedings is one by which the expression "in the name of the Attorney-General" carries the meaning of complete control over the proceedings by the Attorney-General although a private person might act as prosecutor. That control is complete in the sense that the Attorney-General has all the powers that a party to a proceeding would have in the running of the case.

102 The immediate context of s 268.121(2) is that before it was inserted into the *Criminal Code* in 2002 similar provisions were enacted in the United Kingdom in 2001[109], New Zealand in 2000[110], and Canada in 2000[111]. The Australian legislation was clearly drafted with the same international concerns in mind and by reference to those foreign models[112]. However, neither the legislation of New Zealand nor that of the United Kingdom contains a provision equivalent to the constraint imposed upon a private person by s 268.121(2) that the offence may only be prosecuted "in the name of the Attorney-General". The closest is the provision of the Canadian legislation that requires that "proceedings may be conducted only by the Attorney General of Canada or counsel acting on their behalf"[113]. Ultimately, in determining the interpretation of s 268.121(2) it is

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**109** *International Criminal Court Act 2001* (UK), ss 53(3), 60(3).

**110** *International Crimes and International Criminal Court Act 2000* (NZ), s 13(1).

**111** *Crimes Against Humanity and War Crimes Act 2000* (Can), s 9(3).

**112** See Australia, Joint Standing Committee on Treaties, *The Statute of the International Criminal Court*, Report No 45 (2002) at 82 [3.55].

**113** *Crimes Against Humanity and War Crimes Act 2000* (Can), s 9(3).

not necessary to consider whether or not a relator proceeding involves a private person acting on behalf of the Attorney-General as those words are used in the Canadian legislation. The Commonwealth legislation departed from the Canadian expression and instead used an expression wholly consistent with the long history of relator proceedings in the United Kingdom and Australia. There was an evident purpose for the choice of expression by the Commonwealth Parliament: complete control over the proceedings by the Attorney-General without abolition of the prospect of commencement of the proceedings by a private person.

## The foundations in history and principle of relator proceedings

*Civil law*

103 In *Gouriet v Union of Post Office Workers*[114], Lord Wilberforce drew a distinction of "fundamental principle" between private rights that can be asserted by individuals and public rights that can be asserted by the Attorney-General representing the public. In general, his Lordship said, a private person does not have the right to represent the public[115]. Lord Wilberforce also appeared to recognise one exception to the general proposition that individuals can only assert their private rights. That apparent exception is where "the defendant is infringing or threatens to infringe some public right so as to inflict special damage on the plaintiff"[116]. The extent to which this is an exception may depend upon the extent to which "special damage" or a "special interest" goes beyond a plaintiff's rights in a broad sense, including liberties, powers and immunities.

104 In *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*[117], McHugh J took a similar view, saying of this "foundational principle" that "the Attorney-General of the relevant jurisdiction is regarded as the appropriate person to determine whether civil proceedings should be commenced to enforce the public law of the community"[118]. In contrast, in a joint judgment, Gaudron, Gummow and Kirby JJ, without reference to the exception recognised by Lord Wilberforce, said that one difficulty with the

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**114** [1978] AC 435 at 477.

**115** *Gouriet v Union of Post Office Workers* [1978] AC 435 at 477; see also at 500 per Lord Diplock.

**116** *Gouriet v Union of Post Office Workers* [1978] AC 435 at 483.

**117** (1998) 194 CLR 247; [1998] HCA 49.

**118** *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 276 [82].

reasoning in *Gouriet* was that it had left no room for the "special interest" and "appears to reflect a view of standing which sees administrative review as concerned with the vindication of private not public rights"[119]. In any event, however, it was unanimously held in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* that the respondents had sufficient interest to seek relief by application of the "flexible"[120] rule that an individual can assert public rights where the individual has a "special interest in the subject matter of the action"[121].

105 Subject to statutory provisions and constitutional considerations, and with differences in its application at the margins, English and Australian law represent the same general civil law principle. The principle is that an individual without a sufficient special interest cannot enforce public rights in a civil action. In such a case, the public rights must be asserted by the Attorney-General, either ex officio (from his office) or ex relatione (at the instance of another). Thus, where an individual without a special interest seeks to agitate for the enforcement of public rights, that proceeding must be brought by the Attorney-General at the relation of that individual.

*Criminal law*

106 Writing in the late nineteenth century, Stephen observed that in Continental legal systems "prosecutions having punishment for their object can be instituted only by public authority, but ... a person injured by a crime may join in the prosecution as the *parti civile*, under certain rules"[122]. That approach to the criminal law has a distinct similarity with the civil law approach discussed above, where public rights are generally only able to be enforced by a private person

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**119** *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 261-262 [37].

**120** *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 265 [46], quoting *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558; [1995] HCA 11. See also *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 36; [1981] HCA 50.

**121** *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 267 [50], 283-284 [100]-[103], 284-285 [108]-[110]. See also *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 526-527; [1980] HCA 53; see also at 547; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 35-36, 68-69, 74-76.

**122** Stephen, *A History of the Criminal Law of England* (1883), vol 1 at 495.

whose rights are affected. However, the position in English criminal law, which was received and adapted in Australia, evolved in a more complex manner.

107 In some instances in English law individuals could bring a criminal proceeding in their own name to assert their own rights. One proceeding, although "little in use"[123] by the time of Blackstone, was the "appeal of felony", an original suit by the injured party, commenced by writ or bill, to recover a pecuniary amount from an offender[124]. That proceeding was "conducted like other private litigations"[125]. More common was a proceeding under a statute that entitled a prosecutor to recover a penalty or compensation. In those cases, the prosecutor could bring, in their own name[126], a criminal information, "informing" the court of facts[127] and complaining of serious misdemeanours without the requirement of an indictment sanctioned by a grand jury[128]. Later statutes confined the bringing of some criminal informations in a person's own name to those people who were enforcing their own rights. For instance, in 1861, the *Offences against the Person Act 1861* (UK) required a prosecution for summary offences for common assault or battery, which would exclude the individual's civil claim for assault[129], to be prosecuted "by or on behalf of" the victim[130].

108 Apart from actions instigated by an individual to vindicate their own rights or to obtain a financial recompense, common law principles also permitted a criminal law proceeding to be brought at the relation of an individual, including one who was not directly affected, to vindicate public rights. As Blackstone explained[131], criminal informations brought were of two types: (i) informations

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**123** Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 23 at 308.

**124** Baker, *The Legal Profession and the Common Law: Historical Essays* (1986) at 262.

**125** Stephen, *A History of the Criminal Law of England* (1883), vol 1 at 496.

**126** Paul, *Justices of the Peace* (1936) at 166. See Bere and Chitty, *Burn's Justice of the Peace and Parish Officer*, 29th ed (1845), vol 1 at 962.

**127** Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 236.

**128** Chitty, *A Practical Treatise on the Criminal Law* (1816), vol 1 at 841-842.

**129** Williams, "The Power to Prosecute" [1955] *Criminal Law Review* 596 at 598; *Nicholson v Booth and Naylor* (1888) 16 Cox CC 373 at 376-377.

**130** *Offences against the Person Act 1861* (UK), s 42.

**131** Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 23 at 304-305.

filed by the Attorney-General ex officio, usually[132] for "political"[133] offences tending to disturb the government[134], offences "so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal", and (ii) "those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer" that the Master of the Crown Office files the information[135]. In general, and subject to contrary statutory indication, the enforcement of an enactment made for the benefit of the public at large could occur on the relation of any member of the public[136]. Although the proceedings were styled with the King as the nominal prosecutor, the named prosecutor was the Master of the Crown Office, in whose name the relator's information was filed: he was "the officer of the public, as the Attorney general is the minister of the crown"[137].

109 Where a criminal proceeding did not (or, in the case of a felony, could not) arise by a criminal information, it would commonly arise by an indictment. The difference between criminal informations and the "more usual course of indictment" was that an indictment could only be issued by a jury and usually a grand jury, whereas a criminal information was the "mere allegation of the officer by whom it is preferred"[138]. Although individuals were involved in the prosecution on an indictment it was not a relator procedure. It was the grand jury which would indict, and it did so either by its own knowledge, or on the basis of a draft bill prepared by clerks on behalf of the complainant prosecutor[139], who

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**132** *Barton v The Queen* (1980) 147 CLR 75 at 92; [1980] HCA 48.

**133** See also Maitland, *Justice and Police* (1885) at 143.

**134** Chitty, *A Practical Treatise on the Criminal Law* (1816), vol 1 at 845.

**135** Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 23 at 304. See also *Gouldham v Sharrett* [1966] WAR 129 at 134.

**136** Bere and Chitty, *Burn's Justice of the Peace and Parish Officer*, 29th ed (1845), vol 1 at 962; Paul, *Justices of the Peace* (1936) at 166; *Sargood v Veal* (1891) 17 VLR 660 at 662; *Steane v Whitchell* [1906] VLR 704 at 705-706.

**137** Chitty, *A Practical Treatise on the Criminal Law* (1816), vol 1 at 849. See also *R v Wilkes* (1770) 4 Burr 2527 at 2570 [98 ER 327 at 351].

**138** Chitty, *A Practical Treatise on the Criminal Law* (1816), vol 1 at 841-842. See also Baker, *The Legal Profession and the Common Law: Historical Essays* (1986) at 263-264.

**139** Baker, *The Legal Profession and the Common Law: Historical Essays* (1986) at 264.

might also be a justice of the peace[140]. Once a bill had been sent to a grand jury the matter would be "entirely out of the original prosecutor's hands"[141]. The prosecutor did not even have a right to address the jury[142]. Indeed, in the period up to the nineteenth century the Crown was not generally represented by counsel at trial[143].

110 The relator proceeding, by which any member of the public could bring a criminal information in the name of the Master of the Crown Office, was regarded as so badly misused in the second half of the seventeenth century for frivolous or malicious prosecutions that[144], in 1692[145], Parliament made the process of exhibiting a criminal information subject to the leave of the court[146]. This requirement of leave had the effect of confining the criminal relator informations, which "by leave of the court, are prosecuted in the name of the coroner or master of the crown office"[147], to those "'gross and serious misdemeanours which deserve the most public animadversion', such as riot or sedition"[148].

111 In the nineteenth century, and with increasing frequency in the twentieth century, a further restriction was imposed on criminal relator informations in circumstances where governmental interests were involved, such as official secrets, or where it was thought that the right to prosecute might be "used very

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**140** Langbein, "The Origins of Public Prosecution at Common Law" (1973) 17 *American Journal of Legal History* 313 at 318.

**141** Stephen, *A History of the Criminal Law of England* (1883), vol 1 at 496.

**142** *Gouldham v Sharrett* [1966] WAR 129 at 133, citing *R v Brice* (1819) 2 B & Ald 606 [106 ER 487].

**143** Baker, *The Legal Profession and the Common Law: Historical Essays* (1986) at 287.

**144** Baker, *The Legal Profession and the Common Law: Historical Essays* (1986) at 266; Holdsworth, *A History of the English Law*, 3rd ed (1944), vol 9 at 242-245.

**145** Statute 4 & 5 Will & Mary c 18.

**146** *Liston v Davies* (1937) 57 CLR 424 at 434; [1937] HCA 22.

**147** Chitty, *A Practical Treatise on the Criminal Law* (1816), vol 1 at 844.

**148** Baker, *The Legal Profession and the Common Law: Historical Essays* (1986) at 266. See also Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 23 at 304-305.

injuriously", such as incest[149]. In those cases, Parliament required the additional safeguard of consent, usually of the Attorney-General, to be obtained even before the proceeding is commenced[150]. In 1981, a Royal Commission in the United Kingdom observed that there were more than 100 Acts of the Parliament of the United Kingdom where a private citizen's liberty to prosecute was subject to a requirement of consent "of a Minister, usually the Attorney General, an official, the Director of Public Prosecutions, or a judge"[151]. In 1998 the Law Commission of England and Wales recommended that a requirement of consent of the Attorney-General should be used to control prosecutions for those offences which involve national security or some international element or which create a high risk that the right of prosecution by an individual will be abused causing irreparable harm[152].

112 The relator proceeding in English criminal law thus came to follow, broadly, a similar pattern to that of the civil law. Private individuals did not generally have a right to bring their own action to enforce public rights. The process by which a private individual could vindicate public rights in court was by a relator proceeding brought in the name of the Attorney-General (civil law) or the Master of the Crown Office (criminal law). However, the abuse of the relator proceeding in criminal law saw the introduction of a requirement of leave of the court. And, in cases where governmental interests were involved, a requirement of consent of the Attorney-General was introduced in some statutes.

**The nature of the relator proceeding**

113 Whether the proceeding is civil or criminal, the relator proceeding is, as the name suggests, a proceeding by which a person, company or local or public authority can "'relate' facts to the Attorney-General tending to show that someone ... is breaking the law"[153]. As I have explained, in civil proceedings the facts are related to the Attorney-General, in whose name the proceeding is brought, but in criminal relator proceedings brought by criminal informations, the English

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**149** Devlin, *The Criminal Prosecution in England* (1960) at 18.

**150** English examples concerning obscenity and breaches of the peace include the *Children and Young Persons (Harmful Publications) Act 1955* (UK), s 2(2); *Theatres Act 1968* (UK), s 8.

**151** United Kingdom, Royal Commission on Criminal Procedure, *Report* (1981) Cmnd 8092 at 161 [7.48].

**152** Law Commission, *Consents to Prosecution* (1998) at 61-62 [6.46], 63 [6.52].

**153** Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed (2017) at 1001 [16.140].

tradition was that an individual related the facts to the court in the name of the Master of the Crown Office and prosecuted the case in the name of the Master of the Crown Office, with the leave of the court.

114 The English criminal tradition was altered in 1823, in its application in New South Wales, and aligned with the tradition for civil law, by legislation which required "all Crimes [felonies], Misdemeanors and Offences cognizable in the said Courts" to be prosecuted in the name of the Attorney-General[154]. Indictments were presented by a grand jury in the Courts of Sessions of the Peace but they had not been adopted in the Supreme Court[155]. From 1823, in the Supreme Court the Attorney-General would proceed for all offences either (i) ex officio, or (ii) by a relator proceeding prosecuted in his name rather than in the name of the Master of the Crown Office. In *R v Howe*[156], Forbes CJ is recorded as considering that in the relator proceeding for libel before him there was "little doubt of the propriety of *leaving the trial to the exertions of the private prosecutor*" as "would be the course in England" although he noted that, unlike in England, the prosecution in New South Wales would be in the name of the Attorney-General.

115 The grand jury was soon found to be "unsuited to the circumstances of the colony"[157] and the 1823 legislation was superseded in 1828 by a new Act, the *Australian Courts Act 1828* (Imp)[158], which, although in s 10 it recognised the possibility that the Governor of New South Wales or Van Diemen's Land might "further ... extend" the use of the grand jury, also conferred upon the Supreme Court the same ex officio power of the Attorney-General for all offences other than capital offences[159]. The ability of the Attorney-General to bring and control a proceeding, including those that would have been brought by grand jury in

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**154** *New South Wales Act 1823* (Imp) (4 Geo IV c 96), s 4. See also *R v McKaye* (1885) 6 LR (NSW) L 123 at 127.

**155** Bennett, "The Establishment of Jury Trial in New South Wales" (1961) 3 *Sydney Law Review* 463 at 482.

**156** [1824] NSWSupC 2 (emphasis in original).

**157** *R v McKaye* (1885) 6 LR (NSW) L 123 at 127.

**158** 9 Geo IV c 83.

**159** *Australian Courts Act 1828* (Imp) (9 Geo IV c 83), s 6; *R v McKaye* (1885) 6 LR (NSW) L 123 at 127.

England[160], and those that would be brought by relator action with the leave of the court, remained[161].

116 The process by which the relator action was then, and is still, brought is aptly described by Professors Aronson and Groves and Associate Professor Weeks[162]:

> "If there is time, this is done by instructing a solicitor and counsel, who prepare the originating process and accompanying pleadings or affidavit. Counsel certifies that the case is proper for the allowance of the Attorney-General's fiat, and the solicitor certifies the client's capacity to meet any adverse costs order."

117 It has been held that the Attorney-General has an unreviewable discretion whether or not to permit the institution of proceedings[163] and is not required to disclose their reasons for refusing to authorise the bringing of proceedings in their name: "[c]ourts of justice cannot compel anyone to invoke their aid who does not choose to do so; nor can they demand of him an explanation for his abstention"[164].

118 For "practical purposes"[165], once the Attorney-General grants consent to the proceedings, the proceedings will usually be conducted by the relator. However, the relator acts throughout the proceedings on behalf of the Attorney-General. Although the Attorney-General "generally permits the relator to select a solicitor to conduct the case ... such person is not the solicitor of the relator, but of the Attorney-General"[166]. The Attorney-General may "interfere at any

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**160** *R v Walton* (1851) 1 Legge 706 at 707.

**161** *Australian Courts Act 1828* (Imp) (9 Geo IV c 83), ss 5, 6; *Barton v The Queen* (1980) 147 CLR 75 at 92-93.

**162** Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed (2017) at 1001 [16.140].

**163** *Barton v The Queen* (1980) 147 CLR 75 at 94-95, 103-104, 110-111. See also *London County Council v Attorney-General* [1902] AC 165 at 168; Edwards, *The Law Officers of the Crown* (1964) at 288-289.

**164** *Gouriet v Union of Post Office Workers* [1978] AC 435 at 496.

**165** *Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 363.

**166** *Attorney-General for Ireland (Humphreys) v Governors of Erasmus Smith's Schools* [1910] 1 IR 325 at 331.

moment, and see that the cause is conducted by someone he has confidence in"[167]. The Attorney-General can "regulate the mode" by which the case is conducted[168]. The Attorney-General has complete charge of the litigation at all times[169]. The relator cannot appear separately and cannot take an opposing position to the Attorney-General[170]. It is, therefore, a "basic misconception" to treat the use of the Attorney-General's name as "fictional" with the "real claimant" as the relator[171]:

> "[The Attorney-General's] position in relator actions is the same as it is in actions brought without a relator (with the sole exception that the relator is liable for costs ...). He is entitled to see and approve the statement of claim and any amendment in the pleadings, he is entitled to be consulted on discovery, the suit cannot be compromised without his approval; if the relator dies, the suit does not abate."

119 The same position applies where the relator proceedings concern the criminal law. Amendments to the criminal information cannot be made without the sanction of the Attorney-General[172]. The Attorney-General can discontinue the proceedings by entry of a nolle prosequi[173]. In *Attorney-General v The Ironmongers' Company*[174], Lord Langdale MR said that:

> "he did not recognise the relator as distinct from the Attorney-General; that the suit was the suit of the Attorney-General, though at the relation of

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**167** *Attorney-General v Haberdashers' Company* (1852) 15 Beav 397 at 402 [51 ER 591 at 593].

**168** *Attorney-General v Governors of the Sherborne Grammar School* (1854) 18 Beav 256 at 264 [52 ER 101 at 104].

**169** *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 473-474 [287] and the authorities cited; [2002] HCA 16.

**170** *Attorney-General v The Ironmongers' Company* (1840) 2 Beav 313 at 328 [48 ER 1201 at 1207]. See also *Halsbury's Laws of England*, 5th ed (2015), vol 8 at 520 [615].

**171** *Gouriet v Union of Post Office Workers* [1978] AC 435 at 477-478; see also at 521.

**172** *Attorney-General v Fellows* (1820) 1 Jac & W 254 [37 ER 372].

**173** *R v Dunn* (1843) 1 Car & K 730 at 731 [174 ER 1009 at 1010]; *R v Chairman, County of London Quarter Sessions*; *Ex parte Downes* [1954] 1 QB 1 at 6.

**174** (1840) 2 Beav 313 at 328-329 [48 ER 1201 at 1207].

> another person upon whom he relied and who was answerable for costs; and that he could only recognise the counsel for the relator as the counsel for the Attorney-General, and could hear them only by his permission; that the suit was so entirely under the control of the Attorney-General that he might desire the Court to dismiss the information, and that if he stated that he did not sanction any proceeding, it would be instantly stopped."

120 Thus, there is "no difference between an information filed ex officio by the Attorney General and a proceeding by him at the relation of a third party, except as to costs"[175]. "In both cases the Sovereign, as *parens patriae*, sues by the Attorney General."[176] In both cases the Attorney-General has "the legal right to control the conduct of the proceedings" and has the responsibility for the proceedings[177]. The relator action is "the Attorney-General's action"[178] and it is "as competent or incompetent as if it were brought *ex officio* by him"[179].

121 In summary, a proceeding by the Attorney-General at the relation of a third party is brought in the name of the Attorney-General because it is by the Attorney-General and on their behalf. As Griffith CJ said in relation to a prosecution "in the name of" the Collector of Customs, the power can be exercised "for and on behalf of the Collector"[180].

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**175** *Attorney General v Logan* [1891] 2 QB 100 at 103. See also *Gouriet v Union of Post Office Workers* [1978] AC 435 at 478.

**176** *Attorney-General v Cockermouth Local Board* (1874) LR 18 Eq 172 at 176. See also *Attorney General v Logan* [1891] 2 QB 100 at 106.

**177** *Attorney-General (Q); Ex rel Duncan v Andrews* (1979) 145 CLR 573 at 582; [1979] HCA 24; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 473-474 [287].

**178** *Attorney-General v Wimbledon House Estate Co Ltd* [1904] 2 Ch 34 at 39; *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 275; [1945] HCA 30.

**179** *Attorney-General (Vict) v The Commonwealth* (1935) 52 CLR 533 at 560; [1935] HCA 31; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 402 [53].

**180** *Christie v Permewan, Wright & Co Ltd* (1904) 1 CLR 693 at 700; [1904] HCA 35.

**Section 13 of the *Crimes Act 1914* (Cth) and s 69 of the *Judiciary Act 1903* (Cth)**

122 At the start of the twentieth century, the general operation of relator proceedings for Commonwealth offences was altered by the creation of a new regime for prosecution of Commonwealth offences, bifurcated between (i) offences prosecuted summarily, akin to those prosecuted historically on a criminal information, and (ii) offences prosecuted on indictment[181]. The key elements of the new regime were s 13 of the *Crimes Act 1914* (Cth) and ss 68 and 69 of the *Judiciary Act 1903* (Cth). Subject to contrary intention in the relevant legislation or regulation[182], s 13 of the *Crimes Act* deals with offences which may be tried summarily, historically those commenced by criminal informations. It also deals with the committal process for offences to be prosecuted on indictment. Section 69 of the *Judiciary Act* deals with offences to be tried after indictment, the issue of which in England would have been the consequence of a decision by a jury, usually a grand jury, but which in New South Wales would generally be initiated by the Attorney-General[183].

123 As to offences that may be tried summarily, the effect of s 13 is to permit those public rights to be brought and prosecuted in the name of a private individual. Leave of the court is no longer required by the general regime. Section 13 thus recognises the practical reality that had emerged from the manner in which a public right had been prosecuted historically on a criminal information in the name of a public officer: "[e]very person has an interest, and is allowed to put the law in motion in criminal matters"[184]. That reality was that the Master of the Crown Office and, in New South Wales, the Attorney-General had exercised no real constraint over the commencement of relator proceedings filed in their name. Section 13 operated "to clarify by a degree of simplification"[185].

124 As to offences which are to be tried on indictment, s 69 of the *Judiciary Act* maintained, and maintains, the requirement that those offences be prosecuted by indictment in the name of the Attorney-General of the

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**181** See, generally, *R v Judd* (1919) 26 CLR 168 at 172; [1919] HCA 9.

**182** *Crimes Act 1914* (Cth), s 13.

**183** *R v Walton* (1851) 1 Legge 706 at 707; *Barton v The Queen* (1980) 147 CLR 75 at 92-93.

**184** *Brebner v Bruce* (1950) 82 CLR 161 at 169-170; [1950] HCA 36, quoting *Grant v Thompson* (1895) 72 LT 264 at 265.

**185** *Brebner v Bruce* (1950) 82 CLR 161 at 175.

Commonwealth or of such other person as the Governor-General appoints in that behalf[186]. By subsequent amendment[187], s 69(2A) was introduced. That provision confirms that s 69 did not affect the power of the Commonwealth Director of Public Prosecutions or a Special Prosecutor to prosecute by indictment, respectively in their official name or own name.

125 That regime is facilitated by s 68 of the *Judiciary Act*. One effect of s 68 is that so far as State or Territory courts have federal jurisdiction to prosecute Commonwealth offences, the procedural laws of the State or Territory would generally apply to both summary and indictable proceedings, including the committal proceedings for indictment that would historically have proceeded by a grand jury or by the Attorney-General in New South Wales.

126 It was not suggested, nor could it have been suggested, by any counsel in this special case that s 69 of the *Judiciary Act* abolished the relator action. Plainly, it did not do so. Nor did State legislative provisions that require indictments to be brought "on behalf of the Crown, in the name of the Attorney General or the Director of Public Prosecutions"[188] abolish the possibility of relator proceedings. All were enacted to include the possibility of relator proceedings brought for and on behalf of the Attorney-General.

127 The continued existence of relator proceedings was assumed by Isaacs J in *R v Judd*[189], when he considered the operation of a similar bifurcated regime in s 6(3A) of the *War Precautions Act 1914* (Cth). That sub-section, inserted by an amendment in 1915[190], imposed upon summary offences the consent constraint which had been required for offences involving governmental interests in England. The sub-section required written consent of the Attorney-General or Minister for Defence for the summary prosecution of an offence against the *War Precautions Act*. The amendment to the *War Precautions Act* also imposed a similar requirement to that in s 69 of the *Judiciary Act*, namely prosecution in the name of the Attorney-General, although without the possibility of the use of the name of a person authorised by the Governor-General.

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**186** *Bainbridge-Hawker v The Minister of State for Trade and Customs* (1958) 99 CLR 521 at 558; [1958] HCA 60.

**187** *Director of Public Prosecutions (Consequential Amendments) Act 1983* (Cth), s 21.

**188** *Criminal Procedure Act 1986* (NSW), s 8(1). See also *Criminal Procedure Act 1921* (SA), s 103(1); *Criminal Procedure Act 2004* (WA), Sch 1 cl 3(3).

**189** (1919) 26 CLR 168.

**190** *War Precautions Act (No 2) 1915* (Cth), s 3.

128 In *R v Judd*, Isaacs J explained that the constraints of (i) the consent of the Attorney-General and (ii) the use of the name of the Attorney-General provided "a safeguard to the individual" in that it "left the whole thing really in the hands of the Executive Government"[191]. In the instance of offences prosecuted summarily, the requirement of consent gave the Executive Government a veto power upon the commencement of proceedings. In the instance of offences prosecuted on indictment, the requirement that the proceedings be brought in the name of the Attorney-General gave the Executive Government, through the Attorney-General, the complete control of a party over any relator proceedings.

129 With this background, the essence of the preliminary issue in this case is whether the special international context of s 268.121 of the *Criminal Code* requires a different meaning to be given to the words "prosecuted in the name of the Attorney-General". In my view, it does not.

**The text and purpose of s 268.121 of the *Criminal Code***

130 The purpose of Div 268 of the *Criminal Code* is to "create certain offences that are of international concern and certain related offences"[192] by creating a complementary jurisdiction of Australia to the jurisdiction of the International Criminal Court[193].

131 The indictable offences in Div 268 divide into two groups. On the one hand, there are those offences that can be prosecuted summarily as well as on indictment[194], such as offences of compelling service in hostile forces (s 268.30), denying a person a fair and regular trial (s 268.31), and sentencing or execution without due process (s 268.76). On the other hand, there are those that must be prosecuted on indictment, such as genocide (ss 268.3, 268.4, 268.5, 268.6, 268.7), enslavement (s 268.10), and torture (s 268.25).

132 Section 268.121 provides:

"**268.121 Bringing proceedings under this Division**

(1) Proceedings for an offence under this Division must not be commenced without the Attorney-General's written consent.

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**191** *R v Judd* (1919) 26 CLR 168 at 172; see also at 173.

**192** *Criminal Code* (Cth), s 268.1(1).

**193** *Criminal Code* (Cth), s 268.1(2).

**194** See *Crimes Act 1914* (Cth), s 4J.

(2) An offence against this Division may only be prosecuted in the name of the Attorney-General.

(3) However, a person may be arrested, charged, remanded in custody, or released on bail, in connection with an offence under this Division before the necessary consent has been given."

*The meaning of ss 268.121(1) and 268.121(3) of the Criminal Code*

133 The most immediate and important matter of context in which sub-ss (1) and (3) must be interpreted is that they closely followed the pattern of the earlier overseas legislation which was also designed to give effect to obligations upon those States as parties or potential parties to the Rome Statute.

134 The United Kingdom legislation, the *International Criminal Court Act 2001* (UK), contains a provision, like s 268.121(1), requiring that the relevant "[p]roceedings for an offence shall not be instituted except by or with the consent of the Attorney General"[195]. A generally applicable provision, similar to s 268.121(3), also exists in United Kingdom legislation with the effect that such an exception did not need to be included in the *International Criminal Court Act*. The reason for this should be explained in more detail.

135 From 1889, the consent of the Attorney-General was required for a prosecution to be commenced for offences under the *Official Secrets Act 1889* (UK). In 1911, the *Official Secrets Act 1911* (UK) added a proviso to the consent provision[196], which was otherwise in identical terms to the 1889 Act, that the consent of the Attorney-General was not required before the arrest, or remand in custody or on bail, of a person charged with an offence under that Act. However, no further proceedings could be taken until the consent of the Attorney-General had been obtained. In the second reading speech to the *Official Secrets Bill 1911*, in the House of Lords, Viscount Haldane explained that[197]:

> "There is a provision in the Official Secrets Act of 1889 which we keep – the provision that you cannot prosecute without the assent of the Attorney-General. That provision was construed to mean that you could not arrest without the fiat of the Attorney-General. The result was that many of these persons with whom we wished to interfere were a long way off before any warrant could be obtained for their arrest. Therefore there is a

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**195** *International Criminal Court Act 2001* (UK), s 53(3).

**196** *Official Secrets Act 1911* (UK), s 8.

**197** United Kingdom, *Parliamentary Debates*, House of Lords, 25 July 1911, vol 9, col 643-644.

> provision in this Bill analogous to that which exists in the present law in the case of all felonies."

That exception was adapted and applied to offences generally in s 25(2) of the *Prosecution of Offences Act 1985* (UK), which provides, in effect, for the same exemption from any enactment that prohibits the institution or carrying on of proceedings for any offence except with consent, including that of the Attorney-General. In *R v Lambert*[198], the Court of Appeal of England and Wales held that s 25 "covers action that needs to be taken to apprehend the offender and detain him if there is not time to obtain permission. It does not in our judgment permit anything more to be done." Section 25 of the *Prosecution of Offences Act* also applies to offences under the *International Criminal Court Act*.

136 The New Zealand legislation, the *International Crimes and International Criminal Court Act 2000* (NZ), took the same approach. That legislation provides that the relevant proceedings may not be instituted "without the consent of the Attorney-General"[199] and contains an exception to the consent provision in very similar terms to s 268.121(3) and for the same purpose[200].

137 The restriction in s 268.121(1) and the exception in s 268.121(3) of the *Criminal Code* closely followed the United Kingdom and New Zealand approaches, for the same purpose. As the Explanatory Memorandum to the *International Criminal Court (Consequential Amendments) Bill 2002* said of s 268.121(3)[201]:

> "Proposed subsection (3) provides that a person may be arrested, charged and remanded in custody or released on bail for an offence under this Division before the consent has been given. This is to ensure that any delay in obtaining written consent from the Attorney-General will not delay the arrest of a person or allow a person to escape, and that it also will not result in a person being unduly held on remand."

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**198** [2010] 1 WLR 898 at 909 [21].

**199** *International Crimes and International Criminal Court Act 2000* (NZ), s 13(1).

**200** *International Crimes and International Criminal Court Act 2000* (NZ), s 13(2). See New Zealand, Foreign Affairs, Defence and Trade Committee, *International Crimes and International Criminal Court Bill*, Commentary (2000) at 7.

**201** Australia, House of Representatives, *International Criminal Court (Consequential Amendments) Bill 2002*, Explanatory Memorandum at 16.

*Application of the meaning of ss 268.121(1) and 268.121(3) of the Criminal Code*

138 In each of the United Kingdom[202] and New Zealand[203], courts and commentators have assumed that a relator proceeding can be brought with the consent of the Attorney-General. However, by initially lodging the charge-sheet and draft summons in his own name with the Magistrates' Court at Melbourne, Mr Taylor sought to bring the charge by relying upon the exception in s 268.121(3).

139 It is unnecessary to consider whether the charge-sheet should have been accepted for filing by the Registrar at the Magistrates' Court within the exception in s 268.121(3). If the charge had been brought by a police officer it would have fallen precisely within the text and purpose of s 268.121(3). As a private person seeking to bring a charge, it may be that Mr Taylor was in no different a position from a police officer who "is acting not by virtue of his office but as a private citizen interested in the maintenance of law and order"[204]. But it is not necessary to consider this issue further because the preliminary issue is whether s 268.121(2) precludes the prosecution as a relator proceeding in the name of the Attorney-General.

*The text and purpose of s 268.121(2) of the Criminal Code*

140 By itself, the text of s 268.121(2) does not suggest the exclusion of a relator proceeding. To the contrary, its terms come as close as possible to expressly including relator proceedings without the use of the word "relator". As I have explained, an offence that is prosecuted by way of a relator proceeding is an offence "prosecuted in the name of the Attorney-General". It falls precisely within the words of s 268.121(2).

141 Neither the United Kingdom nor the New Zealand legislation contains a sub-section equivalent to s 268.121(2). The absence of such a provision in that legislation may simply be based upon an assumption that relator proceedings are possible. Or it may be a consequence of particular legislation or more recent developments concerning relator proceedings in those jurisdictions. However, in

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**202** *R (Islamic Human Rights Commission) v Civil Aviation Authority* [2006] EWHC 2465 at [38]; Warbrick, "Immunity and International Crimes in English Law" (2004) 53 *International and Comparative Law Quarterly* 769 at 771-774.

**203** Dunworth, "From Rhetoric to Reality: Prosecuting War Criminals in New Zealand" (2008) 5 *New Zealand Yearbook of International Law* 163.

**204** Devlin, *The Criminal Prosecution in England* (1960) at 17. See also *Lund v Thompson* [1959] 1 QB 283 at 285.

Australia, in the absence of s 268.121(2), the effect of s 13 of the *Crimes Act* would be that unless a contrary implication of legislative intention could be found elsewhere in Div 268, some offences in that Division could be prosecuted summarily, with the consent of the Attorney-General, but without the complete control of the Attorney-General that would ordinarily be associated with a relator proceeding. The evident purpose of s 268.121(2) is to impose upon any prosecution for an offence against Div 268 the control of the proceedings by the Attorney-General in addition to the Attorney-General's written consent for their commencement.

142 The requirement that an offence be prosecuted "in the name of the Attorney-General" does not exclude agents of the Attorney-General. Indeed, it was common ground in oral submissions that the Attorney-General could delegate a prosecution to the Commonwealth Director of Public Prosecutions as their agent. The Director is empowered to prosecute in their own name or "in any other manner"[205]. An exclusion of relator proceedings would therefore require s 268.121(2) to be read as though it required prosecution "in the name of the Attorney-General *and by the Attorney-General or their agent other than where the prosecutor acting as relator to the Attorney-General is not a professional prosecutor*".

143 This is a large implication which is substantially at variance with the words used[206]. The strongest argument in its favour is the existence of the legislative provision in Canada which preceded the introduction of Div 268, which was also a response to the Rome Statute, and which might arguably be interpreted to exclude relator proceedings. Section 9(3) of the *Crimes Against Humanity and War Crimes Act 2000* (Can) provided:

> "No proceedings for an offence under any of sections 4 to 7, 27 and 28 [including genocide, a crime against humanity or a war crime] may be commenced without the personal consent in writing of the Attorney General or Deputy Attorney General of Canada, and those proceedings may be conducted only by the Attorney General of Canada or counsel acting on their behalf."

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**205** *Director of Public Prosecutions Act 1983* (Cth), s 9(1); *R v Gee* (2003) 212 CLR 230 at 247 [34]; [2003] HCA 12.

**206** *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 548 [38]; [2014] HCA 9.

144 Professor Lafontaine has argued that this provision excluded private prosecutions and that it existed "to allow for considerations of foreign policy to be assessed at the political level"[207]. As I explain below, there is, however, ambiguity about the expression "private prosecutions". But whether or not the Canadian provision excludes relator proceedings might depend upon whether Canadian law recognises the complete control that the Attorney-General has historically had over a relator proceeding and whether that control is sufficiently within s 9(3) of the *Crimes Against Humanity and War Crimes Act* for the relator to be considered to be acting on behalf of the Attorney-General of Canada. Those issues need not be considered in this case. The Commonwealth Parliament, with the benefit of consideration of s 9(3), chose to adopt the different and long-standing form of words that reflects the existence of relator proceedings.

*The submission that the purpose of s 268.121(2) of the Criminal Code was to exclude private prosecutions*

145 The submission that s 268.121(2) excludes private prosecutions relied upon s 12 of the *War Crimes Act 1945* (Cth). That section was inserted by the *War Crimes Amendment Act 1988* (Cth), requiring that offences against the *War Crimes Act* be prosecuted only in the name of the Attorney-General or the Director of Public Prosecutions. The Explanatory Memorandum to the *War Crimes Amendment Bill* provided that "[t]he nature of the offences" meant that it was "desirable to exclude the possibility of private prosecutions"[208].

146 The expression "private prosecution" is both misleading and ambiguous. It is misleading because, as Maitland observed, such prosecutions are "public" since it commonly means that "any one of the public may prosecute"[209]. It is ambiguous because it is an expression that is used in different ways. Sometimes it is used to mean a prosecution by a private individual who is not a public prosecutor, a police officer or an agent of the police[210]. On other occasions it is used to include prosecutions by police officers, albeit that they are not acting by virtue of their office, "but as a private citizen interested in the maintenance of law

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**207** Lafontaine, "The Unbearable Lightness of International Obligations: When and How to Exercise Jurisdiction under Canada's *Crimes against Humanity and War Crimes Act*" (2010) 23 *Revue Québécoise de droit international* 1 at 27.

**208** Australia, House of Representatives, *War Crimes Amendment Bill 1987*, Explanatory Memorandum at 8.

**209** Maitland, *Justice and Police* (1885) at 141 fn 1.

**210** Hay, "Controlling the English Prosecutor" (1983) 21 *Osgoode Hall Law Journal* 165 at 180.

and order"[211]. On still further occasions it is used to describe those proceedings in which the private person conducts the prosecution in their own name rather than, as a relator proceeding, in the name of and subject to the control of the Attorney-General. As the Australian Law Reform Commission observed, there is "no clear-cut definition of a private prosecution"[212].

147 A private prosecution in the last sense describes a summary charge brought by a private citizen in their own name, which, unlike a relator proceeding, can only be withdrawn by the Attorney-General or the Director of Public Prosecutions if the charge is taken over and then there is an application for leave to withdraw or discontinue[213]. In a 1990 working paper the Law Reform Commission of Canada seemed to treat private prosecutions as having the meaning of a summary charge brought by a private citizen, and as excluding relator actions, when it contrasted the power of the Attorney-General to "supervise" private prosecutors (who have powers "to lay a charge and to proceed with a prosecution") with the power of the Attorney-General to determine "what actions ought to be brought in the name of the state"[214].

148 It is unclear what should be taken to have been meant by "private prosecutions" in the draftsperson's discussion in the Explanatory Memorandum to the *War Crimes Amendment Bill*. Without more, an ambiguous statement in an Explanatory Memorandum will rarely be of assistance in statutory interpretation[215]. If an ambiguous statement were decisive then the selection of a preferred meaning would invite a teleological approach to interpretation of the statute. It suffices here to say that if "private prosecutions" means those

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**211** Devlin, *The Criminal Prosecution in England* (1960) at 16-17. See also *Lund v Thompson* [1959] 1 QB 283 at 285.

**212** Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985) at 184 [346].

**213** *R v Dainer; Ex parte Pullen* (1988) 78 ACTR 25 at 30-31; *Price v Ferris* (1994) 34 NSWLR 704 at 708; *Miller v Director of Public Prosecutions (Cth)* (2005) 142 FCR 394 at 399 [23]-[24]. See also *Gouriet v Union of Post Office Workers* [1978] AC 435 at 487, 520-521; *R (Gujra) v Crown Prosecution Service* [2013] 1 AC 484 at 492 [15]; MacDermott, *Protection from Power under English Law* (1957) at 36.

**214** Law Reform Commission of Canada, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*, Working Paper 62 (1990) at 19, 22.

**215** *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 556-557 [65]; see also, for example, at 554 [55].

prosecutions that are brought and conducted in the name of the private party then the statement is entirely accurate.

149 Even if the ambiguous reference to "private prosecutions" in the Explanatory Memorandum to the *War Crimes Amendment Bill* were to be understood to include relator proceedings instituted in the name of the Attorney-General the reference could not be decisive of the meaning of s 12 of the *War Crimes Act*. It would be contrary to the plain semantic meaning of the words of s 12 of that Act. It would be contrary to the history of the relator action and the association between that history and the expression "in the name of the Attorney-General". It would be contrary to the assumptions underlying decisions such as that of Isaacs J in *R v Judd*[216]. And, perhaps most significantly, it would not be consistent with the immediate context of s 268.121 of the *Criminal Code*, whose provisions deal with the same issues as the legislation of the United Kingdom, New Zealand, and Canada but which do not adopt the Canadian wording.

**Conclusion**

150 I would have allowed this special case to progress to further hearing past the preliminary issue. A relator prosecution brought in the name of the Attorney-General, and controlled by the Attorney-General, is a prosecution "in the name of the Attorney-General". The particular international context in which Div 268 was enacted is consistent with this conclusion.

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**216** (1919) 26 CLR 168.