

Prosecution Guidelines



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Contents

Chapter 1. The decision to prosecute	8
1.1. Introduction	8
1.2. The tests for deciding whether to prosecute	8
1.3. Prospects of conviction	8
1.4. Public interest	9
1.5. Factors not relevant to the prosecution decision	10
1.6. Children	11
1.7. Discontinuing a prosecution	11
1.8. Retrials	11
1.9. Reconsidering a prosecution decision	12
Chapter 2. The role of the prosecutor	13
2.1. Introduction	13
2.2. General principles	13
2.3. The role of the prosecutor in trials and summary hearings	14
2.4. The role of the prosecutor in sentencing	16
Chapter 3. Selecting charges	18
3.1. Introduction	18
3.2. Charge selection	18
3.3. ex officio charges	18
3.4. Finding a bill of indictment	19
Chapter 4. Charge resolution	20
4.1. Introduction	20
4.2. Why charge resolution is important	20
4.3. When is it appropriate that charge resolution occur	20
4.4. Statement of agreed facts	21
4.5. Taking offences into account – Form 1 offences	21
4.6. Unrepresented accused	22



Chapter 5. Victims and witnesses	24
5.1. Introduction	24
5.2. New South Wales Charter of Victims' Rights	24
5.3. Communicating with victims: general principles	24
5.4. Information to be provided	24
5.5. Additional obligations to victims and other prosecution witnesses	26
5.6. Consultation resolving charges and discontinuing prosecutions	26
5.7. Referring matters to the Witness Assistance Service (WAS)	27
5.8. Conferences	28
5.9. Victim Impact Statements	28
5.10. Domestic violence offences	28
5.11. Complaints and reviews	30
Chapter 6. Elections	31
6.1. Introduction	31
6.2. Elections to proceed on indictment	31
Chapter 7. Taking over proceedings	32
7.1. Introduction	32
7.2. Taking over proceedings commenced by Police	32
7.3. Taking over proceedings commenced by a private prosecutor	32
Chapter 8. Mental illness	34
8.1. Introduction	34
8.2. The decision to prosecute	34
8.3. Diversion of matters dealt with in the Local Court or Children's Court	34
8.4. Fitness and special hearings	34
8.5. Agreeing to the entry of a special verdict	34
Chapter 9. Juries and judge alone trials	35
9.1. Introduction	35
9.2. Jury selection	35
9.3. Judge alone trials	35



Chapter 10. DPP appeals	37
10.1. Introduction	37
10.2. When will the DPP lodge an appeal?	37
10.3. Interlocutory appeals and appeals against the exclusion of evidence in a trial	37
10.4. Appeals against sentence	37
10.5. Appeal against acquittal on a question of law alone	38
10.6. Referral on a question of law	39
10.7. Retrials after acquittal	39
10.8. Investigation after acquittal	39
 Chapter 11. Indemnities, undertakings, informers and induced statements	 40
11.1. Introduction	40
11.2. Benefits	40
11.3. Informer witnesses	40
11.4. Immunities	41
11.5. Induced statements	43
 Chapter 12. Pre-charge advice	 44
12.1. Introduction	44
12.2. When the ODPP will provide pre-charge advice	44
12.3. What the ODPP will provide advice about	44
12.4. Confidentiality and legal privilege	45
 Chapter 13. Disclosure	 46
13.1. Introduction	46
13.2. The duty of disclosure	46
13.3. Disclosure of material by Police and other investigative agencies	46
13.4. The Director's legal privilege	48
 Chapter 14. Evidence	 49
14.1. Introduction	49
14.2. Disputed evidence	49
14.3. Illegally or improperly obtained evidence	49
14.4. Hypnosis or EMDR evidence	49
14.5. Calling of expert evidence and the use of Audio-Visual Link (AVL)	49



Chapter 15. Reasons for decisions	50
15.1. Introduction	50
15.2. Requests for reasons	50
15.3. Privilege	51
Chapter 16. Media contact and non-publication orders	52
16.1. Introduction	52
16.2. Guiding principles	52
16.3. Communicating with the media	52
16.4. Closed court, suppression and non-publication orders	54
16.5. Complaints about media reporting	54
Chapter 17. Proceeds of crime	55
17.1. Introduction	55
17.2. Proceeds of Crimes	55



Introduction

The Office of the Director of Public Prosecutions (ODPP) acknowledges the Traditional Custodians of the lands on which our offices are located and where we provide services to the people of New South Wales. We recognise the rich histories, languages and customs of the Traditional Custodians and pay respect to Elders past, present and emerging. The Office honours the Aboriginal and Torres Strait Islander peoples' unique cultural and spiritual relationships with the land and waters.

Public confidence in the criminal justice system demands a prosecuting authority that is independent, fair and effective.

These Prosecution Guidelines, issued under s.13(1) of the *Director of Public Prosecutions Act* 1986, set out the general principles for the initiation and conduct of criminal prosecutions. They supersede all previous guidelines and policies issued under that section.

There have been developments in recent years which have had an impact on the criminal justice system, including changes to legislation, case law, procedures and policies. These Guidelines reflect a recognition of the inherent interest of victims as participants in the criminal justice system. Greater attention than ever before has been placed on the responsibility of prosecutors to inform victims about the progress of a case and to consult them about key decisions.

However, it must be borne in mind that the ODPP represents the community generally, rather than any individual. The duty of the prosecutor was articulated by the Supreme Court of Canada in the landmark decision of *Boucher v The Queen* (1954) 110 CCC 263 at 270:

It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his [or her] function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

The ODPP must serve the public interest first and foremost. The prosecutor owes a duty of fairness to the community. The community's interest is twofold: that those who are guilty be brought to justice and that those who are innocent not be wrongly convicted.

These Prosecution Guidelines serve multiple purposes. They guide prosecutors in the exercise of their duties, providing a standard against which the conduct of criminal proceedings should be measured. They promote impartial, principled and consistent decision-making. Their online publication ensures transparency, openness and accountability to the community.

In order to achieve these purposes, the Prosecution Guidelines must be accessible to the public and must remain current. A glossary is included and plain English has been used as much as possible.



The Guidelines are intended to be a living document. As the law evolves and new challenges emerge, so too must the Guidelines be updated and amended.

The Guidelines do not envisage every possible scenario that may arise in criminal proceedings. They cannot, and do not, provide a formula which can be applied to individual cases so as to yield a particular outcome. Every case is unique and must be considered on its merits. Section 13(2) of the *Director of Public Prosecutions Act 1986* specifically prohibits the issuing of guidelines in relation to particular cases. Instead, the Guidelines capture the fundamental principles and core values that underpin prosecutorial decision making at various stages in the prosecution process.



L A Babb SC
Director of Public Prosecutions
29 March 2021



Chapter 1. The decision to prosecute

1.1. Introduction

In deciding whether to prosecute, the public interest is the paramount consideration. It has never been the rule that whenever sufficient evidence exists, a prosecution must take place.

The purpose of this Chapter is to set out:

1. the tests for deciding whether to prosecute
2. the special considerations that apply when deciding whether to prosecute a child
3. the circumstances in which a prosecution will be discontinued
4. the factors taken into account when deciding whether to proceed to retrial
5. the circumstances in which a decision to prosecute may be reversed or reviewed.

1.2. The tests for deciding whether to prosecute

The decision to prosecute involves two questions:

1. can it be said that there is no reasonable prospect of conviction on the admissible evidence?
2. is the prosecution in the public interest?

1.3. Prospects of conviction

Determining whether it can be said that there is no reasonable prospect of conviction requires evaluating the likely strength of the admissible evidence the prosecution would present to the court, bearing in mind that the prosecution has to prove each element of the offence beyond a reasonable doubt.

The following matters should be taken into account:

1. are there reasonable grounds to believe any evidence might be excluded
2. whether the prosecution witnesses are available, competent, compellable and reliable
3. the credibility and reliability of other admissible evidence in the prosecution case

The test must also take into account any defence open to, or indicated by, the [accused](#).



Consideration should also be given to:

1. any inferences that may be drawn from circumstantial evidence
2. whether the prosecution is able to exclude beyond a reasonable doubt any reasonable hypothesis consistent with the accused being innocent
3. any other matter that could impact on the prospects of conviction.

1.4. Public interest

If the first test is satisfied, consideration must be given to whether a prosecution is in the public interest.

The following is not an exhaustive list. The weight to be given to any particular public interest factor will depend on the circumstances of the case.

Offence-related factors

1. the seriousness, or conversely, the triviality, of the offence
2. the prevalence of the offence in the community, whether it is of considerable public concern and the need to denounce and deter the offending behaviour
3. whether the offence is obsolete or obscure
4. the passage of time since the offence, having regard to its seriousness and the reasons for the delay

Accused-related factors

1. the accused's degree of culpability
2. the accused's criminal history and background
3. the accused's age, physical health, mental health or cognitive impairment
4. whether the offence occurred while the accused was serving a sentence, on bail or remand
5. whether the accused is willing to co-operate in the investigation or prosecution of others, or the extent to which the accused has done so

Victim-related factors

1. the victim's attitude to a prosecution
2. the victim's age, physical health, mental health or cognitive impairment and whether the prosecution may have an adverse physical or emotional impact on the victim
3. the protection of the victim and the victim's family



Sentencing factors

1. the likely outcome if the accused is found guilty, having regard to the sentencing options available to the court
2. whether a sentence has already been imposed on the accused that adequately reflects the criminality of the conduct
3. whether the accused has already been sentenced for other offences and the likelihood of any additional penalty being imposed, having regard to the principle of totality in sentencing

Other factors

1. whether any resulting conviction would necessarily be regarded as unreasonable or a miscarriage of justice
2. any mitigating or aggravating circumstances of the offence
3. the availability and efficacy of any alternatives to prosecution, including disciplinary proceedings
4. the availability of compensation, restitution, reparation or forfeiture to any person or body following a successful prosecution, including any criminal compensation or confiscation
5. whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute
6. the need to maintain public confidence in basic constitutional institutions such as the Parliament and the courts
7. any special circumstances that would prevent a fair trial from being conducted
8. the likely length and expense of a trial if disproportionate to the seriousness of alleged offending
9. the age, physical health, mental health or special infirmity of an essential witness.

1.5. Factors not relevant to the prosecution decision

A decision whether or not to prosecute must not be influenced by:

1. the race, religion, gender, gender identity, national origin or political associations, activities or beliefs of the accused or any other person involved (unless the accused's political associations, activities or beliefs are directly related to an offence)
2. the prosecutor's personal views concerning the accused or the victim
3. the possible effect of the decision on the personal or professional circumstances of those responsible for making it
4. political pressure or interference, or any possible political consequences of the decision.



1.6. Children

Special considerations apply to the prosecution of a [child](#).

When deciding whether the public interest warrants the prosecution of a child, particular regard should be given to:

1. the seriousness of the offence
2. the child's age, apparent maturity and mental capacity
3. the child's prior record, including the circumstances of any previous caution
4. the availability and efficacy of alternatives to prosecution
5. the sentencing options available to the Children's Court
6. the child's family circumstances, if known
7. the likelihood that the prosecution would be excessively harmful to the child or otherwise inappropriate, having regard to any known circumstances.

1.7. Discontinuing a prosecution

The tests for determining whether to prosecute in [Guideline 1.2](#) have continuing application throughout the prosecution process. In determining whether to discontinue a prosecution, consideration should also be given to any change in circumstances regarding the evidence and the presence of public interest factors.

Any request on behalf of the accused for the matter to be discontinued should be dealt with expeditiously.

Consultation with police and the victim must take place in accordance with [Chapter 5: Victims and witnesses](#).

1.8. Retrials

Where a trial has ended without [verdict](#), or when a [retrial](#) is ordered after the accused's appeal against conviction is upheld, consideration should be given to whether or not a retrial is required.

Factors to be considered include:

1. if the trial ended without a verdict:
 - a. whether the trial ended because the jury was unable to agree, or for another reason
 - b. whether another jury would be in a better or worse position to reach a verdict
2. if a retrial has been ordered after a successful conviction appeal, whether certain evidence has been ruled inadmissible
3. in either case:
 - a. the seriousness of the matter
 - b. whether and to what extent the accused has spent time in custody



- c. the cost of a retrial to the community and to the accused
- d. the views of the victim and police in accordance with the principles of Chapter 5
- e. whether evidence is still available

Where two juries have been unable to agree upon a verdict, a retrial will be directed only in exceptional circumstances. Any such direction must be given by the [Director](#) or a [Deputy Director](#).

Where a jury has reached a verdict on some charges but is undecided on others, the following should be considered in addition to the above factors when determining whether to proceed on the remaining charges:

- the seriousness of the remaining charges
- the sentences the accused has received for the other charges.

The views of the victim and police should be taken into account in considering whether a matter should proceed to a retrial, in accordance with the principles in [Chapter 5: Victims and witnesses](#). The complainant in [prescribed sexual offence proceedings](#) should be informed about the legislative provisions permitting his or her recorded evidence at the original trial to be tendered at a retrial.

1.9. Reconsidering a prosecution decision

A decision to proceed in a matter, or to take no further proceedings, will be reversed when it is in the interests of justice to do so. It may be in the interests of justice to reverse a decision if:

- significant new facts warrant it
- the decision was the result of fraud or improper conduct
- the decision was made on an erroneous basis.

The victim has a right to seek a review of a decision to discontinue a prosecution where the discontinuance results in an end to all proceedings relating to that victim in accordance with the Victims' Right of Review Policy.

Chapter 2. The role of the prosecutor

2.1. Introduction

This Chapter sets out the role and duties of the prosecutor, including at trial and sentence.

2.2. General principles

The prosecutor's principal role is to assist the court to arrive at the truth and to do justice between the community and the accused, according to law and the principles of fairness. A prosecutor must not argue the prosecution's case for a conviction beyond a full and firm presentation of that case. Nevertheless, there will be occasions when the prosecutor will be entitled firmly and vigorously to urge the prosecution's view about a particular issue and to test, and if necessary vigorously test, that advanced on behalf of an accused person or evidence adduced by the defence.

The ODPP adopts the [International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors](#).

A prosecutor must:

1. act independently and impartially, without regard to individual or sectional interests or public or media pressure
2. act fairly in relation to the [accused](#)
3. strive for the timely and efficient administration of justice
4. assist the court with adequate submissions of law to enable the law to be properly applied to the facts
5. assist the court to avoid appealable error
6. shall not, by language or other conduct, seek to inflame or bias the court against the accused.
7. observe the highest ethical and professional standards
8. act with integrity and care
9. be mindful of cultural sensitivities, especially but not limited to those relating to Aboriginal and Torres Strait Islander people
10. avoid any real, perceived or potential conflict of interest
11. comply with the [Legal Profession Uniform Conduct \(Barristers\) Rules 2015](#) and the [Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015](#).



As a party to the proceedings, the prosecution is entitled to procedural fairness. This may mean, for example, that an [adjournment](#) should be sought when the defence gives insufficient notice of alibi or expert evidence.

2.3. The role of the prosecutor in trials and summary hearings

General conduct

In [trials](#) and [summary hearings](#) a prosecutor:

1. must present the prosecution case fairly and firmly
2. must seek to adduce all relevant evidence in a clear and logical manner
3. must refer in the opening address only to the evidence reasonably expected to be admitted at trial
4. must confine the case to identified issues that are genuinely in dispute and present those issues clearly and succinctly.

Calling witnesses

1. A prosecutor should generally call all [witnesses](#) whose testimony:
 - a. is admissible and necessary to present the relevant circumstances
 - b. gives the prosecutor reasonable grounds to believe that it could provide evidence relevant to any matter in issue; unless:
 - i. the opponent consents to the prosecutor not calling a particular witness
 - ii. the only matter with respect to which the particular witness can give evidence has been dealt with by an admission on behalf of the accused
 - iii. the only matter with respect to which the particular witness can give evidence goes to establishing a particular point already adequately established by another witness or other witnesses
 - iv. the prosecutor believes on reasonable grounds that the testimony of a particular witness is untruthful or unreliable
 - v. the prosecutor, having the responsibility of ensuring that the prosecution case is presented properly and fairly, believes on reasonable grounds that the interests of justice would be harmed if the witness was called as part of the prosecution case
2. A prosecutor must inform the defence as soon as practicable of the identity of any witness the prosecutor intends not to call on any grounds within i, ii, iii, iv or v above together with the relevant grounds, unless revealing the grounds to the opponent would harm the interests of justice.

If a decision is made not to call evidence from a material witness where there are identifiable circumstances clearly establishing that his or her evidence is unreliable, the prosecution, where the accused requests that the witness be called and where appropriate, should assist the accused to call such a witness by making him or her available or, in some cases, call the witness. Where appropriate, the Crown should make an application to cross-examine the witness.

A prosecutor must:

3. object to any question asked of a prosecution witness that:
 - a. is misleading or confusing
 - b. is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive
 - c. is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate
 - d. has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability)
4. conduct [cross-examination](#) of the accused fairly and not suggest a reversal of the onus of proof when cross-examining the accused or addressing the court

A prosecutor must not:

1. Appeal to prejudice or make emotional attacks on the accused. This does not mean, however, that the presentation of the prosecution case must be bland or unengaging.
2. comment on answers witnesses give during the course of their evidence, while witnesses are in the witness box
3. advance theories or make submissions not supported by evidence.

Witness conferences

A prosecutor may assist a witness prepare to give evidence by:

1. advising the witness to read their statement prior to giving evidence
2. explaining the court's procedure (including the roles of the judge or magistrate), oath or affirmation taking and the order of examination in chief, cross-examination and re-examination
3. informing the witness that they must answer all questions truthfully, however difficult the questions may be
4. informing the witness that it is not a sign of weakness to not know or not recall the answer to a particular question and that they should not be afraid to say this if it is genuinely the case
5. explaining to the witness that it is the role of defence counsel to put their client's case and challenge the prosecution's version of events, including by suggesting the witness is mistaken or lying and informing the witness that they must listen carefully to any such suggestion and clearly say whether they agree or disagree with it
6. informing the witness that they should not be afraid to ask for a break if they genuinely need one, such as when they feel tired, are losing concentration or want to compose themselves emotionally



7. explaining to the witness the importance of listening to each question carefully and making sure they understand it before answering it and encouraging them not to be afraid to ask the lawyer, judge or magistrate to repeat or rephrase any question they do not understand

A prosecutor may:

1. conference a witness by eliciting the account contained in their statement
2. question and test the version of evidence to be given by the witness and
3. if new and relevant information comes forward, request the officer-in-charge to obtain that information in statement form

A prosecutor must not:

4. advise or suggest to a witness that they give false or misleading evidence
5. coach a witness by advising what answers they should give to questions they might be asked.

Evidence

A prosecutor must not inform the court or the defence that the prosecution has evidence supporting an aspect of its case without believing on reasonable grounds that such evidence exists or will be available, and must promptly inform the defence and the court if later learning that the evidence will not be available.

A prosecutor must promptly inform the defence if intending to use evidence that the prosecutor has reasonable grounds to believe may have been unlawfully or improperly obtained.

Where a witness is expected to give controversial evidence, or where their conduct is impugned in relevant ways in other parts of the prosecution brief, the prosecution should disclose that witness's criminal history to the accused's legal advisers at an early stage.

2.4. The role of the prosecutor in sentencing

The prosecutor has an active role to play in the sentencing process.

It is the duty of the prosecutor to present the facts of the case at [sentence](#). Whenever possible a [statement of agreed facts](#) should be submitted (see [Guideline 4.4](#)).

If the [offender](#) is being sentenced after trial or hearing, the prosecutor should prepare a summary of the facts capable of being found by the judge or magistrate that is consistent with the verdict.

Where facts are asserted on behalf of the offender that are contrary to the prosecutor's position on a matter of some significance to sentence, the prosecutor should identify areas in agreement and those to be determined following a hearing (often referred to as a 'disputed facts hearing').

The prosecutor must:

1. make submissions addressing the objective seriousness of the offence and the subjective circumstances of the offender where known
2. inform the court of any relevant authority or legislation bearing on the appropriate sentence



3. inform the court about the outcome of proceedings against any co-offender and provide copies of relevant material before the court that dealt with a co-offender
4. fairly test the evidence or assertions advanced for the offender where necessary
5. correct any error made on behalf of the offender during a sentence hearing
6. assist the court to avoid appellable error on the issue of sentence.

The prosecutor must provide reasonable notice to the defence of any witness required for cross-examination. If the prosecutor has been given insufficient notice of defence material to properly consider the prosecution's position or verify defence assertions, an adjournment should be sought. Whether notice is insufficient will depend on the seriousness of the offence, the complexity and volume of the new material, the significance of the new allegations, the degree of divergence between the prosecution and defence positions and the availability of the means to check the material's reliability.

A prosecutor may:

1. submit that a sentence of full-time detention is appropriate or that a sentence other than full-time detention is within range, but must not suggest or recommend a numerical sentence or a sentencing range in a particular case, unless by reference to a guideline judgment
2. provide statistical material and details of comparable cases where it would assist the court, indicating how the court would be assisted

A prosecutor must not in any way limit the discretion of the Director to appeal against the inadequacy of the sentence.

Chapter 3. Selecting charges

3.1. Introduction

Alleged wrongdoing may give rise to a potential choice between different charges. The purpose of this Chapter is to set out the principles that apply to selection of appropriate charges and to the filing of an [indictment](#) with an [ex officio charge](#).

3.2. Charge selection

Charges are to be selected that adequately and appropriately address the criminality alleged and enable the matter to be dealt with fairly and expeditiously according to law.

Substantive charges reflecting the offences actually committed are to be selected in preference to conspiracy charges whenever possible. However, there will be occasions when only a conspiracy charge is adequate and appropriate to reflect the accused's participation in an offence.

It is undesirable to overload the indictment with an excessive number of charges as this may result in trials becoming unduly complex or lengthy. However, there will be cases where the extent of the criminality makes it necessary and appropriate to present a lengthy indictment.

In some cases it will be appropriate to proceed with representative charges, provided the charges on the indictment adequately and essentially reflect the totality of the criminal conduct.

A prosecutor should consider the desirability of consistent charges when there is one or more co-accused, although there will be cases where different charges are necessary and appropriate to reflect the different roles of each accused.

Charges should not be selected for the purpose of providing scope for charge resolution at a later stage.

3.3. ex officio charges

It may be necessary to consider an [ex officio charge](#) in certain circumstances, including:

1. in substitution for a charge committed for trial or sentence, to ensure the indictment contains the most appropriate charge
2. to add a charge to cover criminality not identified or known about prior to committal
3. where the matter has been committed for sentence and certain charges were withdrawn for public interest reasons as part of a resolution (see [Chapter 4](#)) but the accused subsequently fails to adhere to the plea
4. where a direction has previously been made for [no further proceedings](#) following a [committal](#) but it is considered appropriate to revive the charges
5. to place offences on the indictment that were transferred to the [District Court](#) or [Supreme Court](#) on a certificate under [s.166](#) of the *Criminal Procedure Act 1986*



6. to expedite trial proceedings, including where it is considered desirable and appropriate to join the accused in proceedings against a co-accused who has already been committed for trial
7. where there is a technical defect in the committal charge requiring substitution or other correction.

Ordinarily the accused should be put on notice that the prosecutor is considering filing an *ex officio* indictment and given the opportunity to make representations to the Director by a nominated date on whether an *ex officio* indictment should be filed.

3.4. Finding a bill of indictment

Crown Prosecutors have a statutory bill-finding function pursuant to s5(1)(b) *Crown Prosecutors Act 1986*. Because of the desirability of certainty in charge selection, however, the approval of the Director or a Deputy Director should be sought for the finding of a bill of indictment or count in respect of any offence under a different provision (including subsection) to that committed for trial or sentence.

No bill of indictment should be found for an offence that has not been committed for trial except to add a statutory or common law alternative to the indictment, as an alternative to an offence that has been committed for trial or sentence.

The finding of a bill of indictment does not permit the withdrawal of any charge committed for trial or sentence (including the purported merging of charges, or the substitution of charges except as outlined above).

Chapter 4. Charge resolution

4.1. Introduction

This Chapter sets out:

1. why charge resolution is important
2. when charge resolution may occur
3. the principles applying to preparing a statement of agreed facts
4. the principles applying to the decision to have certain offences taken into account when the offender is being sentenced for another offence
5. special provisions concerning an accused person who is without legal representation.

4.2. Why charge resolution is important

The option of charge resolution in appropriate cases is necessary for the effective and efficient conduct of prosecutions. It relieves victims and other witnesses of the burden of having to give evidence, provides certainty of outcome and saves the community the cost of running trials. However, charge resolution must be based on principle and reason, not on expedience alone.

The resolution of charges is a legitimate way of progressing criminal proceedings. The law recognises the benefits to the criminal justice system of appropriate early guilty pleas, and sentencing discounts are available in most cases to reflect their utilitarian value. The earlier an appropriate plea is offered, the greater the benefits to the offender and the community in general.

4.3. When is it appropriate that charge resolution occur

A matter may only be dealt with by way of charge resolution if it is in the public interest to do so. In determining whether a charge resolution is in the public interest, the following factors are to be considered, in addition to the public interest factors outlined in Chapter 1, the decision to prosecute:

1. the charge or charges to proceed appropriately reflect the essential criminality of the criminal conduct capable of being proven [beyond a reasonable doubt](#) and provide an adequate basis for sentencing
2. the evidence available to support the prosecution case is weak in a material way, even though it cannot be said that there is no reasonable prospect of conviction, and the public interest will be satisfied with an acknowledgment of guilt to certain lesser criminal conduct
3. the cost saving to the community is significant when weighed against the likely outcome of the matter if it went to trial
4. charge resolution will save a [witness](#) from having to give evidence in court proceedings, where the desirability of this is a particularly compelling factor in the case



Discussions between the prosecutor and an accused's legal representative on the appropriate charge resolution of a matter must occur as part of a [case conference](#), where one is required, and may occur at any other stage as the matter progresses through the courts.

Consultation with victims and police

In considering whether to accept a plea from the accused, the [victim](#) and the [officer-in-charge](#) must be consulted and their views properly considered, although the public interest is the overriding consideration.

Pursuant to [s.35A Crimes \(Sentencing Procedure\) Act 1999](#), where charge resolution has occurred the prosecutor must file a certificate to verify that these consultations have taken place or, if it they have not taken place, the reasons why. [Chapter 5: Victims and witnesses](#) sets out the requirements for communicating with and consulting victims about charge resolution.

In most cases it will be appropriate to inform the accused's legal representative that the prosecution will only accept a plea offer if its terms are clearly set out in writing. In all cases, written records should be maintained of charge resolution discussions and consultation with the victim and officer-in-charge.

If a charge resolution proposed by the accused is determined not to be in the public interest, the prosecutor may consider whether to propose an alternative resolution, having regard to the factors set out above.

4.4. Statement of agreed facts

It is desirable for the prosecution and the accused to reach agreement on the facts on which the offender should be sentenced and for there to be a [statement of agreed facts](#) signed by the prosecutor and by or on behalf of the offender.

A statement of agreed facts:

1. must not grossly distort the facts as a basis upon which to secure charge resolution
2. should precisely identify the facts both the prosecution and the offender accept and indicate any facts or issues in dispute
3. should not include facts that would invite the court to sentence for a more serious offence than that for which the offender stands to be sentenced.

The views of the victim (in accordance with the requirements in [Chapter 5: Victims and witnesses](#)) and the officer-in-charge regarding the contents of the statement of agreed facts must be obtained. A written record must be maintained to explain how and when the statement of agreed facts came into being.

4.5. Taking offences into account – Form 1 offences

It is up to the prosecutor to determine whether or not an offence is suitable for placement on a [Form 1](#) as part of a charge resolution. This decision should be based on principle and reason, not administrative convenience or expedience alone. The prosecutor should have regard to:

1. the need to ensure that the offences for which the offender will be sentenced adequately reflect the totality of the admitted criminality
2. the relative seriousness of, and the maximum penalties for, offences for which the offender will be sentenced and on the Form 1, including consideration of aggravating factors



3. the relationship between the principal offence and the Form 1 offences, taking into account the need to represent individual victims and episodes of offending on the indictment
4. the public interest in convictions being recorded for certain offences.

The maximum penalty for a Form 1 offence should generally be less than the maximum penalty available for the principal offence. In some circumstances it may be appropriate for offences with the same maximum penalty as the principal offence to be placed on a Form 1 – for example, where there are multiple offences of a similar nature – provided doing so would not create an imbalance between the principal offence and the Form 1 offences.

There is generally a public interest in convictions being recorded for:

1. failure to appear
2. firearms offences
3. serious offences against police officers
4. breaches of apprehended domestic violence orders
5. offences committed while on bail or other forms of conditional liberty
6. offences for which penalties increase for second or subsequent convictions
7. offences in relation to the administration of justice
8. traffic offences where the offender has a poor traffic record.

The views of the victim (in accordance with [Chapter 5: Victims and witnesses](#)) and the officer-in-charge about taking offences into account on a Form 1 must be obtained.

The Form 1 should set out the date and other particulars for each offence so they can be readily identified. Details about Form 1 offences should be included in any statement of agreed facts.

These same considerations apply to placing Commonwealth offences on a schedule attached to another Commonwealth offence. This can only be approved, however, by an officer with the appropriate delegation from the Commonwealth Director of Public Prosecutions.

4.6. Unrepresented accused

Particular care must be taken when dealing with an accused person who is without legal representation. The prosecutor's duties of fairness and disclosure mean that the accused must be appropriately informed of the prosecution case, the course it will take and procedural issues.

A prosecutor must maintain a detachment from the accused and should never advise the accused about legal issues or how the defence is to be conducted.

The fact that the accused is without legal representation does not mean that the prosecutor is prohibited from engaging in charge resolution discussions. However, caution should be exercised in the following manner:

1. any plea offer made by the accused is to be considered and responded to in writing
2. telephone contact with the accused should be avoided wherever possible, and take place in the presence of a witness if it is unavoidable
3. face-to-face contact with the accused should only occur in the presence of a witness



4. contemporaneous notes should be taken of any telephone or face-to-face communication that does occur
5. a written record should be maintained of all information and material provided to and received from the accused
6. where appropriate, a prosecutor may communicate with the accused through the court.

A prosecutor should be aware that special legislative protections apply to vulnerable persons and complainants in sexual assault matters that prevent them being directly cross-examined by a self-represented accused.



Chapter 5. Victims and witnesses

5.1. Introduction

The ODPP recognises the important role that victims of crime play as participants in criminal proceedings and will treat all victims with courtesy, compassion, cultural sensitivity and respect.

The ODPP is an independent statutory agency whose main function is to prosecute serious crime in NSW independently, on behalf of the entire NSW community. The ODPP does not provide legal representation to victims.

5.2. New South Wales Charter of Victims' Rights

The ODPP is bound by the [Charter of Victims' Rights](#) and that document together with these Guidelines form a framework under which the ODPP works with victims and witnesses.

5.3. Communicating with victims: general principles

When communicating with a [victim](#), the prosecutor must have regard to:

1. whether the victim wishes to be contacted about the matter
2. the victim's preferred method and frequency of contact
3. the personal circumstances of the victim

The victim must be given the contact details of the solicitor with carriage of the matter.

The victim must be given information about the case at an early stage, and there is an ongoing obligation to keep them informed throughout its progress. This must be done directly by a member of the prosecution team, rather than through administrative staff or police officers. An effort must be made to minimise the number of staff members responsible for victim contact.

5.4. Information to be provided

Victims of crime must be given the following information in a timely manner, unless:

1. they have indicated that they do not wish to be consulted (either specifically about such matters or generally) or
2. their whereabouts cannot be ascertained after reasonable inquiry.

Information about the court process, the victim's role as a witness and support services

- Information is contained on the ODPP's website:
 - <https://www.odpp.nsw.gov.au/going-court-and-being-witness>

Information about the charges

- The victim must be informed about the charges laid against the accused.



- The victim must be consulted prior to the prosecutor deciding:
 - to substantially change the charges
 - not to proceed with some or all of the charges
 - to accept a plea to a less serious charge.
- The victim must be informed of any such decision prior to it being announced in court.

Information about bail

- The victim must be:
 - notified whenever the accused applies for [bail](#), including any application to vary the conditions of bail
 - consulted about any need for protection they may have prior to the hearing of the bail application
 - promptly informed of the outcome of any bail application, including any special bail conditions designed to protect the victim or the victim's family.

Information about the date, time and location of court listings

- The prosecutor must inform the victim about the date, time and location of any [mention](#) or [hearing](#) of the case, including bail, [committal](#), [trial](#), [sentence](#), [appeal](#) and [breach of sentence](#) hearing.

Information about the outcome of hearings

- The prosecutor must inform the victim about the outcome of any part of the proceedings, including bail, criminal case conference, committal, trial, sentence, appeals and breach of sentence.

Information about appeals

- If an appeal is lodged, the prosecutor must inform the victim about:
 - the fact that an appeal has been lodged
 - the type of appeal
 - the appeal process and possible outcomes.

Information about breach of sentence

- If an offender is required to appear before a court in relation to a breach of sentence, the solicitor with carriage of those proceedings must inform the victim about:
 - the fact that the [offender](#) is required to appear before the court for breaching the sentence
 - the nature of the proceedings and possible outcomes.

Information about sexual assault communications privilege

- If access to a victim's confidential counselling records is sought by the accused, the victim should be informed about legal advice and assistance available through the Sexual Assault Communications Privilege Service, Legal Aid NSW.

Information about the defence of mental illness, fitness inquiries and special hearings

- In all cases involving the defence of not guilty by reason of mental illness, the prosecutor must inform the victim about:
 - what the defence of not guilty by reason of mental illness means
 - how the evidence may be presented regarding the defence of mental illness
 - the options available to the court if the accused is found not guilty by reason of mental illness.



- In all cases where the accused's fitness to be tried is raised, the prosecutor must inform the victim:
 - of the date, time and location of any [fitness hearing](#), [special hearing](#), and hearing for the imposition of a penalty
 - about the nature of fitness inquiries and special hearings.

Information about Victims Registers

- In all cases where an offender is sentenced to [full-time detention](#) or subject to a [limiting term](#), the solicitor with carriage of the matter must provide the victim with contact details for the relevant [Victims Register](#) with Corrective Services, Juvenile Justice or the Forensic Division of the Mental Health Review Tribunal.

5.5. Additional obligations to victims and other prosecution witnesses

Victims and prosecution witnesses must be informed:

1. if there is a prohibition against the publication of their name and other identifying information
2. that they are not obliged to state their address or telephone number in open court, unless the court otherwise orders.

Prosecutors should be familiar with the various legislative provisions available with respect to:

- excluding the public from the court room
- using pre-recorded evidence
- using [special measures](#), such as screens and closed-circuit television (CCTV) facilities to give evidence
- the presence of a support person.

Prosecutors should explain the effect of the applicable provisions to victims and other prosecution witnesses.

A prosecution witness entitled to use special measures to give evidence must not be discouraged from doing so because of any perceived forensic advantage in not making the appropriate arrangements.

Prosecutors must be familiar with legislative provisions designed to protect the privacy of victims and witnesses and must apply for a [closed court](#), [non-publication order](#) or suppression order in appropriate cases. Prosecutors must inform victims if there is an option for them to request the lifting of a non-publication or suppression order. As far as practicable during the hearing the ODPP must minimise a victim's exposure to unnecessary contact with the accused, defence witnesses and supporters of the accused.

5.6. Consultation resolving charges and discontinuing prosecutions

The victim must be consulted prior to making any of the following decisions, unless they have expressed a desire not to be consulted or their whereabouts cannot be ascertained after reasonable inquiry:

1. to substantially change the charges
2. not to proceed with some or all of the charges
3. to resolve the matter by accepting a plea to a less serious charge (see [Chapter 4: Charge resolution](#)).



Consultation with a victim regarding charge resolution requires an explanation of the full implications of proceeding on fewer or lesser charges, including:

1. an explanation of the current charges and any proposed substitution of them
2. a summary of the reasons why charge resolution is being considered
3. the respective maximum penalties of the charges
4. the impact of any charge resolution on the evidence to be presented on sentence, including the statement of agreed facts and any Victim Impact Statement
5. where relevant, the implications of a matter being dealt with as a Form 1 offence.

In advising a victim of a possible discontinuance of all charges, a summary of the reasons why discontinuance is being considered should be provided.

Providing a summary of reasons does not constitute a waiver of [legal privilege](#).

Victims must be given adequate time to form their views, having regard to the nature and urgency of the decision. This includes giving victims the opportunity to obtain assistance from a parent or carer (other than the accused) or a support person, before providing their views.

The views of the victim must be taken into account and given due consideration but are not determinative. It is the public interest, not any private individual or sectional interest, that must be served. The decision to proceed by way of charge resolution or to discontinue all charges rests with the Director or the Director's delegate.

There are cases when the victim requests that proceedings be discontinued. This can occur in proceedings for [domestic violence](#) offences (see [Guideline 5.9](#)), non-domestic sexual assault offences and in other contexts. Careful consideration must be given to any request by a victim to discontinue proceedings in determining whether a prosecution is in the public interest, but other factors are also relevant, including where there is other evidence implicating the accused person, where there is a history of similar offending and the gravity of the alleged offence.

5.7. Referring matters to the Witness Assistance Service (WAS)

The role of the [Witness Assistance Service \(WAS\)](#) is to provide support in appropriate cases to victims and witnesses during the criminal justice process. WAS can assist with providing information, identifying special needs of victims and witnesses, referring victims for counselling and support, providing court preparation and coordinating court support. WAS allocates its resources to victims and witnesses in greatest need of its services.

The solicitor with carriage of a matter must ensure it has been referred to WAS as early as possible in the prosecution process if it involves:

1. death
2. sexual assault
3. domestic violence
4. a child victim or witness
5. a victim or witness with special needs.

In any other case, the solicitor with carriage should refer the matter to WAS when it is considered appropriate.



5.8. Conferences

A [conference](#) with a victim or witness may be conducted for the following purposes:

1. to obtain information from and about witnesses on evidentiary issues
2. to explain the court process and other matters referred to in [Guideline 5.4](#)
3. to consult victims as required under [Chapter 4: Charge Resolution](#) and [Guideline 5.6](#).

Prosecutors, including a Crown Prosecutor where one is briefed, must confer with victims at the earliest available opportunity before all court hearings. Key witnesses should ordinarily be conferenced, but there may be occasions where this is undesirable. A WAS officer may be present for some conferences and should be consulted if there has been prior WAS involvement. The victim may also wish to have some other support person present during the conference.

5.9. Victim Impact Statements

The [harm](#) suffered by a victim is a factor to be taken into account in sentencing. Victims who have suffered physical, psychological or psychiatric harm, and family members of a deceased victim, must be informed about:

1. the right to prepare a Victim Impact Statement (VIS)
2. how a VIS may be presented in court, including that it may be read aloud
3. alternative arrangements available for the reading of a VIS aloud
4. the limits on what may be included in a VIS
5. the sort of content that may result in objection being taken to the VIS or parts of it.

The prosecutor must take all reasonable steps to ensure that the victim has a sufficient opportunity to prepare a VIS. If the prosecutor has been given insufficient notice of a defence plea to allow for the victim to prepare a VIS, an [adjournment](#) of the sentencing proceedings must be sought.

The prosecutor must ensure that any VIS prepared complies with the legislation, including that it does not contain material that is offensive, threatening, intimidating or harassing. Any such material and other inadmissible material (such as allegations of criminal conduct going beyond the offences for which the offender is being sentenced) must be deleted before a VIS is tendered. A victim should be consulted as to changes that may be required to their VIS and informed of the reasons for these changes.

5.10. Domestic violence offences

General principles

The ODPP recognises the unique dynamics a domestic violence context brings to a prosecution. Victims and witnesses may be afraid of the consequences of giving evidence or may not wish to show allegiance to a particular family member. The ODPP must conduct prosecutions involving domestic violence sensitively, having regard to the needs and safety of those affected by it.

It is therefore important that victims of domestic violence are supported throughout the course of criminal proceedings and that all reasonable steps are taken to minimise delays.



Requests to discontinue

In some cases a victim of domestic violence may not wish to give evidence or may request that a prosecution be discontinued. Possible reasons may include:

1. threats, harassment or intimidation by the accused, or the accused's family or associates
2. pressure from family and community members
3. fear of being publicly shamed, disowned or outcast from the community
4. fear that showing support for a prosecution may place them at further risk of harm
5. a wish to reconcile with the accused
6. a belief that the accused will not re-offend, for example, because they have undertaken to attend counselling
7. fear of the accused receiving a custodial sentence and the financial consequences this would have on the accused, the victim and any children.

If the victim demonstrates reluctance or unwillingness to give evidence, steps should be taken to ascertain the reasons why. The prosecutor should:

1. request that police investigate
2. conduct a conference with the victim, if possible, to discuss the victim's concerns and any available options to allay those concerns
3. consult with WAS regarding any prior contact.

The following matters are to be considered in determining whether the matter should proceed:

1. the reasons the victim does not want the matter to proceed
2. information known about any risk to the safety of the victim, children, dependents, or other persons connected to the victim
3. whether the victim has been advised about available support services, special measures for giving evidence or other protections available during the proceedings
4. whether there is a reasonable prospect of conviction without the victim having to give evidence
5. the seriousness of the alleged offence, including:
 - a. the harm the victim suffered
 - b. whether the offence was planned
 - c. whether a weapon was involved
 - d. whether the offence was committed in the presence of children
6. any reported or otherwise known history of violence by the accused against the victim or others, including, for example, repeated police call-outs



7. whether there has been an escalation in the seriousness of violence
8. any history of threatening behaviour, stalking or intimidation by the accused
9. whether the alleged offence was committed in breach of bail, sentence, parole or an apprehended violence order
10. the personal circumstances of the victim, including their well-being if they are required to testify
11. the views of the officer-in-charge and, where relevant, any other agency.

Although the victim's attitude to continuing a prosecution is important, it is not to be regarded as determinative. In some cases, it may be appropriate to seek to compel the attendance of the victim to give evidence. There may also be cases where the prosecution can proceed without calling the victim to give evidence. A prosecutor should determine whether there is a case based on evidence other than the victim's account that can prove any or some of the offences charged.

Apprehended Domestic Violence Orders

Prosecutors must be familiar with the legislation relating to the court's power to make interim and final apprehended violence orders against a person charged or convicted, respectively, of a domestic violence offence under [Part 9](#) of the *Crimes (Domestic and Personal Violence) Act 2007*. This power should be brought to the court's attention in appropriate cases.

5.11. Complaints and reviews

A victim who has a complaint about the ODPP relating to a breach of the [Charter of Victims' Rights](#) or about the handling of a case involving them may make a complaint in accordance with the ODPP [Feedback and Complaints Policy](#).

The ODPP also has a Victims' Right of Review Policy that gives victims the right to request a review of a decision not to prosecute in certain circumstances. Victims who have a right to request a review are to be informed of this in writing when they are notified of the decision.

Chapter 6. Elections

6.1. Introduction

This Chapter sets out the criteria for determining whether an election should be made for a [Table offence](#) to be dealt with on [indictment](#), rather than [summarily](#).

6.2. Elections to proceed on indictment

In determining whether or not to elect to deal with a Table offence on indictment, consideration should be given to:

1. whether the conduct giving rise to the offence can be adequately addressed within the sentencing limits of the Local Court having regard to:
 - a. the seriousness of the offence, including:
 - i. the circumstances of the offence
 - ii. the nature of the conduct
 - iii. any aggravating or mitigating circumstances
 - b. the accused's personal circumstances, including criminal background
 - c. the maximum penalties available for summary disposal and on indictment
 - d. any standard non-parole period applicable to the offence
2. the prevalence of the offence in the community and the greater deterrent effect of an accused being dealt with on indictment
3. the manner in which any co-accused is being dealt with
4. whether there is a relevant connection between the Table offence and an offence that is strictly indictable or another Table offence suitable to being dealt with on indictment
5. whether for some other reason the interests of justice require that the matter be dealt with on indictment.

Care should be taken to ensure that the issue of whether to elect is resolved at the earliest possible stage.

An election should not be made for tactical reasons.

An election should only be withdrawn in accordance with the principles set out above and subject to prior consultation with the [victim](#) and [officer-in-charge](#).



Chapter 7. Taking over proceedings

7.1. Introduction

This Chapter sets out the principles for determining whether the [DPP](#) should take over proceedings commenced by Police or by a private prosecutor.

7.2. Taking over proceedings commenced by Police

The DPP will take over a prosecution commenced by Police:

1. in every case where an election has been made
2. in accordance with an arrangement between the ODPP and Police for the conduct of certain matters in the [Local Court](#) or the [Children's Court](#), such as child sexual assault offences
3. where proceedings are being conducted in the Local Court or Children's Court in accordance with [pre-charge advice](#) on the basis that the ODPP would conduct the prosecution in that court
4. where proceedings were brought contrary to advice or a decision by the DPP not to proceed
5. where there appears to be a conflict of interest or the risk of unfairness arising from the conduct of the prosecution if it is not taken over by the DPP
6. where, on the request of a Police Prosecutor, there is a sound basis for doing so
7. the public interest otherwise requires it, having regard to, for example, the gravity of the offence, its connection with another offence the ODPP is prosecuting and all the surrounding circumstances.

If the DPP takes over the prosecution, a decision may be made to discontinue it in accordance with [Guideline 1.2: The tests for deciding whether to prosecute](#).

7.3. Taking over proceedings commenced by a private prosecutor

NSW law allows for a prosecution to be commenced by a private individual and this right has been described as "a valuable constitutional safeguard against inertia or partiality on the part of authority".

However, since the creation of the DPP in 1986, one of the principal functions of the Director has been to conduct prosecutions for indictable offences in NSW. The Director therefore has a role to play in ensuring the right to launch a private prosecution is not abused.

Consequently, the DPP has the power to take over the conduct of a prosecution initiated by another person and, having done so, to continue it or bring it to an end.



Where the DPP has taken over the conduct of a private prosecution, or is considering doing so, the DPP may request a full report of the circumstances giving rise to the prosecution, copies of the statements and other documentary evidence, and any further information. The DPP may also seek police assistance to investigate the matter. These provisions enable a full assessment to be made of the prosecution case before, or after, any decision is made to take over the matter.

Given the large range of circumstances that may give rise to a private prosecution, it is impracticable to lay down inflexible rules as to when the discretion to take over a matter will be exercised. In general, however, a private prosecution will be taken over and discontinued where:

1. there is no reasonable prospect of a conviction on the [admissible](#) evidence
2. the prosecution is not in the public interest
3. there are reasons for suspecting that the decision to institute the prosecution was based on improper motives or otherwise constituted an abuse of the prosecution process
4. the private prosecution was instituted to circumvent an earlier decision of the DPP not to proceed with a prosecution for the same offence.

Chapter 8. Mental illness

8.1. Introduction

Issues regarding mental illness may arise at any stage in criminal proceedings. The purpose of this Chapter is to set out some of the different ways in which mental illness may be considered in commencing and conducting a prosecution.

8.2. The decision to prosecute

[Guideline 1.2](#) sets out some of the factors that may be taken into account in determining whether to prosecute. These include the accused's mental health, alongside factors such as the seriousness of the offence. Ordinarily, mentally disordered people should not be prosecuted for trivial offences that pose no threat to the community.

8.3. Diversion of matters dealt with in the Local Court or Children's Court

Where the issue of [diversion](#) from the criminal justice system to the health system is raised in the [Local Court](#) or the [Children's Court](#), the prosecutor should assist the court with submissions regarding the nature and circumstances of the offence, the nature and extent of the accused's condition and the availability of relevant health services.

8.4. Fitness and special hearings

A [fitness hearing](#) may be conducted in the [District Court](#) or the [Supreme Court](#) to determine whether the accused is fit to be tried. The question of whether the accused is fit to be tried is usually raised by the [defence](#). However, where there is an obvious fitness issue and it is not raised by the defence, it should be raised by the prosecution. The prosecutor may seek an independent medical assessment.

In determining whether a matter should proceed to [special hearing](#), the principles regarding the decision to prosecute in [Guideline 1.2](#), as well as the requirement for consultation with the [victim](#) and [officer-in-charge](#), as set out in [Chapter 5: Victims and witnesses](#), apply.

Consideration should also be given to whether there has been any change in the available evidence since the finding of unfitness and whether, and to what extent, the accused will have been detained by the time a special hearing would be heard.

8.5. Agreeing to the entry of a special verdict

There may be matters where the availability of a special verdict is supported by experts retained by both the defence and the prosecution. Nevertheless, the approval of the Director or a Deputy Director should be obtained prior to a prosecutor agreeing that a court should enter a special verdict.



Chapter 9. Juries and judge alone trials

9.1. Introduction

This Chapter sets out the principles of selecting a jury and considering applications for judge alone trials.

9.2. Jury selection

The prosecution is allowed three challenges without restriction to stand aside a potential juror for each [accused](#).

The prosecution may also challenge a juror for cause. This right of challenge should only be exercised if there is reasonable cause for doing so.

The prosecution's right of challenge should never be exercised so as to attempt to select a jury that is not representative of the community, including as to age, gender, gender identification, sexual orientation, ethnic origin, religious belief, marital status or economic, cultural or social background. The most important concern is to secure a fair and impartial jury.

9.3. Judge alone trials

Most trials in the [District Court](#) and the [Supreme Court](#) are heard before a [judge](#) and jury. However, in certain circumstances, an order may be made for a [judge alone trial](#).

If the accused applies for a judge alone trial but the prosecutor does not agree, it will be for the judge to determine whether it is in the interests of justice to make the order.

In determining whether to agree to a judge alone trial, prosecutors must have regard to:

1. the important role of juries, as representatives of the community, in the administration of criminal justice
2. whether the trial will involve a factual issue that requires the application of objective community standards, such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness
3. any evidence in support of the accused's request
4. the timing of the application, that is whether it was made within the statutory time limit or whether leave to make the request out of time is required, particularly if the application is made shortly before or on the day fixed for trial
5. whether any potential prejudice may be adequately addressed through the process of jury selection or by instructions to the jury by the trial judge
6. whether the trial involves highly technical or complex expert evidence



7. public health emergencies that prevent jury trials.

Predictions as to the likelihood of conviction by either trial by jury or trial by judge alone should not be considered in determining the prosecutor's position.

Prosecutors must assess any request for a judge alone trial on its merits and make submissions against the making of such an order in appropriate cases.



Chapter 10. DPP appeals

10.1. Introduction

This Chapter sets out guidelines on:

- DPP appeals
- retrials and investigations after acquittal.

10.2. When will the DPP lodge an appeal?

The [DPP](#) will only lodge an [appeal](#) if satisfied that:

1. all applicable statutory criteria are established
2. there is a reasonable prospect that the appeal will succeed
3. it is in the public interest.

10.3. Interlocutory appeals and appeals against the exclusion of evidence in a trial

The DPP has a right of appeal to the [Court of Criminal Appeal \(CCA\)](#) against an [interlocutory judgment or order](#) made by a [judge in the District Court or Supreme Court](#).

The DPP also has a right of appeal against any decision or ruling on the admissibility of evidence, provided the decision or ruling eliminates or substantially weakens the prosecution's case.

The prosecutor should consider whether an unfavourable decision may be amenable to appeal.

Where an appeal is anticipated, the judge should be alerted to the possibility that the CCA may deal with the matter expeditiously, so as to enable the proceedings to continue with minimal disruption, rather than vacating the trial date.

In determining whether to appeal, the DPP will consider whether the judge made an error in reaching the decision.

10.4. Appeals against sentence

Sentence appeals to the Court of Criminal Appeal

The DPP has a right of appeal to the CCA against a [sentence](#) imposed in the [Supreme Court](#), the [District Court](#) and the [Drug Court](#).

Only the [Director](#) or a [Deputy Director](#) can determine whether or not to appeal against a sentence.

Prosecutors should promptly assess all sentences imposed to determine whether they may be the subject of an appeal. There is no statutory time limit, but delay in lodging an appeal may impact on the appeal court's decision. Matters where the offender has been sentenced to a penalty other than full-time detention should be expedited.



A request for a review of the sentence may be made by a person with a legitimate interest in the matter, such as the victim or police officer-in-charge. A prosecutor should refer such a matter to the Director even if they do not agree that an appeal is appropriate.

The primary purpose of DPP sentence appeals is to allow the CCA to provide governance and guidance to sentencing courts. In determining whether or not to appeal against a sentence, the DPP will first consider whether the sentencing judge made an error. Even if there is error, the prosecution must still establish that the sentence is manifestly inadequate. If there is no identifiable error, an appeal may nevertheless succeed where the sentence is so manifestly inadequate that it is likely to undermine public confidence in the proper administration of criminal justice in the sentencing of offenders.

DPP appeals against sentence are, and ought to be, rare. They should be brought in appropriate cases:

1. to enable the courts to establish and maintain adequate standards of punishment for crime
2. to enable idiosyncratic approaches to be corrected
3. to correct sentences that are so disproportionate to the seriousness of the crime as to lead to a loss of confidence in the administration of criminal justice.

For any offence there is a range of legitimate sentencing options, determined by the nature and seriousness of the offence and the offender's personal circumstances. The CCA must be satisfied that the sentence falls outside that range to such an extent as to be manifestly inadequate. Mere dissatisfaction by the prosecution with the sentence passed is not enough to warrant an appeal.

If the CCA finds that the sentence is manifestly inadequate, the prosecution must persuade the CCA to exercise its residual discretion to re-sentence the offender. Factors that may militate against the CCA's exercise of the discretion to intervene include:

1. any delay in lodging the appeal
2. the likely custodial status of the offender by the time an appeal would be heard
3. the subjective characteristics of the offender, including mental and physical health and any steps taken towards rehabilitation since the date of sentence
4. the position taken by the prosecution before the sentencing judge.

Sentence appeals to the District Court

The DPP has a right of appeal to the [District Court](#) against sentences imposed in the [Local Court](#). There is a time limit of 28 days for lodging an appeal against a sentence imposed in the Local Court. While it is not essential to establish error by the [magistrate](#) or manifest inadequacy, an appeal against sentence to the District Court will only be instituted where there is a reasonable prospect that the appeal would succeed.

10.5. Appeal against acquittal on a question of law alone

The DPP may appeal to the CCA against a directed acquittal or an acquittal in a judge alone trial. The Director will only lodge such an appeal if satisfied that:

1. the acquittal arose from an error involving a question of law alone
2. the Court would exercise its discretion in favour of ordering a retrial.



10.6. Referral on a question of law

If a person is acquitted of any charges, the DPP may refer a point of law that arose at or in connection with the hearing to the CCA for an opinion. The DPP will only refer a point of law to the CCA if satisfied that:

1. the point clearly arose in the proceeding
2. the point is contentious and requires authoritative resolution
3. the CCA's opinion will be of practical benefit in future cases.

10.7. Retrials after acquittal

The DPP may apply to the CCA for a retrial after an acquittal where:

1. there is fresh and compelling evidence, in the case of an offence with a maximum penalty of life imprisonment
2. the acquittal is tainted, in the case of an offence with a maximum penalty of 15 years or more.

The DPP will only make an application if a retrial would be in the interests of justice.

10.8. Investigation after acquittal

Police officers do not investigate an offence of which a person has been acquitted unless the DPP has given written authorisation. Such investigations are rare. The DPP will only give written authorisation if satisfied that:

1. there is, or as a result of the investigation there is likely to be, sufficient new evidence of the commission of the offence by a person to warrant the investigation
2. it is in the public interest for the investigation to proceed
3. the previous acquittal would not be a bar to the trial of the person for an offence that may be charged as a result of the investigation.

Chapter 11. Indemnities, undertakings, informers and induced statements

11.1. Introduction

The purpose of this Chapter is to set out:

1. the principles for calling an informer witness to give evidence
2. the process for tendering an affidavit of assistance
3. the factors to be considered when determining whether or not the DPP should recommend an indemnity or undertaking
4. the requirements for obtaining approval to take an induced statement.

11.2. Benefits

As a general rule, those who commit serious criminal offences should be held accountable. However, in some cases it may be in the public interest to grant some kind of benefit to a person who has committed a criminal offence in return for that person providing evidence against another. Such benefits may include:

- an [indemnity](#) from prosecution for specified criminal offences or conduct
- an [undertaking](#) not to use that person's evidence in criminal proceedings against them
- a reduction in sentence based on the nature and extent of co-operation with the authorities.

11.3. Informer witnesses

An informer witness is any person (other than a victim who has suffered direct harm in the case) who:

1. can provide information obtained through direct personal contact with the accused and/or other evidence relevant to the matter, and
2. is either a co-offender; civilian undercover operative; or other person seeking some benefit in exchange for providing this information.

A prison informer witness is a prisoner or former prisoner who provides an account of an admission made by another inmate while in custody.



If it is contemplated that an informer be called as a witness, approval should be sought from the Solicitors Executive or the Crown Prosecutor who has been briefed in the matter.

The desirability of calling an informer to give evidence must be carefully considered. Any relevant entry on the ODPP Index of Informers must be considered before approval to call an informer is given. Independent evidence that supports the account given by the informer or otherwise establishes the accused's guilt should be identified. Particular care should be taken when considering calling a prison informer. Independent evidence that an admission was made will generally be required in these cases.

In the case of a prison informer the approval of the Director or a Deputy Director must first be obtained.

Where an informer is to be called as a witness, the prosecutor should, subject to legal professional privilege and public interest immunity, disclose all matters that would assist in evaluating the informer's evidence, including:

1. any criminal history
2. whether or not police or Corrective Services have any information that might assist in evaluating the informer's credibility, particularly in relation to:
 - a. motivation for giving evidence
 - b. any history of animosity towards the accused
 - c. favourable / different treatment by Corrective Services compared to other prisoners
 - d. reliability and mental health
 - e. the extent to which public officers have given evidence or written reports on behalf of the informer (for example, to courts or the NSW State Parole Authority)
 - f. whether any discount on sentence has been given for assistance in the matter
 - g. whether the informer was in custody at the time of giving assistance
 - h. whether an immunity has been granted or requested
 - i. whether any monetary or other benefit of any kind has been claimed, offered or provided
 - j. whether the informer gave evidence or was to give evidence in any other current or earlier criminal proceedings.

An informer who has provided or will provide assistance to the authorities may be entitled to a reduction in sentence. Co-operation by offenders with law enforcement agencies should be appropriately acknowledged and, if necessary, tested at the time of sentencing.

Police may provide evidence of an informer's assistance to the sentencing court by way of an affidavit of assistance, annexing a report endorsed by a supervising officer. The prosecutor must read the affidavit of assistance and report before tendering them. A prosecutor should ask to see a copy of the affidavit of assistance before the sentence date so the contents can be properly considered.

11.4. Immunities



There are two types of immunities: indemnities and undertakings. An indemnity protects the informer from prosecution in exchange for the informer promising to give evidence against an accused. An undertaking only provides that the evidence given by the informer in court cannot be used against them in criminal proceedings. An immunity is usually conditional on the informer giving truthful evidence against others in criminal proceedings, so may be revoked if they fail to do so.

Only the Attorney General can grant an immunity. Pursuant to the Interagency Protocol for Indemnities and Undertakings it is the Director's role to make recommendations to the Attorney General on whether or not to do so. This includes where other agencies of government wish to apply for an immunity for an informer.

Applications for immunities must be dealt with in a timely manner and must be accompanied by a copy of the informer's statement and a summary of the evidence.

Criteria to be considered in determining whether to recommend an immunity

An immunity will only be recommended by the Director if it would be in the interests of justice for it to be granted. The most important considerations are:

1. whether the informer's evidence is reasonably necessary to secure the accused's conviction
2. the informer's degree of culpability compared to that of the accused.

Applications for immunities should address the following factors:

1. the informer's present circumstances and attitude to giving evidence without the benefit of an immunity
2. the value of the informer's evidence in proceedings against the accused, having regard to all the admissible evidence and any anticipated defence
3. the relative seriousness of the offences committed by the informer compared to those committed by the accused and their relative levels of involvement
4. the strength of the evidence to support charges against the informer and the public interest in prosecuting the informer
5. the strength of the evidence to support the prosecution of the accused on lesser or fewer charges without the informer's evidence, and whether such charges would properly reflect the accused's criminality
6. the likelihood of strengthening any weakness in the prosecution case other than by relying on the informer's evidence (for example, by further investigation)
7. the informer's character, credibility and reliability
8. the outcome of any previous reliance on the informer's evidence
9. whether the informer's evidence is corroborated by other evidence
10. whether the informer has provided a full and frank statement, including an acknowledgment of their role in the offences
11. whether any form of reward, inducement, protection or privilege is being provided or offered to the informer to cause them to give evidence, other than the indication that an application will be made for an undertaking / indemnity



12. whether the officer-in-charge and any other relevant State or Commonwealth investigatory or prosecuting authority support the application
13. whether it would be more appropriate for the court to issue a certificate under [s128](#) of the *Evidence Act 1995*
14. any other relevant matters.

The appropriateness of the kind of immunity (whether an indemnity or an undertaking) should be addressed as part of the application.

11.5. Induced statements

An induced statement is a statement taken from a witness with a promise not to use the information in the statement against that witness in criminal proceedings.

Where the anticipated evidence relates to a matter being prosecuted by the ODPP, approval to take an induced statement from the accused, a witness or a potential witness must first be obtained from the Director. All requests for the Director's approval to take an induced statement must be made in writing and supported by copies of all available relevant documents. Prior to the DPP taking over proceedings, Police Area Commanders and Police District Commanders (as the case may be) or police officers of equivalent rank (Superintendent and above) who are in line command of the officer making the application are authorised to approve the taking of an induced statement.

It must be made clear by the police officer taking the statement that the only inducement being offered by the Director is that the contents of the statement will not be used against the witness. No other benefit, such as the acceptance of a charge resolution or the withdrawal of charges, forms part of the inducement. The inducement to be recorded at the beginning of the statement should be in the following terms:

"I am making this statement after a promise held out to me by ... that no information given in it will be used in any criminal proceedings against me in any court in New South Wales, except in respect of the falsity of my statement or for the purpose of establishing the falsity of evidence given by me as a witness".

All correspondence relating to a request to take an induced statement is to be treated by the ODPP as sensitive and securely stored.

This Guideline does not apply to police or other investigators carrying out investigations solely pursuant to Australian Crime Commission, NSW Crime Commission, Independent Commission Against Corruption, or Law Enforcement Conduct Commission references.

Chapter 12. Pre-charge advice

12.1. Introduction

The ODPP does not investigate allegations that a crime has been committed. Investigations are carried out by the NSW Police Force and other investigative agencies. However, the ODPP may provide independent legal advice prior to proceedings being commenced for a criminal offence. This is referred to as [pre-charge advice](#). Pre-charge advice has the benefit of identifying the appropriate charges early in the criminal justice process to avoid whenever possible withdrawing a prosecution or varying the charges at a later time.

This Chapter sets out:

1. when the ODPP will provide pre-charge advice
2. what the ODPP will provide advice about
3. the principles concerning confidentiality and legal privilege.

The ODPP has protocols in place with investigative agencies setting out procedures for providing pre-charge advice.

The criteria for determining whether a person should be prosecuted for an offence are as set out in [Guideline 1.2](#).

12.2. When the ODPP will provide pre-charge advice

The [ODPP](#) is available to provide pre-charge advice to investigative agencies:

1. if the matter would be prosecuted by the ODPP if charges were filed
2. the matter has some complexity, novelty, raises a potential conflict of interest for the investigative agency or has broader policy implications
3. as agreed by the investigative agency and the ODPP.

Advice will not be provided on an informal basis.

Pre-charge advice must be sought from the [Director](#) prior to filing any charge that requires the consent of the Director or the Attorney General.

12.3. What the ODPP will provide advice about

The ODPP will provide advice about the sufficiency of evidence and the appropriateness of charges in accordance with Chapter 1: the decision to prosecute.



Unless otherwise instructed by the Director or a [Deputy Director](#), the ODPP will not provide advice about:

- operational or investigative matters
- whether to file charges in a particular jurisdiction.

12.4. Confidentiality and legal privilege

The fact that a matter has been referred to the ODPP for pre-charge advice, the content of the advice and the fact that advice has been provided will not be disclosed to a third party unless [legal privilege](#) has been waived. The privilege rests with the agency that has requested the advice.

Chapter 13. Disclosure

13.1. Introduction

The purpose of this Chapter is to set out the prosecution's continuing duty of disclosure and also how the duty of disclosure interacts with the Director's legal professional privilege and other claims of privilege by third parties.

13.2. The duty of disclosure

Prosecutors are under a continuing obligation to fully disclose to the [accused](#) all material known to them in a timely manner that on their sensible appraisal:

1. is relevant or possibly relevant to an issue in the case
2. raises or possibly raises a new issue that is not apparent from the evidence the prosecution proposes to rely on
3. holds out a real as opposed to fanciful prospect of providing a lead to evidence that goes to either of the previous two situations.

The prosecution's duty of disclosure continues after [trial](#) and the conclusion of any [appeal](#).

The prosecution's duty of disclosure does not extend to disclosing material relevant only:

1. to the credibility of defence (as distinct from prosecution) witnesses
2. because it might deter the accused from leading false evidence in his or her case in respect of a fact not otherwise in issue, and therefore not foreseeably relevant to the proceedings at the time the prosecution became aware of the material.

All due care must be taken to protect the security of sensitive documents and other material and information, particularly where its disclosure may:

1. affect the safety of individuals
2. jeopardise continuing investigations
3. potentially affect the flow of confidential information to and between justice agencies
4. otherwise prejudice the criminal justice process or diminish public confidence in the criminal justice system.

The Criminal Procedure Regulations provide that material served on the accused must not disclose the address, date of birth or the telephone number of witnesses unless that information is relevant or an order has been made for those details to be disclosed.

13.3. Disclosure of material by Police and other investigative agencies



In all matters prosecuted by the ODPP, police and other investigative agencies must, in addition to providing the brief of evidence:

1. notify the ODPP of all other documentation, material and information, including that concerning any proposed witness, that might be relevant to either the prosecution or the defence
2. disclose such documentation, material or information to the ODPP, if requested
3. certify that the DPP has been notified of all such documentation, material and other information ([s15A Director of Public Prosecutions Act 1986](#); [Schedule 1](#), Director of Public Prosecutions Regulation 2015).

Legal privilege and public interest immunity

Where a prosecutor receives material that may be subject to a claim of [legal privilege](#) (other than that over which the Director has claim), public interest immunity or statutory immunity, the prosecutor should not disclose that documentation, material or information to the defence without first consulting with the officer-in-charge. The officer-in-charge should be given a reasonable opportunity to seek advice.

Subject to any claim of privilege or immunity, such material, if assessed as relevant in the way described above, should be disclosed to the defence.

Where the prosecutor and the police disagree as to what should be disclosed, and there is no claim of public interest immunity, the matter is to be referred to the [Director](#) or a [Deputy Director](#).

The prosecution must put the defence on notice of any known material over which a claim of privilege or immunity has or is being made, so as to allow the defence the opportunity to contest the relevant claim and seek access to the material via subpoena. Generally, this will be achieved by the service of a s15A disclosure certificate by Police.

Where a claim of privilege or immunity is pursued, the question of disclosure will be determined by the outcome of that claim in court.

On rare occasions the overriding interests of justice may require the existence of otherwise disclosable information to be withheld – for example where disclosure may pose a threat to the personal safety of a person, or to protect an ongoing investigation. Such a course can only be taken with the approval of the Director or a Deputy Director.

In such cases, consideration must be given to whether the charge against the accused to which the material is relevant should be withdrawn and/or whether the accused should be charged with a lesser offence to which such material would not be relevant. ([rule 88, Legal Profession Uniform Conduct \(Barristers\) Rules 2015](#); [rule 29.6, Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015](#)).

Unless any unfairness caused to the accused by withholding notice of the existence of such material can be ameliorated, the prosecution must be discontinued. In extraordinary circumstances delayed notice of the existence of such material may be approved by the Director or a Deputy Director. Any decision to delay notice should be for a finite period of time and regularly reviewed.

Where the ODPP gains knowledge or comes into possession of documents or material over which the accused has a claim or potential claim of legal privilege, that material must be disclosed by the ODPP to the accused as soon as reasonably practicable.

Where the ODPP comes into possession of documents or materials (whether by police or another third party) over which a claim or potential claim of sexual assault communication privilege applies, the ODPP must return those documents or material and notify the defence of its existence and any claim or potential claim of sexual assault communication privilege as soon as reasonably practicable.

13.4. The Director's legal privilege

Legal privilege will ordinarily be claimed against the production of any document in the nature of an internal ODPP advice, such as a submission to the Director and submissions between solicitors and Crown Prosecutors. Only the Director or a Deputy Director may approve any waiver of privilege.

The Director's legal privilege extends to documents containing material created or gathered for the dominant purpose of providing legal advice to the Director, including internal advice, memoranda, summaries, internal emails, conference notes and file notes.

There is no implied or automatic waiver of legal privilege on [conference](#) notes when a witness makes a disclosure that significantly adds to or is inconsistent with a previous statement. If a witness discloses information in a conference that warrants disclosure to the defence, as best practice, an arrangement should be made for the witness to make a supplementary statement with police, where practicable, which will then be disclosed to the defence. In urgent circumstances, this may be by way of signing a police notebook statement. A request may be made for a direction to waive legal privilege over relevant disclosures.

The giving of reasons for prosecutorial decision making generally does not constitute a waiver of legal privilege in respect of matters in which reasons have been given. Internal legal advice must not be released when reasons are given.

Chapter 14. Evidence

14.1. Introduction

This Chapter deals with evidence that:

1. is disputed
2. is illegally or improperly obtained
3. is derived from hypnosis or EDMR
4. will be given by AVL.

14.2. Disputed evidence

In some matters defence may advise that the admissibility of certain evidence is to be challenged. If there has not been a pre-trial ruling made with respect to this evidence, care should be taken in opening a case to a jury to ensure that nothing is said that may lead to a subsequent discharge of the jury.

14.3. Illegally or improperly obtained evidence

Where evidence intended to be led appears on reasonable grounds to have been unlawfully or improperly obtained, the prosecutor must promptly inform the accused and make a copy of that evidence available to him/her.

14.4. Hypnosis or EMDR evidence

Evidence obtained by either hypnosis or EMDR cannot be used in any case unless it has been approved by the Director or a Deputy Director.

14.5. Calling of expert evidence and the use of Audio-Visual Link (AVL)

Prosecutors must request the court to allow medical practitioners to give evidence at a time and by a means most convenient to them. This includes interposing the witness where necessary and arranging well in advance of the trial or hearing for the evidence to be given by AVL.

Section 5BAA of the *Evidence (Audio and Audio Visual Links) Act 1998* provides that ordinarily a "government agency witness" must give evidence to court by audio link or AVL from any place within New South Wales.

When arranging the attendance of witnesses at trial the convenience of government agency witnesses is the most important consideration, regardless of any perceptions a prosecutor may have about the evidence being diminished by reason of its being given remotely.

Supreme Court Practice Note SC Gen 15 and *Local Court Practice Note Crim 1* provide that parties must give the court and the other party no less than 10 working days' notice of the use of AVL. The best practice to be adopted is that the court should be advised of the need for AVL at the time the trial is fixed for hearing.



Chapter 15. Reasons for decisions

15.1. Introduction

The disclosure of reasons for prosecution decisions is consistent with the open and accountable operations of the [ODPP](#). This Chapter sets out the ODPP's guidelines on giving reasons for decisions, including when and to whom they may be given.

This guideline applies to the following decisions to:

1. withdraw a charge and proceed on another
2. substantially alter a charge
3. discontinue all charges
4. offer no evidence on appeal
5. lodge an appeal
6. decline to lodge an appeal.

Nothing in this Chapter prevents the giving of reasons in other cases where it may be appropriate to do so.

15.2. Requests for reasons

A person who requests reasons for a decision to discontinue a prosecution may be given reasons if the person has a legitimate interest in the prosecution and there is no basis to decline the request.

A person with a legitimate interest in the prosecution includes:

1. a victim
2. a family member of a deceased victim
3. the officer-in-charge
4. any other person whose rights, liabilities or obligations are affected by the decision.

A request for reasons must be declined if giving the reasons would:

1. prejudice a current or future court case
2. interfere with an ongoing investigation
3. put the safety of any person at risk
4. breach legal privilege



5. breach any statutory provision
6. breach any court order
7. embarrass or breach the privacy of a victim (if a victim's family member requests reasons).

A request for reasons may also be declined if it is otherwise not in the public interest to give reasons.

15.3. Privilege

The giving of reasons does not generally constitute a waiver of [legal privilege](#) in respect of matters in which reasons have been given. Internal legal advice must not be released when reasons are given unless the [Director](#) determines otherwise.



Chapter 16. Media contact and non-publication orders

16.1. Introduction

An informed public is an essential part of a transparent, fair and equitable justice system. The community receives much of its information about the criminal justice system through the media. Accurate and timely reporting by the media serves to educate the community and enhance public confidence in the administration of justice.

The purpose of this Chapter is to set out:

1. guiding principles for the ODPP response to media requests
2. matters that may and may not be disclosed
3. rules restricting access to court proceedings and prohibiting or restricting the publication and disclosure of material arising in a criminal matter.

16.2. Guiding principles

The guiding principles for providing information to the media are to:

1. support the administration of justice and the integrity of the criminal justice system
2. respect the presumption of innocence and the accused's right to a fair trial
3. respect the principle of open justice and recognise the public interest in receiving accurate and timely information about criminal proceedings
4. recognise that the media has an important role to play in providing accurate and timely information to the community about criminal proceedings that are of public interest
5. treat victims with courtesy and compassion and respect their dignity and privacy.

There is no general obligation to provide information to the media. However, the ODPP will endeavour to assist the media by confirming factual information already made public through the criminal justice system.

16.3. Communicating with the media

The ODPP has a Media and Communications Liaison Officer (MCLO) who should be the primary point of contact for media enquiries.

Information of an uncontroversial nature that is already in the public domain, such as confirmation of the charges that have been referred to in open court, a plea entered in open court, past and future listings, dates, venues, and the sentence or other outcome of the proceedings, may be provided to the media without referring the enquirer to the MCLO.



All other media enquiries, including requests for statements, interviews, video footage, photographs or any other evidence should be directed to the MCLO. The approval of the Director or a Deputy Director is required to respond to media enquiries other than those of an uncontroversial nature concerning matters in the public domain. The Director or Deputy Director must be advised if the enquiry relates to an accused person who is also facing trial on other charges.

Prosecutors with the conduct of matters that are likely to attract significant media attention should provide details of the matters, in advance, to the MCLO, particularly matters where proceedings are to be discontinued.

Prosecutors are not to speak on behalf of the Director or the ODPP without prior authorisation. Media releases on behalf of the Director or the ODPP are to be issued only by the MCLO with the approval of the Director or a Deputy Director.

Prosecutors must conduct themselves towards the media and the public in a courteous and dispassionate manner. Compliance with professional codes of conduct is expected and all communications with the media should be considered 'on the record'.

Among the matters ODPP staff and Crown Prosecutors are not to publicly discuss with or disclose to the media are:

1. confirmation of whether a matter is under investigation or whether advice has been sought by or from an external agency
2. the prosecution's intended approach in a case, including whether or not the matter is being reviewed
3. contact details for any victim or civilian witness
4. information that may lead to the identification of prisoners, informers and others who are giving evidence at some personal risk or assisting law enforcement officers
5. any information the disclosure of which is prohibited by law, such as privacy legislation
6. any matter the subject of a non-publication or suppression order
7. any information the subject of legal privilege or public interest immunity
8. any part of the proceedings not conducted in an open hearing
9. any evidence excluded at trial or not adduced in court proceedings
10. expressions of the prosecutor's personal opinions, including, but not limited to:
 - a. the possible or likely outcome of proceedings
 - b. the veracity of any evidence
 - c. the guilt or innocence of the accused
 - d. the correctness or otherwise of a judicial decision or verdict
 - e. the adequacy of a sentence
 - f. the prospects of any appeal.

Prosecutors should not comment on current or future proceedings in any forum where there is a real possibility that such comments could be publicly reported and bring into question the prosecutor's capacity to fulfil their prosecutorial duties in a fair and detached manner.

On request, prosecutors appearing for the Director may provide their names to the media; others may prefer to remain anonymous and are entitled to request anonymity.

If the media seeks to contact a victim or civilian witness, the prosecutor or a [Witness Assistance Service](#) officer may convey the request to the victim or witness. It will be for the victim or witness to decide whether to make contact with the inquirer directly.

16.4. Closed court, suppression and non-publication orders

Open justice is a fundamental tenet of our justice system and is particularly important in criminal proceedings. However, the law also recognises that there are some circumstances where restricting access to proceedings or prohibiting the publication or disclosure of information is justified in the public interest.

Closed courts

Prosecutors should be aware that the law requires the closing of a court in certain cases including:

- where the accused is a child
- where a complainant in a sexual assault matter is giving evidence
- other evidence in proceedings for prescribed sexual offences
- for proceedings for an offence of incest or attempted incest.

Mandatory non-publication

Prosecutors should be aware of the legislative restrictions on publication that automatically prohibit the publication of material that tends to identify certain persons, for example children involved in criminal proceedings or complaints in prescribed sexual assault proceedings.

[Section 195](#) of the *Evidence Act 1995* prohibits the publication of disallowed questions or questions in respect of which the court refused leave to ask.

A breach of any of the above provisions constitutes a criminal offence.

Applications for suppression and non-publication orders

The Court may prohibit or restrict the publication or disclosure of information under the [Court Suppression and Non-publication Orders Act 2010](#) or by using the court's inherent power to regulate its proceedings. Prosecutors should familiarise themselves with these laws and be prepared to apply for orders when necessary.

16.5. Complaints about media reporting

The MCLO should be contacted immediately if material is published in breach of a statutory provision or a court order or could otherwise be prejudicial to proceedings. If the matter is still before the court, a request may be made that the court issue an order for the material to be removed.

Inaccurate media reports about the conduct of a prosecution or any other matter concerning the ODPP must be reported to the MCLO for remedial action.



Chapter 17. Proceeds of crime

17.1. Introduction

Confiscation of the proceeds of crime deprives offenders of the benefits generated by their criminal behaviour and removes the motivation to commit crimes for personal gain.

17.2. Proceeds of Crimes

The ODPP is responsible for confiscation action arising from the prosecution of all serious offences under NSW law, except for those cases in which the NSW Crime Commission has taken action.

The [confiscation](#) of assets used in or derived from the commission of serious crime is an important aspect of the criminal justice system and is justified to:

1. prevent unjust enrichment
2. deter crime by reducing its profitability
3. prevent crime by confiscating the means to commit it
4. maintain public confidence in the criminal justice system
5. put criminally derived assets to the use and benefit of society.

Prosecutors should pursue authorised confiscation applications after a conviction is recorded.



Glossary

Term	Definition
accused	a person charged with a crime; may also be referred to as the defendant or the alleged offender
acquittal	a verdict that the prosecution has not proven that the accused is guilty beyond a reasonable doubt
adjournment	a break during a trial or other court proceedings to another time or day
admissible	used to describe evidence that is allowed to be given in court
appeal	a challenge made to a court's decision, taken to a higher court
bail	the release of the accused while criminal proceedings are taking place on condition that the accused will attend court and comply with any other condition imposed
barrister	a lawyer whose main role is to present the evidence and make legal arguments in court on behalf of their client
beyond reasonable doubt	the test (also referred to as the standard of proof) for proving a crime in court
breach of sentence	when the offender is dealt with for failing to comply with a sentence
brief	a collection of written or recorded statements or interviews, expert reports, video footage, photographs and other material obtained by an investigative agency and given to the ODPP
case conference	a conference between a prosecutor and the accused's legal representative under Chapter 2, Part 3, Division 5 of the <i>Criminal Procedure Act 1986</i>
certifying a charge	charge certification takes place in the Local Court when the DPP certifies which offences will be pursued against an accused person
charge	the allegation that a person has committed a specific crime



Term	Definition
charge resolution	a process resulting in a decision by the prosecution to withdraw one or more charges on the accused promising to plead guilty to fewer and/or less serious offences and/or to place one or more offences on a Form 1 document
child	a person under the age of 18 years
Children's Court	the court that deals with most cases where a child is charged with a crime in NSW
CCTV	closed-circuit television
closed court	a courtroom that is closed to members of the public
co-accused	One or more persons or organisations charged with committing the same offence
committal	when a case is referred from the Local Court or the Children's Court to be dealt with in the District Court or Supreme Court
conference	a meeting, such as between the prosecutor and a witness, to discuss the case
confiscation	action taken by the government to take money and assets used in or obtained through crime
conviction	a finding that the accused is guilty of a crime
counsel	another word for barrister
count	a charge on the indictment
court	the building where the case is heard. Also used to describe in general terms the judicial officer hearing the case, such as a magistrate or judge
Court of Criminal Appeal (CCA)	the court in NSW that deals with conviction, sentence and other appeals from the District and Supreme Courts
Client legal privilege	See " Legal privilege "
crime	a breach of criminal laws, as set down in legislation or by the courts



Term	Definition
cross-examination	when the lawyer representing one party in the case challenges the evidence of a witness called by the other party, e.g. defence counsel may cross-examine a prosecution witness
Crown Prosecutor	a barrister appointed under the Crown Prosecutors Act 1986
defence	used to refer to the accused's legal response to the prosecution, a lawful excuse for doing something or the accused's legal team
defence counsel	the barrister representing the accused
defendant	a person charged with a crime; may also be referred to as the accused or the alleged offender
Deputy Director	a Deputy Director of Public Prosecutions (NSW)
Director (DPP)	the Director of Public Prosecutions (NSW) or delegate
discontinue proceedings	end the prosecution
District Court	the court that deals with most of the serious criminal cases in NSW
diversion	an option for magistrates to deal with a person with a cognitive impairment, mental illness or other mental condition other than in accordance with law (s32 Mental Health (Forensic Provisions) Act 1990)
domestic violence	a wide range of behaviours, including physical, sexual and psychological abuse, occurring within married and de facto relationships, between family members, couples who are separated or divorced, and within shared households
Drug Court	a court of record that deals with criminal matters involving accused persons who are addicted to illicit drugs
election	NSW law allows for less serious indictable matters (Table Offences) to be dealt with summarily in the Local Court. An election is a decision by either party to require a Table Offence to be dealt with on indictment in the District Court – see also Table offence
evidence	material presented in court to prove or disprove a fact; it may be what a witness says or an exhibit



Term	Definition
<i>ex officio</i> charge	a charge on an indictment that was not referred from the Local Court or the Children's Court, which can only be authorised by the Director or a Deputy Director
examination-in-chief	the questioning of a witness by the lawyer who represents the side that has called that witness to give evidence, e.g. the prosecutor asking questions of a prosecution witness
fitness hearing	a hearing before a judge in the District or Supreme Court to determine whether the accused is mentally fit to face trial
Form 1	a document under s.32 of the <i>Crimes (Sentencing Procedure) Act 1999</i> containing a charge or a list charges that the accused agrees to have taken into account when being sentenced for some other offence; no conviction is recorded and no separate sentence is imposed for Form 1 offences
full-time detention	the length of time to be spent by the offender in prison
harm	physical, psychological or psychiatric harm, or having property taken, damaged or destroyed
hearing	an important listing of the case in court, e.g. a trial, summary hearing or sentence hearing
immunity	an indemnity or undertaking
indemnity	protection against prosecution granted by the Attorney General under s.32 of the <i>Criminal Procedure Act 1986</i>
indictable offence	an offence that may be dealt with on indictment in the District Court or the Supreme Court
indictment	a document filed in the District Court or the Supreme Court that lists the charges against the accused
informer witness	a person who gives information to an investigative agency about someone else's criminal activity in return for some benefit, e.g. a lighter sentence
investigative agency	a government agency that investigates crime
interlocutory judgment or order	a judgment or order given at an intermediate stage of a criminal proceedings, typically prior to the commencement of or during trial, in relation to (among other things) the admissibility of evidence



Term	Definition
judge	a person who hears cases in the District Court or the Supreme Court
judge alone trial	a trial heard before a judge without a jury (s132 Criminal Procedure Act 1986)
legal privilege	protection from revealing confidential communications and documents between a lawyer and their client, sometimes referred to as client legal privilege or legal professional privilege
limiting term	a term similar to a sentence. Imposed by the District or Supreme Courts at the conclusion of special hearings (criminal proceedings used when accused persons are not fit to stand trial)
Local Court	a lower court which hears less serious matters. A magistrate sits in the Local Court without a jury
magistrate	a judicial officer who hears cases in the Local Court or the Children's Court
mention	a brief hearing of the matter in court
no further proceedings	a direction to end the prosecution
non-publication order	a restriction or prohibition in legislation or by order of the court against the publication of the case or some aspect of the case, e.g. a victim's name
offender	a person who has been found guilty of a crime
Office of the Director of Public Prosecutions (ODPP)	comprises the Director's Chambers, the Crown Prosecutors' Chambers and the Office of the Solicitor for Public Prosecutions
officer-in-charge (OIC)	the officer in charge of the investigation, usually a police officer
plea	the accused's answer to the charge: guilty or not guilty
pre-charge advice	advice provided by the ODPP to an investigative agency before charging
prescribed sexual offence proceedings	proceedings that include a charge for a prescribed sexual offence as defined in s3(1) Criminal Procedure Act 1986



Term	Definition
prosecution	the criminal case, or the party running the criminal case (also currently referred to as the Crown)
prosecutor	an ODPP solicitor or a Crown Prosecutor, including a solicitor acting for the DPP and private counsel briefed by the DPP
public interest immunity	where it is in the public interest not to reveal confidential information
re-examination	questioning a witness about answers the witness gave in cross-examination
retrial	a new trial of the same case
sentence	the penalty imposed by the judge or magistrate on a guilty offender
solicitor with carriage	the ODPP solicitor who is responsible for a particular case
special hearing	a hearing in cases where the accused has been found unfit to stand trial, to determine whether the accused has committed the offence; it is similar to a regular trial
special measures	different arrangements for a witness to give evidence, e.g. the use of screens in the courtroom or giving evidence from another room by closed-circuit television
statement of agreed facts	a written summary of the undisputed facts agreed to by the prosecution and defence for sentencing purposes
strictly indictable	matter must be dealt with on indictment in either the District or Supreme Court
summary hearing	a hearing before a magistrate in the Local Court or the Children's Court
summary offence	an offence that cannot be dealt with on indictment
Supreme Court	the court in NSW where the most serious criminal cases are heard, e.g. murder
suppression order	a restriction or prohibition in legislation or by order of the court against disclosure about the case or some aspect of the case



Term	Definition
table offence	an indictable offence listed in Tables 1 and 2 in Schedule 1 of the <i>Criminal Procedure Act 1986</i> that is capable of being dealt with either summarily in the Local Court or on indictment in the District Court or Supreme Court
trial	a hearing where evidence is presented and a decision is made, can be with a jury or judge alone
undertaking	a promise by the Attorney General that evidence given by the person in court will not be used against them under s33 <i>Criminal Procedure Act 1986</i>
verdict	the decision of whether the accused is guilty or not guilty after a trial or hearing
victim	a person who has suffered harm as a direct result of an act committed by another person in the course of a criminal offence, including a member of a deceased victim's immediate family
Victim Impact Statement (VIS)	a statement by a victim that may be read or presented to a court before the offender is sentenced to describe the effects of the crime on the victim
Victims Register	a register to keep victims informed about what happens with an offender after the end of the case in court; e.g. possible release dates and parole hearings
witness	a person who attends court to give evidence
Witness Assistance Service (WAS)	a specialist service within the ODPP that provides assistance and support to victims and vulnerable witnesses in the criminal justice process

Office of the Director of Public Prosecutions

Level 6, Parkline Place,
252 Pitt Street,
Sydney NSW 2000
Locked Bag A8
Sydney South NSW 1232

Phone 02 9285 8606
Fax 02 9285 8600
TTY 02 9285 8646

odpp.nsw.gov.au