

# Sexual Assault Review Report

February 2025

## Executive summary

The Office of the Director of Public Prosecutions (ODPP) is responsible for the prosecution of all serious offences committed in New South Wales. Every year the ODPP prosecutes approximately 18,000 matters.

Following public commentary from some judges of the District Court, in March 2024 the Director of Public Prosecutions resolved to undertake a review of adult sexual offence matters to ensure that these prosecutions are conducted fairly, impartially, and in accordance with the New South Wales Prosecution Guidelines (Prosecution Guidelines).

The Sexual Assault Review (the Review) examined all adult sexual assault matters with a trial or special hearing listing in the NSW District Court from 1 April to 31 December 2024.

The Review analysed 327 matters. In 310 of those matters a determination was made to proceed to trial. Seventeen matters were discontinued. Of these, nine were discontinued on evidentiary grounds and eight were discontinued on a combination of discretionary and evidentiary grounds. The percentage of matters discontinued in 2024 is consistent with the average rate of discontinuance of sexual assault matters from 2018 to 2023.

The Review examined levels of compliance with the Prosecution Guidelines. In 316 of the 327 matters considered, the Prosecution Guidelines were properly applied. In the 11 matters where the Prosecution Guidelines were not appropriately applied, five matters proceeded to trial and six were discontinued on either discretionary or evidentiary grounds.

The Review found a consistently high standard of legal analysis concerning the question of whether to proceed with sexual offence prosecutions. The small number of matters where the Prosecution Guidelines were not appropriately applied involved particularly legally and factually complex issues including intoxication of complainants and complexities in the evidence relevant to issues of consent.

The Review identified opportunities for improvement including further training and guidance for ODPP lawyers on the complexities of the law of consent and evidentiary issues arising from that complexity, and other aspects of the prosecution process; amendments to internal processes; further development of evidence-based research on key areas impacting sexual offence prosecutions; and working with NSW Police to improve brief service and disclosure.

*The leadership team wishes to thank all staff involved in the Sexual Assault Review  
for their professionalism, diligence and commitment to justice in  
undertaking this important work in addition to their challenging day to day workload.*



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## Introduction

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

Following public comments by judges of the NSW District Court that suggested that sexual offence prosecutions were being improperly pursued,<sup>1</sup> and in accordance with the Office of the Director of Public Prosecutions (the ODPP)'s commitment to self-examination and continuous improvement, in February 2024 the Director of Public Prosecutions resolved to undertake a review of adult sexual offence matters to ensure that the ODPP is conducting these prosecutions fairly, impartially and in accordance with the NSW Prosecution Guidelines (the Review).

The Review also provided an opportunity to analyse current processes to identify any systemic issues with the application of the NSW Prosecution Guidelines (Prosecution Guidelines) and opportunities to improve our practices including but not limited to training and procedures.

## Terminology

For the purpose of this Report, the term "sexual offence" is used to refer to all sexual offences, including those involving sexual intercourse, sexual touching and sexual acts as currently defined in the *Crimes Act 1900* (NSW) (*Crimes Act*), as well as any predecessor offences encompassing the same conduct.<sup>2</sup>

This Report uses the term "complainant" rather than, for instance "victim" or "victim-survivor", because this is the language used by the Court. Exceptions are where reference is made to the Charter of Victims Rights or specific provisions of the Prosecution Guidelines that use the term "victim".

## The NSW Director of Public Prosecutions and the ODPP

Investigating offences and prosecuting offences are two distinct and separate functions within the criminal justice system. In NSW, the NSW Police Force and other investigative agencies are responsible for investigating criminal conduct and laying charges. The ODPP is responsible for prosecuting some summary and all indictable offences in the Local, District and Supreme Courts, and appeals arising from those prosecutions. The ODPP is not responsible for enacting

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<sup>1</sup> See *R v Martinez (a pseudonym)* [2023] NSWDC 552 per Newlinds DCJ and *R v Smith (a pseudonym)* [2024] NSWDC 41 per Whitford DCJ. The Conduct Division of the Judicial Commission of NSW found that Judge Newlinds' criticism of the ODPP in *Martinez* had no basis in evidence and involved a serious denial of procedural fairness that amounted to an abuse of the Judge's power: [Report of the Conduct Division of the Judicial Commission of NSW 19 August 2024](#) [186]-[188]. The Conduct Division of the Judicial Commission of NSW found that Judge Whitford's criticism of the ODPP in *Smith* was 'wholly without evidentiary foundation', involved a fundamental denial of procedural fairness, and that the judge's 'highly inflammatory', 'extraordinary' and 'irresponsible' comments were a public attempt to influence prosecutorial decision-making that 'inevitably carried the risk of undermining public confidence in the administration of justice': [Report of the Conduct Division of the Judicial Commission of NSW 5 November 2024](#) ([74]-[80], [116]-[166]).

<sup>2</sup> See ss 61HA to 61HC of the *Crimes Act*.



legislation, which is the function of the legislature, or deciding government policy, which is the function of the Executive branch of government.

An independent prosecution agency is recognised as a key indicator of the health of a democracy and the maturity of the rule of law in any given jurisdiction. Prior to the establishment of independent prosecution agencies in the 1980s, prosecutions in the states and territories of Australia were conducted by the Attorneys General and individual practitioners appointed by the Governor. Throughout the 1970s and 1980s, a series of federal and state inquiries into corruption and organised crime revealed the influence that organised crime and partisan interests were seen to exert on the conduct of prosecutions and exposed the frailties of Australia's existing accountability infrastructure.<sup>3</sup>

Widespread public concern that existing governance structures were inadequate to address government corruption and organised crime led to the establishment of independent Directors of Public Prosecution across Australia. In NSW, the office of Director of Public Prosecutions was created in 1987 by the enactment of the *Director of Public Prosecutions Act 1986 (NSW) (DPP Act)*.

### **Prosecutorial independence**

Critical to understanding the role of the Director of Public Prosecutions is an appreciation that our systems of government and governance do not countenance direct interference in the exercise of prosecutorial discretion. Decisions by the ODPP about criminal prosecutions are to be made free of influence of political, individual, media or other sectional interests. As then President of the NSW Court of Appeal Michael Kirby observed in *Price v Ferris*,<sup>4</sup> the office of the NSW Director of Public Prosecutions was developed to ensure manifest independence and obviate "...suspicion that important prosecutorial discretions will be exercised otherwise than on neutral grounds."<sup>5</sup>

Section 4 of the *DPP Act* establishes the Director of Public Prosecutions as an independent statutory office holder. While Part 4 of the *DPP Act* provides for certain responsibilities as between the Director and the Attorney General, the Director is otherwise an independent office holder of the executive branch of government.

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<sup>3</sup> The 1989 *Commission of Inquiry into Possible Illegal Activities and Associated Police* GE Fitzgerald QC; the *Royal Commission of Inquiry into Allegations of Organised Crime in Clubs*, Justice Moffitt (1973-1974); the *Royal Commission of Inquiry into Drug Trafficking in NSW*, Justice Woodward (1977-1979); the *Commonwealth Royal Commission of Inquiry into Drug Trafficking*, Justice Stewart (1981-1983); the *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union*, Frank Costigan QC (1980-1984); the 'Big League Scandal' in which NSW Premier Neville Wran and Chief Stipendiary Magistrate Murray Farquhar were accused of corruption; the 'Jackson Affair' which revealed that Rex Jackson, the NSW Minister for Corrective Services was accepting bribes from inmates (*Jackson & Hakim v R* (1988) 33 A Crim R 413); 'The Age Tapes' scandal involving the allegation by NSW Chief Magistrate Clarrie Briese and NSW District Court Judge Paul Flannery that sitting High Court Judge Lionel Murphy had privately pressured them to pervert the course of criminal proceedings against Morgan Ryan, a disgraced solicitor.

<sup>4</sup> (1994) 34 NSWLR 704.

<sup>5</sup> *Ibid.* at 707-708.



Whilst a structurally independent ODPP is a necessary condition for the full expression of the rule of law so too is the accountability of public prosecutors.

In NSW there are multiple layers of prosecutorial accountability. The first is judicial. Each year, the ODPP brings thousands of prosecutions in NSW courts, each of which is subject to the scrutiny of judges, and in many cases, juries. Accountability to the judiciary exists at all stages of the criminal justice process, from the Local Court through to the High Court of Australia. In every matter, prosecutorial conduct and decision making is closely examined.

A second layer of accountability relates to the executive government and Parliament. The ODPP is accountable to Parliament and the Attorney General through the statutory obligation to prepare and furnish annual reports.<sup>6</sup> These reports provide Parliament with the opportunity to examine the legal and administrative performance of the ODPP. Furthermore, s 25 of the *DPP Act* provides that the Director must consult with the Attorney General about the exercise of her functions when requested. In turn, Crown Prosecutors and ODPP solicitors are accountable to the Director, as they conduct prosecutions on the Director's behalf and exercise delegated functions.

Thirdly, the ODPP is accountable to the general public, complainants, accused people, and other criminal justice stakeholders through the consistent application of the Prosecution Guidelines. In accordance with the 1986 recommendations of the NSW Law Reform Commission,<sup>7</sup> since its inception the ODPP has consistently published Prosecution Guidelines. The Prosecution Guidelines are the only policy that bears on the decision whether to prosecute and are contained in a publicly accessible document that was developed in consultation with all criminal justice stakeholders, including the judiciary. Any person affected by any decision made by the ODPP in the course of a prosecution may access and consider the Prosecution Guidelines, understand the underlying principles for the initiation, conduct and continuance of criminal prosecutions and make submissions to the ODPP by reference to the Prosecution Guidelines. The importance of these guidelines to the open and accountable exercise of prosecution functions cannot be overstated.

Fourth, under the *Victims Rights and Support Act 2013* (NSW) (*VRSA*) victims of crime may seek review of certain decisions. While the ODPP does not represent or act for complainants, victims of crime occupy a unique place in the conduct of a prosecution. This avenue of accountability recognises their important and vested interest in the prosecution process.

Finally, so far as criminal law and prosecution policy is concerned, it is legitimate that society settles matters of policy through the political system with appropriate parliamentary oversight. This is another important aspect of the rule of law; issues of legal policy can and should be

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<sup>6</sup> Section 34 of the *DPP Act*.

<sup>7</sup> *Criminal Procedure - Procedure from Charge to Trial: A General Proposal for Reform* NSW Law Reform Commission Discussion Paper [1986] NSWLRCDP 13.

discussed through transparent and rigorous law reform processes. This includes state and federal law reform commissions, governmental working parties, the work of the NSW Bureau of Crimes Statistics and Research, and broader academic research. For example, the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) was informed by a comprehensive consultative law reform process conducted by the NSW Law Reform Commission as reflected in [Report 148: Consent in relation to sexual offences \(tabled Nov 2020\)](#). Reforms such as these inform the application of the Prosecution Guidelines and the ODPP's impartial conduct of prosecutions of laws developed by Parliament in consultation with the community is a further aspect of the rule of law.

Consistent with this high degree of independence and accountability, prosecutorial decisions (other than those that are reviewed during trial, sentence or appeal sentence proceedings) are not susceptible to judicial review. This reflects an important separation between the executive powers and the judicial functions of government. It is the role of the courts to determine guilt or innocence, and it would be inappropriate for courts to play any role in determining who is prosecuted and for what offences.<sup>8</sup> As the High Court has observed, were a judge to have the power to decline to hear cases which they do not think should be brought, it may give the impression that cases which a judge permits to be heard are prosecutions brought with their approval.<sup>9</sup> This would significantly undermine the impartiality of the judiciary and erode public confidence in the administration of justice.

Another rationale for the independence of the prosecutorial function is that prosecutorial decisions involve complex weighing of public interest considerations, which should be undertaken dispassionately and at arm's length from other branches of government. Prosecutors bring to bear their specialised training and expertise in determining complex and sensitive questions of prosecutorial discretion. Unlike the courts, prosecutors also make these decisions after considering the entirety of the evidence obtained in the course of the investigation and the exercise of their discretion is not limited by the rules of evidence.

## **ODPP Prosecution Guidelines and Procedures**

### **Prosecution Guidelines**

As noted above, the Prosecution Guidelines, issued under s 13(1) of the *DPP Act*, set out the general principles for the initiation and conduct of criminal prosecutions by the ODPP.

The Prosecution Guidelines provide a framework for the conduct of prosecutions and for decision-making across all areas of work undertaken by the ODPP. The Prosecution Guidelines cover areas such as the commencement and continuation of prosecutions, the conduct of trials and appeals, the duty of disclosure and other functions of the ODPP. The Prosecution Guidelines

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<sup>8</sup> *Maxwell v The Queen* (1996) 184 CLR 501 at 534 (Gaudron and Gummow JJ).

<sup>9</sup> *Barton v The Queen* (1980) 147 CLR 75 at 110 (Wilson J).



also provide comprehensive guidance for the way in which the ODPP works with complainants and witnesses, and expressly incorporates adherence to the Charter of Victims Rights (the Charter).

The Prosecution Guidelines apply to all lawyers acting for the ODPP, including the Director, Deputy Directors, Crown Prosecutors, solicitors employed by the ODPP, and private counsel briefed by the ODPP. Adherence to the Prosecution Guidelines is a requirement under the ODPP Code of Conduct.

The Prosecution Guidelines were most recently republished in March 2021, after wide consultation with stakeholders, including the judiciary, the legal profession, the government, and complainants and their families.

The Prosecution Guidelines are publicly available on the ODPP website ([www.odpp.nsw.gov.au/prosecution-guidance/prosecution-guidelines](http://www.odpp.nsw.gov.au/prosecution-guidance/prosecution-guidelines)).

### **The decision to prosecute**

[Chapter 1](#) of the Prosecution Guidelines concerns the decision to prosecute. It imposes a two-stage test for the decision to prosecute, namely:

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?

The first limb of this test requires an evaluation of the likely strength of the admissible evidence the prosecution would present to the court, bearing in mind that the prosecution must prove beyond a reasonable doubt each element of the offence. Chapter 1 expressly requires that the prosecutor must have regard to factors such as whether there are reasonable grounds to believe any evidence might be excluded; whether the prosecution witnesses are available, competent, compellable, and reliable; the credibility and reliability of other admissible evidence in the prosecution case; and any defence open to, or indicated by, the accused.

Chapter 1 also provides guidance on what should be considered when deciding whether a prosecution is in the public interest. It contains a non-exhaustive list of factors concerning, amongst other things, factors relating to the alleged offence or offences; the accused person; the complainant; sentencing considerations; and other factors.

The decision to prosecute is not only considered at the time of commencing a prosecution but must be reviewed throughout the life of the prosecution. Accordingly, the decision to prosecute also encompasses the decision to continue a prosecution. Significant points at which the decision to prosecute may be reconsidered include the decision to certify charges for committal; the settling of a bill of indictment (confirming the charges on which the accused person is to stand trial); on receipt of representations from an accused person to discontinue the proceedings; during preparation for trial; or following a finding that an accused person is not fit to stand trial.

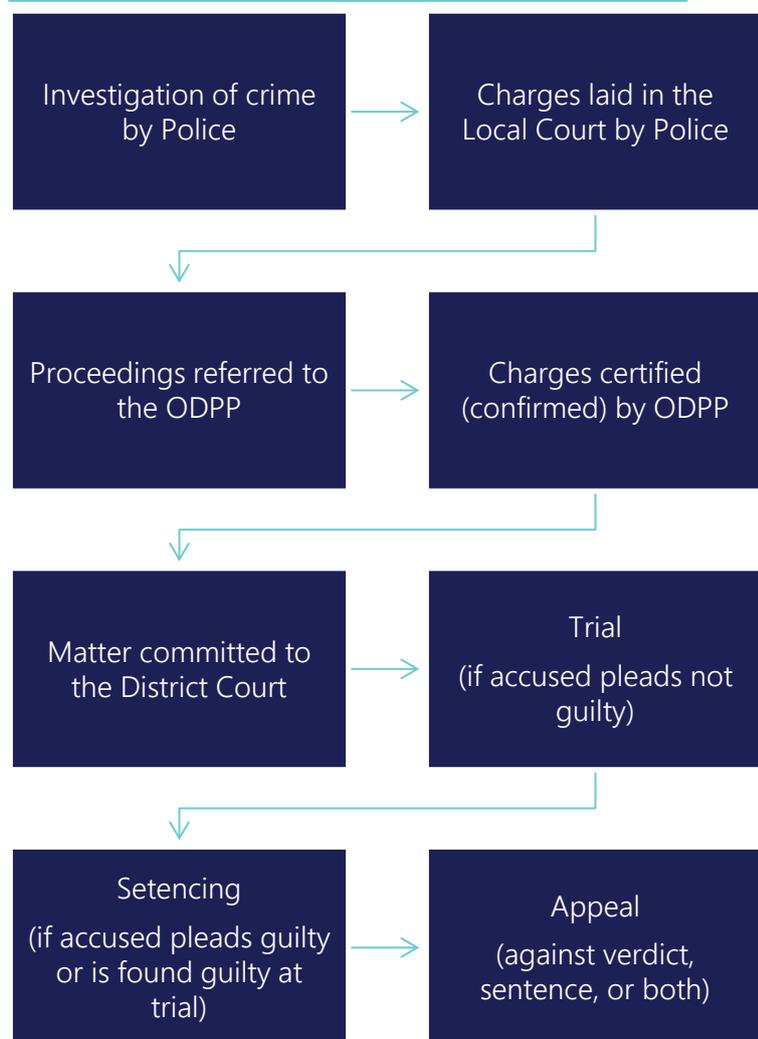


New issues may arise, or new evidence may be disclosed during ongoing investigations or the preparation of a matter for trial, which may require the decision to prosecute to be reconsidered by reference to the test described in the Prosecution Guidelines. This means that where a decision has been made to prosecute a matter, that decision may be revoked at any time, where such a decision is required on the proper application of the Prosecution Guidelines.

The “no reasonable prospects of conviction test” embodied in the Prosecution Guidelines, has applied in NSW since the ODPP’s inception in 1987. It is in substantially similar terms to that employed across most of the states, territories and the Commonwealth of Australia and in a vast array of common law countries.<sup>10</sup>

### Decision making at the ODPP

**Figure 1 - Progress of a Sexual Offence Prosecution**



All offences prosecuted on indictment follow a similar lifecycle, dictated by legislation and the courts’ procedures and practice notes. Prosecutions are commenced by the laying of charges in the Local Court by the investigative agency (usually police). The ODPP takes carriage of a prosecution when a sufficient brief of evidence has been served by investigators. The ODPP is then responsible for certifying the charges (a process of ensuring that the charges are appropriate and correct), engaging in discussions with the defence (to determine whether an early guilty plea may be forthcoming), and in serious prosecutions, including all sexual assault prosecutions, having the matter committed for trial to a higher court (usually the District Court).

<sup>10</sup> See Annexure A.



All committal matters, including sexual offence prosecutions, undergo a comprehensive, multi-step review and analysis throughout the course of the prosecution, supported by robust standard operating procedures and clear legal delegations.

Prior to committal, while the charges are still in the Local Court, the ODPP undertakes a three-stage certification process. First, the solicitor with carriage<sup>11</sup> of the matter considers the brief of evidence that has been served by police (bearing in mind that investigation frequently continues after charging and evidence continues to be served by police). The solicitor prepares a comprehensive report analysing the legal and factual issues of the matter and applies the Prosecution Guidelines to their recommendations on the decision to prosecute and the appropriate charges. In accordance with the Charter of Victims Rights, the views of the complainant and of the Police Officer in Charge are taken into account at this stage. Secondly, a more senior Managing Solicitor undertakes a further review, applying the Prosecution Guidelines and their expertise to provide additional legal analysis and make their own independent recommendations on the decision to prosecute and the appropriate charges. Finally, the matter is briefed to either a Crown Prosecutor or Solicitor Advocate. Again, they consider the decision to prosecute in accordance with the Prosecution Guidelines, which involves an assessment of the correctness of the charges and the legal and factual issues in the matter, before making a final decision on what (if any) charges should be certified. These decisions are made early in the prosecution process and result in the filing of a Charge Certificate setting out the charges that are to be prosecuted. In accordance with the ODPP's formal legal delegations, while the charges are in the Local Court a Crown Prosecutor or Solicitor Advocate may discontinue individual charges or the entire proceedings without the approval of the Director or a Deputy Director where certain preconditions are met.<sup>12</sup>

After committal, in accordance with the requirement to continually consider the decision to prosecute, matters in the District and Supreme Courts are subject to further reviews at significant junctures including at arraignment (when the accused person enters their plea), before a trial readiness hearing (when the judge confirms with the parties that the trial is ready to proceed), and while preparing for trial.

### **Discontinuation of proceedings**

The *DPP Act* provides that once a matter has been committed for trial to the District Court or Supreme Court, only the Director has the power to discontinue a matter or direct that no bill be found, a power she may delegate only to Deputy Directors.<sup>13</sup> Accordingly, any changes to or withdrawal of charges that have been committed for trial must be considered by the Director or Deputy Directors. This process involves an additional four-tier review process. First, the solicitor with carriage prepares a submission to the Director's Chambers, comprehensively setting out the

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<sup>11</sup> See Annexure B for the ODPP's organisational structure.

<sup>12</sup> Sections 7, 33(2)(b) and (c) of the *DPP Act*.

<sup>13</sup> Sections 5, 7, 33 of the *DPP Act*; see too s 5(3) of the *Crown Prosecutors Act 1986* (NSW).



factual and legal issues and addressing the Prosecution Guidelines. The Crown Prosecutor or Solicitor Advocate briefed in the matter prepares a second report, which provides additional analysis and review, with their own recommendations. In some cases, a single report may be prepared by the Crown Prosecutor or Solicitor Advocate in consultation with the solicitor with carriage. The matter is then allocated to a Senior Legal Adviser whose role is to independently review the recommendations of the solicitor with carriage and Solicitor Advocate or Crown Prosecutor and provide their own advice and recommendations. Finally, the matter – including all reports and recommendations – is considered and determined by the Director or a Deputy Director.

Proceedings may be discontinued for evidentiary or discretionary reasons. Evidentiary reasons are where it is determined that the admissible evidence is such that it cannot be said that the charge has reasonable prospects of conviction. Discretionary reasons may include where a complainant is no longer willing or able (either mentally or physically) to participate or cope with the stressors of the criminal justice system; where the continuation of proceedings would be unfair;<sup>14</sup> where two juries have been unable to agree upon a verdict and there are not exceptional circumstances that warrant proceeding with a third trial, or otherwise proceeding further would be oppressive;<sup>15</sup> where although there are reasonable prospects of conviction, a trial may be unfair, for example because disclosure obligations are unable to be met;<sup>16</sup> or where there is a combination of matters relevant to the question of whether proceeding with the prosecution is in the public interest, including the matters outlined in Chapters 1.4 and 1.6 of the Prosecution Guidelines.

Offences, including sexual offences, committed within a context of domestic violence involve a unique dynamic. It is not uncommon that complainants in these matters express reluctance to give evidence. Requests to discontinue proceedings by victims of domestic violence must be handled sensitively as recognised in Chapter 5.10 of the Prosecution Guidelines.

By way of example, in one matter considered in the Review, the complainant's mental health deteriorated so significantly whilst giving evidence that she was admitted as an involuntary patient to a mental health facility, causing the trial to be adjourned. Her social support was limited to her partner and the ODPP Witness Assistance Service and she did not have family or professional mental health support. Although the complainant wanted to give evidence once the trial resumed, she ultimately decided that she should not proceed given the risks to her mental health and life circumstances. That matter was discontinued on discretionary grounds.

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<sup>14</sup> See [Jago v The District Court of NSW \(1989\) 168 CLR 123](#); [Walton v Gardiner, Herron and Gill \(1993\) 177 CLR 378](#); [R v Subramaniam \[2002\] NSWCCA 372](#).

<sup>15</sup> Chapter 1.8 of the Prosecution Guidelines.

<sup>16</sup> Chapter 13.3 of the Prosecution Guidelines.

## Obligations under the Charter of Victims Rights

Under the Charter contained in s 6 of the *Victims Rights and Support Act 2013* (NSW), the ODPP is required to provide timely information and appropriate support to complainants. Clause 6.5 of the Charter requires the prosecution to inform a complainant of any decision of the prosecution to modify or not to proceed with charges laid against the accused, including any decision to accept a plea of guilty by the accused to a less serious charge in return for a full discharge with respect to the other charges, prior to that decision being made.

Under the Prosecution Guidelines, the ODPP must consider the complainant's view about the prosecution, their physical and mental health, whether the prosecution may adversely impact the complainant, and the protection of the complainant and the complainant's family.

In all sexual offence prosecutions, a Witness Assistance Service Officer (WAS Officer) is assigned to the matter. WAS Officers possess tertiary qualifications in relevant disciplines such as psychology and social work and have specialist knowledge in relation to working with complainants. The ODPP employs 66 WAS Officers, including nine identified First Nations officers who, where possible, are allocated to matters in which the complainant is a First Nation person to provide a culturally appropriate service. WAS Officers work closely with the legal team and are present whenever consultation is undertaken with the complainant.

In every matter where the question of whether to continue the prosecution is considered, the written views of the WAS Officer are provided. WAS Officers' views serve a discrete purpose, allowing the decision maker to be satisfied that the ODPP has taken a trauma-informed approach to its decision making. A non-exhaustive list of areas on which WAS Officers are well positioned to comment includes the capacity of the complainant to give evidence; their understanding of what has been explained to the complainant by the legal team; what supports or interventions are available to the complainant to assist them at trial; a risk assessment of the safety and mental health of the complainant; and any additional concerns the complainant, family member, or their support persons may hold in relation to the criminal justice process.

## Prosecuting sexual offences

### Nature of sexual offence prosecutions

Sexual offences involve complainants of all ages and genders, from a diverse range of socioeconomic and cultural and linguistic backgrounds. Sexual offence complainants are often vulnerable in some way, for example children and young people, elderly people, people living with disability, neurodivergence, developmental, cognitive, or mental health issues, people experiencing domestic or family violence, people with alcohol and other drug dependencies, people living in rural areas and sex workers. Around 15% of sexual assault complainants are First Nations complainants, who are overrepresented as complainants in the criminal justice system. Many complainants who engage with the ODPP have experienced complex trauma and have a wide variation of experience with, and understanding of, the criminal justice system.



Adult (and child) sexual offence prosecutions make up a significant proportion of the prosecution work conducted by the ODPP.<sup>17</sup> These matters frequently involve complex issues of fact and law. Sexual offending is by its nature a crime that is often committed in private, and these prosecutions almost always involve disputed issues of witness credibility.

### Sexual offence laws

Part 3 of the *Crimes Act* deals with offences against the person. Division 10 of Part 3 contains sexual offences against adults (and children).

In very broad terms, the prosecution of a sexual offence requires proof beyond reasonable doubt that:

- the sexual conduct (of whatever kind) occurred;
- the complainant did not consent to the sexual conduct;<sup>18</sup>
- the accused person knew the complainant did not consent to the sexual activity, was reckless as to whether they consented, or if the accused believed the complainant was consenting, that belief was not reasonable in the circumstances.

### Consent

In 2021, the NSW Parliament passed the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021*, which applies to offences committed after 1 June 2022. This reform followed an extensive review of the law of consent by the NSW Law Reform Commission.<sup>19</sup> It made significant changes to the law of consent in relation to sexual offences, including the requirements for proof concerning an accused person's knowledge as to whether a complainant was not consenting to sexual activity. The reforms introduced what has been described as the "affirmative consent" model into the *Crimes Act*.

Section 61HI of the *Crimes Act*, titled "Consent generally", presently provides that:

- (1) A person **consents** to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.
- (2) A person may, by words or conduct, withdraw consent to a sexual activity at any time.

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<sup>17</sup> Between the 2004/2005 financial year and 2023/2024 financial year, sexual offence matters (adult and child) comprise an average of 14% of all ODPP matters referred for prosecution (an average of 807 per annum) and 45% of all ODPP matters that proceed to trial (an average of 284 per annum).

<sup>18</sup> Note that this element does not apply in child sexual offence prosecutions.

<sup>19</sup> New South Wales Law Reform Commission, [Consent in relation to sexual offences](#) (Report No 148, September 2020).

- (3) Sexual activity that occurs after consent has been withdrawn occurs without consent.
- (4) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.
- (5) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity.
- (6) A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with—
  - (a) that person on another occasion, or
  - (b) another person on that or another occasion.

The *Crimes Act* gives the example that a person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.<sup>20</sup>

Section 61HJ<sup>21</sup> sets out the circumstances in which there is no consent. It provides that:

- (1) A person does not consent to a sexual activity if—
  - (a) the person does not say or do anything to communicate consent, or
  - (b) the person does not have the capacity to consent to the sexual activity, or
  - (c) the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity, or
  - (d) the person is unconscious or asleep, or
  - (e) the person participates in the sexual activity because of force, fear of force or fear of serious harm of any kind to the person, another person, an animal or property, regardless of—
    - (i) when the force or the conduct giving rise to the fear occurs, or
    - (ii) whether it occurs as a single instance or as part of an ongoing pattern, or

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<sup>20</sup> Section 61HI of the *Crimes Act*.

<sup>21</sup> Which came into effect on 1 July 2022 and applies only to offences committed after that date.



- (f) the person participates in the sexual activity because of coercion, blackmail or intimidation, regardless of—
    - (i) when the coercion, blackmail or intimidation occurs, or
    - (ii) whether it occurs as a single instance or as part of an ongoing pattern, or
  - (g) the person participates in the sexual activity because the person or another person is unlawfully detained, or
  - (h) the person participates in the sexual activity because the person is overborne by the abuse of a relationship of authority, trust or dependence, or
  - (i) the person participates in the sexual activity because the person is mistaken about—
    - (i) the nature of the sexual activity, or
    - (ii) the purpose of the sexual activity, including about whether the sexual activity is for health, hygienic or cosmetic purposes, or
  - (j) the person participates in the sexual activity with another person because the person is mistaken—
    - (i) about the identity of the other person, or
    - (ii) that the person is married to the other person, or
  - (k) the person participates in the sexual activity because of a fraudulent inducement.
- (2) This section does not limit the grounds on which it may be established that a person does not consent to a sexual activity.

### **The accused person's state of mind – Knowledge about consent**

In addition to proving beyond reasonable doubt that the complainant was not consenting at the time of the sexual conduct, the prosecution must prove beyond reasonable doubt that the accused "knew" of that lack of consent.

Section 61HK of the *Crimes Act* titled "Knowledge about consent" provides that:

- (1) A person (the *accused person*) is taken to know that another person does not consent to a sexual activity if—
  - (a) the accused person actually knows the other person does not consent to the sexual activity, or



- (b) the accused person is reckless as to whether the other person consents to the sexual activity, or
  - (c) any belief that the accused person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.
- (2) Without limiting subsection (1)(c), a belief that the other person consents to sexual activity is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.
- (3) Subsection (2) does not apply if the accused person shows that—
- (a) the accused person had at the time of the sexual activity—
    - (i) a cognitive impairment within the meaning of section 23A(8) and (9), or
    - (ii) a mental health impairment, and
  - (b) the impairment was a substantial cause of the accused person not saying or doing anything.
- (4) The onus of establishing a matter referred to in subsection (3) lies with the accused person on the balance of probabilities.
- (5) For the purposes of making any finding under this section, the trier of fact—
- (a) must consider all the circumstances of the case, including what, if anything, the accused person said or did, and
  - (b) must not consider any self-induced intoxication of the accused person.

As can be seen from the legislative provisions extracted above, the elements of sexual offences can be legally complex, and can involve difficult questions for judges and juries to resolve. Additionally, the rules of evidence and procedure that apply in criminal proceedings in NSW also significantly impact the question of whether there are reasonable prospects of conviction in a particular matter.

In recent years, there have been numerous changes to the law pertaining to sexual offences, which have significantly changed the legal landscape. Many of these changes were designed to address what are now understood to be outdated “rape myths and misconceptions”<sup>22</sup> and to improve the experience of sexual offence complainants throughout the trial process. Changes to

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<sup>22</sup> Australian Institute of Family Studies (Dec 2024) [Understanding adult sexual assault matters: Insights from research and practice: A Resource for the Justice Sector](#).



the legal landscape must be taken into account by ODPP lawyers when applying the Prosecution Guidelines.

### Changing legal landscape

Some examples of legal changes impacting the prosecution of sexual offences (and the application of the Prosecution Guidelines) include:

- The abolition of the requirement for a witness' evidence to be corroborated.<sup>23</sup>
- Provisions of the *Criminal Procedure Act 1986* (NSW) (*CP Act*) that exclude evidence of protected sexual assault communications for example, the counselling and medical records of a complainant.<sup>24</sup>
- Abolition of the *Longman* warning which required judges to warn the jury that where there is any delay in making a complaint that is not triflingly short and there is a risk of relevant forensic disadvantage that is not 'far-fetched or fanciful', it would be unsafe or dangerous to convict unless the jury, scrutinising the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, is satisfied of its truth and accuracy.<sup>25</sup>
- Limitation and clarification of the *Murray* direction which required judges to warn juries that where the prosecution case rests on the evidence of only one witness, the evidence of that witness must be scrutinised with great care before concluding that the accused is guilty.<sup>26</sup>
- Changes to the conduct of retrials and subsequent trials of sexual offence proceedings, to enable the recorded evidence of complainants to be led as their evidence in any retrial.<sup>27</sup>
- Changes to the test for admissibility of tendency and coincidence evidence.<sup>28</sup>

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<sup>23</sup> Section 164 of the *Evidence Act 1995* (NSW) (*Evidence Act*) introduced in 1995.

<sup>24</sup> Section 126H of the *Evidence Act*; ss 295 to 306 of the *CP Act* introduced in 1997. In 2010 amendments expanded the protections around when protected confidence evidence can be adduced and the factors that the Court must consider before granting leave to disclose those records (ss 298(1), 299, 299A, 299C and 299D of the *CP Act*).

<sup>25</sup> *Longman v The Queen* (1989) 168 CLR 79, impacted by the introduction in 2006 of s 294 of the *CP Act*.

<sup>26</sup> *R v Murray* (1987) 11 NSWLR 543, significantly limited in 2006 by the introduction of s 294AA of the *CP Act*; *R v Ewen* [2015] NSWCCA 117 at [101]-[147]; *Gould v R* [2021] NSWCCA 92 at [134], [136].

<sup>27</sup> Sections 306A to 306G of the *CP Act* introduced in 2005 relate to retrials of sexual offence proceedings and ss 306H to 306L introduced in 2006 relate to subsequent trials of sexual offence proceedings.

<sup>28</sup> Amendment in 2020 to the balancing test in s 101(2) of the *Evidence Act*.



- A prohibition on the use of evidence of a complainant’s prior sexual reputation, and strict restrictions on the use of evidence of a complainant’s prior sexual experience or activity or lack thereof.<sup>29</sup>
- Introduction of arrangements for complainants to limit the negative impacts of giving evidence:
  - Section 294A *CP Act* which prohibits a complainant being cross-examined by an unrepresented accused and instead provides for a person appointed by the court to so examine the complainant.<sup>30</sup>
  - Section 294B *CP Act* which allows complainants to give evidence by audiovisual link from a remote room to restrict contact between the complainant and the accused person (who is in the courtroom during the trial).<sup>31</sup>
  - Section 294C *CP Act* which entitles the complainant to a support person(s) when giving evidence (whether the complainant is in the courtroom or not).<sup>32</sup>
  - Section 294CA *CP Act* which ensures that a complainant does not have to give evidence more than once where the accused is involved in other proceedings relating to other complainants for similar offences.<sup>33</sup>
- Judicial directions designed to address misconceptions and prejudices concerning sexual assault, sexual consent and the behaviour and responses of sexual assault complainants (ss 292 to 294 *CP Act*), including:
  - Section 294 *CP Act*. Where evidence arises regarding delay in complaint or a failure to complain by the complainant, a judge must instruct the jury that delays or failures do not necessarily mean the allegation that the offence was committed is false and that complainants may have good reasons to hesitate in making, or refrain from making, a complaint.<sup>34</sup>
  - Section 293A *CP Act*. In circumstances where the evidence of the complainant is inconsistent, different to another account or has gaps, it may be appropriate for a judge to direct the jury that experience shows that people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way

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<sup>29</sup> Originally introduced in 1981 in s 409B of the *Crimes Act*; re-enacted in 1999 as s 105 of the *CP Act* (renumbered as s 293 of the *CP Act* in 2001 and renumbered again as s 294CB in 2021). See the discussion on the legislative history of this provision in *Jackmain (a pseudonym) v R* [2020] NSWCCA 150 [96]-[98]; [123]-[131] per Leeming JA.

<sup>30</sup> Introduced in 2003.

<sup>31</sup> Introduced in 2004.

<sup>32</sup> Introduced in 2005.

<sup>33</sup> Introduced in 2018.

<sup>34</sup> Introduced in 1999 (previously s 107).

each time; trauma may affect people differently, including affecting how they recall events; it is common for there to be differences in accounts of a sexual offence; and both truthful and untruthful accounts of a sexual offence may contain differences.<sup>35</sup>

- Section 292A *CP Act*. A direction by a judge to the jury that sexual assault can happen in many different circumstances, including between people who know each other, people who are in an “established relationship”, or between people who are married.<sup>36</sup>
- Section 292B *CP Act*. A direction advising the jury that there is no typical or “normal” response to non-consensual activity and that people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything, and the jury must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity.<sup>37</sup>
- Section 292C *CP Act*. A direction that people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence, and that the absence of injury or violence, or threats of injury or violence, does not necessarily mean that a person is not telling the truth about an alleged sexual offence.<sup>38</sup>
- Section 292D *CP Act*. A direction that trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not, and that the presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence.<sup>39</sup>
- Section 292E *CP Act*. A direction that the jury should not assume that a person gave consent to sexual activity because the person wore particular clothing or had a particular appearance, or consumed alcohol or another drug, or was present in a particular location.<sup>40</sup>

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<sup>35</sup> Introduced in 2018.

<sup>36</sup> Introduced in 2021.

<sup>37</sup> Introduced in 2021.

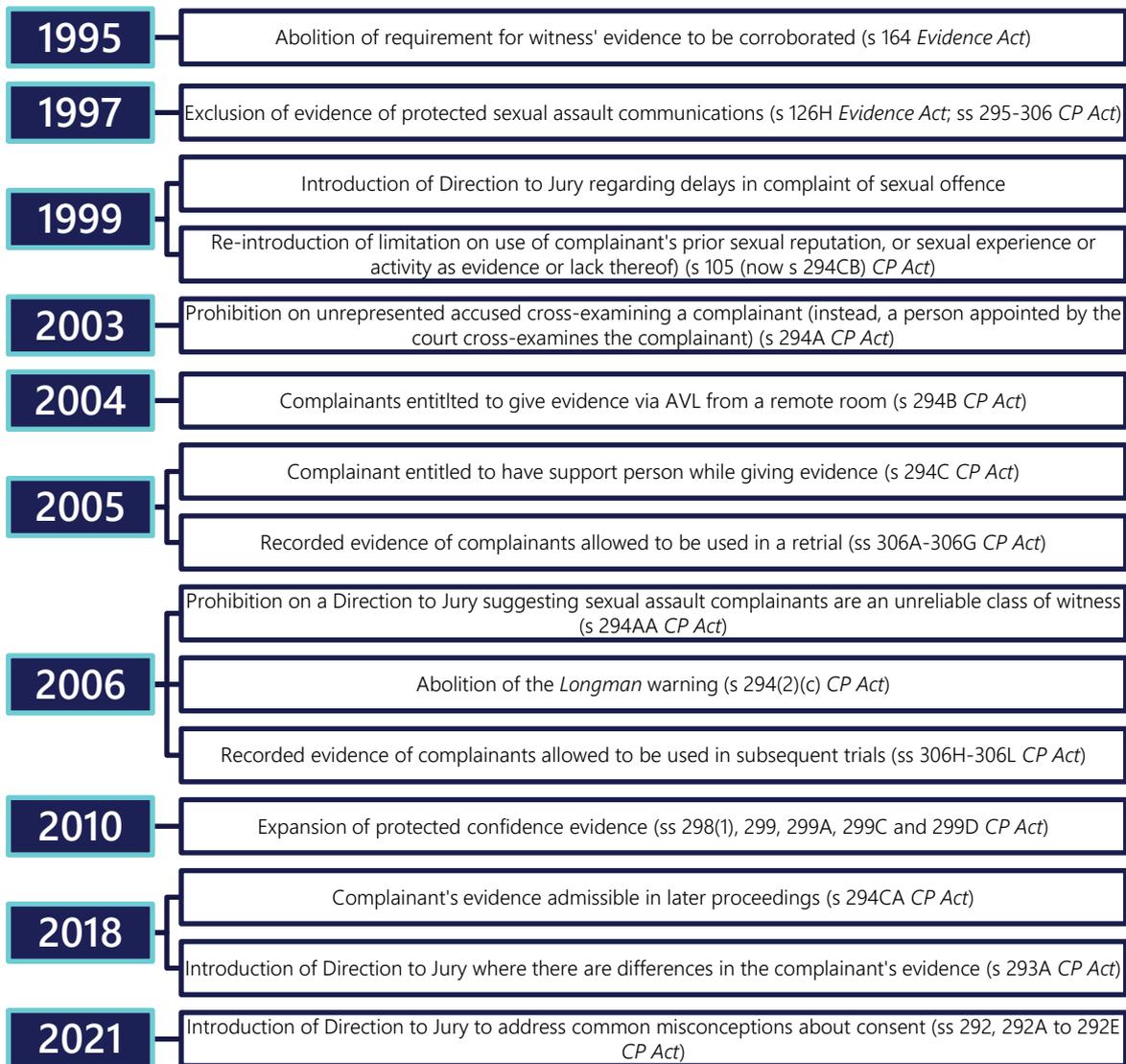
<sup>38</sup> Introduced in 2021.

<sup>39</sup> Introduced in 2021.

<sup>40</sup> Introduced in 2021.



**Figure 2 – Changing Legal Landscape of Sexual Offence Prosecutions**



### Assessing issues of credibility

In addition to legislative reforms that impact the way in which a complainant's evidence will be considered by a jury, case law has also continued to develop with respect to how the evidence of complainants should be understood.<sup>41</sup> In recent years the NSW Court of Criminal Appeal has repeatedly observed that stereotypical expectations about how a victim of sexual assault is 'supposed' or 'expected' to behave are unhelpful and misguided<sup>42</sup> and that behaviours that may not seem sensible, logical or otherwise plausible to those who have not endured that experience

<sup>41</sup> See for example *Sakar v R* [2024] NSWCCA 40, in particular the judgment of Simpson AJA from [84] (Button and Weinstein JJ agreeing), which provides an illustrative example of the complex considerations involved in assessing the credibility of sexual assault complainants.

<sup>42</sup> *Harper v R* [2022] NSWCCA 211 at [183]-[192].



may not necessarily be indicative of implausibility or inconsistency with an allegation of sexual assault.<sup>43</sup>

As Adamson JA observed in *Davis v The King* [2024] NSWCCA 120 at [166]:

*The criminal law is there to protect victims of all ages, education and walks of life, including the underprivileged, the inarticulate, and those whose cultural background has neither prepared them for, nor accustomed them to, the adversarial system which applies in Anglo-Saxon cultures.*

It is in the context of this changing legal landscape and the evolving understanding of the behaviour and experience of sexual assault complainants, that difficult prosecutorial decisions concerning sexual offences are made.

Decisions about whether to commence or continue prosecutions will often require close examination of issues concerning a complainant's credibility. However, the fact that there may be issues concerning a complainant's credibility will not necessarily lead to the conclusion that there are no reasonable prospects of conviction. What is required is a careful analysis of the evidence, having regard to the applicable law and the Prosecution Guidelines, predicated on the assumption that the trial will be conducted in a competent fashion and the jury will be properly directed. These decisions are not easy, and they are made with care, diligence, and an anxious consideration of the important role of prosecutorial discretion and the public interest.

It is important to note that satisfaction of the Prosecution Guideline test, namely, that it cannot be said that the matter does not have reasonable prospects of conviction, should not be equated to the proposition that a conviction is certain or more likely than not, and a verdict of not guilty does not mean that there has been a failure to apply the Prosecution Guidelines.

### **Analysis of conviction rates**

When comparing rates of conviction in NSW over the past five years with other Australian jurisdictions, data show in relation to all types of offending, on average only South Australia and Tasmania have higher conviction rates than NSW. Considering adult and child sexual offence matters, on average NSW has the second highest conviction rate in Australia, behind only Tasmania.<sup>44</sup>

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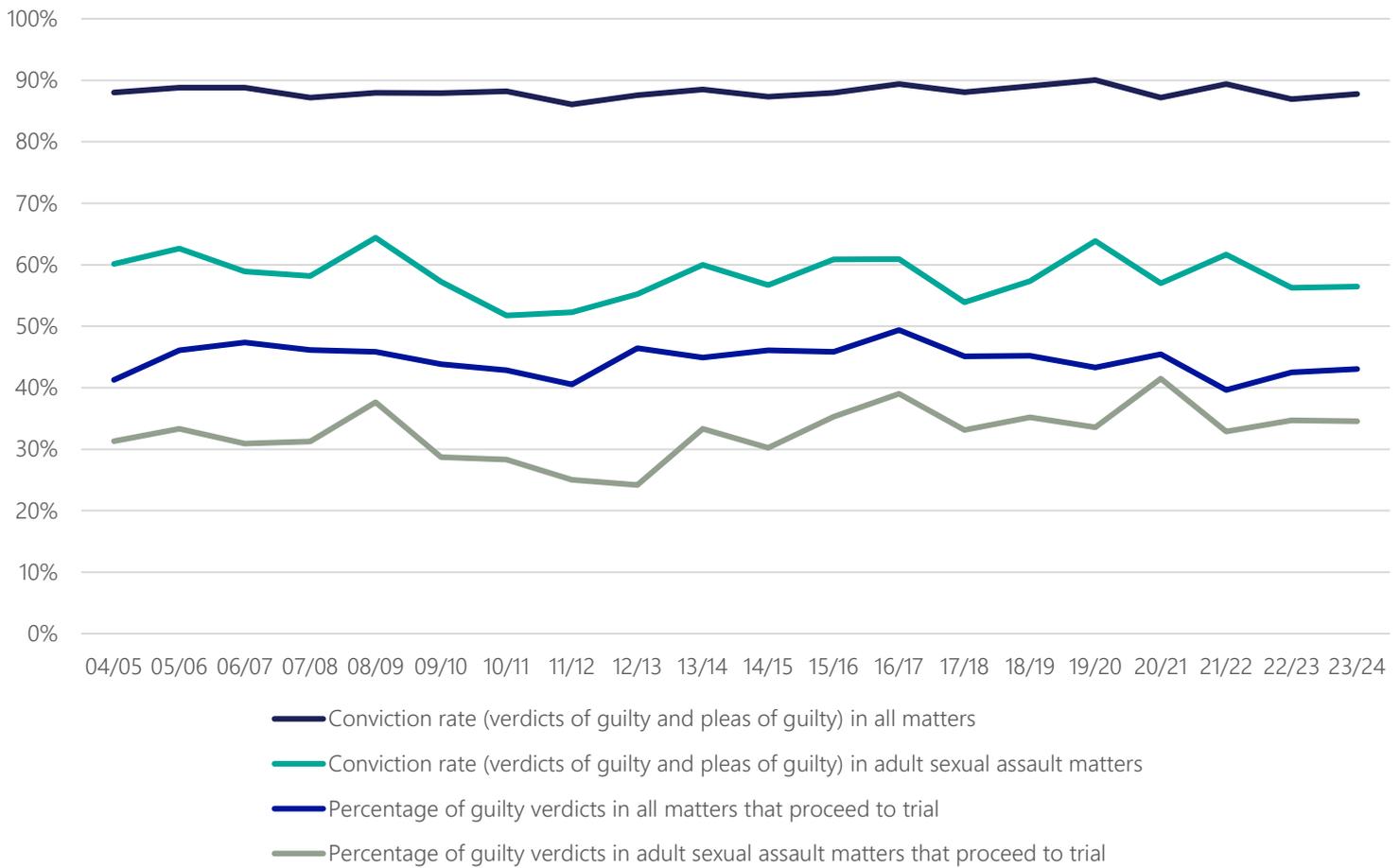
<sup>43</sup> *Maughan v R* [2020] NSWCCA 51 at [99].

<sup>44</sup> Caution must be exercised when comparing NSW conviction rates and other Australian jurisdictions using ABS data. ABS data is collected from multiple states and territories across Australia to create a national dataset. It uses a standardised methodology to seek to ensure comparisons across different jurisdictions is accurate. Unlike ODPP data, ABS data do not distinguish between sexual offences against children and those against adults, so the ability to compare sexual assault conviction rates using ABS data is limited.

### Conviction rates in NSW

Over the last 20 years the annual conviction rate in all matters (whether by way of plea of guilty or verdict of guilty after trial) has been consistent, ranging between 86% and 90%, with an average of 88%. The annual rate of conviction in all matters that proceed to trial over that period has also remained consistent, averaging 45%. Similarly, the average annual conviction rate in all adult sexual assault matters (whether by way of plea of guilty or verdict of guilty after trial) has also been comparatively consistent, ranging between 52% and 64% with an average of 58%. The annual rate of conviction in adult sexual assault matters that proceed to trial over that period has also remained consistent, averaging 33% (see Table 1).

**Table 1 - Conviction Rates in NSW**  
ODPP Statistics FY04/05 to FY23/24



Matters involving sexual offences against adults are more likely to proceed to a contested trial than other types of matters. Between 2004/2005 and 2023/2024, on average 33% of all matters (all offences) were committed for sentence and 31% of all matters were committed for trial (with the balance of matters (36%) disposed of in the Local Court). In contrast, with adult sexual

offences, only 10% of matters were committed for sentence and 67% of matters were committed for trial (with the balance of matters (23%) disposed of in the Local Court).<sup>45</sup>

### **Discontinuation of proceedings**

Between 2018 and 2023, the ODPP discontinued 15-21% of all adult sexual assault matters listed for trial in the District Court each year. While constraints on data mean that it is difficult to say with certainty, it is likely this rate of discontinuance is higher than for other offence categories (except child sexual assault and assault).<sup>46</sup>

From 2020 to 2023, of all adult sexual assault matters that were discontinued, approximately three quarters were discontinued for discretionary reasons and approximately one quarter were discontinued on evidentiary grounds. Discontinuance on evidentiary grounds most commonly occurs where new evidence arises before or during a trial or evidentiary deficiencies are identified during the ongoing review of the matter.

### **Scope and Methodology of the Sexual Assault Review**

The Review examined all sexual assault matters with a trial or special hearing<sup>47</sup> listing between 1 April and 31 December 2024. This review was undertaken 'mid-stream', that is, it considered pending matters with the intention to identify any matters that required discontinuance or had not been considered in accordance with the Prosecution Guidelines.

The Review included all offences involving complainants over the age of consent (aged 16 or 17 years) at the time of the offence. It excluded child sexual assault matters where the complainant was 15 years or under at the time of the offence. This distinction reflects the differences in consent law noting that the applicable sexual offences for complainants aged 16 or 17 years is the same as those applicable to adult complainants.

The Review included all matters involving sexual offences including aggravated offences and sexual touching offences. Sexual offence matters often involve related offending of a different kind such as other types of assaults, stalking, firearms offences and sexual assault that occurs in the course of a break and enter. The Review also included some matters involving child sexual assault where the offending began when the complainant was a child and continued into adulthood.

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<sup>45</sup> Matters are disposed of in the Local Court where the matter was reviewed by the ODPP and returned to Police, discontinued in the Local Court, or was finalised in the Local Court by the ODPP following a plea or summary hearing.

<sup>46</sup> The ODPP's internal data is derived from court result records, which are manually entered onto the ODPP's case management system. Any errors in the entry of the records will impact the accuracy of the data.

<sup>47</sup> A special hearing occurs where an accused has been found unfit to be tried (due to mental health or cognitive impairment). They are conducted as nearly as possible as a criminal trial with additional procedures including different verdicts: ss 54 to 56 [Mental Health and Cognitive Impairment Forensic Provisions Act 2020](#).



There were 327 matters subject to the substantive review.<sup>48</sup>

To ensure high standards of independence and objectivity, the Review employed the principles approved in the [NSW Government Internal Audit Policy](#). Key controls included:

- Clear scope and responsibilities: Scope and responsibilities were documented and communicated.
- Record keeping: All documents relied upon were recorded and the findings of each matter review were documented, ensuring transparency.
- Experienced reviewers: The lawyers tasked with reviewing the matters were highly experienced Deputy Senior Crown Prosecutors and Crown Prosecutors. They were selected for their specialised expertise in this complex area of law, their proven understanding and diligent application of the Prosecution Guidelines, and for their recent experience in prosecuting sexual assault matters with challenging factual elements and difficult legal issues. The reviewers were approved by the Senior Crown Prosecutor. Significant resources were dedicated to the Review. The reviewers were supported by a Senior Solicitor and a team of legal support officers.
- Independence: The reviewer's location differed from the region of the prosecution (for example, Crown Prosecutors in the Lismore office reviewed matters listed and briefed in Sydney). This procedure ensured the reviewer had the required level of expertise and prosecution experience in the NSW jurisdiction whilst also safeguarding independence. The identity of the legal team and the reviewer were documented to demonstrate that separate individuals were involved in the review process.
- Conflicts of Interest: Any conflicts (such as the reviewer having previously worked on a particular matter) were documented and managed.
- Compliance with the Prosecution Guidelines: When conducting the review, reviewers had regard not only to whether the matter should proceed, but also to whether the Prosecution Guidelines had been complied with, noting that a key control for effective decision-making throughout the prosecution process is compliance with the Prosecution Guidelines.
- A multi-step review process was employed, including consideration by Director's Chambers and/or further review to identify any systemic issues and determine non-compliance with the Prosecution Guidelines.

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<sup>48</sup> A further 23 matters fell within scope but had already been referred to Director's Chambers for consideration under the ODPP's normal procedures (four-tier review process as set out on page 10), prior to being considered in the Review. These matters were excluded from the data set of the review.



- Independent review: The draft Sexual Assault Review Report and cross-section of matters the subject of review were independently reviewed by Sir Max Hill KC (the former DPP of England and Wales) and Professor Julia Quilter, University of Wollongong, School of Law.

To ensure the accuracy of the documents and information considered by the reviewers, the documentation was collated by those with detailed knowledge of the matter: the solicitor with carriage and the advocate briefed for trial. Documents included, but were not limited to, the Indictment, Crown Case Statement, internal legal reports, the complainant's statement, and other items of significance from the brief of evidence, such as the accused's version of events (where one existed). The solicitor with carriage prepared a summary of the matter for the purpose of the Review including:

- factual summary;
- the identified (legal and factual) issues;
- any previous recommendations to discontinue the matter (by the solicitor with carriage, Managing Solicitor, certifier, advocate briefed or Police);
- any history of plea negotiations;
- significant changes in circumstances since committal; and
- outstanding requisitions that may be critical to the trial proceeding.

The reviewer considered whether the decision to prosecute or continue the prosecution was in accordance with the Prosecution Guidelines, taking into account:

- whether there was no reasonable prospect of conviction on some or all of the charges on the admissible evidence;
- the public interest;
- all matters referred to in Chapter 1.3 of the Prosecution Guidelines including the reliability and credibility of the complainant;
- whether the charges on the Indictment were correct and correctly pleaded;
- any appropriate plea offer; and
- whether disclosure was complete.

The reviewers were instructed that there should be careful consideration of matters involving intoxication, assaults alleged to have occurred during relationships, complaints made during



family law proceedings and evidence going to the issue of lack of consent and the necessary mental element.<sup>49</sup>

In some instances, additional requisitions, supplementary statements from the complainant(s) or further consultation with the complainant(s) were requested by the reviewer prior to finalisation of the review of a particular matter.<sup>50</sup> In this case, the matter was referred back to the solicitor with carriage and advocate briefed to obtain the relevant information before the review was finalised.

Where the reviewer was of the opinion that some or all charges should be terminated, the matter was referred back to the solicitor with carriage and advocate briefed who prepared a Submission to Director's Chambers. These matters were considered according to standard procedures as set out on page 10.

Where reviewers identified potential issues with the application of the Prosecution Guidelines in some respect or where the matter was terminated on evidentiary grounds, the matter was subject to further, more detailed review by an Acting Deputy Director (a Senior Counsel).

Where the Prosecution Guidelines were not complied with in some respect, the legal team involved was advised and counselled.

The Review commenced on 18 March 2024 with matters prioritised according to the listing date of the trial and the bail status of the accused. The substantive review concluded on 10 July 2024. The additional reviews conducted by the Acting Deputy Director were completed on 30 August 2024. A small number of matters required more time before an outcome could be achieved as they required further action prior to finalisation, for example, receiving and considering additional requisitions from Police or awaiting responses from defence regarding plea resolution. On 29 November 2024, the last matter in the Sexual Assault Review was completed.

The review process was intensive and involved the extensive allocation of ODPP resources. Each of the 327 matters required multiple hours of work by the solicitor with carriage and advocate briefed in preparing summaries and consolidating documentation. The Review was coordinated by a Deputy Solicitor with the assistance of the Principal Solicitor and six legal support officers. Thirty-one Crown Prosecutors and 12 Deputy Senior Crown Prosecutors were involved in undertaking the reviews, also supported by a Senior Solicitor. An Acting Deputy Director

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<sup>49</sup> These issues can present legal and evidentiary challenges at trial and are frequently raised on appeal. Recent examples include *Sakar v R* [2024] NSWCCA 40 and *Smee v The King* [2024] NSWCCA 121; *Beattie v R* [2020] NSWCCA 334; *Holt v R* [2019] NSWCCA 50; *Irmak v R*; *R v Dagdanasar* [2021] NSWCCA 178; *Lee v R* [2023] NSWCCA 203.

<sup>50</sup> Prosecutors can only consider the accused's version of events or defences, when the accused raises this information with the police or ODPP. Where the accused provides this information, it was considered.



conducted further investigations. Almost 50,000 pages of documents were reviewed as part of the Review, which generated approximately 2,000 pages of new documentation and analysis.

## Findings of the Sexual Assault Review

The Sexual Assault Review examined 327 matters, with the following results:

1. Discontinuance:
  - (a) In 95% of matters reviewed (310 matters) a determination was made to proceed to trial.
  - (b) 5% of matters reviewed (17 matters) were discontinued. The grounds for discontinuance were as follows:
    - (i) Nine matters were discontinued on evidentiary grounds.<sup>51</sup>
    - (ii) Eight matters were discontinued on either discretionary grounds only, or a combination of discretionary and evidentiary grounds.

As referred to on page 23, over the course of a typical year, between 15% and 21% of all sexual offence matters that have been committed for trial may be discontinued. The number of matters discontinued in 2024 (both in and outside the scope of the Review), is consistent with the average rate of discontinuance seen between 2018 and 2023.<sup>52</sup> This suggests that the matters discontinued under the Review would have been identified through the ODPP's standard procedures requiring that the decision to prosecute be considered throughout the lifecycle of the matter, particularly in the course of preparing for trial.

Of the 327 matters reviewed, 187 were committed for trial before the commencement of the 2021 Sexual Consent Reforms and 140 matters (43%) after.

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<sup>51</sup> There are many reasons why it may be determined that a matter should not proceed. A decision to withdraw all charges does not necessarily indicate a failure to apply the Prosecution Guidelines. As the test is evaluative and determined by the admissible evidence in the individual case, reasonable minds may differ when considering the question of reasonable prospects of conviction in complex factual and legal circumstances. Where the matter was discontinued but there was found to have been compliance with the Prosecution Guidelines, there may have been a change to the admissible evidence, or it was found that there was appropriate consideration of the Prosecution Guidelines and the decision to prosecute was within the appropriate exercise of discretion, but ultimately after review by a number of senior practitioners, it was determined that the better view was that the matter did not enjoy reasonable prospects of conviction.

<sup>52</sup> Twenty matters were discontinued throughout 2024 that were out of scope of the Review (either they did not have a trial listing or were listed prior to the commencement of the Review). In 26 matters a determination was made to proceed to trial, but they were subsequently discontinued consistent with the requirement to continually reassess the decision to prosecute (as discussed at page 8). Twelve matters were discontinued due to a change in the complainant's circumstances (discretionary reasons), 11 matters were discontinued due to changes in the admissible evidence (evidentiary reasons), and 3 were discontinued for a combination of discretionary and evidentiary reasons.

Ten of the 17 matters which were discontinued involved alleged offences that were committed for trial prior to the commencement of the law reform and six after the law reform. The rate of discontinuance appears to be consistent between offences allegedly committed before the commencement of the affirmative consent legislation compared with offences alleged to have been committed after its commencement. However, the data sample is not large enough to make any definitive findings as to whether the reform has impacted the likelihood of matters proceeding.

2. Compliance with the Prosecution Guidelines:

- (a) 97% of matters (316 matters) were found to have complied with the Prosecution Guidelines.
- (b) In 3% of matters (11 matters) the Prosecution Guidelines were not complied with in some respect. There were no findings of misconduct or egregious breaches of the Prosecution Guidelines. In those 11 matters, the outcomes were as follows:
  - (i) In five matters, all charges were discontinued on evidentiary grounds alone. In each of those five matters, the factual and legal issues were explored by the legal team, however, the Prosecution Guidelines were not appropriately applied. Each matter involved the exercise of judgment, with complex factual and legal issues including intoxication of the complainant and inconsistencies in the complainant's evidence.
  - (ii) In one matter, all charges were discontinued on discretionary grounds.
  - (iii) In the remaining five matters, the matter proceeded or will proceed to trial.<sup>53</sup>

3. In the 11 matters where there was not proper compliance with the Prosecution Guidelines, only two had a brief served within the timeframe prescribed in Local Court Practice Note Comm 3. In four matters, the certifier was briefed to consider the charges more than six months after the first court return date. Late and incomplete brief service results in time pressures for the ODPP because such delays reduce the time available

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<sup>53</sup> Non-compliance with the Prosecution Guidelines does not necessarily mean that a matter should be discontinued. As an example, in one matter, the Sexual Assault Review identified that the certifier applied an incorrect legal test to a single element in one count of a multi-count matter. That count was discontinued, and a more appropriate charge was substituted. The matter proceeded on other counts. The offender was subsequently convicted on multiple counts. In another matter, the certifier did not consider the charge to the correct standard. It was appropriate for the matter to proceed, albeit another charge with the same maximum penalty was preferred as the more appropriate charge. The misapplication of the Prosecution Guidelines had already been identified through other review mechanisms independently of the Sexual Assault Review. That matter is awaiting trial.



for the ODPP to consider the matter, noting that the ODPP must certify the charges within six months after the first court return date.<sup>54</sup>

4. The Review demonstrated a consistently high standard of legal analysis by solicitors and Crown Prosecutors in an area of the law that is legally and factually complex.
5. No systemic deficiencies of process were identified:
  - (a) The multi-step standard operating procedures (as set out on page 10) were found to be robust and effective controls in ensuring that legal and factual issues were considered in every matter.
  - (b) Complainants were appropriately contacted and consulted in accordance with the Prosecution Guidelines.
  - (c) Where appropriate (in accordance with the Prosecution Guidelines), the legal team engaged with the accused's legal representative to appropriately resolve the matter.
6. Decisions about whether to commence or continue prosecutions are complex; each matter is unique and must be considered on its merits. The Prosecution Guidelines do not envisage every possible scenario that may arise in criminal proceedings. They are not intended to, and do not, provide a formula which can be applied to individual cases to yield a particular outcome. The Prosecution Guidelines were found to be an effective framework for decision making, ensuring that the ODPP only prosecutes matters where there are reasonable prospects of conviction and the prosecution is in the public interest.
7. No policies or considerations other than the Prosecution Guidelines were found to have been applied.

## Opportunities for improvement

A number of themes were identified by the Review:

1. Factual and legal issues were generally thoroughly considered and a balanced approach to complainant evidence and evidence of the accused (where available) was applied. However, the matters where problems with the application of the Prosecution Guidelines were identified involved legally and factually complex considerations such as

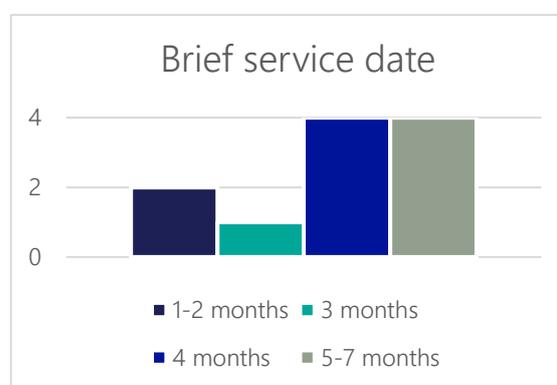
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<sup>54</sup> Section 68 of the *CP Act* provides that six months after the first return date, a Magistrate must discharge the accused unless the ODPP can satisfy the Magistrate that it is in the interests of justice to adjourn the matter.



the intoxication of the complainant and the analysis of the issue of consent where the evidence on that issue was complex.

2. In some matters there was some confusion as to the applicable legal test for charge certification. Section 66(2)(a) of the *CP Act* provides that the test for charge certification is whether the 'evidence available to the prosecutor is capable of establishing each element of the offences', which does not align with the higher standard imposed by the Prosecution Guidelines.
3. In some matters there was insufficient analysis by the Charge Certifier, potentially due to workload and time constraints.
4. In a small number of matters, errors in the drafting of the Indictment were identified, specifically, particularising all elements in sexual touching offences.
5. Late and incomplete brief service may be a contributing factor to poor decision making. The Local Court Practice Note Comm 3 prescribes that the brief of evidence is to be served by NSW Police within eight weeks of the first mention. Timely brief service gives the ODPP eight weeks to conduct all necessary analyses, including conferencing the complainant.



Opportunities for improvement were identified in the following areas:

1. Further training in the areas of:
  - (a) The application of Prosecution Guidelines 1.2-1.4 to the certification test, including the importance of referencing the test, as articulated in the Prosecution Guidelines, in legal analysis.
  - (b) The complexities of the law of consent and guidance on intoxication and consent, including where the complainant's recollection is limited or fragmented due to intoxication, where the complainant 'gives in' to the sexual act,<sup>55</sup> and where inconsistencies in accounts may impact the assessment of the credibility of the complainant.

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<sup>55</sup> Where a complainant 'gives in' to the sexual act, the assessment of the accused's state of mind (their knowledge, belief or recklessness as to whether the complainant consented) is a more complex forensic task.



- (c) The need to seek an adjournment in the Local Court when there is insufficient time to properly consider the certification (particularly in circumstances where the brief is served late).
  - (d) Charge Certificates and Indictment drafting skills, including not overloading the Indictment, particularising between dates, and the application of s 80AF of the *Crimes Act*.
  - (e) The application of the 'Victim related factors' in Prosecution Guideline 1.4, including the complainant's mental health and their attitude to the prosecution process.
  - (f) Selection of the appropriate choking offence under s 37 of the *Crimes Act*.
  - (g) Amendment to the preamble to the ODPP Legal Delegations to clarify that the Prosecution Guidelines are to be applied at every stage of the prosecution process.
2. Amendment to internal template documents and standard operating procedures providing further clarity on the charge certification test and to reiterate that certifiers must fully analyse factual and legal issues, assess the admissible evidence available at the time of certification, and consider the purpose of jury directions, that is to ensure the jury does not operate on preconceptions or personal beliefs, but as impartial, independent and fair-minded fact finders.
  3. Enhancement of technology used to generate Charge Certificates and Indictments to provide improved cross-checking of offence particulars.
  4. Establishing a 'Consent, Sexual Assault and Intoxication Working Group' with internal stakeholders and academic experts to consider the research presented at the recent Australian Institute of Judicial Administration National Justice Forum on Sexual Assault, the reasons in *BQ v The King* [2024] HCA 29, and the use of expert evidence at trial to address the impact of intoxication on memory and behaviour.
  5. Establishing a 'Trauma and Memory Working Group' with internal stakeholders and academic experts to consider evidence-based research on the impact of trauma upon memory recall, consistency of accounts, and demeanour.
  6. Consideration of the utility of a fourth-tier review process to include a bill-finding process by a Deputy Senior Crown Prosecutor or experienced Crown Prosecutor to confirm charges at the arraignment stage (subject to funding).
  7. Continue delivering external information sessions for the media and other stakeholders on criminal law processes and procedures by the ODPP's Communications Unit.
  8. Review of procedures for briefing private Crown Prosecutors, including a review of the guidance and materials and resources made available and the consideration of a



conference with the private counsel, solicitor with carriage, and their allocated Deputy Senior Crown Prosecutor mentor.

9. Amendments to the Memorandum of Understanding with NSW Police concerning timeframes for brief service and further police training on disclosure. Procedures to improve brief service reporting data, which currently does not allow the ODPP to monitor the time taken for police to serve a brief of evidence.



**Sally Dowling SC**

**Director of Public Prosecutions**

26 February 2025



## Annexure A – Prosecution Guidelines, comparison by jurisdiction\*

Jurisdiction		Criteria for the decision to prosecute
Australia	Australia: <a href="#">Prosecution Policy of the Commonwealth DPP</a>	<p>A two-stage test must be satisfied before a prosecution is commenced:</p> <ul style="list-style-type: none"> <li>• There must be <b>sufficient evidence</b> to prosecute the case; and</li> <li>• It must be evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the <b>public interest</b>.</li> </ul> <p>[emphasis original]</p>
	New South Wales: <a href="#">The ODPP Prosecution Guidelines, Chapter 1</a>	<p>The decision to prosecute involves two questions:</p> <ul style="list-style-type: none"> <li>• Can it be said that there is no reasonable prospect of conviction on the admissible evidence?</li> <li>• Is the prosecution in the public interest?</li> </ul>
	Victoria: <a href="#">Policy of the Director of Public Prosecutions for Victoria, Chapter 1</a>	<p>A prosecution may only proceed if:</p> <ul style="list-style-type: none"> <li>• There is a reasonable prospect of a conviction; and</li> <li>• A prosecution is in the public interest.</li> </ul>
	Queensland: <a href="#">Director's Guidelines, the Decision to Prosecute</a>	<p>The decision to prosecute is a two tiered test:</p> <ul style="list-style-type: none"> <li>• Is there sufficient evidence?; and</li> <li>• Does the public interest require a prosecution?</li> </ul>



Jurisdiction		Criteria for the decision to prosecute
	<b>South Australia:</b> <a href="#">Statement of Prosecution Policy &amp; Guidelines, the Decision to Prosecute</a>	<p>A prosecution should not proceed if:</p> <ul style="list-style-type: none"> <li>• There is no reasonable prospect of a conviction being secured.</li> <li>• In light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued.</li> </ul>
	<b>Western Australia:</b> <a href="#">Statement of Prosecution Policy and Guidelines 2022, the Decision to Prosecute</a>	<p>The decision to prosecute:</p> <ul style="list-style-type: none"> <li>• Whether there is a prima facie case is a threshold test which governs the decision to charge. In the absence of a prima facie case, a person should not be charged.</li> <li>• If a prima facie case exists, a prosecution should only proceed when it is in the public interest.</li> </ul>
	<b>Tasmania:</b> <a href="#">Prosecution Policy and Guidelines, Prosecution Guidelines</a>	<p>The initial consideration in the exercise of the discretion to prosecute is:</p> <ul style="list-style-type: none"> <li>• Whether the evidence is sufficient to justify the institution or continuation of a prosecution.</li> <li>• If satisfied, the prosecutor must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued.</li> </ul>
	<b>Northern Territory:</b> <a href="#">Guidelines of the Director of Public Prosecutions, the Decision to Prosecute</a>	<p>The prosecution process should be initiated or continued whenever:</p> <ul style="list-style-type: none"> <li>• It appears that there is a reasonable prospect of conviction and</li> <li>• It is in the public interest.</li> </ul>



Jurisdiction		Criteria for the decision to prosecute
	<p><b>Australian Capital Territory:</b>  <a href="#">The Prosecution Policy of the Australian Capital Territory.</a>  <a href="#">the Decision to Prosecute</a></p>	<p>The decision to prosecute can be understood as a two-stage process:</p> <ul style="list-style-type: none"> <li>• First, does the evidence offer reasonable prospects of conviction?</li> <li>• If so, is it in the public interest to proceed with a prosecution?</li> </ul>
<b>New Zealand</b>	<p>The Solicitor-General's Prosecution Guidelines  <a href="#">Te Aratohu Aru a te Rōia Mātāmua o te Karauna,</a>  <a href="#">Making prosecution decisions</a>  <a href="#">Te taenga atu ki ngā whakatauaru</a></p>	<p>There are two stages to the test:</p> <ul style="list-style-type: none"> <li>• The first stage is the Evidential Test: Is there enough evidence to prove the proposed charge beyond reasonable doubt?</li> <li>• The second stage is the Public Interest Test: Does the public interest require a prosecution to be brought?</li> </ul> <p>Prosecution Guidelines were updated on 1 October 2024, and plan to come into force in January 2025. Below is the test, which is still in force:</p> <p><a href="#">The Test for Prosecution</a> is met if:</p> <ul style="list-style-type: none"> <li>• The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction; and</li> <li>• Prosecution is required in the public interest.</li> </ul>
<b>Canada</b>	<p><b>Canada (Federal, including the Territories):</b> <a href="#">Public Prosecution Service of Canada Deskbook, 2.3 Decision to Prosecute</a></p>	<p>Crown counsel must only proceed with prosecutions where two conditions are met:</p> <ul style="list-style-type: none"> <li>• There is a reasonable prospect of conviction; and</li> <li>• The prosecution is in the public interest.</li> </ul>



Jurisdiction	Criteria for the decision to prosecute
<b>Ontario:</b> <a href="#">Crown Prosecution Manual, Charge Screening</a>	When considering whether to continue the prosecution of a charge: <ul style="list-style-type: none"> <li>• The Prosecutor should determine if there is a reasonable prospect of conviction.</li> <li>• If there is a reasonable prospect of conviction, the Prosecutor must then consider whether it is in the public interest to continue the prosecution.</li> </ul>
<b>Newfoundland and Labrador:</b> <a href="#">Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador, the Decision to Prosecute</a>	Crown Attorneys must consider two issues when deciding whether to prosecute: <ul style="list-style-type: none"> <li>• Whether there is sufficient admissible evidence to justify the initiation or continuation of proceedings; and,</li> <li>• Whether the public interest is served by the initiation or continuation of a prosecution.</li> </ul>
<b>Prince Edward Island:</b> <a href="#">Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Prince Edward Island, the Decision to Prosecute</a>	Crown Attorneys must consider two issues when deciding whether to prosecute: <ul style="list-style-type: none"> <li>• First, whether the evidence is sufficient to justify the institution or continuation of proceedings.</li> <li>• Second, whether the public interest requires that a prosecution be pursued.</li> </ul>
<b>Nova Scotia:</b> <a href="#">Nova Scotia Public Prosecution Service, the Decision to Prosecute (Charge Screening)</a>	Prosecutors must consider two issues when deciding whether or not to prosecute: <ul style="list-style-type: none"> <li>• Is there sufficient evidence?; and</li> <li>• Is the public interest best served by prosecution of the case?</li> </ul>



Jurisdiction		Criteria for the decision to prosecute
	<b>New Brunswick</b> <b>Nouveau Brunswick:</b> <a href="#">Public Prosecutions Operation Manual, Pre-Charge Screening</a>	The Crown Prosecutor must be satisfied that there is: <ul style="list-style-type: none"> <li>• Evidence to provide a reasonable prospect of conviction against each alleged offender on each charge.</li> <li>• Where the proposed charge passes the evidential test, the Crown Prosecutor will then consider whether the public interest requires a prosecution.</li> </ul>
	<b>British Columbia:</b> <a href="#">Crown Counsel Policy Manual, Charge Assessment Guidelines</a>	The two-part test for charge assessments: <ul style="list-style-type: none"> <li>• Whether there is a substantial likelihood of conviction; and, if so,</li> <li>• Whether the public interest requires a prosecution.</li> </ul>
	<b>Saskatchewan:</b> <a href="#">Prosecutions – Proceeding with Charges</a>	Crown prosecutors will apply a twofold test: <ul style="list-style-type: none"> <li>• Is there a reasonable likelihood of conviction, and</li> <li>• Is it in the public interest to proceed.</li> </ul>
	<b>Alberta:</b> <a href="#">Guideline Crown Prosecution Service, Decision to Prosecute</a>	Crown prosecutors must consider two overarching questions when determining whether to prosecute: <ul style="list-style-type: none"> <li>• First, is the evidence sufficient to justify the commencement or continuation of proceedings?</li> <li>• Second, if it is, is the commencement or continuation of the prosecution in the public interest?</li> </ul>



Jurisdiction		Criteria for the decision to prosecute
	<b>Manitoba:</b> <a href="#">Role of the Manitoba Prosecution Service</a>	<p>The Crown attorney, based on the evidence, must consider two important factors:</p> <ul style="list-style-type: none"> <li>• Whether there is a reasonable likelihood of conviction and,</li> <li>• Whether the prosecution is in the public interest.</li> </ul>
<b>Northern Ireland</b>	Public Prosecution Service <a href="#">Code for Prosecutors, Prosecution Decisions</a>	<p>The Test for Prosecution is met if:</p> <ul style="list-style-type: none"> <li>• The evidence which can be presented in court is sufficient to provide a reasonable prospect of conviction; and</li> <li>• Prosecution is required in the public interest.</li> </ul>
<b>Ireland</b>	Oifig an Siúrthóra Ionchúiseamh Poiblí <a href="#">Office of the Director of Public Prosecutions, Guidelines for Prosecutors</a>	<p>The Decision Whether to Prosecute:</p> <ul style="list-style-type: none"> <li>• A prosecution should be initiated or continued if it is in the public interest, and not otherwise.</li> <li>• The prosecutor should not lay a charge where there is no reasonable prospect of securing a conviction before a reasonable jury or a judge in cases heard without a jury.</li> </ul>



Jurisdiction		Criteria for the decision to prosecute
England	<p>The Crown Prosecution Service</p> <p><a href="#">Code for Crown Prosecutors, the Decision Whether to Prosecute</a></p>	<p>The Full Code Test to start or continue a prosecution has two stages:</p> <ul style="list-style-type: none"> <li>• Sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge (the evidential stage); followed by</li> <li>• A prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour (the public interest stage).</li> </ul> <p>Note: An exception may occur where the Threshold Test may be applied instead of the Full Code Test.</p>



Jurisdiction		Criteria for the decision to prosecute
<b>Wales</b>	The Welsh Government <a href="#">Prosecution Code, the Prosecution Test</a>	A prosecution must not be commenced unless the case has passed both stages of the Prosecution Test: <ul style="list-style-type: none"> <li>• Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect for each offence under consideration (the sufficient evidence stage), followed by</li> <li>• Whether the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour (the public interest stage).</li> </ul>
<b>Scotland</b>	Crown Office & Procurator Fiscal Service <a href="#">Prosecution Code, Criteria for Decisions</a>	Prosecutors must take into account legal and public interest considerations, including: <ul style="list-style-type: none"> <li>• Legal considerations: Domestic and international law.</li> <li>• Evidential considerations: The Procurator Fiscal must be satisfied that there is sufficient admissible evidence to justify commencing proceedings.</li> <li>• Public Interest considerations: The prosecutor must consider what action is in the public interest.</li> </ul>

\*The Codes or Guidelines have been condensed. For the full prosecution tests, please follow the attached links.



## Annexure B – Office of the Director of Public Prosecutions (NSW) Organisational Structure

