ODPP
New South Wales

# Victims' Right of Review Policy

JULY 2021

# Contents


1. Overview 3

2. Purpose 3

3. Background 3

4. Scope 4

5. Key Responsibilities 4

6. Review Principles 4

7. Review Process 5

Appendix A: Process for reviewing decisions not to prosecute 10

## 1. Overview

The ODPP's Victims' Right of Review Policy outlines:

- the right of victims of crime to request a review of an ODPP decision not to proceed with a prosecution
- the review process
- the possible outcomes of a review.

## 2. Purpose

The Office of the Director of Public Prosecutions is committed to being responsive to victims of crime, witnesses and other stakeholders in the prosecution process, and transparent in our decision making.

We recognise that a decision we take not to proceed with a prosecution is of great significance to victims and that they should be:

- informed before it is formally announced
- entitled to seek a review of the decision, if dissatisfied with it.

The purpose of this Victims' Right of Review (VRR) Policy is to:

- establish and support the right of a victim to seek a review of an ODPP decision not to proceed with a prosecution
- provide a framework for a consistent approach to victims' review requests.

While it is an important principle that the public should be able to rely on decisions the ODPP takes as final, a careful balance must be struck between providing certainty and being responsive to victims who seek reviews.

## 3. Background

The Royal Commission into Institutional Responses to Child Abuse recommended in its Criminal Justice Report that:

> Each Australian Director of Public Prosecutions should establish a robust and effective formalised complaints mechanism to allow victims to seek internal merits review of key decisions.

In response to the Royal Commission recommendation, the NSW Government stated that the ODPP would develop a formal process for a merit review of decisions to withdraw all charges or refuse to certify any charges.

This policy and the ODPP's Prosecution Guideline 1.5.2, which the policy supports, align with the Royal Commission's recommendation and implement the NSW Government's response.

## 4. Scope

This policy applies to:

- all ODPP staff (which, in this policy, includes Crown Prosecutors and other statutory appointees)
- all ODPP decisions not to commence, or to discontinue a prosecution at any stage of the proceedings, made on or after 29 March 2021.

## 5. Key Responsibilities

This policy applies to:

| | |
|---|---|
| An ODPP office that makes a decision not to prosecute, when that decision ends all charges affecting a victim | • On request from a victim, reassess a decision not to prosecute, including whether any errors were made in arriving at it and whether it was adequately explained to the victim.<br>• If error is discovered and it is possible and appropriate to do so, re/commence the prosecution.<br>• If no error is found, notify the victim in writing with a full explanation for the decision. |
| • Deputy Senior Crown Prosecutors<br>• Senior Crown Prosecutor<br>• Deputy Directors of Public Prosecutions<br>• Director of Public Prosecutions | • Review afresh a decision not to prosecute if:<br>  ○ the local office that made the decision has reassessed it as correct and the victim remains dissatisfied<br>  ○ a Crown Prosecutor made the original decision.<br>• If the review determines the decision should be changed and it is possible and appropriate to do so, take steps to re/commence the prosecution. |

## 6. Review Principles

**Decisions victims can seek to have reviewed**

A victim of crime (see below) is entitled to seek a review of an ODPP decision not to commence, or to discontinue, a prosecution **when that decision ends all charges affecting them.**

A victim is not entitled to seek a review of a decision not to prosecute **when proceedings involving them continue**. This includes when:

- a charge (or charges) is terminated or substantially altered, but another charge (or charges) relating to the victim continues

- proceedings against one or more defendants are terminated but proceedings relating to the victim against another defendant/s continue.

A victim is also not entitled to a review if a decision not to prosecute was made at their request, with their agreement, or because they withdrew support for the prosecution.

### Who is a victim?

A victim of crime is a person who is alleged to have been caused harm, including physical, psychological or psychiatric harm, or economic loss, by the alleged criminal offence. For the purposes of this policy, 'victim' also includes:

- a close relative of a person whose death was directly caused by the alleged criminal offence
- a parent or guardian, where the victim is less than 16 years old
- a carer or family spokesperson of a victim who is unable to communicate effectively due to injury, disability or illness, including mental illness.

A victim's written authority is required to request a review on their behalf by anyone outside of the above definitions.

### Factors to review

In reviewing a decision not to prosecute, the ODPP will look at a number of factors. These include whether the evidence was significantly misinterpreted, the law was incorrectly applied, the relevant ODPP guidelines were not followed, or the decision was based on flawed reasoning.

To re/commence a prosecution, the ODPP must also be satisfied that:

- the case now meets its guideline test for prosecuting (as set out in chapter one of the *Prosecution Guidelines*)
- to maintain public confidence in the criminal justice system, the decision must be reversed.

## 7. Review Process

### Communicating decisions not to prosecute

The ODPP will notify victims in writing if we decide not to commence a prosecution or to bring proceedings to an end. The notification will include the basis for the decision – that is, whether it was made on the evidence available or in the public interest (these decisions should have already been discussed with both victims and police).

When a decision not to prosecute ends all charges affecting the victim, the notification will also inform the victim of their right to request a review of the decision. An information sheet, a review request form and the full contact details of the ODPP office that made the decision will be provided.

**Step/s a victim needs to take and the process the ODPP will follow**

To request a review of decision not to proceed with a prosecution, a victim will need to fill out the review request form and post, email or deliver it to the office that made the decision. The office can help them fill out the form, if needed.

On receiving a request for a review, the ODPP will follow the process outlined in Table 1 on the following page (a process map is also available, at Appendix A.)

As outlined in Table 1, if a victim remains dissatisfied after the ODPP has conducted a preliminary assessment of the decision, they can seek a fresh review by a senior prosecutor. To do this, they should email the same review request form to VRR@odpp.nsw.gov.au within 10 working days.

**Table 1: ODPP process on receiving a victim's request for review of a decision not to prosecute**

## Step 1: preliminary assessment by local office

When an ODPP office receives a victim's request for a review of a decision it made not to prosecute, an officer from that local office who is senior to the original decision maker will reassess the decision.

An exception to this is when the decision was made by a Crown Prosecutor – requests for reviews of those decisions will go straight to a senior prosecutor
(see Step 2).

This preliminary assessment is an opportunity for the ODPP to look at the decision again, and to respond to the victim within a short timeframe. It is also an opportunity to ensure the victim had the decision fully explained to them.

**If no error is found in the decision-making process**, the ODPP office will notify the victim of this in writing. The notification will include the reasons for the decision not to prosecute, and an offer to further explain it by phone or in person.

Sometimes, this will be enough to address the victim's concerns. However, if the victim remains dissatisfied, they can request that the review move to the second stage (see Step 2).

**Step 2, if required**

## Step 2: (if required): senior prosecutor review

If a victim remains dissatisfied after a preliminary assessment, or if a Crown Prosecutor made the original decision not to prosecute, the review will move to the second step.

This step is carried out by a prosecutor who is senior to the original decision maker and was not involved in the original decision.

In practice, this will be a Deputy Senior Crown Prosecutor, the Senior Crown Prosecutor, a Deputy Director or the Director of Public Prosecutions.

The senior prosecutor will assess the case afresh – that is, from the beginning – to determine whether the original decision was the right one.

**If the senior prosecutor agrees with the original decision not to prosecute**, the ODPP will write to the victim to:

- confirm the initial reasons provided, if they were adequate
- provide a thorough explanation – also addressing any specific questions the victim raised – if they were inadequate
- offer to discuss the decision with the victim.

**If different decision should have been made**

## Different decision should have been made

If the ODPP finds (either at Step 1 or at Step 2) **that a different decision should have been made**, it will determine whether it is possible and appropriate to re/commence a prosecution. It will notify the victim in writing of the outcome and offer to discuss it with them. If re/commencement is:

- both possible and appropriate, the ODPP will prosecute
- not possible for legal reasons or not appropriate, the ODPP will explain this to the victim and, where it is right to do so, apologise to them.

### Notification to the accused

The rights of the accused will be one of the factors the ODPP takes into account when assessing whether re/commencing a prosecution is appropriate. However, the accused will not be made aware of a victim's request for a review unless the decision not to prosecute is reversed.

### Time limits

The time limits that apply to the review process are outlined below, in Table 2.

**Table 2: Time limits at each stop in the review process**

| Action | Time limit |
|---|---|
| Victim review request | A request for a review should be made within five working days where possible but can be made up to three months from notification of the decision (late requests may make re/commencing proceedings more difficult).<br><br>After three months, the ODPP will only consider requests in exceptional circumstances. |
| Preliminary assessment | The ODPP office that made the decision not to prosecute should complete its reassessment within 10 working days of receiving a request for a review. |
| Victim request that review move to second step | A victim has 10 working days from being notified by the local ODPP office that it has reassessed the original decision as correct to request a fresh review by a senior prosecutor. |
| Senior prosecutor review | The senior prosecutor should complete the fresh review within 20 days. |
| Updates if timeframes not met | If it is not possible to meet the above timeframes, the ODPP will notify the victim of this and then provide progress updates at least every 20 working days until a final decision is made. |
| Time limited cases | If a case is approaching a date at which it becomes too late to prosecute, the ODPP will inform the victim of this. Where possible, the ODPP will aim to complete the review and provide a decision before that date. |

### Lessons from the review

Where lessons can be learned from a victim's review request the ODPP will, where appropriate and possible, make the necessary changes to procedure, process or practice to reduce the likelihood of the situation arising again.

### Other complaints/concerns

The ODPP will deal with concerns or complaints about legal decisions outside the scope of this policy, including any complaints about its service, under its Feedback and Complaints Policy.

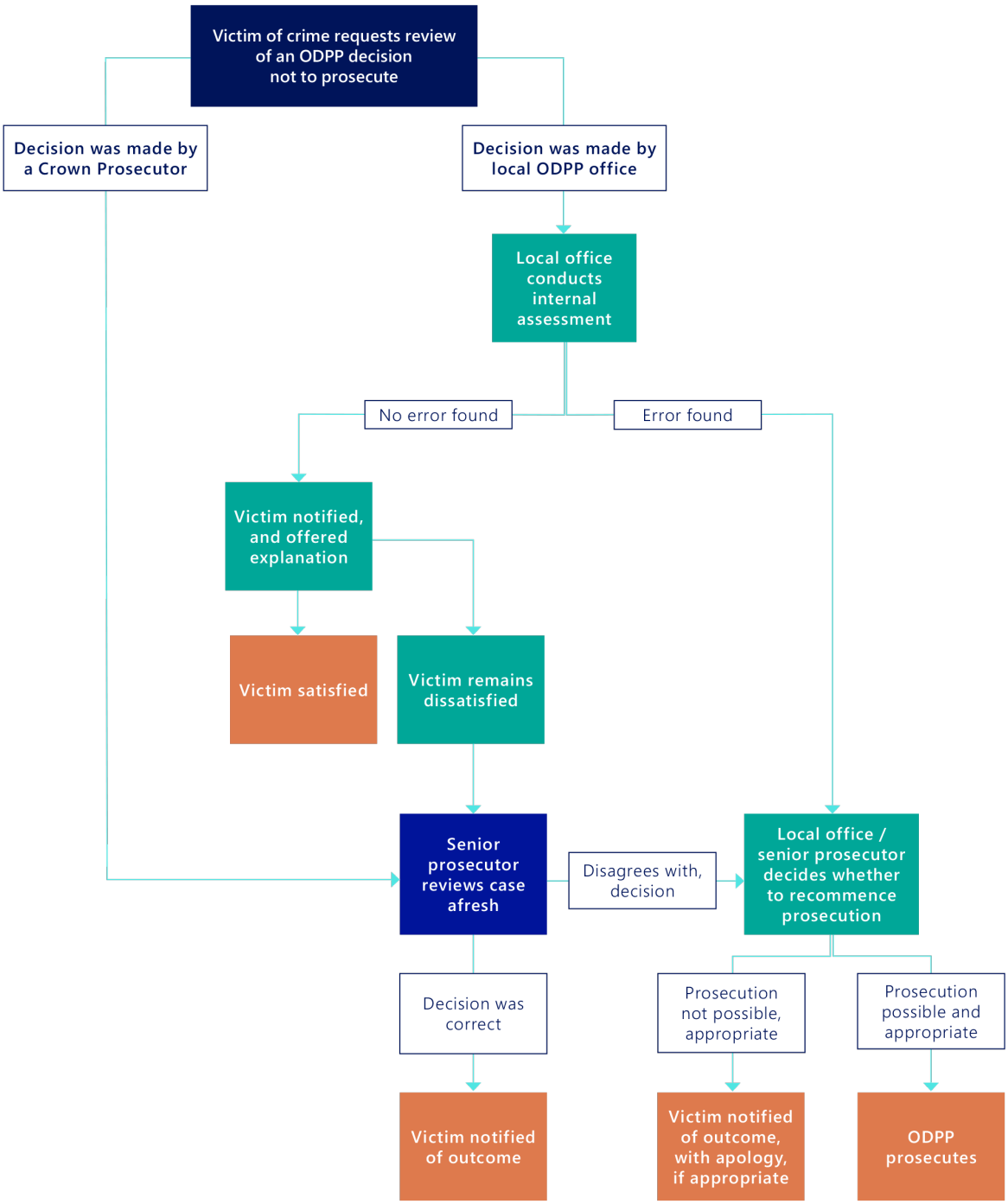
### Review

The ODPP will review this Policy 12 months from commencement and update it as required.

### Document ownership, control and history

| Version | Endorsed by Committee | Approved | Approved by the Director |
|---|---|---|---|
| 2105.18 | Legal | July 2021 | |
| V2.2024 – Brand update only | Legal | March 2024 | Anne Whitehead |

# Appendix A: Process for reviewing decisions not to prosecute



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