

Introduction

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

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

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

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

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

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

The ODPP must serve the public interest first and foremost.

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

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

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

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

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Chapter 1: The decision to prosecute

1.1 Introduction

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

1.1.2 The purpose of this Chapter is to set out:

-) the test for deciding whether to prosecute, including the special considerations that apply when deciding whether to prosecute a child
-) the circumstances in which a prosecution will be discontinued
-) the factors taken into account when deciding whether to proceed to retrial
-) the circumstances in which a prosecution decision may be reversed or reviewed.

1.2 The tests for deciding whether to prosecute

1.2.1 The decision to prosecute involves two questions:

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

Prospects of conviction

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

1.2.3 The following matters should be taken into account, to the extent that they impact on the prospects of conviction in any particular case:

- (1) all the evidence the prosecution will present, having regard to whether there are reasonable grounds to believe any evidence might be excluded
- (2) whether the prosecution witnesses are available, competent, compellable and reliable
- (3) the credibility of the admissible evidence in the prosecution case
- (4) the reliability of any identification evidence where identification is in issue, particularly where there is substantive conflict between eye-witnesses
- (5) the availability and reliability of any forensic or medical evidence
- (6) any other matter that could impact on the prospects of conviction.

1.2.4 The test must also take into account any lines of defence plainly open to, or indicated by, the accused.

1.2.5 Consideration should also be given to:

-) inferences that may be drawn from circumstantial evidence
-) whether the prosecution is able to exclude beyond a reasonable doubt any reasonable hypothesis consistent with the accused being innocent.

Public interest

1.2.6 Consideration must be given to whether a prosecution is in the public interest. Public interest factors include:

Offence-related factors

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

Accused-related factors

- (5) the accused's degree of culpability
- (6) the accused's criminal history and background
- (7) the accused's age, physical health, mental health or cognitive impairment
- (8) whether the offence occurred while the accused was serving a sentence or on bail
- (9) whether the accused is willing to co-operate in the investigation or prosecution of others, or the extent to which the offender has done so

Victim-related factors

- (10) the victim's attitude to a prosecution
- (11) the victim's age, physical health, mental health or cognitive impairment, and whether the prosecution may have an adverse physical or emotional impact on them
- (12) the protection of the victim and the victim's family

Sentencing factors

- (13) the likely outcome if the accused is found guilty, having regard to the sentencing options available to the court
- (14) whether a sentence has already been imposed on the accused that adequately reflects the criminality of the episode
- (15) whether the accused has already been sentenced for a series of other offences and the likelihood of any additional penalty being imposed, having regard to the principle of totality in sentencing

Other factors

- (16) any mitigating or aggravating circumstances
- (17) the availability and efficacy of any alternatives to prosecution, including disciplinary proceedings
- (18) the availability of compensation, restitution, reparation or forfeiture to any person or body following a successful prosecution, including any criminal compensation or confiscation
- (19) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute
- (20) the need to maintain public confidence in basic constitutional institutions such as the Parliament and the courts
- (21) any special circumstances that would prevent a fair trial from being conducted
- (22) the likely length and expense of a trial if disproportionate to the seriousness of alleged offending
- (23) the age, physical health, mental health or special infirmity of an essential witness.

1.2.7 This is not an exhaustive list. The weight to be given to public interest factors will depend on the particular circumstances of each case.

Factors not relevant to the prosecution decision

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

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

Children

1.2.9 Special considerations apply to the prosecution of a child. The public interest may not require the prosecution of a child who is a first offender in circumstances where the offence is not serious.

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

- (1) the seriousness of the offence

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

1.3 Discontinuing a prosecution

- 1.3.1 The test for determining whether to prosecute in Guideline 1.2 has a continuing application throughout the prosecution process. In determining whether to discontinue a prosecution, consideration should also be given to any change in circumstances regarding the evidence and the presence of public interest factors.
- 1.3.2 Any requests on behalf of the accused for the matter to be discontinued should be dealt with expeditiously.
- 1.3.3 Consultation with police and the victim must take place in accordance with Chapter 5: Victims and witnesses.

1.4 Retrials

- 1.4.1 Where a trial has ended without verdict, or when a retrial is ordered after the accused's appeal against conviction is upheld, consideration should be given to whether or not a retrial is required.
- 1.4.2 Factors to be considered include:
 -) if the trial ended without a verdict:
 - whether the trial ended because the jury was unable to agree, or for another reason
 - whether another jury would be in a better or worse position to reach a verdict
 -) if a retrial has been ordered after a successful conviction appeal, whether certain evidence has been ruled inadmissible
 -) in either case:
 - the seriousness of the matter
 - whether and to what extent the accused has spent time in custody
 - the cost of a retrial to the community and to the accused

- the views of the victim and police.

1.4.3 Where two juries have been unable to agree upon a verdict, an additional trial will be directed only in exceptional circumstances. Any such direction must be given by the Director or a Deputy Director.

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

-) the seriousness of the remaining charge/s
-) the sentence/s the accused has received for the other charge/s.

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

1.5 Reconsidering a prosecution decision

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

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

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

Chapter 2: The role of the prosecutor

2.1 Introduction

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

2.2 General principles

- 2.2.1 A prosecutor is a ‘minister of justice’. The prosecutor’s principal role is to assist the court to arrive at the truth and to do justice between the community and the accused, according to law and the dictates of fairness. A prosecutor must not press the prosecution’s case for a conviction beyond a full and firm presentation of that case.

- 2.2.2 The ODPP adopts the **International Association of Prosecutors’** Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors which is set out in Appendix 1.

- 2.2.3 A prosecutor must:

-) act independently and impartially, without regard to individual or sectional interests, or public or media pressure
-) act fairly in relation to the accused
-) strive for the timely and efficient administration of justice
-) assist the court with adequate submissions of law to enable the law to be properly applied to the facts
-) assist the court to avoid appellable error
-) use temperate and dispassionate language
-) observe the highest ethical and professional standards of integrity and care
-) be mindful of cultural sensitivities, especially but not limited to those relating to Indigenous and Torres Strait Islander people
-) avoid any real or potential conflict of interest
-) to the extent they apply, comply with the Legal Profession Uniform Conduct (Barristers) Rules 2015 and the Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015.

- 2.2.4 A prosecutor must not make any submission of fact or law that is not soundly based.

2.3 The role of the prosecutor in trials and summary hearings

2.3.1 In trials and summary hearings, a prosecutor:

-)] must present the prosecution case fairly and firmly
-)] must seek to place all the relevant evidence intelligibly before the court
-)] must refer only to the evidence reasonably expected to be presented at trial in the opening address
-)] must confine the case to identified issues that are genuinely in dispute and present those issues clearly and succinctly
-)] should generally call all witnesses whose testimony:
 - (1) is admissible and necessary to present the relevant circumstances
 - (2) gives the prosecutor reasonable grounds to believe that it could provide admissible evidence relevant to any matter in issue; unless:
 - (i) the opponent consents to the prosecutor not calling a particular witness
 - (ii) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused
 - (iii) the only matter with respect to which the particular witness can give admissible evidence goes to establishing a particular point already adequately established by another witness or other witnesses
 - (iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable
 - (v) the prosecutor, having the responsibility of ensuring that the prosecution case is presented properly and presented with fairness to the accused, believes on reasonable grounds that the interests of justice would be harmed if the witness was called as part of the prosecution case.
-)] must inform the defence as soon as practicable of the identity of any witness the prosecutor intends not to call on any ground/s within (ii), (iii), (iv) or (v) above together with the relevant ground/s, unless revealing the ground/s to the opponent would harm the interests of justice
-)] must not adopt tactics involving an appeal to prejudice or amounting to an intemperate or emotional attack on the accused. That does not mean that in properly carrying out the role the prosecutor's cross-examination and jury address must be bland, colourless and lacking in the advocate's flourish.
-)] must not comment on answers witnesses give during the course of their evidence
-)] must not advance theories not supported by evidence

) must object to any question asked of a prosecution witness that:

- (1) is misleading or confusing
- (2) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive
- (3) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate
- (4) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability)

) must conduct cross-examination of the accused fairly and not suggest a reversal of the onus of proof when cross-examining the accused or addressing the court

) may assist a witness prepare to give evidence by:

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

) must not:

- (1) advise or suggest to a witness that they give false or misleading evidence
- (2) coach a witness by advising what answers they should give to questions they might be asked

) may conference a witness by eliciting the account contained in their statement and:

the prosecutor may question and test the version of evidence to be given by the witness and

if new and relevant information comes forward, the prosecutor should request the officer-in-charge to obtain that information in statement form

-) must not inform the court or the defence that the prosecution has evidence supporting an aspect of its case without believing on reasonable grounds that such evidence exists or will be available, and must promptly inform the defence and the court if later learning that the evidence will not be available
-) must promptly inform the defence if intending to use evidence that the prosecutor has reasonable grounds to believe may have been unlawfully obtained
-) must disclose any information, including any criminal convictions, in the prosecutor's possession that reflects materially on the credibility of a prosecution witness, or where cross-examination based on the information might reasonably be expected to materially affect the witness's credibility.

2.3.2 The prosecution is entitled to procedural fairness. This may mean, for example, that an adjournment should be sought when the defence gives insufficient notice of alibi or expert evidence.

2.4 The role of the prosecutor in sentencing

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

2.4.2 It is the duty of the prosecutor to present the facts of the case at sentence. Whenever possible a statement of agreed facts should be submitted (see Guideline 4.4). If the offender is being sentenced after trial or hearing, the prosecutor should prepare a summary of the facts capable of being found by the judge or magistrate that is consistent with the verdict.

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

2.4.4 The prosecutor:

-) must make submissions addressing the objective seriousness of the offence and the subjective circumstances of the offender where known
-) must inform the court of any relevant authority or legislation bearing on the appropriate sentence
-) must inform the court about the outcome of proceedings against any co-offender and provide copies of relevant material before the court that dealt with a co-offender

-) Must fairly test the evidence or assertions advanced for the offender where necessary
-) must correct any error made on behalf of the offender during a sentence hearing
-) must assist the court to avoid appellable error on the issue of sentence
-) may submit that a sentence of full-time detention is appropriate or that a sentence other than full-time detention is within range, but must not suggest or recommend a numerical sentence or a sentencing range in a particular case, unless by reference to a guideline judgment
-) may provide statistical material and details of comparable cases where it would assist the court, indicating how the court would be assisted
-) must not in any way limit the discretion of the Director to appeal against the inadequacy of the sentence.

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

Chapter 3: Selecting charges

3.1 Introduction

- 3.1.1 A criminal case may give rise to a potential choice between different charges. The purpose of this Chapter is to set out how charges are selected and the principles that apply to filing an indictment with an ex officio count.

3.2 Charge certification

- 3.2.1 Charges are to be selected that adequately and appropriately address the criminality alleged and enable the matter to be dealt with fairly and expeditiously according to law.
- 3.2.2 Substantive charges reflecting the offences actually committed are to be selected in preference to conspiracy charges whenever possible. There will be occasions when only a conspiracy charge is adequate and appropriate to reflect the accused's participation in an offence.
- 3.2.3 A prosecutor should bear in mind that it is undesirable to overload the indictment with an excessive number of charges as this may result in trials becoming unduly complex or lengthy. There will be cases where the extent of the criminality makes it necessary and appropriate to present a lengthy indictment.
- 3.2.4 In some cases it will be appropriate to proceed with representative counts, provided the counts on the indictment adequately and essentially reflect the totality of the criminal conduct.
- 3.2.5 A prosecutor should consider the desirability of consistent charges when there is one or more co-accused, although there will be cases where different charges are necessary and appropriate to reflect the different roles of each accused.
- 3.2.6 Charges should not be selected for the purpose of providing scope for plea negotiation at a later stage.

3.3 Ex officio counts

- 3.3.1 It may be necessary to consider an ex officio count in certain circumstances, including:
- (1) in substitution of a charge committed for trial or sentence, to ensure the indictment contains the most appropriate charge
 - (2) to add charges not identified or known about prior to committal
 - (3) where the matter has been committed for sentence and certain charges were withdrawn for public interest reasons as part of a resolution (see Chapter 4) but the accused subsequently fails to adhere to the plea

- (4) where a direction has previously been made for no further proceedings following a committal but it is considered appropriate to revive the charge/s
- (5) to place offences on the indictment that were transferred to the District Court or Supreme Court on a certificate under s166 of the *Criminal Procedure Act 1986*
- (6) to expedite trial proceedings, including where it is considered desirable to join the accused in proceedings against a co-accused who has already been committed for trial
- (7) where there is a technical defect in the committal charge requiring substitution or other correction.

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

Chapter 4: Charge resolution

4.1 Introduction

4.1.1. This Chapter sets out:

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

4.2 Why charge resolution is important

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

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

4.3 When is it appropriate that charge resolution occur

4.3.1 A matter may only be dealt with by way of charge resolution if it is in the public interest to do so. That is:

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

(5) there are otherwise compelling public interest factors in favour of charge resolution (see Guideline 1.2: The decision to prosecute).

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

4.3.3 A proposed charge resolution should not be accepted if:

-) to do so would distort the facts disclosed by the available evidence and create an artificial basis for sentence
-) the accused continues to assert their innocence of the offence/s to which the resolution relates
-) the evidence does not support the proposed charge.

4.3.4 In considering whether to accept a plea from the accused, the victim and the officer-in-charge must be consulted and their views properly considered, although the public interest is the overriding consideration. Pursuant to s35A *Crimes (Sentencing Procedure) Act 1999*, where charge resolution has occurred the prosecutor must file a certificate to verify that this consultation has taken place or, if it has not taken place, the reasons why. Chapter 5: Victims and witnesses sets out the requirements for communicating with and consulting victims about charge resolution.

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

4.3.6 If a charge resolution proposed by the accused is determined not to be in the public interest, the prosecutor may consider whether to propose an alternative resolution, having regard to the factors in paragraphs 4.3.1 – 4.3.4.

4.4 Statement of agreed facts

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

4.4.2 A statement of agreed facts:

-) should precisely identify the facts both the prosecution and the offender accept and indicate the areas of fact in dispute
-) should not include facts that would invite the court to sentence for a more serious offence than that for which the offender stands to be sentenced.

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

4.5 Taking offences into account – Form 1 offences

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

-) the need to ensure that the offences for which the offender will be sentenced adequately reflect the totality of the admitted criminality
-) the relative seriousness of, and the maximum penalties for, offences for which the offender will be sentenced and on the Form 1, including consideration of aggravating factors
-) the relationship between the principal offence and the Form 1 offence/s, taking into account the need to represent individual victims and episodes of offending on the indictment
-) the public interest in convictions being recorded for certain offences.

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

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

-) failure to appear
-) firearms offences
-) serious offences against police officers
-) breaches of apprehended domestic violence orders
-) offences committed while on bail or other form of conditional liberty
-) offences for which penalties increase for second or subsequent convictions
-) offences in relation to the administration of justice
-) traffic offences where the offender has a poor traffic record.

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

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

4.6 Unrepresented accused

- 4.6.1 Particular care must be taken when dealing with an accused person who is without legal representation. The prosecutor's duties of fairness and disclosure mean that the accused must be appropriately informed of the prosecution case and the course it will take. A prosecutor must maintain a detachment from the accused and should never advise the accused about legal issues or how the defence is to be conducted.
- 4.6.2 The fact that the accused is without legal representation does not mean that the prosecutor is prohibited from engaging in charge resolution discussions. However, caution should be exercised in the following manner:
-) any plea offer made by the accused is to be considered and responded to in writing
 -) telephone contact with the accused should be avoided
 -) face-to-face contact with the accused should only occur in the presence of a witness
 -) contemporaneous notes should be taken of any telephone or face-to-face communication that does occur
 -) a written record should be maintained of all information and material provided to and received from the accused
 -) where appropriate, a prosecutor may communicate with the accused through the court.

Chapter 5: Victims and witnesses

5.1 Introduction

- 5.1.1 The ODPP recognises the important role of victims as participants in criminal proceedings and the benefit to them of continuity of the prosecution team. The ODPP must provide victims with timely information and assistance and consult with them before deciding to resolve or discontinue a charge.
- 5.1.2 However, the ODPP does not provide legal representation to victims in the same way lawyers represent their clients. The ODPP is an independent statutory agency whose main function is to prosecute serious crime in NSW independently, on behalf of the entire NSW community.

5.2 Communicating with victims: general principles

- 5.2.1 The ODPP is bound, to the extent that is relevant and practicable, by the Charter of Victims Rights and must treat victims with courtesy, compassion, cultural sensitivity and respect for their rights and dignity.
- 5.2.2 Prior to and when communicating with a victim, the prosecutor must have regard to:
-) whether the victim wishes to be contacted about the prosecution and, if so, whether in relation only to specific issues or events
 -) the victim's preferred method and frequency of contact
 -) the particular circumstances of the victim, for example, the victim's age, any language or cultural barrier and any physical disability, mental illness or cognitive impairment
 -) whether it would be appropriate to communicate with the victim through a parent or carer or a support person
 -) the nature of the offence/s and any harm sustained by the victim.
- 5.2.3 The victim must be given the contact details of the solicitor with carriage of the matter.
- 5.2.4 The victim must be given information about the case at an early stage, with an ongoing obligation to keep them informed. This must be done directly by either the solicitor with carriage of the matter or, where appropriate, a more senior member of the prosecution team, rather than through administrative staff, WAS officers or police officers. An effort must be made to minimise the number of staff members responsible for victim contact.

5.3 Information to be provided

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

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

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

-) This information is contained on the ODPP's website:
 - <http://www.odpp.nsw.gov.au/victims-witnesses/going-to-court-and-being-a-witness>;

Information about the charges

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

Information about bail

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

Information about the date, time and location of court listings

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

Information about the outcome of hearings

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

Information about appeals

) If an appeal is lodged, the prosecutor must inform the victim about:

- the fact that an appeal has been lodged
- the type of appeal
- the appeal process and possible outcomes.

Information about breach of sentence

) If an offender is required to appear before a court in relation to a breach of sentence, the solicitor with carriage of those proceedings must inform the victim about:

- the fact that the offender is required to appear before the court for breaching the sentence
- the nature of the proceedings and possible outcomes.

Information about sexual assault communications privilege

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

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

) In all cases involving the defence of not guilty by reason of mental illness, the prosecutor must inform the victim about:

- what the defence of not guilty by reason of mental illness means
- how the evidence may be presented regarding the defence of mental illness
- the options available to the court if the accused is found not guilty by reason of mental illness.

) In all cases where the accused's fitness to be tried is raised, the prosecutor must inform the victim:

- of the date, time and location of any fitness hearing, special hearing, and hearing for the imposition of a penalty
- about the nature of fitness inquiries and special hearings.

Information about Victims Registers

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

5.4 Additional obligations to victims and other prosecution witnesses regarding the court process

5.4.1 Victims and prosecution witnesses must be informed:

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

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

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

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

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

5.4.4 Prosecutors must be familiar with legislative provisions designed to protect the privacy of victims and witnesses and must apply for a closed court, non-publication order or suppression order in appropriate cases. Prosecutors must inform victims if there is an option for them to request the lifting of a non-publication or suppression order.

5.4.5 As far as practicable, the ODPP must, during the course of a court proceeding and within a court building, minimise a victim's exposure to unnecessary contact with the accused, defence witnesses and supporters of the accused.

5.5 Consultation regarding resolving charges and discontinuing prosecutions

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

-) to substantially change the charges
-) not to proceed with some or all of the charges
-) to resolve the matter by accepting a plea to a less serious charge (see Chapter 4: Charge Resolution).

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

-) a child victim or witness
 -) a victim or witness with special needs.

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

5.7 Conferences

- 5.7.1 A conference with a victim or witness may be conducted for the following purposes:

-) to obtain information from and about witnesses on evidentiary issues
 -) to explain the court process
 -) to consult victims as required under Chapter 4: Charge Resolution and Guideline 5.4.

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

5.8 Victim Impact Statements

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

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

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

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

5.9 Domestic violence offences

General principles

- 5.9.1 The ODPP recognises the unique dynamics a domestic violence context brings to a prosecution. Victims and witnesses may be afraid of the consequences of giving evidence or may not wish to show allegiance to a particular family member. The ODPP must conduct prosecutions involving domestic violence sensitively, having regard to the needs and safety of those affected by it.
- 5.9.2 It is therefore important that victims of domestic violence are supported throughout the course of criminal proceedings and that all reasonable steps are taken to minimise delays.

Requests to discontinue

- 5.9.3 In some cases a victim of domestic violence may not wish to give evidence or may request that a prosecution be discontinued. Possible reasons may include:
-) threats, harassment or intimidation by the accused, or the accused's family or associates
 -) pressure from family and community members
 -) fear of being publicly shamed, disowned or outcast from the community
 -) fear that showing support for a prosecution may place them at further risk of harm
 -) a wish to reconcile with the accused
 -) a belief that the accused will not re-offend, for example, because they have undertaken to attend counselling
 -) fear of the accused receiving a custodial sentence and the financial consequences this would have on the accused, the victim and any children.
- 5.9.4 If the victim demonstrates reluctance or unwillingness to give evidence, steps should be taken to ascertain the reasons why. The prosecutor should:
-) request that police investigate, including taking a statement from the victim explaining the reasons for not wishing to proceed, particularly if the prosecutor suspects that the victim has been frightened or coerced into seeking the withdrawal of the charges
 -) conduct a conference with the victim, if possible, to discuss the victim's concerns and any available options to allay those concerns
 -) consult with WAS regarding any prior contact and to arrange attendance at the conference.
- 5.9.5 The following matters are to be considered in determining whether the matter should proceed:
-) the reasons the victim does not want the matter to proceed
 -) information known about any risk to the safety of the victim and any children or other dependents

-) whether the victim has been advised about available support services, special measures for giving evidence or other protections available during the proceedings
 -) whether there is a reasonable prospect of conviction without the victim having to give evidence
 -) the seriousness of the alleged offence, including:
 - the harm the victim suffered
 - whether the offence was planned
 - whether a weapon was involved
 - whether the offence was committed in the presence of children
 -) any reported or otherwise known history of violence by the accused against the victim or others, including, for example, repeated police call-outs
 -) whether there has been an escalation in the seriousness of violence
 -) any history of threatening behaviour, stalking or intimidation by the accused
 -) whether the alleged offence was committed in breach of bail, sentence, parole or an apprehended violence order
 -) the personal circumstances of the victim, including their well-being if they are required to testify
 -) the views of the officer-in-charge and, where relevant, any other agency.

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

Apprehended Domestic Violence Orders

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

5.10 Complaints and reviews

5.10.1 A victim who has a complaint about the ODPP relating to a breach of the Charter of Victims Rights or about the handling of a case involving them may make a complaint in accordance with the ODPP Feedback and Complaints policy.

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

Chapter 6: Elections

6.1 Introduction

- 6.1.1 This Chapter sets out the criteria for determining whether an election should be made for a Table offence to be dealt with on indictment, rather than summarily.

6.2 Elections

- 6.2.1 In determining whether or not to elect to deal with a Table offence on indictment, consideration should be given to:
- (1) whether the conduct giving rise to the offence can be adequately addressed within the sentencing limits of the Local Court having regard to:
 - (a) the seriousness of the offence, including:
 - the circumstances of the offence
 - the nature of the conduct
 - any aggravating or mitigating circumstances
 - (b) the accused's personal circumstances, including criminal background
 - (c) the maximum penalties available for summary disposal and on indictment
 - (d) any standard non-parole period applicable to the offence
 - (2) the prevalence of the offence in the community and the greater deterrent effect of an accused being dealt with on indictment
 - (3) the manner in which any co-accused is being dealt with
 - (4) whether there is a relevant connection between the Table offence and an offence that is strictly indictable or another Table offence suitable to being dealt with on indictment
 - (5) whether for some other reason the interests of justice require that the matter be dealt with on indictment.
- 6.2.2 Care should be taken to ensure that the issue of whether to elect is resolved at the earliest possible stage.
- 6.2.3 An election should not be made for tactical reasons.
- 6.2.4 An election should only be withdrawn in accordance with the principles set out in Guideline 6.2.1 and subject to consultation with the victim and officer-in-charge.

Chapter 7: Taking over proceedings

7.1 Introduction

- 7.1.1 This Chapter sets out the principles for determining whether the ODPP should take over proceedings commenced by Police or by a private prosecutor.

7.2 Taking over proceedings commenced by Police

- 7.2.1 The DPP will take over a prosecution commenced by Police:

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

- 7.2.2 If the DPP takes over the prosecution, a decision may be made to discontinue it in accordance with Guideline 1.2: The decision to prosecute.

7.3 Taking over proceedings commenced by a private prosecutor

- 7.3.1 Not all prosecutions are initiated by police officers or other officials acting in the course of their public duty. The right of a private individual to institute a prosecution has been described as "a valuable constitutional safeguard against inertia or partiality on the part of authority". Nevertheless, the right is open to abuse and to the intrusion of improper personal or other motives. Further, there may be public policy reasons why a private prosecution, although instituted in good faith, should not proceed, or at least should not be allowed to remain in private hands. Consequently, the DPP has the power to take over the conduct of a prosecution initiated by another person and, having done so, to continue it or bring it to an end.

- 7.3.2 Where the DPP has taken over the conduct of a private prosecution, or is considering doing so, the DPP may request a full report of the circumstances giving rise to the prosecution, copies of the statements and other documentary evidence, and any further information. The DPP may also seek police assistance in investigating the matter. These provisions enable a full assessment to be made of the prosecution case before, or after, any decision is made to take over the matter.
- 7.3.3 Given the large range of circumstances that may give rise to a private prosecution it is impracticable to lay down inflexible rules as to when the discretion to take over a matter will be exercised. In general, however, a private prosecutor will be permitted to retain the conduct of the proceedings unless:
- (1) there is no reasonable prospect of a conviction on the admissible evidence
 - (2) the prosecution is not in the public interest
 - (3) there are reasons for suspecting that the decision to institute the prosecution was based on improper motives or otherwise constituted an abuse of the prosecution process
 - (4) it would not be in the interests of justice for the conduct of the prosecution to remain within the discretion of a private individual having regard to the gravity of the offence and all the surrounding circumstances.
- 7.3.4 Where a private prosecution is instituted to circumvent an earlier decision of the DPP not to proceed with a prosecution for the same offence, it will usually be appropriate to take over the prosecution with a view to bringing it to an end

Chapter 8: Mental illness

8.1 Introduction

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

8.2 The decision to prosecute

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

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

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

8.4 Fitness and special hearings

- 8.4.1 A fitness hearing may be conducted in the District Court or the Supreme Court to determine whether the accused is fit to be tried. The question of whether the accused is fit to be tried is usually raised by the defence. However, where there is an obvious fitness issue and it is not raised by the defence, it should be raised by the prosecution. The prosecutor should obtain an independent assessment.
- 8.4.2 In determining whether a matter should proceed to special hearing, the principles regarding the decision to prosecute in Guideline 1.2, as well as the requirement for consultation with the victim and officer-in-charge, as set out in Chapter 5: Victims and witnesses, apply. Consideration should also be given to whether there has been any change in the available evidence since the finding of unfitness and whether, and to what extent, the accused will have been detained by the time a special hearing would be heard.

Chapter 9: Juries and judge alone trials

9.1 Jury selection

- 9.1.1 The prosecution has three challenges to stand aside a potential juror without restriction for each accused.
- 9.1.2 The prosecution may also challenge a juror for cause. This right of challenge should only be exercised if there is reasonable cause for doing so.
- 9.1.3 The prosecution's right of challenge should never be exercised so as to attempt to select a jury that is not representative of the community, including as to age, gender, gender identification, sexual orientation, ethnic origin, religious belief, marital status or economic, cultural or social background. The paramount concern is to secure a fair and impartial jury.

9.2 Judge alone trials

- 9.2.1 Most trials in the District Court and the Supreme Court are heard before a judge and jury. However, in certain circumstances, an order may be made for a judge alone trial.
- 9.2.2 If the accused applies for a judge alone trial but the prosecutor does not agree, it will be for the judge to determine whether it is in the interests of justice to make the order.
- 9.2.3 In determining whether to agree to a judge alone trial, prosecutors must have regard to:
 -) the important role of juries, as representatives of the community, in the administration of criminal justice
 -) whether the trial will involve a factual issue that requires the application of objective community standards, such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness
 -) any evidence in support of the accused's request
 -) the timing of the application, that is whether it was made within the statutory time limit or whether leave to make the request out of time is required, particularly if the application is made shortly before or on the day fixed for trial
 -) whether any potential prejudice may be adequately addressed through the process of jury selection or by instructions to the jury by the trial judge
 -) whether the trial involves overly technical or complex expert evidence.
- 9.2.4 Predictions as to the likelihood of conviction by either trial by jury or trial by judge alone should not be considered in determining the prosecutor's position.
- 9.2.5 Prosecutors must assess any request for a judge alone trial on its merits and make submissions against the making of such an order in appropriate cases.

Chapter 10: DPP appeals

10.1 Introduction

10.1.1 This Chapter sets out guidelines on:

-) DPP appeals
-) retrials and investigations after acquittal.

10.2 When will the DPP lodge an appeal?

10.2.1 The DPP will only lodge an appeal if satisfied that:

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

10.3 Interlocutory appeals and appeals against the exclusion of evidence

10.3.1 The DPP has a right of appeal to the Court of Criminal Appeal (CCA) against an interlocutory judgment or order made by a judge.

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

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

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

10.4 Appeals against sentence

Sentence appeals to the Court of Criminal Appeal

10.4.1 The DPP has a right of appeal to the CCA against a sentence imposed in the Supreme Court, the District Court and the Drug Court.

10.4.2 Only the Director or a Deputy Director can determine whether or not to appeal against a sentence. Prosecutors should promptly assess all sentences imposed to determine whether they may be the subject of an appeal. There is no statutory time limit, but delay in lodging an appeal may impact on the appeal court's decision. Matters where the offender has been sentenced to a penalty other than full-time detention should be expedited.

10.4.3 There may be occasions when the prosecutor does not consider the sentence to be appellable but it is necessary to refer a matter to the DPP for a decision. This may

occur, for example, when a request for a review of the sentence is made by a person with a legitimate interest in the matter, such as the victim or police officer-in-charge.

10.4.4 The primary purpose of prosecution sentence appeals is to allow the CCA to provide governance and guidance to sentencing courts. In determining whether or not to appeal against a sentence, the DPP will first consider whether the sentencing judge made an error. Even if there is error, the prosecution must still establish that the sentence is manifestly inadequate.

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

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

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

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

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

Sentence appeals to the District Court

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

10.5 Appeal against acquittal on a question of law alone

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

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

10.6 Referral on a question of law

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

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

10.7 Retrials after acquittal

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

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

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

10.8 Investigation after acquittal

10.8.1 A police officer must not investigate an offence of which a person has been acquitted unless the DPP has given written authorisation. Such investigations are rare. The DPP will only give written authorisation if satisfied that:

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

Chapter 11: Indemnities, undertakings, informers and induced statements

11.1 Introduction

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

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

11.1.2 The purpose of this Chapter is to set out:

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

11.2 Informer witnesses

11.2.1 An informer witness is any person (other than a victim in the case) who:

-) can provide information obtained through direct personal contact with the accused, and
-) is either a co-offender, civilian undercover operative, or other person seeking some benefit in exchange for providing this information.

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

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

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

-) any criminal history
-) whether or not police or Corrective Services have any information that might assist in evaluating the informer's credibility, particularly in relation to:

- motivation for giving evidence
- any history of animosity towards the accused
- favourable / different treatment by Corrective Services compared to other prisoners
- reliability and mental health
- the extent to which public officers have given evidence or written reports on behalf of the informer (for example, to courts or the NSW State Parole Authority)
- whether any discount on sentence has been given for assistance in the matter
- whether the informer was in custody at the time of giving assistance
- whether an immunity has been granted or requested
- whether any monetary or other benefit of any kind has been claimed, offered or provided
- whether the informer gave evidence or was to give evidence in any other current or earlier criminal proceedings.

11.2.5 An informer who has provided or will provide assistance to the authorities may be entitled to a reduction in sentence. Co-operation by offenders with law enforcement agencies should be appropriately acknowledged and, if necessary, tested at the time of sentencing. Police may provide evidence of an informer's assistance to the sentencing court by way of an affidavit of assistance, annexing a report endorsed by a supervising officer. The prosecutor must read the affidavit of assistance and report before tendering them.

11.3 Immunities

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

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

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

Criteria to be considered in determining whether to recommend an immunity

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

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

11.3.5 Applications for immunities should address the following factors:

- (a) the informer's present circumstances and attitude to giving evidence without the benefit of an immunity
- (b) the value of the informer's evidence in proceedings against the accused, having regard to all the admissible evidence and any anticipated defence
- (c) the relative seriousness of the offences committed by the informer compared to those committed by the accused and their relative levels of involvement
- (d) the strength of the evidence to support charges against the informer and the public interest in prosecuting the informer
- (e) the strength of the evidence to support the prosecution of the accused on lesser or fewer charges without the informer's evidence, and whether such charges would properly reflect the accused's criminality
- (f) the likelihood of strengthening any weakness in the prosecution case other than by relying on the informer's evidence (for example, by further investigation)
- (g) the informer's character, credibility and reliability
- (h) the outcome of any previous reliance on the informer's evidence
- (i) whether the informer's evidence is corroborated by other evidence
- (j) whether the informer has provided a full and frank statement, including an acknowledgment of their role in the offence/s
- (k) whether any form of reward, inducement, protection or privilege is being provided or offered to the informer to cause them to give evidence, other than the indication that an application will be made for an undertaking / indemnity
- (l) whether the officer-in-charge and any other relevant State or Commonwealth investigatory or prosecuting authority support the application
- (m) whether it would be more appropriate for the court to issue a certificate under s 128 of the *Evidence Act 1995*

(n) any other relevant matters.

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

11.4 Induced statements

- 11.4.1 An induced statement is a statement taken from a witness with a promise not to use the information in the statement against that witness in criminal proceedings.
- 11.4.2 Where the anticipated evidence relates to a matter being prosecuted by the ODPP, approval to take an induced statement from the accused, a witness or a potential witness must first be obtained from the Director. All requests for the Director's approval to take an induced statement must be made in writing and supported by copies of all available relevant documents. Prior to the ODPP taking over proceedings, Police Area Commanders and Police District Commanders (as the case may be) or police officers of equivalent rank (Superintendent and above) who are in line command of the officer making the application are authorised to approve the taking of an induced statement.
- 11.4.3 It must be made clear that the only inducement authorised by the Director is not to use the contents of the statement against the witness. It is not to be part of any other inducement such as the acceptance of a charge resolution or the withdrawal of charges.
- 11.4.4 All correspondence relating to a request to take an induced statement is to be treated by the ODPP as sensitive and securely stored.
- 11.4.5 This Guideline does not apply to police or other investigators carrying out investigations solely pursuant to Australian Crime Commission, NSW Crime Commission, Independent Commission Against Corruption, or Law Enforcement Conduct Commission references.

Chapter 12: Pre-charge advice

12.1 Introduction

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

12.1.2 This Chapter sets out:

-) when the ODPP will provide pre-charge advice
-) what the ODPP will provide advice about
-) how advice may be requested and provided
-) the principles concerning confidentiality and legal privilege.

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

12.1.4 The criteria for determining whether a person should be prosecuted for an offence are as set out in Guideline 1.2.

12.2 When the ODPP will provide pre-charge advice

12.2.1 The ODPP is available to provide pre-charge advice to investigative agencies:

-) if the matter would be prosecuted by the ODPP if charges were filed, and
-) the matter has some complexity, novelty, raises a potential conflict of interest for the investigative agency or has broader policy implications; or

as agreed by the investigative agency and the ODPP.

12.2.2 Pre-charge advice must be sought from the Director prior to filing any charge that requires the consent of the Director or the Attorney General.

12.3 What the ODPP will provide advice about

12.3.1 The ODPP will provide advice about the sufficiency of evidence and the appropriateness of charges.

12.3.2 Unless otherwise instructed by the Director or a Deputy Director, the ODPP will not provide advice about:

-) operational or investigative matters

) whether to file charges in a particular jurisdiction.

12.4 How advice may be requested and provided

12.4.1 Advice will not be provided on an informal basis.

12.4.2 A request for advice about whether charges should be filed must:

-) be in writing
-) set out what advice is sought
-) include an endorsement by the Police Area Commander or Police District Commander (as the case may be), Crime Manager (or equivalent), Commander Police Prosecutions or Manager Operational Legal Advice unit that the matter is suitable for referral to the ODPP for advice
-) note any urgency that may require an expedited response
-) enclose:
 - a summary of the evidence
 - the brief of evidence.

12.4.3 On receiving a request for advice, the ODPP will provide the agency with an acknowledgment of receipt.

12.4.4 Within seven days of receiving the request, the ODPP will:

-) determine, in accordance with Guideline 12.2 and 12.3, whether to give the requested advice
-) inform the agency whether the requested advice will be given.

12.4.5 All advice must be in writing, legally accurate and clearly set out the reasoning to adequately explain the conclusion reached.

12.4.6 The ODPP will provide a letter of advice to the agency within 8 weeks of the matter being allocated to a solicitor. This time frame may be reduced in urgent cases. The solicitor should make contact with the agency if further time is required to comply with the request.

12.4.7 In any case involving a death, a letter of advice must not be sent without the approval of the Director or a Deputy Director.

12.5 Confidentiality and legal privilege

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

Chapter 13: Disclosure

13.1 The duty of disclosure

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

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

13.1.2 The prosecution's duty of disclosure continues after trial and the conclusion of any appeal.

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

-) to the credibility of defence (as distinct from prosecution) witnesses
-) to the credibility of the accused
-) because it might deter the accused from giving false evidence or raising an issue of fact that might be shown to be false.

13.1.4 In all matters prosecuted by the ODPP, police must, in addition to providing the brief of evidence:

-) notify the ODPP of all other documentation, material and information, including that concerning any proposed witness, that might be relevant to either the prosecution or the defence
-) disclose any of such documentation, material or information to the ODPP, if requested
-) certify that the DPP has been notified of all such documentation, material and other information (s 15A, Director of Public Prosecutions Act 1986; Schedule 1, *Director of Public Prosecutions Regulation 2015*).

Subject to public interest immunity considerations, such material, if assessed as relevant in the way described above, should be disclosed and, where practicable, made available to the defence.

13.1.5 The requirement to disclose the means of finding prospective witnesses may be satisfied by making the witnesses available to the defence where possible, subject to public interest immunity considerations.

13.1.6 Where a prosecutor receives, directly or indirectly, material that may be subject to a claim of legal privilege, public interest immunity or statutory immunity, the prosecutor should not disclose that documentation, material or information to the defence without first consulting with the officer-in-charge. The purpose of the consultation is to give that officer the opportunity to raise any concerns about such

disclosure. The officer should be given a reasonable opportunity to seek advice if there is any concern or dispute.

- 13.1.7 Where the prosecutor and the police disagree as to what, if any, of the sensitive documentation, material or information should be disclosed and there is no claim of public interest immunity, the matter is to be referred to the Director or a Deputy Director.
- 13.1.8 In cases where a claim of public interest immunity is to be or is being pursued, the question of disclosure will be determined by the outcome of that claim.
- 13.1.9 The duty of disclosure extends to any record of an account by a witness that is inconsistent with their previously intended evidence or adds to it significantly, including any account made in a conference (recorded in writing or otherwise) and any victim impact statement. Subject to public interest immunity considerations, the Director will not claim legal privilege (legal professional privilege or client legal privilege) in respect of such statements provided their disclosure serves a legitimate forensic purpose.
- 13.1.10 On rare occasions the overriding interests of justice require that disclosable information is withheld – for example, where there is a need to protect the integrity of the administration of justice or the identity of an informer (covered by public interest immunity), or to prevent danger to life or personal safety. Such a course should only be taken with the approval of the Director or a Deputy Director. In such cases, consideration must be given to whether the charge against the accused to which the material is relevant should be withdrawn, and whether the accused should be charged with a lesser offence to which such material would be less relevant (rule 88, *Legal Profession Uniform Conduct (Barristers) Rules 2015*; rule 29.6, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*).
- 13.1.11 Legal privilege will ordinarily be claimed against the production of any document in the nature of an internal ODPP advice, such as a submission to the Director and submissions between solicitors and Crown Prosecutors. Only the Director or a Deputy Director may approve any waiver of privilege.
- 13.1.12 The Director's legal privilege extends to documents containing material created or gathered for the dominant purpose of providing legal advice to the Director, including internal advice, memoranda, summaries, internal emails, conference notes and file notes.
- 13.1.13 If a witness discloses information in a conference that warrants disclosure to the defence, as best practice an arrangement should be made for the witness to make a supplementary statement with police, which would then be disclosed to the defence. In urgent circumstances, this may be by way of signing a police notebook statement. As a last resort, a request may be made for a direction to waive legal privilege over the notes. Once this is approved, disclosure may be made by correspondence indicating that a conference occurred with a list of the relevant disclosures.

- 13.1.14 The giving of reasons does not constitute a waiver of legal privilege in respect of matters in which reasons have been given. Internal legal advice must not be released when reasons are given.
- 13.1.15 It remains the ODPP's practice not to include addresses or telephone numbers of witnesses in statements provided to the defence except where they are material to an issue in the proceedings.
- 13.1.16 All due care must be taken to protect the security of sensitive documents and other material and information, the inappropriate disclosure of which may:
-) affect the safety of individuals
 -) jeopardise continuing investigations
 -) potentially affect the flow of confidential information to and between justice agencies
 -) otherwise prejudice the criminal justice process or diminish public confidence in the criminal justice system.

Chapter 14: Reasons for decisions

14.1 Introduction

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

14.1.2 This guideline applies to the following decisions:

-) to discontinue a charge and proceed on another
-) to substantially alter a charge
-) to discontinue all charges
-) to offer no evidence on appeal
-) to lodge an appeal
-) to decline to lodge an appeal.

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

14.2 Requests for reasons

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

14.2.2 A person with a legitimate interest in the prosecution includes:

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

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

-) prejudice a current or future court case
-) interfere with an ongoing investigation
-) put the safety of any person at risk
-) breach legal privilege
-) breach any statutory provision
-) breach any court order
-) embarrass a victim (if a victim's family member requests reasons).

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

14.3 Privilege

- 14.3.1 The giving of reasons does not constitute a waiver of legal privilege in respect of matters in which reasons have been given. Internal legal advice must not be released when reasons are given unless the Director determines otherwise.

Consultation Draft

Chapter 15: Media contact and non-publication orders

15.1 Introduction

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

15.1.2 The purpose of this Chapter is to set out:

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

15.2 Guiding principles

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

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

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

15.3 Communicating with the media

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

15.3.2 Information of an uncontroversial nature that is already in the public domain, such as confirmation of the charges that have been referred to in open court, a plea entered in open court, past and future listings, dates, venues, and the sentence or

other outcome of the proceedings, may be provided to the media without referring the enquirer to the MCLO.

- 15.3.3 All other media enquiries, including requests for statements, interviews, video footage, photographs or any other evidence should be directed to the MCLO. The approval of the Director or a Deputy Director is required to respond to media enquiries other than those of an uncontroversial nature concerning matters in the public domain. The Director or Deputy Director must be advised if the enquiry relates to an accused person who is also facing trial on other charges.
- 15.3.4 Prosecutors with the conduct of matters that are likely to attract significant media attention should provide details of the matters, in advance, to the MCLO, particularly matters where proceedings are to be discontinued.
- 15.3.5 Prosecutors are not to speak on behalf of the Director or the ODPP without prior authorisation. Media releases on behalf of the Director or the ODPP are to be issued only by the MCLO with the approval of the Director or a Deputy Director.
- 15.3.6 Prosecutors must conduct themselves towards the media and the public in a courteous and dispassionate manner. Compliance with professional codes of conduct is expected and all communications with the media should be considered 'on the record'.
- 15.3.7 Among the matters ODPP staff and Crown Prosecutors are not to publicly discuss with or disclose to the media are:
 -) confirmation of whether a matter is under investigation or whether advice has been sought from an external agency
 -) the prosecution's intended approach in a case, including whether or not the matter is being reviewed
 -) contact details for any victim or civilian witness
 -) information that may lead to the identification of prisoners, informers and others who are giving evidence at some personal risk
 -) any information the disclosure of which is prohibited by law, such as privacy legislation
 -) any matter the subject of a non-publication or suppression order
 -) any information the subject of legal privilege or public interest immunity
 -) any part of the proceedings not conducted in an open hearing
 -) any evidence excluded at trial or not adduced in court proceedings
 -) expressions of the prosecutor's personal opinions, including, but not limited to:

- the possible or likely outcome of proceedings
- the veracity of any evidence
- the guilt or innocence of the accused
- the correctness or otherwise of a judicial decision or verdict
- the adequacy of a sentence
- the prospects of any appeal.

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

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

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

15.4 Closed court, suppression and non-publication orders

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

Closed courts

15.4.2 Prosecutors should be aware of statutory provisions that can exclude the general public from proceedings, including:

-) criminal proceedings in which the accused is a child under the age of 18 years (s10, *Children (Criminal Proceedings) Act 1987* (mandatory in all cases))
-) proceedings for an offence of incest or attempted incest (s291B, *Criminal Procedure Act 1986* (mandatory in all cases))
-) evidence by the complainant and a sexual offence witness in proceedings for a prescribed sexual offence (ss 291 and 294D, *Criminal Procedure Act 1986* (unless the court otherwise orders))
-) other evidence in proceedings for a prescribed sexual offence (s 291A, *Criminal Procedure Act 1986* (if the court directs))
-) evidence of counselling records concerning a victim of a sexual assault offence (also known as a 'protected confidence' or records subject to 'sexual

assault communications privilege’) (s 302(1), *Criminal Procedure Act 1986* (if the court directs)).

Mandatory non-publication

- 15.4.3 Prosecutors should be aware of the legislative restrictions on publication.
- 15.4.4 Automatic statutory prohibitions apply to identifying certain categories of persons, including:
 -) children (including as the accused, a witness who is a child or was a child at the time of the relevant events and a deceased child) (s 15A, *Children (Criminal Proceedings) Act 1987*)
 -) complainants and sexual offence witnesses in prescribed sexual assault proceedings (s 578A, *Crimes Act 1900* and s 294D(5), *Criminal Procedure Act 1986*)
 -) participants in the witness protection program (s 26, *Witness Protection Act 1995*)
 -) participants in controlled operations (s 28, *Law Enforcement (Controlled Operations) Act 1997*)
 -) persons with an assumed identity (s 34, *Law Enforcement and National Security (Assumed Identities) Act 1998*)
- 15.4.5 Section 195 of the *Evidence Act 1995* prohibits the publication of prohibited questions.
- 15.4.6 A breach of any of the above provisions constitutes a criminal offence.

Applications for suppression and non-publication orders

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

15.5 Complaints about media reporting

- 15.5.1 The MCLO should be contacted immediately if material is published in breach of a statutory provision or a court order, or could otherwise be prejudicial to proceedings. If the matter is still before the court, a request may be made that the court issue an order for the material to be removed.
- 15.5.2 Inaccurate media reports about the conduct of a prosecution or any other matter concerning the ODPP must be reported to the MCLO for remedial action.

Chapter 16: Proceeds of crime

- 16.1.1 The ODPP is responsible for confiscation action arising from the prosecution of all serious offences under NSW law, except for those cases in which the NSW Crime Commission has taken action.
- 16.1.2 The confiscation of assets used in or derived from the commission of serious crime is an important aspect of the criminal justice system and is justified to:
-) prevent unjust enrichment
 -) deter crime by reducing its profitability
 -) prevent crime by confiscating the means to commit it
 -) maintain public confidence in the criminal justice system
 -) put criminally derived assets to the use and benefit of society.
- 16.1.3 Prosecutors are required to address confiscation issues when screening and preparing all matters. Particular attention needs to be paid to whether a freezing notice or restraining order is required to prevent the disposal of assets that may be the subject of confiscation proceedings. If the property is clearly and directly derived or realised from criminal activity, there is a presumption that the ODPP will seek its forfeiture unless it belongs to an identifiable victim to whom it can be returned, or who is in a position to take civil action.
- 16.1.4 Decisions as to what, if any, confiscation action should be taken must be regularly reviewed during the prosecution process, particularly if charges are altered or new evidence comes to light.
- 16.1.5 Prosecutors are instructed to pursue authorised confiscation applications after a conviction is recorded.

Glossary

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

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

crime	a breach of criminal laws, as set down in legislation or by the courts
cross-examination	when the lawyer representing one party in the case challenges the evidence of a witness called by the other party, e.g. defence counsel may cross-examine a prosecution witness
defence	used to refer to the accused's legal response to the prosecution, a lawful excuse for doing something or the accused's legal team
defence counsel	the barrister representing the accused
defendant	a person charged with a crime; may also be referred to as the accused or the alleged offender
Deputy Director	a Deputy Director of Public Prosecutions (NSW)
Director (DPP)	the Director of Public Prosecutions (NSW)
discontinue proceedings	end the prosecution
District Court	the court that deals with most of the serious criminal cases in NSW
diversion	an option for magistrates to deal with a person with a cognitive impairment, mental illness or other mental condition other than in accordance with law (s 32, <i>Mental Health (Forensic Provisions) Act 1990</i>)
domestic violence	a wide range of behaviours, including physical, sexual and psychological abuse, occurring within married and de facto relationships, between family members, couples who are separated or divorced, and within shared households
evidence	material presented in court to prove or disprove a fact; it may be what a witness says or an exhibit
ex officio count	a charge on an indictment that was not committed from the Local Court or the Children's Court, which can only be authorised by the Director or a Deputy Director

examination-in-chief	the questioning of a witness by the lawyer who represents the side that has called that witness to give evidence, e.g. the prosecutor asking questions of a prosecution witness
fitness hearing	a hearing before a judge in the District or Supreme Court to determine whether the accused is mentally fit to face trial
Form 1	a document under s 32 of the <i>Crimes (Sentencing Procedure) Act 1999</i> containing a charge or a list charges that the accused agrees to have taken into account when being sentenced for some other offence; no conviction is recorded and no separate sentence is imposed for Form 1 offences
full-time detention	the length of time to be spent by the offender in prison
harm	physical, psychological or psychiatric harm, or having property taken, damaged or destroyed
hearing	an important listing of the case in court, e.g. a trial, summary hearing or sentence hearing
immunity	an indemnity or undertaking
indemnity	protection against prosecution granted by the Attorney-General under s 32, <i>Criminal Procedure Act 1986</i>
indictable offence	an offence that may be dealt with on indictment in the District Court or the Supreme Court
indictment	a document filed in the District Court or the Supreme Court that lists the charges against the accused
informer witness	a person who gives information to an investigative agency about someone else's criminal activity in return for some benefit, e.g. a lighter sentence
investigative agency	a government agency that investigates crime
judge	a person who hears cases in the District Court or the Supreme Court

judge alone trial	a trial heard before a judge without a jury (s 132, <i>Criminal Procedure Act 1986</i>)
legal privilege	protection from revealing confidential communications and documents between a lawyer and their client, sometimes referred to as client legal privilege or legal professional privilege
Local Court	a lower court which hears less serious matters. A magistrate sits in the Local Court without a jury.
magistrate	a person who hears cases in the Local Court or the Children's Court
mention	a brief hearing of the matter in court
no further proceedings	a direction to end the prosecution
non-publication order	a restriction or prohibition in legislation or by order of the court against the publication of the case or some aspect of the case, e.g. a victim's name
offender	a person who has been found guilty of a crime
Office of the Director of Public Prosecutions (ODPP)	comprises the Director's Chambers, the Crown Prosecutors' Chambers and the Office of the Solicitor for Public Prosecutions
officer-in-charge (OIC)	the officer in charge of the investigation, usually a police officer
plea	the accused's answer to the charge: guilty or not guilty
pre-charge advice	advice provided by the ODPP to an investigative agency before charging
prescribed sexual offence proceedings	proceedings that include a charge for a prescribed sexual offence as defined in s 3(1), <i>Criminal Procedure Act 1986</i>

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

suppression order	a restriction or prohibition in legislation or by order of the court against the disclosure about the case or some aspect of the case
Table offence	an indictable offence listed in Table 1 and 2 in Schedule 1 of the <i>Criminal Procedure Act 1986</i> that is capable of being dealt with either summarily in the Local Court or on indictment in the District Court or Supreme Court
trial	a hearing in a court where evidence is presented and a decision is made, can be with a jury or judge alone
undertaking	a promise by the Attorney General that evidence given by the person in court will not be used against them under s 33, <i>Criminal Procedure Act 1986</i>
verdict	the decision of whether the accused is guilty or not guilty after a trial or hearing
victim	a person who has suffered harm as a direct result of an act committed by another person in the course of a criminal offence, including a member of a deceased victim's immediate family
Victim Impact Statement (VIS)	a statement by a victim that may be read or presented to a court before the offender is sentenced to describe the effects of the crime on the victim
Victims Register	a register to keep victims informed about what happens with an offender after the end of the case in court; e.g. possible release dates and parole hearings
witness	a person who attends court to give evidence
Witness Assistance Service (WAS)	a specialist service within the ODPP that provides assistance and support to victims and vulnerable witnesses in the criminal justice process