

Introduction

This edition of the Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales incorporates some minor amendments and a few substantial alterations required to meet new legislation and changing circumstances in the prosecution of crime.

The guidelines are re-issued as one document and again are being published only electronically, on the ODPP website and intranet. The document, or parts, may be downloaded and printed as required. This aids in the dissemination of the document and has helped to make amending the guidelines a more convenient, timely and inexpensive process.

The *Director of Public Prosecutions Act 1986* and associated legislation created for the first time in NSW an independent professional service for the prosecution of serious criminal offences. These guidelines are issued pursuant to section 13 of the Act. A reference to a prosecutor in the document is a reference to any legal practitioner representing the interests of the Crown or of the Director in criminal and related proceedings pursuant to the Act.

Prosecution Policy and Guidelines were first issued in July 1987 when the Office commenced operations and further editions were published in 1988, 1991, 1993, 1995 and 1998. They were consolidated into one document and re-issued in 2003. There will always be a need to keep them up to date and in step with legislative and procedural changes affecting the criminal justice process.

These guidelines are freely and publicly available and should be read in conjunction with the many other instruments that affect the conduct of prosecutions. They serve to guide prosecutors and to inform the community about actions taken in its name.

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Sydney
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1 The Director of Public Prosecutions

[Furnished 20 October 2003]

The Director prosecutes on behalf of the Crown (that is, the community) under the *Director of Public Prosecutions Act 1986*. He or she is responsible to the Attorney General for the due exercise of the functions of the office, but acts independently of the government and of political influence. The Director also acts independently of inappropriate individual or sectional interests in the community and of inappropriate influence by the media.

As Kirby P (as he then was) said in *Price v Ferris* (1994) 34 NSWLR 704 at p 707, the object of having a Director of Public Prosecutions is:

"to ensure a high degree of independence in the vital task of making prosecution decisions and exercising prosecution discretions."

It ensures that there is:

"manifest independence in the conduct of the prosecution. It is to avoid the suspicion that important prosecutorial discretions will be exercised otherwise than on neutral grounds. It is to avoid the suspicion, and to answer the occasional allegation, that the prosecution may not be conducted with appropriate vigour."

The Director's functions are carried out independently of the courts.

"Our courts do not purport to exercise control over the institution or continuation of criminal proceedings, save where it is necessary to do so to prevent an abuse of process or to ensure a fair trial."

(per Dawson and McHugh JJ in *Maxwell v The Queen* (1995) 184 CLR 501).

Cases are prepared and conducted by lawyers employed in the Office of the Director of Public Prosecutions ("ODPP"). In many cases Crown Prosecutors are briefed and in some cases private counsel. In all cases the legal practitioners act on behalf of the Director. They are also subject to his or her general direction in the exercise of their professional functions, which direction may be given by way of published guidelines including these Prosecution Guidelines.

Pursuant to the *Director of Public Prosecutions Act 1986* the Director may delegate the exercise of particular functions.

Staff of the ODPP and Crown Prosecutors carry out their duties in compliance with the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors promulgated by the International Association of Prosecutors ([Appendix A](#)).

2 Role and Duties of the Prosecutor

[Furnished 20 October 2003]

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 is not entitled to act as if representing private interests in litigation. A prosecutor represents the community and not any individual or sectional interest. A prosecutor acts independently, yet in the general public interest. The "public interest" is to be understood in that context as an historical continuum: acknowledging debts to previous generations and obligations to future generations.

In carrying out that function:

"it behoves him - Neither to indict, nor on trial to speak for conviction except upon credible evidence of guilt; nor to do even a little wrong for the sake of expediency, or to pique any person or please any power; not to be either gullible or suspicious, intolerant or over-pliant: in the firm and abiding mind to do right to all manner of people, to seek justice with care, understanding and good countenance."

(per RR Kidston QC, former Senior Crown Prosecutor of New South Wales, in *"The Office of Crown Prosecutor (More Particularly in New South Wales)"*, (1958) 32 ALJ 148).

It is a specialised and demanding role, the features of which need to be clearly recognised and understood. It is a role that is not easily assimilated by all legal practitioners schooled in an adversarial environment. It is essential that it be carried out with the confidence of the community in whose name it is performed.

"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 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."

(per Rand J in the Supreme Court of Canada in *Boucher v The Queen* (1954) 110 CCC 263 at p 270).

In this State that role must be discharged in the environment of an adversarial approach to litigation. The observance of those canons of conduct is not incompatible with the adoption of an advocate's role. The advocacy must be conducted, however, temperately and with restraint.

The prosecutor represents the community generally at the trial of an accused person.

"Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one."

(per Deane J in *Whitehorn v The Queen* (1983) 152 CLR 657 at pp 663-664).

Nevertheless, there will be occasions when the prosecutor will be entitled firmly and vigorously to urge the prosecution's view about a particular issue and to test, and if necessary to attack, that advanced on behalf of an accused person or evidence adduced by the defence. Adversarial tactics may need to be employed in one trial that may be out of place in another. A criminal trial is an accusatorial, adversarial procedure and the prosecutor will seek by all proper means provided by that process to secure the conviction of the perpetrator of the crime charged.

3 Fairness

[Furnished 20 October 2003; amended 1 June 2007]

Having regard to the role and duties of the prosecutor as described in [Guideline 2](#), a prosecutor must act impartially and fairly according to law. This will involve the prosecutor informing the defence and the court of directions, warnings or authorities which may be appropriate in the circumstances of the case, even where unfavourable to the prosecution. It will also involve identifying portions of evidence which may be objectionable and declining to open on such evidence.

As a general rule the prosecution must offer all its proofs during the presentation of its case (and, for example, should not first adduce evidence of an admission which is relevant to a fact in issue during cross-examination of an accused person).

Cross-examination of an accused person as to credit or motive must be fairly conducted. Material put to an accused person must be considered on reasonable grounds to be accurate and its use justified in the circumstances of the trial. (See also Barristers' and Solicitors' Rules 63 and 64 — [Appendix B](#).)

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

Procedural Fairness to the Prosecution

The prosecution's right to be treated fairly must not be overlooked.

In *Moss v Brown* (1979) 1 NSWLR 114 at p 126 the Court of Appeal said:

"In any discussion of fairness, it is imperative to consider the position of all parties. It is sometimes forgotten that the Crown has rights and, as it has a heavy responsibility in respect of the invoking and enforcement of the criminal law, which includes seeing that the public revenue is not imposed upon, it is entitled to maintain those rights, even if they may bear heavily upon some accused. As Lord Goddard CJ said in R v Grondkowski (1946) KB 369 at 372: 'The judge must consider the interests of justice as well as the interests of the prisoners'."

Ensuring the prosecution's right to fairness may require a prosecutor to seek an adjournment of a matter due to insufficient notice of listing being given to the prosecution or to allow an appeal pursuant to section 5F of the *Criminal Appeal Act* 1912 to be considered.

4 The Decision to Prosecute

[Furnished 20 October 2003; amended 1 June 2007]

The prosecution process is usually enlivened by a suspicion, an allegation or a confession. Not every one, however, will result in a prosecution.

"It has never been the rule in this country ... that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should ... prosecute 'wherever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest'. That is still the dominant consideration."

(per Sir Hartley Shawcross QC, UK Attorney General and former Nuremberg trial prosecutor, speaking in the House of Commons on 29 January 1951).

That statement applies equally to the position in New South Wales. The general public interest is the paramount criterion.

The question whether or not the public interest requires that a matter be prosecuted is resolved by determining:

- (1) whether or not the admissible evidence available is capable of establishing each element of the offence;
- (2) whether or not it can be said that there is no reasonable prospect of conviction by a reasonable jury (or other tribunal of fact) properly instructed as to the law; and if not
- (3) whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

The first matter requires no elaboration: it is the *prima facie* case test.

The second matter requires an exercise of judgment which will depend in part upon an evaluation of the weight of the available evidence and the persuasive strength of the prosecution case in light of the anticipated course of proceedings, including the circumstances in which they will take place. It is a test appropriate for both indictable and summary charges.

The third matter requires consideration of many factors which may include the following:

- 3.1 the seriousness or, conversely, the triviality of the alleged offence or that it is of a "technical" nature only;
- 3.2 the obsolescence or obscurity of the law;
- 3.3 whether or not the prosecution would be perceived as counter-productive; for example, by bringing the law into disrepute;
- 3.4 special circumstances that would prevent a fair trial from being conducted;
- 3.5 whether or not the alleged offence is of considerable general public concern;
- 3.6 the necessity to maintain public confidence in such basic institutions as the

- Parliament and the courts;
- 3.7 the staleness of the alleged offence;
 - 3.8 the prevalence of the alleged offence and any need for deterrence, both personal and general;
 - 3.9 the availability and efficacy of any alternatives to prosecution;
 - 3.10 whether or not the alleged offence is triable only on indictment;
 - 3.11 the likely length and expense of a trial;
 - 3.12 whether or not any resulting conviction would necessarily be regarded as unsafe and unsatisfactory;
 - 3.13 the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court;
 - 3.14 whether or not the proceedings or the consequences of any resulting conviction would be unduly harsh or oppressive;
 - 3.15 the degree of culpability of the alleged offender in connection with the offence;
 - 3.16 any mitigating or aggravating circumstances;
 - 3.17 the youth, age, maturity, intelligence, physical health, mental health or special disability or infirmity of the alleged offender, a witness or a victim;
 - 3.18 the alleged offender's antecedents and background, including culture and language ability;
 - 3.19 whether or not the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
 - 3.20 the attitude of a victim or in some cases a material witness to a prosecution;
 - 3.21 whether or not and in what circumstances it is likely that a confiscation order will be made against the offender's property;
 - 3.22 any entitlement or liability of a victim or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken; and/or
 - 3.23 whether or not the Attorney General's or Director's consent is required to prosecute.

The applicability of and weight to be given to these and other factors will vary widely and depend on the particular circumstances of each case.

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

- (i) the race, religion, sex, national origin, social affiliation or political associations, activities or beliefs of the alleged offender or any other person involved (unless they have special significance to the commission of the particular offence or should otherwise be taken into account objectively);
- (ii) personal feelings of the prosecutor concerning the offence, the alleged offender or a victim;
- (iii) possible political advantage or disadvantage to the government or any political party, group or individual;

- (iv) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution or otherwise Involved in its conduct; or
- (v) possible media or community reaction to the decision.

It is recognised that the resources available for prosecuting are finite and should not be expended pursuing inappropriate cases. Alternatives to prosecution, including diversionary procedures, should always be considered.

5 Expedition

[Furnished 20 October 2003; amended 1 June 2007]

It is a fundamental obligation of a prosecutor to assist in the timely and efficient administration of criminal justice. Accordingly and particularly:

- cases should be prepared for hearing as quickly as possible;
- bills of indictment should be found as early as possible, preferably (as normally required) within 28 days of committal for trial;
- particulars of the indictment should be communicated to the accused as soon as possible;
- any proposed amendment to an indictment should be communicated to the accused forthwith in anticipation of consent or an application for an order giving leave to amend; and
- any event that affects the question of whether or not a jury will be empanelled must be reported to the Sheriff as soon as practicable

6 Settling Charges

[Furnished 20 October 2003]

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

Substantive charges are to be preferred to conspiracy where possible; however, there will be occasions when a charge of conspiracy is appropriate by reason of the facts and/or the need adequately to address the overall criminality of the conduct alleged.

Prosecutors must in all cases guard against the risk of hearings becoming unduly complex or lengthy (although complexity and/or length in some cases may be unavoidable, necessary or otherwise appropriate).

7 Discontinuing Prosecutions

[Furnished 20 October 2003]

Discontinuing Local Court Prosecutions and District Court Appeals

The lawyer with conduct of a matter must advise the police officer-in-charge and the victim whenever the ODPP is considering whether or not to discontinue a prosecution in the Local Court or to offer no evidence in an appeal to the District Court. The police officer-in-charge should be consulted on any relevant matters, including perceived deficiencies in the evidence and any matters raised by the accused person or appellant. The views of the victim on the proposed course of action must be sought. The views of the police officer-in-charge and the victim should be recorded prior to the submission of a report and recommendation. However, if the police officer-in-charge or victim is not able to be consulted within a reasonable time, the attempts made to contact him or her must be described in the relevant report.

An important purpose of this consultation is to make sure that the prosecution is aware of all relevant factors before discontinuing or offering no evidence in a matter.

This consultation is the responsibility of each lawyer preparing a first report on the question whether the matter should be discontinued or no evidence offered. The views of the police officer-in-charge and the victim (if obtained) must be included in that first report. It is the responsibility of the Managing Lawyer to ensure that a second report is prepared and to check if the consultations have occurred and that the results are reflected in the first report.

After a decision has been made, the lawyer with carriage of the matter must notify the police officer-in-charge and the victim of the decision as soon as practicable.

Discontinuing Trials and Committals for Sentence

Accused persons or their representatives or prosecutors may make application that a charge or charges be discontinued or varied or that a bill of indictment not be found. Such applications are to be dealt with expeditiously.

In considering and preparing such applications regard is to be had principally to the three tests set out in [Guideline 4](#), bearing in mind any additional considerations of fact or argument put forward by the defence.

In trials and matters committed for sentence it is the responsibility of the Crown Prosecutor, Trial Advocate or Lawyer who authors the report to the Director's Chambers to ensure that the consultations with the police officer-in-charge and the victim described above have occurred. The views of the police officer-in-charge and the victim should be included in the report. However, if the police officer-in-charge or victim is not able to be consulted within a reasonable time, the attempts made to contact him or her must be described in the relevant report.

After a decision has been made, the lawyer with carriage of the matter must notify the police officer-in-charge and the victim of the decision as soon as practicable.

Generally

Where a direction has been given in a matter to proceed or to take no further

proceedings, that direction will not be reversed unless significant new facts warrant it, the direction was obtained by fraud or impropriety or the direction was obtained or made on an erroneous basis, and in any such case the interests of justice require a reversal.

8 Election for offence to be dealt with on indictment

[Furnished 20 October 2003; amended 1 June 2007]

Procedures are prescribed by Chapter 5 of the *Criminal Procedure Act 1986* and Tables 1 and 2 for certain offences ("table offences") to be dealt with either summarily or on indictment. The prosecution may elect to have a table offence dealt with on indictment.

If a police prosecutor considers that such an election should be made the matter will be referred to the ODP with all relevant material. The lawyer to whom it is referred is to make a recommendation to a Managing Lawyer or a Trial Advocate for decision (or to a Deputy or Assistant Solicitor if circumstances dictate). The police prosecutor is then to be advised of the decision.

If an election is made, the Director takes over the prosecution. If it is not, then the matter is generally returned to the police.

Division 1A of the *Crimes (Sentencing Procedure) Act 1999* relating to standard non-parole periods applies only where no penalty other than imprisonment is appropriate.

In relation to offences included in the table of standard non-parole period offences pursuant to section 54D of the Act, if the view is taken that no penalty other than imprisonment is appropriate and that the offence falls within the middle of the range of objective seriousness or higher for that particular table offence, then election should be made for the offence to be dealt with on indictment.

An election should not be made unless:

- (i) the accused person's criminality (taking into account the objective seriousness and his or her subjective considerations) could not be adequately addressed within the sentencing limits of the Local Court; and/or
- (ii) for some other reason, consistently with these guidelines, it is in the interests of justice that the matter not be dealt with summarily (eg. a comparable co-offender is to be dealt with on indictment; or the accused person also faces a strictly indictable charge to which the instant charge is not a back-up).

Election decisions and review of those decisions in matters under Division 1A of the Act should be made by a Crown Prosecutor, a Trial Advocate or a Managing Lawyer (or an Assistant Solicitor or Deputy Solicitor if circumstances dictate).

9 Finding Bills of Indictment

[Furnished 20 October 2003]

This guideline is to be read in conjunction with [Guideline 6](#) (Settling Charges) and [Guideline 20](#) (Charge Negotiation and Agreement; Agreed Statements of Facts; Form 1).

An *ex officio* indictment is a bill of indictment found for an offence in respect of which there has been no committal for trial. An *ex officio* count in an indictment may be similarly described.

Pursuant to section 5(1)(b) of the *Crown Prosecutors Act 1986* a Crown Prosecutor may find a bill of indictment in respect of an offence whether or not the person concerned has been committed for trial in respect of the offence. However, the approval of the Director or a Deputy Director should be sought to the finding of any bill of indictment or count in respect of any offence that is substantially different in nature or seriousness from an offence founding a committal for trial. Such approval, if required urgently, may be sought by telephone, to be confirmed later upon a submission in writing. A bill of indictment may be found for a truly alternative count to a committal charge without the Director's or a Deputy Director's additional sanction.

A decision whether or not to proceed by way of *ex officio* indictment or count where no committal proceedings have taken place should be made by the Director or a Deputy Director and should be made within two months of the matter arising or being referred to the ODP for consideration. The alleged offender must be advised of the direction given.

If a prosecutor has doubt about the finding of a particular bill the approval of the Director or a Deputy Director should be sought. In any event, where a charge is to be reduced in scope or severity from the committal charge, the police officer-in-charge and the victim should be consulted. Where the police officer-in-charge or the victim objects to the proposed reduced charge, the Crown Prosecutor or Trial Advocate should consult the Senior Crown Prosecutor or a Deputy Senior Crown Prosecutor, or in regional areas the most senior Crown Prosecutor available, and if appropriate the Director or a Deputy Director. A written record must be made of all consultations described above.

The alleged offender in each case must be kept informed. Where appropriate the alleged offender should be given the opportunity of making representations when consideration is being given to an *ex officio* indictment or count against him or her.

A proceeding such as a coronial inquest or inquiry or a committal hearing in respect of another charge in a matter may be regarded as a sufficient substitute for committal proceedings; or it may be considered that an issue or issues could appropriately be explored in pre-trial proceedings (a so-called *Basha* inquiry). If that is not the case and an *ex officio* indictment would be inappropriate, then police should be advised that proceedings should be commenced in the Local Court unless the alleged offender requests that the matter be dealt with directly on indictment.

10 Taking over Proceedings

[Furnished 20 October 2003; amended 1 June 2007]

The Director may take over a matter pursuant to section 9 of the *Director of Public Prosecutions Act 1986*. Although the right of an individual to prosecute in the Local Court survives, the object of having a Director of Public Prosecutions is to ensure manifest integrity, neutrality and consistency in the making of prosecutorial decisions and the conduct of prosecutions.

Proceedings may be taken over if:

- (i) the police officer-in-charge of the investigation so requests and there is a sound basis for doing so;
- (ii) there is no reasonable prospect of conviction;
- (iii) they appear to be frivolous or vexatious or brought for an inappropriate ulterior purpose;
- (iv) they appear to have arisen out of a conflict of a predominantly civil nature and/or a civil legal remedy may be available;
- (v) they have been brought contrary to advice or a decision by the Director not to proceed;
- (vi) they have been instituted by police or a private person and there appears to be a conflict of interest or the risk of unfairness arising from their conduct of the prosecution;
- (vii) the public interest otherwise requires it, having regard (for example) to the gravity of the offence, its connection with another offence being prosecuted by the ODPP and all the surrounding circumstances; and/or
- (viii) an ODPP officer holding specific delegation pursuant to the Consolidated Instrument of Delegation and Orders approves the takeover.

If such a decision is made the notices required by section 10 of the Act must be given expeditiously and before the next court appearance. Nevertheless, the mere act of appearing before a court in a prosecution or proceeding (including an appeal) in respect of an offence will constitute the taking over of that matter by the Director. In any such case an original informant disappears from the record (see *Price v Ferris* (1994) 34 NSWLR 704). Accordingly, after a matter has been taken over it cannot be returned to or conducted by or in the name of the original prosecutor.

Before any matter is taken over other than in accordance with (viii) above and if time reasonably permits, it must be assessed and a decision made by the Director as to its future course (eg to continue or discontinue the proceedings).

11 Privacy

[Furnished 20 October 2003; amended 1 June 2007]

The ODPP must observe the Information Protection Principles set out in the *Privacy and Personal Information Protection Act 1998*. The principles apply to the collection, retention, access, alteration, use and disclosure of personal information.

The ODPP must also observe the Health Privacy Principles set out in the *Health Records and Information Privacy Act 2002*. The principles apply to the collection, storage, access, accuracy, use and disclosure of personal health information.

12 Reasons for Decisions

[Furnished 20 October 2003; amended 1 June 2007]

Reasons for decisions made in the course of prosecutions or of giving advice, in appropriate circumstances, may be disclosed by the Director to persons outside the ODPP. Reasons will not be given in any case, however, where to do so may cause serious undue harm to a victim, a witness or an accused person, or could significantly prejudice the administration of justice.

Generally the disclosure of reasons for prosecution decisions is consistent with the open and accountable operations of the ODPP; however, the terms of advice given to or by the Director may be subject to legal professional privilege and privacy considerations may arise. Reasons will only be given to an inquirer with a legitimate interest in the matter and where it is otherwise appropriate to do so. A legitimate interest includes the interest of the media in reporting the open dispensing of justice where previous proceedings have been public.

Reasons for not proceeding with a prosecution where committal proceedings or an inquest has taken place may be given by the Director.

Where there have been no prior public proceedings and a decision is made not to commence or continue a prosecution, reasons may also be given by the Director. However, where it would mean publishing material assessed as not having sufficient evidentiary value to justify prosecution, only a brief explanation may be given.

Detailed reasons will not normally be given publicly for the decision to appeal or not to appeal against a sentence.

13 The Director of Public Prosecutions and Police

[Furnished 20 October 2003]

The Director prosecutes. The police (and some other agencies) investigate. The Director has no investigative function and no power to direct police or other agencies in their investigations.

The Director does not act or appear on behalf of any person (other than the Crown), nor (in the absence of express instructions) do police act or appear on his or her behalf.

The Director may advise investigators in relation to the sufficiency of evidence to support nominated charges and the appropriateness of charges; but not in relation to operational issues, the conduct of investigations or the exercise of police or agency powers. Any advice given to such persons may only be done formally and on behalf of the Director. Guidelines on the giving of advice to police are in [Guideline 14](#).

14 Advice to Police

[Furnished 20 October 2003; amended 11 November 2005 and 1 June 2007]

In accordance with the [Protocol](#) between the ODPP and the NSW Police Force, advice will be provided as set out below in respect of matters:

- that are strictly indictable;
- that involve allegations of child sexual assault;
- that are indictable offences where the ODPP may exercise its discretion to elect to proceed on indictment: but these matters must be referred to the ODPP for a decision as to jurisdiction before advice will be provided.

The protocol does not apply to proceedings against a police officer or to requests for advice received from police in specialist investigative agencies.

Advice as to the sufficiency of evidence or the appropriateness of charges may be given in the following circumstances

- (i) After a determination by the Local Area Commander, Crime Manager (or equivalent) or Police Legal Services that the evidence is sufficient and a Court Attendance Notice ("CAN") is appropriate, a matter may be referred by police for advice as to the sufficiency of evidence or the appropriateness of a CAN.
- (ii) Advice will be provided only on receipt of sufficient material in admissible form.
- (iii) Where insufficient material is provided to allow a decision to be made, the ODPP may request additional material before advice will be provided.
- (iv) Advice as to the sufficiency of evidence will generally be provided within four weeks of receipt of the material referred to in (ii) and (iii); however, where practicable and on the provision of reasons for urgency in the matter in question, a shorter period may be negotiated.
- (v) The advice will include reasons why charges are not recommended, the draft wording of charges recommended and requisitions for any additional material considered appropriate.

Advice during the course of an investigation

The ODPP may provide advice to police during an investigation into an indictable offence. Requests for this type of advice should be made in writing and endorsed by the Local Area Commander, Crime Manager (or equivalent) or Police Legal Services.

Advice will be given only as to:

- (i) the admissibility of evidence already obtained by police (which may include advice as to whether such evidence is admissible, or whether it can be made admissible);
- (ii) evidence that is likely to be obtained including its admissibility, how to make it admissible and legal provisions relevant to obtaining the evidence;
- (iii) the legal implications of alternative or proposed courses described by police.

Applications for advice as to the admissibility of any evidence or the legal implications of alternatives proposed by police must provide sufficient information to enable the question to be answered. The application for advice will be considered by the ODPP on the information provided and supporting documentation may be required to enable proper consideration.

The ODPP will not direct police as to which choice should be made, but rather provide advice as to the legal limitations or consequences of a particular choice.

Advice during the course of an investigation will be provided within at least three working days.

General Issues

There is no distinction to be drawn between "formal" and "informal" advice and "provisional" or conditional advice should not be given.

Where the main issue is the credibility of the complainant or another main witness, the papers are to include an assessment of the credibility of that person. Generally the ODPP will not interview witnesses for the purpose of giving advice as to the sufficiency of evidence or the appropriateness of charges.

Whether police follow the advice as to the sufficiency of evidence or the appropriateness of charges is a matter for them. It is also a matter for police whether they wish to inform any person of the terms of the advice given to them by the ODPP. The ODPP generally will not disclose to persons outside the ODPP that police have sought advice or that advice has been provided and will not disclose in any case the terms of any advice provided.

The ODPP will not advise the police to discontinue an investigation.

Matters to be referred to the Director or a Deputy Director

The following requests for advice must be referred to the Director or a Deputy Director unless such matters have been specifically delegated to other ODPP officers:

- (i) whether or not a prosecution should proceed following a proposed international extradition;
- (ii) whether or not an immunity (indemnity or undertaking) should be requested;
- (iii) whether or not an appeal should be lodged (including an application for prerogative relief);
- (iv) whether or not a police officer should be prosecuted for an indictable offence;
- (v) whether or not an *ex officio* indictment should be filed or an *ex officio* count included on an indictment;
- (vi) where the Director's sanction or approval is required for the commencement of proceedings (eg perjury, certain sexual offences, *Listening Devices Act 1984* prosecutions);
- (vii) matters of particular sensitivity, including allegations of corruption or serious misconduct by any public official and allegations of criminal conduct by persons in the practice of professions.

In cases of homicide (including murder, manslaughter, infanticide) or dangerous driving causing death, the recommendation is to be referred to the Director's Chambers for final consideration.

Advisings Generally

All requests by police for advice, including requests concerning:

- (a) the availability of criminal charges, involving:
 - (i) a question of the sufficiency of evidence;
 - (ii) a consideration of the admissibility of evidence; and/or
 - (iii) a view as to the appropriateness of preferring a particular charge or of proceeding in a particular court;
- (b) the present state of law with respect to a certain subject matter (where this requires detailed evaluation);
- (c) the merits of dealing with a matter summarily rather than on indictment, by means of preferring a less serious charge;
- (d) the availability of:
 - an *ex officio* indictment or count;
 - an appeal to the District Court on sentence;
 - an appeal pursuant to the *Criminal Appeal Act 1912*;
 - a stated case; or
 - prerogative relief;
- (e) the discontinuance of Local Court proceedings;
- (f) matters relating to whether or not an individual is to be charged or the form of the proceedings and, if requested, the ultimate venue of any such proceedings;

are to be answered in writing following a specific written request for such advice.

Should a person seeking advice be unable to do so in writing because of the urgency of the request or other circumstances of the matter, this should not preclude the giving of advice. In such instances the written advice should recite the oral request made of the ODPP and the information upon which the advice is based.

In the event that the urgency or circumstances of the matter preclude the initial provision of written advice, this again should not preclude the giving of oral advice. A letter confirming the oral advice is to be dispatched within 24 hours.

Requests for advice relating to matters of law which require a detailed evaluation or involve police or other investigative powers are to be referred to the Deputy Solicitor (Legal).

All requests are to be forwarded to the Assistant Solicitor (Operations) in Sydney or the Managing Lawyer at a regional office as appropriate.

All requests for advice are to be registered on CASES.

15 Induced Statements

[Furnished 20 October 2003; amended 1 June 2007]

An induced statement is one taken from a person on the basis that the information in the statement will not be used against the person making the statement. It is a statement from a person who is prepared to supply information relevant to the investigation of criminal activity which may tend to incriminate him or her in criminal activity and who is not otherwise prepared to supply the information.

Local Area Commanders 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.

However, if a matter is already with the ODPP for the conduct of a prosecution already begun (not simply to provide advice as to the sufficiency of evidence to support charges) and:

- it is intended by police to take an induced statement from the defendant, accused or appellant or a witness or potential witness in the proceedings; and
- the statement relates to the matter

then the police are to obtain written approval from the Director before the induced statement is taken. Such authorisation will only be given after consideration of a written request supported by copies of all available relevant documents.

Requests for authorisation must be referred to the Director's Chambers.

The inducement to be recorded at the beginning of the statement should be in the following terms:

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

Prior to charges being laid against any person/s inculpated in the induced statement, all correspondence is to be treated by the ODPP as sensitive and securely stored and treated accordingly.

This Guideline does not apply to police carrying out investigations pursuant to Australian Crime Commission, Independent Commission Against Corruption, NSW Crime Commission or Police Integrity Commission references.

16 Informers

[Furnished 20 October 2003; amended 1 June 2007]

An informer is a person (not being a victim in the matter) who:

- has given assistance to police or investigators as a consequence of knowledge that has come into his or her possession through direct personal contact with an alleged offender; and
- is a co-offender, prisoner, civilian undercover operative, or a person bargaining such knowledge for the advantage of himself or herself or another person.

As far as possible, care must be taken to ensure that the tribunal of fact is aware of all matters that would assist the proper evaluation of the evidence of an informer. In every such case a decision must first be made whether or not an informer should be called at all.

If it is contemplated that an informer be called as a witness, approval should be sought from the Assistant Solicitor (Legal) or, if a Crown Prosecutor is briefed in the matter, the Crown Prosecutor.

In all cases the ODPP Index of Informers should be accessed and considered before approval to call an informer is given. Requests for access should be in writing, identifying the matter in which it is contemplated the informer will be called and accompanied by a Witness Informer Report from the police and a copy of the informer's statement/s. The matter will then be recorded on the index.

When a decision has been made whether or not to approve the calling of the informer, that decision is to be notified in writing to those who maintain the index. If the decision is not to approve the calling of the informer, that notification is to include the reasons.

In the case of a prison informer (a prisoner or former prisoner who provides evidence of an admission made by a fellow prisoner during imprisonment), the approval of the Director or a Deputy Director must first be obtained.

Independent evidence that supports the account given by the informer or other independent evidence proving guilt should be identified (and some independent evidence of the making of an admission will generally be required in the case of a prison informer).

The ODPP Index of Informers records informers who have given evidence or been proposed to give evidence and any known public evaluation of their evidence by the courts. Such information assists in the determination whether or not to call such witnesses. The relevant entry/ies generally will be made available to the defence if such a witness is to be called.

The accused person should be informed in advance of the trial of:

- (a) the informer's criminal record;
- (b) whether or not the Police or Corrective Services Department has any information which might assist in evaluating the informer's credibility, particularly as to:

- (i) motivation,
 - (ii) previous animosity against accused persons,
 - (iii) favourable/different treatment by Corrective Services,
 - (iv) mental health/reliability,
 - (v) the extent to which public officers have given evidence or written reports on behalf of the informer (eg to courts, Parole Board);
- (c) whether any monetary or other benefit of any kind has been claimed, offered or provided;
 - (d) whether the informer was in custody at the time of giving assistance;
 - (e) whether an immunity has been granted or requested;
 - (f) whether any discount on sentence has been given for assistance in the matter; and/or
 - (g) other current or former criminal proceedings in which the informer has given evidence or was proposed to give evidence.

Public interest immunity in some circumstances may prevent the disclosure of the identity of an informer (see [Guideline 18](#)).

17 Immunities (Indemnities and Undertakings)

[Furnished 20 October 2003; amended 1 June 2007]

There are two types of immunities: indemnities under section 32 and undertakings under section 33 of the *Criminal Procedure Act 1986*.

In principle it is desirable that the criminal justice system should operate without the need to grant any concessions to persons who participated in the commission of offences or who have guilty knowledge of their commission. Nevertheless, it may be appropriate to do so in some cases in the public interest.

Section 19 of the *Director of Public Prosecutions Act 1986* enables the Director to request the Attorney General to grant indemnity from prosecution or to give an undertaking that an answer, statement or disclosure will not be used in evidence. The Director may not grant such an indemnity or give such an undertaking. The Attorney General may do so pursuant to Chapter 2 of the *Criminal Procedure Act 1986* and may also give an undertaking that binds him or her in honour.

Generally an accomplice should be prosecuted (subject to these guidelines) whether or not he or she is to be called as a witness. An accomplice who pleads guilty and agrees to co-operate in the prosecution of another is entitled to receive a consequential reduction in the otherwise appropriate sentence.

There may be rare cases, however, where that course cannot be taken (for example, there may be insufficient admissible evidence to support charges against the accomplice).

A request for an indemnity or undertaking on behalf of a witness will only be made by the Director to the Attorney General after consideration of a number of factors, the most significant being:

- (i) whether or not the evidence that the witness can give is reasonably necessary to secure the conviction of the accused person;
- (ii) whether or not that evidence is available from other sources; and
- (iii) the relative degrees of culpability of the witness and the accused person.

It must be able to be demonstrated in all cases that the interests of justice require that the immunity be given.

The Interagency Protocol for Indemnities and Undertakings provides procedures for applications to the Attorney General for immunities and for their revocation that should be followed by the ODPP.

Any request to the Attorney General for an immunity (indemnity or undertaking) pursuant to the *Criminal Procedure Act 1986* or otherwise must be made in a timely manner and must address the following matters:

- (a) The present circumstances of the proposed witness should be outlined and in doing that his or her attitude to giving evidence without the benefit

of any immunity and his or her exposure to prosecution from having previously given evidence should be addressed.

- (b) The evidence which the proposed witness is capable of giving should be summarised.
- (c) The involvement and culpability of the proposed witness in the criminal activity compared with that of the accused person should be considered.
- (d) The appropriateness of the kind of protection (ie. indemnity or undertaking) proposed should be considered.
- (e) The availability of evidence that would substantiate charges against the proposed witness must be stated and the question whether it would be in the public interest that he or she be prosecuted but for his or her preparedness to testify for the prosecution if given an immunity under the Act should be examined.
- (f) The strength of the prosecution evidence against the accused person without the evidence it is expected the witness can give should be assessed.
- (g) The question of whether, if some charge or charges could be established against the accused person without the evidence of the proposed witness, the charge(s) would properly reflect the accused person's criminality should be addressed.
- (h) The proposed witness's reliability should be assessed and whether or not his or her evidence may be corroborated.
- (i) The likelihood of the weakness in the prosecution case being strengthened other than by relying on the evidence the proposed witness can give (eg. the likelihood of further investigations disclosing sufficient independent evidence to remedy the weakness or evidence being forthcoming from another source) should be examined.
- (j) The request should also deal with the likelihood of a conviction being secured using the proposed witness's evidence.
- (k) The general character of the proposed witness should be examined and, in particular, the outcome of reliance on any previous grant should be addressed.
- (l) The question whether any inducement or other reward, benefit or assistance has been claimed, offered or provided should be addressed.
- (m) The views of any other relevant State or Commonwealth investigatory or prosecuting authority should be addressed.
- (n) Consideration should be given to whether or not a certificate under

section 128 of the *Evidence Act* 1995 would be likely to be granted and whether or not that course would afford sufficient protection to the witness.

The Interagency Protocol and forms of indemnity and undertaking are in [Appendix C](#).

18 Disclosure

[Furnished 20 October 2003; amended 1 June 2007]

Prosecutors are under a continuing obligation to make full disclosure to the accused in a timely manner of all material known to the prosecutor which can be seen on a sensible appraisal by the prosecution:

- to be relevant or possibly relevant to an issue in the case;
- to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; and/or
- to hold out a real as opposed to fanciful prospect of providing a lead to evidence which goes to either of the previous two situations.

The prosecution duty of disclosure does not extend to disclosing material:

- relevant only to the credibility of defence (as distinct from prosecution) witnesses;
- relevant only to the credibility of the accused person;
- relevant only because it might deter an accused person from giving false evidence or raising an issue of fact which might be shown to be false; or
- of which it is aware concerning the accused's own conduct to prevent an accused from creating a trap for himself or herself, if at the time the prosecution became aware of that material it was not seen as relevant to an issue in the case or otherwise disclosable pursuant to the criteria above.

In all matters prosecuted by the Director, police, in addition to providing the brief of evidence, must notify the Director of the existence of, and where requested disclose, all other documentation, material and other information, including that concerning any proposed witness, which documentation, material or other information might be of relevance to either the prosecution or the defence in relation to the matter and must certify that the Director has been notified of all such documentation, material and other information. (Procedures are in place for such certification to occur.)

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.

Where a prosecutor receives, directly or indirectly, sensitive documentation, material or information, or material that may possibly be subject to a claim of public interest immunity, the prosecutor should not disclose that documentation, material or information to the defence without first consulting with the police officer-in-charge of the case. The purpose of the consultation is to give that officer the opportunity to raise any concerns as to such disclosure. Accordingly, the officer should be allowed a reasonable opportunity to seek advice if there is any concern or dispute.

Where there is disagreement between a prosecutor and the police as to what, if any, of the sensitive documentation, material or information should be disclosed and there is no claim of public interest immunity, then in cases being prosecuted by

counsel, the matter is to be referred to the Director or a Deputy Director and in cases being prosecuted by lawyers, the Solicitor for Public Prosecutions or a Deputy Solicitor.

In cases where a claim of public interest immunity is to be pursued or is being pursued, then the question of disclosure will be determined by the outcome of that claim.

The duty of disclosure extends to any record of a statement by a witness that is inconsistent with the witness' previously intended evidence or adds to it significantly, including any statement made in conference (recorded in writing or otherwise) and any victim impact statement. Subject to public interest immunity considerations, the Director will not claim legal professional privilege (including client legal privilege) in respect of such statements recorded in writing or on tape, provided the disclosure of such records serves a legitimate forensic purpose.

If a witness makes any such statement in conference (adding significantly to or inconsistent with any previous statement/s), the lawyer present must note that fact and arrange for a supplementary written statement to be taken by investigators. That supplementary statement should be disclosed to the defence.

Rare occasions may arise where the overriding interests of justice - for example, a need to protect the integrity of the administration of justice, the identity of an informer (covered by public interest immunity) or to prevent danger to life or personal safety - require the withholding of disclosable information. Such a course should only be taken with the approval of the Director or a Deputy Director.

Legal professional privilege ordinarily will be claimed against the production of any document in the nature of an internal ODPP advising (eg. a submission to the Director, submissions between lawyers and Crown Prosecutors).

Reference should be made to Barristers' Rules 66, 66A and 66B and Solicitors' Rules A66, A66A and A66B ([Appendix B](#)). The requirement of Barristers' Rule 66 and Solicitors' Rule A66 to disclose "*the means of finding prospective witnesses*" may be satisfied by making the witnesses available to the opponent where possible, subject to public interest immunity considerations. It remains the practice of the ODPP 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).

Regard should be had to the protection of the privacy of victims. (See also point 8, Charter of Victims' Rights, *Victims Rights Act 1996* - [Appendix D](#).)

Security of documents and other material

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 or otherwise prejudice the criminal justice process or diminish public confidence in the criminal justice system. This includes the locking away of such material when the workplace is not attended and not leaving the material unattended at court, in motor vehicles or other non-

secure places or exposing it to casual perusal by unauthorised observers. It also includes discussion of such matters in circumstances where it may be overheard by members of the public or persons not authorised to receive such information.

19 Victims of Crime; Vulnerable Witnesses; Conferences

[Furnished 20 October 2003; amended 24 October 2005 and 1 June 2007]

A victim of crime (as defined in section 5 of the *Victims Rights Act 1996*) is a person who suffers harm as a direct result of an act committed, or apparently committed, by another person in the course of a criminal offence and includes a member or nominated representative member of the victim's immediate family if the person dies. "Harm" includes physical or psychological harm, the loss of an immediate family member or having property taken, destroyed or damaged.

ODPP Lawyers and Crown Prosecutors, to the extent that it is relevant and practicable to do so, must have regard to the Charter of Victims' Rights ([Appendix D](#)) in addition to any other relevant matter.

Victims, whether witnesses or not, should appropriately and at an early stage of proceedings have explained to them the prosecution process and their role in it. ODPP Lawyers are required to make contact with the victim and provide ongoing information about the progress of the case. This should be done by the ODPP Lawyer (and where appropriate by a Crown Prosecutor) directly, rather than through intermediaries (such as ODPP Clerks or Witness Assistance Service officers).

Victims of crime (whether they have requested it or not) should be informed in a timely manner of:

- charges laid or reasons for not laying charges;
- any decision to change, modify or not proceed with charges laid and any decision to accept a plea to a less serious charge;
- the date and place of hearing of any charge laid; and
- the outcome of proceedings, including appeal proceedings, and sentence imposed.

Where the offence involves sexual violence or results in actual bodily harm, mental illness or nervous shock to the victim, the victim should be consulted before any decision under the second dot point above is made, unless the victim has indicated that he or she does not wish to be consulted or his or her whereabouts cannot be ascertained after reasonable inquiry.

The Witness Assistance Service ("WAS") may assist in appropriate cases. That assistance should be sought in every case of any substance; that is to say, certainly in any case in which there is an identifiable victim of serious crime, particularly a case of sexual assault or a domestic violence related matter. Early referral to the WAS is recommended where possible. The WAS can assist with providing information, identifying special needs of victims and witnesses, referring victims for counselling and support, providing court preparation and coordinating court support.

The views of victims will be sought, considered and taken into account in making decisions about prosecutions; but those views will not alone be determinative. It is the general public, not any private individual or sectional, interest that must be served. Views expressed should be recorded on the ODPP file.

Careful consideration should be given to any request by a victim that proceedings be discontinued. In sexual offences, particularly, such requests, properly considered and freely made, should be accorded significant weight. It must be borne in mind, however, that the expressed wishes of victims may not coincide with the general public interest and in such cases, particularly where there is other evidence implicating the accused person, there is a history of similar offending or where the gravity of the alleged offence requires it, the general public interest must prevail.

In domestic violence offences (as defined by section 562A of the *Crimes Act 1900* and which may also include a sexual assault offence), any request by the victim that proceedings be discontinued should be carefully considered in accordance with the ODPP Protocol for Reviewing Domestic Violence Offences ([Appendix E](#)). The needs, welfare and safety of the victim and any children should be considered as relevant factors in determining where the overall general public interest lies. It may be necessary to defer any decision on discontinuance until a thorough appraisal of all the circumstances of the case can be made.

Victims with special needs or conditions should be given careful consideration. Prosecutors should seek the involvement of the WAS in their dealings with such persons.

Child Witnesses

ODPP Lawyers should comply with the NSW Interagency Guidelines for Child Protection Intervention in cases of the physical or sexual assault of children (excerpts from which are contained in [Appendix F](#)). In the case of a child witness the ODPP Lawyer is to ensure that the child is appropriately prepared for and supported in his or her appearance in court. All child victims and witnesses should be referred to the WAS at the earliest opportunity. Child witnesses are to be treated consistently with the provisions of the UN Convention on the Rights of the Child (excerpts from which are contained in [Appendix G](#)).

ODPP Lawyers and Crown Prosecutors should ensure that they are familiar with the legislated provisions available for children to give evidence at court. A child may give evidence-in-chief wholly or partly in the form of a recording made by an investigating official of an interview with a child. It should be noted that evidence given in that form is not required to be served on a party to any proceeding, including a proceeding in relation to apprehended violence commenced under Part 15A of the *Crimes Act 1900*.

The recommended procedure is described in *R v NZ* [2005] NSWCCA 278 at [210]. Generally, the audiotape or the videotape of the interview should not become an exhibit and should not be sent with the exhibits to the jury room. Early conferences with children in relation to their electronic statements are desirable. Considerable time should be allowed for this process. (See the ODPP Child Sexual Assault Manual for relevant legislative information and procedural guidelines).

Vulnerable Adult Witnesses

Witnesses who have a disability (eg. intellectual disability, physical disability, sensory disability or psychiatric disability) should be referred to the WAS to assess their support needs and to determine any barriers to communication and/or access that

may require some planning. There is a presumption in favour of CCTV for such persons and consideration should also be given to other alternative provisions (eg. screens, closed courts) for giving evidence that could assist vulnerable adult witnesses, particularly in matters related to personal violence or sexual assault. Prosecutors are encouraged to consult with an Aboriginal WAS officer about Aboriginal victims and witnesses who may require assistance.

Conferences

Due to the requirements of pre-trial disclosure, and especially where complainants are not required for committal hearings, there is an obligation upon prosecutors to confer with witnesses at the earliest available opportunity before all court hearings.

Conferences serve the dual purposes of obtaining information from and about witnesses on evidentiary issues and providing relevant information about the proceedings to witnesses and to families of victims in matters involving death. In sexual assault matters complainants should be informed of the requirement, for the purpose of establishing the elements of the offence, to recount in precise detail the sexual assault, including explicit and detailed acts of sexual intercourse and sexual penetration. Conferences should also be conducted for the purpose of informing victims of charge negotiations and to discuss any agreed statement of facts. Victims may wish to have the presence of a support person during a conference and it may be useful to consider the presence of a WAS officer for some types of conferences (see ODPP Conferencing Guidelines).

Early conferences enable compliance with the Charter of Victims' Rights ([Appendix D](#)), more effective screening of cases and more accurate disclosure of relevant material (see [Guideline 18](#)) and enhance the professionalism of the ODPP and the effectiveness of the criminal justice process.

Victim impact statements

The *Crimes (Sentencing Procedure) Act* 1999, Part 3 Division 2 enables victim impact statements to be provided in some circumstances and the Charter of Victims' Rights provides that victims should have access to information and assistance for their preparation. Prosecutors should be familiar with the relevant legislation.

ODPP Lawyers and Crown Prosecutors should ensure that a victim impact statement complies with the legislation - especially that it does not contain material that is offensive, threatening or harassing. Such material and other inadmissible material (eg. allegations of further criminal conduct not charged) is to be deleted before a statement is tendered. Victims should be consulted as to changes that may be required to be made to their victim impact statements and be informed of the reasons for these changes. The question of the victim impact statement being read out in court should also be canvassed with the victim or immediate family member or other representative. A victim impact statement that has been duly received by a court may be read out in court, in part or in whole, by a victim to whom it relates or by a member of the immediate family or other representative of the victim. It may not be read out by a Crown Prosecutor or ODPP Lawyer or staff member.

Copies of statements should ordinarily be made available to prisoners to read; however, prisoners are not to retain copies of victim impact statements.

When offenders are convicted and sentenced, victims should be informed about the relevant Victims Register with the Department of Corrective Services, the Department of Juvenile Justice or the Mental Health Review Tribunal.

See also [Guidelines 7](#) (Discontinuing Prosecutions) and [20](#) (Charge Negotiation and Agreement; Agreed Statements of Facts; Form 1) in relation to victim consultation requirements.

20 Charge Negotiation and Agreement: Agreed Statements of Facts: Form 1

[Furnished 20 October 2003; amended 1 June 2007]

A plea of guilty is a factor to be taken into account in mitigation of sentence. There are obvious benefits also to the criminal justice system resulting from a plea of guilty. The earlier it is offered, the greater will be the benefits accruing to the accused person and the community.

Negotiations between the parties are to be encouraged and may occur at any stage of the progress of a matter through the courts. Charge negotiations must be based on principle and reason, not on expedience alone. Written records of the charge negotiations must be kept in the interests of transparency and probity.

Prosecutors are actively to encourage the entering of pleas of guilty to appropriate charges. They should point out to the defence the benefits available pursuant to section 22 of the *Crimes (Sentencing Procedure) Act 1999* and *R v Thomson and Houlton* (2000) 49 NSWLR 383 and the significance of the time at which a plea is entered. They should refer to the section and the judgment, where appropriate, in submissions to the court.

Where the appropriate authority or delegation has been obtained or is in place, a prosecutor may agree to discontinue a charge or charges upon the promise of an accused person to plead guilty to another or others. A plea of guilty in those circumstances may be accepted if the public interest is satisfied after consideration of the following matters:

- (a) the alternative charge adequately reflects the essential criminality of the conduct and the plea provides adequate scope for sentencing; and/or
- (b) the evidence available to support the prosecution case is weak in any material respect; and/or
- (c) the saving of cost and time weighed against the likely outcome of the matter if it proceeded to trial is substantial; and/or
- (d) it will save a witness, particularly a victim or other vulnerable witness, from the stress of testifying in a trial and/or a victim has expressed a wish not to proceed with the original charge or charges.

The views of the police officer-in-charge and the victim must be sought at the outset of formal discussions, and in any event before any formal position is communicated to the defence, and must be recorded on file. Delegated lawyers and Crown Prosecutors may substitute charges in the Local Court where the police officer-in-charge and/or the victim (if any) agree or do not agree. The terms of the delegation must be understood and complied with.

In matters in the District and Supreme Courts, where the police officer-in-charge or the victim objects to the proposed charge or charges, the Crown Prosecutor should consult the Senior Crown Prosecutor or a Deputy Senior Crown Prosecutor, or in regional areas the most senior Crown Prosecutor available, or if appropriate the Director or a Deputy Director. A Trial Advocate with conduct of such a matter

should submit the matter to the Director's Chambers. A written record must be made of all consultations described above.

If a version of the facts is negotiated and agreed, the ODPP lawyer or Crown Prosecutor involved must prepare or obtain a written statement of agreed facts to be signed on behalf of both parties. A copy must be kept on file with an explanation of how and when it came into being. Where reference to any substantial and otherwise relevant and available evidence is to be omitted from a statement of facts, the views of the police officer-in-charge and the victim must be sought about the statement of agreed facts before it is adopted.

The views of the victim about the acceptance of a plea of guilty and the contents of a statement of agreed facts will be taken into account before final decisions are made; but those views are not alone determinative. It is the general public, not any private individual or sectional, interest that must be served.

An alternative plea will not be considered where its acceptance would produce a distortion of the facts and create an artificial basis for sentencing, or where facts essential to establishing the criminality of the conduct would not be able to be relied upon, or where the accused person intimates that he or she is not guilty of any offence.

Prosecutors should be familiar with the principles established in *R v De Simoni* (1981) 147 CLR 383. Where the prosecution agrees not to rely on an aggravating factor no inconsistent material should be placed before the sentencing judge.

It is often not possible for the same prosecutor to have the conduct of the one matter throughout the course of the proceedings. Consequently, records must be made as events occur for the assistance of prosecutors coming into the matter at later times and for transparency and probity. The progress of negotiations and connected requirements must be recorded, step by step, by the ODPP Lawyer and Crown Prosecutor involved at the time by notes on the file made as soon as practicable after the event. Entries should also be made on CASES which enable the course of the proceedings to be traced, but they may be less detailed. Any offer by the defence must be recorded clearly, including any offer that is rejected.

If facts for a plea of guilty to an indictable matter are agreed while the matter is in the Local Court, they should be amended later only if the evidence available has altered in a material respect. Ordinarily, however, a statement of agreed facts is to be finally settled by a Crown Prosecutor or Trial Advocate when agreement is reached for a plea of guilty in the District Court or Supreme Court.

Any written offers or representations by the defence must be filed. In many cases there will not need to be any written record from the defence; but in any case of complexity or sensitivity, the defence should be asked to put in writing (or to adopt a prosecution document recording), without prejudice, the offer of a plea and the reasons why it is considered an appropriate disposition of the matter. In some cases it may be appropriate to inform the defence that the prosecution will not consider an offer unless its terms are clearly set out in writing. The content and timing of such communications will be of significance to the defence as well, given the weight to be accorded to early and appropriate pleas.

Where an earlier offer has been rejected by a lawyer or Crown Prosecutor any subsequent proposal to reverse the decision where circumstances are otherwise unchanged should be referred to a Managing Lawyer or Deputy Senior Crown Prosecutor respectively.

If a prosecutor is contemplating accepting a plea of guilty to manslaughter on the basis of substantial impairment by an abnormality of mind arising from an underlying condition pursuant to section 23A of the *Crimes Act 1900*, the community values inherent in the requirement of section 23A(1)(b) are to be taken into consideration.

Form 1

Some charges may be suitable for inclusion on a Form 1 under section 32 of the *Crimes (Sentencing Procedure) Act 1999*. The decision to place offences on a Form 1 should be based on principle and reason, not administrative convenience or expedience alone. It should be remembered that offences on a Form 1 are all taken into account when sentencing for the principal offence and that the maximum penalty available is the maximum of the particular principal offence. The remarks of Spigelman CJ in *Attorney General's Application under s37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) NSWCCA 518 at [68] are significant:

"Striking the appropriate balance between overloading an indictment and ensuring that the indictment - leading to conviction and to sentence for, and only for, matters on the indictment - adequately reflects the totality of the admitted criminality, is primarily a matter for the Crown. The decision of the Crown in this regard will, no doubt, be guided by the determination in this case that, when matters are 'taken into account' on a Form 1, the sentencing judge does not, in any sense, impose sentences for those offences."

A balance is to be struck between the number of counts on the indictment and the Form 1. Excessive counts on the indictment can make sentence proceedings unduly lengthy and complex. On the other hand, there is a public interest in ensuring that certain offences are recorded as convictions.

In *R v Barton* [2001] NSWCCA 63 Spigelman CJ examined the means by which the additional matters, taken into account on a Form 1, are reflected in the sentence imposed. His Honour stated:

"[64] The position, in my opinion, is that, although a court is sentencing for a particular offence, it takes into account the matters for which guilt has been admitted, with a view to increasing the penalty that would otherwise be appropriate for the particular offence. The Court does so by giving greater weight to two elements which are always material in the sentencing process. The first is the need for personal deterrence, which the commission of the other offences will frequently indicate, ought to be given greater weight by reason of the course of conduct in which the accused has engaged. The second is the community's entitlement to extract retribution for serious offences when there are offences for which no punishment has in fact been imposed. These elements are entitled to

greater weight than they may otherwise be given when sentencing for the primary offence. There are matters which limit the extent to which this is so. The express position in subs 33(3) referring to the maximum penalty for the primary offence is one. The principle of totality is another."

The counts on indictment should reflect such matters as the individual victims, range of dates, value of property and aggravating factors. Where there are multiple offences relating to the one episode it will be appropriate to place preparatory or lesser offences on the Form 1: eg. indecent assault leading to sexual intercourse without consent; robbery of customers within a bank during a bank robbery (unless there are aggravating factors such as actual bodily harm caused to the customer).

Generally speaking, the maximum penalty of offences placed on a Form 1 should be less than the maximum penalty available for the principal offence. An obvious exception to this is the situation where multiple counts for the same or similar offences (such as a series of counts for break, enter and steal or robbery) have been laid against an accused person. However, even in these situations aggravated forms of such offences should not be included on a Form 1 if the principal offence is a non-aggravated count of the same general type.

Offences such as failure to appear, firearms offences (where there are multiple firearms offences some may be placed on a Form 1), serious offences against police officers, breaches of apprehended domestic violence orders, offences committed while on bail or while on probation/parole, offences in relation to the administration of justice, or traffic offences where the offender has a poor traffic record should not generally be placed on a Form 1. Such a matter should usually proceed on indictment or by summary proceedings so that a conviction is entered for the public record.

The views of the police officer-in-charge and the victim must be sought and recorded on file before any decision is made about placing offences on a Form 1.

Police officers are a prescribed class of persons for the purpose of signing a Form 1 on behalf of the Director. The Director has also authorised Crown Prosecutors and some senior lawyers to sign Forms 1. Ordinarily a Form 1 will be signed by a police officer.

It is the responsibility of the prosecutor negotiating the use of a Form 1 to have a properly completed Form 1 signed by an authorised person before that negotiation can be settled with the defence. Prosecutors who do not have the delegated authority to sign a Form 1 cannot give an undertaking that an offence will be included on a Form 1.

The Form 1 schedule should contain as much detail as possible. It is not sufficient merely to recite the title of the offence.

A brief statement of facts within the schedule is usually sufficient, but in more serious cases statements of facts relevant to the Form 1 offences should be tendered, together with witness statements and other relevant information, and cross-referenced on the Form 1. The schedule should contain the charge number and

sequence number so that all charges can be accounted for. The prosecutor conducting the sentence proceedings should be satisfied that the decision to place offences on a Form 1 is within principle and reason. If necessary the prosecutor should consult a senior officer.

Pursuant to section 16BA(1) of the *Crimes Act 1914* (Cth), Commonwealth offences can be taken into account on a schedule provided there is a Commonwealth offence on the indictment and provided approval is obtained from an appropriately delegated officer; that is, an officer delegated to sign Commonwealth indictments (which includes the Director, Deputy Directors and some Crown Prosecutors). The general principles, as set out above, apply to the decision to place Commonwealth offences on a schedule.

21 Young Offenders

[Furnished 20 October 2003]

Special considerations may apply to the prosecution of children. The longer term damage which can be done to a child because of an encounter with the criminal law early in his or her life should not be underestimated and consequently in some cases prosecution must be regarded as a severe measure with significant implications for the future development of the child concerned. Whilst each situation must be assessed on its merits, frequently there will be a stronger case for dealing with the situation by some means other than prosecution, such as by way of caution or youth justice conference under the *Young Offenders Act 1997*. On the other hand, the seriousness of the alleged offence, harm to any victim and the conduct, character and general circumstances of the child concerned may require that prosecution be undertaken.

The public interest will not normally require the prosecution of a child who is a first offender where the alleged offence is not a serious one.

Different considerations may apply in relation to traffic offences where infringements may endanger the lives of the young driver and other members of the community.

The factors set out in [Guideline 4](#) are also relevant to any consideration as to whether a child should be prosecuted; however, the following matters are particularly important:

- the seriousness of the alleged offence;
- the age, apparent maturity and mental capacity of the child;
- the available alternatives to prosecution and their likely efficacy;
- the sentencing options available to the court if the matter were to be prosecuted;
- the family circumstances and, in particular, whether the parents appear willing and able to exercise effective discipline and control of the child;
- the child's antecedents, including the circumstances of any relevant past behaviour and of any previous cautions or youth justice conferences; and
- whether a prosecution would be likely to cause emotional or social harm to the child, having regard to such matters as his or her personality and family circumstances.

It should be noted that in 1990 the Australian Government agreed to be bound by the United Nations Convention on the Rights of the Child (see [Appendix G](#)), article 3.1 of which states:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

22 Mental Health Issues

[Furnished 20 October 2003; amended 1 June 2007]

From time to time persons suffering from a mental illness, intellectual impairment or some other psychological problem are charged with criminal offences and come before the courts. It is often not appropriate for these matters to be prosecuted through the ordinary criminal justice process because the alleged offender is incapable of understanding the charges or the procedures involved or cannot give instructions. In these cases the matters generally proceed under the provisions of the *Mental Health (Criminal Procedure) Act 1990*.

Where a person is charged with a summary offence and the proceedings are before the Local Court there is provision under the Act for the magistrate to dispose of the charge without a hearing if it appears to the magistrate that the person is or was at the time of the alleged offence suffering from a mental illness or mental condition. Options available to the magistrate include dismissing the charge and discharging the person unconditionally or with conditions generally relating to the person's care or making a community treatment order under the *Mental Health Act 1990*.

The effect of dealing with an offence under the Act is to remove the person from the procedures and sanctions of the criminal justice system on the basis of the person's mental condition, generally with a view to having the person receive treatment for the condition or come under some form of supervision. It is therefore important that the magistrate be provided with as much evidence as possible as to the nature and circumstances of the offence, the nature and extent of the person's mental problem and the availability of relevant health services in order for the magistrate to be able to decide whether or not it is appropriate that the person be dealt with under the Act.

Where the person has been committed to the District Court or the Supreme Court the matter is generally brought under the provisions of the Act by raising before the court the issue of the person's fitness to be tried for the offence. This issue, as far as possible, should be raised before the person is arraigned at trial; but it may be raised at any time during the course of proceedings and may be raised more than once. In most cases the issue is raised by the defence on the basis of a psychiatric or psychological report indicating that the person is unfit to be tried. The issue, however, can be raised by any party to the proceedings and is occasionally raised by the Crown, generally where the person is unrepresented. Where the issue is raised by the defence it is the practice of the Crown to obtain an independent psychiatric assessment of the person as soon as practicable.

Whether the issue is raised before or after arraignment the court considers submissions in relation to conducting an inquiry into the person's fitness and if satisfied that an inquiry is warranted conducts the inquiry as soon as practicable.

The fitness inquiry is a non-adversarial procedure with no onus of proof on any particular party. The object of the inquiry is for the parties to place all relevant evidence before the court concerning the question of the person's unfitness to be tried for the offence. The inquiry is conducted by judge alone.

If the person remains unfit to be tried the matter proceeds to a special hearing unless the Director determines otherwise. The special hearing is conducted as nearly as possible as if it were a trial and is conducted by judge alone unless the accused, defence representative or prosecutor elects to have a jury.

23 Unrepresented Accused Persons

[Furnished 20 October 2003]

Particular care must be exercised by a prosecutor in dealing with an accused person without legal representation. The basic requirement, while complying in all other respects with these guidelines, is to ensure that the accused person is properly informed of the prosecution case so as to be equipped to respond to it, while the prosecutor maintains an appropriate detachment from the accused person's interests.

Oral communications with an unrepresented accused person, so far as practicable, should be witnessed if face to face and promptly noted in all cases. A record should be maintained of all information and material provided to an unrepresented accused person. Prosecutors may also, where appropriate, communicate with the accused person through the court.

While a prosecutor has a duty of fairness to an accused person, it is not a prosecutor's function to advise an accused person about legal issues, evidence, inquiries and investigations that might be made, possible defences or the conduct of the defence. However, the prosecutor also has a duty to ensure that the trial judge gives appropriate assistance to the unrepresented accused person.

Where there is a child witness, regard must be had to section 28 of the *Evidence (Children) Act 1997*.

In relation to adult and child complainants of sexual assault, regard must be had to section 294A of the *Criminal Procedure Act 1986*.

24 Judge Alone Trials

[Furnished 20 October 2003]

An accused person may elect to be tried by a judge alone, subject to the consent of the Director or his delegate (see section 132 of the *Criminal Procedure Act* 1986.)

Each case is to be considered on its merits. There is no presumption in favour of consent. It should be borne in mind that the community has a role to play in the administration of justice by serving as jurors and those expectations and contributions are not lightly to be disregarded. Consent is not to be given where the principal motivation appears to be “judge shopping”. Consent is not to be given where the election has not been made in accordance with section 132(4) of the *Criminal Procedure Act* 1986 (see *R v Coles* (1993) 31 NSW LR 550).

Predictions of the likelihood of conviction by either jury or judge alone or of a jury disagreement are not to be considered.

The principal consideration is the achieving of justice by the fairest and most expeditious means available.

Trials in which judgment is required on issues raising community values – for example: reasonableness, provocation, dishonesty, indecency, substantial impairment under section 23A of the *Crimes Act* 1900 – or in which the cases are wholly circumstantial or in which there are substantial issues of credit should ordinarily be heard by a jury.

Cases which may be better suited to jury trial include those where the interests of the alleged victim require a decision by representatives of the community.

Cases which may be better suited to trial by judge alone include cases where:

- the evidence is of a technical nature, or where the main issues arise (in cases other than substantial impairment under section 23A of the *Crimes Act* 1900) out of expert opinions (including medical experts);
- there are likely to be lengthy arguments over the admissibility of evidence in the course of the trial;
- there is a real and substantial risk that directions by the trial judge or other measures will not be sufficient to overcome prejudice arising from pre-trial publicity or other cause;
- the only issue is a matter of law;
- the offence is of a trivial or technical nature;
- witnesses or the accused person/s may so conduct themselves as to cause a jury trial to abort; and/or
- significant hurt or embarrassment to any alleged victim may thereby be reduced.

The power to consent has been delegated by the Director to all Crown Prosecutors and Trial Advocates. Where uncertainty exists as to whether or not to consent, reference should be made to the Director or a Deputy Director, the Senior Crown Prosecutor or a Deputy Senior Crown Prosecutor.

25 Jury Selection

[Furnished 20 October 2003]

The Crown right of challenge should only be exercised if there is reasonable cause for doing so. It should never be exercised so as to attempt to select a jury that is not representative of the community; including as to age, sex, ethnic origin, religious belief, marital status or economic, cultural or social background.

26 Witnesses

[Furnished 20 October 2003]

The prosecution should generally call all apparently credible witnesses whose evidence is admissible and essential to the complete unfolding of the prosecution case or is otherwise material to the proceedings. Unchallenged evidence that is merely repetitious should not be called unless that witness is requested by the accused.

If a decision is made not to call evidence from a material witness where there are identifiable circumstances clearly establishing that his or her evidence is unreliable, the prosecution, where the accused requests that the witness be called and where appropriate, should assist the accused to call such a witness by making him or her available or, in some cases, call the witness for the purpose of making him or her available for cross-examination without adducing relevant evidence in chief (see Rule A.66B(j) of the Solicitors' Rules – [Appendix B](#)).

Mere inconsistency of the testimony of a witness with the prosecution case is not, of itself, grounds for refusing to call the witness. A decision not to call a witness otherwise reasonably to be expected to be called should be notified to the accused a reasonable time before the commencement of the trial, together with a general indication of the reason for the decision (eg The witness is not available or not accepted as a witness of truth). In some circumstances, the public interest may require that no reasons be given. Where practicable the prosecution should confer with the witness before making a decision not to call the witness.

If the defence provides a statement of a witness containing evidence that is unfavourable to the prosecution case, the material may be investigated by police. In any event, such action does not alone oblige the prosecution to call that evidence in its case.

There should be disclosure of any information, including any criminal convictions, in the possession of the prosecutor that reflects materially on the credibility of a prosecution witness or where cross-examination based upon it might reasonably be expected to materially affect that credibility.

The mere unwillingness or unavailability of a witness to testify is not ordinarily required to be disclosed unless the matter proceeds to a contested hearing.

Any immunity (indemnity or undertaking) – granted or approved in principle – or inducement provided to a prosecution witness should be disclosed to the accused in advance of the trial.

Child witnesses are to be treated, so far as practicable, consistently with the provisions of the UN Convention on the Rights of the Child (excerpts from which are [Appendix G](#)).

27 Evidence

[Furnished 20 October 2003]

Disputed Evidence

Especially where the defence advises that the admission of evidence is to be challenged, care should be taken in opening a case to a jury to ensure that nothing is said that may lead to a subsequent discharge of the jury.

Illegally or Improperly Obtained Evidence

Where evidence intended to be led appears on reasonable grounds to have been illegally or improperly obtained, the prosecutor must inform the accused within a reasonable time (and see Barristers' and Solicitors' Rule 67 – [Appendix B.](#))

Hypnosis or EMDR Evidence

The following guidelines apply to evidence obtained by either hypnosis or EMDR (eye movement desensitization and reprocessing) and should be read accordingly. Failure to comply with them will give rise to a high probability that the court will decline to admit such evidence, whether tendered by the prosecution or the defence.

Prosecutors will have regard to these guidelines when determining whether or not such evidence should be tendered on behalf of the prosecution.

- (1) Hypnotically induced evidence (to be read for present purposes as including reference to evidence obtained by EMDR) must be limited to matters which the witness has recalled and related prior to the hypnosis (or EMDR) – referred to as “the original recollection”. In other words, evidence will not be tendered by the prosecution where its subject matter was recalled for the first time under hypnosis or thereafter. The effect of that restriction is that only detail recalled for the first time under hypnosis or thereafter may be advanced as evidence in support of the original recollection.
- (2) The substance of the original recollection must have been preserved in written, audio or video recorded form.
- (3) The hypnosis must have been conducted in accordance with the following procedures:
 - (a) the witness gave informed consent to the hypnosis;
 - (b) the hypnosis was performed by a person who is experienced in its use and who is independent of the police, the prosecution and the accused person;
 - (c) the witness's original recollection and other information supplied to the hypnotist concerning the subject matter of the hypnosis was recorded in writing or by audio or video recording in advance of the hypnosis; and

(d) the hypnosis was performed in the absence of police, the prosecution and the accused person, but was video recorded.

28 Sentence

[Furnished 20 October 2003; amended 1 June 2007]

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

The starting point for a consideration of its role is Barristers' Rule 71 and Solicitors' Rule A71 (see [Appendix B](#)) which provide:

"A prosecutor must not seek to persuade the court to impose a vindictive sentence or a sentence of a particular magnitude, but:

- (a) must correct any error made by the opponent in address on sentence;*
- (b) must inform the court of any relevant authority or legislation bearing on the appropriate sentence;*
- (c) must assist the court to avoid appealable error on the issue of sentence;*
- (d) may submit that a custodial or non-custodial sentence is appropriate; and*
- (e) may inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant appellate authority."*

In pursuing this last requirement, a prosecutor should:

- adequately present the facts;
- ensure that the court is not proceeding upon any error of law or fact;
- provide assistance on the facts or law as required;
- fairly test the opposing case as required;
- refer to relevant official statistics and comparable cases and the sentencing options available;
- if it appears there is a real possibility that the court may make a sentencing order that would be inappropriate and not within a proper exercise of the sentencing discretion, make submissions on that issue - particularly if, where a custodial sentence is appropriate, the court is contemplating a non-custodial penalty.

It is a judicial officer's duty to find and apply the law and that responsibility is not circumscribed by the conduct of legal representatives. Any understanding between the prosecution and defence as to submissions that will be made on sentence does not bind the judge or magistrate.

A prosecutor should not in any way fetter the discretion of the Director to appeal against the inadequacy of a sentence (including by informing the court or an opponent whether or not the Director would, or would be likely to, appeal, or whether or not a sentence imposed is regarded as appropriate

and adequate). The Director's instructions may be sought in advance in exceptional cases.

Co-operation by convicted persons with law enforcement agencies should be appropriately acknowledged and, if necessary, tested at the time of sentencing. When the NSW Police Force wishes to bring an informer's assistance to the attention of a sentencing court, the NSW Police Force Handbook court matters instruction requires it to do so by way of an affidavit of assistance.

The main features of the "Affidavit of Assistance" are:

- the report of the case officer is annexed to the affidavit;
- the affidavit is sworn by the case officer's supervisor to the effect that he or she has conducted appropriate enquiries and is satisfied that the contents of the report are true and accurate; and
- the affidavit is to be delivered by the case officer to the prosecutor seven working days before the sentence date.

Prosecutors should refer also to [Guideline 29](#) (Appeals Against Sentences).

Defence Disclosure on Sentence

Unless copies of all documents to be tendered by the defence on sentence are lodged with the ODPP at least two clear working days before the hearing of the matter by the court, the prosecution may make an application for a direction under section 4(2) and (3) of the *Evidence Act* 1995 that the law of evidence applies to the proceedings. If this application is successful, hearsay evidence will be inadmissible pursuant to the general provisions of the *Evidence Act*. If the application is not granted, the prosecution may seek an adjournment for the sentence hearing to be re-listed before the same magistrate or judge.

If an adjournment is not granted, the prosecution will indicate to the court that it has not been possible to test the material and therefore it is the prosecution's submission that the court should give it less weight.

A receipt is to be given for documents supplied in advance to the prosecution.

Where copies of defence documents have been supplied in advance to the prosecution, the ODPP will advise the defence in writing at least 24 hours before the hearing of the matter if the authors of any defence documents are required for cross-examination.

Where the defence documents are not supplied in advance, the prosecution will retain copies of those tendered on the prosecution file and in specific cases or at random will seek verification of those documents after the hearing.

29 Appeals Against Sentences

[Furnished 20 October 2003; amended 1 June 2007]

The prosecutor in any case conducted by the ODPP should assess any sentence imposed. If it is considered to be appellable or possibly so, or it is a matter likely to attract significant public interest, a report should be provided promptly to the Director for determination of whether or not an appeal will be instituted.

In determining whether or not to appeal against a sentence imposed by a judge or magistrate, the Director will have regard to the following matters:

- (i) whether or not the sentencer made a material error of law or fact, misunderstood or misapplied proper sentencing principles, or wrongly assessed or omitted to consider some salient feature of the evidence, apparent from the remarks on sentence;
- (ii) manifest inadequacy of the sentence which may imply an error of principle by the sentencer;
- (iii) the range of sentences (having regard to official statistics and comparable cases) legitimately open to the sentencer on the facts;
- (iv) the conduct of the proceedings at first instance, including the prosecution's opportunity to be heard and the conduct of the case;
- (v) the element of double jeopardy involved in a prosecution/Crown appeal and its likely effect on the outcome (the probable imposition of a lesser sentence than was appropriate at first instance);
- (vi) the appeal court's residual discretion not to intervene, even if the sentence is considered too lenient; and/or
- (vii) whether the appeal is considered likely to succeed.

In addition to the above matters prosecutors should be aware that:

- prosecution/Crown appeals are and ought to be rare, as an exception to the general conduct of the administration of criminal justice they should be brought to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic approaches to be corrected and 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;
- the appellate court will intervene only where it is clear that the sentencer has made a material error of fact or law or has imposed a sentence that is manifestly inadequate (which in the exercise of discretion may still not be sufficient cause);

- the appellate court will take into account the advantages enjoyed by the sentencer which are denied to it;
- the appellate court will not be concerned whether or not it would have found the facts differently, but will consider whether or not it was open to the sentencer to find the facts as he or she did;
- a respondent to a prosecution/Crown appeal suffers a species of double jeopardy which is undesirable;
- apparent leniency or inadequacy alone may not be enough to justify appellate correction;
- scope must remain for the exercise of mercy by the primary sentencer;
- the range of appropriate sentences with respect to a particular offence is a matter on which reasonable minds may differ; and
- if an appeal is to be instituted, it must be done promptly.

Prosecutors should refer also to [Guideline 28](#) (Sentence).

When a Crown appeal against sentence is being considered, the offender should be so advised if time reasonably permits and again when a direction has been given. Such advice should be given before any information about the appeal or the process is released publicly. If an appeal is instituted and later abandoned, the offender is also to be advised in a timely manner.

The spirit and intent of Barristers' and Solicitors' Rules 71 and A71 (see [Appendix B](#)) should also guide the approach taken by prosecutors appearing in the Court of Criminal Appeal (in both Crown and offender appeals).

In some appeals the circumstances may justify the Crown submitting that the particular case falls within the "worst case" category and so should attract the maximum penalty or a penalty close to the maximum. In other appeals it may be appropriate to inform the court of the range of sentences which the Crown considers to be appropriate, having regard to official statistics and comparable cases. A specific sentence should not be suggested unless the court expressly seeks assistance in the calculation of an appropriate term of imprisonment.

30 Proceeds of Crime

[Furnished 20 October 2003; amended 1 January 2008]

Confiscation is an issue to be considered from the outset in all cases – it is not a mere "optional add-on" to sentence proceedings or to the conduct of a prosecution. It may potentially be available in many types of cases, including for example drug offences, armed robberies, bribery and "contract" killings or assaults.

ODPP lawyers when screening and preparing matters are required to address confiscation issues and, if confiscation action is considered appropriate, are required to prepare a submission seeking the Director's authority or that of a delegated officer to commence proceedings.

Crown Prosecutors (including private counsel briefed on my behalf) and ODPP lawyers are instructed to pursue authorised confiscation applications after a conviction is recorded.

Crown Prosecutors and ODPP lawyers should familiarise themselves with the additional guidance contained in the document entitled "Guidelines and assistance for ODPP lawyers in initiating and conducting proceedings pursuant to the Confiscation of Proceeds of Crime Act 1989 (CoPoCA)."

31 Retrials

[Furnished 20 October 2003; amended 1 June 2007]

Where a trial has ended without verdict consideration should be given to whether or not a retrial is required. Factors to be considered include:

- whether or not the jury was unable to agree (or the trial ended for other reasons);
- whether or not another jury would be in any better or worse position to reach a verdict;
- the cost of a retrial to the community and to the accused person;
- the views of any victim of crime involved.

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

32 Media Contact

[Furnished 20 October 2003; amended 1 June 2007]

The functions of the ODPP bring it into contact with the media (which expression includes public reporters and commentators of all kinds). This cannot and should not be avoided as the public have a right to (and should) know what is happening publicly in the criminal justice process.

However, there is a need to ensure that prosecutors are aware of the legal regime applying to such action, of the limits of their professional obligations and of the rights of others and are sensitive to the way in which their comments and conduct may be reported.

Jury trials require that the evidence be presented in a way that makes it (for the most part) immediately accessible to the media. In some other higher court proceedings, in committal proceedings and in some other proceedings in the Local Court that usually will not be the case because of the use of written statements by witnesses and the presentation of evidence and other material in documentary form.

In trials, rulings on evidence and any other matters dealt with in the absence of the jury (where one is to be or has been empanelled) should not be commented upon publicly by prosecutors, other than to remind the media that those matters should not be reported during the trial.

The seeking and giving of legal advice within the ODPP is not carried out in public and the process is subject to privilege. No public comment concerning matters referred to the ODPP for advice is to be made without the Director's approval.

Statutory Provisions Limiting Publication

Prosecutors and all ODPP staff should be aware of the following statutory provisions that affect the publication of information and comment.

- (a) The *Children (Criminal Proceedings) Act 1987* and the *Children (Care and Protection) Act 1987* strictly prohibit and make an offence the publication or broadcast of the identity of a child or material that might enable identification. In no circumstances should the media be given the name or description or other means of likely identification (including, for example, the name or a photograph of a family member) of a child called as a witness, a child to whom the proceedings relate or a child who is otherwise involved or mentioned in any proceedings. This prohibition extends to a deceased child and a child victim's siblings where they are children.
- (b) Section 291 of the *Criminal Procedure Act 1986* requires certain criminal proceedings to be held *in camera* if the court so directs.
- (c) Section 578A of the *Crimes Act 1900* and Part 5, Division 1 of the *Criminal Procedure Act 1986* deal with, respectively, the non-publication of evidence and the prohibition of publication of the

identity of complainants in proceedings for certain offences.

- (d) Part 5, Division 2 of the *Criminal Procedure Act 1986* limits the disclosure of privileged sexual assault counselling communications.
- (e) The *Witness Protection Act 1995* protects the identity of participants in the Witness Protection Program.
- (f) The *Law Enforcement (Controlled Operations) Act 1997* confers wide powers on courts to protect from publication the identity of participants in authorised operations.
- (g) The *Law Enforcement and National Security (Assumed Identities) Act 1998* enables courts to protect the identity of certain officers who have an assumed identity approval under the Act.
- (h) The *Privacy and Personal Information Protection Act 1998* restricts the collection, retention, access, alteration, use and disclosure of personal information in some circumstances.
- (i) The *Health Records and Information Privacy Act 2002* affects the collection, storage, access, accuracy, use and disclosure of personal health information.

Prosecutors and ODPP staff should not provide the media with any information which would circumvent the effect or permit a breach of Part 5 of the *Criminal Procedure Act 1986* or section 578A of the *Crimes Act* or the provisions of the legislation relating to children.

Section 314 of the *Criminal Procedure Act 1986* provides for media representatives to inspect court documents on application to a court registrar.

Professional Rules

All legal practitioners (solicitors and barristers) are bound by Bar Rule 59 of the Barristers' Rules (see [Appendix B](#)) which provides as follows:

- "59. A barrister must not publish, or take steps towards the publication of, any material concerning current proceedings in which the barrister is appearing or has appeared, unless:*
- (a) the barrister is merely supplying, with the consent of the instructing solicitor or the client, as the case may be:*
 - (i) copies of pleadings or court process in their current form, which have been filed, and which have been served in accordance with the court's requirements;*
 - (ii) copies of affidavits or witness statements, which have been read, tendered or verified in open court, clearly marked so as to show any parts which have not been read, tendered, or verified or which have been disallowed on objection;*
 - (iii) copies of the transcript of evidence given in open court, if permitted by copyright and clearly marked so as to show any corrections agreed by the other parties or directed by the court;*
 - (iv) copies of exhibits admitted in open court and without restriction on access; or*

- (v) *copies of written submissions which have been given to the court, and which have been served on all other parties; or*
- (b) *the barrister, with the consent of the instructing solicitor or the client, as the case may be, is answering unsolicited questions from journalists concerning proceedings in which there is no possibility of a jury ever hearing the case or any re-trial and:*
- (i) *the answers are limited to information as to the identity of the parties or of any witness already called, the nature of the issues in the case, the nature of the orders made or judgment given including any reasons given by the court;*
 - (ii) *the answers are accurate and uncoloured by comment or unnecessary description; and*
 - (iii) *the answers do not appear to express the barrister's own opinions on any matters relevant to the case."*

This rule should be read carefully and understood.

For the purposes of Rule 59, in proceedings in which ODPP Lawyers, Crown Prosecutors or private counsel appear, the Director is the "client".

General

All inquiries from the media for information should be directed to the Media Liaison and Communications Officer ("MLCO"), except where the information requested is of an uncontroversial nature, is of a kind routinely provided directly by prosecutors and has been provided to the defence or is readily obtainable by the defence (for example, statements of facts admitted or handed up to the bench on bail hearings or pleas of guilty, names or addresses of witnesses who have given them in open testimony in court, details of charges heard in open court or included in a Court Attendance Notice, agreed statements of facts that have been tendered and admitted). Prosecutors may provide the media with the MLCO's contacts (including e-mail address, work and mobile telephone numbers) who may be contacted at all times.

Media releases on behalf of the ODPP are to be issued only by the MLCO with the approval of the Director (or if he or she is not readily available, a Deputy Director). If it is considered that something should be issued proactively to the media on behalf of the ODPP (for example the issue of a statement of a general kind), the matter should be referred to the Director's Chambers or the MLCO.

In special cases where particular sensitivity may be required (and legal practitioners should exercise judgment so as to identify such cases) there may be a need to refer to the Director or the MLCO for advice or instructions on how to proceed; but generally the instructions are as follows.

1. There is no general obligation to provide information to the media.
2. There must be compliance with Bar Rule 59, except for the following matters.
3. Notwithstanding Bar Rule 59, the names and addresses of victims and addresses of other witnesses who are to be or have

been called in court proceedings should not be supplied to the media. Information already given in open court (including names and addresses) may be confirmed. Care must be taken to ensure that the identities of witnesses such as prisoners, informers and others who are giving evidence at some personal risk are kept confidential (so far as is possible) and are not disclosed to the media.

4. Notwithstanding Bar Rule 59, true copies of open exhibits (including paper photographs and prints) may, if convenient, be inspected or provided if otherwise appropriate; or the media may be referred to section 314 of the *Criminal Procedure Act 1986* (see above).
5. Notwithstanding Bar Rule 59, videotapes and audiotapes of recorded interviews, re-enactments, demonstrations and identifications and all digital photographs and recordings are not to be provided or made available for inspection.
6. It is permissible if requested by the media for a prosecutor to give his or her name and indicate that the prosecution is being conducted by the ODPP, but many prosecutors prefer to remain anonymous and security considerations may militate against disclosure of names.
7. It is not appropriate to discuss with the media the likely result of proceedings or the prospect of appellate proceedings being instituted, a matter being discontinued or an *ex officio* indictment being filed.
8. It is not appropriate to comment to the media on the correctness or otherwise of any determination of a court.

Discretion should be exercised in relation to sensitive material (eg. Medical reports, pre-sentence reports) or material produced under compulsion, where it may be more appropriate to direct inquiries to the court. Medical (including psychiatric and psychological) reports on offenders and victims should not be made available to the media by the prosecution.

Statements, summaries, criminal histories, exhibits or copies (including documents, paper photographs, plans and the like), the disclosure of which is permissible pursuant to Bar Rule 59 and these guidelines, are only to be provided to the media, subject to the following qualifications. Inspection of any such items should take place in the ODPP officer's presence and only if convenient. It is permissible to allow the media to view lengthy documents for the purposes of accurate reporting and where appropriate to do so otherwise than in the presence of the prosecution representative. The media may photograph real evidence and paper photographs in evidence if they wish and if that may be done conveniently. Copies of statements of witnesses admitted into evidence with addresses and telephone numbers deleted may be provided if that is the more convenient course, subject to the restrictions and provisions referred to above. Transcripts of court proceedings may not be provided or displayed to the media because of copyright restrictions.

Disclosure of documentation or information, other than that permitted by Bar Rule 59 and in accordance with these guidelines, is not to occur unless approved by the Director or a Deputy Director. The public release of information must be done

consistently. Public confusion and criticism may result if different officers publish different material about the same or a related or comparable matter. Uncoordinated release of information may also prejudice action being taken by others (for example the Attorney General) which may not be known to all officers.

Requests for Interviews

Requests for interviews with ODPP officers on matters concerning prosecutions should be referred to the MLCO who may consult with the Director.

Incorrect Media Reports

Incorrect media reports about the conduct of a prosecution or any other matter concerning the ODPP may be reported to the MLCO for remedial action.

Special Interest Matters

Prosecutors with the conduct of matters that are likely to attract significant media attention are requested to provide details of the matters, in advance, to the MLCO.

33 International Guidelines

[Furnished 20 October 2003]

In 1990 the United Nations adopted Guidelines on the Role of Prosecutors. They are [Appendix H](#).

In 1999 the International Association of Prosecutors adopted Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors. They are [Appendix A](#).

In 1985 the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. It is [Appendix I](#).

These instruments provide further guidance for prosecutors.

34. Calling of Expert Evidence and the use of Audio Visual Links (AVL)

[Furnished 13 July 2009]

The Department of Health experiences growing problems in retaining suitably qualified medical practitioners to perform forensic medical examinations. Medical practitioners protest that performing this important service is inconvenient and time wasting and there is uncertainty and expense in attending court to give evidence. In order to address these concerns, all prosecutors must request the court to allow medical practitioners to give evidence at a time and by a means most convenient to them. This includes interposing the witness where necessary and arranging well in advance of the trial or hearing for the evidence to be given by AVL.

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

Government agency witnesses include members of staff of the Government Service or NSW Health Service, or persons employed in or engaged by any government agency, who have provided expert reports for use in evidence in proceedings or proposed proceedings or who are called as experts to give opinion evidence in proceedings. The provision applies to forensic medical examiners called in sexual assault cases and other medical practitioners engaged by the Police or the ODPP to provide expert reports, nurse examiners and analysts from the Division of Analytical Laboratories (DAL).

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

In all cases involving a government agency witness, whether the witness is required by the defence to be called in person must be ascertained as soon as possible after committal and preferably before a trial date is set. When seeking unavailable dates from medical practitioners, information should also be sought as to what days of the week are most convenient to give evidence. The ODPP will arrange for the witness to give evidence via AVL unless there are no AVL facilities available at the court or at a place convenient to the witness. The NSW Department of Health has numerous AVL sites in public hospitals and other facilities across NSW. There is also a site at DAL at Lidcombe.

Supreme Court Practice Note SC Gen 15 and Local Court Practice Note No 7 of 2008 provide that parties must give the court and the other party no less than 10 working days notice of the use of AVL. There is no equivalent practice note on the subject in the District Court. The best practice to be adopted is that the court should be advised of the need for AVL at the time the trial is fixed for hearing.

APPENDIX A

[Furnished 20 October 2003]

[[Guidelines 1, 33](#)]

International Association of Prosecutors STANDARDS OF PROFESSIONAL RESPONSIBILITY and THE STATEMENT OF THE ESSENTIAL DUTIES AND RIGHTS OF PROSECUTORS

1. Professional Conduct

Prosecutors shall:

- (a) at all times maintain the honour and dignity of their profession;
- (b) always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession;
- (c) at all times exercise the highest standards of integrity and care;
- (d) keep themselves well-informed and abreast of relevant legal developments;
- (e) strive to be, and to be seen to be, consistent, independent and impartial;
- (f) always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial;
- (g) always serve and protect the public interest;
- (h) respect, protect and uphold the universal concept of human dignity and human rights.

2. Independence

- 2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.
- 2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:
 - transparent;
 - consistent with lawful authority;
 - subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.
- 2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

3. Impartiality

Prosecutors shall perform their duties without fear, favour or prejudice. In

particular they shall:

- (a) carry out their functions impartially;
- (b) remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;
- (c) act with objectivity;
- (d) have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- (e) in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;
- (f) always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.

4. Role in criminal proceedings

4.1 Prosecutors shall perform their duties fairly, consistently and expeditiously.

4.2 Prosecutors shall perform an active role in criminal proceedings as follows:

- (a) where authorised by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally;
- (b) when supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights;
- (c) when giving advice, they will take care to remain impartial and objective;
- (d) in the institution of criminal proceedings, they will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence;
- (e) throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence;
- (f) when, under local law and practice, they exercise a supervisory function in relation to the implementation of court decisions or perform other non-prosecutorial functions, they will always act in the public interest.

4.3 Prosecutors shall, furthermore;

- (a) preserve professional confidentiality;
- (b) in accordance with local law and the requirements of a fair trial, consider the views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights;

and similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible;

- (c) safeguard the rights of the accused in co-operation with the court and other relevant agencies;
- (d) disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial;
- (e) examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;
- (f) refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment;
- (g) seek to ensure that appropriate action is taken against those responsible for using such methods;
- (h) in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate.

5. Co-operation

In order to ensure the fairness and effectiveness of prosecutions, prosecutors shall:

- (a) co-operate with the police, the courts, the legal profession, defence counsel, public defenders and other government agencies, whether nationally or internationally; and
- (b) render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual co-operation.

6. Empowerment

In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled:

- (a) to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability;
- (b) together with their families, to be physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions;
- (c) to reasonable conditions of service and adequate remuneration,

commensurate with the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished;

- (d) to reasonable and regulated tenure, pension and age of retirement subject to conditions of employment or election in particular cases;
- (e) to recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures;
- (f) to expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards;
- (g) to objective evaluation and decisions in disciplinary hearings;
- (h) to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status; and
- (i) to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.

APPENDIX B

[Furnished 20 October 2003]

[[Guidelines 3, 18, 26, 27, 28, 29, 32](#)]

NEW SOUTH WALES BARRISTERS' RULES 62 - 72

Prosecutor's duties

62. A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.
63. A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.
64. A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.
65. A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.
66. A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused, unless:
- (a) such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person; and
 - (b) the prosecutor believes on reasonable grounds that such a threat could not be avoided by confining such disclosure, or full disclosure, to the opponent being a legal practitioner, on appropriate conditions which may include an undertaking by the opponent not to disclose certain material to the opponent's client or any other person.
- 66A. A prosecutor who has decided not to disclose material to the opponent under Rule 66 must consider whether:
- (a) the defence of the accused could suffer by reason of such non-disclosure;
 - (b) the charge against the accused to which such material is relevant should be withdrawn; and
 - (c) the accused should be faced only with a lesser charge to which such material would not be so relevant.
- 66B. A prosecutor must call as part of the prosecution's case all witnesses:
- (a) whose testimony is admissible and necessary for the presentation of the whole picture;

- (b) whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;
- (c) whose testimony or statements were used in the course of any committal proceedings; and
- (d) from whom statements have been obtained in the preparation or conduct of the prosecution's case;

unless:

- (e) the opponent consents to the prosecutor not calling a particular witness;
- (f) 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; or
- (g) the prosecutor believes on reasonable grounds that the administration of justice in the case would be harmed by calling a particular witness or particular witnesses to establish a particular point already adequately established by another witness or other witnesses;

provided that:

- (h) the prosecutor is not obliged to call evidence from a particular witness, who would otherwise fall within (a)-(d), if the prosecutor believes on reasonable grounds that the testimony of that witness is plainly unreliable by reason of the witness being in the camp of the accused; and
- (i) the prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within (f), (g) and (h), together with the grounds on which the prosecutor has reached that decision.

67. A prosecutor who has reasonable grounds to believe that certain material available to the prosecution may have been unlawfully obtained must promptly:

- (a) inform the opponent if the prosecutor intends to use the material; and
- (b) make available to the opponent a copy of the material if it is in documentary form.

68. A prosecutor must not confer with or interview any of the accused except in the presence of the accused's representative.

69. A prosecutor must not inform the court or the opponent that the prosecution has evidence supporting an aspect of its case unless the prosecutor believes on reasonable grounds that such evidence will be available from material already available to the prosecutor.

70. A prosecutor who has informed the court of matters within Rule 69, and who has later learnt that such evidence will not be available, must immediately inform the opponent of that fact and must inform the court of it when next the case is before the court.

71. A prosecutor must not seek to persuade the court to impose a vindictive sentence or a sentence of a particular magnitude, but:
- (a) must correct any error made by the opponent in address on sentence;
 - (b) must inform the court of any relevant authority or legislation bearing on the appropriate sentence;
 - (c) must assist the court to avoid appealable error on the issue of sentence;
 - (d) may submit that a custodial or non-custodial sentence is appropriate; and
 - (e) may inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant appellate authority.
72. A barrister who appears as counsel assisting an inquisitorial body such as the Independent Commission Against Corruption, the National Crime Authority, the Australian Securities Commission, a Royal Commission or other statutory tribunal or body having investigative powers must act in accordance with Rules 62, 64 and 65 as if the body were the court referred to in those Rules and any person whose conduct is in question before the body were the accused referred to in Rule 64.

THE LAW SOCIETY OF NEW SOUTH WALES

SOLICITORS' RULES A62 to A72

[Rules A.62-A.72 of the Advocacy Rules included in the Solicitors' Rules are in generally similar terms to the Barristers' Rules set out above. Where there are differences the relevant rule and part are set out below.]

A.66B ...and

- (j) the prosecutor must call any witness whom the prosecutor intends not to call on the ground in (h) if the opponent requests the prosecutor to do so for the purpose of permitting the opponent to cross-examine that witness.

A.67 A prosecutor who has reasonable grounds to believe that certain material available to the prosecution may have been unlawfully or improperly obtained must promptly:

- (a) inform the opponent if the prosecutor intends to use the material; and
- (b) make available to the opponent a copy of the material if it is in documentary form;
- (c) inform the opponent of the grounds for believing that such material was unlawfully or improperly obtained.

APPENDIX C

[Furnished 20 October 2003; amended 1 June 2007]

[Guideline 17]

INTERAGENCY PROTOCOL FOR INDEMNITIES & UNDERTAKINGS

1. This interagency protocol has been approved by the Attorney General to apply to applications for, and revocations of, indemnities (s 32 *Criminal Procedure Act 1986*) and undertakings (s 33 *Criminal Procedure Act 1986*).
2. The protocol applies to applications made by agencies of government, including the Director of Public Prosecutions ("DPP"). It does not apply to applications made by, or on behalf of, individuals.
3. The protocol applies to revocations where the initial application for the indemnity was made by a government agency (the applicant). It does not apply to revocations where the initial application was made by, or on behalf of, individuals.

Applications

4. Applications should be in accordance with the guidelines published by the DPP in the Prosecution Guidelines. The Crime Commission has agreed to submit its applications to the Attorney General through the DPP.
5. Any matter not dealt with in the DPP's guidelines, which the applicant considers relevant to the application, should be expressly stated. If any matter which an applicant, not being the DPP, considers relevant to the application comes to the attention of the applicant after the application has been submitted, it is the responsibility of the applicant to formally and promptly draw that matter to the attention of the DPP in writing.
6. The DPP may request or recommend that the Attorney General grant an indemnity or an undertaking, or may recommend that the Attorney General not grant an indemnity or an undertaking, or may provide advice to the Attorney General in relation to an application for an indemnity or an undertaking.
7. Prior to the DPP settling advice and any recommendation to the Attorney General concerning an application, the DPP will first notify the applicant of any concerns the DPP has about the application and/or the applicant's recommendation and invite the applicant to comment.
8. Any request, recommendation or advice from the DPP to the Attorney General will include a copy of the original submission by the applicant supporting the application, as well as any additional submissions made in response to a notification under paragraph 7 of this protocol.
9. When the DPP sends a request, recommendation or advice to the Attorney General it is processed by the Legal & Community Services Division within the Attorney General's Department and briefed to the Crown Advocate to advise the Attorney General.

10. The Crown Advocate may discuss any concerns the Crown Advocate has about the application with the applicant and/or the DPP if the Crown Advocate believes that would be of assistance before advising the Attorney General on the application.
11. With the consent of the Attorney General, the Crown Advocate may discuss the DPP's request, recommendation or advice with the applicant.
12. Where considered necessary to assist the Crown Advocate to prepare advice to the Attorney General, the Crown Advocate may convene a conference involving relevant parties.
13. In exceptional cases, the Attorney General may, upon receipt of the Crown Advocate's advice, convene a further conference with the relevant parties to discuss the issues arising from the application.
14. For the purpose of such discussion, the Attorney General may consider it appropriate to disclose the substance of the Crown Advocate's advice to the applicant and the DPP on a confidential basis.

Revocations

15. The DPP may request or recommend that the Attorney General revoke an indemnity or an undertaking, or may provide advice to the Attorney General in relation to the revocation of an indemnity or an undertaking.
16. Prior to the DPP settling advice and any recommendation to the Attorney General concerning a revocation application or advice, the DPP will first notify the original applicant of any grounds it has for seeking a revocation and invite the applicant to comment.
17. Any request, recommendation or advice from the DPP to the Attorney General will include a copy of any submissions made by the applicant in response to a notification under paragraph 16 of this protocol.
18. When the DPP sends a request, recommendation or advice to the Attorney General concerning a revocation it is processed by the Legal & Community Services Division within the Attorney General's Department and briefed to the Crown Advocate to advise the Attorney General.
19. The Crown Advocate may discuss any concerns the Crown Advocate has about the revocation with the applicant and/or the DPP if the Crown Advocate believes that would be of assistance before advising the Attorney General on the application.
20. With the consent of the Attorney General, the Crown Advocate may discuss the DPP's request, recommendation or advice with the applicant.
21. Where considered necessary to assist the Crown Advocate to prepare advice to the Attorney General, the Crown Advocate may convene a conference involving relevant parties.
22. In exceptional cases, the Attorney General may, upon receipt of the Crown Advocate's advice, convene a further conference with the relevant parties to discuss the issues arising from the proposed revocation.

23. For the purpose of such discussion, the Attorney General may consider it appropriate to disclose the substance of the Crown Advocate's advice to the applicant and the DPP on a confidential basis.

FORMS OF IMMUNITIES

To.....[1]

Indemnity under Criminal Procedure Act 1986, s 32

If you actively co-operate in an inquiry into the conviction/the committal/the trial [2]

of.....[3] for..... [4]

and if your evidence there is the truth, the whole truth and nothing but the truth, I grant you indemnity from prosecution for:

1. [5]; or
2. [6] *any associated offence in respect of matters relevant to the inquiry/trial[7] and covered by your evidence at an inquiry/trial; or [8]*
3. [9].

Attorney General
[date]

To..... [10]

Undertaking under Criminal Procedure Act 1986, s 33

If you actively co-operate in criminal proceedings [11] against.....

.....[12]

for..... [13]

and if your evidence there is the truth, the whole truth and nothing but the truth, I undertake that

- evidence which you give or produce;
- the fact that you do so; and
- information or evidence obtained as a result

will not be used in proceedings against you except in respect of the falsity of your evidence.

Attorney General
[date]

[1] Full name of witness.

[2] Delete whichever is inapplicable.

[3] Insert name of accused or person whose conviction is subject to inquiry.

[4] Describe offence.

[5] Describe offence for which witness is in jeopardy.

[6] This sub-paragraph represents the form of words appropriate to a grant of indemnity from prosecution in respect of matters which emerge in the evidence.

[7] Delete whichever is inapplicable.

[8] The word "or" should be deleted if sub-paragraph 3 is not used.

[9] If an offence already suspected is to be the subject of indemnity, it should be fully described. For example, it could read "any part had by you in the cultivation and supply of cannabis by between the years and inclusive" to indemnify an accomplice.

[10] Insert name of witness

[11] Section 33 cannot be used for inquiries

[12] Insert name of accused.

[13] Describe offence.

APPENDIX D

[Furnished 20 October 2003; amended 1 June 2007; 7 December 2010]

[[Guidelines 18, 19](#)]

NEW SOUTH WALES CHARTER OF VICTIMS' RIGHTS

Victims' Rights Act 1996

1. Courtesy, compassion and respect

A victim will be treated with courtesy, compassion, cultural sensitivity and respect for the victim's rights and dignity.

2. Information about services and remedies

A victim will be informed at the earliest practical opportunity, by relevant agencies and officials, of the services and remedies available to the victim.

3. Access to services

A victim will have access where necessary to available welfare, health, counselling and legal assistance responsive to the victim's needs.

4. Information about investigation of the crime

A victim will, on request, be informed of the progress of the investigation of the crime, unless the disclosure might jeopardise the investigation. In that case, the victim should be informed accordingly.

5. Information about prosecution of accused

1. A victim will be informed in a timely manner of the following:
 - (a) the charges laid against the accused or the reasons for not laying charges,
 - (b) any decision of the prosecution to modify or not to proceed with charges laid against the accused, including any decision to accept a plea of guilty by the accused to a less serious charge in return for a full discharge with respect to the other charges,
 - (c) the date and place of hearing of any charge laid against the accused,
 - (d) the outcome of the criminal proceedings against the accused (including proceedings on appeal) and the sentence (if any) imposed.
2. A victim will be consulted before a decision referred to in paragraph (b) above is taken if the accused has been charged with a serious crime that involves sexual violence or that results in actual bodily harm or psychological or psychiatric harm to the victim, unless:
 - (a) the victim has indicated that he or she does not wish to be so consulted, or

- (b) the whereabouts of the victim cannot be ascertained after reasonable inquiry.

6. Information about trial process and role as witness

A victim who is a witness in the trial for the crime will be informed about the trial process and the role of the victim as a witness in the prosecution of the accused.

7. Protection from contact with accused

A victim will be protected from unnecessary contact with the accused and defence witnesses during the course of court proceedings.

8. Protection of identity of victim

A victim's residential address and telephone number will not be disclosed unless a court otherwise directs.

9. Attendance at preliminary hearings

A victim will be relieved from appearing at preliminary hearings or committal hearings unless the court otherwise directs.

10. Return of property of victim held by State

If any property of a victim is held by the State for the purpose of investigation or evidence, the inconvenience to the victim will be minimised and the property returned promptly.

11. Protection from accused

A victim's need or perceived need for protection will be put before a bail authority by the prosecutor in any bail application by the accused.

12. Information about special bail conditions

A victim will be informed about any special bail conditions imposed on the accused that are designed to protect the victim or the victim's family.

13. Information about outcome of bail application

A victim will be informed of the outcome of a bail application if the accused has been charged with sexual assault or other serious personal violence.

14. Victim impact statement

A relevant victim will have access to information and assistance for the preparation of any victim impact statement authorised by law to ensure that the full effect of the crime on the victim is placed before the court.

15. Information about impending release, escape or eligibility for absence from custody

A victim will, on request, be kept informed of the offender's impending release or escape from custody, or of any change in security classification that results in the offender being eligible for unescorted absence from custody.

16. Submissions on parole and eligibility for absence from custody of serious offenders

A victim will, on request, be provided with the opportunity to make submissions concerning the granting of parole to a serious offender or any change in security classification that would result in a serious offender being eligible for unescorted absence from custody.

17. Compensation for victims of personal violence

A victim of a crime involving sexual or other serious personal violence is entitled to make a claim under a statutory scheme for victims compensation.

18. Information about complaint procedure where Charter is breached

A victim may make a complaint about a breach of the Charter and will, on request, be provided with information on the procedure for making such a complaint.

APPENDIX E

[Furnished 20 October 2003; amended 1 June 2007]

[Guideline 19]

ODPP PROTOCOL FOR REVIEWING DOMESTIC VIOLENCE OFFENCES

1. Domestic violence includes a range of violent and abusive behaviours perpetrated by one person against another. It occurs within married and de facto relationships, between family members, couples who are separated or divorced, and within shared households.
 - 1.1 Domestic violence has a profound effect on children and constitutes a form of child abuse. Children can be affected by being exposed to violence in the parental relationship, by becoming the victims of violence, or a combination of the two.
 - 1.2 Domestic violence offences and personal violence offences are defined in s562A of the Crimes Act 1900
2. It is not uncommon for victims of domestic violence to request that the prosecution be discontinued. This may happen for various reasons:
 - the relationship between the victim and the accused resumes
 - the victim forgives the accused
 - the victim is financially dependant on the accused
 - the accused agrees to seek counselling
 - threats, harassment or intimidation by the accused; and
 - disillusionment with the criminal justice system.
 - 2.1 Prosecutors must determine the basis for the victim's wish to not proceed. This should involve making a detailed appraisal of all the circumstances of the case.
 - The prosecutor should take the following steps:
 - hold a conference with the victim
 - take a written statement from the victim explaining the reasons for not wishing to proceed
 - consult with the police OIC in order to obtain his or her views, as well as any relevant information or investigations required
 - consult with other relevant agencies
 - consult with a Witness Assistance Officer; and
 - prepare a comprehensive report as to recommendations.
 - 2.2 Where the prosecutor suspects that the victim has been frightened or coerced into withdrawing the complaint, the Police OIC should be immediately advised.
 - 2.3 If the victim wants to discontinue, the prosecutor should consider the

following factors when making an assessment of the circumstances of the case:

- the conduct or violence is of a minor or trivial nature and there is no prior history of similar conduct
- the victim has made an informed decision, free from threats, harassment or intimidation by any person
- the police and/or the victim agree
- the likelihood of the accused offending again
- the victim's continuing relationship with the accused
- the effect on that relationship of continuing with the case against the victim's wishes
- the history of the relationship, particularly if there has been any other violence in the past including sexual assault (ie past injuries and previous withdrawal of charges by the victim)
- where there have been repeated police callouts concerning incidents in the relationship
- the conduct involves premeditated violence, stalking, harassment or intimidation
- the seriousness of the offence
- where the conduct or violence was committed during the term of an Apprehended Domestic Violence Order (under Part 15A of the Crimes Act 1900) or recognisance involving the same victim or similar conduct or violence
- the victim's injuries
- if the accused used a weapon
- if the accused has made any threats since the offence; and
- the effect on any children living in the household.

2.4 Prosecutors should consult with the police, the Witness Assistance Service and any other relevant service providers (including the Department of Community Services where children are involved) in determining the appropriate course of action.

3. A victim's need or perceived need for protection should be put before a bail authority by the prosecutor in any bail application by the accused.

3.1 Victims should be informed about any special bail conditions imposed on the accused that are designed to protect the victim or victim's family, and the outcome of any bail application by the accused.

3.2 Prosecutors may institute and conduct, on behalf of the victim, proceedings for an Apprehended Domestic Violence Order or variation of an existing order under Part 15A of the *Crimes Act 1900* where necessary in order to protect the victim (see s 20A *DPP Act 1986*).

APPENDIX F

[Furnished 20 October 2003; amended 1 June 2007]

[[Guideline 19](#)]

NEW SOUTH WALES INTERAGENCY GUIDELINES FOR CHILD PROTECTION INTERVENTION

[EXCERPTS FROM CHAPTER 5 “CRIMINAL PROCEEDINGS”]

5.1 ISSUES TO CONSIDER

It is the responsibility of whoever is bringing the prosecution to decide whether there is sufficient evidence to proceed with charges against offenders, and to make an assessment about the emotional and cognitive competency of a child or young person to give evidence in any criminal proceedings and to determine the likelihood of a successful prosecution. In making that determination, consideration will be given to matters including evaluating prospective witnesses in terms of perceived honesty, credibility and ability to handle the rigours of the court process.

Practitioners and agencies need to be responsive to the dilemmas faced by families going through criminal prosecutions and work with children, young people and families to:

- reduce uncertainty by providing as much information as possible about court processes and procedures, including dates and the purpose of proceedings
- increase support and practical assistance
- acknowledge the reality of their distress.

5.3 COMMUNICATING THROUGHOUT CRIMINAL PROCEEDINGS

During the progress of criminal proceedings, issues will arise that need to be communicated to those working with the child or their family. Where there is an allocated case manager, that person should advise the Office of the Director of Public Prosecutions of their role and how they can be contacted. For those situations where the accused person is in the care of the Minister or the Director-General, the Department of Community Services will provide additional support as needed.

It is the responsibility of the Office of the Director of Public Prosecutions or the police officer in charge of the case, when less serious charges are involved, to keep the case manager informed of changes as they occur. These include:

- dates of court listings, hearings, trial adjournments
- dates for the hearing of evidence from a victim
- bail applications, granting of bail and any conditions
- breaches of bail conditions
- progress of proceedings
- charges withdrawn by the Crown ('no bill' applications)
- findings or determinations of courts
- sentencing decisions

- appeals
- any other matter that arises which is relevant to the safety, welfare or wellbeing of the child or young person.

It is the responsibility of the case manager to ensure this information is conveyed to other relevant agencies involved with the child or young person and their parents or care givers and, if appropriate, adjustments made to the case plan in light of the new information.

5.5 COURT PREPARATION FOR A CHILD OR YOUNG VICTIM

The *Charter of Victims' Rights* requires that a child or young person who gives evidence in criminal proceedings be offered information to assist their understanding of the often demanding court process and procedures. An adult of the child's choosing should also support them through the court process. This person may be any suitable person who is not a witness and who is available to assist the child or young person. The Office of the Director of Public Prosecutions should advise this court support person of the parameters of their role in relation to the victim.

The police should also advise the Office of the Director of Public Prosecutions if the child or young person is Aboriginal. The identification of such children and accommodation of their needs is of particular importance, given the experience of Aboriginal families and communities with the legal system. Additionally, the Office of the Director of Public Prosecutions needs to be advised by the police if a child or young person has any other special needs, such as related to a physical disability or to an intellectual or cognitive learning disability.

It is the responsibility of the Office of the Director of Public Prosecutions to ensure that a child or young person is appropriately prepared to appear as a witness. This should involve the prosecutor meeting with the child or young person and their caregivers well before the commencement of proceedings in order to assess the needs of the child or young person as a witness. If a NSW Health Sexual Assault Service or another counselling service is involved in the case, the prosecutor should liaise with that service and the case manager, if applicable, to discuss the child's or the young person's specific needs with regard to court preparation and support.

The prosecutor should at this meeting:

- assess the child's or the young person's competence to give evidence
- decide whether the child or young person's pre-recorded statement will be presented as evidence
- in chief, if this record has been made
- form an appreciation of the child's developmental level, including language and conceptual skills,
- their capacity to understand concepts of time and locality, and their capacity to concentrate
- form an appreciation of the child or young person's level of anxiety in relation to the proceedings
- establish some trust and rapport with the child or young person

- liaise with the Witness Assistance Service.

Child sexual assault matters are referred early to the Witness Assistance Service to facilitate access to counselling, support and court preparation and support.

This contact, if involving very young children, may need to occur over several meetings. It will enable the prosecutor to decide what special arrangements should be sought from the court to facilitate the child giving evidence. There is now a presumption that children will have a right to:

- the presence of a supportive person while giving evidence
- give evidence in chief in the form of a recording, wholly or partly
- give all their evidence by closed circuit television (CCTV), or when CCTV facilities are not available, by alternative arrangements.

It must be made clear to the child, young person and relevant parents or caregivers that the court determines court arrangements for children's testimony, and no promises can be given about particular arrangements. It should also be clarified to all relevant parties that, given the pressures on court lists, it is unlikely that the one prosecutor will remain with a matter from start to finish.

5.6 COURT DETERMINATIONS

The Office of the Director of Public Prosecutions is responsible for informing the child or young person and the parents, caregivers or guardian and the case manager, if available, of the outcome of criminal proceedings or any bargaining agreements reached with the defence.

APPENDIX G

[Furnished 20 October 2003]

[[Guidelines 19, 21, 26](#)]

UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

(Excerpts)

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated

from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

PART II

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardians(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
 - (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
 - (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (i) To be presumed innocent until proven guilty according to law;

- (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
 - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
 - (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
 - (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
 - (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
 - (vii) To have his or her privacy fully respected at all stages of the proceedings.
3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
- (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
 - (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

APPENDIX H

[Furnished 20 October 2003]

[Guideline 33]

UNITED NATIONS GUIDELINES ON THE ROLE OF PROSECUTORS

Qualifications, Selection and Training

1. Persons selected as prosecutors shall be individuals of integrity and ability with appropriate training and qualifications.
2. States shall ensure that:
 - (a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;
 - (b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.

Status and Conditions of Service

3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.
4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal and other liability.
5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.
6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.
7. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.

Freedom of Expression and Association

8. Prosecutors, like other citizens, are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.
9. Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.

Role in Criminal Proceedings

10. The office of prosecutor shall be strictly separated from judicial functions.
11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecutions and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.
12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.
13. In the performance of their duties, prosecutors shall:
 - (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
 - (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
 - (c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
 - (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.
15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violation of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.
16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods or inform the court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

Discretionary Functions

17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

Alternatives to Prosecution

18. In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of the suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.
19. In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special consideration shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.

Relations with Other Government Agencies or Institutions

20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

Disciplinary Proceedings

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.
22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines.

Observance of the Guidelines

23. Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.
24. Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

APPENDIX I

[Furnished 20 October 2003]

[[Guideline 33](#)]

UNITED NATIONS DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER

A. VICTIMS OF CRIME

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.
2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.
3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

Access to justice and fair treatment

4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.
5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.
6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
 - a. Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;
 - b. Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

- c. Providing proper assistance to victims throughout the legal process;
 - d. Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
 - e. Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.
7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

Restitution

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.
9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.
10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.
11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

Compensation

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:
- a. Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
 - b. The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.
13. The establishment, strengthening and expansion of national funds for

compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

Assistance

14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.
15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.
16. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.
17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

B. VICTIMS OF ABUSE OF POWER

18. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.
19. States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support
20. States should consider negotiating multilateral international treaties relating to victims, as defined in paragraph 18.
21. States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.