



Director's Instruction No. 1

Discontinuing Prosecutions and significantly amending Statements of Facts in the Supreme Court

Aim of Instruction

To set out the procedure for the discontinuing of prosecutions in the Supreme Court (by filing a Notice Declining to Proceed Further in a Prosecution) and to ensure consistency, accountability and transparency in the process. This instruction also applies to significant amendments to statements of facts which will materially change the nature of the case.

The criteria on which prosecutions are discontinued are the same as the criteria for the decision to prosecute set out in the Prosecution Policy. This instruction deals with the **procedure** within the office for deciding to discontinuing prosecutions, including the **level** at which particular decisions may be taken, and how the process will be **documented**.

To which matters does this instruction apply?

This instruction applies to:

- Discontinuance in the Supreme Court, including where a plea is accepted to some counts on the indictment in full satisfaction of the indictment;
- any significant amendment to the statement of facts, where those amendments materially change the nature of the case.

Background

The power to discontinue prosecutions is a long standing one now enshrined in legislation: s 7(6) of the *DPP Act*.

Where a person has been committed for trial or been indicted for an indictable offence the Director may decline to proceed further in the prosecution of the offence and may cause the prosecution to be brought to an end. This is done by filing a Notice Declining to Proceed Further in a Prosecution. The Notice may relate to particular counts or all counts. The better view is that the decision of the Director to file a Notice is not reviewable. However the court has power to stay the presentation of any subsequent indictment: *R v SH* [2009] ACTSC 50. See also the joint judgment of Gaudron and Gummow JJ in *Maxwell v the Queen* (1996) 184 CLR 501 at 534, approved by the High Court in *Likiardopoulos v The Queen* [2012] HCA 37 per the joint judgment at paragraph 37.

As to how to discontinue matters committed for sentence pursuant to section 90A of the *Magistrates Court Act 1930*, the question is not free from doubt. Sub section 90A(12) provides that “the procedure relating to committal for trial applies, as nearly as may be, to a committal under subsection (7)”, so the better view is that the discontinuance of matters committed for sentence should be in the same way as matters committed for trial.

Reasons to discontinue

Any decision to discontinue must be made in accordance with the **Prosecution Policy**. Prosecutions are discontinued on the following grounds:

- The evidence is not sufficient to constitute a prima facie case
- There are no reasonable prospects of a conviction
- It is not in the interests of the public to proceed.

Any submission that a matter should be discontinued must canvass these grounds. The grounds should be considered strictly in that order. In other words if the evidence is not sufficient to constitute a prima facie case, there is no need to consider the public interest.

On the other hand, if it is concluded that either of the first two grounds are met, that conclusion could be bolstered by reference to public interest factors if known.

The first two grounds encompass issues of both fact and law.

Consultation with informant and victim

The informant and the Supervising Lawyer of the Sexual Assault and Family Violence units should be consulted if a prosecutor is considering submitting a request for discontinuance. The reasons will be explained by the prosecutor. Ultimately it is a decision for the Office, but the AFP should be involved in the consultation process.

Victims should, where reasonably practicable, be consulted, either directly, or through the informant. While their views can be taken into account, the decision to discontinue remains with the Office.

Where practicable, consultation should take place prior to the prosecutor submitting a recommendation to discontinue. In any event it must be the subject of a clear file note.

For matters with an identifiable victim, such consultations should take place unless there are compelling reasons not to do so. Special rules apply for discontinuing matters involving an identifiable victim: See Director's Instruction No. 14.1 and 14.2.

Sexual offences

In order to ensure consistency of approach in relation to sexual offences, requests to discontinue sexual offences in the Supreme Court (including discontinuing some counts on the indictment or significantly amending the statement of facts) must be **copied to the Supervising Lawyer, Sexual Offences Unit** to allow the Unit to put forward its views if appropriate.

Procedure for obtaining approval for discontinuing prosecutions and significantly amending Statements of Facts

A Notice Declining to Proceed Further in a Prosecution can only be signed by the Director, the Deputy Director or Assistant Director.

Except in exceptional cases where it is not possible to do so, a recommendation that the Director sign a Notice Declining to Proceed Further in a Prosecution must be accompanied by a written submission clearly setting out the relevant factors and attaching a draft Notice. The decision to seek the filing of a notice should be discussed if at all possible with a senior lawyer before being submitted to the Director. That senior lawyer should record his or her recommendation and any comments on the submission. All paperwork should be placed on the case file.

Where it is not possible to prepare a written minute, a written record of the decision, including the reasons why it was sought and granted, must be created and placed on the relevant file.

In some cases, the prosecution will accept a plea in relation to some only of the counts on the indictment in full satisfaction of the indictment. On one view, a Notice Declining to Proceed Further in a Prosecution should be filed in relation to the charges not pressed. In any event this policy applies where a **plea is accepted to some charges in full satisfaction** of the counts on the indictment (including where a plea is accepted to an alternative charge).

This instruction also applies where there is a proposed **significant change to the statement of facts**, where those amendments materially change the nature of the case.

Reference should also be had to Director's Instruction No. 7 on Charge Negotiation, which regulates charge negotiation for Supreme Court matters.

Level at which decision taken

In all cases with no identifiable victim, Director or in his absence the Deputy or Assistant Director.

In all cases with an identifiable victim, the Deputy Director or Assistant Director in first instance, noting some matters will be subject to an automatic review by the Director (see Director's Instruction No. 14.1-14.2).