



Director's Instruction No. 2

Causing prosecutions to be brought to an end and significantly amending statements of facts in the Magistrates Court and Children's Court

Aim of Instruction

To set out the procedure for causing prosecutions to be brought to an end in the Magistrates Court and Children's Court 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 brought to an end 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 bring prosecutions to an end, 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:

- Withdrawal or NETO of charges in the Magistrates Court;
- Withdrawal or NETO of charges in the Children's Court;
- any significant amendment to the statement of facts, where those amendments materially change the nature of the case.

Background

The power of the DPP to cause prosecutions to be brought to an end is enshrined in

legislation: s 6(1)(i) of the DPP Act. Matters brought to an end in the Magistrates Court may either be:

- Indictable matters being prosecuted summarily;
- Summary prosecutions; or
- Committal proceedings.

The Children's Court jurisdiction is different – see below.

It should be noted that there may be some significant difference in consequences between:

- Withdrawing a charge; and
- Offering no evidence (or no further evidence) on a charge [usually called NETO “no evidence to offer”].

This difference will be explored below.

There are a number of situations which arise at the Magistrates Court and Childrens Court where bringing matters to an end might be considered, for example:

- on a plea being entered to the primary charges, withdrawal of backup charges;
- A decision to accept an offer of a plea to some charges in full satisfaction of all charges, and the consequent withdrawal of those charges that are not proceeding;
- A perceived evidentiary issue, usually a prosecution witness failing to attend at hearing, or failing to adhere to their statement either during a pre-hearing conference or in the witness box;
- A perceived legal issue, usually raised by the defence or magistrate.

A factor which must always be kept in mind is the necessity to consult with victims and informants in appropriate cases: see Director's Instruction No. 14.1-2.

Withdrawal or NETO?

There is an important difference between withdrawing a matter on the one hand, and offering no evidence (or no further evidence) on the other hand. A matter that is withdrawn is not dismissed. However a matter that is NETO'd is dismissed. Theoretically at least, a matter that is withdrawn may be able to be re-commenced. However, if a matter is NETO'd there may be a plea of autrefois acquit available to the defendant if the matter is re-commenced.

Generally, if possible a matter should be **withdrawn** rather than NETO'd. However, as discussed below, the timing of the decision not to proceed will usually dictate the appropriateness of this course.

The *Magistrates Court Act 1930* makes no reference to an information being withdrawn. [Note this is different from the Supreme Court where the DPP has a recognised right to file a no bill – section 7(6) of the DPP Act.] However, at common law, a complaint could be withdrawn by **leave of the court**. The factors that govern the grant of leave will include what stage the proceedings are at, and any other considerations of fairness. It is possible that the grant of leave to withdraw could be conditional, for example, there may be cases where the magistrate may as a condition of granting leave require that no fresh information be laid.

See generally *Bishop v. Cody* [1939] VLR 246.

It should be noted that the withdrawal is by the prosecutor (albeit by leave), not the magistrate, and *semble* does not require the consent of the defendant. See generally *AB v DPP* [2008] NSWCA 91.

The guiding principle in determining whether to withdraw or NETO is fairness. If a hearing has already commenced for example, then it will usually be appropriate to offer no further evidence and have the matter dismissed.

On the other hand, if dealing with purely backup charges, withdrawal will usually be appropriate.

A more difficult situation is where a plea is offered and accepted on some charges in full satisfaction of all charges. In that situation, the defendant should not be permitted to renege on the agreement without facing all original charges. Accordingly, the further charges should be kept on foot to be withdrawn **after** the defendant has been sentenced in accordance with the agreement. If such matters are NETO'd and dismissed then by the operation of section 143 of the *Magistrates Court Act 1930* they may be a bar to further proceedings.

It should be noted that the decision to withdraw or NETO will have particular significance for the operation of:

- Section 244 of the MCA – costs. The section does not seem to permit an award of costs if a matter is withdrawn;
- Section 143 of the MCA – consequences if matter dismissed. A dismissal is a bar to any other information or proceeding in any court for the same matter against the same party.

A note about Children's Court matters

The Children's Court has jurisdiction to hear and decide all summary and indictable offences if the defendant was under 18 years old at the time of the alleged offence. The only exceptions are offences punishable by imprisonment for life. This means that matters which are indictable or purely indictable can be dealt with in the Childrens

Court.

Notwithstanding this, the same levels of authority apply to matters in the Childrens Court as in the Magistrates Court.

Procedure

If at all practicable, a request to bring a charge to an end should be put in writing, and be accompanied by the statement of facts. It should be signed off by a lawyer at the appropriate level – see table below - and a copy placed on the file.

The following matters should be considered and if necessary addressed:

- The grounds in the Prosecution Policy
- The attitude of the informant and the victim
- Financial implications if relevant.

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.

Some specific situations

Ideally consideration of whether to withdraw or NETO charges should take place prior to the hearing date. This is not always possible. Some specific situations need to be mentioned.

1. Backup charges

Prosecutors may withdraw purely backup charges without further consultation.

2. Points of law and statutory interpretation

If prosecutors are considering discontinuing a matter because of some perceived legal issue (as distinct from a matter of evidence or credibility) they should consult with a senior lawyer (Practice Managers/Senior Advocates or above). Consultation should be before court if possible. If the issue arises unexpectedly at court, prosecutors should seek a short adjournment and consult as above.

3. Lack of prosecution witnesses at hearing

Absence of a prosecution witness should not lead inevitably to a NETO. The preferred approach is to ascertain if a subpoena has been served, and if so, and

there is no explanation for the witness's absence, seek an adjournment and a warrant for the arrest of that witness (unless a warrant is not appropriate, for example if the witness is a child). Even if no subpoena were served, it may be that an adjournment is warranted. If the issue arises unexpectedly at court, prosecutors should seek a short adjournment and consult with their Supervising Lawyer or above.

4. Prosecution witnesses not up to proof

If after proofing a vital prosecution witness at court prior to the hearing, an issue arises for the consideration of a withdrawal or NETO, the prosecutor should request a short adjournment to allow discussion with their Supervising Lawyer or above.

5. Withdrawal of charges due to offer of a plea to some charges and/or a plea offer on amended statement of facts

A plea offer is often made at court on the day of a hearing on the basis of a change to the statement of facts and/or withdrawal of some charges. Amendments to the SOF may materially change the nature of the case. If either of these situations arises unexpectedly at court, prosecutors should seek a short adjournment and consult with the victim and their Supervising Lawyer or above.

6. Representations that matters be discontinued

Depending on the grounds put forward, this may involve consideration of the matters set out in the Prosecution Policy. See Director's Instruction No. 1 for a more detailed discussion on this. Note particularly however that the public interest ground only arises for consideration where there a prima facie case and reasonable prospects of conviction. The decision to offer no evidence in a matter on the ground of public interest should be exercised sparingly and consistently with the Prosecution Policy. Two situations illustrate this. Care should be taken where there is an offer to repay moneys or make good damage on the basis that charges are dropped. In most such situations, it is almost certainly not appropriate to drop the charges. Care should also be taken when there are representations to drop regulatory matters on the basis that statutory obligations have now been complied with.

7. Supervising Lawyers and Senior Advocates cannot withdraw or NETO their own matters

The authority conferred by this Instruction to Supervising Lawyers and Senior Advocates does not include the authority to NETO or withdraw their own matters. An officer of the same level must exercise that authority.

Level at which decision taken

Approval is required from the position indicated in the table below.

MAGISTRATES COURT & CHILDRENS COURT	
Type of offence	Approval required from
<p><i>A “reviewable decision offence” – as per Directors Instructions 14.2</i></p> <p><i>A reviewable decision</i> means a decision to discontinue the entirety of a prosecution involving an <u>identifiable complainant</u>. This includes:</p> <ul style="list-style-type: none"> • a decision to withdraw all charges or discontinue proceedings involving the complainant (including by filing a Notice Declining to Proceed Further in a Prosecution); • a decision to offer no evidence (NETO) in proceedings involving the complainant. 	
<p>Homicide, Sexual Offence and Serious violent offence</p>	<p>Director - <u>via automatic review</u>:</p> <ul style="list-style-type: none"> • Supervising Lawyer (<i>If initiated at Grade 1-3 level – then they make recommendation to Supervising Lawyer</i>) – auto review by DD or AD; • Reviewed by DD or AD per Directors’ Instruction 14.2 – auto review to Director;
<p>Less serious violent offence</p> <p>Any other offence against an identifiable complainant named in the information</p> <p>(Note: reviewable upon request)</p>	<p>Supervising Lawyer</p> <ul style="list-style-type: none"> • Note, if a ‘review’ is triggered – follow Directors’ Instruction 14.2
<p><i>A matter that is not a “reviewable decision offence” as per Directors Instructions 14.2</i></p> <p>A reviewable decision <u>does not</u> include:</p> <ul style="list-style-type: none"> • a decision to significantly amend a Statement of Facts; 	

<ul style="list-style-type: none"> • a decision to reduce a charge/s to less serious charge/s, or to a fewer number of charges, in satisfaction of an indictment or information. 	
<p>All offences with no identifiable victim where the issue is:</p> <ul style="list-style-type: none"> • A point of law • A matter of statutory interpretation 	Senior Advocates or above, the Magistrates Court Practice Manager or the Supreme Court Practice Manager
All offences with no identifiable victim where the issue is public interest	Director, Deputy Director or Assistant Director
(purely) backup charges	Prosecutor him/herself
Traffic offences	Supervising Lawyer or above, a Grade 3 Prosecutor from the same team
Regulatory matters <i>excluding</i> Work Safety prosecutions	A Prosecutor from the regulatory practice
Work Safety prosecutions	Director, unless unavailable then Deputy Director or Assistant Director, all such matters to go through the Prosecutor supervising the Work Safety practice
Summary only offences with no identifiable victim	Supervising Lawyer or above or a Grade 3 Prosecutor from the same team
Indictable offences able to be dealt with summarily, with no identifiable victim	Supervising Lawyer or above or a grade 3 prosecutor.
Purely indictable offences with no identifiable victim	Director, Deputy Director or Assistant Director
Purely indictable offences involving an identifiable victim, where discontinuance of all proceedings involving the victim is in prospect	Deputy Director, unless unavailable then Assistant Director.
Indictable offences able to be dealt with summarily / summary only offences with an identifiable victim, where discontinuance of all proceedings involving the victim is in prospect	Assistant Director, unless unavailable then Deputy Director.
<ul style="list-style-type: none"> - Purely indictable offences; - all sexual offences; - driving offences causing GBH or death; and - aggravated burglary and aggravated robbery where decision relates to discontinuing only some charges involving the victim OR significant amendments to statements of facts which will 	Director, Deputy Director or Assistant Director.

materially change the nature of the case	
Offences involving an identifiable victim other than: <ul style="list-style-type: none"> - purely indictable offences; - all sexual offences; - driving offences causing GBH or death; or - aggravated burglary and aggravated robbery where decision relates to discontinuing only some charges involving the victim OR significant amendments to statements of facts which will materially change the nature of the case	Supervising Lawyer or above, a Grade 3 Prosecutor from the same team.

**** As at 2 July 2019**

39 Meaning of *less serious violent offence proceeding*—ch 4

In this chapter:

less serious violent offence proceeding means—

- (a) a proceeding for an offence against any of the following provisions of the *Crimes Act 1900*:
 - (i) section 21 (1) (Wounding);
 - (ii) section 22 (Assault with intent to commit other offence);
 - (iii) section 23 (1) (Inflicting actual bodily harm);
 - (iv) section 24 (1) (Assault occasioning actual bodily harm);
 - (v) section 25 (Causing grievous bodily harm);
 - (vi) section 26 (Common assault);
 - (vii) section 28 (Acts endangering health etc);
 - (viii) section 29 (4) and (5) (Culpable driving of motor vehicle);
 - (ix) section 31 (Threat to inflict grievous bodily harm);
 - (x) section 37 (Abduction of young person);
 - (xi) section 41 (Exposing or abandoning child);
 - (xii) section 116 (Destroying or damaging property); or
- (b) a proceeding for an offence against the *Criminal Code*, section 403 (Damaging property); or
- (c) a proceeding for an offence against the *Personal Violence Act 2016*, section 35 (Offence—contravention of protection order).

Meaning of *serious violent offence proceeding*—ch 4

In this chapter:

serious violent offence proceeding means—

- (a) a proceeding for an offence against any of the following provisions of the [Crimes Act 1900](#):
 - (i) section 12 (Murder);
 - (ii) section 15 (Manslaughter);
 - (iii) section 19 (Intentionally inflicting grievous bodily harm);
 - (iv) section 20 (Recklessly inflicting grievous bodily harm);
 - (v) section 21 (2) (Wounding);
 - (vi) section 23 (2) (Inflicting actual bodily harm);
 - (vii) section 24 (2) (Assault occasioning actual bodily harm);
 - (viii) section 27 (Acts endangering life etc);
 - (ix) section 29 (2) and (3) (Culpable driving of motor vehicle);
 - (x) section 30 (Threat to kill);
 - (xi) section 32 (Demands accompanied by threats);
 - (xii) section 34 (Forcible confinement);
 - (xiii) section 35 (Stalking);
 - (xiv) section 36 (Torture);
 - (xv) section 38 (Kidnapping);
 - (xvi) section 40 (Unlawfully taking child etc);
 - (xvii) section 42 (Child destruction);
 - (xviii) section 43 (Childbirth—grievous bodily harm); or
- (b) a proceeding for an offence against any of the following provisions of the [Criminal Code](#):
 - (i) section 309 (Robbery);
 - (ii) section 310 (Aggravated robbery);
 - (iii) section 311 (Burglary) if the complainant was in the building at the time of the offence;
 - (iv) section 312 (Aggravated burglary) if the complainant was in the building at the time of the offence.

41 **Meaning of sexual offence proceeding—ch 4**

In this chapter:

sexual offence proceeding means—

- (a) a proceeding for an offence (a **sexual offence**) against any of the following provisions of the *Crimes Act 1900*:
 - (i) part 3 (Sexual offences);
 - (ii) part 4 (Female genital mutilation);
 - (iii) part 5 (Sexual servitude); or
- (b) a proceeding for an offence against the *Family Violence Act 2016*, section 43 (Offence—contravention of family violence order) if the family violence order was made because of a sexual offence, or an alleged sexual offence, against the person protected under the order; or
- (c) a proceeding for an offence against the *Personal Violence Act 2016*, section 35 (Offence—contravention of protection order) if the protection order was made because of a sexual offence, or an alleged sexual offence, against the person protected under the order.