

THE PROSECUTION POLICY OF THE AUSTRALIAN CAPITAL TERRITORY



ACT DPP
OFFICE OF THE DIRECTOR
OF PUBLIC PROSECUTIONS

FOREWORD

The Prosecution Policy of the Australian Capital Territory was published in December 1991 by the first Director, Ken Crispin QC. The policy followed the establishment of the Territory's own independent Office of Public Prosecutions under the *Director of Public Prosecutions Act 1990*. Until now the policy has remained unchanged despite important changes to Territory law. Therefore it is timely that the current Director Jon White SC should revise the policy.

The update to the policy acknowledges and encompasses the *Human Rights Act 2004* and the *Victims of Crime Act 1994* which were enacted after the original policy was published. Notably it acknowledges a prosecutor's role to act in accordance with human rights as a public authority under the Act.

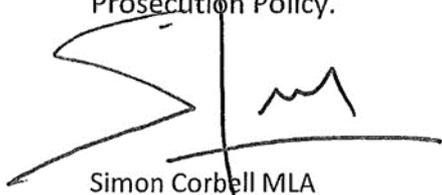
Over the last twenty years the common law has also changed. Notable changes, now incorporated into the policy, include prosecutors' duties to disclose, and the role of the prosecutor in the sentencing process.

Although the revised policy incorporates the various developments of the law, the test in relation to the decision to prosecute remains the same. Indeed the same test is contained in the prosecution policies of all Australian States and Territories and the Commonwealth.

As my predecessor, then Attorney-General, Mr Terry Connolly said in the foreword of the original policy, the published policy:

"ensures the consistency of decisions made in similar circumstances and, by the same token, assists officers in reaching a sound decision on the basis of an informed exercise of their judgement. The public availability of the document serves the dual purpose of making the decision-making process open and accountable, as well as ensuring that the public is informed of the principles which guide the Director of Public Prosecutions and his Office in the performance of their function."

The twin principles of consistency and transparency continue to be served by the revised Prosecution Policy.

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a vertical line and a wavy horizontal line.

Simon Corbell MLA
Attorney-General

13.4.15

PROSECUTION POLICY OF THE AUSTRALIAN CAPITAL TERRITORY

TABLE OF CONTENTS

1. Introduction	1
2. The decision to prosecute	3
General criteria	3
Prosecution of juveniles	5
Prosecution of corporations	6
Discontinuing a prosecution	7
3. Other decisions in the prosecution process	8
Choice of charges	8
Mode of trial	8
Consent to prosecution	9
Charge negotiation	9
Jury selection	10
Retrials	10
Sentence	10
4. Disclosure	12
5. The unrepresented accused	14
6. Private prosecutions	15
7. Undertaking that a person will not be prosecuted	16
8. Victims of crime	18
9. Publication of reasons	19

PROSECUTION POLICY OF THE AUSTRALIAN CAPITAL TERRITORY

1. INTRODUCTION

- 1.1 On 1 July 1991 the *Director of Public Prosecutions Act 1990* (the Act) came into effect. It established an Office of the Director of Public Prosecutions (DPP) controlled by the Director of Public Prosecutions (the Director) for the Australian Capital Territory.
- 1.2 The Act ensures the effective removal of the prosecution process from the political arena by affording the Director an independent status in that process. While under section 20 of the Act the Attorney-General may give directions or furnish guidelines to the Director in relation to the performance or exercise by the Director of his or her functions or powers, such a direction or guideline must be of a general nature and must not refer to a particular case. Further, the Attorney-General must not give a direction or furnish a guideline unless he or she has consulted with the Director. Any such direction or guideline is a notifiable instrument and must be presented to the Legislative Assembly.
- 1.3 The Act also ensures that the prosecutor's role will be independent of police and other investigative agencies. Of course, in practice, there will need to be cooperation and consultation between the respective bodies. Nonetheless, once an investigation has culminated in a prosecution, any decision as to whether or not it should proceed will be made independently by the DPP. In the ACT that independence extends to summary prosecutions as well.
- 1.4 The Director's functions are also carried out independently of the courts: as the High Court has said, "*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*".
- 1.5 The purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a court what the prosecution considers to be credible evidence relevant to what is alleged to be a crime. Accordingly, prosecutors have strikingly been called "ministers of justice". A prosecutor represents the community: as Deane J has observed, he or she must "*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*".
- 1.6 Although the role of the prosecutor excludes any notion of winning or losing, the prosecutor is entitled to present the prosecution's case firmly, fearlessly and vigorously, with, it has been said "*an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings*".
- 1.7 Further, the prosecution's right to be treated fairly must not be overlooked. Indeed, in the Australian Capital Territory, the *Human Rights Act 2004*, provides that everyone - the accused, members of the community and victims of crime - has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

- 1.8 The ACT is a human rights compliant jurisdiction, and all staff of the DPP must be mindful of the principles underlying the *Human Rights Act* and its purpose, as they conduct the business of the DPP. In particular they are responsible for respecting, protecting and promoting the human rights that are set out in that Act.
- 1.9 This policy is not intended to cover every conceivable situation which may be encountered during the prosecution process. Prosecutors must seek to resolve a wide range of issues with judgment, sensitivity and commonsense. It is neither practicable nor desirable too closely to fetter the prosecutor's discretion as to the manner in which the dictates of justice and fairness may best be served in every case.
- 1.10 From time to time, the Director may issue directions or furnish guidelines pursuant to section 12 of the Act. This policy supersedes the previous policy and guidelines and directions.

2. THE DECISION TO PROSECUTE

General criteria

- 2.1 It is not the case that every allegation of criminal conduct must culminate in a prosecution. The decision to prosecute should not be made lightly or automatically but only after due consideration. An inappropriate decision to prosecute may mean that an innocent person suffers unnecessary distress and embarrassment. Even a person who is technically guilty may suffer undue hardship if, for example, he or she has merely committed an inadvertent or minor breach of the law. On the other hand, an inappropriate decision not to prosecute may mean that the guilty go free and the community is denied the protection to which it is entitled. It must never be forgotten that the criminal law reflects the community's pursuit of justice and the decision to prosecute must be taken in that context.
- 2.2 Further, the resources available for prosecution are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue, with appropriate vigour, those cases worthy of prosecution.
- 2.3 Whilst a number of general principles may be articulated, it is not possible to reduce such an important discretion to a mere formula. Plainly, the demands of fairness and consistency will be important considerations, but the interests of the victim, the accused and the general public must all be taken into account. (In this context the term "the accused" includes an alleged offender, a defendant and an accused.)
- 2.4 The decision to prosecute can be understood as a two-stage process. First, does the evidence offer reasonable prospects of conviction? If so, is it in the public interest to proceed with a prosecution?
- 2.5 The initial consideration will be the adequacy of the evidence. A prosecution should not be instituted or continued unless there is reliable evidence, duly admissible in a court of law, that a criminal offence has been committed by the person accused. This consideration is not confined to a technical appraisal of whether the evidence is sufficient to constitute a prima facie case. The evidence must provide reasonable prospects of a conviction. If it is not of sufficient strength any prosecution would be unfair to the accused and a waste of public funds.
- 2.6 The decision as to whether there is a reasonable prospect of a conviction requires an evaluation of how strong the case is likely to be when presented in Court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact. The prosecutor should also have regard to any lines of defence which are plainly open to or have been indicated by the accused, and any other factors which are properly to be taken into account and could affect the likelihood of a conviction.
- 2.7 The factors which need to be considered will depend upon the circumstances of each individual case. Without purporting to be exhaustive they may include the following:
 - (a) Are the witnesses available and competent to give evidence?
 - (b) Do they appear to be honest and reliable?
 - (c) Do any appear to be exaggerating, defective in memory, unfavourable or friendly towards the accused, or otherwise unreliable?

- (d) Do any have a motive for being less than candid?
- (e) Are there any matters which may properly form the basis for an attack upon the credibility of a witness?
- (f) What impressions are the witnesses likely to make in court, and how is each likely to cope with cross-examination?
- (g) If there is any conflict between witnesses, does it go beyond what might be expected; does it give rise to any suspicion that one or both versions may have been concocted; or conversely are the versions so identical that collusion should be suspected?
- (i) Are there any grounds for believing that relevant evidence is likely to be excluded as legally inadmissible or as a result of some recognised judicial discretion?
- (j) Where the case is largely dependent upon admissions made by the accused, are there grounds for suspecting that they may be unreliable given the surrounding circumstances?
- (k) If identity is likely to be an issue, is the evidence that it was the accused who committed the offence sufficiently cogent and reliable?
- (l) Where several accused are to be tried together, is there sufficient evidence to prove the case against each of them?

2.8 If the assessment leads the prosecutor to conclude that there are reasonable prospects of a conviction, he or she must then consider whether it is in the interest of the public that the prosecution should proceed. In many cases the interests of the public will only be served by the deterrent effect of an appropriate prosecution. Mitigating factors may always be put forward by an offender when the court is considering the appropriate sentence to be imposed, and it will usually be appropriate that they be taken into account only in that manner. Generally, the more serious the offence the more likely it will be that the public interest will require that a prosecution be pursued.

2.9 Nevertheless, the Director is invested with significant discretion, and, in appropriate cases, must give serious consideration to whether the public interest requires that the prosecution be pursued. Many factors may be relevant to the public interest, and the weight which should be accorded to them will depend upon the circumstances of each case. Without purporting to be exhaustive those factors may include the following:

- (a) the seriousness or, conversely, the triviality of the alleged offence;
- (b) whether it is of a "technical" nature only;
- (c) any mitigating or aggravating circumstances;
- (d) the youth, age, physical health, mental health or special vulnerability of the accused, a witness or victim;
- (e) the antecedents and background of the accused;
- (f) the staleness of the alleged offence;
- (g) the degree of culpability of the accused in relation to the offence;
- (h) the effect on public order and morale;
- (i) the obsolescence or obscurity of the law;
- (j) whether the prosecution would be perceived as counterproductive, for example, by bringing the law into disrepute;
- (k) the availability and efficacy of any alternatives to prosecution;
- (l) the prevalence of the alleged offence and need for deterrence, both personal and general;
- (m) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
- (n) whether the alleged offence is of considerable public concern;

- (o) any entitlement of a person or body to criminal compensation, reparation or forfeiture if prosecution action is taken;
- (p) the actual or potential harm occasioned to any person as a result of the alleged offence,
- (q) the attitude of the victim of the alleged offence to a prosecution;
- (r) the need to give effect to regulatory priorities;
- (s) the likely length and expense of a trial;
- (t) whether the accused is willing to cooperate in the investigation or prosecution of others, or the extent to which he or she has already done so;
- (u) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
- (v) whether the alleged offence is triable only on indictment; and
- (w) the need to maintain public confidence in such basic institutions as parliament and the courts.

2.10 Plainly the decision to prosecute must **not** be influenced by:

- (a) the race, ethnic origin, social position, marital status, sexual preference, sex, religion or political associations or beliefs of the accused or any other person involved (unless they have special significance to the commission of the particular offence or should otherwise be taken into account as a matter of fairness to the accused);
- (b) any personal feelings concerning the alleged offender or victim;
- (c) any political advantage, disadvantage or embarrassment to the government or any political group or association; or
- (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

Prosecution of juveniles

2.11 Special considerations apply to the prosecution of juveniles. In this context a juvenile is a child (a person who is under 12 years old) or a young person (a person who is 12 years old or older, but not yet an adult). The best interests of the juvenile must always be considered. Juveniles should be encouraged to accept responsibility for their behaviour, and should be dealt with so as to provide them with the opportunity to develop in socially responsible ways. Prosecution of a juvenile must always be regarded as a severe step. Generally, a much stronger case can be made for methods of disposal which fall short of prosecution unless the seriousness of the alleged offence or the circumstances of the juvenile concerned dictate otherwise. In this regard, ordinarily the public interest will not require the prosecution of a juvenile who is a first offender in circumstances where the alleged offence is not serious.

2.12 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.

2.13 In deciding whether or not the public interest warrants the prosecution of a juvenile regard should be had to such of the factors set out in paragraph 2.9 as appear to be relevant and to the following matters:

- (a) the seriousness of the alleged offence;
- (b) the age, apparent maturity and mental capacity of the juvenile;
- (c) the available alternatives to prosecution and their likely efficacy;
- (d) the sentencing options available to the court if the matter were to be prosecuted;

- (e) the family circumstances of the juvenile particularly whether those with parental responsibility appear willing and able to exercise effective discipline and control over the juvenile;
- (f) the juvenile's antecedents including the circumstances of any previous cautions that he or she may have been given; and
- (g) whether a prosecution would be likely to have an unduly harsh effect on the juvenile or otherwise be inappropriate, having regard to such matters as the vulnerability of the juvenile and his or her family circumstances.

2.14 Under no circumstances should a juvenile be prosecuted solely to secure access to the welfare powers of the court.

Prosecution of Corporations

2.15 As a general rule a reference in an Act to a person includes a reference to a corporation as well as an individual. Consequently, a corporation may be liable for any criminal offence except those that by their very nature cannot be committed by an artificial entity, for example sexual offences. From time to time the question arises whether it will be appropriate for a corporation to be charged with an offence, instead of, or as well as, an individual.

2.16 A thorough enforcement of the criminal law against corporate offenders, where appropriate, will have a deterrent effect, protect the public, and support ethical business practices. Prosecuting corporations, where appropriate, will capture the full range of criminality involved and thus lead to increased public confidence in the criminal justice system. Prosecution of a corporation should not be seen as a substitute for the prosecution of criminally culpable individuals such as directors, officers, employees, or shareholders. Prosecuting such individuals provides a strong deterrent against future corporate wrongdoing. Equally, when considering prosecuting individuals, it is important to consider the possible liability of the company where the criminal conduct is for corporate gain.

2.17 As a general rule it is best to have all connected offenders - corporate and individual - prosecuted together at the same time.

2.18 There will be occasions when it will be appropriate to charge a natural person with being an accessory to an offence committed by a corporation, notwithstanding that there is no charge against the corporation itself. The situations where this might be appropriate may include where the corporation has ceased to exist, or is in administration, liquidation or receivership.

2.19 It should be noted that the fact that a corporation is insolvent will not of itself preclude the prosecution of the corporation.

2.20 In deciding whether the prosecution of a corporation is required in the public interest, without purporting to be exhaustive, the public interest factors at paragraph 2.9 and those set out below may be relevant. The weight which should be accorded to them will depend upon the circumstances of each case:

- (a) a history of similar conduct (including prior criminal and regulatory enforcement actions against it), and conversely, the lack of such a history;
- (b) whether the corporation had been previously subject to warnings, sanctions or criminal charges and had nonetheless failed to take adequate action to prevent future unlawful conduct, or had continued to engage in the conduct;

- (c) whether the corporation's board of directors or a high managerial agent of the corporation engaged in the conduct or authorised or permitted the commission of the alleged offence;
- (d) whether the conduct alleged is part of, or was encouraged or tolerated by, an existing corporate culture within the corporation;
- (e) the failure of the corporation to create and maintain a corporate culture requiring compliance with the contravened law, or conversely, the existence of a genuinely proactive and effective corporate culture encouraging compliance;
- (f) the failure of the corporation to provide adequate systems for giving relevant information to relevant people in the corporation;
- (g) failure to report wrongdoing within a reasonable time of the offending coming to light;
- (h) a genuinely proactive approach adopted by the corporate management team involving self-reporting and remedial actions, including the compensation of victims;
- (i) the availability of alternative civil or regulatory remedies that are likely to be effective and more proportionate;
- (j) whether the offending represents isolated actions by individuals, for example by a rogue director;
- (k) the fact that the offending is not recent in nature, and the corporation in its current form is effectively a different body to that which committed the offences;
- (l) whether the corporation is in administration, liquidation or receivership.

Discontinuing a prosecution

2.21 Generally the considerations relevant to the decision to prosecute set out above will also be relevant to the decision to discontinue a prosecution. The final decision as to whether a prosecution proceeds rests with the Director. However, wherever practicable, the views of the police (or other referring agency) and the views of the victim will be sought and taken into account in making that decision. Of course, the extent of that consultation will depend on the circumstances of the case in question, and in particular on the reasons why the Director is contemplating discontinuing the prosecution. It will be for the Director to decide on the sufficiency of evidence. On the other hand, if discontinuance on public interest grounds is contemplated, the views of the police or other referring agency, and the views of the victim will have greater relevance.

3. OTHER DECISIONS IN THE PROSECUTION PROCESS

Choice of Charges

- 3.1 In many cases the evidence will disclose conduct which constitutes an offence against several different laws. Care must be taken to choose charges which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will enable the court to impose a sentence commensurate with the gravity of the conduct. It will not normally be appropriate to charge a person with a number of offences in respect of the one act but in some circumstances it may be necessary to lay charges in the alternative.
- 3.2 The charges laid will usually be the most serious available on the evidence. However, it is necessary to make an overall appraisal of such factors as the strength of the evidence, the probable lines of defence to a particular charge and whether or not trial on indictment is the only means of disposal. Such an appraisal may sometimes lead to the conclusion that it would be appropriate to proceed with some other charge or charges.
- 3.3 The provisions of a specific Act should normally be relied upon in preference to the general provisions of the *Crimes Act* or *Criminal Code* unless such a course would not adequately reflect the gravity of the criminal conduct disclosed by the evidence.
- 3.4 There is a particular need for restraint in relation to conspiracy charges. Whenever possible, substantive charges should be laid reflecting the offences actually committed as a consequence of the alleged conspiracy. However, there are occasions when a conspiracy charge is the only one which is adequate and appropriate on the available evidence. Where conspiracy charges are laid against a number of accused jointly it is important to give due consideration to any risk that a joint trial may be unduly complex or lengthy or may otherwise cause unfairness to one or more of the accused.
- 3.5 Under no circumstances should charges be laid with the intention of providing scope for subsequent charge negotiation.

Mode of trial

- 3.6 Summary disposition usually provides the speediest and most efficient disposition of justice. In relation to some indictable offences, the prosecution has the power to elect whether those matters are dealt with summarily. In other cases the consent of the prosecution may be required before an indictable matter can be dealt with summarily.
- 3.7 In making the election or giving or withholding consent for summary disposal, each case is to be considered on its merits. The over-riding consideration is to achieve justice. The principal matter to be considered will be whether in the circumstances the Magistrates Court can adequately deal with the matter should it proceed to sentence. In turn, that will depend on:
 - the nature and circumstances of the alleged offending;
 - any other matters that a court would have to consider in sentencing the alleged offender, were the offence to be proved; and
 - the criminal history if any of the alleged offender.

3.8 Other factors to be considered are:

- whether the alleged offence is part of a series of related alleged offences, and if so whether it is appropriate to deal with those alleged offences summarily;
- whether there are any co-offenders of the alleged offender, and if so whether it is appropriate for the alleged offender to be dealt with together with the co-offenders; and
- any delay, increased costs or adverse effects upon witnesses likely to be occasioned by proceeding on indictment.

3.9 Under no circumstances will the election be made, or consent given or withheld, for tactical reasons.

Consent to prosecution

3.10 The Director has been authorised to give consent to the prosecution of a number of offences. This is to ensure that prosecutions are not brought in inappropriate circumstances. The reason for the requirement for consent is a factor which should be taken into account in deciding whether to prosecute. For example, consent may be required to ensure that mitigating factors are taken into account, or to prevent prosecutions in trivial matters. In such cases the question of consent is really bound up in the decision whether to prosecute. Other cases may involve a use of the criminal law in sensitive or controversial areas, such as conspiracy, or may involve important considerations of public policy, such as administration of justice offences.

Charge negotiation

3.11 Charge negotiation involves negotiations between the defence and the prosecution in relation to the charges to be proceeded with. Such negotiations may result in the accused pleading guilty to a fewer number of charges, or to a less serious charge or charges, with the remaining charges either being not being proceeded with or being taken into account on a schedule. It may also result in agreement for matters to be dealt with summarily. In some cases it may involve agreement about the content of the statement of facts to be put before the court.

3.12 There are obvious benefits to the criminal justice system from a plea of guilty. The earlier it is achieved, the greater will be the benefits accruing to the accused, the victim, witnesses and the community. Accordingly, negotiations between the defence and the prosecution are to be encouraged. They may occur at any stage and may be initiated by the prosecution or the defence. Charge negotiations must be based on principle and reason, and not on expediency. A clear record of the negotiations must be kept in the interests of transparency and probity.

3.13 A plea of guilty may be accepted following appropriately authorised plea negotiations if the public interest is satisfied on consideration of the following matters:

- (a) whether the plea reasonably reflects the essential criminality of the conduct and provides an adequate basis for sentencing;
- (b) whether it will save a witness, particularly a victim or other vulnerable witness from the stress of testifying in a trial;
- (c) the desirability of prompt and certain dispatch of the case;
- (d) the need to avoid delay in the dispatch of other pending cases;
- (e) the time and expense involved in a trial and any appeal proceedings;

- (f) any deficiencies in the available evidence;
- (g) in cases where there has been a financial loss to any person, whether the defendant has made restitution or arrangements for restitution;
- (h) the views of the police or other referring agency; and
- (i) the views of the victim, where those views are available and if it is appropriate to take those views into account.

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

3.15 Sentencing of offenders is a matter for the court. It is not to be the subject of agreement or purported agreement between the prosecution and defence.

Jury selection

3.16 In exercising the right to challenge or stand aside prospective jurors the prosecution must not attempt to select a jury which is not representative of the community including as to age, sex, ethnic origin, marital status or economic or social background.

Retrials

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

- (a) the reason the trial ended, that is, whether the jury was unable to agree or other reason;
- (b) whether or not another jury would be in any better or worse position to reach a verdict;
- (c) the seriousness of the alleged offence;
- (d) the cost to the community;
- (e) the cost to the accused;
- (f) whether the accused has spent time in custody;
- (g) the views of the victim.

3.18 Where two juries have been unable to agree upon a verdict, a third or additional trial will be directed only in exceptional circumstances.

Sentence

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

3.20 As the High Court has said, a prosecutor should draw to the attention of the court what are submitted to be the facts that should be found, the relevant principles that should be applied and what has been done in other (more or less) comparable cases. It is not the role of the prosecutor to proffer some statement of the specific result he or she considers should be reached, or a statement of the bounds within which that result should fall.

- 3.21 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, the prosecutor may make submissions on that issue. This will be particularly so if, where a custodial sentence is appropriate, the court is contemplating a non-custodial penalty, or where a conviction is appropriate, the court is contemplating a non-conviction order.
- 3.22 Where facts are asserted on behalf of an accused which are contrary to the prosecutor's instructions or understanding, the prosecutor should press for a trial of the disputed issues, if the resolution of such disputed facts is in the interests of justice or is material to sentence.
- 3.23 Co-operation by convicted persons with law enforcement agencies should be appropriately acknowledged and, if necessary, tested at the time of sentencing. On no occasion will it be appropriate for material such as police testimony as to an accused's assistance to authorities, to be handed directly to the court. Such material should be given to the prosecutor and tendered to the court by the prosecutor at the prosecutor's discretion.
- 3.24 Where an offender is unrepresented, the prosecutor should, as far as practicable, assist the court by putting all known relevant matters before the court, including such matters as may amount to mitigation.
- 3.25 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).

4. DISCLOSURE

- 4.1 The prosecution is under a continuing obligation to make full disclosure to the accused in a timely manner of all material known to the prosecution 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; 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 matters.
- 4.2 The prosecution is also under a duty to disclose to the defence information in its possession which is relevant to the credibility or reliability of a prosecution witness, for example:
- a relevant previous conviction or finding of guilt;
 - a statement made by a witness which is inconsistent with any prior statement of the witness;
 - a relevant adverse finding in other criminal proceedings or in non-criminal proceedings;
 - evidence before a court, tribunal or Royal Commission which reflects adversely on the witness;
 - any physical or mental condition which may affect reliability;
 - any concession which has been granted to the witness in order to secure the witness's testimony for the prosecution.
- 4.3 The prosecution must fulfil its duty of disclosure as soon as reasonably practicable. The prosecution's duty of disclosure continues throughout the prosecution process and any subsequent appeal.
- 4.4 In fulfilling its disclosure obligations the prosecution must have regard to the protection of the privacy of victims and other witnesses. The prosecution will not disclose the address or telephone number of any person unless that information is relevant to a fact in issue and disclosure is not likely to present a risk to the safety of any person.
- 4.5 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;
 - relevant only because it might deter an accused from giving false evidence or raising an issue of fact which might be shown to be false; or
 - for the purpose of preventing an accused from creating a forensic disadvantage for himself or herself, if at the time the prosecution became aware of the material it was not seen as relevant to an issue in the case or otherwise disclosable.
- 4.6 The prosecution may refuse to disclose material on the grounds of public interest immunity or legal professional privilege.

- 4.7 Where material has been withheld from disclosure on public interest grounds, the defence should be informed of the claim of immunity and the basis for the claim in general terms unless to do so would reveal that which it would not be in the public interest to reveal. In some cases it will be sufficient to delay rather than withhold disclosure. For example if disclosure might prejudice ongoing investigations, disclosure could be delayed until after the investigations are completed.
- 4.8 Legal professional privilege will ordinarily be claimed against the production of any document in the nature of an internal DPP advice or opinion. Legal professional privilege will not be claimed in respect of any record of a statement by a witness that is inconsistent with that witness's previous statement or adds to it significantly, including any statement made in conference and any victim impact statement, provided the disclosure of such records serves a legitimate forensic purpose.
- 4.9 The duty on the prosecution to disclose material to the accused imposes a concomitant obligation on the police and other investigative agencies to notify the prosecution of the existence and location of all such material. If required, in addition to providing the brief of evidence, the police or other investigative agency shall certify that the prosecution has been notified of the existence of all such material.

5. THE UNREPRESENTED ACCUSED

- 5.1 Particular care must be exercised by a prosecutor in dealing with an accused without legal representation. The basic requirement, while complying in all other respects with this policy, is to ensure that the accused 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's interests.
- 5.2 So far as practicable, oral communications with an unrepresented accused should be witnessed. Communications should be promptly noted in all cases. A record should be maintained of all information and material provided to an unrepresented accused. Prosecutors may also, where appropriate, communicate with the accused through the court.
- 5.3 A prosecutor has a duty to ensure that the trial judge gives appropriate assistance to the unrepresented accused.
- 5.4 While a prosecutor has a duty of fairness to an accused, it is not a prosecutor's function to advise an accused about legal issues, evidence, inquiries and investigations that might be made, possible defences, or the conduct of the defence.

6. PRIVATE PROSECUTIONS

- 6.1 Not all prosecutions are initiated by police officers or other officials acting in the course of their public duty. The right of a private individual to institute a prosecution has been described as "*a valuable constitutional safeguard against inertia or partiality on the part of authority*". Nevertheless, the right is open to abuse and to the intrusion of improper personal or other motives. Further, there may be considerations of public policy why a private prosecution, although instituted in good faith, should not proceed, or at least should not be allowed to remain in private hands. Consequently, section 8 of the Act enables the Director to take over the conduct of prosecutions initiated by another person. Thereafter the prosecution may be continued or brought to an end.
- 6.2 Section 13 of the Act provides that where the Director has taken over the conduct of a private prosecution or is considering doing so the informant must provide to the Director a full report of the circumstances giving rise to the prosecution together with copies of the statements of any witnesses and other documentary evidence, and furnish any further information the Director requires. In addition, section 14 enables the Director to seek police assistance in investigating the matter. These provisions enable a full assessment to be made of the prosecution case before any decision is made or, alternatively, after the matter has been taken over.
- 6.3 Given the large range of circumstances which may give rise to a private prosecution it is impracticable to lay down inflexible rules as to the manner in which the discretion will be exercised. In general, however, a private prosecutor will be permitted to retain the conduct of the proceedings unless:
- (a) there is insufficient evidence to justify the continuation of the prosecution, that is to say, there is no reasonable prospect of a conviction being secured on the available evidence;
 - (b) the prosecution is not in the public interest;
 - (c) there are reasons for suspecting that the decision to institute a private prosecution was actuated by improper motives or otherwise constituted an abuse of the prosecution process; or
 - (d) it would not be in the interests of justice for the conduct of the prosecution to remain within the discretion of a private individual having regard to the gravity of the offence and all the surrounding circumstances.
- 6.4 Where a private prosecution is instituted to circumvent an earlier decision of the Director not to proceed with a prosecution for the same offence, it will usually be appropriate to take over the prosecution with a view to bringing it to an end.

7. UNDERTAKING THAT A PERSON WILL NOT BE PROSECUTED

- 7.1 The Director has a power under the Act to give an undertaking that a person will not be prosecuted for a specified offence or in respect of specified acts or omissions. Where such an undertaking has been given, no proceedings may subsequently be instituted in respect of the offence or conduct so specified. The undertaking may be given subject to such conditions (if any) as the Director considers appropriate.
- 7.2 In principle it is desirable that the criminal justice system should operate without the need to grant any concessions to persons who have participated in the commission of offences or who have guilty knowledge of their commission. It is obviously a grave step to grant, in effect, immunity from prosecution to someone apparently guilty of a serious offence. However it has long been recognised that exceptional cases do arise in which the interests of justice demand that such a course be pursued.
- 7.3 As a general rule an accomplice should be prosecuted irrespective of whether he or she is to be called as a witness, subject of course to the usual evidentiary and public interest considerations being satisfied. If tried and convicted or acquitted with respect to the offences in issue, the person will then be a compellable witness for the prosecution, without the need for the issuing of an undertaking. Upon pleading guilty the accomplice who is prepared to co-operate in the prosecution of another can expect to receive a substantial reduction in the sentence that would otherwise have been appropriate.
- 7.4 The central issue in deciding whether to give an accomplice an undertaking under the Act is whether it is in the overall interests of justice that the opportunity to prosecute the accomplice in respect of his or her own involvement in the crime in question should be foregone in order to secure that person's testimony in the prosecution of another. The factors to be considered include:
- (a) the importance of the evidence which may be obtained as a result of the undertaking;
 - (b) the extent of the criminal involvement of the person seeking the undertaking compared with that of the accused;
 - (c) whether the person seeking the undertaking has given a full and frank statement of his or her prospective evidence, including an acknowledgement of his or her own role in the offences in issue;
 - (d) the character, credibility and previous criminal record of the person concerned;
 - (e) whether any inducement has been offered to the person to give the evidence sought; and
 - (f) whether there is any other means of obtaining the evidence in question, including by granting the person a more limited undertaking such as under section 9(1) or section 9(4) of the Act.
- 7.5 Any undertaking given by the Director will generally be subject to the condition that the recipient of the undertaking will give evidence as and when called to do so, and that any evidence the person is called upon to give will be given truthfully, accurately and on the basis that the person will withhold nothing of relevance.
- 7.6 Requests for consideration of the giving of an undertaking will usually come from the police. Where such a request is made, the Director should be provided with a full copy of the brief of evidence against the principal offender, a copy of the brief or

other material against the proposed witness, a full and frank statement signed by the proposed witness, and a comprehensive report adverting to each of the standard indemnity criteria, as listed above. Given that undertakings will rarely be given, it is prudent for investigators to consult with the Director as soon as practicable if they intend requesting an undertaking for a potential witness in criminal activity under investigation.

- 7.7 Where an accomplice receives any concession from the Director in order to secure his or her evidence, for example, whether as to choice of charge, or the grant of an undertaking under the Act, the terms of the agreement or understanding between the prosecution and the accomplice should be disclosed to the court and to the defence.

8. VICTIMS OF CRIME

- 8.1 In exercising their functions, the Director and all members of the staff of the DPP must have regard to the governing principles in the *Victims of Crime Act 1994*.
- 8.2 Victims are to be accorded sympathetic and dignified treatment. They have a right to information about the progress of investigations and the prosecution of the offender, including the charges and any modifications to the charges. A victim should be told about any decision not to proceed with a charge against the accused. Further, a victim should be told about the trial process and of the rights and responsibilities of witnesses, and be given an explanation of the outcome of criminal proceedings, including of any sentence and its implications. Victims must be informed of the outcome of finalised court proceedings in a timely fashion.
- 8.3 There should be concern for the safety and wellbeing of victims, including protecting them from unnecessary contact with the accused and defence witnesses during the course of a trial or hearing.
- 8.4 A number of agencies which exercise a function in the administration of justice are responsible for ensuring these principles are adhered to, including the DPP, police, and victim support agencies. Those agencies must work together in a complementary way.
- 8.5 Consideration must be given in the early stages of contact with the victim, and/or their families, to involvement in the case by the witness assistance service of the DPP. In all appropriate cases, victims should be advised of the service and where necessary referred to it.
- 8.6 Victims may make victim impact statements pursuant to Part 4.3 of the *Crimes (Sentencing) Act 2005*. Prosecutors should ensure that the opportunity to prepare an adequate victim impact statement has been given, and that when one is prepared it contains relevant material to assist the court in the sentencing process. They must also ensure that victims are aware of their right to present the statement as a written statement or a statement given orally in court.

9. PUBLICATION OF REASONS

- 9.1 Where the Director decides to exercise the power conferred by the Act to decline to proceed further with a prosecution, reasons may be given to any enquirer with a legitimate interest in the matter. For example, the person said to be the victim of the alleged offence or those responsible for the investigation will normally be informed. It is acknowledged that the community through the media have a legitimate interest in the administration of justice and where a person has been publicly committed for trial there will generally be no objection to the reasons for any decision not to proceed with such a trial being made public.
- 9.2 However reasons will not be given where to do so might give rise to further harm or serious embarrassment to a victim, a witness or to the accused, or where such a step might significantly prejudice the administration of justice. Similarly, even where reasons are given it may be necessary to limit the amount of detail disclosed. Under no circumstances will the Director engage in public debate concerning the reasons.
- 9.3 Reasons will not normally be given for a decision to discontinue proceedings before there has been any public hearing, because to do so would involve publishing allegations against members of the community in circumstances where there is insufficient evidence to substantiate them or, for some other reason, a prosecution would not be justified.