



## 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

1. 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, through formal recording of decisions taken.
2. 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 a charge or charges in the Magistrate's Court;
- Withdrawal or NETO of a charge or charges in the Children's Court;
- any significant amendment to the statement of facts, where those amendments materially change the nature of the case.

#### Compliance

When the instruction applies, prosecutors are required to fill out a "ROD/RORD", with sufficient information commensurate with the decision taken

- Record of decision

- Record of “reviewable” decision

### **Power and levels of decision making**

The power of the DPP to both prosecute and cause prosecutions to be brought to an end in the Magistrates Court is enshrined in legislation: s 6 *Director of Public Prosecutions Act 1990*.

Matters to be finalised in the Magistrates Court may either be:

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

There are a number of situations where bringing matters to an end might be considered, for example:

- On a plea being entered to the primary charges, discontinuing backup charges;
- A decision to accept an offer of a plea to some charges in full satisfaction of all charges, and the consequent discontinuance 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 identified in advance of hearing;
- An unforeseen issue, usually raised by the defence or magistrate while in court, with limited ability to rectify the perceived problem.

### ***Magistrates Court***

- The table set out at the end of this Instruction outlines the level of authority required for the type of decision being made.

### ***Childrens Court***

- While the jurisdiction of the Childrens Court is different to the Magistrates Court, in that it can deal with all matters other than an offence with life imprisonment (subject to consent to jurisdiction), the same levels of authority apply to matters in the Childrens Court as in the Magistrates Court.

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 v NETO?**

There is a 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”].

The former does not involve a determination of the charge. The latter is essentially a hearing, for which there is no evidence, or insufficient evidence capable of establishing guilt, thus resulting in the charge being dismissed. Following dismissal, the matter is subject to *autrefois acquit*. Whereas, following the withdrawal of the matter, the same or a similar charge can be proffered (subject to there being no abuse of proceedings).

Generally, 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 DPP has a power to unilaterally withdraw charges. This has been considered by the Supreme Court: see generally [Woods v Porter \[2018\] ACTSC 161 \(1 June 2018\) per McWilliam AsJ](#). at [19]-[28]. In particular see paragraph [28] (emphasis added):

28. Thus, I consider it well established that whatever the means by which a prosecutor terminates proceedings falling short of an acquittal, 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: *Maxwell* at 512 per Dawson and McHugh JJ; *Thompson v Judge Byrne* [1999] HCA 16; 196 CLR 141 at [24].

Important principles are that:

1. Certain decisions involved in the prosecution process are unsusceptible of judicial review. This includes the decision to prosecute, or to not prosecute: *Maxwell v The Queen* (1996) 184 CLR 501 (*Maxwell*) at 534 per Gaudron and Gummow JJ, cited in *Likiardopoulos v The Queen* [2012] HCA 37; 247 CLR 265 (*Likiardopoulos*) at [37] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
2. The power of the DPP to enter a *Nolle Prosequi* (ergo “withdraw”); or to decline to offer evidence are aspects of the prosecutorial discretion: *Maxwell* at 534.
3. The only exception to this general rule is if the court is required to prevent an abuse of process:
4. Withdrawing a charge, in and of itself is not an abuse of process. However, withdrawing a charge can amount to an abuse, primarily in circumstances where the hearing has begun and the defendant should be entitled to have the matter heard accordingly to law.

The guiding principle therefore in determining whether to **NETO** is fairness. If the matter is at hearing, a hearing has already commenced, then it will usually be appropriate to offer no evidence, or no further evidence, and have the matter dismissed. Prior to that, a withdrawal is ordinarily appropriate.

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.

### ***Timing of withdrawal.***

Where it can be shown that the withdrawal of proceedings is for a legitimate reason, there is no impediment nor reason to not withdraw charges at the earliest opportunity (for instance upon the plea of guilty to certain charges, but before sentencing). Should a defendant ultimately renege on a negotiated outcome, or seek orders allowing for the withdrawal of pleas of guilty, the prosecution will be able to prove that it is not an abuse of process to reinstitute such charges. The completed ROD/RORD, combined with any records of a negotiated outcome (e.g. representations received from the defendant and DPP's response) will demonstrate that there has been no abuse of process should charges be reinstated.

There is *one exception* that must be considered. Prosecution for matters where the maximum penalty is less than 6 months must be commenced within 1 year of the commission of the offence, unless an ACT law states otherwise: s 192 *Legislation Act 2001*. Accordingly, prosecutors may determine in appropriate cases (where there is a realistic chance finality of the proceedings may not occur until after 12 months from the commission of the offence) to only withdraw certain charges where a statutory bar may arise.

### **Procedure**

If at all practicable, a request to bring a charge to an end should be put in writing (ROD/RORD), 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 ROD/RORD before the conduct is so taken, 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 appearance at court. 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, member of Crown Chambers 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 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.

<b>MAGISTRATES COURT &amp; CHILDRENS COURT</b>	
<b>TABLE 1: “REVIEWABLE DECISIONS”</b>	
<b>Type of offence</b>	<b>Approval required from</b>
<p><b><i>A “reviewable decision offence” – as per Directors Instructions 14.2</i></b></p> <p><b><i>A reviewable decision</i></b> means a decision to discontinue the entirety of a prosecution involving an identifiable complainant. This includes:</p> <ul style="list-style-type: none"> <li>• a decision to withdraw all charges or discontinue proceedings involving the complainant (including by filing a Notice Declining to Proceed Further in a Prosecution);</li> <li>• a decision to offer no evidence (NETO) in proceedings involving the complainant.</li> </ul>	
<p>Homicide, Sexual Offence and Serious violent offence</p>	<p><b>Director - <u>via automatic review:</u></b></p> <ul style="list-style-type: none"> <li>• Prosecutor with carriage to make recommendation to Supervising Lawyer in RORD. <ul style="list-style-type: none"> <li>• Auto review by AD or DD;</li> <li>• With Auto review to Director (<i>per Directors’ Instruction 14.2 – auto review to Director</i>).</li> </ul> </li> </ul>
<p>Less serious violent offence; or</p> <p>Any other offence against an identifiable complainant named in the information</p> <p><i>(Note: reviewable upon request)</i></p>	<p><b>Assistant Director or Deputy Director – <u>with option for review to Director</u></b></p> <ul style="list-style-type: none"> <li>• Prosecutor with carriage to make recommendation to Supervising Lawyer in RORD.</li> </ul>

	<ul style="list-style-type: none"> <li>Matter proceeds to AD or DD for determination. <ul style="list-style-type: none"> <li>Note, if a 'review' is triggered by complainant – follow Directors' Instruction 14.2.</li> </ul> </li> </ul>
<b>MAGISTRATES COURT &amp; CHILDRENS COURT</b>  <b>TABLE 2:</b>  <b>"NON REVIEWABLE DECISIONS"</b>	
Type of offence	Approval required from
<p><b><i>A matter that <u>is not</u> a "reviewable decision offence" as per Directors Instructions 14.2</i></b></p> <p>A reviewable decision <u>does not</u> include:</p> <ul style="list-style-type: none"> <li>a decision to significantly amend a Statement of Facts;</li> <li>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.</li> </ul>	
All offences with no identifiable victim where the issue is: <ul style="list-style-type: none"> <li>A point of law</li> <li>A matter of statutory interpretation</li> </ul>	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"> <li>- Purely indictable offences;</li> <li>- all sexual offences;</li> <li>- driving offences causing GBH or death; and</li> <li>- 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</li> </ul>	Director, Deputy Director or Assistant Director.
Offences involving an identifiable victim other than: <ul style="list-style-type: none"> <li>- purely indictable offences;</li> <li>- all sexual offences;</li> <li>- driving offences causing GBH or death; or</li> <li>- 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</li> </ul>	Supervising Lawyer or above, a Grade 3 Prosecutor from the same team.

**\*\* As at 1 Sept 2020**

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**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.