



Director's Instruction No. 14.2 Reviewable Decisions to Discontinue Contact with Complainants, Review Processes and Auditing

SUMMARY OF RORD AND REVIEW PROCESS

1. The Record of Reviewable Decision (RORD) process in relation to discontinuing certain matters has materially changed from that contained in the previous version of this Director's Instruction (dated 16/11/2021). It introduces the concept of category 1, 2 and category 3 reviewable matters. In summary:
 - a. **In relation to a category 1 reviewable matter** – where the prosecutor with carriage is considering discontinuing the matter, in the first instance they are to prepare a Record of Decision for the relevant supervising lawyer. The supervising lawyer will be the final decision maker UNLESS the complainant requests a review of the decision.¹ If such a request is made, only at that point will a RORD then be prepared for the relevant Deputy Director who will become the final decision maker. The Director, in the exercise of his discretion, may decide to review the matter however this course is not available as a 'right'.
 - b. **In relation to a category 2 reviewable matter** – A RORD must be completed for the relevant Deputy Director. The Deputy Director will be the final decision maker UNLESS a review is *requested* by the complainant, at which point the Director will become the final decision maker.
 - c. **In relation to a category 3 reviewable matter** – in all circumstances a RORD must be prepared for the relevant Deputy Director, whose decision will then *automatically* be reviewed by the Director who will be the final decision maker.

¹ The Deputy Director may decide to review the matter in the exercise of their discretion. This will not happen in the ordinary course.

A) BACKGROUND

2. The purpose of this Instruction is to ensure compliance with recommendations 40-43 of the Royal Commission into Institutional Responses to Child Sexual Abuse (*Criminal Justice Report*, Parts III to VI, 2017):

DPP complaints and oversight mechanisms

40. Each Australian Director of Public Prosecutions should:
 - a. have comprehensive written policies for decision-making and consultation with victims and police;
 - b. publish all policies online and ensure that they are publicly available; and
 - c. provide a right for complainants to seek written reasons for key decisions, without detracting from an opportunity to discuss reasons in person before written reasons are provided.
 41. Each Australian Director of Public Prosecutions should establish a robust and effective formalised complaints mechanism to allow victims to seek internal merits review of key decisions.
 42. Each Australian Director of Public Prosecutions should establish robust and effective internal audit processes to audit their compliance with policies for decision-making and consultation with victims and police.
 43. Each Australian Director of Public Prosecutions should publish the existence of their complaints mechanism and internal audit processes and data on their use and outcomes online and in their annual reports.
3. It must be recognised that the ACT DPP prosecutes all criminal offences alleged to have been committed against Territory laws. The 'three category' system is to recognise that a significant number of category 1 offences would not ordinarily be prosecuted by other Directors of Public Prosecutions, who tend to focus on category 2 and 3 offences.
 4. It must be recognised that a decision to discontinue in particular a sexual offence is a matter of potentially great moment for a complainant. Specific rules therefore apply for discontinuing an offence with an identifiable complainant.

Related documents and Director's Instructions

5. This Instruction should also be read in line with:
 - **Decisions to Discontinue Prosecutions – Victims' Right of Review Director's Guideline** (published on ACT DPP website);
 - **The ACT DPP Prosecution Policy 2021;**
 - **Director's Instruction No. 1:** Discontinuing prosecutions and significantly amending Statements of Facts in the Supreme Court;

- **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;
- **Director’s Instruction No.7:** Charge negotiations in the Supreme Court;
- **Director’s Instruction No. 13:** Guidelines for contact with complainants in sexual offence matters;
- **Director’s Instruction No.14.1:** Review of a decisions to discontinue a prosecution;
- **Internal RORD Audit Form;** and
- **Template:** email to complainant re right of review.

B) APPLICATION

6. This Instruction outlines the procedure to be followed in relation to the making of a reviewable decision.
7. A **reviewable decision** means a ‘category 1 reviewable decision’, a ‘category 2 reviewable decision’, or a ‘category 3 reviewable decision’², to discontinue the entirety of a prosecution involving an identifiable complainant. This includes:
 - a decision to withdraw all charges or discontinue proceedings involving the complainant (including by filing a Notice Declining to Proceed Further in a Prosecution); and
 - a decision to offer no evidence (NETO) in proceedings involving the complainant.
8. A reviewable decision does not include:
 - a decision to significantly amend a Statement of Facts;
 - 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.
9. A reviewable decision does not include a decision not to bring proceedings involving a complainant. However, where the Office has provided an opinion to an investigative agency that no charge/s are to be laid in a matter, that opinion is a reviewable decision subject to the agency requesting a review in its own right, or on behalf of a complainant.
10. For the purposes of this Instruction, a **complainant** is a complainant in a prosecution conducted by the DPP, and also includes a close family member or partner of a deceased person in homicide cases. Where appropriate the views of a child complainant should be sought directly, however if not appropriate, a parent or guardian of a child complainant.
11. After a reviewable decision has been made, there are two types of review process available:

² Category 1, 2 and 3 reviewable decisions are defined in the table at paragraph [13] of this Instruction.

- review at request; or
 - automatic review.
12. A decision that is subject to **automatic review** means that the decision will be reviewed without requiring the complainant to request a review. A decision that is subject to **review at request** will be reviewed only when a request for review is made by the complainant, in accordance with this procedure.
13. The type of review process available depends on the charge for which the prosecution will be discontinued. If a decision is made to discontinue the entirety of a prosecution where there is more than one charge, the review process available will be the one which applies to the most serious charge.

Type of prosecution	Type of review available
Homicide offence ³	Category 3 reviewable decision <ul style="list-style-type: none"> • Primary decision Deputy Director • Automatic review to Director
Sexual offence ⁴	
Serious violent offence ⁵	
Nominated offences <u>Crimes Act 1900 Offences:</u> <ul style="list-style-type: none"> • Culpable Driving of motor vehicle: s 29(4); (5) • Causing Grievous bodily harm: s 25 • Threat to inflict grievous bodily harm: s 31 • Abduction of young persons: s 37 • Driving motor vehicle at police: s 29A <u>Criminal Code 2002 Offences:</u> <ul style="list-style-type: none"> • Arson • Other property related offences with value over \$10,000 in value (excluding take / driving / riding cars) • Conspiracy Any Commonwealth charge involving a complainant Any decision based on public interest grounds ⁶	Category 2 reviewable decision <ul style="list-style-type: none"> • Primary decision Deputy Director • Review at request (to Director)

³ Homicide offences are: murder, contrary to section 12 of the *Crimes Act*; manslaughter, contrary to section 15 of the *Crimes Act*; culpable driving causing death, contrary to section 29(2) or (3) of the *Crimes Act*; and negligent driving causing death, contrary to section 6(1)(a) of the *Road Transport (Safety and Traffic Management) Act 1999*.

⁴ See definition at 41 of the *Evidence (Miscellaneous Provisions) Act 1991*.

⁵ See definition at 40 of the *Evidence (Miscellaneous Provisions) Act 1991*.

⁶ Bear in mind, as per paragraphs [7] – [8] of this instruction, that a decision is only a ‘reviewable decision’ if it involves discounting all charges. A decision to accept a negotiated plea outcomes to lesser charges on public interest grounds is not a reviewable decision, and is thus not subject to this Instruction.

All other less serious violent offence ⁷ that is not a category 2 or 3 reviewable decision	Category 1 reviewable decision <ul style="list-style-type: none"> • Primary decision Supervising Lawyer • Review at request (to Deputy Director)
Any other offence against an identifiable complainant named in the information that is not a category 2 or 3 reviewable decision	

C) RECOMMENDING A DISCONTINUANCE

Category 1 reviewable decision

14. A prosecutor with carriage of a matter may consider that a category 1 reviewable decision should be made. This can be at the prosecutor's own initiative, following defence representations, or a request by the complainant.
15. The prosecutor should prepare a **Record of Decision / Record of Reviewable Decision** minute for their supervising lawyer detailing the recommendation that the matter be discontinued, and the reason for doing so against the background of the *ACT DPP Prosecution Policy 2001*.
16. At this point, the prosecutor should contact the complainant to ascertain the complainant's views unless there are compelling reasons not to do so. If there are compelling reasons not to contact the complainant, these should be documented in the RORD.
17. Contact with the complainant may be made through the Witness Liaison Officer or the informant. A file note should be created and saved in Folder 22 on CASES, documenting contact with the complainant and recording their views. If the complainant is unable to be contacted, reasonable attempts at contacting them must be documented in the file note.
18. The prosecutor should not only consult the complainant, but also advise them that if they are dissatisfied with a decision to discontinue a matter they can ask that the decision be reconsidered by the DPP. The views of the informant and complainant should be included in the minute. If they were not contacted, the reason for this should be included in the minute.
19. The prosecutor should save all supporting documentation for the minute into Folder 22 on CASES.
20. The prosecutor should send the minute to their supervising lawyer, or -
 - a. For FV offences – FV supervising lawyer;
 - b. For sexual offences – SO supervising lawyer.
21. The supervising lawyer should then record on the **Record of Decision / Record of Reviewable Decision (ROD/RORD)** minute whether the matter should proceed or be discontinued, and provide reasons. The **ROD/RORD** minute should then be saved in Folder 22 on CASES.
22. If the decision is to proceed, the prosecutor must advise the informant and the complainant.

⁷ See definition at 39 of the *Evidence (Miscellaneous Provisions) Act 1991*.

23. If the decision is to discontinue, the prosecutor must advise the informant and the complainant of the decision. First contact with the complainant should be made by phone, and a file note should be made of this conversation. The prosecutor should explain to the complainant the reasons for the decision, as well as the right to seek a review. When giving reasons for the decision, the prosecutor should be mindful that the decision may be overturned on review. The prosecutor should ensure that any reasons given would not interfere with the conduct of a future trial, if it were to proceed.
24. Immediately after advising the complainant by phone, the prosecutor should send a follow-up email to the complainant. This email should set out the decision, the right to seek an internal review, how to apply for a review and how the review process works, including the right to seek written and oral reasons following review.
25. The file should be marked **SUBJECT TO REVIEW** on the front cover, and kept until the end of the review period. As far as possible, the prosecutor should refrain from communicating the decision to discontinue to the court or defence until the complainant has positively communicated that they will not request a review, or **7 days** have elapsed since the decision was communicated to the complainant.

Category 2 and 3 reviewable decisions

26. A prosecutor with carriage of a matter may consider that a category 2 or 3 reviewable decision should be made. This can be at the prosecutor's own initiative, following defence representations, or a request by the complainant.
27. The prosecutor should prepare a **Record of Decision / Record of Reviewable Decision (ROD/RORD)** for their supervising lawyer detailing the recommendation that the matter be discontinued, and the reason for doing so against the background of the *ACT DPP Prosecution Policy 2021*.
28. At this point, the prosecutor should contact the complainant to ascertain the complainant's views unless there are compelling reasons not to do so. If there are compelling reasons not to contact the complainant, these should be documented in the RORD.
29. Contact with the complainant may be made through the Witness Liaison Officer or the informant. A file note should be created and saved in Folder 22 on CASES, documenting contact with the complainant and recording their views. If the complainant is unable to be contacted, reasonable attempts at contacting them must be documented in the file note.
30. The prosecutor should not only consult the complainant, but also advise them that if they are dissatisfied with a decision to discontinue a matter they can ask that the decision be reconsidered by the DPP.
31. The prosecutor should save all supporting documentation for the minute into Folder 22 on CASES.
32. The prosecutor should send the RORD to their supervising lawyer, or -
 - a. For FV offences – FV supervising lawyer;
 - b. For sexual offences – SO supervising lawyer.

33. The supervising lawyer should then record on the RORD whether the matter should proceed or be discontinued, and provide reasons. The minute should then be saved in Folder 22 on CASES. The RORD should then be forwarded to:
 - a. For matters in the carriage of Crown Chambers – Deputy Director (Chief Crown Prosecutor); or
 - b. For all other matters – Deputy Director (Criminal Practice).⁸
34. The relevant Deputy Director will record on the RORD whether the matter should proceed or be discontinued, and their reasons for reaching that decision.
35. If the decision of the Deputy Director is to proceed, the prosecutor must advise the informant and the complainant.
36. If the decision is to discontinue, the prosecutor should advise the informant and complainant that the decision will be reviewed by the Director and that they can make comment/submissions in relation to that review. First contact with the complainant should be made by phone, and a file note should be made of this conversation. The prosecutor should explain to the complainant the reasons for the decision, as well as the right to seek a review. When giving reasons for the decision, the prosecutor should be mindful that the decision may be overturned on review. The prosecutor should ensure that any reasons given would not interfere with the conduct of a future trial, if it were to proceed.
37. Immediately after advising the complainant by phone, the prosecutor should send a follow-up email to the complainant. This email should set out the decision, the right to seek an internal review, how to apply for a review and how the review process works, including the right to seek written and oral reasons following review.
38. The file should be marked **SUBJECT TO REVIEW** on the front cover, and kept until the end of the review period. As far as possible, the prosecutor should refrain from communicating the decision to discontinue to the court or defence until the automatic review is completed by the Director.

D) REVIEWING A DISCONTINUANCE

Review of a category 1 & 2 reviewable decision

39. The complainant has 7 days to request a review of the decision from the time they were first informed of the decision.⁹ The complainant may request a review either over the phone or by email.
40. If the complainant requests a review of the decision, the **RORD** should be provided to the relevant reviewer (Deputy Director or Director). The RORD should be saved in CASES Folder 22.
41. The RORD will then be considered by the relevant reviewer (Deputy Director or Director). The reviewer will become the final decision maker in relation to the matter.

⁸ If the relevant Deputy Director is unavailable, the other Deputy Director may conduct the review.

⁹ Depending on the court timetable, this timeframe may be shorter. If the request is received outside of this timeframe, the prosecutor should immediately raise this with the Director for further consideration.

42. The reviewer has 7 days to review the decision (depending on the timeframe of the matter),¹⁰ having regard to the documents saved on Folder 22 in CASES (including the file note documenting the complainant's views, the RORD and supporting documents and any request for review by complainant) and the brief of evidence. The decision will be considered in accordance with the Prosecution Policy.
43. The reviewer must consider the case afresh, by examining all the evidence and the views of the complainant, and forming an independent view of the sufficiency of the evidence, the prospects of conviction and the public interest considerations, before scrutinising the approach taken by the original decision-maker, including the reason/s for the decision. The reviewer may ask police to obtain additional evidence or refer to legal authorities not considered by the original decision-maker. The reviewer must also have regard to any comments or submissions made by the complainant.
44. Once the review is complete, the reviewer should record in the RORD whether the original decision is endorsed/not endorsed and notify the prosecutor with carriage of the matter.
45. The prosecutor must then contact the complainant to explain the outcome of review. If the decision to discontinue is endorsed, the prosecutor should inform the complainant prior to informing the court, and should offer the complainant the right to both:
 - a. discuss the reasons for the decision with the reviewer in person (in the presence of a Witness Liaison Officer or support person, if desired); and
 - b. receive a letter containing the reviewer's written reasons for the decision (which must be requested within **14 days** of the final decision being communicated to the complainant).¹¹
46. If written reasons are requested for the decision, the reviewer should:
 - a. Provide written reasons to the complainant within **14 days**;
 - b. Consult with any allocated Witness Liaison Officer prior to providing written reasons to the complainant;
 - c. Ensure that written reasons are not provided in circumstances where:
 - i. statutory or other restrictions prohibit or limit the release of such information;
 - ii. the giving of reasons may affect a related case (for example, the prosecution of a co-offender) which is before the court.
 - d. If the circumstances in 7(c) are present at the time of the request, the request should remain under active review, so that if and when the circumstances are no longer applicable, further consideration may be given to the provision of reasons at that time.

¹⁰ If a trial is listed to commence within 7 days of a decision to discontinue, the request for review must be made as soon as possible, as the timeframe for the review process will be shorter. In some cases, it may not be possible to review the decision before notice of the decision is communicated to the court. In those circumstances, the decision will be still be reviewed by the Director, but the matter may not be able to be prosecuted.

¹¹ If the request is received outside of this timeframe, the prosecutor should immediately raise this with the Director for further consideration.

47. Following the giving of reasons for the decision, the Witness Liaison Officer should follow up with the complainant to ensure that they are referred to agencies for further support as required.

Review of a category 1 reviewable decision

48. A complainant has no 'right' to have the Director further review the decision of a Deputy Director in relation to a category 1 reviewable matter. The Director may, nonetheless, review the Deputy Director's decision in the exercise of his discretion.

Review of a category 3 reviewable decision

49. Once the Deputy Director completes the RORD process detailed at paragraphs [42] – [47] above, the Deputy Director must bring the matter to the attention of the Director¹² **as soon as possible**.

E) AUDIT OF COMPLIANCE

50. A record must be made of each of the steps in the above process on the RORD. At the completion of each financial year, an audit will be conducted in relation to reviewable decisions in that year, to establish whether the procedures set out in this Instruction have been complied with, and to target areas of non-compliance for future training and monitoring.
51. Auditing of compliance will be conducted based on the following records on CASES:
- Document: RORD (Record of Reviewable Decisions) – Discontinuing a matter involving an identifiable complainant
 - Document: File note – complainant contact re discontinuance
 - Document: Email to complainant – right to review
 - Document: Letter providing reasons for discontinuance
52. It is therefore **crucial** that each of the above documents be saved and entered into CASES by the prosecutor, the Deputy Director / Assistant Director, and the Director.
53. The audit will be undertaken by an Audit Committee appointed by the Director. The Audit Committee should meet at least 3 times per financial year for the purpose of auditing reviewable decisions and recording compliance with the procedures set out in this Instruction.
54. The results of the audit should be recorded on the 'Internal RORD Audit Form', which must be placed on the file. If, during the audit, the procedure undertaken in relation to a reviewable decision was not followed in accordance with this Instruction, the audit committee must review and consider the basis of that decision. The Audit Committee should raise any areas of persistent non-compliance with the Director as they arise.

¹² If the Director is unavailable, the matter may be reviewed by the Deputy Director who did not conduct the review of the supervising lawyer's recommendation.

55. At the end of the financial year, the Audit Committee must provide copies of all completed Internal Audit Forms to the Director. The Audit Committee must also prepare a short annual report for the Director outlining relevant information, including:

- the number of files audited;
- the types of matters audited (e.g. 'sexual offence');
- the level of compliance with the procedures in this Instruction;
- a breakdown and summary of any compliance issues, and suggested measures for addressing those issues in the Office.

The results of the audit will be published in the annual report of the Director for the year in question.

Shane Drumgold SC
August 2022