



GUIDELINES

*Pursuant to section 25 of the **Director of Public Prosecutions Act** the following statement of guidelines to be followed in the performance of the Director's functions have been issued.*

The criteria governing the decision to prosecute

1. Sir Hartley Shawcross QC, then Attorney-General, stated to the House of Commons on 29 January 1951:

*It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should ... prosecute **whenever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest.** That is still the dominant consideration. (H.C. Debates, Vol.483, col.681, 29 January 1951).*

This statement is equally applicable to the position in Australia and the Northern Territory. The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue with some vigour those cases worthy of prosecution.

2. The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system.
3. The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution. A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the alleged offender. (The term *alleged offender* includes a defendant or an accused person).

4. When deciding whether the evidence is sufficient to justify the institution or continuation of a prosecution the existence of a bare prima facie case is not enough. Once it is established that there is a prima facie case it is then necessary to give consideration to the prospects of conviction. ***A prosecution should not proceed if there is no reasonable prospect of a conviction being secured.*** In indictable matters this test presupposes that the jury will act in an impartial manner in accordance with its instructions.
 5. The decision whether there is a reasonable prospect of 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, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the alleged offender and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course there can never be an assurance that a prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and the useless expenditure of public funds.
 6. When evaluating the evidence regard should be had to the following matters:
 - (a) are there grounds for believing the evidence may be excluded bearing in mind the principles of admissibility at common law and under statute? For example, prosecutors will wish to satisfy themselves that confessional evidence has been properly obtained. The possibility that any evidence might be excluded should be taken into account and, if it is crucial to the case, may substantially affect the decision whether or not to institute or proceed with a prosecution
 - (b) if the case depends in part on admissions by the alleged offender, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the alleged offender?
 - (c) does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the alleged offender, or may be otherwise unreliable?
 - (d) has a witness a motive for telling less than the whole truth?
 - (e) are there matters which might properly be put to a witness by the defence to attack his or her credibility?
 - (f) what sort of impression is the witness likely to make? How is the witness likely to stand up to cross-examination? Does the witness suffer from any physical or mental disability which is likely to affect his or her credibility?
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- (g) if there is conflict between eye-witnesses, does it go beyond what one would expect and hence materially weaken the case?
- (h) if there is lack of conflict between eye witnesses, is there anything which causes suspicion that a false story may have been concocted?
- (i) are all the necessary witnesses available and competent to give evidence, including any who may be abroad? Is any witness likely to obtain an exemption from giving evidence pursuant to the *Justices Act* or other provisions?
- (j) where child witnesses are involved, are they likely to be able to give sworn evidence or, if not, is there corroboration in some material particular by some other evidence implicating the alleged offender?
- (k) if identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the alleged offender?
- (l) where two or more alleged offenders are charged together, is there a realistic prospect of the proceedings being severed? If so, is the admissible evidence sufficient to prove the case against each alleged offender should separate trials be ordered?

This list is not exhaustive, and of course the matters to be considered will depend upon the circumstances of each individual case, but it is introduced to indicate that, particularly in borderline cases, the prosecutor must be prepared to look beneath the surface of the statements.

7. Having satisfied himself or herself that the evidence is sufficient to justify the institution or continuation of a prosecution, the prosecutor must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued. It is not the rule that all offences brought to the attention of the authorities must be prosecuted.
8. The factors which can properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. While many public interest factors militate against a decision to proceed with a prosecution, there are public interest factors which operate in favour of proceeding with a prosecution (for example, the seriousness of the offence, the need for deterrence). In this regard, generally speaking the more serious the offence the less likely it will be that the public interest will not require that a prosecution be pursued.
9. Factors which may arise for consideration either alone or in combination in determining whether the public interest requires a prosecution include:
 - (a) the seriousness or, conversely, the triviality of the alleged offence or that it is of a *technical* nature only
 - (b) any mitigating or aggravating circumstances

- (c) the youth, age, intelligence, physical health, mental health or special infirmity of the alleged offender
- (d) the alleged offender's antecedents and background
- (e) the staleness of the alleged offence
- (f) the degree of culpability of the alleged offender in connection with the offence
- (g) the obsolescence or obscurity of the law
- (h) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute
- (i) the availability and efficacy of any alternatives to prosecution
- (j) the prevalence of the alleged offence and the need for deterrence, both personal and general
- (k) whether the consequences of any resulting conviction would be unduly harsh and oppressive
- (l) whether the alleged offence is of considerable public concern
- (m) any entitlement of the State or Territory, the victim or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken
- (n) the attitude of the victim of the alleged offence to a prosecution
- (o) the likely length and expense of a trial
- (p) whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so
- (q) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court
- (r) whether the alleged offence is triable only on indictment and
- (s) the necessity to maintain public confidence in such basic institutions as the Parliament and the courts.

The applicability of and weight to be given to these and other factors will depend on the particular circumstances of each case.

10. A decision whether or not to prosecute must clearly not be influenced by:

- (a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved
 - (b) personal feelings concerning the offender or the victim
 - (c) possible political advantage or disadvantage to the government or any political group or party or
 - (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.
11. As a matter of practical reality the proper decision in many cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. Although there may be mitigating factors present in a particular case, often the proper decision will be to proceed with a prosecution and for those factors to be put to the court at sentence in mitigation. Nevertheless, where the offence is not so serious as plainly to require prosecution the prosecutor should also apply his or her mind to whether the public interest requires a prosecution to be pursued.

Domestic violence cases

12. The following separate guidelines result from a consideration and application of the government's policy on domestic violence. That policy involves the implementation of a domestic violence strategy. One of the objectives of that strategy is to ensure the Territory has a criminal justice driven prosecution that does not rely on the victim giving evidence. What is referred to as the *no drop* policy is intended to ensure that charges may be laid and cases proceed to hearing despite the victim not wishing to co-operate further and/or give evidence at a hearing.
13. In specific cases there may be a conflict between the principles expounded in the guidelines, which deal with the general criminal prosecution, and those to be applied in domestic violence cases.
14. Since February 1998, the responsibility for prosecution of all summary offences has been transferred to the Office. It is therefore appropriate that distinct guidelines relating to domestic violence cases be applied by those appearing to prosecute summary offences who, from February 1998 at least, have been prosecuting on behalf of the Office.
15. The specific guidelines to be applied in domestic violence cases are as follows:
- (a) Special care must be taken in deciding whether to prosecute cases arising out of domestic or family circumstances. Although the attitude of the victim of the alleged offence to a prosecution (see para 9(n) above) remains an important factor, it is not to be regarded as decisive.
 - (b) If in such cases, there is available (irrespective of the wishes or presence of the victim) evidence which provides a reasonable prospect of a conviction
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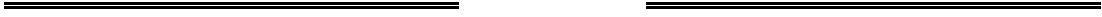
being secured, then the matter should be prosecuted to hearing unless there are exceptional circumstances.

- (c) What might be exceptional circumstances cannot be established in advance. However, the fact that a victim simply does not wish to proceed should not be so regarded.
- (d) If in the opinion of the prosecutor holding the brief in the Court of Summary Jurisdiction, exceptional circumstances exist why charges should be withdrawn, he or she nevertheless is not to withdraw the charges except with the authority of the officer-in-charge of Summary Prosecutions or of the Chambers' Prosecutor (in either case to be confirmed in writing within 48 hours of the withdrawal).
- (e) Subsequent to any withdrawal pursuant to para (d), the relevant prosecutor must record in writing on the file the grounds upon which such decision was made and submit a written report within 7 days of the withdrawal endorsed by the relevant authorising officer, to the Deputy Director of the Office of the Director of Public Prosecutions (in the Darwin Office) Darwin or the Assistant Director (in Alice Springs) as appropriate.
- (f) Where the exceptional circumstances arise in part because of the reluctance of a victim to proceed with the matter, the prosecutor should arrange for a statement to be taken from the victim outlining those circumstances. If necessary or desirable, the victim should be called to give evidence in court detailing the wishes to withdraw.

Prosecution of juveniles

- 16. Special considerations apply to the prosecution of juveniles. Prosecution of a juvenile should always be regarded as a severe step, and generally speaking a much stronger case can be made for methods of disposal which fall short of prosecution unless the seriousness of the 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 offence is not serious.
- 17. 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 9 as appear to be relevant, but particularly to:
 - (a) the seriousness of the offence
 - (b) the age and apparent maturity and mental capacity of the juvenile
 - (c) the available alternatives to prosecution, such as a caution, and their efficacy
 - (d) the sentencing options available to the relevant children's court if the matter were to be prosecuted

- (e) the juvenile's family circumstances, particularly whether the parents of the juvenile appear able and prepared to exercise effective discipline and control over the juvenile
- (f) the juvenile's antecedents, including the circumstances of any previous caution the juvenile may have been given, and whether they are such as to indicate that a less formal disposal of the present matter would be inappropriate
- (g) whether a prosecution would be likely to be harmful to the juvenile or be inappropriate, having regard to such matters as the personality of the juvenile and his or her family circumstances.





EXERCISE OF GENERAL PROSECUTORIAL DISCRETION

1. It is a fundamental obligation on those who prosecute for the Crown to assist in facilitating the speedy administration of justice insofar as that is possible. To that end cases should be prepared for trial quickly and an indictment settled at the earliest practicable opportunity. Once prepared the details of the indictment should be communicated to the accused or the accused's legal representatives. Similarly any amendment to the indictment should be communicated to the defence at the earliest opportunity.
2. No ex-officio indictment should be found without the specific approval of the Director in respect of any offence which is substantially different in nature from the offence or offences committed for trial or in respect of any offence where there has been no committal for trial.
3. When the charge against a defendant has been dismissed by a magistrate and consideration is being given to proceeding on that charge by way of ex-officio indictment the defendant so discharged should be notified. In reaching a decision whether or not to proceed in this way particular significance will be given to any relevant delay and a decision should be made within three months of the case being referred for consideration.
4. A number of decisions have highlighted the need for restraint in laying conspiracy charges. Whenever possible substantive charges should be laid. However, there are occasions when a conspiracy charge is the only one which is adequate and appropriate on the available evidence. Where it is proposed to lay or proceed with conspiracy charges against a number of accused jointly, Crown prosecutors must guard against the risk of the joint trial being unduly complex or lengthy, or otherwise causing unfairness to accused.
5. The Crown has a responsibility to ensure trials proceed and once a case has been listed for trial it is generally speaking not appropriate for the Crown to force an adjournment by refusing to present an indictment to the court. Where such action is taken a report should be made to the Director explaining the reasons for so doing.

The Crown should also assist the efficient organisation of the business of the courts by opposing unnecessary applications for adjournments of trials on the day of trial and, in particular, where such applications are for the purpose of seeking to review judgments of the trial judge as to preliminary matters such as staying the indictment.

6. In exercising the right of challenge of the Crown no attempt should be made to select a jury which is not representative as to age, sex, or ethnic origin.
7. When advised by defence counsel before a trial that there is a particular reason certain evidence should not be referred to in the Crown's opening and the relevant evidence will be challenged, care should be taken to ensure nothing is said in the opening which may lead to the subsequent discharge of the jury. Where appropriate a preliminary ruling should be sought before opening.
8. Where Crown witnesses are known to prosecuting counsel to have prior convictions and/or are indemnified in respect of the matter before the court and that fact could be of any material significance in the trial, it is appropriate to reveal the conviction or the indemnity to the defence.
9. Attention should be given to the decision of the High Court in *The Queen v Apostilides* and, in particular, the statement that a decision whether or not to call a relevant witness from whom the defence wish to lead evidence must be made with due sensitivity to the dictates of fairness to an accused. It was said by the court that a refusal to call the witness would be justified only by reference to the overriding interests of justice and such an occasion would be rare. The unreliability of the evidence is only sufficient where there are identifiable circumstances which clearly establish it. If a decision is made not to call the witness the defence should be notified in due time.

It is recognised that there is a general duty upon the Crown to disclose the case-in-chief for the prosecution to counsel for the accused.

The purpose of disclosure by the Crown is threefold:

- (a) to ensure that the defence is aware of the case-in-chief for the prosecution and all other evidence relevant to the guilt or innocence of the accused
- (b) to resolve non-contentious and time-consuming issues in advance of the preliminary hearing or trial in an effort to ensure more efficient use of court time
- (c) to encourage the resolution of cases including where appropriate the entering of guilty pleas at a date early in the proceedings.

The guiding principle is always full disclosure of the case-in-chief for the prosecution and all other evidence relevant to the guilt or innocence of the accused. Such full disclosure may only be limited where there is a real need to protect the integrity of the administration of justice, including the need to prevent the endangerment of the life or safety of witnesses or interference with the administration of justice.

10. Where it is desired to cross-examine an accused as to credit or motive, it is the responsibility of Crown prosecutors to be fair. In particular, when putting material based on information made available to the Crown, care should be taken to ensure

the material is accurate and use of it is justified in the circumstances of the particular trial.

11. In prosecuting charges of personal assault including charges of sexual assault, particular attention should be paid to the situation of the victim who may have suffered emotional and physical distress as a result of the offence. This concern should manifest itself by explaining to victims their role in the prosecution process and providing reasons to victims for decisions made in relation to proceedings that directly affect them such as not proceeding with a prosecution or decisions to proceed on a lesser charge. Similarly, appropriate consideration should be given to the wishes of a victim who does not wish to proceed with a prosecution for reasons of health, humiliation or trauma.
12. It is not the practice of the Crown to address on the quantum of sentence in the normal case and clearly there are limits on the matters that can properly be raised by the Director on sentence. It is not the role of the prosecutor to press for the highest possible penalty or to seek to sway the court by passion or rhetoric, ie to engage in forensic urging on the question of sentence before the sentencing judge. The role of the prosecutor is to ensure that all relevant material is before the court and where appropriate to ensure that the significance of any part of the material is drawn to the court's attention.

It is the function of the Crown prosecutor to seek to prevent the court falling into appellable error. Where assistance is sought by the court, the Crown should be in a position to provide the court with any relevant decisions relating to principles of sentence and should always be prepared to assist with respect to technicalities of sentencing. Depending upon the circumstances of the case, the prosecutor may draw the court's attention to any aggravating circumstances or the absence of extenuating circumstances; he or she may canvass the various sentencing options available and may, in an appropriate case, suggest a particular option to the court; he or she may refer to the mischief which the legislation addresses, and any legislative history which may assist the court; and he or she may inform the court of the range of penalties imposed by other courts in similar matters.

A prosecutor should not urge the imposition of a particular sentence on the court and should ensure that matters beneficial to the defendant are also drawn to the court's attention. The overwhelming obligation of the prosecutor is one of fairness.

In the case of an unrepresented defendant, special care must be taken to ensure that all relevant matters are before the court including those beneficial to the defendant.

Special care should be taken when the court seeks the Crown prosecutor's consent to a particular sentencing option. An agreement that a non-custodial sentence is appropriate may have the effect of frustrating the power of the Director to proceed with an appeal against the inadequacy of sentence.

13. Where a lawyer is appearing on behalf of the Director in the Court of Summary Jurisdiction in either committal proceedings or defended hearings the same professional standards referred to in guideline 1 apply as where counsel appears for

the Crown in a jury trial. Legal representatives of the Director appear to represent the interests of the State or Territory and the primary duty is to assist the court to arrive at the truth. Before prosecution all cases should be assessed as to whether a prosecution is appropriate at all or whether a prosecution is appropriate on the charge laid. In presenting the case it is not the duty of the prosecutor to secure a conviction or committal for trial by all means but rather to ensure the court is apprised of all relevant facts and the relevant law.



GUIDELINES FOR APPEALS AGAINST INADEQUACY OF SENTENCE

1. The Director is empowered to appeal against the inadequacy of sentences which have been imposed. There are no time limits on an appeal against the inadequacy of a sentence by the Director but, in practice, the Director commences appeals expeditiously and 28 days is regarded as a guide to the commencement of appeals. On a number of occasions representations have been received outside that time of 28 days. It follows that persons (be they police, politicians or members of the general public) who seek to bring particular cases to the notice of the Director should do so expeditiously. Apart from the abovementioned time constraint other factors must be considered. All of the relevant material must be obtained and analysed and in the cases of appeals to the Supreme Court and the Court of Criminal Appeal the views of a Crown prosecutor obtained. In any event, as a matter of fairness, those persons at risk of an appeal by the Director ought to be notified of their fate as swiftly as possible. Whether particular sentences are adequate or whether they should be the subject of an appeal is a topic which frequently attracts public interest. It is appropriate therefore that I enunciate the legal factors which govern the appellate process.
2. The sentencing function of the court involves elements of retribution, deterrence (special and general) and rehabilitation and is extremely complex. In sentencing for any offence, a trial judge or magistrate will be faced with a wide spectrum of sentencing options ranging from a bond or community service to imprisonment.
3. The sentence for a specific offence will vary according to its nature, the circumstances of its commission, the antecedents of the prisoner and indeed the viewpoint of the particular judge or magistrate who must deal with the accused. Consequently, for any given offence there exists a range of legitimate penalty options. An appellate court will not interfere with the exercise of a judge's or magistrate's sentencing discretion unless an error in the exercise of that discretion can be demonstrated. In practical terms the court must be satisfied that the sentence imposed falls clearly outside the appropriate penalty range and may consequently be characterised as manifestly inadequate. Mere disagreement with the sentence passed is insufficient.
4. Furthermore, appellate courts have long maintained that Crown appeals should be a rarity instituted for the purposes of enabling the courts to maintain adequate standards of punishment, to correct idiosyncratic views of individual judges as to

particular crimes or classes of crime and to remedy those sentences which are so disproportionate to the seriousness of the offence as to shock the public conscience.

5. It should be understood that any decision by the Director to appeal against the sentence imposed by a court can only be made within the context of these legal principles.
6. In addition, I would make the following general comments. It appears that there is a current community view that offences which involve a disregard of the value of human life, the invasion of the physical integrity of individuals and the infliction of high levels of fear and violence upon them, warrant condign penalties. There is also a concern which should not be cursorily dismissed that this viewpoint is not being sufficiently embraced by the courts. Experience does indicate that the sentencing range for particular offences does alter over time to reflect community concern at their prevalence or seriousness. It is neither appropriate nor possible for a Director of Public Prosecutions to seek unilaterally by a succession of appeals to alter the range or tariff for a specific offence. Nevertheless, I will continue to institute appeals in appropriate cases where the penalty imposed appears to be manifestly inadequate. Ultimately, any change in sentencing levels must be achieved either by legislative intervention or must be judicially initiated.



GUIDELINES FOR PROSECUTION DISCLOSURE

General

These guidelines for prosecution disclosure in the Northern Territory recognise that:

1. there must be a full and frank delivery or exchange by the investigator to the prosecutor
2. not all material in the hands of the prosecutor will appear immediately relevant because there is no obligation in this country for the defence to make pre-trial disclosure either of issues or general defence information
3. there is a continuing obligation to disclose
4. there may be good and sustainable public interest reasons in declining to disclose material which is either sensitive, privileged or of a type the disclosure of which may undermine the administration of justice or endanger the life or safety of any person.

Generally speaking, however, the defence is entitled to receive pre-trial particulars of the charge or charges and the Crown case-in-chief. Whilst there is no common law duty imposed upon the prosecution to make full disclosure pre-trial it is inconsistent with a person's right to a fair trial for the prosecution to withhold from or fail to disclose to the defence material in its possession which is relevant and admissible.

Specific matters of which there should be disclosure

1. Particulars of the accused's prior convictions
2. copies of all written statements, and an opportunity to examine electronically recorded interviews, of all witnesses to be called together with a copy of any prior inconsistent statement of those witnesses
3. copy of any written or electronically recorded statement obtained from the accused by a person in authority
4. copies of any photographs, plans, documents or other representations which will be tendered by the prosecution at trial

5. an opportunity to examine exhibits which will be tendered
6. copies of proofs of statements of any expert witnesses to be called and, by appointment through the prosecution, an opportunity for a defence expert from the same or similar discipline to speak with that expert pre-trial.
7. copy of any warrant or details of any other statutory authority used in the gathering of evidence to be adduced at trial
8. an opportunity to inspect bank records, books of account or other records or documents relevant to the prosecution case-in-chief which may not be introduced into evidence but relied upon
9. the prosecutor is not obliged to call a witness whom he or she does not regard as credible. In the case of any material or statement which is or may be exculpatory, on the prosecution case-in-chief, and which the prosecutor declines to adduce or call, the defence should receive details of the evidence and the whereabouts of the witness or witnesses. If requested by the defence the prosecution should subpoena the witness.

Discretion to withhold or delay disclosure on public interest grounds

If a prosecutor is of the opinion that specific material or evidence should not be disclosed, or its disclosure delayed in the public interest, that material should, subject to review by the Director and, where necessary the court, be immune from disclosure. Some, but not all, of the factors which should be taken into account in determining this public interest issue are:

- (a) the material is relevant
- (b) withholding is necessary to preserve the identity of an informer
- (c) withholding is necessary to protect the safety or security, including protection from harassment, of persons who have supplied information to the police or persons close to them
- (d) the material is protected by legal professional privilege
- (e) the material, if it became known, might facilitate the commission of other offences or alert a person to police investigations
- (f) the material discloses some unusual form of surveillance or method of detecting crime
- (g) the material is supplied to the police only on condition that the contents will not be disclosed
- (h) the material contains details of private delicacy to the maker
- (i) the material relates to the internal workings of the police force
- (j) the material relates to national or state security.

If after consultation with the Director a *public interest* claim is maintained in support of immunity against disclosure the prosecutor must advise the defence that material, without specification, has been withheld on a claim of immunity. If the defence is not satisfied with that claim or any consideration of its submissions by the Director the matter should be submitted to the court for resolution prior to trial.

If the prosecutor considers, after consultation with the Director, that the non-disclosure of the material could prejudice the defence at trial the Director must consider whether the charge or charges to which the material is relevant should be withdrawn and whether the accused should be charged with an alternative or lesser offence the prosecution of which will not necessitate the production of the withheld material.

Continuing obligation to disclose

The prosecutor's duty of disclosure is a continuing obligation but the extent of that obligation should be seen as also imposing upon the defence an obligation to give timely notice of any defence or issue, not immediately apparent on the prosecution case, which may make otherwise irrelevant material relevant. For example:

- (a) the prosecution should not be required to provide details of prior convictions or records of police disciplinary proceedings against a Crown witness until the defence has indicated that the credibility of that witness is to be attacked and the prior convictions, etc are relevant
- (b) the validity of a warrant or other authority should, unless an indication of challenge is given, be proved in a formal way. Any evidence establishing the correctness of the process, etc should only be provided if an indication of challenge is given.

There will be many instances where the prosecution should be entitled to rely upon the *presumption of regularity* unless a contrary indication is given. Until that indication is given the issue of irregularity should be treated as irrelevant and one upon which supporting evidence and material is not required.

The defence of insanity, once raised, and other defences or challenges requiring expert evidence, will not only broaden the field of relevant information in the hands of the prosecution but also require an understanding between prosecution and defence to enable frank pre-trial exchanges of information and access to witnesses.

Disclosure of material additional to the Crown case

These guidelines deal with disclosure of material not directly relevant to the Crown case.

Duties of police

Because of the dependence of prosecutors upon investigating officers or agencies for the gathering of documentation and evidentiary material in all matters in which either a prosecution is commenced in the summary jurisdiction or following committal for trial on indictment, police, if requested, must disclose to the Director, as soon as possible after the commencement or proceedings or the committal, all other documentation, material and any other information held by any police officer concerning the investigation. This includes information held concerning any proposed prosecution witness, which the prosecution considers might be of assistance or interest to either the prosecution or the defence.

The police officer-in-charge of the investigation shall, if required by the Director, certify, on delivery of that information, that to the best of that officer's knowledge, information or belief all such documentation, material or information has been disclosed to the Director.

Should any of the documentation, material or information additional to the Crown case be either sensitive or of a nature which requires protection or limited disclosure the officer-in-charge of the investigation shall identify that information at the time it is made available to the Director.

Obligations of the prosecution concerning material additional to the Crown case

The prosecution, upon request by the defence, shall, upon sufficient reason being given and subject to any claim for immunity on the grounds of public interest (appearing earlier in these guidelines) allow inspection of all such documentation, material or information.

Defence disclosure

The prosecution should, wherever it is consistent with the court's practice, encourage defence counsel to make an opening address to the jury following the Crown opening which is not argumentative but merely opens the defence case and identifies or discloses the issues in the trial thereby defining the issues so that questions of relevance and issues of disclosure are clearly identified at the commencement of the trial process.

Disclosure of previous convictions of witnesses

It has already been noted that the prosecutor's duty of disclosure is a continuing one. It has been suggested that the prosecution should not be required to provide details of prior convictions or records of police disciplinary proceedings against a Crown witness until the defence has indicated that the credibility of that witness is to be attacked and the prior convictions, etc are relevant.

However, in considering the extent to which disclosure should be made in such cases consideration should also be given to:

- (i) the position adopted by the Commonwealth Director of Public Prosecutions in its *statement on prosecution disclosure* (which is set out as an annexure to these guidelines as issued to prosecutors but which is not included with the Annual Report)
- (ii) the decision of the Supreme Court of Victoria Court of Appeal in the matter of **R v Garofalo** (BC9807143, No 87 of 1998, delivered 18 December 1998) where Ormiston JA said at para 70:

Consequently, at least for present purposes, the rule (that pursuant to which the prosecution should disclose to the defence witnesses' convictions) may be stated that, at the least, in trials on presentment or indictment, the prosecution should inform the defence of any convictions of every proposed witness whose credibility may be in issue, if proof of any such conviction may

reasonably be seen as capable of affecting the witness's credibility. It is irrelevant that counsel or instructing solicitor or any other person directly engaged in the prosecution of the particular charge is unaware of any relevant conviction, for it is for the prosecution to make the necessary enquiries on computer or otherwise, although it could not be suggested that their obligations go further. Again for present purposes that level of enquiry must be seen as having been necessary, so that, without examining that issue further, the ignorance of both counsel and instructing solicitor was irrelevant in the present case.





EXTRADITION

DIRECTOR OF PUBLIC PROSECUTIONS ACT 1990

STATEMENT OF EXTRADITION GUIDELINES

*These Guidelines are to be read in conjunction with the Statement of Prosecution Guidelines issued pursuant to section 25 of the **Director of Public Prosecutions Act**.*

1. The extradition of persons required to answer any charge of an offence or to serve a sentence imposed in the Northern Territory will always involve additional expense to the Territory.
2. However, that expense will generally be appropriate where there are reasonable prospects of conviction, in order to maintain confidence in the administration of the law and to prevent offenders fleeing from justice.
3. When application is made to take steps to secure extradition, in addition to the assessment of the prosecution case in accordance with these guidelines, the following factors will be relevant:
 - (a) any delay after discovery of the suspected offender
 - (b) any compensation or restitution which might be ordered following conviction
 - (c) the likely disposition following conviction; where the person to be extradited is already serving a sentence in another jurisdiction this factor will have greater weight
 - (d) the likely cost to the Territory.
4. Approval for extradition may be sought by police or other relevant government agency.
5. Before determining a request for extradition, the Director may consult with and require information from a relevant agency.

6. Applications for approvals for extradition should be in writing, presenting reasons for the extradition of a particular fugitive offender.
7. In urgent cases, approval may be sought and given orally. An oral approval must be followed by a report of the circumstances from the requesting agency as soon as possible.
8. The following factors, if applicable, will be taken into consideration in deciding whether approval is given:
 - (a) the country or state from which the fugitive is to be extradited
 - (b) the nationality of the fugitive
 - (c) whether the fugitive is to be charged with an offence or, having been charged, has absconded
 - (d) the nature and gravity of the offence or offences alleged against the fugitive
 - (e) the existence of reasonable prospects of conviction
 - (f) any delay after discovery of the fugitive's whereabouts
 - (g) the likely disposition following conviction
 - (h) where a person is in custody, whether the provisions of the *Prisoners (Interstate Transfer) Act* should be utilised
 - (i) the likely cost of extradition
 - (j) the existence of assets held by the fugitive which could satisfy an order in relation to breach of bail or a confiscation order and where such assets are to be found.
9. In seeking approval for extradition, or in providing information, the Director should be advised if and to what extent the fugitive might reasonably constitute a risk to the public, either at large or for the purposes of transportation to the Northern Territory. Advice to the Director should include recommendations as to whether the fugitive should be extradited on bail or in custody. If in custody, advice should include information on the number of officers required to effect extradition and the cost of economy airfare for the fugitive and officer(s).
10. Approval for extradition may be given by the Director or the Deputy Director.



PLEA NEGOTIATIONS

A priority of this Office is to always endeavour to ascertain at the earliest possible point in the criminal process whether a plea of guilty is likely to be entered in respect of any charge brought. There are clearly dangers in endeavouring to set any exhaustive criteria as to whether a plea should or should not be accepted, having regard to the vast variety of circumstances giving rise to the exercise of the prosecutorial discretion. However, it is helpful to identify some of the major factors which may cause the Director to accept an accused's offer of a plea. The Crown possesses a discretion to accept pleas of guilty to lesser or fewer offences than those with which an accused person has originally been charged.

No such plea will be accepted by the Crown unless it reasonably reflects the nature of the criminal conduct of the accused and provides an adequate basis upon which the court can impose an appropriate sentence. In exercising this discretion it has to be borne in mind that in a particular case the public interest may be better served by the certainty of a conviction secured by the acceptance of a plea than by the unpredictability inherent in a contested trial.

The major factors which may cause the Director to accept an accused's offer of plea may be briefly listed.

The evidence available to support the Crown case on the principal charges may be lacking in some particular. The Crown case may be fraught with forensic difficulty. Such problems may relate to the admissibility of evidence or to the credibility or availability of witnesses or indeed to the reluctance of some major witnesses (particularly victims) to give evidence.

The acceptance of a plea may save witnesses, especially elderly people and young children, from the trauma of court appearance. Where an indictment contains a number of counts and the imposition of concurrent sentences will effectively result in the same total penalty, a plea to a lesser number of charges may be warranted. This consideration may also arise where an accused person is already serving a substantial term of imprisonment.

Where the community is faced with a long and expensive trial on minor matters with a negligible penalty as a likely result, the foreshortening of procedures may be seen as desirable in the public interest.

Occasions sometimes arise where an accused person will offer to plead guilty to a specific count on an indictment and thereafter give evidence on behalf of the Crown. The acceptability of such a course will depend upon the importance of such evidence to the Crown case and the level of culpability of the accused compared with those of whom it is sought to convict by the use of this evidence.

While the circumstances involved in this decision-making process are infinitely variable, no plea will be accepted unless, after analysis of all the facts, it is concluded that it is in the public interest to do so.

It is essential to the just operation of the criminal justice system that multiple or inappropriate charges are not laid with the object of strengthening the plea bargaining position of the Crown.

The principles expressed above have been already expressed in similar or identical form in other parts of the Commonwealth and have wide acceptance in other jurisdictions. I see no cause to depart from those accepted principles and practices and they will generally be adhered to. I have instituted in this Office the operation of a system of checking and accountability designed to ensure that concluded plea negotiations accommodate the interests of the Crown, the defence, the community and the victim.

Internal office procedures in relation to plea negotiations have been formulated in revised directions to Crown prosecutors from 1 June 1994. These are designed to ensure that acceptance of plea occurs only after the material has been subjected to scrutiny by, and consultation between, at least two qualified and experienced practitioners, thus providing protection against capricious or other ill-considered judgments. It also provides an additional safeguard of accountability by requiring documentation of the acceptance decision. This affords a protection to the prosecutor and the police alike.

In cases which are serious or potentially contentious, or involving the death of any person, no acceptance of any plea offer to lesser or fewer charges shall occur without the consent of the Director.



INDEMNITY FROM PROSECUTION

The Director is empowered by s.21 of the *Director of Public Prosecutions Act* to grant an indemnity from prosecution, whether on indictment or otherwise, and to give an undertaking to a person that an answer given or a statement or disclosure made by the person will not be used in evidence against the person. These powers are an inherent part of the prosecutorial function.

1. This section is concerned with the broad considerations involved in deciding whether to give an accomplice an indemnity or undertaking in order to secure that person's testimony for the prosecution.
2. A decision whether to call an accomplice to give evidence for the prosecution frequently presents conflicting considerations calling for the exercise of careful judgment in the light of all the available evidence. Inevitably, however, there will be instances where there is a weakness in the prosecution evidence that makes it desirable, or even imperative, to call an accomplice for the prosecution if that accomplice appears to be the only available source of the evidence needed to strengthen the weakness.
3. In conjunction with the question whether to call an accomplice the question may arise whether that accomplice should also be prosecuted. In this regard, unless the accomplice has been dealt with in respect of his or her own participation in the criminal activity the subject of the charge against the defendant, he or she will be in a position to claim the privilege against self-incrimination in respect of the very matter the prosecution wishes to adduce into evidence. Where, however, an accomplice has been given an indemnity or undertaking that indemnity or undertaking will override what would otherwise be an allowable claim of privilege.
4. In principle it is desirable that the criminal justice system should operate without the need to grant any concessions to persons who participated in alleged offences in order to secure their evidence in the prosecution of others. However, it has long been recognised that in some cases this course may be necessary in the interests of justice.

Nevertheless, an indemnity or undertaking will only be given as a last resort. In this regard, 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. 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. However, this course may not be practicable in some cases; for example, time may not permit charges against the accomplice to proceed to conviction before the trial of the principal offender, or there may be insufficient admissible evidence to support charges against the accomplice.

5. Apart from being a course of last resort, an indemnity or undertaking will only be given provided the following conditions are met:
 - (a) the evidence that the accomplice can give is considered necessary to secure the conviction of the defendant and that evidence is not available from other sources, and
 - (b) the accomplice can reasonably be regarded as significantly less culpable than the defendant.

 6. The central issue in deciding whether to give an accomplice an indemnity or undertaking 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. In determining where the balance lies, the following factors will be taken into account:
 - (a) the significance to a successful prosecution of the evidence which it is hoped to obtain as a result of the indemnity or undertaking having particular regard to:
 - (i) the strength of the prosecution evidence against the defendant without the evidence it is expected the accomplice can give and, if some charge or charges could be established against the defendant without the accomplice's evidence, the extent to which those charges would reflect the defendant's criminality
 - (ii) the extent to which the prosecution's evidence is likely to be strengthened if the accomplice testifies, apart from taking into account such matters as the availability of corroborative evidence, and the weight that the arbiter of fact is likely to give to the accomplice's testimony, it will also be necessary to consider the likely effect on the prosecution case if the accomplice does not come up to proof
 - (iii) the likelihood of the weakness in the prosecution case being strengthened other than by relying on the evidence the accomplice can give (for example, the likelihood of further investigations disclosing sufficient independent evidence to remedy the weakness)
 - (iv) whether there is or is likely to be sufficient admissible evidence to substantiate charges against the accomplice and whether it would be in the public interest that the accomplice be prosecuted but for his or
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her preparedness to testify for the prosecution if given an indemnity or undertaking, and

- (v) whether, if the accomplice were to be prosecuted and then testify, there is a real basis for believing that his or her personal safety would be at risk while serving any term of imprisonment
 - (b) the degree of involvement of the accomplice in the criminal activity in question compared with that of the defendant
 - (c) has any inducement been offered to the person concerned?
 - (d) what is the character, credit and previous criminal record of the person concerned?
 - (e) has the person concerned made or is the person prepared to make full disclosure of all facts and matters within his or her knowledge?
7. Where an accomplice receives any concession from the prosecution in order to secure his or her evidence, whether as to choice of charge, the grant of immunity from prosecution or by means of an indemnity or undertaking, the terms of the agreement or understanding between the prosecution and the accomplice should be disclosed to the court.
8. In the course of an investigation the police may identify a participant in the criminal activity under investigation as a person who is likely to be of more value as a prosecution witness than a defendant. Thereafter the investigation may be directed at constructing a case against the remaining participants based on the evidence it is expected this person will give. Unless for some reason it is not practicable to do so, the police should always seek advice from the Director as to the appropriateness of such a course. This will minimise the potential for an otherwise meritorious prosecution being abandoned as a consequence of the Director deciding that it would not be in the interests of justice to grant the accomplice an undertaking under the Act in order to secure his or her testimony.





INFORMERS

The use of informers as prosecution witnesses is always a matter which calls for the making of careful and well balanced judgments. On the one hand there is always a tendency to distrust an informer, particularly if that informer has gained or has anything to gain from giving evidence. A circumstance which creates particular difficulty is where that informer is a prisoner in gaol where it must be recognised that small favours could induce a false testimony from people who have less to lose than the ordinary witness.

On the other hand, the evidence of informers is evidence capable of evaluation by a jury and realistically there are many instances where the evidence of an informer will be absolutely true. Moreover, there are some areas of law enforcement where a prosecution will only ever be possible as a result of evidence from informers. That is often true in respect of corruption by public officials where evidence from an informer is often the catalyst to commence an investigation.

It is not infrequent for informers to be available to be used as witnesses. What must be done is to ensure as far as is possible that the tribunal of fact is aware of all of the matters which would affect the proper evaluation of the evidence of an informer.

The prosecuting authority has a special responsibility to ensure the processes of justice do not miscarry where an informer is used. In some cases that will involve assessing whether the evidence of the informer is so tainted that it should not be used at all.

In all cases, where it is proposed to use an informer as a witness, care will be taken to ascertain whether the informer has been promised any reward for giving evidence or hopes to gain any benefit from testifying. Any criminal record the informer has and any motive for lying will be carefully scrutinised.

In the ordinary course of events the prosecutor will look for significant corroborative evidence to support the evidence of an informer. That will be particularly so where the informer is serving a sentence in a gaol. It will be even more so where a prison informer gives evidence of an oral confession made by another prisoner in gaol. In this latter event there must be a strong presumption that the evidence will not be called unless either the alleged confession itself is strongly corroborated or there is substantial independent evidence of the guilt of the accused. In any event it will be necessary for the prosecution to make a careful and objective assessment of the informer and the evidence to be given.





MEDIA GUIDELINES

In keeping with a policy of openness and accountability, where appropriate, information is to be given to the media by the prosecuting counsel appearing in a particular matter or by the Director or Deputy Director but by no other member of the staff, pursuant to the following guidelines:

1. **Before trial or plea**

- (a) Where an inquiry concerns a pending trial or pleas, information may be given as to trial date, likely length and venue. Unless the accused has already appeared and the indictment has been read in court, details as to the actual charges *cannot* be given. No comment should be made about a matter being *no billed* or discontinued or an ex-officio indictment being filed.
- (b) Details of names and address of witnesses *cannot* be given.
- (c) Details of prior convictions *cannot* be given.

2. **Plea of guilty**

Following a plea of guilty the following details may be given:

- (a) the form of indictment
- (b) the plea
- (c) the court, judge and counsel names
- (d) the sentence or other order
- (e) the address of the accused
- (f) a copy of the Crown outline of facts as given in court
- (g) any other information already disclosed in open court.

3. **Trials**

In the event of a trial, all of the details referred to above in respect of pleas of guilty may be given.

4. **General**

Counsel may use their discretion as to information supplied but the following factors are relevant:

- (a) it is in the Crown's interest that matters in court be reported. If justice has any deterrent effect then the community must know about the matters before courts
- (b) reports should be accurate. Therefore, if a reporter who has attended court seeks clarification or assistance, reasonable efforts to help should be made
- (c) there is a real risk of miscarriage in the report of a case by a journalist who has not personally attended at all and after a trial or plea requests information. In these circumstances the request should generally be refused
- (d) witnesses' addresses should never be disclosed. If the media wish to contact a witness, advise the witness of the inquiry. Special care should be taken to ensure that informers and others who are giving evidence at some personal risk are kept confidential
- (e) before any information is released concerning the impact of the crime on the victim prosecuting counsel should ensure that it is acceptable to the victim and the Victim Support Unit that such information be released
- (f) in the event of any doubt about the applicability of the guidelines or whether it is appropriate to give information, *say nothing*
- (g) no information should be given, of course, in cases where there has been a direction by the court not to give information or where there is a statutory prohibition against supplying information as, for example, in ss.6 and 7 of the *Sexual Offences (Evidence and Procedure) Act* and s.24 of the *Misuse of Drugs Act*
- (h) it is incumbent upon the prosecuting counsel, prior to the release of any information, to ensure no statutory or other prohibition exists in relation to the information supplied.

5. **Comments on specific cases or sentences**

No comment is ever to be made out of court to the media concerning a verdict or sentence or the fact that the case might or will be the subject of appeal. In the case of Crown appeals the practice is not to release details to the media until the appeal has been filed and then served on the respondent.

6. **Comments on policy**

These should be referred to the Director or, in his absence, the Deputy Director.

7. **Comments on investigations or operational matters**

The media should be advised that the Office does not make comments about investigations or operational matters and if appropriate the request should be referred to the Director or, in his absence, the Deputy Director.

8. **Comments on decisions to terminate prosecutions**

These should be referred to the Director or, in his absence, the Deputy Director.

9. **Request to film Crown prosecutors**

Television stations have a legitimate interest in obtaining film of prosecutors for use in reports of cases. It is a matter for individuals as to how they will respond. However, there is no objection to prosecutors posing for cameras in the office or elsewhere to provide television stations with file footage. Moreover, especially in long cases, it should be possible to agree to be filmed entering or leaving court once on condition that thereafter you are not confronted each time you step outside. On the other hand, if the media continue to chase the prosecutor there is little point in becoming upset at the interest. Certainly no sign of annoyance should be displayed.

10. **Local rules**

Prosecuting counsel shall at all times comply with any relevant rules of professional conduct applicable to them by reason of their admission to practice in the Northern Territory and, in this context, which relate to contact with the media. All prosecutors shall ensure that he or she has at all times an up-to-date copy of such rules.

11. **Legislative requirements**

All members of staff shall have regard to the *Public Sector Employment and Management Act*, its By-laws and Regulations, in relation to any comments to the media and to any directions, determinations or guidelines issued by the Commissioner for Public Employment or any other authorised officer pursuant to the Act. In the event of any apparent conflict with these guidelines, the members of staff should refer the conflict to the Director for his advice and determination.