



## REPUBLIC OF NAURU

### OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (ODPP)

#### GUIDELINES TO ALL STAFF OF THE ODPP NAURU AND NAURU POLICE OFFICERS AND OTHERS ACTING ON BEHALF OF THE DIRECTOR OF PUBLIC PROSECUTIONS (DPP).

#### GUIDELINES ISSUED BY THE DPP NAURU

These are guidelines not directions. They are designed to assist the exercise of prosecutorial decisions to achieve consistency and efficiency, effectiveness, openness and fairness in the administration of criminal justice in Nauru.

The ODPP represents the community. The community's interest is that the guilty be brought to justice and that the innocent not be wrongly convicted.

## GUIDELINES INDEX

		(Pages)
1.	DUTY TO BE FAIR.....	4
2.	FAIRNESS TO THE COMMUNITY.....	4
3.	EXPEDITION.....	4-5
4.	THE DECISION TO PROSECUTE.....	5-7
5.	THE DECISION TO PROSECUTE PARTICULAR CASES.....	7-10
6.	CAPACITY OF JUVENILE WITNESSES.....	10
7.	COMPETENCY OF JUVENILE WITNESSES.....	10
8.	INFORMATIONS.....	11
9.	EX-OFFICIO INFORMATIONS.....	11
10.	EX-OFFICIO SENTENCES.....	12-14
11.	CHARGES REQUIRING DPP'S CONSENT.....	14
12.	CHARGE NEGOTIATIONS.....	14-16
13.	SUBMISSIONS.....	16
14.	CASE REVIEW.....	16-17
15.	TERMINATION OF A PROSECUTION BY ODPP.....	17
16.	CONSULTATION WITH POLICE.....	17-18
17.	CONSULTATION WITH VICTIMS.....	18
18.	REASONS FOR DECISIONS.....	18
19.	NOLLE PROSEQUI.....	19
20.	VICTIMS.....	19-22
21.	ADVICE TO POLICE.....	23-24
22.	BAIL APPLICATIONS.....	24
23.	DISCLOSURE.....	25-27
24.	UNREPRESENTED ACCUSED.....	28
25.	OPENING ADDRESS.....	28
26.	PRISON INFORMATION/CO.....	28-29
27.	IMMUNITIES.....	29

28.	WITNESSES.....	30
29.	EXPERT WITNESSES.....	30
30.	INTERPRETERS.....	30
31.	CROSS EXAMINATION.....	30
32.	ARGUMENT.....	31
33.	ACCUSED’S RIGHT TO SILENCE.....	31
34.	SENTENCE.....	31-33
35.	APPEALS AGAINST SENTENCE.....	33-34
36.	RE-TRIALS.....	34-35
37.	EXHIBITS.....	35
38.	DISPOSAL OF EXHIBITS.....	35
39.	MEDIA.....	36
40.	RELEASE OF DEPOSITIONS.....	36
41.	CONFIDENTIALITY.....	37

## **1. DUTY TO BE FAIR**

The duty of a prosecutor is to act fairly and impartially, to assist the court to arrive at the truth.

- a prosecutor has the duty of ensuring that the prosecution case is presented properly and with fairness to the accused;
- a prosecutor is entitled to firmly and vigorously urge the Prosecution view about a particular issue and to test and, if necessary, to attack the view put forward on behalf of the accused; however, this must be done temperately and with restraint;
- a prosecutor must never seek to persuade a Court to a point of view by introducing prejudice or emotion;
- a prosecutor must not advance any argument that does not carry weight in his or her own mind or try to shut out any legal evidence that would be important to the interests of the person accused;
- a prosecutor must inform the Court of authorities or trial directions appropriate to the case, even where unfavourable to the prosecution; and
- a prosecutor must offer all evidence relevant to the Prosecution case during the presentation of the Prosecution case. The Prosecution cannot split its case.

## **2. FAIRNESS TO THE COMMUNITY**

The prosecution also has a right to be treated fairly. It must maintain that right in the interests of justice. This may mean, for example, that an adjournment must be sought when insufficient notice is given of alibi evidence, representations by an unavailable person or expert evidence to be called by the defence.

## **3. EXPEDITION**

A fundamental obligation of the prosecution is to assist in the timely and efficient administration of justice.

- cases should be prepared for hearing as quickly as possible;
- charges and information's should be finalised as quickly as possible;
- information's should be published to the defence as soon as possible;
- any amendment to an information should be made known to the defence as soon as possible;

- as far as practicable, adjournment of any trial should be avoided by prompt attention to the form of the information, the availability of witnesses and any other matter which may cause delay; and
- any application by ODPP for adjournment must be approved by the DPP.

#### 4. THE DECISION TO PROSECUTE

The prosecution process should be initiated or continued wherever it appears to be in the public interest. That is the prosecution policy of the prosecuting authorities in this country, Australia, England and Wales. If it is not in the interests of the public that a prosecution should be initiated or continued then it should not be pursued. The scarce resources available for prosecution should be used to pursue, with appropriate vigour, cases worthy of prosecution and not wasted pursuing inappropriate cases.

It is a two tiered test:-

- (i) is there sufficient evidence? and
- (ii) does the public interest require a prosecution?

##### (i) **Sufficient Evidence**

- A prima facie case is necessary but not enough.
- A prosecution should not proceed if there is no reasonable prospect of conviction before the Supreme or District Court.

A decision by a Magistrate to commit a defendant for trial does not absolve the prosecution from its responsibility to independently evaluate the evidence. The test for the Magistrate is limited to whether there is sufficient evidence. The prosecutor must go further to assess the quality and persuasive strength of the evidence as it is likely to be at trial.

The following matters need to be carefully considered bearing in mind that guilt has to be established beyond reasonable doubt:-

- (a) the availability, competence and compellability of witnesses and their likely impression on the Court;
- (b) any conflicting statements by a material witness;
- (c) the admissibility of evidence, including any alleged confession;
- (d) any lines of defence which are plainly open; and
- (e) any other factors relevant to the merits of the Prosecution case.

##### (ii) **Public Interest Criteria**

If there is sufficient reliable evidence of an offence, the issue is whether discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

Discretionary factors may include:-

- (a) the level of seriousness or triviality of the alleged offence, or whether or not it is of a 'technical' nature only;
- (b) the existence of any mitigating or aggravating circumstances;
- (c) the youth, age, physical or mental health or special infirmity of the alleged offender or a necessary witness;
- (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) whether or not the prosecution would be perceived as counter-productive to the interests of justice;
- (h) the availability and efficacy of any alternatives to prosecution;
- (i) the prevalence of the alleged offence and the need for deterrence, either personal or general;
- (j) whether or not the alleged offence is of minimal public concern;
- (k) any entitlement or liability of a victim or other person to compensation, reparation or forfeiture if prosecution action is taken;
- (l) the attitude of the victim of the alleged offence to a prosecution;
- (m) the likely length and expense of a trial;
- (n) whether or not 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;
- (o) the likely outcome in the event of a conviction considering the sentencing options available to the Court;
- (p) whether or not a sentence has already been imposed on the offender which adequately reflects the criminality of the episode;
- (q) whether or not the alleged offender has already been sentenced for a series of other offences and what likelihood there is of an additional penalty, having regard to the totality principle;
- (r) the necessity to maintain public confidence in the Courts; and

- (s) the effect on public order and morale.

The relevance of discretionary factors will depend upon the individual circumstances of each case.

The more serious the offence, the more likely that the public interest will require a prosecution.

Indeed, the proper decision in most cases will be to proceed with the prosecution if there is sufficient evidence. Mitigating factors can then be put to the Court at sentence.

(iii) **Impartiality**

A decision to prosecute or not to prosecute must be based upon the evidence, the law and these guidelines. It must never be influenced by:-

- (a) race, religion, sex, national origin or political views;
- (b) personal feelings of the prosecutor concerning the offender or the victim;
- (c) possible political advantage or disadvantage to the government or any political group or individual; or
- (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution.

## 5. THE DECISION TO PROSECUTE PARTICULAR CASES

Generally, the Prosecutor should at least read the depositions and the witness statements and examine important exhibits before a decision whether or not to file an information, and upon what charges, is made.

Where the Prosecutor has prosecuted the preliminary inquiry, it will generally not be necessary to wait for the delivery of the depositions by the court before preparing a draft information. Unless the matter is complex or borderline, the public prosecutor will often be able to rely upon his or her assessment of the preliminary hearing evidence and its impact upon the Prosecution case without delaying matters for the delivery of the depositions by the courts.

(i) **Juvenile Offenders**

Special considerations apply to juvenile offenders. Under the principles of the Juvenile Offenders Act 2009 (when it comes into effect) in a prosecution is a last resort. The following points should be considered:

- The welfare of the juvenile and rehabilitation should be carefully considered;
- Ordinarily the public interest will not require the prosecution of a juvenile who is a first offender where the offence is minor;

- The seriousness of the offence or serial offending will generally require a prosecution;
- Driving offences that endanger the lives of the juvenile and other members of the community should be viewed seriously.

The public interest factors should be considered with particular attention to:-

- (a) the seriousness of the alleged offence;
  - (b) the age, apparent maturity and mental capacity of the juvenile (including the need, in the case of juveniles under the age of 14, to prove that they knew that what they were doing was seriously wrong and was deserving of punishment);
  - (c) the available alternatives to prosecution, and their efficacy;
  - (d) the sentencing options available to Courts dealing with juvenile offenders if the prosecution was successful;
  - (e) the juvenile's family circumstances, particularly whether or not the parents 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 or conference and whether or not a less formal resolution would be inappropriate;
  - (g) whether a prosecution would be harmful or inappropriate, considering the juvenile's personality, family and other circumstances; and
  - (h) the interest of the victim.
- (ii) **Aged or Infirm Offenders**

Prosecuting authorities are reluctant to prosecute the older or more infirm offender unless there is a real risk of repetition or the offence is so serious that it is impossible to overlook it.

In general, proceedings should not be instituted or continued where the nature of the offence is such that, considering the offender, a Court is likely to impose only a nominal penalty.

When the defence suggests that the accused's health will be detrimentally affected by standing trial, medical reports should be obtained from the defence and, if necessary, arrangements should be sought for an independent medical examination.

(iii) **Peripheral Defendants**

As a general rule the prosecution should only proceed against those whose participation in the offence was significant.

The inclusion of defendants on the fringe of the action or whose guilt in comparison with the principal offender is minimal may cause unwarranted delay or cost and cloud the essential features of the case.

(iv) **Sexual Offences**

Sexual offences such as rape or attempted rape are a gross personal violation and are serious offences. Similarly, sexual offences upon juveniles should always be regarded seriously. Where there is sufficient reliable evidence to warrant a prosecution, there will seldom be any doubt that the prosecution is in the public interest.

(v) **Sexual Offences by Juvenile's**

A juvenile may be prosecuted for a sexual offence where the juvenile has exercised force, coerced someone younger, or otherwise acted without the consent of the other person.

A juvenile should not be prosecuted for:-

- (a) A sexual offence in which he or she is also the "complainant", as in the case of unlawful carnal knowledge or indecent dealing. The underage target of such activity cannot be a party to it, no matter how willing he or she is.
- (b) For sexual experimentation involving juveniles of similar ages in consensual activity.

(vi) **Mental Illness**

- Mentally disordered people should not be prosecuted for trivial offences which pose no threat to the community.
- However, a prosecution may be warranted where there is a risk of re-offending by a repeat offender with no viable alternative to prosecution. Regard must be had to:-

- (a) details of previous and present offences;
- (b) the nature of the defendant's condition; and
- (c) the likelihood of re-offending.

- In rare cases, continuation of the prosecution may so seriously aggravate an accused's mental health that this outweighs factors in favour of the prosecution. Where the matter would clearly proceed but for the mental deterioration, an independent assessment may be sought.
- Relevant issues should be brought to the DPP's attention as soon as possible. The DPP's discretion will more likely be exercised in cases where:-

(a) either:-

- the defence are relying upon expert reports describing unfitness to plead, unsoundness of mind or, in the case of murder, diminished responsibility at the time of the offence; or
- there is otherwise significant evidence of unsoundness of mind or unfitness for trial; and

- If a significant issue about the accused's capacity to be tried arises during the trial, the prosecutor should seek an adjournment for the purpose of obtaining an independent psychiatric assessment. The public prosecutor or Nauru police force should refer the matter to the DPP for consideration if:-

(a) either:-

- the expert concludes that the accused is unfit for trial and is unlikely to become fit after a tolerable adjournment; or
- the expert is uncertain as to fitness.

## **6. CAPACITY OF JUVENILE OFFENDERS**

A juvenile under the age of 7 years is not criminally responsible for any act or omission. Section 29 of the Criminal Code

A juvenile less than 14 years of age is not criminally responsible unless at the time of offending, he or she had the capacity to know that he or she ought not to do the act or make the omission. Without proof of capacity, the prosecution must fail: section 29 of the Criminal Code.

Police questioning a juvenile suspect less than 14 years of age should question the juvenile as to whether at the time of the offence, he or she knew that it was seriously wrong to do the act alleged. This issue should be explored whether or not the juvenile admits the offence.

If the juvenile does not admit the requisite knowledge, police should further investigate between right and wrong and therefore, the juvenile's capacity to know that doing the act was wrong. Evidence should be sought from a parent, teacher, clergyman, or other person who knows the juvenile.

A male juvenile under the age of 14 years is presumed to be incapable of having carnal knowledge: section 29 of the Criminal Code

## **7. COMPETENCY OF JUVENILE WITNESSES**

- (i) No witness under the age of 5 years should be called to testify on any matter of substance unless the competency of the witness has been confirmed in a report by an appropriately qualified expert.
- (ii) A brief of evidence relying upon the evidence of witnesses less than 5 years of age will not be complete until the prosecution has received such a report.
- (iii) There should only be one assessment undertaken.
- (iv) A juvenile witness is not an exhibit. The prosecution should not consent to a private assessment on behalf of the defence.

## 8. INFORMATIONS

- (i) Information's can only be signed by the DPP.
- (ii) An information must not be signed and presented unless it is intended to prosecute the accused for the offence or offences charged in it.
- (iii) Charges must adequately and appropriately reflect the criminality that can reasonably be proven.
- (iv) Holding information's must not be presented.
- (v) It is not appropriate to overcharge to provide scope for plea negotiation.
- (vi) Substantive charges are to be preferred to conspiracy where possible. However conspiracy may be the only appropriate charge in view of the facts and the need to reflect the overall criminality of the conduct alleged.
- (vii) In all cases public prosecutors must guard against the risk of an unduly lengthy or complex trial (obviously there will be cases where complexity and length are unavoidable).
- (viii) The information should be presented as soon as reasonably practicable, but no later than 1 month from the preliminary hearing for trial.
- (ix) If the prosecutor responsible for the information is not in a position to present it within the 1 month period, the prosecutor should advise in writing the defence and the DPP of the situation.

## 9. EX-OFFICIO INFORMATIONS – Section 171 and 172 Criminal Procedure Act 1972

An ex-officio information (where the person has not been committed for trial on that offence) should only be presented in one of the following circumstances:-

- (a) the counts on information and the charges committed up are not substantially different in nature or seriousness; or
- (b) the person accused has been committed for trial or sentence on some charges, and in the opinion of the DPP, the evidence is such that some substantially different offence should be charged;
- (c) in all other circumstances namely where a matter has not been committed to a higher court on any charge an ex-officio information should not be presented without consultation with *the DPP*. The accused must be advised in writing when an ex-officio information is under consideration and, where appropriate, should be given an opportunity to make a submission. A decision whether or not to present an ex-officio information should be made within 2 months of the matter coming to the attention of the public prosecutor.

**10. EX-OFFICIO SENTENCES**

- (i) A defendant may request an ex-officio information.
- (ii) The use of ex-officio information's for pleas of guilty is intended to fast-track uncontested matters.
- (iii) The public prosecutor must prepare an information and summary of facts within 1 month of the receipt of the full ex-officio material.
- (iv) The ex-officio brief is not a full brief of evidence. The following material will be required:-
  - (a) any police interviews with the defendant;
  - (b) any photographs taken;
  - (c) any witness statements that have already been taken;
  - (d) for violent or sexual offences:-
    - a statement from the victim;
    - the victim's contact details for victim liaison; and
    - if applicable, a medical statement documenting the injuries and treatment undertaken;
  - (e) for drug offences, an analyst's certificate, if applicable;
  - (f) a schedule of any property loss or damage including:-
    - the complainant's name and address;
    - the type of property;
    - the value of the loss or damage;
    - any recovery or other reparation.
  - (g) a schedule of any property confiscated, detailing the current location of the property and the property number. The value of the property should also be included where the charges involve the unlawful production or supply of drugs and the property is to be forfeited pursuant to the Illicit Drugs Control Act 2004.
- (v) Public Prosecutors must be vigilant to ensure that the information prepared fairly reflects the gravity of the allegations made against the defendant.

- (vi) If lower court charges are more appropriate, the case should be referred back to the District Court.
- (vii) Where it appears that police have undercharged a defendant, the defence and police should be advised in writing as soon as possible.
- (viii) The DPP *may decline* to proceed by way of ex-officio process where:-

- (a) *The defence disputes significant facts*: A request for an ex-officio information signifies acceptance of all of the material allegations set out in the police forms. If there is any relevant dispute about those matters, the appropriate resolution will generally be through a preliminary hearing.
- (b) *Police material is outstanding*: Police should forward the ex-officio brief within 14 days of its request.

If difficulties arise, for example because of the complexity of the matter, the investigating officer should notify the DPP as soon as possible.

Where there is insufficient reason for the delay, the matter will be referred back for a preliminary hearing.

- (c) A full brief of evidence has already been prepared.
- (ix) The ODPP *will decline* to proceed by way of ex officio information for certain categories of cases involving violence or sexual offending, or co-offending.

- (a) *Serious Sexual or Violent Offending*

For offences of serious sexual or serious violent offending, the conditions for an ex officio prosecution must be strictly met before consent is given.

- Charges must adequately reflect the criminality involved;
- The accused must accept the facts without significant dispute; and
- The application for ex-officio proceedings must be made before a brief of evidence is complete.

- (b) *Co-Accused*

It is difficult for a court to accurately apportion responsibility amongst co-offenders if they are dealt with separately. Furthermore the prosecution's position can only be determined after a full assessment of the versions of each accused and the key witnesses. It is therefore desirable that co-accused be dealt with together.

Where two or more people have been charged with serious offences, the office will not consent to an ex-officio information for one or some accused only, unless:-

- there is a clear and uncontested factual basis for the plea.

In other cases, the co-operative co-offender may choose to proceed by short form preliminary hearing, enter an early plea and be committed for sentence.

(x) **PRESENTATION OF INFORMATIONS**

Other than in exceptional circumstances, ex-officio information's should not be presented to the Court until the day of arraignment. In most cases a failure to appear can be adequately dealt with by a warrant in the District Court at the next mention date.

**11. CHARGES REQUIRING DPP'S CONSENT**

Certain charges must have the written consent of the DPP prior to the institution of proceedings.

The relevant legislation will indicate if the DPP's consent is required, a written request is to be made by the prosecutor or police to the DPP.

Examples of some charges requiring the DPP's consent are: Section 440 of the Criminal Code and Section 29 of the Parliamentary Powers, Privileges and Immunities Act 1976.

**12. CHARGE NEGOTIATIONS**

The public interest is in the conviction of the guilty. The most efficient conviction is a plea of guilty. Early notice of the plea of guilty will maximise the benefits for the victim and the community.

Early negotiations (within this guideline) are therefore encouraged.

Negotiations may result in a reduction of the level or the number of charges. This is a legitimate and important part of the criminal justice system. The purpose is to secure a just result.

(i) **The Principles**

- The prosecution must always proceed on those charges which fairly represent the conduct that the Prosecution can reasonably prove;
- A plea of guilty will only be accepted if, after an analysis of all of the facts, it is in the general public interest.

The public interest may be satisfied if one or more of the following applies:-

- (a) the fresh charge adequately reflects the essential criminality of the conduct and provides sufficient scope for sentencing;
- (b) the prosecution evidence is deficient in some material way;

- (c) the saving of a trial compares favourably to the likely outcome of a trial; or
- (d) sparing the victim the ordeal of a trial compares favourably with the likely outcome of a trial.

An accused cannot be sentenced for a more serious offence which is not charged.

(ii) **Prohibited Pleas**

Under no circumstances will a plea of guilty be accepted if:-

- (a) it does not adequately reflect the gravity of the provable conduct of the accused;
- (b) it would require the prosecution to distort evidence; or
- (c) the accused maintains his or her innocence.

(iii) **Scope for Charge Negotiations**

Each case will depend on its own facts but negotiation may be appropriate in the following cases:-

- (a) where the prosecution has to choose between a number of appropriate alternative charges. This occurs when the one episode of criminal conduct may constitute a number of overlapping but alternative charges;
- (b) where new reliable evidence reduces the Prosecution case; or
- (c) where the accused offers to plead to a specific count or an alternative count in an information and to give evidence against a co-offender. The acceptability of this will depend upon the importance of such evidence to the Prosecution case, and more importantly, its credibility in light of corroboration and the level of culpability of the accused as against the co-offenders;

There is an obligation to avoid overcharging. A common example is a charge of attempted murder when there is no evidence of an intention to kill. In such a case there is insufficient evidence to justify attempted murder and the charge should be reduced independent of any negotiations.

(iv) **File Note**

- Any offer by the defence, the supporting argument and the date it was made should be clearly noted on the ODPP file.
- The decision and the reasons for it should also be recorded and signed.
- When an offer has been rejected, it should not be later accepted before consultation with the DPP.

(v) **Delegation**

- (a) In cases of all matters especially homicide, attempted murder or special sensitivity, notoriety or complexity an offer should not be accepted without consultation with the DPP.

(vi) **Consultation**

In all cases, before any decision is made, the views of the investigating officer and the victim or the victim's relatives, should be sought.

Those views must be considered but may not be determinative. It is the public, rather than an individual interest, which must be served.

**13. SUBMISSIONS**

- (i) Any submission from the defence must be dealt with expeditiously;
- (ii) If the matter is complex or sensitive, the defence should be asked to put the submission in writing;
- (iii) Submissions that a charge should be discontinued or reduced should be measured by the two tiered test for prosecuting, set out in Guideline 0; and
- (iv) Unless there are special circumstances, a submission to discontinue because of the triviality of the offence should be refused if the accused has elected trial on information for a charge that could have been dealt with in the District Court.

**14. CASE REVIEW**

All current cases must be continually reviewed. This means ongoing assessment of the evidence as to:-

- the appropriate charge;
- requisitions for further investigation; and
- the proper course for the prosecution.

Conferences with witnesses are an important part of the screening process. Matters have to be considered in a practical way upon the available evidence. The precise issues will depend upon the circumstances of the case, but the following should be considered:-

- Admissibility of the evidence - the likelihood that key evidence might be excluded may substantially affect the decision whether to proceed or not.

- The reliability of any confession.
- The liability of any witness: is exaggeration, poor memory or bias apparent?
- Has the witness a motive to distort the truth?
- What impression is the witness likely to make? How is the witness likely to stand-up to cross-examination? Are there matters which might properly be put to the witness by the defence to undermine his or her credibility? Does the witness suffer from any disability which is likely to affect his or her credibility (for example: poor eyesight in an eye witness).
- If identity is an issue, the cogency and reliability of the identification evidence.
- Any conflict between eyewitnesses: does it go beyond what reasonably might be expected and hence thereby materially weaken the case?
- If there is no conflict between eyewitnesses, is there cause for suspicion that a false story may have been concocted?
- Are all necessary witnesses available and competent to give evidence?

#### **15. TERMINATION OF A PROSECUTION BY ODPP**

- (i) A decision to discontinue a prosecution or to substantially reduce charges on the basis of *insufficient evidence* cannot be made without consultation with the DPP.
- (ii) Once a determination has been made to discontinue a prosecution, the decision will not be reversed unless:-
  - significant fresh evidence has been produced that was not previously available for consideration or the decision was obtained by fraud; and
  - in all the circumstances, it is in the interests of justice that the matter be reviewed.

#### **16. CONSULTATION WITH POLICE**

The Public Prosecutor must advise the Commissioner of Police whenever the ODPP is considering whether or not to discontinue a prosecution or to substantially reduce charges.

The Commissioner of Police should be consulted on relevant matters, including perceived deficiencies in the evidence or any matters raised by the defence. The Commissioner of Police views should be sought and recorded prior to any decision. The purpose of consultation is to ensure that any final decision takes account of all relevant facts.

It is the responsibility of the Public Prosecutor to check that consultation has occurred and that the police response is considered before any final decision is made.

If neither the Commissioner of Police or next in charge is available for consultation within a reasonable time, the attempts to contact them should be recorded.

After a decision has been made, the Public Prosecutor must notify the Commissioner of Police as soon as possible.

## **17. CONSULTATION WITH VICTIMS**

The relevant Prosecutor must also seek the views of any victim whenever serious consideration is given to discontinuing a prosecution for violence or sexual offences.

The views of the victim must be recorded and properly considered prior to any final decision, but those views alone are not determinative. It is the public, not any individual interest that must be served.

Where the victim does not want the prosecution to proceed and the offence is relatively minor, the discretion will usually favour discontinuance. However, the more serious the injury, the greater the public interest in proceeding. Care must also be taken to ensure that a victim's change of heart has not come from intimidation or fear.

## **18. REASONS FOR DECISIONS**

- (i) Reasons for decisions made in the course of prosecutions may be disclosed by the DPP to persons outside of the ODPP.
- (ii) The disclosure of reasons is generally consistent with the open and accountable operations of the ODPP.
- (iii) But reasons will only be given when the inquirer has a legitimate interest in the matter and it is otherwise appropriate to do so.
  - Reasons for not prosecuting must be given to the victims of crime;
  - A legitimate interest includes the interest of the media in the open dispensing of justice where previous proceedings have been public.
- (iv) Where a decision has been made not to prosecute prior to any public proceeding, reasons may be given by the DPP. However, where it would mean publishing material too weak to justify a prosecution, any explanation should be brief.
- (v) Reasons will not be given in any case where to do so would cause unjustifiable harm to a victim, a witness or an accused or would significantly prejudice the administration of justice.

## 19. NOLLE PROSEQUI

If the Supreme Court trial has not commenced, ordinarily, a nolle prosequi should be entered to discontinue the proceedings.

In the absence of special circumstances, once the trial has commenced, it is desirable that it end by verdict.

Special circumstances which may justify a nolle prosequi will include circumstances where:-

- (a) without fault on the part of the prosecution, it is believed there cannot be a fair determination of the issues: for example: where a ruling of law may be the subject of an appeal;
- (b) a prosecution of a serious offence has failed because of some minor technicality that is curable; or
- (c) matters emerge during the hearing that cause the DPP to advise that it is not in the public interest to continue the hearing.

## 20. VICTIMS

### (i) General Guidelines

The ODPP has the following obligations to victims:-

- (a) To treat a victim with courtesy, compassion and respect;
- (b) To treat a victim in a way that is responsive to his or her age, gender, ethnic, cultural and linguistic background or disability or other special need;
- (c) To assist in the return, as soon as possible, of a victim's property which has been held as evidence or as part of an investigation.
  - Where appropriate, an application must be made for an order for the disposal of any exhibit in the trial or appeal.
  - Where a victim's property is in the custody of the DPP and is not required for use in any further prosecution or other investigation, it should be returned to the victim as soon as is reasonably possible.
  - If the victim inquires about property believed to be in the possession of the police, the victim is to be directed to the Commissioner of Police.
- (d) To seek all necessary protection from violence and intimidation by a person accused of a crime against the victim.
  - Where a bail application is made and there is some prospect that if released, the accused, would endanger the safety or welfare of the victim of the offence or be likely to interfere with a witness or obstruct the course of justice, all

reasonable effort must be made to investigate whether there is an risk of future harm or interference. Where sufficient evidence of risk has been obtained, bail should be opposed. If it has not been practicable in the time available to obtain sufficient information to oppose bail on that ground, an adjournment of the bail hearing should be sought so that the evidence can be obtained.

- Where bail has been granted over the objection of the prosecution and there is a firm risk of serious harm to any person, a report must be given as soon as possible to the DPP for consideration of an appeal or review.
  - When a person has been convicted of an offence involving domestic violence and there is reason to believe that the victim remains at significant risk the prosecutor should apply to the Court for an apprehended violence order pursuant to the Criminal Procedure Act 1972.
- (e) To assist in protecting a victim's privacy as far as possible and to take into account the victim's welfare at all appropriate stages.

### **Improper questions**

- Prosecutors have a responsibility to protect witnesses, particularly youthful witnesses, against threatening, unfair or unduly repetitive cross-examination by making proper objection:
- Questions should be framed in language that the witness understands.
- Prosecutors need to be particularly sensitive to the manner of questioning juveniles and intellectually disabled witnesses.
- Generally, questions about the sexual activities of a complainant of sexual offences will be irrelevant and inadmissible. They cannot be asked without leave of the Court. The only basis for leave is "*substantial relevance to the facts in issue or a proper matter for cross-examination as to credit*".

### **Information for Victims**

The following information should be given in advance of the trial:-

- (a) Every victim who is a witness must be advised of the trial process and his or her role as a prosecution witness.
- (b) Where appropriate, victims must also be provided with access to information about:-
- available welfare, health, counseling, medical and legal help responsive to their needs;
  - how to apply for compensation for injury, loss or damage.

- (c) As soon as a public prosecutor has been allocated to the case any victims involved must be advised of:-
- the identity of the person charged ;
  - the charges upon which the person has been charged by police and or the ODPP;
  - the identity and contact details of the public prosecutor; and
  - the circumstances in which the charges against the accused may be varied or dropped;
- (d) If requested by the victim, the following information about the progress of the case will be given, including:-
- the information charges and the details of the place and date of the hearing of the charges;
  - the reasons for any decision not to proceed with the charge or to substantially amend the charge or to accept a plea to a substantially lesser charge;
  - the details of any bail conditions and any application for variation of any condition that may affect the victim's safety or welfare;
  - the outcome of any proceedings, including appeal;
  - whether the defendant has absconded before trial or sentence; and
  - the nature of any sentence imposed on the offender.

Information which the victim is entitled to receive must be provided within a reasonable time after the obligation to give the information arises.

Notwithstanding that a victim has not initially requested that certain information be provided, if later a request is made, the request is to be met.

Where a case involves a group of victims, or where there is one person or more against whom the offence has been committed and another who is an immediate family member or who is a dependant of the victim(s), the obligation to inform may be met by informing a representative member of the group.

If the victim is an intellectually impaired person and is in the care of another person or an institution, the information may be provided to that person's present carer, but only if the person so agrees.

If the victim is a juvenile and is in the care of another person or the hospital the information may be provided to the juvenile's present carer unless the juvenile informs the ODPP that the information is to be provided to the juvenile alone. The juvenile should be asked questions in order to determine the juvenile's wishes in this regard. Sensitive information should not be provided to a juvenile's carer if that carer, on the information available, seems to be unsympathetic towards the juvenile as, for example, a mother who seems to be supportive of the accused stepfather rather than her juvenile.

**Note:** Where it appears that a victim would be unlikely to comprehend a form letter without translation or explanation the letter may be directed via a person who can be entrusted to arrange for any necessary translation or explanation.

(ii) **Pre-trial Conference**

Where a victim is to be called as a witness the public prosecutor is to hold a conference with the victim beforehand and, if reasonably practicable, the witness should be taken to preview proceedings in a Court of the status of the impending hearing.

(iii) **Sentencing**

The ODPP should inform the sentencing Court of appropriate details of the harm caused to the victim by the crime, but in deciding what details are not appropriate the prosecutor may have regard to the victim's wishes.

The prosecutor must ensure the court has regard to the following provisions, if they would assist the victim:-

- a court, in sentencing an accused, must have regard to the nature and seriousness of the offence including harm done to the victim.
- in sentencing a juvenile a court must have regard to any impact of the offence on the victim.

(iv) In an appropriate case, further action will be required, for example:-

- To ensure, so far as it is possible, that victims and prosecution witnesses proceeding to court, at court and while leaving court, are protected against unwanted contact occurring between such person and the accused or anyone associated with the accused. The assistance of police in this regard might be necessary.
- In any case where a substantial reduction or discontinuance of charge is being considered, the victim and the Commissioner of Police should be contacted and their views taken into account before a final determination is made.
- In any case where it is desirable in the interests of the victim and in the interests of justice that the victim and some witnesses, particularly experts, are conferred with before a hearing, a conference should be held.

ODPP Officers required to comply with the above requirements must make file notes regarding compliance.

## 21. ADVICE TO POLICE

### (i) Form of Request and Advice

- (a) Advice will not be given without a full brief of evidence, if not a full brief a complete police summary of the facts based on available evidence;
- (b) All requests for advice must be answered within one month of receipt of the police material;
- (c) Any time limit must be included in the referral; and
- (d) As a general rule, both the police request for advice and the ODPP advice must be in writing.

There will be cases when the urgency of the matter precludes a written request. In those cases, an urgent oral request may be received and, if necessary, oral advice may be given on the condition that such advice will be formalised in writing within seven days. The written advice should set out details of the oral request and the information provided by police for consideration.

### (ii) Credibility Issues

Where the main issue is the credibility of the complainant or another main witness, the papers are to include an assessment of the credibility of that person. Generally the ODPP will not interview witnesses for the purpose of giving advice as to the sufficiency of evidence or the appropriateness of charges.

### (iii) Nature of ODPP Advice

Pursuant to the Criminal Procedure Act 1972 the police will follow the DPP's advice as to the sufficiency of evidence or the appropriateness of charges. The DPP generally will not disclose to persons outside the ODPP that police have sought advice and will not disclose in any case the terms of any advice provided.

The police will follow the advice of the DPP to discontinue an investigation. Where the material provided by police is incomplete or further investigation is needed, the brief will be returned to police who will be advised that they may re-submit the brief for further advice when the additional information is obtained. For example, this may include requiring police to give an alleged offender an opportunity to answer or comment upon the substance of the allegations.

### (iv) Source of Advice

Advice on the following issues must be finalised by the DPP:-

- (a) homicide or dangerous driving causing death;
- (b) the DPP's consent where it is required for the commencement of proceedings ;

- (c) sensitive matters including allegations of serious misconduct by any public official or the prosecution of a police officer;
- (d) proposed international extradition; and
- (e) proposed immunity from prosecution.

All other cases may be referred to a Public Prosecutor but must be finalised by the DPP.

## 22. BAIL APPLICATIONS

- (i) The Constitution and Criminal Procedure Act 1972 prima facie confers upon any unconvicted person who is brought before a Court the right to bail.
- (ii) The Court's power to refuse bail has three principal aspects:-
  - the risk of re-offending;
  - the risk of interfering with witnesses; and
  - the risk of absconding.

In determining its attitude to any bail application, the prosecution must measure these features against the seriousness of the original offence and the evidence.

Proposed bail conditions should be assessed in terms of their ability to control the risks.

- (iii) Where a bail application is made and there is some prospect that if released, the defendant would endanger the safety or welfare of the victim of the offence or be likely to interfere with a witness or obstruct the course of justice, all reasonable effort must be made to investigate whether there is a risk of future harm or interference. Where sufficient evidence of risk has been obtained, bail should be opposed. If it has not been practicable in the time available to obtain sufficient information to oppose bail on that ground, an adjournment of the bail hearing should be sought so that the evidence can be obtained.
- (iv) Where bail has been granted over the objection of the prosecution and there is a firm risk of serious harm to any person, a report must be given as soon as possible to the DPP for consideration of an appeal or review.

- (v) **Reporting Conditions**

Reporting conditions are imposed to minimise the risk of absconding or re offending.

- (vi) **Overseas Travel**

ODPP staff or police should not consent to a condition of bail allowing overseas travel without the written authority of the DPP.

## 23. DISCLOSURE

The Prosecution has a duty to make full and early disclosure of the prosecution case to the defence.

The duty extends to all facts and circumstances and the identity of all witnesses reasonably regarded as relevant to any issue likely to arise, in either the case for the prosecution or the defence.

In the case of an anonymity, the identity of the protected witness shall not be disclosed without order of the court.

### (i) **Criminal Histories**

The criminal history of the accused must be disclosed:-

- Where a prosecutor knows that a Prosecution witness has a criminal history, it should be disclosed to the defence.
- Where the defence in a joint trial wishes to know the criminal history of a co-accused it should be provided.

### (ii) **Immunity**

Any indemnity or use-derivative-use undertaking provided to a Prosecution witness in relation to the trial should be disclosed to the defence. However, the advice which accompanied the application for immunity is privileged and should not be disclosed.

The DPP's protection from prosecution is limited to truthful evidence. This is clear on the face of the undertaking.

If the witness's credibility is attacked at trial, the undertaking should be tendered. But it cannot be tendered until and unless the witness's credibility is put in issue.

### (iii) **Exculpatory Information**

If a prosecutor knows of a person who can give evidence that may be exculpatory, but forms the view on reasonable grounds that the person is not credible, the prosecutor is not obliged to call that witness

The prosecutor must however disclose to the defence:-

- (a) the person's statement, if there is one, or
  - (b) the nature of the information:-
    - the identity of the person who possesses it; and
    - when known, the whereabouts of the person.
- These details should be disclosed in good time.

The Prosecution, if requested by the defence, should subpoena the person.

(iv) **Inconsistent Statement**

Where a prosecution witness has made a statement that may be inconsistent in a material way with the witness's previous evidence the prosecutor should inform the defence of that fact and make available the statement. This extends to any inconsistencies made in conference.

(v) **Sensitive Evidence**

Sensitive evidence is that which contains an image of a person which is obscene or indecent or would otherwise violate the person's privacy. It will include pornography, juvenile computer games, police photographs of naked complainants and autopsy photographs.

Sensitive evidence:-

- Must not be copied, other than for a legitimate purpose connected with a proceeding;
- Must not be given to the defence without a Court order;
- Must be made available for viewing by the defence upon a request if, the evidence is relevant to either the prosecution or defence case;
- May be made available for analysis by an appropriately qualified expert (for the prosecution or defence). Such release must first be authorised by the DPP, upon such conditions as thought appropriate.

(vi) **Original Evidence**

Original exhibits must be made available for viewing by the defence upon request. Conditions to safeguard the integrity of the exhibits must be settled by the Director of Public Prosecutions. All original statements will be kept in the DPP's safe, all original exhibits will be kept in the ODPP.

(vii) **Public Interest Exception**

The duty of disclosure is subject only to any overriding demands of justice and public interest such as:-

- the need to protect the integrity of the administration of justice and ongoing investigations;
- the need to prevent risk to life or personal safety; or
- public interest immunity, such as information likely to lead to the identity of an informer, or a matter affecting national security.

These circumstances will be rare and information should only be withheld with the approval of the DPP. When this happens, the defence must be given written notice of the claim.

(viii) **Legal Professional Advice**

Legal professional privilege will be claimed in respect of ODPP internal advices and legal advice given.

(ix) **Witness Conferences**

The ODPP will not claim privilege in respect of any written record of a conference with a witness provided there is a legitimate forensic purpose to the disclosure, for example:-

- (a) an inconsistent statement on a material fact;
- (b) an exculpatory statement; or
- (c) further allegations.

The prosecutor concerned must immediately file note the incident and arrange for a supplementary statement to be taken by investigators. The statement should be forwarded to the defence.

(x) **Ongoing Obligation of Disclosure**

When new and relevant evidence becomes available to the prosecution after Disclosure, that new evidence should be disclosed as soon as practicable.

Upon receipt of the file a written inquiry should be made of the Commissioner of Police to ascertain whether that officer has knowledge of any information, not included in the brief of evidence that would tend to help the case for the accused.

Post conviction disclosure relates to reliable evidence that may raise reasonable doubt about guilt.

(xi) **Confidentiality**

- It is an offence to disclose confidential ODPP information other than in accordance with the duty of disclosure or as otherwise permitted by legislation.
- Inappropriate disclosure of confidential information may affect the safety or privacy of individuals, compromise ongoing investigations or undermine confidence in ODPP. This means sensitive material must be carefully secured. It must not be left unattended in Court, in cars or in any place where it could be accessed by unauthorised people.

**24. UNREPRESENTED ACCUSED**

A prosecutor must take particular care when dealing with an unrepresented accused. There is an added duty of fairness and the prosecution must keep the accused properly informed of the prosecution case. At the same time the prosecution must avoid becoming personally involved.

- (i) ODPP staff should avoid any contact with the accused unless accompanied by a witness;
- (ii) Full notes should be promptly made in respect of:-
  - any oral communication;
  - all information and materials provided to the accused; and
  - any information or material provided by the accused.
- (iii) Any admissions made to ODPP staff or any communication of concern should be recorded and mentioned in open court as soon as possible.

The prosecutor should not advise the accused about legal issues, evidence or the conduct of the defence. But he or she should be alert to the judges or magistrates' duty to do what is necessary to ensure that the unrepresented accused has a fair trial. This will include advising the accused of his or her right to a voir dire to challenge the admissibility of a confession.

**25. OPENING ADDRESS**

A prosecutor should take care to ensure that nothing is said in the opening address which may subsequently lead to a mistrial. Such matters might include:-

- contentious evidence that has not yet been the subject of a ruling by the court;
- evidence that may reasonably be expected to be the subject of objection;
- detailed aspects of a witness's evidence which may not be recalled in the witness box.

**26. PRISON INFORMANT/CO-OFFENDER**

When a prosecutor intends to call a prison informant or co-offender, the defence should be advised of the following:-

- the witness's criminal record; and

- any information which may bear upon the witness's credibility such as any benefit derived from the witness's co-operation. For example: any immunity, sentencing discount, prison benefit or any reward.

## 27. IMMUNITIES

The general rule is that an accomplice should be prosecuted regardless of whether he or she is to be called as a Prosecution witness. An accomplice who pleads guilty and agrees to testify against a co-offender may receive a sentencing discount for that co-operation. There will be cases, however, where the accomplice cannot be prosecuted. The issue of immunity most commonly arises where there is no evidence admissible against the accomplice, but he or she has provided an induced statement against the accused.

The DPP has the power to grant immunity from prosecution. This will usually be in the form of a use-derivative-use undertaking (an undertaking not to use the witness's evidence in a nominated prosecution against the witness, either directly or indirectly, to obtain other evidence), but may also be an indemnity (complete protection for nominated offences). Protection in either form will be dependent upon the witness giving truthful evidence. Any application must be made to and approved by the DPP. It is a last resort only to be pursued when the interests of justice require it.

It can only be considered in respect of completed criminal conduct. It does not operate to cover future conduct.

The witness's statement must exist in some form before an application for an undertaking is made.

The application should summarise:-

- (i) the witness's attitude to testifying without immunity;
- (ii) the existing prosecution case against the accused (without immunity for the witness);
- (iii) the evidence which the witness is capable of giving (including the significance of that evidence and independent support for its reliability);
- (iv) the involvement and culpability of the proposed witness; and
- (v) public interest issues: including the comparative seriousness of the offending as between the accused and the witness; whether the witness could and should be prosecuted (what is the quality of the evidence admissible against the witness, and what is the likely sentence).

**28. WITNESSES**

In deciding whether or not to call a particular witness the prosecutor must be fair to the accused. The general principle is that the Prosecution should call all witnesses capable of giving evidence relevant to the guilt or innocence of the accused.

The prosecutor should not call:-

- unchallenged evidence that is merely repetitious; or
- a witness who the prosecutor believes on reasonable grounds to be unreliable. The mere fact that a witness contradicts the Prosecution case will not constitute reasonable grounds.

See: Richardson v R (1974) 131 CLR 116; R v Apstolides (1984) 154 CLR 563; Whitehorn v R (1983) 152 CLR 657 at 664, 682-683.

The defence should be informed at the earliest possible time of the decision not to call a witness who might otherwise reasonably be expected to be called. Where appropriate the witness should be made available to the defence.

**29. EXPERT WITNESSES**

When the prosecution proposes to call a medical officer or other expert as a witness, all reasonable effort should be made to ensure that the witness is present at court no longer than is necessary to give the required evidence.

**30. INTERPRETERS**

Care must be taken to ensure that every prosecution witness who needs an interpreter to testify has one.

**31. CROSS-EXAMINATION**

Cross-examination of an accused as to his or her credit must be fairly conducted. In particular, accusations should not be put unless:-

- (i) they are based on information reasonably assessed to be accurate; and
- (ii) they are justified in the circumstances of the trial.

The Prosecution cannot split its case. Admissions relevant to a fact in issue during the Prosecution case ordinarily should not be introduced during cross-examination of the accused.

**32. ARGUMENT**

A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds can be sustained.

**33. ACCUSED'S RIGHT TO SILENCE**

The right to silence means that no adverse inference can be drawn from an accused's refusal to answer questions: Petty v The Queen (1991) 173 CLR 95.

- Where an accused has declined to answer questions, no evidence of this should be led as part of the Prosecution case (it will be sufficient to lead that the accused was seen by police, arrested and charged);
- Where a defence has been raised for the first time at trial:-
  - (a) if the accused has previously exercised his right to silence, the prosecutor should not raise recent invention;
  - (b) if the accused has previously given a version, but omitted the facts relied upon for the defence at trial, it may be appropriate for the prosecutor to raise recent invention.

**34. SENTENCE**

It is the duty of the prosecutor to make submissions on sentence to:-

- (a) inform the court of all of the relevant circumstances of the case;
- (b) provide an appropriate level of assistance on the sentencing range;
- (c) identify relevant authorities and legislation; and
- (d) protect the judge or magistrate from appealable error.

**(i) Notice**

Police prosecutions should be advised through the ODPP correspondence of the date for sentence and result.

**(ii) Mitigation**

The prosecution has a duty to do all that reasonably can be done to ensure that the court acts only on truthful information. Vigilance is required not just in the presentation of the Prosecution case but also in the approach taken to the defence case. Opinions, their underlying assumptions and factual allegations should be scrutinised for reliability and relevance.

- the prosecutor must provide reasonable notice to the defence of any witness or referee required for cross-examination;
- If the prosecutor has been given insufficient notice of the defence material or allegations to properly consider the Prosecution's position, an adjournment should be sought;
  - Whether there has been insufficient notice will depend upon, inter alia:-
    - the seriousness of the offence;
    - the complexity of the new material;
    - its volume;
    - the significance of the new allegations;
    - the degree of divergence between the Prosecution and defence positions; and
    - availability of the means of checking the reliability of the material.

Victims of crime, particularly those associated with an offender, are often the best source of information. They should be advised of the sentencing date. They should be asked to be present. And as well, they should be told that if, when present in court, there is anything said by the defence which they know to be false, they should immediately inform the prosecutor so that, when appropriate, the defence assertions may be challenged.

False claims can be made in relation to things like illness, employment, civil service, and past trauma. Where the prosecution has not had sufficient notice to verify assertions prior to sentence, the truth may be investigated after sentence. The sentence may be adjourned or reopened to correct a substantial error of fact.

(iii) **Substantial Violence or Sexual Offences**

While it is necessary at sentence for the prosecutor to summarise the victim's account, this may be inadequate.

- In cases of serious violence or sexual offences, the victim's statement should be tendered.
- When available, any doctor's description of injuries and photographs of the injuries should also be put before the judge.
- The court should also be told of any period of hospitalisation, intensive care or long term difficulties.

(iv) **Criminal Histories**

The prosecution must ensure that any criminal history is current as at the date of sentence.

(v) **Custody details**

The prosecution must ensure that any time spent in custody be correct and state the specific dates of custody as at the date of sentence.

(vi) **Financial Loss**

The police should provide ODPP with details of a complainant's financial loss caused by the offence together with supporting evidence.

The ODPP should provide those details to the defence and to the court.

(vii) **Submissions on Penalty**

A prosecutor should not hinder the discretion of the DPP to appeal against the inadequacy of a sentence.

While an undue concession by a prosecution prosecutor at the sentence hearing is not necessarily fatal to an appeal by the DPP, it is a factor which strongly militates against such appeals

Magistrates or Judges have the duty of fixing appropriate sentences. If they are manifestly lenient the error can be corrected on appeal. But if a magistrate or judge is led into the error by a prosecutor, justice may be denied to the community.

- Concessions for non custodial orders should not be made unless it is a clear case.
- In determining the appropriate range, prosecutors should have regard to the sentencing records of the ODPP, Courts and the Nauru Police Force, the appellate judgments of comparable cases, changes to the maximum penalties and sentencing trends.
- The most recent authorities will offer the most accurate guide.

### **35. APPEALS AGAINST SENTENCE**

In every case the prosecutor must assess the sufficiency of the sentence imposed. The magistrates or judges sentencing remarks should be ordered and a report promptly provided to the DPP if it is considered that either:-

- (i) there are reasonable prospects for an appeal; or

- (ii) the case is likely to attract significant public interest.
- The report should be finalised within 7 days of the sentence. It should include the prosecutions and defence submissions, sentencing remarks, any medical or other reports, the criminal history and a copy of any judgments relied upon.
  - The report should only be forwarded to the DPP.
  - An analysis of the prospects for an DPP's appeal should have regard to the following principles:-
    - (a) An DPP's appeal is exceptional: it is to establish and maintain adequate standards of punishment and to correct sentences that are so disproportionate to the gravity of the crime as to undermine confidence in the administration of justice;
    - (b) The Supreme Court will not intervene unless there is:-
      - (i) a material error of fact;
      - (ii) a material error of law; or
      - (iii) the sentence is manifestly inadequate.
    - (c) The sentencing range for a particular offence is a matter on which reasonable minds might differ;
    - (d) The Supreme Court will be reluctant to interfere where the magistrate or judge was led into error by the prosecutor, or the magistrate or judge was unassisted by the prosecutor; and
    - (e) The issue on appeal in relation to fact finding, will be whether it was reasonably open to the magistrate or judge to find as he or she did.

### **36. RE-TRIALS**

- (i) Where a trial has ended without verdict, the prosecutor should promptly furnish advice as to whether a re-trial is required.

Relevant factors include:-

- the reason why the trial miscarried (for example: because of a prejudicial outburst by a key witness);
- whether the situation is likely to arise again;
- the attitude of the complainant;

- the seriousness of the offence; and
  - the cost of re-trial (to the community and the accused).
- (ii) Where a conviction has been quashed on appeal and a re-trial ordered, the prosecutor on appeal should promptly furnish advice as to whether a re-trial is appropriate or viable.

### **37. EXHIBITS**

All documentary exhibits are to be kept in the safe of the DPP, all non documentary exhibits are to be kept in the custody of the ODPP.

### **38. DISPOSAL OF EXHIBITS**

(i) A Trial Judge may make an order for:-

- (a) the disposal of exhibits or
- (b) the delivery of property in possession of the Court.

Without a specific order, Court staff must retain all exhibits.

(ii) Where exhibits have been tendered, the prosecutor should make an application at the conclusion of proceedings. The usual form of order sought would be the return of the exhibits:-

- (a) upon the determination of any appeal; or
- (b) if no appeal, at the expiration of any appeal period;

to:-

- (a) the rightful owners; or
- (b) the Commissioner of Police (in the case of weapons, dangerous drugs or illegal objects etc).

(iii) Where the prosecutor is aware of further related property held by police and not tendered as an exhibit, he or she should apply for an order by the DPP for the delivery of the property to the person lawfully entitled to it.

(iv) All other “exhibits” not tendered in Court should be returned to police and file notes made of the return.

**39. MEDIA**

- (i) There is no prohibition against ODPP staff confirming facts already on the public record. Indeed the principle of open justice and the desirability of accurate reporting would support this. But there is no obligation to provide information to the media.
- (ii) ODPP staff may confirm:-
  - information given in open court; or
  - the terms of charges on an information that has been presented (but not the name of any protected complainant).
- (iii) Matters which should not be discussed with the media, include:-
  - the likely outcome of proceedings;
  - the intended approach of the prosecution (for example: discontinuance, ex-officio information, appeal);
  - the correctness or otherwise of any judicial decision;
  - the name or identifying particulars of a complainant of a sexual offence;
  - the contact details for any victim or lay witness;
  - any details which would breach the protection given to informants ; and
  - details of any person who carries some personal risk.
- (iv) The media should not be given copies or access to tapes of any recorded interviews, re-enactments, demonstrations or identifications.
- (v) The media should not be given any medical, psychological or psychiatric reports on offenders or victims.

**40. RELEASE OF DEPOSITIONS**

The ODPP is the custodian of the depositions. A request to access those depositions by anyone not directly involved in the proceedings must be by way of application to the DPP. This is because of the potentially sensitive nature of the material which may include things such as protected evidence from victims, investigative methodology and the names of informants.

Generally this directive is designed to strike a balance between the interests of the applicant seeking the release of the documents and any contrary public interest. It provides for transparency of process and the right of external review. It also gives legislative protection to the decision maker who releases the documents.

**41. CONFIDENTIALITY**

ODPP has obligations in respect of confidentiality.

Information about a case other than what is on the public record should not be released without authority from the DPP subject to the following exceptions:-

- (i) the release of information to complainants as set out in guidelines;
- (ii) the release of information to police as required for investigative, prosecution and consultative processes; and
- (iii) the duty of full and early disclosure of the prosecution case to the defence.

This means that any request from individuals, other agencies or the media for information which is not a matter of public record should be referred to the DPP.

Internal memoranda are not to be released in any circumstances without prior approval of the DPP.

Dated this Seventh day of May 2009.

P.A. BANNISTER  
DIRECTOR OF PUBLIC PROSECUTIONS