TASMANIA

PROSECUTION POLICY AND GUIDELINES

Director of Public Prosecutions

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Introduction

The Office of the Director of Public Prosecutions was established in 1973. (Initially the Office was called the Crown Advocate but in 1986 the name was changed to Director of Public Prosecutions).

The primary function of the Director of Public Prosecutions is to determine whether to institute proceedings on behalf of the State against a person for an offence or a crime on indictment and, if so, conduct those proceedings. The Director is an independent statutory officer but reports to Parliament through the Attorney-General.

The Director acts independently of the government and of political influence. The Director also acts independently of inappropriate or sectional interests in the community and of inappropriate influence by the media. The Director is independent of police and other investigating bodies and agencies.

As Kirby J (as he then was) said in *Price v Ferris* (1994) 34 NSWLR 704 at 707-8 the object of having a Director of Public Prosecutions:

> …is to ensure a high degree of independence in the vital task of making prosecution decisions and exercising prosecution discretions… the purpose of so acting is to ensure that there is manifest independence in the conduct of the prosecution. It is to avoid the suspicion that important prosecutorial discretions will be exercised otherwise than on neutral grounds. It is to avoid the suspicion, and to answer the occasional allegation, that the prosecution may not be conducted with appropriate vigour…It was to ensure that in certain cases manifest integrity and neutrality were brought to bear upon the prosecutorial decisions that the Act was passed by parliament affording large and important powers to the DPP who, by the Act, was given a very high measure of independence.

The Director's functions are also carried out independently of the courts:

> Our courts do not purport to exercise control over the institution or continuation of criminal proceedings, save where it is necessary to do so to prevent an abuse of process or to ensure a fair trial.
>
> (per Dawson and McHugh JJ in *Maxwell v R* (1995) 184 CLR 501)

The Director is assisted in carrying out his functions by the Deputy Director (who acts in his absence), Crown prosecutors and administrative staff employed in the Office.

In 2015 amendments to the *Director of Public Prosecutions Act 1973* gave the Director a statutory power to issue guidelines to prosecutors, persons acting on the Director's behalf, the Commissioner of Police and prosecutorial agencies with regard to prosecutions and the class of prosecutions which are required to be referred to the Director. These guidelines apply only to prosecutors employed by the Office unless it is stated, or clearly implied, that they apply to Tasmania Police or other agencies. In considering appropriate guidelines, it should be remembered the obligations of the Director of Public Prosecutions

are no different from those imposed on every prosecutor or prosecuting agency in the common law system.

The primary obligation on a prosecutor is one of fairness. Fairness must eventually dictate the discharge of all the functions of a prosecutor. But the question must be asked as to whom these obligations are owed. Obviously a prosecutor must be fair to an accused but that cannot be the sole consideration. There are other parties with legitimate interests who are also entitled to expect a prosecutor to act in a particular way. Sometimes these interests will conflict with those of the accused.

A prosecutor has varying degrees of obligation to the following:

- the court (judge and jury)
- the community
- the accused
- victims
- witnesses
- defence counsel

A prosecutor must play his or her part in securing a fair trial for persons accused of criminal offences. A fair trial is one that results in justice being done, i.e. conviction of the guilty as well as acquittal of the innocent. A fair trial may be described also as one where all relevant credible evidence is presented, tested and adjudicated upon according to law. The obligations of the prosecution to the various parties flow from those concepts.

The purpose of these guidelines is to provide a standard by which the Office and its prosecutors will conduct criminal proceedings on behalf of the State to ensure transparency and maintain a consistency of approach. Where necessary, the guidelines also set out the law and the procedure to follow to assist prosecutors in the Office in their work. The purpose of publishing these guidelines is to enable the judiciary, the legal profession, Tasmania Police, victims, accused persons, persons engaged with the criminal justice system and interested members of the public to understand the actions of the Office. They form part of the uniform prosecution policy adopted in 1990 by the Directors of Public Prosecutions of all States and Territories and the Commonwealth of Australia.

These guidelines do not attempt to cover all questions that can arise in the prosecution process and the role of the prosecutor in their determination. It is sufficient to say that throughout a prosecution the prosecutor must conduct himself or herself in a manner which will maintain, promote and defend the interests of justice, for in the final analysis the prosecutor is not a servant of government or individuals: he or she is a servant of justice. At the same time it is important not to lose sight of the fact that prosecutors discharge their responsibilities in an adversarial context. Accordingly, while the case must at

all times be presented to the court fairly and justly, the community is entitled to expect that it will also be presented fearlessly, vigorously and skilfully.

In *Wood v R* [2012] NSWCCA 21, McClennan CJ at common law said at [577] in respect of the role of the prosecutor:

> It is a specialised and demanding role, the features of which need to be clearly recognised and understood. It is a role that is not easily assimilated by all legal practitioners schooled in an adversarial environment. It is essential that it be carried out with the confidence of the community in whose name it is performed.
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> > 'It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.' (per Rand J in the Supreme Court of Canada in *Boucher v R* (1954) 110 CCC 263 at 270)
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> In this State that role must be discharged in the environment of an adversarial approach to litigation. The observance of those canons of conduct is not incompatible with the adoption of an advocate's role. The advocacy must be conducted, however, temperately and with restraint.
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> The prosecutor represents the community generally at the trial of an accused person.
>
> > 'Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one.' (per Deane J in *Whitehorn v R* [1983] HCA 42; (1983) 152 CLR 657 at 663-664)
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> Nevertheless, there will be occasions when the prosecutor will be entitled firmly and vigorously to urge the prosecution's view about a particular issue and to test, and if necessary to attack, that advanced on behalf of an accused's person or evidence adduced by the defence. Adversarial tactics may need to be employed in one trial that may be out of place in another. A criminal trial is an accusatorial, adversarial procedure and the prosecutor will seek by all proper means provided by that process to secure the conviction of the perpetrator of the crime charged.
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> (see also *Lyons v R* (1992) 1 Tas R 193)

Finally, it should be remembered the guidelines published here are just that, they are not rules of law. Although compliance with these guidelines should generally be expected there will be times, for good reason, when they cannot be followed.

Daryl Coates SC
Director of Public Prosecutions

Prosecution guidelines

These guidelines are published to provide an indication to the community at large of the nature of the task undertaken by the Office of the Director of Public Prosecutions in determining whether or not an indictment should be filed and a prosecution undertaken in the Supreme Court.

Commencement of proceedings

In Tasmania almost all charges involving indictable crime (those crimes dealt with in the Supreme Court) are laid by police officers on complaint in the Magistrates Court who undertake the investigation and gather the evidence relevant to the prosecution. These officers are trained investigators, they are not qualified lawyers and do not undertake a formal course of training in the prosecution of indictable matters in the Supreme Court of this State. This is distinct from the role of Tasmania Police prosecutors who deal with summary matters in the Magistrates Court. The person charges is then committed to the Supreme Court where the Office will determine whether to proceed with the matter by filing an indictment. In addition, the case presented to the Office for prosecution after a preliminary proceeding has been conducted will often have undergone an evidentiary change due to the effect of cross-examination upon witnesses, the addition of forensic evidence (some of which may not be available at the time of charging) and the response to any request from the Office for additional evidence or investigation. Police prosecutions are commenced on obtaining a prima facie case but, as these guidelines indicate, a mere prima facie case is an insufficient level of proof for the Office to be satisfied that an indictment should be filed. The test applied by the Office and all other prosecuting agencies in Australia is one which requires the person signing the indictment to be satisfied that there is a reasonable prospect of conviction on the available and admissible evidence. This test requires, quite obviously, the assumption that the prosecution will be conducted before a reasonable jury not subject to any bias or undue influence and one which is properly directed to assess the issue of guilt.

Decision to prosecute an indictable matter

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, tends to undermine the confidence of the community in the criminal justice system.

It has never been the rule in this country that suspected criminal offences must automatically be the subject of prosecution. A significant consideration is whether the prosecution is in the public interest. The resources available for prosecution action are finite, particularly judicial resources, and should not be wasted pursuing inappropriate cases; a corollary of which is that available resources are employed on those cases worthy of prosecution. It requires a

balancing exercise that includes the interests of the complainant, the community and fairness to the accused.

It follows that the objectives of fairness and consistency are of particular importance. However, fairness need not mean weakness and consistency need not mean rigidity. The criteria for the exercise of this discretion cannot be reduced to something akin to a mathematical formula; indeed it would be undesirable to attempt to do so. The breadth of the factors to be considered in exercising this discretion indicates a candid recognition of the need to tailor general principles to individual cases.

In deciding whether or not a matter should be prosecuted any views put forward by Tasmania Police or other investigating agencies are carefully taken into account. Ultimately, however, the decision is to be made having regard to the consideration referred to below.

The test

The initial consideration in the exercise of the discretion to prosecute is whether the evidence is sufficient to justify the institution or continuation of a prosecution (s310(4) of the *Criminal Code*). 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 an identifiable person.

In 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. A prima facie case is a necessary but not sufficient condition for launching a prosecution. Given the existence of a prima facie case, it must be understood that a prosecution should not proceed if there is no reasonable prospect of a conviction being secured before a hypothetical reasonable jury properly instructed (i.e. an impartial jury) or a magistrate in the case of summary offences. This decision 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. It should be borne in mind that the test is not whether there is a reasonable prospect of an acquittal but whether there is a reasonable prospect of conviction. Both can exist simultaneously. However, application of the reasonable prospect of conviction 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.

When evaluating the evidence, regard should be had to the following matters:

- Are there grounds for believing the evidence may be excluded bearing in mind the principles of admissibility at common law and under statute?
- If the case depends in part on admissions by the accused, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused?
- Does it appear that a witness is exaggerating, or that his or her memory is faulty or contaminated, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable?
- Has a witness any apparent motive for telling less than the whole truth?
- Are there matters which might properly be put to a witness by the defence to attack his or her credibility?
- If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the accused?
- Is there is anything which causes suspicion that a false story may have been concocted?
- Are all the necessary witnesses available and competent to give evidence pursuant to s18 of the *Evidence Act 2001*?
- Where child witnesses are involved, are they competent to give evidence pursuant to the *Evidence Act 2001*?

This list is not exhaustive and, of course, the matters to be considered will depend upon the circumstances of each individual case. None of the above matters should be viewed in isolation but rather in the context of the entire case.

Public interest

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. Public interest does not equate to the level of public interest in an individual person or a particular matter.

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 (e.g. 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.

Factors which may arise for consideration in determining whether the public interest requires a prosecution include:

- the seriousness or, conversely, the triviality of the alleged offence or that it is of a "technical" nature only
- any mitigating or aggravating circumstances
- the youth, age, intelligence, physical health, mental health or special infirmity of the alleged offender, a witness or victim
- the alleged offender's antecedents and background
- the staleness of the alleged offence
- the degree of culpability of the alleged offender in connection with the offence
- the obsolescence or obscurity of the law
- whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute
- the availability and efficacy of any alternatives to prosecution
- the prevalence of the alleged offence and the need for deterrence, both personal and general
- whether the consequences of any resulting conviction would be unduly harsh and oppressive
- whether the alleged offence is of considerable public concern
- the risk to the public in not proceeding
- any entitlement of the victim or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken
- the likelihood of a confiscation order being made against the alleged offender’s property upon conviction
- the attitude of the victim of the alleged offence to a prosecution
- where the victim does not wish to proceed, the likely effect on the victim in forcing him or her to give evidence. Also, conversely, the future risk to the victim, family members and the public in not proceeding.
- the likely length and expense of a trial
- 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

- the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court
- whether the alleged offence is triable only on indictment
- whether the alleged offender has already been sentenced for other offences and the likelihood of the imposition of an additional penalty having regard to the totality principle

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

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 public interest 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 to plainly require prosecution, or where the victim does not wish to proceed, the prosecutor should always apply his or her mind to whether the public interest requires a prosecution to be pursued.

Youthful offenders

Special considerations apply to the prosecution of persons under the age of 18 years. Prosecution action against youthful offenders should be used sparingly and in making a decision whether to prosecute particular consideration should be given to available alternatives to prosecution, such as a caution or reprimand, as well as to the sentencing alternatives available to the relevant Youth Justice Court if the matter were to be prosecuted.

Factors not relevant to the prosecution decision

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

- the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved
- personal feelings concerning the offender or the complainant
- possible political advantage or disadvantage to the government or any political group or party
- the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision
- strong public opinion for or against a particular prosecution

Decision not to indict

In the event that it is determined that an indictment should not be filed or that it should be discontinued, the complainant will be informed of that decision as early as possible. A complainant can request the Director to review the decision (see Indictments, nolles prosequi and discharges).

Once a final decision has been made to discharge an accused, the decision will not be reviewed unless it is plainly wrong, i.e. it was based on incorrect or irrelevant material or a misunderstanding of the law, or was plainly unreasonable, or unless new evidence becomes available.

The decision to discontinue a prosecution will often cause anger and distress to the victim or family of the victim of a crime. Whilst, in an emotional sense, victims of crime and the families of victims of crime may wish to see the alleged perpetrator of a wrong prosecuted for the most serious criminal offence possible there is always a need to ensure that a careful and objective assessment of the available and admissible evidence is made and a correct application of legal principle to that evidentiary material. It is unfortunate that the role of an independent prosecutor is only the subject of consideration or discussion when issues such as this arise. It is to be hoped that the continued publication of these guidelines and, wherever necessary, public explanation will assist the community at large in understanding the careful consideration which is given to the decision to prosecute and the factors which are taken into account in exercising the discretion to prosecute or making the decision to discontinue a prosecution.

Prosecutors' duties

Duties in general

Prosecutors shall at all times:

- maintain the honour and dignity of their profession
- conduct themselves professionally, in accordance with the law
- exercise the highest standards of integrity and care
- keep themselves well informed and abreast of relevant legal developments
- strive to be, and be seen to be, consistent, independent and impartial
- protect an accused person's right to a fair trial and, in particular, ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial. Where, in rare circumstances, there is evidence that should not be disclosed to an accused, that is favourable to an accused, for lawful reasons such as public interest immunity (s130 of the *Evidence Act 2001*) the Director must be informed in order to determine whether the evidence will be disclosed, or whether the fact that material is being withheld from the accused and the reasons for that will be disclosed and, finally, the public interest in continuing with the prosecution in light of the undisclosed evidence (see Disclosure).
- serve and protect the public interest (see Prosecution guidelines on the discretion to prosecute)
- maintain professional confidentiality

The use of prosecutorial discretion should be exercised independently and be free from interference, political or otherwise.

Prosecutors shall perform their duties without fear, favour or prejudice. In particular, they shall:

- carry out their functions impartially
- remain unaffected by individual or sectional interests and public or media pressures and have regard only to the public interest
- act with objectivity
- have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the accused

At all times prosecutors' duties are to the court and they must not deceive or recklessly mislead the court.

Duties in the trial process

Prosecutors are to present the case against an accused person fairly and honestly and to seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.

Prosecutors must not press the prosecution's case for a conviction beyond a full and firm presentation of that case. Of course, the manner in which a prosecution is conducted will often depend on the nature and character of the case.

Prosecutors must not, by language or other conduct, seek to inflame or bias the court against the accused (see *McCullough v R* [1982] Tas R 43). However, prosecutors are not obliged to "pander to the idiosyncratic or hypercritical sensibilities of defence counsel". Prosecutors "are not required to reduce their rhetoric to dull and lifeless factual propositions. They are advocates, albeit their role is special in that they should not fight for a conviction at all costs". (see *Lyons v R* (1992) 1 Tas R 193 per Wright J at 199).

Prosecutors should only exercise the right to stand a juror aside, pursuant to s34 of the *Juries Act 2003,* if there is a reasonable cause to do so. This right should never be exercised in an attempt to select a jury that is not representative of the community as to age, sex, ethnic origin, religious belief, marital status, economic, cultural or social background, nor should a juror be stood aside merely because he or she has been on a jury that acquitted an accused person. Please note, in certain circumstances, prosecutors may be required to show cause as to why a juror has been stood aside (see s34(4) of the *Juries Act 2003*).

Prosecutors who have reasonable grounds to believe that certain material available to the prosecution may have been unlawfully or improperly obtained must promptly:

- inform the defence if they intend to use the material
- make available to the defence a copy of the material if it is in documentary form
- inform the defence of the grounds for believing that such material was unlawfully or improperly obtained

Prosecutors must not confer with, or interview, an accused except in the presence of the accused's representative.

In cases where an accused is unrepresented, prosecutors should not communicate with the accused other than in the presence of a third party. Conversations should be noted. Prosecutors must not advise an unrepresented accused on legal issues or the general conduct of the defence. In the event that there is evidence the prosecutor intends to lead that is arguably inadmissible this should be raised with the trial judge prior to the evidence being called.

All materials and witness statements must be provided in the usual manner and the accused should acknowledge receipt in writing. Telephone communications should be kept to a minimum and recorded in writing immediately. The notes should be kept on the file. In the event of a trial, the witnesses should be advised that the accused is unrepresented and informed of the procedures that will be adopted in the court.

Prosecutors must not inform the court or the defence that the prosecution has evidence supporting an aspect of its case unless they believe on reasonable grounds that such evidence will be available from material already available to them.

Prosecutors who have informed the court of matters referred to in the paragraph above, and who later learn that such evidence will not be available, must immediately inform the defence of that fact and must inform the court of it when the case is next before the court.

Prosecutors have a duty to call all witnesses whose testimony is necessary for the presentation of the whole picture, to the extent that it can be presented by admissible and available evidence, unless they form the view that the interests of justice would be prejudiced rather than served by calling a witness. The fact that a witness will give an account inconsistent with the prosecution case is not sufficient reason for not calling that witness. In those circumstances, a witness should only not be called where there is clear, objective material that all admissible accounts by that witness lack any credibility (see *R v Ashton, Farmer & Randall* [2003] TASSC 140 at [29]). Where a prosecutor decides not to call a witness in these circumstances, the reasons should be recorded in writing and placed on the file. Without limiting the circumstances where a witness will not be called, they may include where an issue is not in dispute and other witnesses have already given evidence regarding that issue, the failure to call a witness is consented to by counsel for the accused, or where a witness is unavailable. Other considerations may include the physical and mental health of a witness. Where possible when a decision has been made not to call a witness that witness should be made available to the defence.

Prosecutors must not coach a witness prior to them giving evidence, in that they should not direct them as to what they should say. However, it is perfectly proper to ask a witness what their evidence would be on a point. It is also proper to point out any inconsistencies or prior inconsistent statements and request an explanation but care should be taken not to suggest answers to a witness.

Prosecutors must fairly conduct the cross-examination of an accused as to credit. Material put to an accused must be considered on reasonable grounds to be accurate and its use justified in the circumstances of the trial.

Prosecutors have a duty to acquaint the judge and jury in ordinary language with those aspects of an expert's discipline and methods necessary to put the court in a position to make an evaluation of the opinion that the expert

expresses, to demonstrate the scientific reliability of the opinion expressed, and to strip forensic evidence of its mystery so far as is possible.

An accused person cannot be put on trial unless a Crown Law Officer forms the view that on the available relevant and admissible evidence there is a reasonable prospect of conviction. If at any stage during a trial a prosecutor forms the view that there may no longer be a reasonable prospect of conviction, e.g. due to loss of evidence or new evidence becoming available, he or she must consult with the Director, or in his absence the Deputy Director, as to whether the trial should continue.

Duties in the sentencing process

Prosecutors shall present the facts in a fair and balanced way, identifying relevant aggravating and mitigating factors where appropriate.

Prosecutors should provide victims, as defined by the *Sentencing Act 1997,* with the opportunity to submit, provide and/or read a victim impact statement (VIS). All statements should comply with the VIS guidelines (see Witness Assistance Service guidelines).

Prosecutors should refer the sentencing judge to any relevant legislation, authorities or sentencing principles applicable to the particular case, including (where necessary) the appropriateness of different types of sentences or the general range of sentences (if any) for a particular type of crime (s 80(2) of the *Sentencing Act 1997*). Care should be taken not to suggest a particular sentencing range within which the court could sentence an individual before it in the exercise of its discretion (see *Barbaro & Zirilli v R* [2014] HCA 2).

Where an accused person relies on expert evidence, e.g. psychiatric evidence, the prosecutor should scrutinise it with care and where appropriate challenge the report as to the adequacy of the material contained in it or its conclusions (see *DPP v O'Neill* [2015] VSCA 325 at [8]).

Indictments, nolles prosequi and discharges

The decision to indict, the form of the indictment, the decision to discharge and the extent of the discharge are the most important decisions in the prosecution process.

Such decisions should be logical, principled, explicable and defensible. Written memoranda and consultation with and between senior, experienced prosecutors are the best methods of achieving those aims and are those to be followed in the Office in all cases.

The prosecutor with conduct of the case must first decide if the file needs completion, and if so should return it to the investigator with a particularised request as to what remains to be done. Of course, in some cases it might appear that there is no point in completion, the matter might be irredeemably incapable of giving rise to a proper charge, or should clearly proceed as a summary charge or charges only. In those cases, discussion should be had with the investigator to alert them to those views as they may know of some further matter which may change the conclusion.

If the crime(s) charged have a victim, some discussion with the victim should also take place to ascertain their views and forewarn them of the possibility that there might be a discharge or reduction in number and/or severity of the charges, and the reasons that might be so. If the Witness Assistance Service (WAS) has not been involved already, its involvement should be recommended to the victim.

When the file is satisfactorily complete, or ought not be completed further because it will remain unviable as an indictable charge, the prosecutor must prepare a memorandum recommending that an indictment be filed and, if so, include a draft indictment, or that the accused be discharged. In this memorandum, a 'discharge' or 'discharged' means when the accused is:

- discharged entirely from charges,
- discharged from the indictable charges to face summary charges, or
- when the nature and severity of the indictable charges with which the accused has been charged are significantly changed.

The memorandum

The memorandum needs to set out the facts essential to the charges to be considered which can or cannot be established to the requisite degree, strengths or difficulties with the evidence including with witnesses, possible legal arguments and the author's thoughts on their likely resolution. Where it is recommended that a matter should not proceed or that it should be substantially downgraded due to an assessment of the credit of a complainant or a witness, the complainant or witness should be interviewed to assess his or her credit. Assessments of credit should be clearly stated in objective terms. It

should also be remembered that what is to be assessed is not the credit of a person generally but the credibility of the allegation made which is the subject of the charge.

In respect of important witnesses whose credibility is likely to be in issue, any prior or pending charges of those witnesses will need to be obtained and the impact of those prior convictions discussed in the memorandum.

If recommending an indictment, the best memoranda serve as an outline of the case and even a reliable aid to an opening address. Memoranda recommending a discharge (absolute or to summary charges) are likely to be read by the investigators, and also need to convey sufficient information for prosecutors, WAS officers and/or police to explain the reasons for discharge or reduction to properly interested parties. Needlessly offensive characterisations of the investigation or witnesses should be avoided, although frankness and identification of deficiencies are required.

Please note the memorandum constitutes legal advice and as such it is subject to legal professional privilege. It should not be released without the approval of the Director.

The Committee

The file with the attached memorandum is to be forwarded to the Director or the Committee. The Committee is comprised of the Deputy Director and Principal Crown Counsel. However, in cases of murder, attempted murder and manslaughter where there is a recommendation to discharge, those matters should be forwarded to the Director to decide whether a prosecution should proceed. It is also an important step in the process that a complainant understands the reasons why a decision to discontinue is made.

The Director's agreement to a discharge or substantial downgrading of the charges is final.

The following rules apply to every indictment or discharge forwarded to the Committee:

- If an indictment of practically the same or similar charges for which the accused has been charged and/or committed is sought, the agreement of only one member of the Committee is required. In the case of any member of the Committee making the recommendation, the agreement of another member is required.

- If a discharge (as defined above) is recommended, the agreement of two Committee members is required unless the recommendation is that of a Committee member, in which case the agreement of another Committee member is required.

- If the recommendation to the Committee is to prosecute on the same or similar charges but one member of the Committee recommends a discharge or a substantial downgrading of the charges then two other

Committee members must also agree with such a discharge or downgrading of the charges.

- Where the Director has personally authorised a prosecution only the Director has authority to discontinue the prosecution.

- Only the Director has the authority to authorise the prosecution or the discontinuance of a prosecution of a police officer.

Where the Committee cannot agree in the above terms, the matter is to be forwarded to the Director.

The same procedure will apply if an indictment has been filed but the prosecutor with conduct of the case believes proceedings should be discontinued and a nolle prosequi entered because there has been some change in circumstances since the indictment was filed which render the prosecution no longer viable.

When forwarding a memorandum to or from the Launceston or Burnie office it is usually not necessary to accompany it with the police file; the memorandum should be sufficiently comprehensive. A Committee member or the Director may subsequently seek the file to clarify or consider any point.

The memorandum is to be saved electronically, as well as the Committee members' responses.

Procedure upon approval of discharge or substantial downgrading of charges

Where practicable, when there is a complainant of the crime originally charged, he or she should be informed of any proposed discharge or reduction in charges before the accused, police and court are informed. This is the task of the prosecutor with conduct of the case. Where the complainant is under 18 years of age or has a disability, a parent, guardian or spokesperson of the complainant should be informed. Where the alleged criminal conduct has caused the death of a person the next of kin or an immediate family member should be informed.

Informing the complainant of the proposed discharge or reduction in charges is an important step in the process. It is important that the complainant understands the reasons why the decision has been made. It is preferable that the complainant be informed of the reasons in person. However, if this is not possible, it should be done by telephone. When informing a complainant of the decision the prosecutor should advise how decisions are made, provide a brief history of the matter and brief reasons for the decision. The complainant should be given an opportunity to provide his or her views about the decision.

A complainant should be advised that they may apply to have the decision reviewed by the Director (unless the decision was approved by the Director). Requests for review must be made within seven days of notification of the

decision. Ordinarily, a letter should be sent confirming that the charges will not proceed and that the complainant has the right to request the Director to review the decision.

Where practicable the memorandum, together with a brief covering letter, should be emailed to the Assistant Commissioner (Operations). The police file should be returned to the Detective Inspector of the originating location, with a copy of the covering letter and memorandum sent to the Assistant Commissioner.

Once the complainant and police have been advised that a matter will not proceed and the prosecutor has confirmed that the complainant has not sought a review of the decision, one of the following steps should be taken to discharge the accused as soon as possible:

- Where the accused is before the court on complaint only, the court should be informed that an indictment will not be filed and the accused should be discharged in relation to that complaint

- Where an indictment has been filed, a nolle prosequi should be filed, or alternatively where instructed by a Crown Law Officer, a prosecutor can inform the court that the State will not proceed further on the indictment and the accused should be discharged (s350 of the *Criminal Code*).

Once a final decision has been made to discharge an accused, the decision will not be changed unless it is plainly wrong, i.e. it was based on incorrect or irrelevant material, or was plainly unreasonable, or unless new evidence becomes available. Complainants have the right to request written reasons for key decisions. Any requests for written reasons will be considered on a case by case basis, bearing in mind the considerable privacy issues, by the Director or Deputy Director.

Any decision made by the Director will not be reviewed. However, a complainant may request to meet with the Director or Deputy Director to have the reasons for the decision explained.

Joint Commonwealth/State trials

On occasions it will be alleged that an accused person has committed both State and Commonwealth crimes arising out of the same factual circumstances. Also, a particular act could be both a State offence and a Commonwealth offence. This is particularly the case with drug offences and child exploitation material.

The Director has an authority to prosecute on indictment Commonwealth matters. Likewise, the Commonwealth Director has been appointed a Crown Law Officer under the *Criminal Code*. There is a memorandum of understanding between the two offices which sets out the protocol as to which office should prosecute in such circumstances. The protocol states each office should consult the other in such circumstances. In determining which office

should prosecute a matter the prime considerations are efficiency and effectiveness. Some of the factors taken into account are:

- Which jurisdiction deals with the majority of that type of offence
- The seriousness of the offence in each jurisdiction
- Which jurisdiction investigated the offence
- The nature and extent of each office's previous involvement in the case
- Where there are a number of offences, in which jurisdiction is the preponderance of the offences
- How much duplication of work would there be in handing over the prosecution to the other office

Where a prosecutor has a case in which there are possible Commonwealth offences he or she must consult with the Director in order for him to determine if it is necessary to consult with the Commonwealth Director and, if it is, to do so.

Retrials

Where a trial has ended without a verdict, consideration should be given as to whether a retrial is required. Factors to be considered include:

- Whether the jury were unable to agree or whether the trial ended for some other reason
- Whether another jury would be in a better or worse position to reach a verdict, i.e. was some evidence ruled inadmissible or has material become known affecting the credibility of witnesses thereby impacting on the initial assessment of a reasonable prospect of conviction, or has further evidence become available
- The views of the complainant including the likely impact a retrial would have on the wellbeing of the complainant or any vulnerable witnesses
- The views of the investigating police officer
- The seriousness of the matter and the public interest in pursuing the charges
- The cost of a retrial to the community and the accused person.

The same procedure that applies to indictments, nolles prosequi and discharges applied to the decision to retry an accused person.

Where two juries have been unable to agree upon a verdict, a third or additional trial will only be directed in exceptional circumstances. Any such direction must be given by the Director.

Where a jury has convicted on some charges but are undecided on others, in determining whether to proceed on the remaining charges in addition to the above factors the following considerations are relevant:

- The seriousness of the remaining charges
- The sentence the accused has received for the charges of which he has been convicted

Remittals pursuant to s308 of the Criminal Code

Section 308 of the *Criminal Code* allows for a judge to remit a matter to the Magistrates Court to be tried before a magistrate if the judge is of the opinion that an accused person shall receive adequate punishment (s308(1)).

The maximum penalty a magistrate can impose per charge is 12 months' imprisonment or a fine not exceeding 20 penalty units (s308(4)).

The magistrate has the same powers and jurisdiction of a judge on the trial of an accused person upon indictment (s308(3)).

Practice Direction 2 of 2015 states that s308 remittals should be considered in the following circumstances:

- Cases in which a defendant has been charged with multiple summary offences, and a relatively small number of indictable offences
- Cannabis cases concerning 50 plants or fewer (trafficking or cultivating for sale)
- Charges of sexual intercourse with a young person under the age of 17 years contrary to s124(1) of the *Criminal Code*, where the accused is 25 years old or younger and the complainant is at least 15 years old
- Charges of being found prepared for the commission of a crime contrary to s248 of the *Criminal Code*
- Charges of unlawfully setting fire to vegetation contrary to s268A of the *Criminal Code*
- Charges of unlawfully setting fire to chattels (including motor vehicles) contrary to s269 of the *Criminal Code*
- Charges of indecent assault contrary to s127(1) of the *Criminal Code*, where the alleged assault appears to be relatively minor

In the event that a prosecutor is asked to consider whether a particular matter warrants consideration for remittal or believes that it should be, he or she should be properly appraised of the following:

- The full circumstances of the crime, including whether there is a reasonable prospect of conviction
- The appropriate charge(s) and whether it differs from the committed charge
- Any aggravating or mitigating factors
- Consideration of s308(4) in light of the accused's priors and the level of criminality, any summary alternative

If that determination cannot be made by the first return date (remand day), then they should ensure there is an explanatory file note for remand counsel. The person conducting remands will then request a date at the end of the sittings to enable the police file to be sent for completion and/or further inquiries.

If it is considered that the matter is a likely remittal pursuant to this section then, again, the matter can be put over to the end of the sittings to enable a decision to be made.

Where the matter is a sexual offence then, unless there is express approval from the Director, or in his absence the Deputy Director, there is to be no agreement to remit pursuant to s308.

In all other instances, if, after consideration of all of the material, there is merit in the matter being remitted and such a decision can be made quickly, then a brief memorandum to the Committee for their consideration is required. The memorandum will need to cover the prospects of conviction and a conclusion as to whether the punishment as provided in s308(4) of the *Criminal Code* is sufficient. The agreement of a single member of the Committee is all that is required for a remission on the same charge. Written approval should be saved to the file. An indictment must be engrossed and filed with the Supreme Court prior to a matter being remitted pursuant to s308.

Conversely, if counsel considers the punishment provided in that sub-section does not adequately cover the nature and circumstances of the crime then please include that in the memorandum to the Committee.

Section 308 applies to trials thus prior to a remittal an indication in court should be sought from defence counsel that the matter will be a trial. If the matter is remitted an accused person can still plead guilty (s308(3)). However, it should be pointed out to the magistrate that it is a late plea.

Section 308 hearings in the Magistrates Court should be conducted by this Office and not Police Prosecution Services. A new summary file will need to be created.

Counsel should not consent to a sentence indication or concede a particular sentencing range is permissible as that would offend the principles in *Barbaro and Zirilli v R* [2014] HCA 2.

An appeal from a conviction or sentence of a magistrate is to the Court of Criminal Appeal.

Appellate court ordered retrials

Where a conviction is overturned by the Court of Criminal Appeal due to an error at the original trial and the court orders a retrial, consideration is required as to whether there should be a retrial. In determining this the following considerations apply:

- The first issue to be decided is whether there is still a reasonable prospect of conviction or has evidence from the original trial become unavailable or been ruled inadmissible by the Court of Criminal Appeal which would lead to the conclusion that there is no longer a reasonable prospect of conviction.
- If there is still a reasonable prospect of conviction, the following public interest factors apply:
    - Has the accused already served all or a substantial amount of the sentence. If so, the following public interest factors apply:
        - The importance of having a conviction for a serious offence
        - Is a conviction required for the accused to not be eligible for a particular licence
        - Is a conviction required for a mandatory reporting condition
        - Is a conviction required for a pecuniary penalty or forfeiture order to be made
    - The views of the complainant, including the likely impact a retrial would have on the well-being of the complainant or any vulnerable witnesses
    - The cost of a retrial to the community and the accused person
    - Any other public interest factors listed in the prosecution guidelines that may not have been present at the time of signing the original indictment

Where a retrial has been ordered by the Court of Criminal Appeal the same procedure applies to the decision to retry a person as those set out earlier in this section for indictments, nolles prosequi and discharges.

Notification of persons charged with criminal offences resulting in death

Within four days of charging a suspect with an offence that has resulted in death, for example, murder, manslaughter, negligent driving causing death, and causing death by dangerous driving, the senior investigating officer must email the Office of the Director of Public Prosecutions at dpp.notifications@justice.tas.gov.au. The notification must include the following details:

- The date of the notification
- The date of the offence(s)
- The date of arrest/charging
- A list of crime(s) charged
- Any dates the accused has appeared or is to appear in court
- Whether the accused has been remanded in custody or released on bail with conditions, and if so, an outline of the conditions of bail
- The accused's personal details, including their full name, residential address, date of birth, occupation and relationship to the complainant
- The deceased's personal details, including their full name and date of birth
- Contact details for the next of kin (or any other person the investigating officer has been liaising with and considers it necessary and appropriate for WAS to have contact with) and a brief outline of any contact that has been had with that person(s)
- An outline of the circumstances of the offence(s)
- Details of any interview conducted with the accused/co-accused, including the date of the interview, a DVD reference number and a summary of any admissions made during the course of the interview
- The name of the accused's legal representative, if known
- A summary of the forensic or medical evidence obtained
- A summary of the major corroborative witnesses, together with personal details, including their full names, residential addresses and contact numbers
- The names and contact details of the main investigating officers.

If copies of the following documents are unable to be forwarded at the time of the notification, they are to be forwarded within seven days of the notification:

- Copy of any eye witnesses statements
- The complaint containing the charges
- The accused's interview
- The medical report

Where documents are subsequently released to the accused or defence counsel pursuant to the *Right to Information Act 2009* or ss 55(6) or 57(3) of the *Justices Act 1959,* a scanned copy of those documents should simultaneously be emailed to the Office.

The email will be forwarded to the WAS manager who will allocate the matter to a WAS officer. Within two days of receipt of the notification WAS will contact the senior investigating officer to discuss making contact with the next of kin. Given the sensitive nature of such matters and the possibility of ongoing investigations, WAS will not contact the next of kin until they have confirmed with the senior investigating officer that it is appropriate to do so. After consultation with the senior investigating officer, WAS will contact the next of kin or family member to provide advice as to the usual course of proceedings, with an assurance that the matter will be dealt with as speedily as possible.

In circumstances where the complaint is generated by the Office of the Director of Public Prosecutions, the prosecutor with carriage of the matter will email dpp.notifications@justice.tas.gov.au on the date the complaint is lodged.

Police Prosecution Services will retain carriage of the matter until an election is made. It is recognised that families of a deceased are particularly vulnerable in the criminal justice system. The Office recognises the importance of keeping the next of kin informed of the decision to prosecute or discharge. Where possible, the next of kin is to be kept informed of developments in the progress of the matter.

The decision to prosecute or recommend discharge is considered in the same way as for any indictable crime (refer Indictments, nolles prosequi and discharges). In most instances, it will involve a discussion with the deceased's next of kin before a final determination is made. In the event it is determined that an indictment should not be filed, the next of kin will be informed of that decision as early as possible. This is to be conducted by inviting the next of kin into the Office to enable those reasons to be explained to them by the prosecutor. Where possible, a WAS officer will be present when this takes place. The next of kin or family member can request the Director to review the decision and should be informed of this right.

Judge-alone trials

Parliament has introduced legislation allowing for trials to be heard and determined by a judge alone in particular circumstances.

A party to proceedings in respect of a crime may apply to the court for an order to have the trial determined by a single judge in place of a trial by jury (s361AA(1) of the *Criminal Code*). Applications may only be made within the three-month period immediately after the accused has been committed to the Supreme Court, unless the court is satisfied the applicant has provided a reasonable explanation for the delay.

A prosecutor may only apply for a trial to be determined by a single judge in place of a trial by jury if the accused person has given informed consent (s361AA(2)(b)(i)) or if there is a significant risk that an offence under s63 of the *Juries Act 2003* may occur if the accused person is tried by a jury (ss361AA(2)(b)(ii) and (8)).

The court must not make an order for a judge-alone trial unless it is satisfied that:

- The accused has given informed consent to the making of the order (unless the application is made by the Crown on the basis of s63 of the *Juries Act 2003* (s361AA(8))
- It is in the interests of justice for the order to be made
- If the accused has been charged with more than one crime or offence and the offences are to be tried together, the order is to relate to all charges
- If there is more than one accused person to be tried together for the crime, an application has been made, under this section in relation to the crime, by each accused person to be tried together and that each accused has given informed consent to the making of the order (unless the application is made by the Crown on the basis of s63 of the *Juries Act 2003*).

The accused will have given informed consent if the court is satisfied that they understand the nature and effect of the proposed order, and they have been provided with legal advice, or have been offered or advised to obtain such legal advice, and they have refused (ss361AA(6)(a) and (6)(b)).

Where an accused person has been provided with legal advice in relation to the making of an order the practitioner who provided the advice must certify in writing that the legal advice was provided, and they believe that informed consent has been freely given (s361AA(6)(c)).

In determining whether it is in the interests of justice to make an order for a judge-alone trial, the court is to take into account whether the relevant crime(s)

involve an element or a question of fact that is more appropriately determined by a jury to ensure that community standards and opinions are reflected. This includes, but is not limited to, questions of reasonableness, dangerousness, indecency, negligence and obscenity. The court may take into account any other matter or circumstance that it considers relevant (s361AA(7)(b)) and inform itself in any manner it thinks appropriate (s361AA(4)).

Prosecutors should carefully consider whether any crime intended to be included on the indictment contains a question or element of fact that is best determined by a jury in order to ensure the criminal justice system is appropriately reflective of community views and standards. Examples of crimes where a judge-alone trial may not be appropriate include:

- Manslaughter
- Indecent assault
- Committing an indecent act with a child or young person
- Procuring a child or young person for sexual abuse
- Communications with intent to procure a child or a young person
- Indecency
- Crimes involving possession, production or distribution of child exploitation material
- Dangerous driving
- Dangerous driving causing grievous bodily harm
- Dangerous driving causing death
- Failure to report the killing of a person
- Crimes involving a consideration of self-defence, defence of another or defence of property
- Crimes involving a consideration of the defence of honest and reasonable mistake

This list is not intended to be exhaustive.

In addition, in determining whether to oppose an application for a judge-alone trial, prosecutors should have regard to the following:

- The important role of juries, as representatives of the community, in the administration of justice
- Whether the application was made within the statutory time limit or whether there is a reasonable explanation for the delay
- Whether any potential prejudice may be adequately addressed by directions to the jury by the trial judge

- Whether the trial involves highly technical or complex evidence
- The length of the trial
- The efficiency of the prosecution process.

The approval of the Director or Deputy Director must be sought before an application for a judge-alone trial is consented to by the Crown.

On the rare occasion in which there is a real risk that an offence under s63 of the *Juries Act 2003* may be committed if a matter is tried by a jury, an application by the Crown for a judge-alone trial can only be made with the authorisation of the Director of Public Prosecutions.

If an application for a judge-alone trial is made and then withdrawn before it is determined, an accused is not permitted to make a further application unless the court is satisfied that exceptional circumstances exist (s361AA(10)).

Where an order is made for a judge-alone trial, it can only be revoked if the court is satisfied the information on which the order was made was false or misleading, or otherwise considers there are reasonable grounds to revoke it (s361AA(11)).

If a judge-alone trial is conducted, in accordance with s371 of the *Criminal Code* Crown counsel will address the court orally and will not provide written submissions (s361AA(9)).

If an order for a judge-alone trial is made, the judge must give reasons for the verdict, including the principles of law applied and the findings of fact relied upon (s383 of the *Criminal Code*).

Appeals in relation to judge-alone trials

Section 361AB of the *Criminal Code* allows a party to proceedings to appeal to the Court of Criminal Appeal a decision of a court to make, or refuse to make, an order for a judge-alone trial.

Where a judge-alone trial has occurred, the Crown can appeal against a decision on a question of law or fact, or a verdict on the grounds that it is unreasonable or cannot be supported having regard to the evidence (s401(2)(bb)).

Sexual crime guidelines

These guidelines recognise the need for sensitivity when dealing with the victims of sexual offences and aim to ensure the provision of advice to investigating authorities, the recommendation for prosecution and the disposition of matters is completed in a timely manner. The Tasmanian Charter of Rights for Victims of Crime provides the background to this approach.

These guidelines also recognise that, as with any other crime, a prosecution can only proceed in accordance with the prosecution guidelines. In particular, a prosecution cannot proceed unless, on the available, relevant and admissible evidence, there is a reasonable prospect of conviction (s310(4) of the *Criminal Code*).

Charging advice to Tasmania Police

The Office of the Director of Public Prosecutions provides an advice service to Tasmania Police prior to charging a person(s) with sexual assault crimes in circumstances where there may be a question as to the appropriateness of charges or the sufficiency of evidence.

The advice is provided for any sexual assault crime that could be prosecuted by indictment but also includes crimes where a defendant may elect, pursuant to s72 of the *Justices Act 1959,* to have the matter prosecuted summarily or where the defendant is a youth and the crime is not a prescribed offence (s161 of the *Youth Justice Act 1997*).

Advice will only be provided upon receipt of a police file from the inspector in charge of the relevant division of Tasmania Police.

The request for advice is to be made to the Office and marked to the attention of the Sexual Assault Liaison Clerk (SALC) (a person nominated by the Director to manage sexual assault and family violence offence referrals).

The police file must contain all the available evidence including a covering letter outlining the nature of the request for advice and, where possible, a summary of the material.

The request for advice and the police file is assigned to a designated senior prosecutor who possesses sufficient relevant experience to review the file in order to make a determination as to whether the laying of charges ought be recommended.

Once the police file is reviewed, the advice is provided to Tasmania Police in writing. The police file will ordinarily be returned with the letter of advice.

All advice is provided upon consideration of whether there is a reasonable prospect of conviction and is based on all the available evidence, including that unfavourable to the prosecution. Where appropriate, the advice will refer to any

legal principle or authority that would impact on the admissibility of evidence or the likelihood of conviction.

Ordinarily, the advice returned with the police file will be provided within a period of six weeks, unless the nature of the case is of some complexity.

The letter of advice will identify the evidence considered, including not only the witness statements and references to the subject report prepared by the investigating officer but also any other sources of relevant information.

Ideally, where the statement of the complainant comprises an audio and/or visual record of interview they will be viewed. However, recourse will sometimes be had to the summaries provided in the subject report (or similar) without recourse to the actual interview. In these circumstances, this will be stated in the letter of advice. Similarly, if an accused has participated in an audio and/or visual record of interview, recourse may be had to the summary provided in the subject report. Again, if so, this will be stated in the letter of advice.

If further investigations are considered appropriate before providing the final advice, the file will be returned with an interim opinion. The investigating officer will be invited to resubmit the file once those investigations have been carried out.

In most cases, the decision whether or not to charge is based upon the complainant's account and an assessment of the weight of any corroborating evidence. In most cases, it is sufficient to base the assessment of the evidence upon the written statement of the complainant or upon review of the video statement of the complainant.

However, in some circumstances, it may be desirable to meet with the complainant prior to providing charging advice to police in order to clarify aspects of their statement, particularly if there are internal or external inconsistencies in their account. In such cases, an assessment of the credibility of the complaint may have an impact upon the decision to charge.

A physical meeting with the complainant need not be undertaken, especially if he or she resides in another jurisdiction. It is sufficient for video link facilities to be used or contact made via other audio and/or visual means. Consideration should be had as to whether or not a Witness Assistance Service (WAS) officer should be involved to provide support for the complainant during the briefing.

Individual charges or a count of persistent sexual abuse of a child or young person

Normally the law requires that a count in an indictment alleges one specific identified occasion where it is alleged that criminal conduct occurred. It is not sufficient to particularise a time period in the indictment and lead evidence of numerous specific acts or evidence of a general nature alleging crimes of a particular type without specifying an individual occasion (see *S v R* (1989) 168

CLR 266). This can lead to difficulty, particularly with child complainants where the complaint is of many allegations of unlawful sexual acts over many years. As a result, Parliament has enacted the offence of persistent sexual abuse of a child [or young person] (s125A of the *Criminal Code*) whereby it is only necessary to particularise three separate unlawful sexual acts, only one of which has to have occurred in this State (s125A(6A)(b) of the *Criminal Code*). It is not necessary to prove the date or the exact circumstances in which any of the unlawful sexual acts were committed (s125A(4)(b) of the *Criminal Code*).

The charge of persistent sexual abuse of a child [or young person] can only be recommended after authorisation is obtained from the Director (s125A(5)). This will depend on an assessment as to whether at least three separate unlawful sexual acts have been identified, as defined in s125A. When taking statements from a complainant, police and prosecutors should ask the complainant to particularise as many individual episodes of unlawful acts as possible.

Ordinarily when at least three unlawful sexual acts are identified as occurring within a course of unlawful sexual conduct the charge of persistent sexual abuse will be recommended.

However, there may be instances where notwithstanding that more than three separate acts can be identified it is considered inappropriate to charge with the s125A crime. This will generally be the case where all allegations can be individually particularised. In the event that individual charges are preferred, there will be a recommendation as to the number and nature of the acts that ought to be particularised as crimes on the complaint.

In cases where a request has been made and prosecution under s125A is authorised, the authority will be provided at the time of the letter of advice recommending the appropriate charges to be laid.

Providing oral advice

In exceptional circumstances, and if urgent advice is required, i.e. where a complainant's safety may be at risk, a suspect is in custody, there is the possibility of scene or evidence contamination or there is a risk the suspect may flee the jurisdiction, such advice may be communicated to the investigating officer orally. However, oral advice should always be confirmed in writing.

Decision not to charge

When Tasmania Police charge a person they need only be satisfied that the legal ingredients are present to justify the laying of a complaint, i.e. a prima facie case has been made out. This standard is less than the standard required to be met when assessing whether there is a reasonable prospect of conviction.

It is not desirable to advise Tasmania Police to charge a person unless, at the time of giving the advice, the evidence would be capable of raising a reasonable prospect of conviction. To do otherwise would unrealistically raise the expectations of the complainant. A letter of advice recommending that

charges ought not be laid will include an explanation to the investigating officer outlining why it has been determined that upon the evidence currently provided no charges are recommended. It will also provide sufficient information to enable the investigating officer to explain the decision to interested parties, including the complainant.

In circumstances where a decision is made to recommend no charges, the designated senior prosecutor (unless he or she is a Principal Crown Counsel) will have the advice reviewed by a member of the Committee before it is sent to the investigating officer.

The complainant and/or their legal representative is not ordinarily entitled to receive a copy of the letter advising Tasmania Police not to charge a suspect with a sexual assault crime. However, in some cases, it may be appropriate to send a letter to the complainant explaining the reasons for the decision or to meet with them for the purpose of explaining the reasons behind the decision.

Release of the letter of advice can only be authorised by the Director.

There is no right of appeal against a decision not to recommend charges. However, the complainant can request a review of the decision. The complainant can also request the Director to review the decision, if it was not made by the Director in the first place.

Recommendation to prosecute or discontinue

The following guidelines are intended to operate after charging by Tasmania Police. They should not in any way be taken to discourage earlier consultation between investigating officers and the Office.

The charging of a person with sexual crimes creates a particular expectation in the complainant that such charges will be proceeded with and raises particular disappointment and possibly further trauma if they are not. Therefore, where possible, consultation before charging is desirable.

As soon as a person is charged with an indictable sexual crime the Office must be notified of the relevant details by email. This is to ensure that the Office complies with the Tasmanian Charter of Rights for Victims of Crime.

The notification is to be emailed to the Office by the senior investigating officer within four working days of charging a suspect. The notification must include the following details:

- the date of the notification
- the date of the offence(s)
- the date of arrest/charging
- a list of the crimes charged

- the original appearance date in court, and any subsequent dates
- whether the accused has been remanded in custody or released on bail with conditions and, if so, an outline of the conditions
- the accused's personal details, including their full name, residential address, date of birth, occupation and relationship to the complainant
- the complainant's personal details, including their full name, residential address, date of birth and contact numbers
- an outline of the circumstances of the offence(s)
- details of any interview conducted with the accused/co-accused, including the date of the interview, a DVD reference number and a summary of admissions made during the course of the interview
- the name of the accused's legal representative, if known
- the nature of the statement made by the complainant, including whether it was obtained by audio visual means
- a summary of the forensic or medical evidence obtained
- a summary of the major corroborative witnesses, together with personal details, including their full names, residential addresses and contact numbers
- the names and contact details of the main investigating officers

If copies of the following documents are unable to be forwarded at the time of the notification, they are to be forwarded within seven days of the notification:

- the complainant's statement (or copy DVD, if it is an audio visual statement)
- the complaint containing the charges
- the accused's interview
- the medical report (a copy of the sexual assault investigation kit (SAIK) will suffice)

Where documents are subsequently released to the accused or defence counsel pursuant to the *Right to Information Act 2009* or ss56(3) or 57(3) of the *Justices Act 1959*, a scanned copy of those documents should simultaneously be emailed to the Office for the attention of the SALC.

The SALC will contact the complainant by letter within two days of receipt of the notification providing advice as to the usual course of proceedings, with an assurance that the matter will be dealt with as speedily as possible. If the complainant is a young child, or there is a reason why making meaningful direct

contact would be impractical or undesirable, or if any other exceptional circumstances exist, such contact will be with the parents or guardians of the complainant. In every other circumstance contact will be established directly with the complainant.

Police Prosecution Services will retain carriage of the matter until an election is made.

It is recognised that complainants in sexual offence crimes are particularly vulnerable to the criminal justice system process. The Office recognises the importance of keeping the complainant informed of the decision to prosecute or to discharge.

The complainant, where possible, is to be kept informed of developments in the progress of the matter. The SALC will forward a copy of the notification to the WAS. The WAS manager will allocate the matter to a WAS officer who then has the responsibility of contacting the complainant and is available to provide updates, e.g. the name of the prosecutor allocated to their case, anticipated dates for preliminary proceedings, meetings with the prosecutor and/or the date of trial.

The decision to prosecute or recommend discharge is considered in the same way as for any indictable crime (see Indictments, nolles prosequi and discharges). In most instances, it will involve a discussion with the complainant before a final determination is made.

In the event it is determined that an indictment should not be filed, the complainant will be informed of that decision as early as possible. This is conducted by inviting the complainant into the Office to enable those reasons to be explained to them by the prosecutor. Where possible, a WAS officer will be present when this takes place. If this is not possible, the notification may be communicated in writing by the prosecutor. Again, the complainant can request the Director to review the decision and they should be informed of this right.

The Assistant Commissioner (Operations) is also notified in writing of the decision not to file an indictment. The notification will explain the reasons why there is no reasonable prospect of conviction or why the matter will not be prosecuted.

Once a final decision has been made to discharge an accused, the decision will not be reviewed unless it is plainly wrong, i.e. it was based on incorrect or irrelevant material, or it was unreasonable, or unless new evidence becomes available.

Prosecuting sexual assault crimes

The prosecution of sexual crimes must not be undertaken without consideration of the provisions of the *Evidence (Children and Special Witnesses) Act 2001*. In appropriate circumstances, there should be a pre-recording of the evidence of child witnesses or sexual assault victims who are particularly vulnerable.

Where consent is not an element of the offence or an available defence, the language of consent should not be used by prosecutors in any sexual assault prosecution. In respect to prosecutions for persistent sexual abuse of a child or young person, prosecutors must identify the unlawful acts by reference to the crime.

Complainants in sexual crimes must be given the opportunity to prepare a victim impact statement (VIS). This is not ordinarily done by the prosecutor. The services which provide assistance to the complainant are the Witness Assistance Service (WAS) or the Victims of Crime Service (VOCS).

Where there is material in a VIS that is inadmissible, then it is the duty of the prosecutor to either make appropriate amendments to the VIS, or draw the material to the attention of the presiding judicial officer.

A copy of the VIS must be provided to the accused before it is presented to the judicial officer (s81A of the *Sentencing Act 1997* and rules 4-7 of the *Criminal Rules 2006*).

Where there has been an appeal against conviction and/or sentence, the complainant will ordinarily be notified of the lodging of the appeal, provided with an explanation of the appeal process and advised as to the outcome of the appeal.

Failing to report the abuse of a child

Section 105A of the *Criminal Code* creates a crime of failing to report the abuse of a child to police. The crime occurs where a person "has information that leads the person to form a reasonable belief that an *abuse offence* has been committed against another person who was a child at the time of the alleged offence, and fails without *reasonable excuse* to disclose that information to a police officer as soon as practicable".

An *abuse offence* is defined within s105A and consists of sexual and physical assaults, as well as offences of neglect, ill-treatment, stalking or bullying and abduction.

A number of statutory defences are provided for in the section, including where the person is a child themselves at the time they obtain the relevant information, or where the alleged victim has attained the age of 18 years when the person obtained the information and the person has reasonable grounds to believe that the alleged victim does not wish the information to be reported to police.

Section 105A(4) provides a non-exhaustive list of matters that may constitute a *reasonable excuse* for failing to disclose the information to a police officer, which include:

- If the person fears on reasonable grounds that disclosing the information would endanger the safety of any person (other than the person alleged to have committed the child abuse offence)
- If reporting the information would disclose information in respect of which there is a lawful claim or right of privilege (this does not include information disclosed during a religious confession)
- If the information is generally available to members of the public.

A prosecution under this section can only be commenced with the written authority of the Director of Public Prosecutions. Ordinarily, a charge under this section will only be brought where the person was in a position of authority or control over the alleged victim and/or perpetrator, and failed to report the matter to police. Consideration will be given to the nature of the position of authority the person holds (e.g. whether the person is the parent, guardian or carer, or are in an institutional setting) and any reason the person proffered as to why they did not report the abuse.

In circumstances where a prosecutor become aware of evidence that a person may have committed the offence of failing to report the abuse of a child (either through witness briefings or following a review of the police file), the prosecutor is to seek advice from the Director or Deputy Director. In determining whether to refer the matter to Tasmania Police for investigation, factors that will be considered include:

- the nature of the relationship between the victim and the person
- the nature of the relationship between the person and the accused
- any reason the person proffered as to why they did not report the abuse
- the complainant's attitude to the matter

If a complainant, during the prosecution process, discloses that a further alleged abuse offence was committed against them when they were a child, the prosecutor is to:

- Consider whether an ex officio charge could be included in the indictment and prepare a memorandum to the Committee. (It will be necessary to obtain a supplemental proof of evidence or request police to obtain a further statutory declaration). In these circumstances, it is not necessary to disclose the information to a police officer unless further investigation is needed.
- If the alleged abuse offence was committed by a person other than the accused, inform a police officer. The complainant should be informed that police will be notified.

If a witness, other than the complainant, discloses to a prosecutor that an abuse offence was committed against them when they were a child, the prosecutor is to inform a police officer. The witness should be informed that police will be notified.

Family violence offence guidelines

These guidelines recognise the need for sensitivity when dealing with victims of family violence offences and the complexity often associated with such offences. The aim is to ensure the provision of advice to investigating authorities with recommendations as to prosecution and/or disposition of matters in a timely and sensitive manner.

These guidelines also recognise that, as with any other crime, a prosecution can only proceed in accordance with the prosecution guidelines. In particular, a prosecution cannot proceed unless, on the available, relevant and admissible evidence, there is a reasonable prospect of conviction (s310(4) of the *Criminal Code*).

What is family violence?

Section 7 of the *Family Violence Act 2004* defines "family violence" as follows:

(a) any of the following types of conduct committed by a person, directly or indirectly, against that person's spouse or partner:

  (i) assault, including sexual assault;

  (ii) threats, coercion, intimidation or verbal abuse;

  (iii) abduction;

  (iv) stalking within the meaning of section 192 of the *Criminal Code*;

  (v) attempting or threatening to commit conduct referred to in subparagraph (i), (ii), (iii) or (iv); or

(b) any of the following:

  (i) economic abuse;

  (ii) emotional abuse or intimidation;

  (iii) contravening an external family violence order, an interim FVO, an FVO or a PFVO; or

(c) any damage caused by a person, directly or indirectly, to any property –

  (i) jointly owned by that person and his or her spouse or partner; or

  (ii) owned by that person's spouse or partner; or

  (iii) owned by an affected child.

Economic and emotional abuse or intimidation are defined in ss8 and 9, respectively.

Who is a family member?

Family relationship is defined in the Act as follows:

> "Family relationship" means a marriage or significant relationship within the meaning of the *Relationships Act 2003*, and includes a relationship in which one or both of the parties is between the ages of 16 and 18 and would, but for that fact, be a significant relationship within the meaning of the Act.

Significant relationships are defined in s4 of the *Relationships Act 2003* as follows:

> (1) For the purposes of this Act, a significant relationship is a relationship between two adult persons –
>
> (a) who have a relationship as a couple; and
>
> (b) who are not married to one another or related by family.
>
> (2) If a significant relationship is registered under Part 2, proof of registration is proof of the relationship.
>
> (3) If a significant relationship is not registered under Part 2, in determining whether two persons are in a significant relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:
>
> (a) the duration of the relationship;
>
> (b) the nature and extent of common residence;
>
> (c) whether or not a sexual relationship exists;
>
> (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
>
> (e) the ownership, use and acquisition of property;
>
> (f) the degree of mutual commitment to a shared life;
>
> (g) the care and support of children;
>
> (h) the performance of household duties;
>
> (i) the reputation and public aspects of the relationship.
>
> (4) No finding in respect of any of the matters mentioned in sub section (3)(a) to (i), or in respect of any combination of them, is to

be regarded as necessary for the existence of a significant relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

Charging advice

It is not uncommon for an accused person to be charged with an indictable crime and a number of related summary offences. Where possible, all charges should be included on the one complaint.

Police Prosecution Services should be directed that at the time of a plea being entered to any indictable matter all other associated charges are to be adjourned sine die to avoid separation of conduct.

When a file is sent to the Office it must include:

- copy files for any other family violence charges pending against the accused
- an annotated record of prior convictions highlighting any convictions for family violence related offences including details of the complainant and particulars of the complaint

Provision of this information is necessary to enable the Office to consider whether there is any tendency or relationship evidence and, where there is a course of conduct, that all matters (where possible) are dealt with in the one trial and/or hearing to avoid the complainant having to give evidence on multiple occasions.

Persistent family violence

The charge of persistent family violence (s170A of the *Criminal Code*) will only be considered where there is serious criminal conduct. The Director will normally only authorise this charge where there are three occasions of indictable offences. However, this is a guideline. In circumstances where there are two occasions of serious indictable conduct and other serious or sustained summary offences, the Director will consider whether this charge should be preferred.

Factors to be considered include:

- Where there are allegations of assault a determination must be made whether the matter would ordinarily be charged summarily on complaint (s35 of the *Police Offences Act*) or charged on indictment (s184 of the *Criminal Code*) (see Assault charging guidelines)
- The period of time the alleged conduct persisted

- Any act the accused is alleged to have done to encourage, or prevent, the complainant from reporting the matter to police

- Whether the offences were committed in breach of an interim or police family violence order or a court ordered interim or family violence order.

Period of offending

Acts which occur within the same event or occurrence will not be relied upon as constituting separate occasions. There must be three separate occasions of family violence offences.

In *Bellemore v Tasmania* (2006) 16 Tas R 364 Slicer J, in considering a ground of appeal that challenged the validity of the then newly enacted s125A, said at [94]-[95] -

> It would appear that Parliament intended to provide for some care in the exercise of discretion in the use of the wide power afforded and the bringing of proceedings within the section by requiring (s125A(7) prosecutions to be commenced only with "the written authority of the Director of Public Prosecutions." Whether the enactment of the subsection provides such protection is a different matter which cannot be a ground for a constitutional challenge (see *Lafitte v Samuels* [1972] 3 SASR 1; *Lodhi v The Queen* (2006) 65 NSWLR 573; *R v Cuerrier* (1998) 127 CCC 3d 1).
>
> **One form of abuse of power which might arise is in circumstances where the prosecution relies on an initial or preparatory act (indecent touching), together with another act, both or all occurring within the same event or occurrence, as constituting two or three "occasions" so as to activate the procedural and evidentiary provisions of s125A.** Again, inappropriate use of power in a particular circumstance would not provide a basis for constitutional challenge, but one for the strict construction of the terms of the enactment (*Sarawati v The Queen* (1991) 172 CLR 1). Consideration of that potential for the misuse of statutory power is not required on the hearing of this appeal. [**emphasis added**].

Time limitation period

This crime does not extend the time limit for family violence offences that may be imposed by any other Act.

Charging advice to Tasmania Police

At the time of charging, all family violence related charges should be included on the one complaint. A plea should be entered to the indictable offences and all associated charges should be adjourned sine die pending the outcome of the indictable offence. The file will be reviewed by the Office to determine if -

- a charge of persistent family violence will be authorised

- there is any tendency or relationship evidence and, where there is a course of conduct, that all matters (where possible) are dealt with in the one trial and/or hearing to avoid the complainant having to give evidence on multiple occasions.

After charging

As soon as a person is charged with an indictable family violence crime the Office must be notified of the relevant details by email. This is to ensure that the Office complies with the Tasmanian Charter of Rights for Victims of Crime.

The notification is to be emailed to the Office by the senior investigating officer within four working days of charging a suspect. The notification must include the following details:

- the date of the notification
- the date of the offence(s)
- the date of arrest/charging
- a list of the crimes charged
- the original appearance date in court, and any subsequent dates
- whether the accused has been remanded in custody or released on bail with conditions and, if so, an outline of the conditions
- the accused's personal details, including their full name, residential address, date of birth, occupation and relationship to the complainant
- the complainant's personal details, including their full name, residential address, date of birth and contact numbers
- a copy of the facts for the prosecutor

If copies of the following documents are unable to be forwarded at the time of the notification, they are to be forwarded within seven days of the notification:

- details of any interview conducted with the accused/co-accused, including the date of the interview, a DVD reference number and a summary of admissions made during the course of the interview
- the name of the accused's legal representative, if known
- the nature of the statement made by the complainant, including whether it was obtained by audio visual means
- a summary of the forensic or medical evidence obtained
- a summary of the major corroborative witnesses, together with personal details, including their full names, residential addresses and contact numbers
- the names and contact details of the main investigating officers

- the complainant's statement (or copy DVD, if it is an audio visual statement)
- the complaint containing the charges
- the accused's interview
- the medical report (if any)

Where documents are subsequently released to the accused or defence counsel pursuant to the *Right to Information Act 2009* or ss56(3) or 57(3) of the *Justices Act 1959*, a scanned copy of those documents should simultaneously be emailed to the Office for the attention of the Family Violence Liaison Clerk (FVLC).

The FVLC will contact the complainant by letter within two days of receipt of the notification providing advice as to the usual course of proceedings, with an assurance that the matter will be dealt with as speedily as possible. If the complainant is a young child, or there is a reason why making meaningful direct contact would be impractical or undesirable, or if any other exceptional circumstances exist, such contact will be with the parents or guardians of the complainant. In every other circumstance contact will be established directly with the complainant.

Police Prosecution Services will retain carriage of the matter in the normal manner until a committal order is made.

It is recognised that victims of family violence offences are particularly vulnerable in the criminal justice system process. The Office recognises the importance of keeping the complainant informed of the decision to prosecute or to discharge.

The complainant, where possible, is to be kept informed of developments in the progress of the matter. The FVLC will forward a copy of the notification to the WAS. The WAS manager will allocate the matter to a WAS officer who then has the responsibility of contacting the complainant and is available to provide updates, e.g. the name of the prosecutor allocated to their case, anticipated dates for preliminary proceedings, meetings with the prosecutor and/or the date of trial.

The decision to prosecute or recommend discharge is considered in the same way as for any indictable crime (see Indictments, nolles prosequi and discharges). In most instances, it will involve a discussion with the complainant before a final determination is made.

In the event it is determined that an indictment should not be filed, the complainant will be informed of that decision as early as possible. This is conducted by inviting the complainant into the Office to enable those reasons to be explained to them by the prosecutor. Where possible, a WAS officer will be present when this takes place. If this is not possible, the notification may be

communicated in writing by the prosecutor. Again, the complainant can request the Director to review the decision and should be informed of this right.

Returning the file for completion

When a file involving family violence is returned to Tasmania Police for completion the prosecutor returning the file must request Tasmania Police to:

- provide any records relating to police intervention during the course of the relationship
- if known, advise whether the complainant has previously been involved in a family violence prosecution
- if not included in the first instance, provide copy files for any other family violence charges pending against the accused and an annotated record of prior convictions, highlighting any convictions for family violence related offences. where records are available, including details of the complainant and particulars of the complaint.

Giving evidence

A prosecutor must consider the compellability of witnesses in any proceedings (s18 of the *Evidence Act 2001*). A prosecutor ought to make witnesses aware of this provision and invite them to obtain independent legal advice as to their rights and obligations, if applicable.

In all family violence matters the *Evidence (Children and Special Witnesses) Act 2001* (the Act) must be considered. All complainants and many witnesses potentially have access to alternative arrangements for giving evidence in court to limit, to the greatest extent practicable, the distress or trauma suffered (see Witnesses).

In any prescribed proceedings where a witness may be declared a “special witness” counsel should consider making an application to have the witness declared a special witness, regardless of whether the relevant witness will give evidence live in court, via closed circuit television or in a pre-recorded hearing. The Act provides that where a witness is declared a special witness in any prescribed proceedings the court must (where facilities are available) make an audio visual record of the evidence (s7A). In the event of a subsequent trial or retrial this recording may be admitted into evidence (s7B).

In situations where an audio visual recording of the evidence will be made, please liaise with court staff to ensure that the recording settings are modified so that only the image of a witness is recorded during the evidence and that any recording is at highest possible resolution.

Please note that the Criminal Justice Report released following the Royal Commission into Institutional Responses to Child Sexual Abuse identified recording a complainant’s evidence in order to avoid the need for a complainant

to give evidence again if there is a subsequent trial as an important procedure in child sexual abuse prosecutions.

Bail applications

See Bail guidelines.

When a complainant retracts their complaint

In some family violence matters the complainant or victim may retract their complaint or ask that the matter not proceed. In these circumstances, it is the policy of the Office to take into account the complainant's wishes, and reasons for them. However, this is not the only factor to be taken into account when determining whether to proceed.

Other factors include:

- whether it is believed the complainant's wishes are freely expressed
- any psychological effect on the complainant in proceeding
- the seriousness of the matter
- the strength of the prosecution case
- the need for deterrence of the alleged offender

Sentencing considerations

Upon conviction for a family violence offence, where relevant, a prosecutor should refer the court to s13 which provides:

> When determining the sentence for a family violence offence, a court or a judge –
>
> (a) may consider to be an aggravating factor the fact that the offender knew, or was reckless as to whether, a child was present or on the premises at the time of the offence, or knew that the affected person was pregnant; and
>
> (b) must take into account the results of any rehabilitation program assessment undertaken in respect of the offender and placed before the court or judge.

The prosecutor must consider seeking a family violence order (FVO) from the sentencing judge. Section 36 provides:

> Where, in proceedings for a family violence offence, the court or a judge is satisfied on the balance of probabilities as to the matters set out in section 16(1), the court or judge may make an order under this Act in addition to any other order which the court or judge may make.

Section 18 sets out the criteria for making an FVO. In particular, in determining whether to seek an FVO a prosecutor must take into account:

- the future risk of harm to the complainant and/or affected child
- the wishes of the complainant (the weight of which will depend on the circumstances of the case including the gravity of the risk and the interests of any affected child)
- the length of any FVO (an order can be for a finite or indefinite period (s19)).

Charge negotiation

Charge negotiation involves negotiations between the defence and the prosecution in relation to the charges to proceed. Such negotiations may result in the accused pleading guilty to fewer than all the charges he or she is facing, or to a lesser charge or charges, with the remaining charges not being proceeded with.

These guidelines have earlier referred to the care that must be taken in choosing the charge or charges to be laid. Nevertheless, circumstances can change and new facts can come to light. Agreements as to charge or charges and plea must be consistent with the requirements of justice.

A proposal should not be entertained by the prosecution unless:

- the charges to be proceeded with bear a reasonable relationship to the nature of the criminal conduct of the accused
- those charges provide an adequate basis for an appropriate sentence in all the circumstances of the case
- there is evidence to support the charges

Any decision whether or not to agree to a proposal advanced by the defence, or to put a counter-proposal to the defence, must take into account all the circumstances of the case and other relevant considerations including:

- whether the accused is willing to co-operate in the investigation or prosecution of others, or the extent to which the accused has done so
- whether the sentence that is likely to be imposed if the charges are varied as proposed would be appropriate for the criminal conduct involved (taking into account such matters as whether the accused is already serving a term of imprisonment)
- the desirability of prompt and certain resolution of the case
- the accused's antecedents
- the strength of the prosecution case
- the likelihood of adverse consequences to witnesses
- in cases where there has been a financial loss to the State or any person, whether the accused has made restitution or arrangements for restitution
- the need to avoid delay in the resolution of other pending cases
- the time and expense involved in a trial and any appeal proceedings

- the views of the investigating police officers
- the views of the victim or others significantly affected.

In no circumstances should the prosecution entertain a proposal if the accused maintains his or her innocence with respect to a charge or charges to which the accused has offered to plead guilty.

The process of determining whether or not to accept a proposal to proceed with fewer or lesser charges should be in accordance with the procedure set out in guidelines for Indictments, nolles prosequi and discharges.

Witness Assistance Service guidelines

General

The Witness Assistance Service (WAS) is a unit within the Office of the Director of Public Prosecutions. Its role is to provide support for witnesses, victims and their families while they are engaged in criminal justice processes for indictable crimes and workplace death matters. Upon request to the WAS manager, assistance with other matters such as lower court appeals, death matters in the Magistrates Court or difficult summary matters may be considered.

Primarily, clients come by referral from the prosecutor with conduct of a matter, although referrals can be requested through other agencies. WAS officers should always check with the prosecutor (or if none has been assigned, with a Committee members or the Director) before accepting a person as a client requiring services beyond general process advice. On being given conduct of a matter, prosecutors should immediately consider the engagement of WAS and, if the case is thought appropriate, instigate that engagement.

WAS resources will be allocated according to need, and it may not be possible to meet all requests. Priority will be given to special needs witnesses who include special witnesses defined in the *Evidence (Children and Special Witnesses) Act 2001* as children, persons with a disability, indigenous witnesses or those from a non-English speaking background, elderly witnesses and immediate family members bereaved by crime. If there are special needs witnesses involved more than peripherally in a matter, the prosecutor with conduct must discuss the involvement of WAS with a WAS officer. Priority will be given to the relative seriousness of a case. Priority will also be given to persons involved in sexual assault matters, matters involving death, family violence and other crimes of violence. The WAS manager will be happy to discuss with prosecutors any issues arising concerning the availability of WAS.

WAS will have automatic involvement in all sexual assault matters. In these matters WAS will maintain regular communication with complainants to keep them informed of the status of the prosecution unless they have been asked not to be kept informed. The initial notification from police is forwarded to the WAS manager who will allocate the matter to a WAS officer. The WAS officer then has the responsibility of contacting the complainant and will act as the point of contact for any inquiries.

When WAS is involved in a matter there needs to be a clear understanding between it and the prosecutor as to whether ongoing information about a case is to be given to particular witnesses and whose responsibility it will be to pass on that information. In relation to discharges or downgrading of charges, WAS is happy to assist with these discussions provided the relevant legal information is provided by the prosecutor. In more complex cases, there will need to be discussion between prosecutors, clerks and WAS officers as to which witnesses will be dealt with by WAS. The same priorities as those outlined above should be applied so the WAS officer only deals with those witnesses

who fit within the guidelines indicated. The same principles should apply to witness briefings.

WAS services include:

- assisting witnesses to understand the court and legal processes
- support during charge selection, negotiation or discontinuance
- showing witnesses the court facilities before they are expected to give evidence
- supporting clients in court or on video link, or while waiting to give evidence
- informing prosecutors and/or court staff as to witnesses' special needs
- referring witnesses to appropriate welfare, health, counselling or other services
- providing victims with information about referral for compensation or damages
- liaising with the court about the location and engagement of interpreters
- identifying who can make victim impact statements (VIS) and assisting in their preparation
- post-court debriefing and assisting to organise ongoing support

As outlined above, although the role of WAS is to assist victims and witnesses through the criminal justice process, WAS officers are employed by the Director of Public Prosecutions, an independent office. It should be noted that WAS officers are not the legal representatives of victims nor do they provide formal counselling services.

Victim impact statements

After a person has been found guilty of, or has pleaded guilty to, an indictable offence the law provides that the victim of the offence can make a victim impact statement (s81A of the *Sentencing Act 1997*). In respect of a summary offence, a VIS can be provided where death or serious injury has occurred as a result of the offence, or if it is a family violence offence. This is often the only opportunity for the victim to have their say. A VIS is entirely voluntary and if the victim feels it would be more traumatic to go through the process of preparing one then there is no obligation for them to do so. On the other hand, some people find the process of preparing and presenting a VIS therapeutic and want to have a role in the process. The decision whether or not to prepare a VIS can be discussed with a WAS officer who can also assist with the preparation of the document. Victim Support Services can also provide assistance with the preparation of a VIS.

Prosecutors should be aware that a VIS is not evidence to show that a victim is suffering from a psychiatric illness or disorder as a result of the crime. Where necessary, a report should be obtained from a relevant expert.

There are some limitations as to what can be included in a VIS. The statement must be limited to details relating only to the crime of which the offender is convicted. Following are some pointers to assist in the preparation of a VIS.

It should include:

- details of any physical injuries caused by the crime and the impact of these injuries
- details of emotional and psychological damage caused by the crime
- details of any changes in behaviour, thoughts, attitudes, coping skills, social life or relationships with others (i.e. how life was before the crime and how it has changed)
- details of the impact of the crime on employment, education or loss of future prospects
- details of the financial impact of the crime
- relevant medical or psychological reports that support the VIS

It should not include:

- any abusive or derogatory comments about the accused
- any impact that is not the result of the crime concerned
- any conduct of which the accused has not been convicted
- any suggestion as to what the sentence should be

Presenting a VIS to the court

There are three options as to how a VIS can be presented to the court.

The first option is for the written document to be handed up to the judge to read to him or herself. Some people prefer this because no-one else in the courtroom will hear it. However, it must be borne in mind that a VIS is not an automatically confidential document. A copy must be given to the accused's lawyer so the accused will also see it. Also, judges regularly use extracts from a VIS in their sentencing comments.

The second option is for the victim to read their VIS to the court.

The third option is for the victim to nominate another person to read the VIS on their behalf.

The WAS officer can assist with the decision as to which of the above options is preferred. When reading out a VIS it should be addressed to the judge or magistrate, not directly to the accused.

If defence counsel challenge any material in the VIS it will be necessary to discuss this with the victim. It is possible (though very unusual) that the victim may have to go into the witness box in order the prove the material.

Witnesses

Prosecutors will deal with all witnesses in a dignified, professional and proper manner.

At the earliest opportunity, consideration should be given as to whether a witness should be referred to the Witness Assistance Service (see WAS guidelines).

In accordance with the principles governing the treatment of victims set out in the Tasmanian Charter of Rights for Victims of Crime, a victim who is to be a witness for the prosecution is to be informed about the trial process and his or her rights and responsibilities as a prosecution witness. They are also to be informed of the progress of the prosecution and if charges are likely to be discontinued or altered they are to be consulted in accordance with the indictments, nolles prosequi and discharge guidelines and, where applicable, the sexual crimes guidelines.

Children and special witnesses

When dealing with a witness under 18 years of age, a person with intellectual disabilities, a victim of an alleged sexual offence, family violence or other crime of violence, or a person who is at some special disadvantage, consideration must be given to whether the person is an “affected child” or a “special witness” within the meaning of the *Evidence (Children and Special Witnesses) Act 2001*. If these provisions are applicable, the witness should be advised of their options and consideration should be given, particularly with a child witness, to having their evidence pre-recorded.

The prosecutor with conduct of the case should make application notwithstanding any forensic advantage that is perceived in not making appropriate arrangements.

Regardless of whether any witness who may be declared a “special witness” will give evidence live in court, via closed circuit television or in a pre-recorded hearing, counsel should consider making an application to have the witness declared a special witness. The witness should be consulted in the decision; specifically a witness should be advised that they may be required to give evidence again in any retrial.

The Act provides that where a witness is declared a special witness in any prescribed proceedings the court must (where facilities are available) make an audio visual record of the evidence (s7A). In the event of a subsequent trial or retrial this recording may be admitted into evidence (s7B).

In situations where an audio visual recording of the evidence will be made, please liaise with court staff to ensure that the recording settings are modified so that only the image of a witness is recorded during the evidence and that any recording is at highest possible resolution.

Please note that the Criminal Justice Report released following the Royal Commission into Institutional Responses to Child Sexual Abuse identified recording a complainant's evidence in order to avoid the need for them to give evidence again if there is a subsequent trial as an important procedure in child sexual abuse prosecutions.

Cases involving an alleged sexual offence or cases where there are vulnerable witnesses should be expedited. In such cases it is our aim to have one prosecutor maintain carriage of the matter from the time of committal to finalisation, noting however that sometimes changes in the prosecution team may be unavoidable due to staffing and court time tables.

Special measures for children giving evidence in court

The Australasian Institute of Judicial Administration has developed a Bench Book for Children Giving Evidence in Australian Courts. The Bench Book outlines sexual abuse of children and their experience of the justice system, communicating with children, children's evidence and coping skills, suggested procedures for children giving evidence and a suggested script for use in special hearings with children or cognitively impaired witnesses.

Prosecutors with proceedings involving children or cognitively impaired witnesses are strongly encouraged to review the relevant portions of the Bench Book in preparing the matter for trial. The Bench Book can be accessed here https://aija.org.au/wp-content/uploads/2017/07/Child-Witness-BB-Update-2015.pdf

Witness Intermediary Scheme

If a witness is giving evidence in relation to a *specified offence* within the meaning of the *Evidence (Children and Special Witnesses) Act 2001*, consideration must be given to whether the Witness Intermediary Scheme ("the Scheme") applies. The Scheme allows for the use of witness intermediaries to assist children and adults with a communication need who are giving evidence in relation to specified offences as defined in s3 of the Act.

- All children (under the age of 18 years) who are giving evidence in relation to a specified offence. The Scheme applies equally to child complainants and child witnesses.

- Adults (a person who has attained the age of 18 years) with a communication need who are giving evidence in relation to a specified offence. An adult witness has a communication need if the "quality or clarity of evidence given by the witness may be significantly diminished by the witness's ability to understand, process or express information" (see s7F).

The court can order an assessment on its own motion. However, on most occasions, the court will be reliant on the prosecutor to identify witnesses likely

to have a communication need. The basis of any perceived need should be articulated in general terms.

There is an ongoing obligation on prosecutors to be aware of whether matters for specified offences are likely to invoke the Scheme. Prosecutors should inform themselves of this upon the allocation of a file.

The Act directs a judge to make an order that an assessment report be prepared in specified proceedings for the class of witnesses listed in s7I(1)(a)-(d).

A judge is not to make an order that an assessment report be prepared if the judge is satisfied that:

- it is unnecessary or inappropriate to make the order
- the witness does not wish the order to be made
- the making of the order would be contrary to the interests of justice

(s7I(3)(a)-(c))

Therefore, if the prosecutor considers the Scheme may apply, its operation must be discussed with the witness. The prosecutor must ask the witness whether they wish to participate in the Scheme. If the witness does not wish to participate in the Scheme, the prosecutor is to make a file note detailing any reasons given by the witness and inform the court that the witness does not consent. If the witness does wish to participate in the Scheme, they must consent to participate in the assessment report procedure. A witness intermediary consent form should be completed by the witness (or their guardian) and placed on the file. In circumstances where this cannot be completed, verbal consent can be provided and a file note made.

There will be occasions when a prosecutor forms a view that a child witness does not need an intermediary. This may be due to a number, or combination, of reasons. Matters to take into account will include the witness's age, their apparent intellectual ability, the subject matter of the evidence and whether the evidence is in dispute. In such cases, the prosecutor should make a file note explaining the reasons why this is the case and must be in a position to make submissions to a judge addressing the factors in s7(3)(a) and (c).

During the appearance when an assessment report is sought, prosecutors should advise the court of any material or issues which may be relevant to the intermediary in conducting their assessment. This will include the witness's statement to police (video or written) or any communication needs that have been identified by Tasmania Police, WAS or the prosecutor. If an assessment report is ordered, the prosecutor is to provide the associate or court clerk with a written document containing the witness's contact details (together with parent/guardian details, if applicable) and confirmation of the witness's consent. A copy of any witness statement will be provided to the court in circumstances where the court has determined it to be necessary. Staff from the Office are not

to provide any material directly to any section of the Department of Justice responsible for the Scheme.

In determining whether to order an assessment report, a judge may inform themselves on any matter in any manner that they think fit (s7L).

An assessment report will ordinarily take three weeks to complete. Once an assessment report has been prepared, it will be provided to the court for distribution to the parties, subject to s7I(5). A judge is to make an order that a witness intermediary be used if, having considered the assessment report, they are satisfied the use of the intermediary will assist the proceeding (s7J). A ground rules hearing will then be convened, in advance of the witness giving evidence (s7K).

Witness expenses

Section 17 of the *Criminal Procedure (Attendance of Witnesses) Act 1996* provides:

> (1) Unless otherwise ordered by the Court, the following people are entitled to be paid expenses in accordance with this section:
>
> (a) any person who gives evidence in a criminal proceeding at the request of the prosecution;
>
> (b) any person whom a Crown Law officer certifies as having attended at any place at the request of the prosecution to give such evidence.
>
> (2) The Court may order the payment of expenses to any person who attends at any place for the purpose of giving evidence in a criminal proceeding.

Thus, where a witness attends court but does not give evidence, the clerk involved in the trial will need to notify a Crown Law Officer of that act, in writing, providing details as to why the person was required at court and why the person did not give evidence. A draft authorisation for witness expenses should also be provided so the Crown Law Officer may certify to the Registrar that the person was indeed required to attend court to give evidence but did not do so.

Financial assistance for accompanying persons

Many witnesses and complainants require support to give evidence in matters prosecuted by the Office. It is primarily the responsibility of the Witness Assistance Service (WAS) to provide witness support for matters prosecuted by the Office.

The Office receives numerous requests for financial assistance to be extended to persons to accompany a witness to court or to a briefing by counsel. In all but the most exceptional cases, all requests should be refused and no expectation created that any financial assistance will be provided. Clerks and prosecutors should make it clear that the legislation covering the expenses of witnesses does not extend to accompanying persons and, as a consequence, there is very little the Office can do about expenses for accompanying persons.

However, there will always be exceptional cases. All requests for financial assistance for accompanying persons are to be made directly to the Deputy Director, who will then consult with the Director and the WAS manager in order to determine whether a request will be made to the Supreme Court.

Most cases prosecuted by the Office will have witnesses who are distressed and desirous of having a family member present to support them. This is not exceptional. For the Office to make a request to the Supreme Court, the case will need to have exceptional features and be one that is beyond the capacity of WAS to appropriately undertake. Therefore, the prosecutor should consult the WAS officer prior to making any request for financial assistance for an accompanying person.

Witness refusal to be sworn

A refusal to be sworn is a contempt of court, and so long as the witness is present in court is does not matter how he came to be there, i.e. the lawfulness of the subpoena or other process does not afford a reason to refuse to be sworn (see *R v Galvin* [1826] NSWSC 52; *Smith v the Queen* [1991] 25 NSWLR 1).

Duress can be a defence (see *Re K* (1983) Crim App Rep 82).

Although not applicable by force of law to the Supreme Court in its criminal jurisdiction, as a guide or framework it is useful to refer to rule 941 of the *Supreme Court Rules 2000* which indicates the form proceedings for contempt would follow in crime and civil (such was applied in *R v Garland* [1997] QSC 145). Rule 941(1) provides the court can order an arrest or issue a warrant for the arrest of the respondent and (when he or she is before the court) rule 941(2)(a) provides the court is to:

- inform the respondent of the contempt charged
- require the respondent to defend the charge
- determine the matter of the charge after having heard the respondent
- if it finds the respondent guilty of contempt, make any order for the punishment or discharge of the respondent as may be just

Rule 941(3) provides:

> The respondent is to be detained in custody until the charge is disposed of, unless the court grants bail.

The procedure to be followed in such circumstances is set out in *Stanley v Tasmania* [2015] TASCCA 24, particularly Porter J at [30]-[31].

The prosecutor ought to see that a refusal to be sworn is attended by contempt proceedings, as "the criminal law and the justice system cannot be held to ransom by the fears of witnesses, however well-founded be those fears" (see *R v Guariglia* [2000] VSC 45 per Byrne J).

In practise, a judge will almost always give a witness an opportunity to reconsider a refusal to be sworn, although an adjournment for the purpose of seeking legal advice or representation does not have to be granted. Proceedings for contempt should not take place before the jury before whom the witness was called. The judge, upon a finding of contempt, must give the offender an opportunity to present material relevant to sentence (see *Stanley v Tasmania* [2015] TASCCA 24 per Tennent J at [18]).

The refusal to give evidence by a witness in a criminal case is regarded as serious. In sentencing the factors to be considered are set out by Tennent J in *Stanley v Tasmania* [2015] TASCCA 24 at [20]-[25].

Indemnities to witnesses and sentencing of informants

The Director is empowered pursuant to s12(1)(eb) of the *Director of Public Prosecutions Act 1973* to grant indemnities from prosecution. Pursuant to s12(1)(ec), the Director has the power to give undertakings to persons that answers given or statements or disclosures made by them will not be used against them in evidence.

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, e.g. by granting them immunity from prosecution. However, it has long been recognised that in some cases this course may be appropriate in the interests of justice. Nevertheless, an immunity under s12(1)(eb) or (ec) 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 than 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 alone.

Apart from being a course of last resort, an immunity under s12(1)(eb) will only be granted provided the following conditions are met:

- the evidence that the witness can give is considered necessary to secure the conviction of the accused, and that evidence is not available from other sources
- the witness can reasonably be regarded as significantly less culpable than the accused.

The central issue in deciding whether to give an accomplice an immunity is whether in the overall interests of justice the prosecution of the accomplice should be foregone in order to secure that person's testimony in the prosecution of another.

However, unless exceptional circumstances exist, no indemnity from prosecution should be granted by the Office. Every attempt should be made to call the person as a witness after having first been tried or sentenced for the offences for which an indemnity from prosecution is sought.

If the person declines to co-operate, i.e. make a confession in an admissible form, and sufficient evidence does not exist for the prosecution of that person and his or her co-offenders and the co-operation of that person will not otherwise be obtained, the following conditions will apply to persons called to give evidence who seek an indemnity from prosecution:

- Any arrangement whereby a person is not prosecuted and is seeking an indemnity in return for co-operation, assistance and the giving of evidence can only be entered into with the prior written approval of the Director.

- Any submission to the Director seeking approval of an arrangement with a person seeking indemnity must be in writing and set out the reasons supporting an arrangement with the witness.

- Unless exceptional circumstances exist, the only arrangement which the Director will contemplate whereby a person suspected of having committed a crime is not prosecuted for that crime in return for their co-operation in the prosecution of others is as follows:

    - A full statement of the evidence which the witness can give is taken from that witness without caution on the understanding that it is to be used only for an assessment of the extent and weight of the evidence which the witness can give (such statement should, preferably, be obtained either by a police officer or, as a second option, by the solicitor representing that person).

    - The statement is to be assessed by the prosecutor and discussed with or considered by the Director to determine its value in the prosecution of other persons. Factors to be taken into account in assessing the statement and the desirability of entering into an arrangement with the witness are:

        - the existence or lack of any other admissible evidence of the guilt of persons suspected or having committed the crime or crimes

        - whether or not the role of the person seeking indemnity is a principal or accessory/secondary participant

        - the credibility or reliability of the witness and the benefits to be obtained to the criminal justice system in entering into the arrangement

        - the need to take into account the view of any victim.

    - The witness must be prepared to give evidence in accordance with the statement and not seek a certificate under the *Evidence Act 2001* prior to trial in the Supreme Court, i.e. no certificate can be sought at preliminary proceedings.

    - If the evidence which the witness can provide is necessary for the prosecution of a principal offender and/or others, the statement must then be attested on oath by the witness. The Office will then indicate that it will not use the sworn statement against the witness and, provided no certificate is sought at any preliminary hearing and the sworn evidence is given in a satisfactory manner

at trial, the Office will not oppose an application made by the witness at trial for a certificate under s128 of the *Evidence Act 2001*.

- From the moment the statement is attested the co-operation of the Director in not prosecuting the witness and not opposing the application for a certificate is dependent upon the compliance by the witness with the preceding paragraph.

All indemnities will be conditional upon the recipient providing truthful evidence.

Where an indemnity has been granted and that person is called against another, the fact that an indemnity has been granted and the terms of it should be disclosed to the defence counsel.

Under no circumstances will the Director grant indemnity from prosecution for future conduct.

Sentencing of informants

Sentencing must generally take place in open court, and any mitigation or discount afforded by past or promised co-operation must be identified in the reasons for sentence. Therefore, letters from police officers or other investigating agencies should not be handed to a judicial officer on the premise that the contents will remain confidential. In rare, exceptional circumstances application can be made to the Director for such a letter to be tendered. However, even in such circumstances the defendant should be told that no guarantee can be made that the contents of the letter will not be made public. Tasmania Police should inform the Office of any request they have received from an accused person or their counsel.

Before the prosecutor refers the court to past informing, the express agreement of the person to be sentenced (or their counsel when represented) ought to be obtained, both as to the mention of the informing and the description to be given to it. Unless the person to be sentenced has agreed to give evidence against others (or has given such evidence) it should be sufficient to describe the giving of past information as having been either "regarded by police as valuable" or "regarded by police as extremely valuable". Information which falls within neither one category nor the other should not be given mention by the prosecution. Of course, whichever description is used must be agreed to by the investigating police. It is not desirable for the prosecutor to seek or to be given further information or details of past informing.

If the person to be sentenced promises to give evidence at the trial of others, and wants that matter taken into account, the prosecutor should particularise who and in relation to what crimes he or she has promised to give evidence about, and should encourage the sentencing judge to articulate any discount given in sentence for such promised co-operation.

Where a person has been sentenced on the basis he or she will co-operate and subsequently that co-operation is not forthcoming, the prosecutor should consult with the Director about appealing the original sentence (see *R v Stanley* [1998] TASSC 13).

Media

No public comment is to be made by prosecutors without the Director's approval in relation to matters that are the subject of criminal proceedings or that have been referred to the Office for an opinion in relation to potential criminal proceedings. All media contact should be referred to the Director.

Prosecutors should not give advice to a journalist or media organisation that they can legally publish any material that has been referred to in court.

All prosecutors must ensure they do not make any comments that demonstrate a lack of detachment or impartiality concerning current or potential matters in any forum where it is likely that such comments may become public and which could lead a fair-minded person to have concerns that the prosecutor may not carry out his or her duty to ensure a fair trial. In an extreme case the court may stay the proceedings of any trial until the prosecutor is replaced (see *MG v R* [2007] NSWCCA 57).

Contempt of court

It is the duty of the State to ensure, as far as practicable, that an accused person receives a fair trial. It is a contempt of court to publish material which has the tendency to prejudice the prosecution or defence in a pending trial (see *R v ABC* [1983] Tas R 161 per Neasey J at 168).

In addition there are some statutory contempts such as the publication of the identity of the victim of a sexual assault (s194K of the *Evidence Act 2001*).

The seriousness of a contempt is to be judged by the prejudice that is likely to flow from the contempt and the culpability of those concerned (see *R v Hally* [2012] TASSC 86). In determining whether to prosecute a person or an organisation for contempt of court the following considerations will apply:

- How prejudicial the published material is
- What were the circumstances in which the alleged contemptible material was published?
- What was the response of the offending party when the publication of the material was pointed out to them?
- What systems were in place to prevent such publications; and further, what systems does the offending party undertake to put in place to prevent further repetition of the conduct?
- What motivated the publication?
- The position or role a person took in the publication, e.g. was the person a private citizen, a junior reporter, an editor or a media company

- The prior record of the person publishing the material

It should be noted the weight given to any one of the above factors may vary according to the circumstances of the case.

Charging guidelines

Parliament has enacted both indictable crimes and summary offences for a number of offences to cover the same conduct. Indictable crimes are dealt with in the Supreme Court before a judge and jury and summary offences are dealt with by the Magistrates Court. In other cases, although not identical, there are similar summary offences to indictable crimes.

The following charging guidelines have been issued for common offences to maintain consistency from case to case. The guidelines do not purport to cover the field and there are many instances where there are similar summary and indictable offences. Where Tasmania Police or other regulatory agencies are unsure whether a matter ought to be charged on indictment or summarily, advice should be sought from the Office, preferably in writing.

Where a person has been charged with an indictable crime but has not yet been committed to the Supreme Court, Tasmania Police should obtain advice from the Office before substituting the indictable crime with a summary offence.

Assault charging guidelines

Indictable crime or summary offence

Parliament has enacted the offence of assault contrary to s35 of the *Police Offences Act 1935* and also as a crime contrary to s184 of the *Criminal Code.* The former is charged summarily on complaint and the latter is charged on indictment. Thus, in cases of assault a determination must be made whether to charge a person summarily or on indictment.

The dominant consideration is the seriousness of the injuries actually received by the complainant, not what could have happened. It is therefore not the case that every time a weapon (other than a firearm) is used, or a vehicle or vessel appears to have been the instrument used for committing an assault that an indictable charge must be preferred.

However, and illustrating that circumstances will vary greatly and do not lend themselves to inflexible rules, an attack with an axe which has resulted fortuitously in only a nick on the finger of the victim should still be one normally pursued on indictment. The intention of the offender can be a significant, but not dominant, consideration. If a firearm is used or involved in a way specified in s115 of the *Firearms Act 1996* it is clearly Parliament's intention that a charge of aggravated assault under s183 of the *Criminal Code* proceed, irrespective of actual injury.

Identical considerations apply when determining whether a person should be charged with the summary offence of assaulting a police officer contrary to s34B(1) of the *Police Offences Act 1935* or the indictable offence of assaulting a police officer contrary to s114 of the *Criminal Code*.

Where the complainant is a police officer who has suffered serious bodily harm so that, upon conviction, s16A of the *Sentencing Act 1997* applies, generally speaking the alleged offender should be charged on indictment with, at the very least, unlawful assault contrary to s184 of the *Criminal Code* or assaulting a police officer contrary to s114 of the *Criminal Code*.

It is not proper to indict a person for *Criminal Code* assault where the facts would normally warrant a summary charge under the *Police Offences Act* merely because the statutory time limit for the charging of a summary offence has expired. However, if there are other more serious indictable charges arising out of the same circumstances as the alleged offences which would normally be dealt with summarily then these matters can be dealt with under the *Criminal Code* in order for the same court to deal with all the circumstances involving the matters.

Assault on a pregnant woman

The crime created by s184A requires only that there to be:

(a) an unlawful assault

(b) on a woman

(c) whom the accused knows to be pregnant.

However, it is not essential that it should be charged as an indictable crime every time those elements are present. The indictable crime should be reserved for situations where:

- The assault would be otherwise indictable. Then the accused's knowledge of the woman's pregnancy is a further aggravating factor and the specific charge will be appropriate.

- The assault was directed at the pregnancy or at the fact that the victim was pregnant or where the assault had a realistic chance of compromising the pregnancy.

Where the assault does not fit these criteria, it can be charged under the *Police Offences Act* (which is not to overlook that not all incidents which technically amount to assault have to be charged in any event) unless there are more serious indictable offences arising out of the same facts, circumstances or relationship, where the *Criminal Code* offence is to be preferred to avoid more than one hearing.

Assault and family violence

Assault cases involving choking, smothering or any other form of strangulation, particularly in a family violence context, should be regarded as grave criminal conduct and even where no injury occurs.

See Strangulation charging guidelines.

Strangulation charging guidelines

Cases involving choking, suffocation or strangulation, particularly in a family violence context, should be regarded as grave criminal conduct. Primarily, prosecutors must consider the following charges:

- strangulation contrary to s170B of the *Criminal Code*
- assault contrary to s184 of the *Criminal Code*
- assault contrary to s35 of the *Police Offences Act 1935*

Further, prosecutors must consider the indictable charges of attempted murder, committing an unlawful act intended to cause bodily harm, causing grievous bodily harm and disabling with intent to facilitate the commission of an offence *or* the flight of an offender.

Parliament has enacted the crime of strangulation (see s170B of the *Criminal Code*). This crime recognises the seriousness of the conduct of choking, suffocation and strangulation. It does not require proof of any consequence of the crime. One purpose of the provision was to ensure strangulation charges will be clearly identifiable on an offender's criminal record.

Choking, suffocation and strangulation are not defined. However, "intentionally placing a hand on the back of a person's neck, in a way which is incapable of affecting the breath of the person or the flow of blood to or from their head, cannot properly be described as being to "intentionally choke" [suffocate or strangle] the person … it must be conduct capable of affecting the breath or blood flow to or from the head while the "choking" is taking place" (see *GS v R; Director of Public Prosecutions (NSW) v GS* [2022] NSWCCA 65 at [62]). In determining the meaning of these terms little, if any, assistance is to be derived from identifying the meaning by use of a dictionary, much less assistance is to be gleaned from the definitions taken from a medical dictionary (see *GS v R* at [42]).

Prosecutorial discretion will be exercised to determine the appropriate charge. Consideration will be given to the facts and circumstances of each individual matter. Prosecutors must consider whether or not to obtain expert medical evidence.

Factors to be considered in determining whether to charge an accused with strangulation, as opposed to indictable assault, include:

- whether the accused intended to choke, suffocate or strangle the complainant
- whether the conduct was capable of affecting the breath or blood flow to or from the head of the victim (noting that slight pressure may be capable of causing such a consequence)

- whether the victim, in fact, experienced loss of breath or restriction of blood flow to or from the head
- whether the victim became unconscious or received any other injuries
- whether the strangulation was part of a series of events
- the length of time of the strangulation, suffocation or choking conduct
- the nature of the relationship between the parties
- whether there was an accompanying threat to kill
- whether there was any additional violence

Factors to be considered in determining whether to charge an accused with summary or indictable assault in relation to strangulation or suffocation include:

- the amount of pressure used and where the pressure was applied, i.e. whether it was capable of effecting the breath or the flow of blood to or from the head of the victim
- the length of time of the strangulation, suffocation or choking conduct
- whether the victim received any injuries
- whether there was additional violence
- whether children were present

In circumstances where slight pressure is placed on the neck, in a way incapable of effecting the breath or the flow of blood to or from the head of the victim the summary charge may be preferred. Consideration must also be given to each of the factors listed above.

Where a person chokes, suffocates or strangles a person and renders that person incapable of resistance with an intent to commit another offence or flee an offence, a charge under s168 of the *Criminal Code* should be preferred.

Of course, deciding the appropriate category of charge is a matter of judgment not science and investigators and prosecutors will appreciate that the Office welcomes discussion about charging decisions before they are made.

For a discussion about the meaning of “intentionally chokes” in the NSW *Crimes Act 1900* see *GS v R; Director of Public Prosecutions (NSW) v GS* [2022] NSWCCA 65.

It is well recognised that the acts of strangulation, choking and suffocation are inherently dangerous. See *DPP v Hardwick* per Martin AJ, with whom Pearce J agreed, at [50], [52] and [63]):

> The dangers attached to choking have been well documented over many years, particularly in homicide cases. Judges sitting in criminal law have become familiar with evidence of pathologists that death in choking cases is usually as a result of pressure applied to the carotid arteries, thereby blocking the arterial blood supply to the brain. In addressing this issue, the sentencing judge was making general observations about the dangers associated with choking and how the application of pressure to the throat "can easily result in death or serious injury". It was appropriate, and indeed necessary, for his Honour to have regard to the dangers attached to the conduct of the appellant as part of his overall assessment of the gravity of the criminal conduct. As his Honour observed, the **risk of death or serious injury, and of long-term physical and psychological impacts, "were clearly apparent" in the appellant's criminal conduct…** (footnotes omitted, emphasis added)

And *DPP v Johnson* [2020] TASCCA 4 per Geason J with whom Wood J agreed at [33]:

> The fact that the respondent's conduct included suffocation has significance to the assessment of the objective seriousness of the offending. Suffocation should be treated with the same level of seriousness as is afforded strangulation or throttling. **Such conduct is inherently dangerous, and capable of causing serious consequences within a very short period. It renders victims incapable of acting to protect themselves**. As Estcourt J observed in DPP v Foster [2019] TASCCA 15 at [26]- [27], it is a form of dominance and control which has the potential to cause grave psychological harm, serious injury and even death. (emphasis added)

And *DPP v Foster* [2019] TASCCA per Estcourt J at [26]-[27]:

> Each of the identified incidents involved vicious and cowardly attacks by the respondent on a woman. Lest it be thought that grabbing the complainant by the throat and applying pressure is somehow less insidious than punching or kicking, it has been noted in an article by Heather Douglas and Robin Fitzgerald entitled "Strangulation, Domestic Violence and the Legal Response", published in the [2014] SydLawRw 11; (2014) 36 (2) Sydney Law Review 231, that strangulation is a form of power and control that can have devastating psychological long-term effects on its victims in addition to a potentially fatal outcome.
>
> **Choking can cause loss of consciousness and can cause death quickly. It has been suggested that death can occur within seven to fourteen seconds. Additionally, underlying internal injuries caused by the pressure applied to the throat can cause swelling which may develop gradually over days and airways obstruction causing death may be delayed.** (emphasis added)

Robbery charging guidelines

Parliament has enacted the summary offence of stealing with force contrary to s38B of the *Police Offences Act 1935* and the indictable crime of robbery contrary to s240(1) of the *Criminal Code.* Both these offences cover similar conduct.

The summary offence should be preferred where:

- the value of any property stolen or attempted to be stolen is less than $20,000
- the conduct has not resulted in bodily injury to the complainant
- the conduct does not involve any threat of a weapon being used or produced
- there are no other indictable crimes arising out of the same facts

This does not mean that on an individual case we would not consider charging a person with robbery even if the above factors are present.

These guidelines are to assist prosecutors in the exercise of their discretion. Each case should be approached and assessed on its own merits.

Care must be taken to choose a charge which reflects the nature and extent of the criminal conduct disclosed by the evidence and which will enable the court to impose a sentence commensurate with the gravity of the conduct.

Indecent assault charging guidelines

Parliament has enacted the summary offence of assault with indecent intent contrary to s35 of the *Police Offences Act 1935* and the indictable crime of indecent assault contrary to s127 of the *Criminal Code*. Both these offences cover similar conduct.

The summary offence should be preferred when any touching (that is indecent) is above the clothing. Where the touching is under the clothing (and is indecent) charges pursuant to s127 of the *Criminal Code* should be preferred.

Where there is more than one act or occasion involving a combination of the above activities, indecent assault charges for all offences can be laid to avoid more than one hearing or where there are other indictable offences committed arising out of the same facts as the sexual assault the indictable crime of indecent assault can be preferred. However, *Criminal Code* charges should not be laid where the summary offence would normally be preferred merely because the statutory time limit for the charging of a summary offence has expired.

The indictable crime of indecent assault may be dealt with summarily if the defendant so elects (s72(1) of the *Justices Act 1959*). The prosecutor may oppose this if, prior to the election, he or she opposes the application and the justice **may** proceed on the basis that s72(1) of the *Justices Act 1959* has not been enacted (s71(2) of the *Justices Act 1959*). Similarly, once a hearing has commenced, a magistrate may abandon the hearing and commit the defendant (s72B(2) of the *Justices Act 1959*).

Where the complaint contains both the electable offence of indecent assault and other non-electable offences that are to be tried on indictment in the Supreme Court, the prosecutor (whether a police prosecutor or a Crown prosecutor) should oppose the electable offence being heard summarily if it is intended the offences will be tried together. In these circumstances, the public interest factors would normally demand that the electable offence be committed to the Supreme Court in order:

- to limit the number of times the complainant and other witnesses are required to give evidence
- to save the community the expense of holding more than one trial
- if there is a conviction, the sentencing judicial officer will be able to sentence on the entire proven conduct

Driving offences involving death or serious injury charging guidelines

Parliament has enacted a series of charges for the driving of a motor vehicle where an accident occurs resulting in death or serious injury. The liability for conduct between offences can overlap in some instances. These guidelines are issued to ensure consistency from case to case.

It should be remembered that not every accident where death or serious injury occurs will result in a breach of the law. Accidents can occur due to inexperience or because people make a mistake or something happens that could not be foreseen or prevented. It is only in cases where the conduct falls into one of the following categories that a charge will arise.

Negligent driving causing death or grievous bodily harm

These offences are summary offences and are dealt with in the Magistrates Court.

Section 32(2A) of the *Traffic Act 1925* provides that "a person must not cause the death of another person by driving … negligently". Sub-section 2B provides that "a person must not cause grievous bodily harm by driving … negligently". Sub-section (2C) provides that:

> For the purposes of … whether a person is driving … negligently, the following are to be taken into account (relevantly):
>
> (a) the circumstances of the case;
>
> (b) the nature, condition and use of the public street…

The test for negligence under the *Traffic Act 1925* appears to be settled and is contained in the decisions of *Filz v Knox* (2002) TASSC 82; *Fehlberg v Gallagher* (1957) Tas SR 286; *Robertson v Watts* 51/1964 and *Price v Fletcher* (1972) Tas SR. It appears to be (and as one would expect):

> Persons who drive vehicles on a public road manage them with the same degree of care as an ordinary prudent man would deem necessary in the circumstances presented to him in order to avoid damage to person or property. The standard is not that of an exceptionally careful man nor is it that which the actual driver may consider but the standard of the average man.

These charges capture a wide range of conduct including momentary inattention, not keeping a proper lookout and driving too fast for the conditions of the road. At its most serious the conduct can overlap with the crime of causing death by dangerous driving.

Causing death or grievous bodily harm by dangerous driving

Section 167A of the *Criminal Code* provides:

> Any person who causes the death of another person by the driving of a motor vehicle at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including in the case of the driving of a motor vehicle on a public street, the nature, condition and use of the street, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the street, is guilty of a crime.

Section 167B of the *Criminal Code* provides:

> Any person who causes grievous bodily harm to another person by the driving of a motor vehicle at a speed or in a manner that is dangerous to the public, having regard to all the circumstances of the case, including, in the case of the driving of a motor vehicle on a public street, the nature, condition and use of the street and the amount of traffic that is actually at that time, or that might reasonably be expected to be, on the street, is guilty of a crime.

These are serious crimes charged on indictment in the Supreme Court. The cause of death or serious injury must be due to the dangerous driving. For driving to be dangerous there must be some identified risk to the public over and above the ordinary risks associated with the driving of a motor vehicle, including driving by persons who may, on occasions, drive with less than due care and attention (see *Jiminez v R* 173 CLR 572).

Although there can be many different circumstances, generally, for the manner of driving to be regarded as dangerous there must be significant speed, the driver is intoxicated or the vehicle itself is in a dangerous condition. The circumstances are not limited to these but there must be some significant feature that makes the driving dangerous. No state of mind is an element of the crime and the standard of driving is to be judged objectively (see *Wahl v State of Tasmania* TASCCA 5 per Evans J at [14]).

Manslaughter

A person's liability for manslaughter arising out of a death in a motor vehicle is pursuant to s156(2)b) of the *Criminal Code* which provides:

> **Culpable homicide**
>
> (2) Homicide is culpable when it is caused –
>
> (b) by an omission amounting to culpable negligence to perform a duty tending to the preservation of human life, although there may be no intention to cause death or bodily harm.

The duty here arises out of s150 of the *Criminal Code* which provides:

> **Duty of persons in charge of dangerous things**
>
> It is the duty of every person who has anything in his charge or under his control, or who erects, makes, or maintains anything, whether living or inanimate, which, in the absence of precaution or care in its use or management may endanger human life, to take reasonable precautions against, and to use reasonable care to avoid, such danger.

However, the omission to properly manage a motor vehicle must be more than mere negligence. It must amount to culpable negligence. For negligence to amount to culpable negligence "the facts must be such that in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such a disregard for the life and safety of others as to amount to a crime against the state and conduct deserving of punishment." (see *Bateman v R* (1925) 19 Cr App R 8 at 11-12; *King v R* [2012] HCA 24 at [26]) "There must be a great falling short of the standard of care which a reasonable man would have exercised and a high risk that death or grievous bodily harm would have resulted. It must be merited of criminal punishment." (see *King v R* supra at [29])

Thus, the test is objective of what a reasonable person regards in the circumstances.

Although the jurisprudential distinction between causing death by dangerous driving and manslaughter is often difficult to distinguish an "indictment for manslaughter is reserved for those cases involving homicide caused by extreme culpability arising out of situations of patent danger created typically by a combination of speed and intoxication." (see *R v O'Brien* [1987] TASSC 47 per Wright J at [34].

To summarise:

- Negligent driving involves a breach of care that one would not expect from a reasonable prudent driver. It can range from lack of attention to excessive speed.

- Dangerous driving involves driving that has caused significant risk to the public over and above the ordinary risks associated with driving.

- Manslaughter involves the most serious cases of dangerous driving or reckless driving.

What charge (if any) a driver should face where death or serious injury has resulted from an accident is, therefore, a matter of judgment but will be based on the above summarised criteria. In order to maintain consistency across the State and from one case to another, Tasmania Police should obtain advice from the Office prior to any charges being laid. Advice should not be given by the Office without it being approved by the Director or his nominee (who will be a senior counsel in the Office).

If, for any reason, a charge needs to be made urgently, telephone contact should be made.

The above procedure will ensure a consistent approach is taken in all cases. It will also allow the Witness Assistance Service to be engaged to provide support at an early stage.

Where summary charges are laid ordinarily the Office should prosecute the matter and victim impact statements should be prepared.

Sentencing factors

There are a number of factors relevant to sentencing in serious driving cases of which prosecutors need to be aware.

General deterrence is the prime consideration (see *Moyle v Tasmania* [2010] TASCCA 2, in particular Tennent J at [51]; *Gallagher v Tasmania* [2009] TASSC 84; *DPP v Watson* [2004] TASSC 54).

The youthfulness of the offender is not a significant mitigating factor because young people are the ones who need to be deterred from committing such offences. As Underwood J (as he then was) said in *DPP v Watson* supra at [21]:

> Death and injury from negligent driving is now widely recognised by the community as a serious social and financial problem. Courts are expected to impose penalties that will be sufficiently severe to deter both the offender and others who might be minded to act like him or her. In the case of crimes such as this one, the significance of youth and good antecedents has to yield in substantial measure, to the need to deter the offender and others. I venture to repeat what I said in *R v O'Brien* A43/1987 at 7:
>
> > Any consideration of the deterrent aspect of sentences for crimes where death is caused by dangerous driving involving conscious risk taking, must acknowledge the fact that a high proportion of offenders fall into the youthful category. It is a notorious fact that young people consume alcohol, often to excess, and then resort to driving motor vehicles thereby putting members of the public at grave risk. In the sentencing process, the need to deter this class of offenders weighs heavily against the reformative and rehabilitative factors leading to the conclusion that, in most cases, a substantial immediate custodial sentence is appropriate.

In cases where death has occurred as a result of the offending behaviour the result is devastating. However, the moral culpability of the offender's behaviour can vary significantly. Hence the hierarchical nature of the charges. Obviously also within each category of charge culpability can vary significantly.

For the summary offence involving negligent driving an assessment of the degree of risk of death or serious injury posed by the negligent driving is an important consideration (see *Charnock v Tasmania Police* [2013] TASSC 64).

For the crimes of causing death or grievous bodily harm by dangerous driving and manslaughter, the presence of the following factors are significant:

- extent and nature of the injuries sustained
- number of people put at risk
- degree of speed
- degree of intoxication and/or substance abuse
- erratic driving
- competitive driving or showing off
- length of journey during which others were exposed to risk
- ignoring of warnings
- evading police pursuit
- degree of sleep deprivation
- failing to stop

(see *R v Jurisic* (1998) 45 NSWLR 209; *R v Whyte* (2002) 55 NSWLR 252; *Shipton v R* [2003] TASSC 23 per Cox CJ at [5]; *Moyle v Tasmania* supra per Wood J at [59]-[60])

Of course, a number of these factors would also be relevant to the summary offences.

Significant prior driving convictions or disqualification from holding a licence is relevant as a lack of a mitigatory factor. These factors are also of considerable weight in respect of personal deterrence and the protection of the public aspects of the sentence (see *Shipton v R* supra per Cox CJ at [11]; *Moyle v R* supra per Crawford CJ at [18])

In respect of the crime of manslaughter the general range of sentencing for manslaughter is relevant. In *DPP v Watson* supra, Slicer J said at [44]:

> A single act of dangerous conduct involving the use of a motor vehicle and which results in death, might still attract a lesser penalty than an equivalent act which involves what has traditionally been described as containing an act of hostility to another. However where there is an extended course of conduct, as here, then there ought be greater equivalence. The absence of personalised or focused hostility is offset by the prolonged conduct, each minute of which is fraught with danger.

See also Blow J (as he then was) in *Shipton v R* supra at [44] where he said:

> Since the Criminal Code does not create a separate crime of "motor manslaughter" it is appropriate to have regard to the range of sentences that have been imposed for the crime of manslaughter in other circumstances.

Finally, it should be remembered it is difficult when comparing sentences from one case to another as the factors may vary considerably. However, what all the cases indicate is the need for a deterrent sentence as Tennent J said in *Gallagher v Tasmania* supra at [84]:

> A comparison of these sentences demonstrates just how difficult, and perhaps unwise, such a comparison can sometimes be. The factors which led to the sentences imposed varied, often significantly. The common theme however was the need to treat the crime of causing death by dangerous driving as one which, community mores dictated, required a significant deterrent sentence.

Driving offences not involving death or grievous bodily harm charging guidelines

Parliament has enacted a series of driving offences, both indictable and summary, where death or grievous bodily harm does not result. These include:

- Driving without due care and attention contrary to rule 367(1) of the *Road Rules 2009*
- Negligent driving contrary to s32(2) of the *Traffic Act 1925*
- Reckless driving contrary to s32(1) of the *Traffic Act 1925*
- Dangerous driving contrary to s172A of the *Criminal Code*

The offences are listed in ascending order of seriousness. Dangerous driving is an indictable offence.

Negligent driving involves a breach of care that one would not expect from a reasonable prudent driver. The negligence can range from lack of attention to excessive speed (see Negligent driving causing death or grievous bodily harm).

Reckless driving involves driving where there is a serious indifference to the consequences. It indicates the driver was alert to the risk involved in his conduct but continued with it regardless and was indifferent to the possible consequences. Members of the public need not have been endangered (see *Kane v Dureau* [1911] VLR 293; *Hayes v Swain* RTR 40).

Dangerous driving involves driving that has caused significant risk to the public, over and above the ordinary risk associated with driving (see Causing death or grievous bodily harm by dangerous driving).

The test for driving without due care and attention was stated by Grey J in *HW v The Police* (2010) MVR 218 at 222:

> The offence of driving without due care is committed when there is a material departure from the high standard of care which is due by anybody who drives a motor vehicle. The standard of care is one which must relate to all the surrounding circumstances.

The test as to the difference between driving without due care and attention and negligent driving was discussed by Burbury CJ in *Price v Fletcher* (1972) Tas SR 35. The difference is that although driving without due care and attention would amount to negligence, negligence includes negligent acts and omissions whereas driving without due care and attention would only amount to omissions.

Therefore, the distinction between driving without due care and attention and negligent driving is a fine one. Generally speaking, a person who is guilty of driving without due care and attention would also be guilty of the offence of negligent driving causing death where a death has occurred. However,

prosecutors should only prefer a charge of driving without due care and attention where the inattention was relatively minor, was over a very short period of time and where any omission was relatively minor. Otherwise, a charge of negligent driving should be preferred.

The difference between reckless and dangerous driving is a matter of degree. Significant penalties are available under the *Traffic Act* for reckless driving. Therefore, in determining whether a person should be charged with reckless or dangerous driving, dangerous driving should be reserved for only the most serious cases.

While it is not possible to be totally prescriptive of all the circumstances where dangerous driving should be charged, the driving should include some of the following factors:

- Significant speed and/or significant impairment due to alcohol and/or drugs
- Prolonged course of what could be said to be dangerous driving, particularly in a built-up area, or where traffic is heavy or the road is busy
- A total disregard for road signs, including traffic lights
- Member(s) of the public* have, in fact, been endangered (*includes passengers)
- Escaping police pursuit
- Degree of sleep deprivation

(See *Banks v Tasmania* [2019] TASCCA 1, in particular [26]-[37])

A charge of reckless driving should be preferred where:

- Although there was a potential risk to the public, no member of the public was, in fact, put at risk
- The driving was of a short duration, and did not occur in a built-up area
- Speed, although significant, was not at an extreme level for the conditions of the road and any alcohol and/or drugs present in the driver's system were not of a high range

Child exploitation material charging guidelines

Parliament has provided that the possession, distribution and production of child exploitation material may be dealt with summarily pursuant to s74A(a) or (b) of the *Classification (Publications Films and Computer Games) Enforcement Act 1995* or on indictment pursuant to ss130A-D of the *Criminal Code 1924*.

What is child exploitation material?

The definition of child exploitation material is the same for both the indictable crimes and the summary offences. In the case of the indictable crimes it is more explicit that knowledge (actual or imputed) that the material possessed or accessed is child exploitation material is required as an element of the crime, but given the defences provided are similar and relate to unsolicited or "accidental" or "unaware" access or possession, in practical terms the decision to charge will not be likely to turn on this distinction as cases where the defences will be clearly likely to be made out might not be charged at all.

Therefore, there needs to be some reliable objective distinction applied to ensure that decisions as to whether to proceed summarily or on indictment can be made in a principled and predictable way, so charging decisions cannot be said to be made capriciously, unfairly or with favouritism. However, the guidelines should be reasonably flexible and not amount to de facto legislating.

It must first be appreciated that child exploitation material is not simply depictions of children, naked or not, engaged in non-sexual activities such as bathing, even if there are numerous images or if they seem to have been taken covertly. Child exploitation material is that which describes or depicts in a way that a reasonable person would regard as being, in all the circumstances, offensive, a person who is or appears to be under the age of 18 years:

- engaged in sexual activity
- in a sexual context
- as the subject of torture, cruelty or abuse (whether or not in a sexual context)

An image (print or otherwise) does not become child exploitation material simply because the viewer or possessor of it derives some sexual satisfaction or has some sexual motive for keeping the image. The sexual context must be apparent by the image or depiction itself, not from its location or possession.

An example of this is where a person in their own home or in a public sphere videos or photographs children showering in a bathroom, or on a beach wearing bathers. Such images are not in a sexual context nor are the children engaged in a sexual activity. In situations such as these, prosecutors should consider s13A of the *Police Offences Act 1935*, subject to time limitations.

Classification

Child exploitation material should **always** be classified by Tasmania Police. Such material is classified and viewed by police using the following categories:

- **Category 1** – Depictions of real pre-pubescent children (under the age of 13 years approximately), and the child is involved in a sexual act, is witnessing a sexual act or the material is focused/concentrated on the child's anal or genital region.

- **Category 2**

    - Depictions or descriptions of any real child from birth to under the age of 18 who is, or appears to be, a victim of torture, cruelty or physical abuse.

    - Depictions of real post-pubescent children under the age of 18 years (approximately 13-18) and the child is involved in a sexual act, is witnessing a sexual act or the material is focussed/ concentrated on the child's anal or genital region or breasts.

    - Descriptions in the form of audio, text, written chats or stories of any child from birth to under the age of 18 who is, or is implied to be, engaged in sexual activity or posing or who is, or is implied to be, in the presence of a person engaged in that activity.

    - Depictions of real pre-pubescent and post-pubescent children engaged in a sexual pose in a way that reasonable persons would regard as being, in all the circumstances, offensive.

    - Anime, cartoons or photo-shopped material depicting representations of a child from birth to under the age of 18 engaged in, or implied to be engaged in, sexual activity or a sexual pose; or in the presence of a person engaged in that activity; or the material is focused/concentrated on the child's anal or genital region or breasts, in a way that reasonable persons would regard as being, in all the circumstances, offensive.

    - Child-like sex dolls or other objects that resemble a child under the age of 18 years, or part of the body of a child, if a reasonable person would consider it likely that the material is intended to be used by a person to simulate sexual intercourse.

- **Category 3** – Related non-illegal files. An image that forms part of a child exploitation material series, but which is not in its own right illegal, although it may contain important clues or identifying information to assist investigations in relation to category 1 or 2 images.

- **Category 4** – Non-illegal, ignorable material.

In instances where there are a significant number of images, police should review/classify a random selection of 1000 images across the different mediums seized, or 50 videos, or 250 cartoons/anime or written child exploitation material (this is to include all the categories referred to above). In addition, 25 images (or 10 videos) are to be described by police.

In cases of a plea of guilty, police are to provide a representative sample for submission to a judicial officer.

The classification of 1000 images (or 50 videos or 250 cartoons/anime or written child exploitation material) is subject to several exceptions and police officers should exercise discretion, depending on the circumstances of the case. These exceptions include (but are not limited to):

- where an accused has produced the images himself or herself, all images are to be reviewed/classified
- where a particular judicial officer has requested further information
- upon a plea of not guilty there will be a need to classify more, if not all, of the seized library as whether an image/video is child exploitation material is a jury question
- an officer may choose to classify an entire seized library due to a particular investigation or, in the alternative, in the desire to locate and protect a subject of a particular image

The Office welcomes discussion with investigators to determine when additional classification may be required.

Apart from classification, other relevant factors to be taken into account include:

- the size of a collection
- the method of classification within a collection
- whether the images were exchanged by way of peer-to-peer
- whether the images were purchased or free
- whether the images were downloaded in one group or there were numerous downloads
- whether there was one site from where the images were obtained or two sites
- how long the person was in possession of the images

Indictable crime or summary offence

The considerations listed above are helpful in providing guidelines as to what should generally be charged as a summary offence and what should be charged as an indictable crime.

Ordinarily, the personal characteristics or history of the accused should not play a part in the selection of summary or indictable charges.

A summary offence should ordinarily be the course pursued in cases where there are 1000 child exploitation material items or fewer.

This is a guideline and subject to individual exceptions including where an accused has:

- produced the actual images (as opposed to "sexting")
- a comprehensive library system (file management system)
- images depicting extremely young children engaged in sexual activities

If there are other more serious indictable charges arising out of the same circumstances as the alleged offences which would normally be dealt with summarily then these matters can be dealt with under the *Criminal Code* in order for the same court to deal with all the circumstances involving the matters.

An indictable crime should be pursued in instances where the quantities of child exploitation material are not within the summary charging guidelines referred to above.

Handling child exploitation material

On occasions, particularly when it is in dispute whether the material is child exploitation material, it may be necessary for the prosecutor with conduct of the case to view the material. In most cases, however, it will be sufficient to rely on the classification and number of images in the descriptions or the sample of the images/videos provided by Tasmania Police.

Section 130E(b) of the *Criminal Code* authorises the viewing, handling and possession of child exploitation material for legal purposes if the conduct is reasonable for that purpose. When dealing with child exploitation material, prosecutors must comply with the following guidelines:

- Before viewing the material an email is to be sent to the Director of Crown Law stating that the material is to be viewed, the purpose of viewing the material and the name of the case
- Only the prosecutors concerned with the particular case are to view the material

- The material is to be kept in a secure place
- Other than for court purposes or the purpose of returning the material to police, the material should not be removed from the Office without the express written consent of the Director or Deputy Director
- Where defence counsel wish to view the material in order to instruct their client, unless exceptional circumstances exist, they are to view the material at the offices of the Director of Public Prosecutions
- Where it is considered exceptional circumstances do exist for defence counsel to take the material, e.g. if expert advice is sought, the written consent of the Director or Deputy Director is required. In such circumstances, defence counsel will be required to give written undertakings as to who will view the material, where it will be stored and that it will be returned on a specified date or earlier if subsequently required by the Office to do so.
- If there is to be a trial, every endeavour should be made by the prosecutor with conduct of the case to reach an agreed fact with defence counsel as to the nature and quantity of the material to avoid having to tender and show the child exploitation material in court. Where this is not possible, the prosecutor should consider making an application to the court pursuant to s130G of the *Criminal Code* to limit the persons in the court to "essential persons" as defined by that section.

Forfeiture of child exploitation material

Section 130F of the *Criminal Code* provides:

> (1) This section applies if a person is prosecuted for a crime under section 130, 130A, 130B, 130C or 130D.
>
> (2) The court may, if it considers material which is the subject of a charge under any of the sections referred to in subsection (1) to be child exploitation material, order that the material be forfeited to the Crown.
>
> (3) The court may make an order under subsection (2) whether or not the person is convicted of a crime under any of the sections referred to in subsection (1).
>
> (4) If the person is convicted of a crime under any of the sections referred to in subsection (1), the court may also order that any thing used to commit the crime be forfeited to the Crown.
>
> (5) The court may also make any order that it considers appropriate to enforce the forfeiture.
>
> (6) This section does not limit the court's powers under the *Crime (Confiscation of Profits) Act 1993* or any other law.

(7) When any material or thing is forfeited to the Crown, the material or thing becomes the Crown's property and may be disposed of or destroyed in such manner as the Attorney-General may direct.

This is a very broad provision and provides the court a wide discretion in respect of forfeiture. In addition to forfeiting child exploitation material, the court can order anything used in the commission of the crime to be forfeited. This may include such items as cameras and computers. It is likely the court will take into account the general use of the item in determining whether to forfeit an item.

Prosecutors should ask for the following to be forfeited:

- All child exploitation material (The court may order it to be forfeited even if the accused is not convicted)

- Any item used directly in the crime, e.g. camera or computer

Where a prosecutor believes a significant item that was used indirectly in the crime should be forfeited, they should consult the Director or Deputy Director.

Drug charging guidelines

The *Misuse of Drugs Act 2001* provides for a number of indictable and summary offences in relation to the sale, possession, manufacturing and growing of prohibited drugs. There is some overlap between the summary and indictable offences.

The indictable offences include:

- manufacturing a controlled drug for sale (s6(1))
- cultivating a controlled plant for sale (s7)
- trafficking in a controlled substance (s12)

In addition, Parliament has enacted summary versions of:

- trafficking in a controlled substance (s27AA)
- cultivating a controlled plant for sale (s22A)

All the above provisions have a deeming provision that where a person has a trafficable quantity of a drug as defined by the Act then a person is presumed to have the intention or belief to sell unless they prove to the contrary on the balance of probabilities.

The elements of both the summary and indictable versions of trafficking in a controlled substance and cultivating a controlled plant for sale are identical. Therefore, a determination must be made whether to charge a person summarily or on indictment.

In cases involving cannabis, where there are 70 or fewer plants, or less than 2 kilograms of cannabis product, summary charges are to be preferred unless it appears the conduct is part of a series and/or where it appears the person is operating a commercial enterprise.

In the case of other controlled drugs, where the value of the drugs involved is less than $10,000, summary charges are to be preferred unless it appears the conduct is part of a series and/or where it appears the person is operating a commercial enterprise.

As Parliament has made this specific enactment, generally where a person is found to be in possession of in excess of the trafficable quantity they should be charged with trafficking in a controlled substance or cultivating a controlled plant for sale either summarily or on indictment, even where there is no other evidence of an intention to sell. Of course, prosecutors are to bear in mind there must be a reasonable prospect of conviction. Thus, any actual positive evidence of a lack of intention to sell should be considered. Where there is no other evidence of an intention to sell, and the amount is less than the trafficable quantity, then the following summary offences should be preferred:

- manufacturing a controlled drug (s21)
- cultivating a controlled plant (s22)
- possessing, using or administering a controlled drug (s24)
- possessing or using a controlled plant or its products (s25)

Sections 26 and 27 of the Act also provide for the summary offence of selling a controlled drug or plant. A person who sells a controlled drug or plant by definition under the Act has trafficked in that drug and would be liable to be charged with trafficking in a controlled substance (s12 or s27AA).

Thus, Parliament has provided that where a person sells a controlled drug they can be charged with either the indictable crime of trafficking in a controlled substance, the summary equivalent, or the summary offence of selling a controlled drug or plant. Where it is alleged that a person has sold more than the trafficable quantity of a particular drug on any one occasion then the preferred charge should be trafficking. Further, where the sale is less than the trafficable quantity but there is evidence of numerous sales, the charge should also be trafficking.

The charge of selling a controlled drug or plant should only be preferred where there is a small number of sales of an amount under the trafficable quantity where it could not be said to be a commercial operation.

Giretti count

In cases where it is alleged that a person carried on a business of trafficking, a *Giretti* count is to be preferred. In order to establish trafficking on this basis, it must be shown that the accused was engaged in a 'continuous drug selling activity of a commercial and systematic kind' (see *Giretti v R* (1986) 24 A Crim R 112; *Roland v Tasmania* [2016] TASCCA 20 at [6]). Thus, a *Giretti* count may be appropriate where there is evidence of an ongoing drug-dealing business, whether or not the accused was found in possession of any illicit drugs.

Where an indictment is framed on a *Giretti* basis, an alternative of trafficking on a particular date(s) can be included.

Onus of proof regarding possession

Section 12(1) of the Act makes it a crime to traffic in a prohibited substance. Trafficking includes possessing a substance with the intention of selling it. Where a person has possessed a trafficable quantity he or she is presumed to have intended to have the drug for sale unless he or she proves on the balance of probabilities he or she did not have that intention (s12(2)).

Section 3(3) of the Act provides:

> Without restricting the generality of the expression "possession", a controlled substance is taken to be in a person's possession for the purposes of this Act so long as it is on any land or premises occupied by the person, or is enjoyed by the person in any place or is in the person's order and disposition, unless the person proves that he or she had no knowledge of the substance.

Thus, where a controlled substance is found on a person's property that person is deemed to be in possession of that substance unless he or she can prove to the contrary. However, this provision does not apply to the trafficking provision in s12 of the Act. In *Momcilovic v R* [2011] HCA 34 the majority of the High Court held on construction principles applicable to the *Misuse of Drugs Act 2001* that the Victorian equivalent of s3(3) (the extended definition of the expression possession) was inapplicable to a charge of the equivalent s12(1) of the Act (trafficking) and relying on s12(2) the rebuttable presumption of the accused having the relevant intention once the accused is proved to have possessed a trafficable quantity of a controlled substance.

In other words, it is not sufficient to prosecute that the accused, in the extended definition of possession, possessed a trafficable quantity. Possession involves knowledge and control. Bell J at [666] states what the common law requires for possession:

> The common law requires more in order to prove that an accused is in possession of a thing than establishing that the thing is in premises occupied by the accused. The accused must have actual or constructive control of the thing and intend to exercise that control to the exclusion of those not acting in concert with him or her. Proof of the intention requires that the accused know of the existence of the thing. However, knowledge alone may not establish the intention. An occupier of premises may have knowledge of the presence of a prohibited drug in the premises and yet not be in possession of the drug. The prosecution of an accused who is in joint occupation of premises for an offence arising out of the seizure of drugs in the premises will commonly present the difficulty of excluding the reasonable possibility that the drugs were in the possession of another of the occupants.

Thus, prosecutors must consider when determining whether to indict a person for trafficking, and the case is relying on possession, whether there is sufficient evidence to indicate the person knew of the existence of the drug and was exercising control over it.

When conducting a trafficking trial, prosecutors should ensure neither they nor the trial judge refer to the *Misuse of Drugs Act* definition of possession when referring to trafficking when directing the jury. However, as s36A(3) of the Act provides that a person who is indicted for but found not guilty of trafficking under s12(1) may be convicted of an offence under s24 (possessing, using or administering a controlled drug) or s25 (possessing or using a controlled plant or its products) a proper direction on those alternatives if they are to be left ought proceed on the s3(3) definition.

Forfeiture of property on conviction

Section 38 of the *Misuse of Drugs Act 2001* provides:

> A court that convicts or finds a person guilty of an offence under this Act may, in addition to any other order that it may make, order that any property of the person used in the commission of the offence is forfeited to the Crown.

This provision is very broad and will include items used in the growing or manufacturing of an illicit drug under the Act. However, it could also include such property as real estate or vehicles used in the transportation of such drugs. Whether an application for such property is made under the Act should depend on the type of criminal activity and the relevance of the specific item of property to that activity. In other words, the use that was ordinarily made and as intended under the Act. Obviously, prosecutors should apply for all drugs to be forfeited, and any equipment used to manufacture, grow or produce those drugs together with any money used in the commission of the crime. Where it is thought that other items such as real estate or vehicles should be forfeited, the Director or Deputy Director should be consulted.

Prosecutors should also consider s11 of the *Crime (Confiscation of Profits) Act 1993* for forfeiture of tainted property or pecuniary penalty order for profits made as a result of the crime.

Money laundering

On occasions an accused person will be found in possession of a controlled substance and a significant amount of cash or property. However, there will be no evidence of any actual sales and a trafficking charge will be based on possession of the drug with the intention of trafficking in the drug. In such circumstances, it may not be possible to prove the money is tainted property.

Therefore, a charge pursuant to ss66A or B of the *Crime (Confiscation of Profits) Act 1993* should be considered. Section 66A creates various crimes including knowingly or recklessly dealing with the proceeds of crime. Section 66B makes it a crime to deal with property suspected of being the proceeds of crime unless an accused can show that he or she had no reasonable grounds to suspect the property was the proceeds of crime. Upon conviction the money or property will then be forfeited as tainted property.

Sentencing

Trafficking can result in significant variation in sentences due to the wide variety of circumstances in which the crime may be committed (see *DPP v Williamson* [2013] TASCCA 6 at [13]). Prosecutors should be aware that the following factors are highly relevant to the sentencing of drug offenders:

- motive – was the offence of a commercial nature or, alternatively, was the accused supporting a drug habit?

- role of the accused and the amount of profit received from the drugs
- prevalence of the drug in the community
- harm the drug can cause (see *Stebbins v Tasmania* [2016] TASCCA 16 per Estcourt J at [66]-[69]; *Sweetman v Tasmania* [2016] TASCCA 5)
- value of the drug
- scale of the operation and the length of time of the operation (see *DPP v Williamson* supra; *Stebbins v Tasmania* supra per Estcourt J at [46]-[47])

The major considerations for trafficking for commercial gain are general deterrence and punishment (see *Stebbins v Tasmania* supra per Pearce J at [114]).

Property damage/destruction charging guidelines

In many cases involving property damage or destruction the evidence will disclose conduct which could constitute an offence or a crime. Unlawfully setting fire to property (not structures, buildings or erections) can be dealt with summarily pursuant to s37AA of the *Police Offences Act 1935* or on indictment pursuant to ss268A or 269 of the *Criminal Code*. Similarly, unlawfully injuring or destroying property can be dealt with summarily pursuant to s37(1) of the *Police Offences Act 1935* or on indictment pursuant to s273 of the *Criminal Code*.

Care must be taken to choose a charge which reflects the nature and extent of the criminal conduct disclosed by the evidence and which will enable the court to impose a sentence commensurate with the gravity of the conduct.

These guidelines are to assist prosecutors in the exercise of their discretion. Each case should be approached and assessed on its own merits.

Summary charges should be preferred in all cases unless:

- The property involved is valued at greater than $20,000.00 (s37AA of the *Police Offences Act 1935*)
- The charge forms part of a course of conduct or series of crimes which are indictable
- The conduct involved serious or potentially serious risk to and /or danger to other property and/or to another person's life or safety. The risk should be real and substantial, not speculative. Matters such as weather conditions, locality and deliberateness or recklessness may have a bearing on this consideration
- Circumstances relating to the alleged offender and/or to the conduct are such that the penalty provisions available in the lower court would not be adequate
- The co-accused was dealt with on indictment. (Prosecutors should strive for consistency as between co-offenders unless there are compelling reasons not to. Considerations such as age discrepancy and criminal culpability would be relevant here.)

Perverting justice charging guidelines

A discretion exists as to whether to deal with an act or an omission aimed at, or having a tendency to, undermine the system of law and/or its administration, as a crime or as a summary offence.

The principle consideration is that the charge chosen be appropriate for the nature and extent of the criminal conduct disclosed by the evidence and which would enable a sentencing court to impose a sentence commensurate with the gravity of the conduct having regard to personal and general deterrent.

Prosecutors are often faced with such decisions in the context of traffic offences where an individual provides false particulars to the intercepting officer or investigating official. Such conduct can be dealt with summarily under s15 of the *Road Safety (Alcohol and Drugs) Act 1970* or s55A of the *Police Offences Act 1935*.

Equally, if the evidence discloses the act was one coupled with the requisite intent it could amount to the crime of perverting justice pursuant to s105 of the *Criminal Code*. In *R v Rogerson* (1992) CLR 268, Brennan and Toohey JJ said at 280:

> The course of justice consists in the due exercise by a court or competent judicial authority of its jurisdiction to enforce, adjust or declare the rights and liabilities of persons subject to the law in accordance with the law and the actual circumstances of the case (*R v Todd* [1957] SASR 305 at 328). The course of justice is perverted (or obstructed) by impairing (or preventing the exercise of) the capacity of a court or competent judicial authority to do justice. The ways in which a court or competent judicial authority may be impaired in (or prevented from exercising) its capacity to do justice are various. Those ways comprehend, in our opinion, erosion of the integrity of the court or competent judicial authority, hindering of access to it, deflecting applications that would be made to it, denying it knowledge of the relevant law or of the true circumstances of the case, and impeding the free exercise of its jurisdiction and powers including the powers of executing its decisions. An act which has a tendency to effect any such impairment is the actus reus of an attempt to pervert the course of justice.

Thus, providing false particulars to the intercepting officer or other officials may amount to perverting justice if it is done so with the intention of preventing a charge being laid and therefore a court hearing and determining a matter.

In respect of perverting justice involving a traffic offence, a further discretion arises pursuant to s72AB of the *Justices Act 1959*; that is, the giving or withholding of consent for summary disposition. Each case should to be dealt with on its merit.

However, a summary charge should be preferred unless:

- the charge forms part of a course of conduct or series of crimes which are indictable

- the act or omission was such that it was not discovered or corrected by the particular individual within a reasonable time
- the act or omission led to the institution of proceedings against another person
- the act or omission was difficult to detect and/or required considerable resources to uncover the deception
- the circumstances relating to the alleged offender and/or the conduct were such that the penalty provision available in the lower court would not be adequate

The above factors should also guide the prosecutor's discretion to give or withhold consent in relation to s72AB of the *Justices Act 1959*. Where a prosecutor exercises such a discretion a written record should be made outlining the reasons for the decision.

A prosecutor should strive for a consistent approach in relation to these matters.

The crime of perverting justice covers a myriad of conduct beyond what is referred to above. Section 105 of the *Criminal Code* does not create a continuing offence.

The crime requires the commission of an act (not acts) or omission (not omissions) with a requisite state of mind. There is no such crime as attempting to commit perverting justice (see *Tasmania v Green & White* [2007] TASSC 81). The act or omission does not have to result in the particular consequence intended coming to fruition because the very attempt has a tendency to pervert justice.

There is particular need for restraint in relation to conspiracy charges pursuant to s297(1)(b) of the *Criminal Code.* Wherever possible, the substantive charges should be laid reflecting the offences actually committed as a consequence of the alleged conspiracy. However, particularly in cases where a number of acts have occurred, each of which could technically amount to a charge of perverting justice, to carry out or obtain one over-arching goal a conspiracy charge should be preferred (see Conspiracy charging guidelines).

Conspiracy charging guidelines

Section 297 of the *Criminal Code* makes conspiracy a crime. In particular, s297(1)(b) makes it a crime to conspire to pervert the course of justice and s297(1)(c) makes it a crime to conspire to commit a crime.

A conspiracy is an agreement between two or more persons. There must be a conscious understanding of a common design to carry out a particular act or cause a particular state of affairs. The conspiracy becomes unlawful because the agreement is to do an unlawful act (crime) or to do an act by unlawful means (see *R v Rogerson* (1992) 174 CLR 268 per Brennan & Toohey JJ at 280-1).

The crime is completed when the agreement comes into existence. However, it is a continuing offence and it continues as long as two or more people remain in the agreement. In *Truong v R* (2004) 223 CLR 122, Gleeson CJ and McHugh & Heydon JJ said at [35]:

> Although a crime of conspiracy has been committed, and in that sense is complete, once an agreement to commit a crime has been made, conspiracy is a continuing offence. It is an error to think that the crimes comes to an end once the agreement has come into existence.

Thus, persons can be participants in the same conspiracy who do not know each other or even know of each others' existence providing they have a conscious understanding of the same common design. Likewise, persons can leave or join the conspiracy and the conspiracy will continue provided there are at least two persons with the same common design or agreement.

Often a charge of conspiracy will preferred where two or more people form an agreement to conspire to commit a crime but that crime, for whatever reason, is not committed. However, the charge of conspiracy is not limited to this situation.

Conspiracy can also be charged where the substantive crime has been committed. Generally speaking, however, conspiracy and the substantive crime should not be tried on the same indictment (see *R v Hoar* (1981) 148 CLR 32) although there is no rule of law that requires a conspiracy count to be severed from a count that charges commission of the crime in respect of which it is alleged there was a conspiracy (see *Tasmania v Green* (2007) 16 Tas R 318). Where conspiracy is charged with the substantive offence it can lead to injustice because of the unnecessary complexity caused by difficult judicial directions to juries regarding the admissibility of evidence and add to the length of trials (see *R v Moore* [1988] 1 Qd R 252). Also, where a specific offence is charged the allegation can be more specifically particularised, thus giving the accused greater certainty of the case he or she has to meet and a more reasonable precise focus for determining the admissibility of evidence.

Generally, conspiracy charges will only be preferred in the following circumstances:

- Where there is evidence that a conspiracy was entered into by two or more people, however, the substantive offence has not been completed

- Where the agreement has lasted for a significant period of time involving many substantive offences, however the essence of the agreement is ongoing criminal activity in an established organisation and the charging of the substantive offences would not indicate the overall criminality of the group or individuals within the group (see *Shepherd v R* (1988) 37 A Crim R 303)

- Where the conspiracy or agreement was to carry out a specific unlawful purpose which amounted to a crime but to achieve that purpose there were a number of overt acts committed which were, in themselves, substantive offences but were only committed to achieve the major unlawful purpose of the agreement

In framing an indictment for conspiracy, prosecutors must be careful when determining what agreement each particular accused shared. Further, in carrying out an unlawful agreement other unlawful agreements may be entered into with people who did not share or have common design with the major agreement. In such circumstances, individual counts particularising the separate agreements are required. In other words, care must be taken to ensure that each count only charges one conspiracy and is therefore not duplicitous (see *Georgiadis v R* (2002) 11 Tas R 137 at [21]-[25]; *Gerakiteys v R* (1984) 153 CLR 317). Particulars must be precise in order to avoid arguments that a specific count could refer to a number of different alleged or conceivable conspiracies.

Prosecutors should also be aware that where overt acts in carrying out the conspiracy are to be relied on to prove the conspiracy, such acts need to be particularised. It is not necessary for such acts to be particularised in the indictment but if not the particulars should be forwarded to the accused's counsel in a separate document.

Where Tasmania Police are of the view that a charge of conspiracy should be laid, advice should be obtained from the Office.

No indictment should be filed for a count of conspiracy without the approval of the Director.

False statutory declarations and other false statements charging guidelines

Making a false statutory declaration or making other false statements in particular circumstances is a crime contrary to s113 of the *Criminal Code.* Section 72 of the *Justices Act 1959* allows an accused person to elect that a charge brought pursuant to s113 of the *Criminal Code* be tried summarily, provided the prosecutor of the complaint consents.

Ordinarily, consent should be given unless:

- there are other charges arising out of the same course of conduct that must be dealt with on indictment; or
- the prosecutor is of the view that the conduct alleged is so serious as to warrant the crime being tried on indictment

Sea fisheries offences charging guidelines

The *Living Marine Resources Management Act 1995* and regulations and rules made under that Act regulate the management of the State sea fisheries resources and provide for a number of indictable and summary offences in relation to the unlawful taking, possession, sale, purchase and trafficking of such resources and the keeping of records in respect of such activities.

The indictable offences are contained in Division 9 of Part 9 of the Act as follows:

- Possession of fish without lawful excuse (s264)
- Trafficking in fish without lawful excuse (s264A)
- In respect of records kept under the Act, knowingly making false or misleading statements or omitting matters to that effect (s265)

Prosecutors should note that a person is taken to traffic in fish if, on one or more occasions, one or any combination of a number of activities specified in s264A(2), involving one or a mixture of fish species, is carried out in relation to fish that are unlawfully taken or possessed. In this regard "unlawfully" includes taking or possessing fish contrary to the Act or any regulation or rule made under the Act.

The Act provides that these indictable offences can be determined in a court of summary jurisdiction if the prosecutor and defendant consent and the court is satisfied that it is proper to do so.

Furthermore, there is a high degree of overlap between these indictable offences and numerous summary offences contained elsewhere in the Act and in the regulations and rules made under the Act.

The decision to proceed on indictment based on the subject matter of the acts or omissions complained of will ordinarily have regard to the following factors or any combination thereof:

- The seriousness and objective gravity of the alleged offence(s), and judicial recognition of the paramountcy of considerations of general deterrence in respect of offences involving the unlawful exploitation of precarious public natural resources
- The quantity of fish involved and the extent of unlawful exploitation of the fishery in question, including consideration of environmental impacts
- The duration of the activity involved, and the degree of persistency in offending
- The amount of commercial or other gain derived or sought to be derived from the activity involved

- The impact of the activity on the integrity of fisheries and environmental management controls and record keeping requirements directed to ensuring the preservation and sustainability of the resource

- Other special features (for example, involving protected marine species or undertaking activity in special areas such as marine reserves and sanctuaries)

Wherever possible, Tasmania Police should consult with the Office before charging with indictable offences.

In respect of convictions for such offences, prosecutors should be aware of the following:

- A finding of guilt for an offence relating to the taking, possession, purchase, sale or trafficking of fish will attract, in addition to any general penalty, a mandatory special penalty equal to 10 times the value of the fish involved (s267(1)) which cannot be reduced or suspended for any reason (s267(2)). The value of the fish involved is calculated in accordance with *Fisheries (Value of Fish) Order 2015*. Mandatory special penalties also apply to offences involving the use of fishing apparatus (s268).

- Upon conviction for any offence under the Act, provision is made in Division 4 of Part 9 of the Act (ss225-233) for the forfeiture of fish to which the offence relates, and of any fishing apparatus, equipment, vessel or other things used in, or in connection with, the commission of the offence, or any proceeds of sale thereof.

- Provision is made in Division 6 of Part 9 of the Act (ss242-250) for the allocation of demerit points to convicted offenders and to any licence under which an offender was operating when the offence was committed. The number of demerit points to be allocated is calculated by reference to the penalty imposed in terms of the amount of any fine (including special penalties) or the number of months of suspended or actual imprisonment. Demerit points remain in force for a period of five years from the date of conviction. Depending on the seriousness of the offence involved, an accumulation of 200 or more demerit points can result in the permanent or temporary disqualification of an offender from obtaining or holding a licence, and temporary suspension of a licence.

- In an appropriate case, application can be made under the Act (s251) for a control order restricting or prohibiting specified activities of an offender for a specified period.

- Prosecutors should also consider applicability of the provisions of the *Crime (Confiscation of Profits) Act 1993* for the forfeiture of tainted property in relation to the offence or the making of a pecuniary penalty order in respect of profits made as a result of the commission of the offence.

Stalking and bullying charging guidelines

Section 192 of the *Criminal Code* prohibits stalking and bullying. A prosecution under this section must not be commenced without the consent of the Director. Pursuant to s72(4) of the *Justices Act 1959* a charge of stalking or bullying can be tried summarily with the consent of the prosecutor of the complaint. At the time of authorisation the Director will indicate whether consent is given for the matter to be tried summarily.

Stalking and bullying occurs where a person pursues a course of conduct with the intention of causing another person physical or mental harm, including self-harm, or extreme humiliation or to be apprehensive or fearful. A person is deemed to have such an intention if a course of conduct is pursued which he or she knew or ought to have known was likely to cause another person physical or mental harm, including self-harm or extreme humiliation, or to be apprehensive or fearful (s192(3) of the *Criminal Code*).

The *Criminal Code* provides for a wide range of actions that could constitute the course of conduct that amounts to stalking and bullying (s192(1)(a)-(j)). Such conduct can include acting in any way "that could reasonably be expected to cause the other person to be apprehensive or fearful". It can also include actions that are not illegal *per se* and actions that could constitute other offences. There is a particular overlap with the following offences or court orders:

- assault
- trespass
- restraint orders (s106B of the *Justices Act 1959*)
- emotional abuse or intimidation (s9 of the *Family Violence Act 2004*)
- family violence orders (ss14 and 16 of the *Family Violence Act 2004*)

A person pursues a course of conduct if the conduct is sustained or the conduct occurs on more than one occasion (s192(2)). It is therefore a continuing offence.

Generally, the Director's consent to charge with stalking and bullying (as distinct from pursuing individual charges or preventative court orders) will only be given in circumstances where:

- the course of conduct is extremely serious
- the course of conduct has continued over an extensive period of time
- lesser charges, restraint orders or other proceedings have failed to stop the conduct

Ultimately it is a question of judgment. In determining whether to consent to a charge of stalking and bullying, the following considerations will apply:

- The number and type of incidents that have been directed at a complainant
- The period of time over which the incidents have occurred
- The planning and motivation for the conduct, e.g. where the conduct has occurred over a short time span and was not motivated to intimidate a complainant over an extended period of time then individual charges should be preferred.
- Have individual charges or other court measures failed to stop the conduct? If so, a charge of stalking should be preferred.
- In pursuing the conduct did other serious crimes occur, i.e. sexual assaults or the distribution of child exploitation material? If so, a charge of stalking and bullying should be preferred.
- The effect the conduct has had on the complainant
- Does the complainant have another remedy such as a complaint to the Anti-Discrimination Commission or to an employer or school that is taking disciplinary action?

Youths who engage in stalking and bullying will only be charged in exceptional cases where the conduct is extremely serious, there has been a considerable adverse consequence to the complainant and there is no other appropriate manner to deal with the matter. In circumstances where the conduct has taken place at the youth's school, the Director will consider any disciplinary action that may have been taken by the school or the Department of Education in respect of the alleged conduct. Tasmania Police should consider the diversionary procedures set out in Part 2 of the *Youth Justice Act 1997*.

Where the complaint contains a charge of stalking and bullying and associated summary charges, all associated charges should be adjourned *sine die* pending the outcome of the indictable offence. The file will be reviewed by the Office to determine whether the associated summary charges can be heard and determined by the Supreme Court. In these circumstances, the public interest factors would normally demand that where possible all associated charges should be finalised in the one proceeding in order:

- to limit the number of times the complainant and other witnesses are required to give evidence
- to save the community the expense of holding more than one trial
- if there is a conviction, the sentencing judicial officer will be able to sentence on the entire proven conduct

Computer-related crime charging guidelines

Sections 257B-E of the *Criminal Code* enact various crimes relating to computers. Identical provisions in the *Police Offences Act 1935* make various acts summary offences. The crimes or offences are as follows:

- computer-related fraud (s257B of the *Criminal Code*; s43A of the *Police Offences Act 1935*)
- damaging computer data (s257C of the *Criminal Code*; s43B of the *Police Offences Act 1935*)
- unauthorised access to a computer (s257D of the *Criminal Code*; s43C of the *Police Offences Act 1935*)
- insertion of false information as data (s257E of the *Criminal Code*; s43D of the *Police Offences Act 1935*)

On occasions some of these offences may overlap, e.g. a person may commit computer-related fraud by using a computer without authorisation and/or by inserting false data into a computer.

Thus, Parliament has provided that for the above crimes a person can either be charged on indictment or summarily.

Care must be taken to choose a charge which reflects the nature and extent of the criminal conduct disclosed by the evidence which will enable a court to impose a sentence commensurate with the gravity of the conduct.

These guidelines are to assist prosecutors in the exercise of their discretion. Each case should be approached and assessed on its merit.

Where the computer-related crime involves fraud a similar approach to stealing as provided by s72 of the *Justices Act 1959* should be taken. That is, a summary charge should be preferred where the amount of the alleged computer-related fraud is less than $20,000 unless:

- the charge involved forms part of a course of conduct or series of crimes which are indictable
- circumstances relating to the alleged offender and/or to the conduct are such that the penalty provision in the lower court would not be adequate
- a co-accused was dealt with on indictment (prosecutors should strive for consistency as between co-offenders unless there are compelling reasons not to)

Where the crime does not involve a financial element, such as damaging data or inserting false information for non-financial reasons, in determining whether a charge should be summary or indictable the purpose of the crime and its result

should be considered. Generally the charge should be a summary one unless the conduct involves serious, or potentially serious, risk to lives or property.

Similarly, in the case of unauthorised access to a computer, consideration needs to be given to the type of information accessed and the purpose of the access.

Before any charges, whether summary or indictable, are laid further consideration needs to be given as to whether the conduct may be adequately dealt with by employment codes of conduct.

In determining whether an employment code of conduct is sufficient, regard to the following is required:

- The type of material accessed
- The purpose for which it was accessed, e.g. was it for a malicious purpose?
- Whether the material was disseminated
- Whether the access caused any actual harm to an individual or organisation
- The likely penalty pursuant to a code of conduct proceeding

Criminal defamation charging guidelines

Section 196(1) of the *Criminal Code* provides:

> A person who, without lawful excuse, publishes matter defamatory of another living person (the "victim") –
>
> (a) knowing the matter to be false or without having regard to whether the matter is true or false; and
>
> (b) intending to cause serious harm to the victim or any other person or without having regard to whether such harm is caused –
>
> is guilty of a crime.

Sub-section (6) provides that a prosecution under this section must not be commenced without the consent of the Director.

Prosecutions for criminal defamation will only be authorised on rare, serious occasions, particularly where there is a civil remedy. If it is part of a general sustained offensive behaviour towards one individual, normally a stalking charge will be preferred.

Generally speaking, consent for prosecution will only be forthcoming in the following circumstances:

- The application has demonstrated a sound case, that is, a clear *prima facie* case that defamatory publications were made including evidence negating lawful excuse for the publications: *Goldsmith v Pressdram Ltd* [1977] 1 QB 83 at 88, *Gouldham v Sharrett* [1966] WAR 129 (FC) at 137 and *Spautz v Williams* [1983] 2 NSWLR 506 at 537.

- The case is one which calls for the intervention of the criminal law: *Shapowloff v Fitzgerald* [1966] 2 NSWR 244 at 249.

- That the intervention of the criminal law is called for where:

    - The defamation is so serious as to require both punishment of the offender and the protection of the community: *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 at 485 and *Spautz v Williams* supra at 540; and

    - The public interest, as distinct from the individual's interest, requires the institution of criminal proceedings: *Goldsmith v Pressdram Ltd* supra and *Shapowloff v Fitzgerald* [1966] 2 NSWR 244.

See also *Westbrooke v Parker* [1998] TASSC 104.

Authorisation should be sought in accordance with the same procedure as that for seeking authorisation for a charge of persistent sexual abuse of a child or young person.

Bail guidelines

Prosecutors are to comply with the following guidelines when dealing with bail applications.

A person in custody has the right to apply to the Supreme Court for bail in the following circumstances:

- via s7A of the *Bail Act 1994* where a person has been committed to the Supreme Court in respect of an offence and has appeared in that court in respect of the offence
- an appeal from an order of a magistrate refusing bail pursuant to s21A of the *Bail Act 1994*

Please note, unless the offence the person is charged with is a crime there is no jurisdiction for the Supreme Court to hear a bail application unless a magistrate at first refused an application (other than on appeal to the Court of Criminal Appeal).

An appeal from an order of a magistrate under s21A of the *Bail Act 1994* may only be made by a person in custody if an application for bail was made either orally or in writing and submissions were made in support of the application (s21A(3)(a)) of the *Bail Act 1994*). The appeal must be filed within 21 days after the order to which the appeal relates was made or refused (s21A(3)(b)) of the *Bail Act 1994*).

Except where the provisions of s12 of the *Family Violence Act 2004* or the provisions of s35(2) of the *Justices Act 1959* apply (see below), the principles regarding the granting of bail are those of the common law. Please note the *Bail Act 1994* does not prescribe any tests for the granting of bail.

The common law is that an accused person is presumed to be innocent and therefore there is a general presumption that an accused person should be granted bail, with the onus being on the prosecution to show that a person should not be granted bail.

In *The Matter of S and The Matter of Section 304 of the Criminal Code* (2005) TSSC 89, Slicer J said:

> Bail is a form of conditional, not absolute, liberty (see generally *Griffiths v R* (1977) 137 CLR 293) and has long been a method of accommodating the presumption of innocence, the impact of prolonged detention before trial with the ensuring of receiving attendance at trial and potential risk to the community of the State.

In *R v Fisher* (1964) 14 Tas R 12, Crawford J at [3] said:

> ... that prima facie every accused is entitled to his freedom until he stands trial ... Simply because a man is charged with a serious crime (not being a capital case) that of itself is not a strong ground for refusing bail. In many cases bail is allowed, although a man is charged with a serious crime.

Crawford J set out the following factors in determining the question of bail:

- the probability or otherwise of the accused appearing at the trial. In connection with this, there are three subsidiary factors:
    - seriousness of the crime
    - probability of conviction
    - severity of the punishment that may be imposed
- his ties with his family
- his character and antecedents
- the likelihood of interference with witnesses
- whether the prosecution opposes the application
- whether a refusal of bail would prejudice the preparation of his defence
- the delay before trial
- the protection of the public

The common law exception is that with a charge of murder the onus is on the accused to satisfy the court that there should be a grant of bail. Bail will only be granted in exceptional circumstances (see *R v Clarkson* [1981] VR 165; *Lim v Gregson* [1989] WAR 1).

Thus, although the protection of the public is a factor the court takes into account, it is not the paramount factor, except for two exceptions where the common law has been modified by statute.

Section 12 of the *Family Violence Act 2004* provides:

> (1) A person charged with a family violence offence is not to be granted bail unless a judge, court or police officer is satisfied that release of the person on bail would not be likely to adversely affect the safety, wellbeing and interests of an affected person or affected child.
>
> (2) Without limiting the matters to be taken into account in considering whether or not to grant bail to a person, a judge, court or police officer must have regard to the following:
>
> (a) any available risk screening or rehabilitation program assessment;
>
> (b) the person's demeanour;
>
> (c) the result of any available safety audit;

(d) the availability of suitable accommodation for the person and any affected person or affected child;

(e) any other matter the judge, court or police officer considers relevant.

(3) Section 34 of the *Justices Act 1959* does not apply to a person charged with an offence under section 35 of this Act.

Thus, where a person is charged with a family violence offence as defined by the *Family Violence Act 2004* (ss4 & 7), securing a person's attendance at trial is not the paramount consideration but the applicant, not the prosecution, has to satisfy the court that their release on bail would not be likely to adversely affect the safety, well being and interests of an affected person or affected child. The Act therefore reverses the common law and creates a presumption against bail, the onus being on the applicant to displace the onus (see *R v S* (2008) 157 A Crim R 451; *Olsen v Tasmania* [2005] TASSC 40; *DPP (Acting) v JCN* [2015] TASFC 13 per Pearce J at [18]).

The other statutory provision that alters the common law for bail is s35(2) of the *Justices Act 1959* which covers a person who is in custody charged with an offence which would be in breach of a restraint order. Section 35(2) provides:

> In determining whether to refuse to bail or to admit to bail a person who is a prescribed person within the meaning of section 34A or a person referred to in section 34A(1) who has been taken into custody in respect of an offence constituted by a breach of a restraint order, interim restraint order or telephone interim restraint order, the justice –
>
> (a) must consider the protection and welfare of the person for whose benefit the restraint order, interim restraint order or telephone interim restraint order is sought or was made to be of paramount importance; and
>
> (b) must take into account any previous violence by that person against the person for whose benefit the restraint order, interim restraint order or telephone interim restraint order is sought or was made or against any other person whether or not that person was convicted of an offence, or had a prior restraint order made against him or her, in respect of that violence.

Thus, although the onus is not reversed, the protection of the person who had the benefit of the restraint order is of paramount importance.

Apart from the above two exceptions, the common law principles for bail, as set out above, apply.

In assessing whether or not to oppose a bail application for serious offences (even where s12 of the *Family Violence Act 2004* or s35(2) of the *Justices Act 1959* do not apply) although at common law protection of the public is not the paramount consideration, it is still a consideration. A court will refuse bail where an accused person poses such a risk that, notwithstanding the presumption of innocence, the protection of the community requires his or her

detention until trial (see *DPP (Acting) v JCN* [2015] TASFC 13 per Pearce J at [16]).

Prosecutors need to carefully consider whether the general public or specific individuals would be at risk if the person in custody is granted bail. If a prosecutor is of the view that the person poses a significant risk to the safety of the public or specific individuals then the bail application should be opposed.

However, bail applications should not automatically be opposed. One of the factors that a judicial officer has to take into account in determining a bail application is whether the prosecution opposes the application. If the prosecution opposes applications for no good reason the fact that an application is opposed would have little meaning for a judicial officer.

If a prosecutor is of the view that a bail application should not be opposed he or she should seek authorisation from a member of the Committee or a Level 3 practitioner, and where the charge is murder, attempted murder or another charge where a complainant has suffered life-threatening injuries, the Director's consent should be obtained.

Where a bail application is not to be opposed clear, brief, written reasons should be made in order to provide a record as to why the decision not to oppose bail was made.

Where it is likely that bail would be granted, careful consideration will need to be given to determine which of the following conditions are required:

- an acceptable surety condition
- a residential condition
- a curfew condition
- a reporting to police condition
- a condition that the applicant does not approach, directly or indirectly, the complainant or other specified persons, including witnesses
- a condition that the applicant does not leave the State
- a condition that the applicant surrender to the registrar his or her passport
- a condition that the applicant or the surety pay an actual recognisance to the registrar

Of course, the appropriate conditions would be dependent on the circumstances of the case.

Information concerning the outcome of bail applications should be promptly relayed to any concerned persons, e.g. police and complainants.

Bail on appeal

Section 415(2) of the *Criminal Code* provides that the Court of Criminal Appeal may admit a person to bail pending the determination of the appeal. Section 418(1)(c) allows a single judge to exercise that power.

Bail should only be granted when a person is serving a sentence of imprisonment but has appealed their sentence in exceptional circumstances (see *Chamberlain v R (No. 1)* (1983) 153 CLR 514).

Where a prosecutor considers there are exceptional circumstances, authority should be sought from a member of the Committee to not oppose such an application.

Crown appeal of a magistrate's decision to allow bail

Section 21A of the *Bail Act 1994* allows an aggrieved person to appeal an order of a magistrate granting bail, or a condition of bail. Section 21C of the Act makes the appeal by way of a *venire de novo*.

Despite this, an appeal should only be considered where the magistrate's decision is clearly unreasonable or further relevant information becomes known after the decision has been made. Where a prosecutor is of the view that an appeal should be considered, authorisation is required from a member of the Committee.

Crown appeal of a judge's decision to allow bail

Section 21B of the *Bail Act 1994* allows a Crown Law Officer to appeal a decision of a judge of the Supreme Court to admit a person to bail, to the Full Court. Where a prosecutor is of the view that an appeal should be considered, authorisation is required from the Director.

Giving advice to investigators

All requests for advice by police investigators should be made in writing to the Office. Advice files, with the exception of sexual assault files (see Sexual crime guidelines), are to be addressed to the Deputy Director who will allocate the file in the normal manner, the exceptions being matters involving death or investigations in respect of police officers where the files should be addressed to the Director. Advice files should not be sent or handed to individual prosecutors.

Requests for advice will include:

- the availability of criminal charges involving
    - the sufficiency of evidence
    - the admissibility of evidence
    - the most appropriate charge in the circumstances
- the present state of the law with respect to a certain subject matter (where this requires detailed evaluation)
- whether a matter should be disposed of summarily rather than on indictment
- sexual crimes

In the ordinary course these requests are to be answered in writing.

There is no distinction to be drawn between “formal” and “informal” advice, and “provisional” advice should not be given.

Should the person seeking advice be unable, due to the urgency of the matter, to seek advice by way of written request, this should not preclude advice being provided. In such instances, the written advice should recite the particular request made of the Office and the information provided upon which the advice is given.

In the ordinary course a letter confirming the oral advice should be sent within 24 hours.

Where the request for advice relates to whether or not there is a basis for charging, any advice must only be provided after an examination of the complete police file. Ordinarily, such advice will only be given after the alleged offender has been provided with an opportunity to answer or comment upon the substance of the allegations by interview or otherwise.

Advice will not be given on any individual exercise of police powers or on operational matters generally. Such requests should be referred to the police

legal officers. If necessary, police legal officers can approach the Director or the Deputy Director.

Where advice is given to proceed or not to proceed such advice needs to be approved by a member of the Committee.

Where the charge is one for an offence resulting in death, the advice is to be referred to the Director for final consideration before it is communicated to the investigating officer.

Prosecution appeals

The prosecution has a right to appeal in certain circumstances. This right will always be exercised with restraint and only where there is a reasonable prospect of success.

Appeals against sentence

Section 401(2)(c) of the *Criminal Code* enables the prosecution to appeal a sentence of the Supreme Court to the Court of Criminal Appeal.

The prosecution's right to appeal against sentence should be exercised sparingly and it is the policy of the Director of Public Prosecutions not to institute such an appeal unless it can be asserted with some confidence that the appeal will be successful. The primary purpose of a Crown appeal was stated in *Director of Public Prosecutions v Bradford* [2016] TASCCA 14 by Pearce J at [14]:

> The underlying principle is that a primary purpose of Crown appeals is to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons: *Green v The Queen; Quinn v The Queen* [2011] HCA 49, 244 CLR 462 at 465-466 [1]-[2]. It is not the function of the Court to overturn a sentence merely because it is light or lenient. The sentence must be shown to be manifestly inadequate to the point of clear error. Appellate courts should exercise deference and restraint. However, when appropriate cases are brought on appeal, it is for this Court to maintain sentencing standards and levels: *Director of Public Prosecutions v P* {2007} TASSC 51 per Crawford J (as he then was) at [18]. Crown appeals serve also to maintain public confidence in the administration of justice by the intervention of this Court in the case of a manifestly inadequate sentence: *Everett v The Queen* [1994] HCA 49, 181 CLR 295 at 306; *R v Stoupe* [2015] NSWCCA 175 at [115]-[116].

In considering a prosecution appeal against sentence it is to be borne in mind that the sentence for a specific offence will vary according to its nature, the circumstances of its commission, the antecedents of the prisoner and the effect on the victim. 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 a magistrate's sentencing decision 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 or, in other words, plainly unjust. Mere disagreement with the sentence passed is insufficient.

In *Director of Public Prosecutions (Acting) v Pearce* [2015] TASCCA 1, Pearce J, with whom Blow CJ and Porter J agreed … summarised the relevant principles at [8] as follows:

> As in all such appeals as this, it is necessary to refer to the principles which limit the circumstances in which intervention of an appellate court is justified. The court sits to correct material error: *Dinsdale v R* (2000) 202

> CLR 321 per Kirby J at [57]–[60]. Where no specific error is alleged, this court must be persuaded of error of the second type referred to in *House v R* (1936) 55 CLR 499 at 505, that is, that the sentence imposed by the sentencing judge is "unreasonable or plainly unjust". It is not to the point that the sentence may be regarded by some as too lenient or too harsh. It must be established that the sentencing order is so manifestly wrong that it could only be the result of some undefinable error in the exercise of the judicial discretion: *Bresnehan v R* (1992) 1 Tas R 234 at 242. A court of criminal appeal may not substitute its own opinion for that of the sentencing judge merely because the appellate court would have exercised its discretion in a manner different from the manner in which the sentencing judge exercised his or her discretion: see *Lowndes v R* (1999) 195 CLR 665 at [15], and the other cases referred to by this court in *Director of Public Prosecutions v CSS* [2013] TASCCA 10. Sentencing judges should be "accorded a wide measure of latitude": *Postiglione v R* (1997) 189 CLR 295 per Kirby J at 336. Excess or inadequacy is either apparent or it is not: *Dinsdale v R* (above) at [6]. In considering that question regard is to be given to all the matters that are relevant to determining the sentence: *Hili v R*(2010) 242 CLR 520 at 539.

A notice of appeal against a sentence should be made within 14 days of the sentence being passed (s407(3A)).

In all cases of serious violence, sexual assault and serious drug crimes, the prosecutor with conduct of the case should consider whether the sentence is adequate in accordance with the above principles (even if they were not present in court when the sentence was pronounced). If the prosecutor believes that the sentence was adequate then a short file note should be entered on the file confirming that is the case. On the other hand, if the prosecutor considers the sentence may be inadequate, he or she should consult with a Principal Crown Counsel to determine whether a submission should be made to the Director to appeal the sentence.

Appeals against conviction

Section 401(2)(b) of the *Criminal Code* enables the prosecution to apply for leave to appeal an acquittal on a question of law. Thus, there can be no appeal on a question of fact or the reasonableness of the verdict. This alters the common law position that a person acquitted of a crime cannot be prosecuted for the same crime again. Therefore, such appeals should only be instituted sparingly. Generally speaking, the appeal of an acquittal will only be considered where the alleged error of law is of substance, is of general importance and not just limited to the individual case or where it has led to a significant miscarriage of justice.

A notice for an application for leave to appeal a conviction must be made within seven days (s407(3)(b)).

All appeals to the Court of Criminal Appeal, whether against sentence or acquittal, must be approved by the Director.

Written submissions

Prosecutors appearing on an appeal, irrespective of whether it is against conviction or sentence, should forward their draft written submissions to the Director prior to filing.

Motions to review

Section 107 of the *Justices Act 1959* allows "[a] person who is aggrieved by an order of justices" to "upon notice in accordance with this section, move the Supreme Court to review that order."

Motions to review are commonly known as lower court appeals. They are governed by Part XI of the Act. A motion to review an order of a magistrate may allege an error of fact, or law, or both.

Police brief the Office to appear as both counsel for the applicant (when police have moved for an order to be reviewed) and as counsel for the respondent (when a defendant has sought a review).

When Tasmania Police brief the Office to appeal a decision of a magistrate, usually on the basis of an acquittal of a defendant by a magistrate, or alleging a sentence is manifestly inadequate, a police officer (usually a prosecutor) will forward a police file to Senior Crown Counsel (Summary Prosecutions) for review. If it is determined that an appeal ought to be instituted, Senior Crown Counsel (Summary Prosecutions) will prepare a motion to review notice, file the notice in the relevant Supreme Court Registry, and request a police officer to serve it on the respondent (defendant).

A motion must be made, filed and served within 21 days after the magistrate's order that is sought to be reviewed (s107(3)). The Clerk of the Court of Petty Sessions ought to also be served with a copy of the motion (s107(3)(b)(ii)).

When the Office acts as respondent counsel to a motion, Senior Crown Counsel (Summary Prosecutions) will receive the motion and open a file.

Upon the filing of a motion to review, the Supreme Court will write to the Court of Petty Sessions for the issuing of prescribed materials to the parties (s109). If the Office is the applicant, the prosecutor should write to Clerk of the Court of Petty Sessions requesting a copy of the recording of proceedings be forwarded to the Supreme Court transcription service so that a transcript of the proceedings before the magistrate may be prepared.

The first return of a motion will usually be before the associate judge. The associate judge will provide directions for the future of the matter. However, it is now commonplace that the first appearance is dispensed with by consent orders between the parties and the matter is readied for hearing before a judge.

The relevant Supreme Court Registry will issue a hearing notice to the parties. Within 10 days of the hearing, the applicant must file and serve contentions of fact and law to be relied upon. Within four days of being served with those

contentions, the respondent must provide contentions in response (see Practice Direction 2 of 2014).

A motion to review does not act as a stay of an order or sentence prior to determination; for that to occur, an interlocutory order seeking a stay must be sought (s109(1)(c)).

A judge will hear and determine the motion in accordance with the powers afforded to the Supreme Court (s110).

In determining a review of the conviction or acquittal of a defendant by a magistrate, a judge may not entertain a ground alleging that the verdict of the magistrate was "unsafe and unsatisfactory" (see *Phillips v Arnold* (2009) 19 Tas R 21 per Crawford CJ at [46]), although the considerations may be similar (see *Smith v McDonald* [2010] TASSC 26 per Wood J at [40] to [41]). Rather, the question for the court is whether it was open to the magistrate, acting reasonably and taking into account the criminal standard of proof, to come to the conclusion that he or she did (see *Kent v Gunns* (2009) 18 Tas R 454 per Porter J at [7]). A motion to review is not a hearing *de novo*, but an applicant may apply for a hearing *de novo* to occur (s111) (see *Coppleman v Godfrey* [2014] TASSC 60).

In determining whether or not to allow a prosecution review of a sentence, s110(2AA) has not displaced the residual discretion of the court to otherwise dismiss an appeal on the basis of the special considerations that attach to such a review (see *Lyons v Bakes* [2015] TASSC 37 per Pearce J at [11]-[17]). If a prosecution review is successful and the court proceeds to resentence, principles of double jeopardy may not be entertained by the court (s110(2AB)).

Upon determination of a motion to review, a judge may exercise any power granted under s110(2).

A person who remains aggrieved by the order of the judge following determination of the motion to review may appeal to the Full Court of the Supreme Court (s123). Such further review by the Full Court is limited to a question of law or upon the admission or rejection of evidence (see *Caccavo v Collins* (2014) 244 A Crim R 65).

Before an appeal to the Full Court is instituted authorisation from the Director should be obtained.

Preliminary proceedings

Section 62 of the *Justices Act 1959* allows the accused or a Crown Law Officer to apply for an order that the witness named in the application gives evidence on oath in preliminary proceedings, prior to committal to the Supreme Court.

Section 331B(2) of the *Criminal Code* allows the accused or a Crown Law Officer to seek leave to apply for preliminary proceedings once the accused has been committed to the Supreme Court, where special circumstances exist (see s331B(2A)).

A judge or magistrate may only grant an application, firstly, if the application identifies the matter in which a witness is to be questioned, specifies its relevance and specifies why cross-examination or examination is justified and, secondly, if the court is satisfied that it is necessary in the interests of justice.

Generally, if a witness is a material witness and the application is limited to cross-examination of evidence relevant to an issue in a forthcoming trial, it will be in the interests of justice to order the application to ensure a fair trial (see *Barton v R* 147 CLR 75). In some circumstances, particularly where the witness has or will be cross-examined on a *voir dire* at trial, it may not be in the interests of justice to have such a preliminary examination (see *Tasmania v Martin* [2010] TASSC 51). Further, where a witness has to travel some distance, i.e. from interstate or overseas, or whose existence or availability only became known shortly before trial, it may be more efficient and convenient to depose his or her evidence before the trial judge by way of a *Basha* inquiry (see *Basha v R* (1989) 39 A Crim R 377).

It is important that witnesses do not give evidence more often than is necessary for the interests of justice to be served. Therefore, the prosecutor with conduct of the case should scrutinise an application, firstly, to determine whether the witness is a material witness and, secondly, to ensure that any order limits cross-examination to relevant admissible evidence.

Where a material witness will not co-operate or speak to a prosecutor, he or she must consider whether to approach a Crown Law Officer to consider making a preliminary proceedings application. A preliminary proceedings application should be made to determine what evidence a witness may give on a particular matter and whether the evidence will be favourable or unfavourable. Obtaining such evidence may be necessary to determine whether there is sufficient evidence to raise an indictment or whether a witness should be called at any forthcoming trial.

Affected persons

If a witness is an “affected person” within the meaning of s61(2) of the *Justices Act 1959*, the court can only grant an application to require the witness to give evidence on oath at a preliminary proceedings in exceptional circumstances. Section 3(1) of the *Justices Act 1959* defines an “affected person” to include a

complainant in respect of most, if not all, sexual offences defined in the *Criminal Code*.

For exceptional circumstances to exist there must be something about the case that departs from that of an ordinary, common or usual case. A person is an affected person irrespective of whether there is a "complaint for a non-sexual crime" (see *Farmer v Lockley* [203] 12 Tas R 244). In that case, the principal judgment was written by Underwood J. In defining special circumstances, the following propositions emerge from his Honour's judgment (as modified to current provisions):

- It is very common that a complaint alleges one or more sexual crimes referred to in the definition of "affected person" as well as other crimes such as assault arising out of the same facts. The protection offered by Parliament to a complainant who is an affected person under one matter of complaint is not lost because a non-sexual crime is properly joined in the same complaint. Thus, no order should be made on any count unless exceptional circumstances exist.

- It must be borne in mind that ss 331B and 62 speak not only of the need for the existence of special circumstances, but there must be special circumstances that justify an affected person being examined.

- What are exceptional circumstances cannot be defined in advance. In each case there should be examination of the circumstances that the applicant contends are exceptional to determine whether, individually or collectively, they justify the making of the order for examination.

- The common theme of legislative provisions of this nature is that in the case of a sexual crime, there is to be no examination of an affected person unless there is something special or unusual about the case to warrant that course. The term "exceptional", now used in the legislation, is a term which, to me, emphasises the extent to which a case must depart from an ordinary, common or usual case.

- The object of such provisions is to avoid a complainant being cross-examined twice unless justified.

- Something more than the loss of the ordinary advantage of cross-examining the witness prior to trial should be shown. Cross-examination is not justified simply in order to obtain material to discredit a witness at trial and will be permitted only if there is a serious risk of an unfair trial if it is not: *Kant v DPP* (1994) 34 NSWLR 216 at 223. See also *KT v DPP* [2009] NSWSC 1126 which adopted the statement of the Court of Appeal in *DPP v Losurdo* (1998) 44 NSWLR 618 at 627.

Prosecutors must scrutinise a preliminary proceedings application for examination of an affected person with great care and such applications must be opposed unless the application clearly demonstrates exceptional circumstances. Approval must be given by a member of the Committee before

consenting to an application. Even where an application demonstrates exceptional circumstances, it is essential that the prosecutor with conduct of the case makes submission to the judge to limit the examination to only those matters that are exceptional.

A prosecutor conducting a preliminary proceeding must object to any examination of an affected person which is outside the terms of the preliminary proceedings order (s65(2) of the *Justices Act 1959*).

If an affected person is examined at preliminary proceedings, they must give their evidence by audio-visual link unless the witness requests otherwise, or an order has been made under s7 of the *Evidence (Children and Special Witnesses) Act 2001*.

Magistrates or justices of the peace

Practice Direction 1 of 2021 issued by the Chief Magistrate states that preliminary proceedings will be heard by justices of the peace unless otherwise ordered by a magistrate.

Practice Direction 2 of 2016 issued by Chief Justice states:

> In cases involving homicide, sexual matters, or Commonwealth offences, preliminary proceedings will be heard by justices of the peace if the parties agree to that course, or if the Court so orders. If the parties do not agree to that course, and the Court does not so order, then the preliminary proceedings in such cases will be dealt with by magistrates.

Where possible, preliminary proceedings should be held by justices of the peace rather than magistrates. This enables preliminary proceedings to be expedited, as justices are more readily available and it frees magistrates to deal with other matters. However, no consent should be given for a justice to conduct a preliminary proceedings where the witness is an affected person, is severely traumatised or whose evidence will be legally contentious. However, in cases where there are other witnesses who do not fall into the former category, it is appropriate to request that those witnesses be examined by a justice.

Time to consider an application

In the Magistrates Court, counsel intending to seek a preliminary proceedings order are to file and serve an application not less than 7 days prior to the preliminary proceedings application listing (see Practice Direction 1 of 2021 of the Chief Magistrate).

In the Supreme Court, an application may be made at any appearance if the applicant is granted leave of the court to apply as a result of one or more of the special circumstances listed in s331B(2A)(a)-(e).

Where an application has not been served within the required time and more time is needed to examine the application, an adjournment should be sought.

Similarly, if the application does not provide sufficient particulars, more should be sought.

Leave

In considering whether leave or not leave should be granted, it should be noted that:

- The interests of justice do not solely equate with the interests of an accused person. It also includes the interests of witnesses and that the business of the court is dealt with as expeditiously as possible.

- An accused is bound by the decisions of his or her counsel. It is not sufficient to rely on the fact that there has been a change of counsel to someone with a different view as to whether there should be preliminary proceedings.

Conduct of preliminary proceedings

Prosecutors should ensure that the witness's statement is tendered at a preliminary proceedings in order to ensure that if that witness becomes unavailable the statement will be admitted as evidence at the trial (s65(3) of the *Evidence Act 2001*). Originally this was one of the major purposes of committal proceedings (see *Barton v R* [1980] 147 CLR 75 at 113).

Prosecutors should ensure that preliminary proceedings are not adjourned without good reason. Where there is more than one defendant, the prosecutor with conduct of the case should ensure there is only one preliminary proceedings involving all co-defendants in order to lessen delay and avoid witnesses having to give evidence more than once.

Bail notices and remands

The following guidelines are designed so prosecutors and defence counsel understand the Office's position regarding bail notices and remands.

Section 7(3A) of the *Bail Act 1994* provides that a Crown Law Officer may advise a person who has been admitted to bail to appear in the Court of Criminal Appeal or the Supreme Court on a particular date, in writing, that they are not required to appear in court at the time and place specified in an order until a later date as specified in the notice.

Bail notices are issued where there is no prospect of the matter being progressed on a particular date and defence counsel request a notice be provided in circumstances where it is unnecessary for the accused to appear. This has the effect of streamlining remand days and ensuring that both defence counsel and prosecutors monitor the progress of matters before obtaining the consent of a Crown Law Officer for a bail notice.

No bail notice will be issued for a general remand day unless a request has been made by defence counsel prior to 5:00 pm on the Thursday prior to the commencement of the sittings unless there are exceptional circumstances. The reason for this is that late bail notices place enormous pressure on the administrative staff of the Office responsible for the settling of the remand list and the staff of the Supreme Court with responsibility for organising judges' files and advertising the court list.

During a sittings requests for bail notices will be considered as often it will not be known whether a matter will be reached. However, bail notices will generally not be given in the following circumstances:

- If it is the first appearance of an accused person in the Supreme Court as he or she will need to receive warnings from the court in relation to alibi and opinion evidence.

- If a matter is listed for a trial during the course of a sittings a bail notice will not be given for the first remand day of that sittings, unless there are exceptional circumstances. This is to allow for any issues with the listing of the trial to be discussed on that day. If the trial is not reached on a subsequent day during the sittings to which the accused has been bailed then a bail notice will be issued.

Defence counsel should not assume that a bail notice will be given simply because one has been issued previously. A bail notice is more likely to be granted where there have been active discussions between defence counsel and the Office thereby eliminating the need for a directions hearing.

Where a matter is listed as a trial or backstop trial during the course of a sittings no prosecutor should agree for that matter to be adjourned to the next sittings of the Supreme Court without the permission of the Director or the Deputy Director.

Prosecutors should keep matters in a sittings and request a directions hearing where a trial is likely to be listed in the next sittings or a directions hearing for a matter is likely to facilitate the expeditious and efficient hearing of the matter.

Prior to remand day a brief explanatory note should be placed on the file by the prosecutor with conduct of the matter, setting out what has been done on the matter and why a particular remand date is being sought so that counsel conducting remands will have up-to-date instructions.

Summary prosecutions

General

The summary prosecution section of the Office provides legal advice to government departments and State Service agencies and assists the Director in the conduct and management of lower court appeals and summary prosecutions under the Workplace Health and Safety laws, Consumer Business and Environment laws and other regulatory offences. The Office also conducts criminal matters in the Magistrates Court that have been remitted from the Supreme Court, indecent assaults and serious summary traffic offences that have resulted in death or serious injury.

In determining whether to proceed with a matter the Prosecution guidelines will apply and when prosecuting matters the Prosecutors' duties will apply. In particular, when summary prosecutions are being conducted by the Office the disclosure provisions of these guidelines, as far as they can be applicable, will apply.

For certain summary prosecutions the Witness Assistance Service will be utilised, especially in cases where the prosecution involves the death or serious injury of a person or the offence is of a sexual nature.

Contest mention in the Magistrates Court

During a contest mention hearing a prosecutor may be faced with, either expectedly or unexpectedly, a sentence indication being sought by defence.

A prosecutor is not to consent to a sentence indication in the Magistrates Court for the crime of indecent assault.

At any sentence indication a prosecutor must not say that they consent or agree to any sentence indication. To do so is contrary to *Barbaro & Zirilli v R* (2014) 253 CLR 58. However, the prosecutor can give submissions in relation to sentence as we would at any sentencing hearing.

In relation to summary matters involving charges contrary to the *Work Health and Safety Act 2012* (and associated regulations), the *Animal Welfare Act* (and associated regulations), the Heavy Vehicle National Law, the *Environmental Management & Pollution Control Act 1994* (and associated regulations), the *Pollution of Waters by Oil and Noxious Substances Act 1987* (and associated regulations), the *Building Act 2016* (and the now-repealed *Building Act 2000*) and the *Occupational Licensing Act 2005* (and associated regulations) or any other regulatory offences, a prosecutor will often be on notice as to the defendant seeking a contest mention and the matters to be raised if a sentence indication is sought. In those circumstances, the prosecutor should discuss with the L3 Crown Counsel - Summary Prosecutions or, in their absence, a member of the Committee or the Director, the submissions that ought to be made to the magistrate.

Section 308 remittals

Prosecutors are not to engage in a sentencing indication in respect to a s308 remittal. Section 308(3) provides a magistrate with the same power and jurisdiction as a judge. As there are no sentence indications given in the Supreme Court, prosecutors should not engage in such a process in the Magistrates Court.

Crime (Confiscation of Profits) Act 1993

The *Crime(Confiscation of Profits) Act 1993* is designed to divest an accused person of tainted assets or deprive him or her of the benefits of their crime upon conviction. The Act also provides for an unexplained wealth declaration to be made against an individual which is not conviction-based. Additionally, the Act provides mechanisms to restrain a person from dealing with their tainted assets pending the further investigating and disposal of charges.

Unexplained wealth applications are to be dealt with by the Unexplained Wealth Unit (the Unit), comprised of prosecutors and a forensic accountant from the Office of the Director of Public Prosecutions and police officers from Tasmania Police.

Conviction-based confiscation and pecuniary penalty order applications are to be applied for by the prosecutor with conduct of the case. Such applications should be considered from the outset in all cases and should not be considered as an "optional add-on" to sentencing proceedings or the conduct of a prosecution.

Forfeiture orders and pecuniary penalty orders

Section 11 provides that upon conviction an authorised officer may apply for a confiscation order (either a forfeiture order or a pecuniary penalty order, or both) but s12 requires that written notice of the application must be given to the accused and any other person who may have an interest in the property. Notice should be given in all relevant cases.

The quantum of a confiscation order can be agreed with defence counsel. If no agreement can be reached then evidence about quantum will be required and the prosecutor must ensure that he or she is in a position to prove the amount.

The prosecutor should be mindful of the effect that the making of a confiscation order has on the sentence to be imposed by the court and make the application for such an order prior to sentencing being concluded (see *Stocks v R* [2000] TASSC 106 and, in particular, Underwood J at [16]):

> …In *R v Hoar* (1981) 34 ALR 357, the Full Court of the Federal Court was concerned with the provisions of the *Fisheries Act* (NT), s48, subs(1) and (2) of which provide:
>
> (1) Anything seized under this Ordinance may, on conviction of a person for an offence in connexion with which that thing was seized, at the discretion of the court recording the conviction, be forfeited to Her Majesty.
>
> (2) The forfeiture shall be in addition to and not a part of a penalty imposed under this Ordinance.
>
> Again, notwithstanding the statutory injunction, review of the impugned penalty proceeded upon the basis that the forfeiture was a relevant

> consideration in fixing an appropriate penalty. This aspect of the case was approved on appeal to the High Court, see *R v Hoar* (1981) 148 CLR 32 at 39.
>
> Although the scheme of the Act contemplates that a confiscation order may be made after sentence has been imposed, I do not thereby see any warrant for finding an implied fetter on the discretion conferred by the Code, s389(3). The sentencing discretion is quite often exercised in the light of future uncertainties, eg, whether an accused will lose his or her employment by reason of the conviction or whether imposition of a custodial sentence will result in the loss of property or, indeed, even whether an accused will not re-offend as he or she contends.
>
> In concluding, as I do, that there was no inhibition on the learned sentencing judge taking into account the confiscation orders he made when exercising his discretion to fix sentence, I say nothing at all about the weight or impact of those orders in the sentencing process. That is an entirely different matter.

If an application is not made as part of the sentencing process, then the State has six months to make the application following conviction. Once that time has elapsed, no application can be made (s11(2)) and any property which might have otherwise been the subject of confiscation will have to be returned to the accused. Equally, an application made and determined may be revisited with the leave of the court (see the special circumstances in s11(5) and (6)).

The prosecutor should be aware that the quantum of the pecuniary penalty order is that which the accused received. The Act specifically excludes outgoings for the purposes of the assessment of quantum. For example, where an accused admits to purchasing $5,000 worth of drugs which he or she sold for $10,000, the pecuniary penalty order is for $10,000 as the $5,000 is an outgoing which is ignored for the purposes of assessment (s22(6)).

Where a private individual has suffered a loss a compensation order should be sought in the name of that individual under s68 of the *Sentencing Act 1997* rather than an order under this Act. Any property or money recovered under this Act cannot be paid to a private individual but is paid into the Crime (Confiscation of Profits) Account (s79).

Restraining orders

Section 26 provides for an application to be made to the Supreme Court for the property of a person convicted, charged or about to be charged to be restrained. In certain circumstances, other persons' property can be restrained.

The Supreme Court may make a restraining order against a defendant's property or property he or she effectively controls where they have an affidavit from a police officer stating that the defendant has committed an offence and a belief that the property is either tainted property or the defendant has derived a benefit directly or indirectly from the commission of the offence and the court is satisfied there are reasonable grounds for holding that belief (s27(1), (4) and (5)).

Early notification

Where a police officer or a prosecutor forms the view that an alleged offender's property should be restrained under s26 they should immediately consult the Unit. Generally speaking, such an application will only be made where there is a risk that relevant assets will be disposed of, although the court can make a restraining order irrespective of whether there is a risk of the property being disposed of (s27(6)). Once a referral is made a decision will be made whether the matter will be handled by a prosecutor within the Unit or a prosecutor within indictable crime. Such decision will be made by the Director or the Deputy Director in consultation with the Unit.

Once a referral is received from Tasmania Police, the prosecutor should request an immediate briefing from the investigating officer. If the assets under consideration are of a commercial nature the Public Trustee may be invited to the briefing if it is envisaged that the Public Trustee will have to administer those assets until such time as the charges are finalised.

A preliminary assessment should be made as to whether a restraining order may be required and, if so, what further information will be required for an application. Consideration will need to be given to monitoring orders, production orders and search warrants in the information gathering process.

In considering whether an application should be made, the prosecutor should have regard to the following:

- the nature of the tainted property
- the apparent strength of the State case
- the likely quantum of any confiscation order as against the value of the asset to be restrained
- the risk of dissipation or disposal of the asset

The application

The prosecutor should proceed with an application if sufficient grounds exist. The approval of the Director has to be obtained prior to any proceedings being instituted. The Director should be consulted very early in the process. If approval is given to commence proceedings, the prosecutor will need to prepare an affidavit of the investigating officer containing the following:

- details of the allegation against the person which must amount to a serious offence or details of the conviction for a serious offence (s26(1)(a) and (b))
- if seeking an ex parte order a statement that the person will be charged within 48 hours of the making of the order (s27(2))

- the potential value of any pecuniary penalty order and/or forfeiture order to be sought against the person and the basis for asserting that they are likely to be made (s27(1)(a) and (b))

- a full and truthful account of the evidence including any weaknesses or material pointing away from the person's guilt

  (Note: the person who is to swear the affidavit must have that obligation specifically drawn to his or her attention before being invited to swear or affirm the affidavit.)

- precise descriptions of the assets to be restrained

- evidence detailing the risk of dissipation

In addition, an originating application either to be served (where there is no real urgency) or not served (where there is an urgent need to protect assets) needs to be prepared. The originating application not intended to be served is an ex parte application to seek an interim restraining order. This application must be forwarded with a covering letter to the Registrar briefly setting out the reasons for urgency, i.e. assets are about to be dissipated or possibly could be if a person is charged.

Ex parte applications are listed before a judge in chambers. The most usual orders, subject to the papers being in order, are the granting of an interim restraining order for a period of 14 days and an order that the application and supporting affidavits be served on affected parties. This is usually the accused but may also be a bank or other third party that holds, or has an interest in, the assets.

An affidavit of the service of these documents on the accused/respondent (and/or third parties) must be filed before the matter comes back before the court. When the matter comes back, usually before the same judge, final restraining orders should be sought. If final orders are made, a further requirement to serve documents may arise.

For the originating application intended to be served, proof of service of the application on the accused and supporting affidavits in the form of an affidavit of service is required to be filed and should be filed before the return date. Instructions to police for service need to make clear the need for personal service.

The matter is listed before the judge generally with the accused/respondent being present in person or being represented by counsel and final orders are made and filed in the usual way.

Important matters to consider

- The court can require that the State give an undertaking as to damages that may flow from the granting of the restraining orders (s27(7)).

Instructions need to be obtained from the Director specifically on this point.

- When obtaining the final orders it is important to ensure that the order states that it "remain in force until further order" as without this the restraining order only has a statutory life of six months (s38(1)).

- It is also important to seek that the order includes that the respondent cannot dispose of or otherwise deal with the subject property "without the written consent of the Director of Public Prosecutions or an authorised officer within the meaning of s4 the *Crime (Confiscation of Profits) Act 1993*". This is necessary because s26(3) provides the court with the power to make provision from the property restrained for the accused/ respondent's reasonable living and legal expenses. To negate the need and cost associated with going back to court and varying a restraining order, the Director can authorise the release and sale, if necessary, of items of restrained property for the purpose of satisfying s26(3).

- A restraining order creates a charge against the real property to which it relates and s33(2) provides that a caveat may be lodged over the title to that property. A caveat should be lodged over the relevant title at the Land Titles Office as soon as possible following the making of an order or interim order.

Where the victim is a private individual generally the protection of such assets is a matter for the individual. However, the Director will consider application for a restraining order where the matter is urgent and if but for the restraining order it would defeat a compensation order made under the *Sentencing Act 1997*.

Unexplained wealth

In addition to conviction based orders, Part 9 of the Act provides for the Supreme Court to make non conviction-based orders for the forfeiture of an individual's unexplained wealth upon application by the Director of Public Prosecutions.

Section 138 sets out what constitutes a person's wealth; that is, all property that was acquired before or after the commencement of Part 9.

Section 139 defines unexplained wealth as the wealth of an individual that is greater than their lawfully acquired wealth.

Section 85 provides that any property or benefit that is a constituent of a person's wealth is presumed not to be lawfully acquired by the person unless the person proves otherwise. Therefore, the onus is on the respondent to prove that the property or benefit was lawfully acquired.

Section 141 provides that the Director of Public Prosecutions may apply to the Supreme Court for an unexplained wealth declaration to be made against a person. Section 142(1) provides that at the hearing of an application under s141 the Supreme Court may make an unexplained wealth declaration. The

court must make an unexplained wealth declaration if satisfied that it is more likely than not that the value of the person's total wealth is greater than the value of the person's lawfully acquired wealth.

Section 87 provides that the Director of Public Prosecutions, by written notice, can require a financial organisation to provide information in writing such as any bank accounts held by a person, the identity of the holder of a bank account, whether a transaction has taken place or is about to take place on a bank account, whether an account is open or closed and the balance of any account.

Section 88 provides that the Director of Public Prosecutions, by written notice, can require other organisations, i.e. the MAIB or the Public Trustee, to provide information or produce to the Director any record, information, material or thing in the custody or possession of the organisation.

These notices must be complied with within seven days (unless a longer period is specified) and failure to do so can result in a significant fine. The financial organisations and other organisations are protected, provided they comply with the notice in good faith. There are also secrecy provisions within the Act to prevent the organisations from disclosing that they have given information to the Director.

Please note the Director will not issue the above notices unless there are reasonable grounds to suspect a person has unexplained wealth. All applications by Tasmania Police for such a notice should be submitted in writing, setting out the basis for suspecting that a person has unexplained wealth.

Section 117 provides that upon application by the Director of Public Prosecutions the Supreme Court may make a wealth-restraining order. A wealth-restraining order can be sought ex parte (s117(2)). Section 125 provides that a wealth-restraining order can also be made in relation to co-owned property where the property is not divisible. The court needs to be satisfied that an application for an unexplained wealth declaration has been made or is to be made within 21 days of the wealth-restraining order being made. Section 118 sets out that the Supreme Court is to consider the grounds for making a wealth-restraining order, the primary ground being that the respondent has unexplained wealth. An interim wealth-restraining order can be made, however, it will expire after three days. A caveat should be lodged to secure the State's interest if a wealth-restraining order is made. A person may object to property being restrained pursuant to s134 and then the State can respond to that objection. An affidavit for a wealth-restraining order should be made setting out the basis of the application.

If the Supreme Court makes an unexplained wealth declaration, the respondent must pay to the State the respondent's unexplained wealth liability (s144). The respondent must pay the unexplained wealth liability within 31 days. If it is not paid the matter can be referred for recovery under the *Monetary Penalties Enforcement Act 2005*, as with a fine.

When drafting and filing an originating application intended to be served seeking an unexplained wealth declaration (s142(1)), the order must comply with s142(4). That is, on making an unexplained wealth declaration the Supreme Court is to specify the assessed value of the respondent's unexplained wealth (s142(4)(a)), order that the respondent pay to the State the amount specified in the declaration as his or her unexplained wealth (s142(4)(b)) and make an ancillary order such as that there be no order for costs (s142(4)(c)). A consent order can be made pursuant to s186.

Any application or investigation into a person's unexplained wealth must be approved by the Director and conducted by the Unit. Where police or prosecutors suspect an individual of having unexplained wealth they should contact the Unit. In particular, prosecutors should contact the Unit where large sums of money have been seized but cannot be forfeited on a conviction-based forfeiture order.

In determining whether to investigate a person for unexplained wealth, the following factors will be taken into account:

- the amount of the suspected unexplained wealth
- the complexity of proving the unexplained wealth
- the likelihood of recovery
- the potential to disrupt serious crime

As unexplained wealth proceedings are civil proceedings, orders may be made by consent. Thus, the amount of an order can be settled between the parties. The following factors will be taken into account in determining whether to settle a matter:

- the amount in issue
- the amount that could be agreed
- the likelihood of obtaining an order for a greater amount if the application is proceeded with
- the length of any contested application
- the cost of any contested application
- the likelihood of recovering any additional amount if successful in the application
- the effect on third parties
- the circumstances by which the unexplained wealth arose

Although unexplained wealth applications are civil-based and investigations and applications are quite independent of the criminal process, often investigations into a person's unexplained wealth will coincide with that person being charged with a criminal offence. In those circumstances, prosecutors and the Unit should attempt, if possible, to progress the unexplained wealth application because any order may be a relevant factor in mitigation for the accused person. However, it should be recognised that this will not always be possible due to the complexity of the unexplained wealth investigation and the time frames for the criminal process.

Disclosure

Where a person has been charged with an indictable crime, s56(3) of the *Justices Act 1959* requires the relevant Commander of Police to disclose to the defendant any statement or interview he or she may have made and the statements of all witnesses that police have obtained investigating the offence. This is to occur during the adjournment after the defendant's first appearance.

If further statements are obtained after this time the Commander is to provide copies of such statements as soon as is reasonably practicable (s57(3)).

The Office of the Director of Public Prosecutions is not subject to the *Right to Information Act 2009* (s6). However, with indictable crimes, prosecutors are under a continuing obligation prior to trial to make full disclosure to the accused of all material known to the prosecutor which can be seen on a sensible appraisal to:

- be relevant or possibly relevant to an issue in the case
- raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use
- hold out a real (as opposed to a fanciful) prospect of providing a lead to evidence which goes to either of the previous two situations

The prosecution duty of disclosure does not extend to disclosing material:

- relevant only to the credibility of defence (as distinct from prosecution) witnesses
- relevant only to the credibility of the accused person
- relevant only because it might deter an accused person from giving false evidence or raising an issue of fact which might be shown to be false
- concerning the accused's own conduct to prevent an accused from creating a trap for himself or herself, if at the time the prosecution became aware of that material it was not seen as relevant to an issue in the case or otherwise disclosable pursuant to the above criteria

In *R v Keogh (No. 2)* [2015] SASC 180 at [54], Blue J summarised the position:

> The prosecution owes a duty to disclose to the defence on a timely basis:
>
> (a) evidence proposed to be adduced by the prosecution including the evidence of witnesses and proposed exhibits;
>
> (b) evidence of witnesses who the prosecution does not propose to call;

(c) material that tends to reflect materially on the credibility of prosecution witnesses;

(d) material that tends to weaken the prosecution case or assist the defence case;

(e) material that is relevant to an issue in the case.

There is, however, no obligation upon the prosecution to go out into the world and investigate matters that might reflect upon the credibility of prosecution witnesses and to then disclose those matters (see *Tasmania v Farhat* [2017] TASSC 42 at [16]).

Continuing obligation to disclose

The prosecutor's duty of disclosure is a continuing obligation owed to the court to ensure an accused person receives a fair trial (see *Smith & Madden v R* [2003] TASSC 91; *Tasmania v Farhat* [2017] TASSC 42 at [18]). There is a continuing obligation to disclose material if it would assist a convicted person's appeal, or if it may amount to fresh evidence that could be used for a second appeal (s402A of the *Criminal Code*) or an application for a prerogative of mercy (s419 of the *Criminal Code*) (see *AB v CD* [2017] VSCA 338). However, the continuity of the obligation to disclose should be seen as also imposing upon the defence an obligation to make timely disclosure of any defence or issue, not immediately apparent on the prosecution case, which may make otherwise irrelevant material relevant. For example:

- The prosecution should not be required to provide details of prior convictions or records of police disciplinary proceedings against a prosecution witness until the defence has indicated that the credibility of that witness is to be attacked and the prior convictions, etc, are relevant unless it is readily apparent that witness' credibility is an issue at trial. Obviously the defence does not have to disclose its case but where it is not readily apparent that a witness' credibility is in issue and prior convictions have not been disclosed if the defence requests the prior convictions of a particular witness they will be disclosed.

- The validity of a warrant or other authority should, unless an indication of challenge is given, be proven in a formal way. Any evidence establishing the correctness of the process, etc, should only be provided if an indication of challenge is given unless it is specifically known by the prosecutor that the warrant is invalid.

Further, it is not the practice of the Office to routinely disclose all police notes, records or documents or the notes or documents of expert witnesses as, in the majority of cases, they are not relevant to an issue at trial. To do so would add a considerable cost and burden to the State without any benefit to an accused person. If, however, they are requested by the defence or it is apparent they are relevant, they are to be disclosed. Tasmania Police should be vigilant to ensure that where such notes might be relevant to a case they are brought to the attention of the prosecutor with conduct of the file. Tasmania Police should

also bring to the attention of the prosecutor any other material that is in its possession, or it is aware of, which may be relevant to the prosecution or defence including the credibility of witnesses. Forensic Science Service Tasmania records and notes are available upon request.

The duty of disclosure extends to any record of a statement by a witness that is inconsistent with the witness' previously intended evidence or adds to it significantly, including any statement made in conference (recorded in writing or otherwise) and any victim impact statement.

If a witness makes any such statement in conference (adding significantly to or inconsistent with any previous statement/s), the prosecutor present must note that fact and arrange for a supplementary written statement to be made. That supplementary statement should be disclosed to defence counsel.

Subject to public interest immunity consideration, such material, if assessed as relevant in the way described above, should be disclosed and, where practicable, made available, to the defence. Failure to do so may cause a miscarriage of justice (see *Mallard v R* (2005) 224 CLR 125).

Public interest immunity is governed by s130 of the *Evidence Act 2001* and the common law. In summary, public interest immunity protects from compulsory disclosure of information where disclosure would be injurious to the public interest (see *Sankey v Whitlam* (1978) 142 CLR 1 per Gibbs J at 38-9). Possible claims for public interest immunity includes information or documents that contain confidential information, reveal the identity of an informant, reveal police investigative techniques, limiting their ability to detect crime, or relate to an ongoing police investigation.

In determining a claim of public interest immunity the court is required to weigh the public interest that would be harmed by the production of the information against the possible injustice if the information was withheld (see *Ryan v State of Victoria* [2015] VSCA 353). In so determining, the nature of the offence, the likely effect of adducing the information and the means available to limit its publication are relevant considerations (s130(c) & (d)).

Where a claim of public interest immunity is asserted care must be taken to identify the basis of the immunity with precision. In *Tasmania v Farhat* [2017] TASSC 42 Pearce J said at [26]:

> In this case, the balancing exercise must weigh the extent of any legitimate forensic purpose in disclosure, whether non-disclosure would impede the accused's right to a fair trial and the evidentiary value and importance of the document to the accused with the public interest against disclosure asserted by the claimant. The categories of public interest are not closed: *Sankey v Whitlam* at 60; *D v National Society for the Prevention of Cruelty to Children* at 230. However, a party, that asserts a claim of public interest immunity to protect a document or information from disclosure, is required to identify, with precision, the basis upon which it is claimed.

Where a prosecutor receives, directly or indirectly, sensitive documentation, material or information, or material that may possibly be subject to a claim of public interest immunity, the prosecutor should not disclose that documentation, material or information to the defence without first consulting with the investigating officer in charge of the case. The purpose of the consultation is to give that officer the opportunity to raise any concerns as to such disclosure. Accordingly, the officer should be allowed a reasonable opportunity to seek advice if there is any concern or dispute.

Some, but not all, of the following factors should be taken into account in determining the public interest issue:

- the material is irrelevant
- withholding is necessary to preserve the identity of an informer
- withholding is necessary to protect the safety or security, including protection from harassment, of persons who have supplied information to police or person close to them
- the material is protected by legal professional privilege
- the material, if it became known, might facilitate the commission of other offences or alert a person to police investigations
- the material discloses some unusual form of surveillance or method of detecting crime
- the material is supplied to police only on condition that the contents will not be disclosed
- the material contains details of private delicacy to the maker
- the material relates to the internal workings of Tasmania Police, or other regulatory agencies
- the material relates to national or State security
- the material relates to a confidential counselling communication within the meaning of s127B of the *Evidence Act 2001*

Where there is disagreement between a prosecutor and police as to what, if any, of the sensitive documentation, material or information should be disclosed and there is no claim of public interest immunity, then in cases being prosecuted by counsel, the matter is to be referred to the Director or Deputy Director to determine whether the document should be disclosed or whether the charges should be reduced in order for the document to be no longer relevant or whether public interest immunity or legal professional privilege should be claimed.

If, after consultation with the Director or Deputy 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 Office the matter should be submitted to the court for resolution prior to trial.

In cases where a claim of public interest immunity is to be pursued or is being pursued, then the question of disclosure will be determined by the outcome of that claim. However, where a claim is unsuccessful but the prosecutor is of the view the material should not be disclosed, he or she should seek advice from the Director as to whether the case should continue (see Prosecutors' duties).

Similarly, if the claim is successful but the prosecutor is of the view that the non-disclosure of the material could seriously prejudice the defence at trial, the Director should be consulted to determine whether the charge or charges to which the material is relevant should be withdrawn or whether the accused should be charged with an alternative or lesser offence that would not necessitate the production of the withheld material.

Further, in some cases the mere disclosure of the claim of public interest immunity will disclose what is likely to be the material over which the claim is made. Again, in those circumstances, the Director is to be informed in order to decide whether the case should continue or not or whether alternative charges should be considered.

Regard should also be had to the protection of privacy of individuals. Unless relevant, care should be taken not to disclose personal information such as a person's address. In particular, care should be taken in respect of medical records or reports to only disclose matters relevant to the offence.

Police informants

Generally speaking, the identity of a police informant is immune from disclosure (see *AB v CD* [2017] VSCA 338 at [45]). The reason for this is:

- The protection of the identity of informants is necessary to maintain confidence in the ability of police to protect informants and to facilitate the ongoing use of informants

- The protection of the individual informer

However, this rule is subject to the public interest in an accused person obtaining a fair trial. That situation will occur where there is good reason to believe that the disclosure of an informant's identity may be of substantial assistance to an accused person (see *AB v CD* [2017] VSCA 338 at [47] and [59]; *AB v CD* (2018) 362 ALR 1 at [9]-[10]).

In some cases the assistance of the identity of the informant and the information provided may be great. However, the danger to the informant of disclosing his or her identity may be significant. In such cases the prosecution

may elect not to proceed or the court may stay the prosecution (see *AB v CD* [2017] VSCA 338 at [66]; *AB v CD* (2018) 362 ALR 1 at [9]).

The identity of a police informant is not to be disclosed to anybody by a Crown prosecutor without the express authorisation of the Director. Where there are grounds to conclude that such a disclosure would materially assist an accused person, a risk assessment needs to be obtained from Tasmania Police as to the dangers to the informant of any such disclosure. The Director will then determine whether disclosure will be made or whether the prosecution will not proceed.

Finally, if it is determined that the disclosure will be made, the informant should be informed and given an opportunity to apply to the court to stay the Director from making such a disclosure (see *AB v CD* [2017] VSCA 338 at [88]).

Taking over proceedings

Pursuant to s27(1) of the *Justices Act 1959*, any person may take out a complaint in the Magistrates Court alleging an offence against another person. However, this provision does not include indictable crimes where the complaint must be taken out by a public officer or the complainant must have the consent of the Director of Public Prosecutions (s27(3)).

Section 12(a)(ii) and (iii) of the *Director of Public Prosecutions Act 1973* enables the Director where he considers it desirable to do so to take over and continue or discontinue any criminal proceeding in respect of a crime or an offence alleged by that person to have been committed. In practise, this means the Director can take over any prosecution commenced by a person in the Magistrates Court for an offence whether the complaint was taken out by a public officer or a private individual.

The object of this provision is to ensure integrity, neutrality and consistency in the making of prosecutorial decisions and the conduct of prosecutions.

There may be various reasons why the Director will take over proceedings. These reasons include, but are not limited to, the following:

- Tasmania Police so requests and there is a sound basis for doing so (although normally in these circumstances a prosecutor from the Office would appear on behalf of the complainant without formally taking over the complaint)
- there is no reasonable prospect of conviction
- they appear to be frivolous or vexatious or brought for an inappropriate ulterior purpose
- they appear to have arisen out of a conflict of a predominantly civil nature and/or a civil legal remedy may be available
- they have been brought contrary to advice or a decision by the Director not to proceed
- they have been instituted by police or a private individual and there appears to be a conflict of interest or the risk of unfairness arising from their conduct of the prosecution
- the public interest otherwise requires it, having regard (for example) to the gravity of the offence, its connection with another offence being prosecuted by the Office and all the surrounding circumstances

Where a person wishes to make application for the Director to take over any proceeding, such application should be in writing, setting out the reasons why the Director should take over the proceeding. Any evidence supporting the application should also be provided.

Before a decision to take over a proceeding is made, reasonable notice will normally be given requesting the complainant requesting to provide reasons, if so minded, why such a decision should not be made.

Where the Director takes over a proceeding, the original complainant is removed from the record and cannot be returned to that complaint (see *Price v Ferris* (1994) 34 NSWLR 704).

Drug treatment orders

Drug treatment orders have been in existence and operating in the Magistrates Court for some time. The amendments to the *Sentencing Act 1997* which came into force on 8 February 2017 have been extended to the Supreme Court (ss27A-27X).

Drug treatment orders (DTOs) are not an available sentencing option to a judge if:

- the offences are sexual offences
- the offences involve the infliction of actual bodily harm that, in the court's opinion, was not minor harm (bodily harm includes psychological harm) (see *Tasmania v Joseph* TASSC 23)

A judge would need to be satisfied on the balance of probabilities that:

- the offender has a demonstrable history of illicit drug use; and
- illicit drug use contributed to the commission of the imprisonable offence(s).

A judge can only make a DTO if he considers that, were he not making the DTO, he would sentence the offender to a term of imprisonment and would not have suspended the sentence, either in whole or in part.

The court must receive and consider a DTO assessment report on the offender.

A DTO cannot be made if the offender is subject to a parole order or another DTO or if there are pending proceedings in relation to sexual offences or offences involving actual bodily harm.

Further, a court must not make a DTO unless it is satisfied:

- in all the circumstances that it is appropriate to do so
- that the facility likely to be used for the treatment and supervision is reasonably accessible to the offender
- that there is sufficient staff in respect of that facility that is likely to be used for the treatment and supervision of the order to be able to provide the treatment and supervision
- there will be sufficient staff and resources to enable the treatment supervision of the offender to be provided when he or she is treated in the facility

The offender must agree in writing to the making of the order and to comply with the treatment supervision part of the order.

In determining whether it is appropriate to make a DTO a major consideration is the seriousness of the offence for which the accused is being sentenced. In *Tasmania v Joseph* [2017] TASSC 23 at [26]-[31] Brett J said:

> Section 27B(3)(a) provides as follows:
>
> > (3) However, the court must not make the drug treatment order unless —
> >
> > > (a) it is satisfied in all the circumstances that it is appropriate to do so; ...
>
> This provision is mandatory in its operation (see the *Acts Interpretation Act* 1931, s 10A). Accordingly, unless the court is satisfied that it is in all the circumstances appropriate to make a drug treatment order, it must not do so.
>
> To determine whether it is appropriate to impose such an order, it is necessary to consider whether the order, as a sentence, will appropriately respond to the various sentencing considerations relevant in the circumstances of the particular case. The variety and potential conflict between the aims of sentencing applicable in a particular case were recognised by the High Court in *Veen v The Queen (No 2)* (1988) 167 CLR 465 at 476:
>
> > However, sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.
>
> A drug treatment order is a sentencing option which places emphasis on the rehabilitation of the offender. It is not without punitive effect because it will require, on the part of the offender, onerous application to the program put in place by the order, and carries with it the potential for activation of the custodial component of the order in the event of default. However, it is still an alternative to imprisonment, where imprisonment would otherwise be the outcome. If a drug treatment order is made, the court is making a choice to place emphasis on rehabilitation as the primary sentencing aim in preference to other sentencing objectives such as general deterrence and retribution. It may be argued that general deterrence is given effect by the custodial component of the order, and the onerous requirements of the treatment and supervision part of the order, and, further, that specific deterrence is also achieved by the custodial component of the order. It might also be argued that a person who otherwise meets the criteria for the making of a drug treatment order, with the appropriate commitment and expectation of success of that order, is not an appropriate vehicle for general deterrence. However, the primary focus of the order is

> rehabilitation, and, as it is a more lenient sentencing order than imprisonment, other punitive aims such as general deterrence are necessarily given less emphasis.
>
> The objective seriousness of the crime will affect the relative emphasis placed on competing considerations in the process of determining sentence. Until recent amendments extended the power to make a drug treatment order to the Supreme Court, such an order could only be made in respect of offences dealt with in the summary jurisdiction. This placed an inflexible limit on the seriousness of offences in respect of which a drug treatment order could be made. The use of such orders only in respect of less serious offences is consistent with the aims expressed in the extract from the second reading speech relating to the 2007 amendments referred to above.
>
> With the extension of this sentencing option to cases dealt with by the Supreme Court, there is no express statutory restriction on when an order can be made, by reference to the objective seriousness of the crime, apart from the pre-existing provisions of s 27B(1). **Notwithstanding this, as already discussed, in order to be satisfied that a drug treatment order is appropriate in all of the circumstances, the court will need to be satisfied that the order will properly respond to the various aims of sentencing appropriate to the case. The result, in some cases, may be that, having regard to the seriousness of the crime, the court cannot be satisfied that a drug treatment order is appropriate.** (Emphasis added)

Once the above prerequisites are met and the DTO is made, the core conditions set out in s27G are attached to the order. Other conditions can also be attached (s27H).

DTOs will be made by the sentencing judge and administered and managed by the Magistrates Court (s27QA).

There are limited places for drug treatment participants. Currently numbers are limited to 40 in the South, 20 in the North and 20 in the North West. These numbers would include those on orders pursuant to a magistrate's order.

It would see a judge adjourn the matter to the Magistrates Court. Dates for DTO court will need to be obtained from the Magistrates Court. The matter can then be forwarded to the relevant Police Prosecution Service to deal with in the Magistrates Court. The offender will then appear regularly before the court for review of their progress. The Court Diversion Officers provide the court with progress reports for each offender. A magistrate may also convene case conferences to an offender subject to a DTO is progressing. These conferences usually take place in the absence of the offender. During these conferences the parties discuss the offender's compliance or lack thereof, whether sanction days should be imposed or whether reward days should be afforded to the offender.

Section 27QA(2) provides that the Magistrates Court may refer a matter back to the Supreme Court if it is of the opinion that the Supreme Court ought to

consider whether to deal with the offender under the provisions of this Part. This can include cancellation of the order pursuant to s27L or contraventions of the order under s27M or for committing further certain offences (s27O).

Deferral of sentencing

Section 7(eb) of the *Sentencing Act 1997* provides:

> A court that finds a person guilty of an offence may, in accordance with this Act and subject to any enactment relating specifically to the offence –
>
> … adjourn the proceedings, grant bail under the *Bail Act 1994* and, by order, defer, in accordance with Division 1 of Part 8, sentencing the offender until a date specified in the order;

The Sentencing Advisory Council, in its report of 6 March 2016 "Phasing out Suspended Sentences", recommended that deferred sentencing should be available to offenders sentenced under the Act as well as those sentenced under the *Youth Justice Act 1997* (this had been available for some time).

Typically the purpose of a deferral is to allow an offender to address the causes of his or her offending and rehabilitation. With the sentencing hearing adjourned for a period of time after which sentence will be passed.

The framework for the deferral of sentencing is contained within ss57A-E and 7A of the Act.

Ordinarily, proceedings may not be adjourned for more than two years from the date the order is made subject to s57C(3) which may see, in certain circumstances, the sentence deferred for no more than 30 months.

Section 57A provides:

> (1) A court may adjourn proceedings in relation to an offender under section 7(eb) so as to defer, in accordance with this Division, sentencing the offender.
>
> (2) The court may, for any one or more of the following purposes, defer, in accordance with this Division, sentencing an offender:
>
> (a) to allow for the assessment of the offender's capacity, and prospects, for rehabilitation;
>
> (b) to allow the offender to demonstrate that the offender is being, or has been, rehabilitated;
>
> (c) to allow the offender to participate in a pre-sentence program;
>
> (d) for any other purpose that the court considers appropriate having regard to the offender and the circumstances of the offending.

Therefore, it is incumbent upon defence to provide evidence supporting one or more of those purposes could be met during a period of deferral. This means reports will need to be critically analysed by prosecutors and, where

appropriate, independent verification may be sought. Bearing in mind that a court may only defer sentencing if:

- an offender is not serving a term of imprisonment, and
- it is satisfied it may grant the offender bail, and
- it defers sentencing the offender for all offences whether or not the offences are punishable by imprisonment.

A court must provide reasons for deferring sentence.

Bail granted under s7(eb) has effect for the period for which sentence is deferred unless revoked and can be subject to conditions (s57B(2)).

Section 57D provides that the order deferring sentence may be revoked. This can occur by a court of its own motion or on an application by the offender or prosecutor. The application is to be in writing and needs to be served at least seven days before the hearing of the application. If the order deferring sentence is revoked the court may proceed to sentence under s7 of the Act.

In relation to making an application for revocation of an order for deferral of sentence, approval from the Committee will be required, accompanied by a short memorandum. Matters such as non-compliance with the proposed program, further offending of a serious nature or absconding from the jurisdiction would be grounds for instituting such proceedings. Bear in mind s57E(1). If an offender who is on a deferred sentence imposed by the Supreme Court or Court of Criminal Appeal appears before a magistrate on another offence, the magistrate has the discretion to re-remand the offender to reappear in the Supreme Court.

Dangerous Criminals and High Risk Offenders Act 2021

The *Dangerous Criminals and High Risk Offenders Act 2021* was proclaimed on 13 December 2021 with the aim of providing protection to the community from persons who have committed offences involving violence, or an element of violence. The Act provides the legislative basis for declarations and orders relating to dangerous criminals (Part 2) and high risk offenders (Part 3).

Dangerous criminal declaration

Section 4 of the Act provides:

> (1) An application may be made by the DPP to the Supreme Court for an offender who is convicted of a crime, involving violence or an element of violence, that is specified in the application, to be declared to be a dangerous criminal.
>
> (2) An application under subsection (1) in relation to an offender who is convicted of a crime specified in the application may be made at any of the following times:
>
> (a) when the offender is convicted of the crime;
>
> (b) when the offender is sentenced for the crime;
>
> (c) when the offender is serving –
>
> (i) a custodial sentence for the crime (whether or not the sentence is being served concurrently with, or cumulatively on, another custodial sentence for another crime or offence); or
>
> (ii) a custodial sentence being served cumulatively on a custodial sentence for the crime to which subparagraph (i) applies (whether or not the sentence is being served concurrently with, or cumulatively on, another custodial sentence for another crime or offence).

A crime involving violence includes a crime of a sexual nature (see *R v Evans* [1999] TASSC 25).

Following the making of a dangerous criminal declaration the offender is to remain in custody until that declaration is discharged.

Dangerous criminal declarations provide for the indeterminate sentencing of an offender, which is contrary to the fundamental principle of proportionality. That principle precludes the increase of a sentence beyond what is proportionate to the crime merely for the purpose of extending the protection to society from the recidivism of the offender.

An application should only be made in exceptional circumstances where, upon cogent evidence, the court could be clearly satisfied that a person presents a

constant danger of physical harm to the community (see *Chester v R* (1988) 165 CLR 611).

In determining whether the offender is a serious danger to the community, the Supreme Court must consider the following:

- whether the nature and circumstances of each offence, involving violence or an element of violence, for which the offender has been convicted are such as to warrant the indefinite detention of the offender
- the offender's antecedents, age and character
- the need to protect the community from the offender
- each report, in relation to the offender, that is before the court, including any report by a psychiatrist, psychologist or medical practitioner or under the *Corrections Act 1997*
- the risk of the offender being a serious danger to the community if the offender is not imprisoned
- any other matters that the court considers relevant

A declaration is not made merely to protect the community because there is some uncertainty about the likelihood of the offender committing a crime (see *DPP v McIntosh* [2013] TASSC 21). However, certainty that the offender will commit a serious crime is not required before a declaration is made. In *Read v R* (1994) 3 Tas R 387, the Court of Criminal Appeal said:

> What the court is required to do is assess the risk posed to the community by the offender being at large. This in turn depends upon the likelihood of his committing further violent offences. This is something which must be judged taking into account all relevant circumstances, including the offender's propensity to commit such offences in the past. If the type of offences in contemplation are of a grave character and if there is a real likelihood that the offender will commit one or more of such offences if and when discharged from gaol, the court may make the appropriate declaration.

Where a prosecutor is of the view that an application for a dangerous criminal declaration should be made, approval is first required from the Director.

In order to pursue an application, it will be necessary for a psychiatric report to be obtained addressing the risk of the offender being a serious danger to the community. Where this has not been obtained prior to the application being made, the court may order that one be prepared (s5).

Where a declaration is made under the Act, the Director of Public Prosecutions must make an application to review the declaration within 12 months before the day by which all relevant custodial sentences have expired. Further reviews must also be sought within three years of the most recent determination refusing to discharge the order.

Where a declaration was made under a previous Act, an application to review the order must be made within three years of the commencement of the Act.

High risk offender order

The Director of Public Prosecutions may apply to the Supreme Court for a high risk offender order (HRO order) in relation to relevant offenders up to 9 months prior to the expiration of their sentence (s33). HRO orders can be sought against relevant offenders.

Relevant offenders are defined in s24 and mean an offender who has been convicted of a serious offence, who has attained the age of 18 years and who is:

(a) in custody –

(i) pursuant to a dangerous criminal declaration; or

(ii) in accordance with an interim HRO order; or

(iii) in accordance with an order discharging a dangerous criminal declaration, but pending the determination of a HRO order; or

(b) subject to a HRO order or an interim HRO order; or

(c) serving a custodial sentence –

(i) for a serious offence; or

(ii) for the offence of breaching a HRO or interim HRO; or

(iii) for an offence, against a law of another State, a Territory or the Commonwealth, that is being served concurrently with or cumulatively on, or partly concurrently with and partly cumulatively on, one or more sentences of imprisonment referred to in subparagraph (i) or (ii).

Crimes amounting to serious offences are listed in Schedule 1 of the Act and include penetrative sexual abuse of a child, persistent sexual abuse of a child, murder, manslaughter, committing an unlawful act intended to cause bodily harm, persistent family violence, rape and aggravated armed robbery.

An application for a HRO order will only be made where there is cogent evidence to satisfy the court, to a high degree of probability, that the offender poses an unacceptable risk of committing a further serious offence unless the HRO order is made (s36(2)).

High degree of probability constitutes a standard of proof which is higher than the civil standard of balance of probabilities but lower than the criminal standard of beyond reasonable doubt (see *Cornwall v Attorney General for New South Wales* [2007] NSWCA 374 at [21]).

In determining whether the offender poses an unacceptable risk, the court need not be satisfied that it is more likely than not that an offender will commit a serious offence (s35(3)). The assessment of risk is an evaluative task, to be undertaken in the context of making the community safe from harm (see *Lynn v New South Wales* [2016] NSWCA 57).

In determining whether to pursue an application, the Director of Public Prosecutions will give consideration to the following matters:

- The circumstances of the offending giving rise to the serious offence, including any comments made by the offender
- The comments on passing sentence relating to the serious offence, particularly as they relate to risk of further offending and/or prospects of rehabilitation
- The circumstances and history of the offender, including their antecedents and any patterns of offending that may be indicated by that history
- The behavioural and management reports prepared pursuant to s27
- The risk assessment report prepared pursuant to s29
- Any known or apparent risk factors, including any steps taken to address them

Where counsel identify a potentially suitable HRO candidate at the time of sentence, that information should be conveyed to the HRO prosecutors for consideration at the appropriate time.

Any application for a HRO order must be approved by the Director.

Suppression orders

On rare occasions it may be necessary to apply to the court to have a report of proceedings (or part thereof) suppressed from publication until further order of the court. In determining whether to make such an application, the following principles will be applied.

Where there is no specific statutory power the Supreme Court has power in its inherent jurisdiction to suppress the proceedings (see *Hogan v Hinch* (2011) 243 CLR 506 per French CJ at [26]; *R v Matterson & Anor; Ex Parte Moles (No. 2)* [1993] TASSC 75).

Where a suppression order is made it may extend to conducting the whole or part of the proceedings in camera or it may be confined to the suppression from publication of some part of the evidence (see *R v Matterson & Anor* supra, per Underwood J at [9]).

Suppression orders will only be given in exceptional cases. It is a fundamental principle that our court proceedings are open. As Pearce J said in *Tasmania v G, DP, T, PL* [2014] TASSC 71:

> There is a paramount public interest in the due administration of justice, freedom of speech, a free media and an open society which requires court proceedings to be open and able to be reported. Informed public debate is promoted. In *Hogan v Hinch*, French CJ said at [20]:
>
> > An essential characteristic of courts is that they sit in public. That principle is a means to an end, and not an end in itself. Its rationale is the benefit that flows from subjecting court proceedings to public and professional scrutiny. It is also critical to the maintenance of public confidence in the courts." [References omitted]
>
> In most cases it is also in the public interest that, if possible, proceedings be publicised contemporaneously and not retrospectively. The interest of the public in contemporaneous reporting is to be contrasted with the interest of media outlets in contemporaneous reporting.

However, another fundamental principle is that an accused person is entitled to a fair trial and is only convicted on admissible evidence presented at trial.

> The law regards as fundamental to the preservation of the rights and freedom necessary for the maintenance of an open and democratic society that a person should not be convicted of a serious criminal offence save by the verdict of a jury after a fair trial upon the evidence presented at that trial. (see *Hinch v A-G* (1987) 164 CLR 15 per Gaudron J at 86)

However, on occasion, these two principles will conflict and a suppression order may be required in proceedings to protect the accused person's right to a fair trial (see *General TV Corp v DPP* (2008) 182 A Crim R 496).

Particular circumstances where the need for a suppression order may arise are where an accused pleads guilty and the publication of those proceedings may prejudice the fair trial of a co-offender, or in cases where separate trials are ordered.

Generally speaking, however, courts will trust a jury to follow directions and exclude material they have heard outside the court from their minds (see *Glennon v R* (1994) 179 CLR 1; *Leaman v R* [1987] TASSC 21). Further, the prejudice can be reduced if the trial of the co-offender is delayed for a considerable period of time.

Thus, a suppression order will normally only be applied for by the Office where:

- a case is likely to attract significant publicity and such publicity is likely to cause a real risk of prejudicing a person's fair trial
- the trial of the co-offender cannot be delayed in the public interest or the material would be so prejudicial that the prejudice could not be cured by delay.

Prior to requesting such an application, prosecutors must:

- seek authorisation from the Director or Deputy Director
- inform counsel for all interested accused that an application will be made
- inform the various media organisations of the intention to make the application as they have a legitimate interest in the outcome of such an application

If an application is granted, care should be taken to inform the various media organisations.

Preliminary proceedings

Section 64 of the *Justices Act 1959* provides that preliminary proceedings are to occur in a closed court.

Section 69A further provides that unless otherwise ordered by a magistrate or judge, information given or produced in preliminary proceedings, an account of preliminary proceedings or any information relating to preliminary proceedings must not be published.

There are some exceptions to this prohibition contained in s69A(2), including where it is necessary for the prosecutor or defendant to publish the information or account in order to effectively conduct his or her case.

Criminal Justice (Mental Impairment) Act 1999

Fitness to stand trial

A person is presumed fit to stand trial unless upon investigation it is established on the balance of probabilities that he or she is unfit.

Such investigation can be commenced by the court, of its own initiative, by the defendant or by the prosecutor at any time after a person is charged. Before such investigation is undertaken it must appear to the court that there is a real and substantial question as to fitness to stand trial.

Therefore, if a prosecutor becomes aware of matters that would raise a question as to fitness to stand trial, there lies an obligation to raise it with the defendant's counsel or, if unrepresented, with the court. Ordinarily, the fitness issue will be raised by the defendant's counsel.

In these circumstances, a prosecutor should consider the following:

- whether there is a reasonable prospect of conviction on each or any of the charges
- whether a report has been obtained from a suitably qualified expert providing an opinion on the defendant's fitness to stand trial which addresses the criteria set out in s8
- whether the report addresses the likelihood of the defendant becoming fit to stand trial during the next 12 months

The real and substantial question as to a defendant's fitness to stand trial only arises if one of the five criteria laid out in s8 is reasonably open.

> The issue of whether a defendant is fit to stand trial should be left to a jury unless no reasonable jury, properly instructed, could find the accused was not fit to be tried. (*Kesavarajah v R* (1994) 181 CLR 230 per Mason CJ, Toohey & Gaudron JJ at 244)

In some circumstances it will be readily apparent that the defendant is unfit to stand trial. However, where the issue of fitness is unclear an independent assessment may be required.

In determining whether it is appropriate to obtain an independent assessment of the defendant, a prosecutor should prepare a memorandum outlining the reasons for such a course of action. The consent of the Director or Deputy Director is required before an independent expert opinion is sought for that purpose.

Where fitness to stand trial is an issue requiring investigation, the principles discussed by Smith J in *R v Presser* [1958] VR 45 at 48; [1958] ALR 248 cited with approval in *Ngatayi v R* (1980) 147 CLR 1 at 8, are of consequence when considering the criteria laid out in s8:

> A mere lack of formal education, a mere lack of familiarity with court forms and procedures, would not, of course, render a man unfit to be tried, but he may, upon the test of fitness for the purposes of the section that has been laid down in the cases, be held unfit to be tried when he is far from being insane in the colloquial sense. Dixon, J, as he then was, mentioned in *Sinclair v R* (1946) 73 CLR 316, that it does not seem to have been noticed by the text writers how high a degree of intelligence the test might demand if it were literally applied. But he is not there, in my view, suggesting that it should be applied in any extreme sense, or in any over-literal sense. It needs, I think, to be applied in a reasonable and commonsense fashion. And the question, I consider, is whether the accused, because of mental defect, fails to come up to certain minimum standards which he needs to equal before he can be tried without unfairness or injustice to him.
>
> He needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any.

Of course, this test needs to be considered in light of modern day criminal practice and procedure. The manner in which a trial is conducted including the extent to which the court can monitor the use of technical language, oppressive questioning, and protect the rights of all participants, including witnesses and the defendant, means that where a consideration is made as to whether the defendant is unable to follow the course of proceedings this must be determined bearing in mind that the trial process can accommodate a defendant's incapacities by having regular breaks, slowing the pace of proceedings, monitoring the type and length of questioning witnesses, including the defendant, and allowing for adjournments where necessary.

Similarly, an assessment of a defendant's capacity to understand the nature of the charge, to understand the nature of the proceedings, to plead to the charge or exercise the right of challenge must be considered in the context of the important role the defendant's counsel plays in the proceedings.

Therefore, there is an expectation that the prosecutor scrutinises with care any expert opinion which focuses on an incapacity that renders the defendant unfit to stand trial especially if the "minimum standard" of intelligence or capacity

upon which the opinion is predicated appears to be far greater than the provision intended.

A defendant's fitness to stand trial need not be investigated by a jury if both the defendant and prosecution agree (see *Tasmania v Drake* [2006] TASSC 21).

If both the prosecution and the defendant's counsel agree the defendant is unfit to stand trial then the court may record a finding to that effect (s19).

Special hearing

In circumstances where a defendant is found not fit to stand trial and after the court has determined whether the defendant is likely to become fit to stand trial in the next 12 months, it must proceed to hold a special hearing.

A special hearing is to be conducted in the same manner as a criminal trial, as the defendant is taken to have pleaded not guilty to the offence (s16).

In criminal proceedings the determination will be made by a jury (s15).

Restriction and supervision orders

If a person is found not fit to stand trial and after a special hearing a jury cannot say the person is not guilty, or alternatively a person is found not guilty on the grounds of insanity, the court has the power to make a number of orders (ss18 and 21). Such orders include a restriction order or a supervision order.

A restriction order is an order requiring the person to whom it applies to be detained in a secure mental unit. Only the Supreme Court has the power to make a restriction order (s24).

A supervision order releases a person under the supervision of the Chief Forensic Psychiatrist (s29A).

When assisting the court in such matters, prosecutors need to make submissions on the basis that such orders are not imposed for punishment but for the protection of the accused and the public (s34).

Section 26(2) allows the Supreme Court, on application under this section or s37(3)(b), to discharge a restriction order. Section 27 allows the Supreme Court to make any other order upon the discharge of a restriction order.

Section 30 allows the Supreme Court to revoke or vary a supervision order.

The court cannot discharge a restriction order without a report from the Chief Forensic Psychiatrist and another psychiatrist. Thus, upon such application, prosecutors should ask the court for a report from the Chief Forensic Psychiatrist.

Further, before discharging a restriction order, the court is required to consider a report on the attitudes of the victims and next of kin (s33). Section 33(1) provides:

> For the purpose of assisting the court to determine proceedings under this Part, the Attorney-General must provide the court with a report stating, so far as reasonably ascertainable, the views of the next of kin of the defendant and the victims, if any, of the defendant's conduct.

"Attorney-General" is not otherwise defined in the Act and so means the Attorney-General himself or herself. To overcome the logistical difficulty created, a direction has been received from the Attorney-General pursuant to the *Director of Public Prosecutions Act 1973* "for the purpose of proceedings under the *Criminal Justice (Mental Impairment) Act 1999*, to provide reports on the Attorney-General's behalf under section 33(1) of the Act".

Thus, prosecutors with conduct of such matters should instruct a WAS officer to obtain such reports from the next of kin. However, in determining whether to support or oppose an application, the Director is not bound by the views of the next of kin. Whether to support or to oppose an application to discharge a restriction order should be determined on all the evidence bearing in mind the principles set out in ss34 and 35. Prior to any hearing, prosecutors should consult with the Director or Deputy Director.