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**DIRECTOR OF PUBLIC PROSECUTIONS  
ACT 1991**

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**STATEMENT OF  
PROSECUTION POLICY AND  
GUIDELINES**



## DIRECTOR OF PUBLIC PROSECUTIONS ACT 1991

# STATEMENT OF PROSECUTION POLICY AND GUIDELINES 1999

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## DIRECTOR OF PUBLIC PROSECUTIONS ACT 1991

## STATEMENT OF PROSECUTION POLICY AND GUIDELINES 1999

### Introduction

1. This *Statement of Prosecution Policy and Guidelines* is based on, and developed from, the Crown's longstanding prosecution policy in Western Australia. It is reduced to writing for the information of prosecutors, police, legal practitioners and the community generally. It has now been reorganised to facilitate ease of reference, and otherwise revised and updated.

2. This *Statement* also takes account of, and incorporates, the *Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders*, Havana, 7 September, 1990. Those Guidelines appear as Appendix 1 to this *Statement*.

### Power and Commencement

3. This *Statement* is issued pursuant to s.24(1) of the *Director of Public Prosecutions Act 1991* and will become operative from the date it is Gazetted.

### Application

4. The policies expressed by this *Statement* apply to—

- (a) all prosecutions for offences on indictment;
- (b) all preliminary hearings for indictable offences;
- (c) all summary prosecutions of indictable offences; and
- (d) as the circumstances allow, all appeals arising out of proceedings in respect of indictable offences.

### The Decision to Charge on Complaint

5. With some statutory exceptions, any member of the public has the power to lay a complaint charging another person with an offence.

6. The primary responsibility for investigating and charging offences resides in investigative agencies, such as the police.

7. A complaint of an offence should not be laid unless there is sufficient credible evidence identifying a person as having committed that offence.

8. The investigation and prosecution of offences are separate and distinct functions within the criminal justice system. In some cases, whether because of complexity, sensitivity or for any other reason, it will be appropriate for the police or investigative agency to seek the opinion of the Director of Public Prosecutions as to whether a charge should be laid. In such cases, the decision to charge will still be one for police or investigative agency, although they will be entitled to act on the recommendation of the Director.

### The Role of the Prosecutor

9. A prosecutor is a "minister of justice". The prosecutor's role is to assist the court to arrive at the truth and to do justice between the community and the accused according to law and the dictates of fairness.

10. A prosecutor is not entitled to act as if representing private interests in litigation. A prosecutor represents the community and not any private or sectional interest. A prosecutor does not have a "client" in the conventional sense and acts independently, yet in the public interest.

### The Decision to Prosecute

11. For the purpose of this *Statement*, a prosecution begins when a person appears in court in response to a charge.

12. The decision to continue a prosecution is at least as important as the decision to charge, but takes into account factors beyond those which influence an investigator. Those factors are set out in this *Statement*.

13. The fundamental objectives of a criminal prosecution are—

- (a) to bring to justice those who commit offences;
- (b) to punish those who deserve punishment for their offences;
- (c) to provide expeditious compensation and restitution to victims of crime; and
- (d) to protect the community.

14. In pursuit of these objectives it is necessary to consider—

- (a) the rights of the alleged offender;
- (b) the interests of victims; and
- (c) the interests of the community.

15. Ordinarily, prosecutorial discretion will be exercised so as to recognise the courts' central role in the criminal justice system in determining guilt and imposing appropriate sanctions for criminal conduct.

#### ***Prima Facie Case***

16. As early as practicable in the prosecution process, attention should be given to whether the evidence discloses a *prima facie* case.

17. The question whether there is a *prima facie* case is one of law. This involves a consideration whether on the available material there is evidence upon which a trier of fact could conclude beyond reasonable doubt that all the elements of the offence have been established.

18. Where the available material does not support a *prima facie* case, the prosecution should not proceed under any circumstances.

#### **The Public Interest**

19. If a *prima facie* case exists, the prosecution of an offence must also be in the public interest.

It is in the public interest that prosecutions be conducted fairly and impartially.

A prosecution which is conducted for improper purposes, capriciously or oppressively is not in the public interest.

#### **Evaluation of the Public Interest**

##### *Reasonable prospects of conviction*

20. It is not in the public interest to proceed with a prosecution which has no reasonable prospect of resulting in a conviction. The term "conviction" in this *Statement* includes, where the context permits, an acquittal on account of unsoundness of mind.

21. If the prosecutor considers that, on the material available, there is no reasonable prospect of conviction by an ordinary jury properly instructed then unless further prompt investigation will remedy any deficiency in the prosecution case, the prosecution should be discontinued.

22. The evaluation of prospects of conviction is a matter of dispassionate judgment based on a prosecutor's experience and may, on occasions, be difficult.

23. However, this does not mean that only cases perceived as 'strong' should be prosecuted. Generally, the resolution of disputed questions of fact is for the court and not the prosecutor. A case considered 'weak' by some may not seem so to others. The assessment of prospects of conviction is not to be understood as an usurpation of the role of the court but rather as an exercise of discretion in the public interest.

24. A preconception as to beliefs which may be held by a jury is not a material factor. Juries can be presumed to act impartially.

25. The evaluation of the prospects of conviction includes consideration of—

- (a) the voluntariness of any alleged confession and whether there are grounds for reaching the view that a confession will not meet the various criteria for admission into evidence;
- (b) the likelihood of the exclusion from the trial of a confession or other important piece of evidence in the exercise of a judicial discretion. In the case of an alleged confession, regard should be given to whether a confession may be unreliable having regard to the intelligence of the accused, or linguistic or cultural factors;
- (c) the competence, reliability and availability of witnesses;
- (d) matters known to the prosecution which may significantly lessen the likelihood of acceptance of the testimony of a witness. Regard should be given to the following—
  - (i) Has the witness made prior inconsistent statements relevant to the matter?
  - (ii) Is the witness friendly or hostile to the defence?
  - (iii) Is the credibility of the witness affected by any physical or mental impairment;
- (e) the existence of an essential conflict in any important particular of the Crown case among prosecution witnesses;
- (f) where identity of the alleged offender is in issue, the cogency and reliability of the identification evidence;
- (g) any lines of defence which have been indicated by or are otherwise plainly open to the defence.

26. Evaluation of the prospects of conviction will generally not have regard to—

- (a) material not disclosed to the prosecution by the defence;
- (b) notification of a defence which purports to rest upon unsubstantiated assertions of fact;
- (c) assertions or facts upon which a defence or excuse are based which are contentious, or rest on information which would not, in the opinion of the prosecutor, form the basis of credible cogent evidence.

*Other Relevant Public Interest Factors*

27. Despite the existence of a *prima facie* case and reasonable prospects of conviction, it may not be in the public interest to proceed if other factors, singly or in combination, render a prosecution inappropriate. These factors include—

- (a) the trivial or technical nature of the alleged offence in the circumstances;
- (b) the youth, age, physical or mental health or special infirmity of the victim, alleged offender or a witness;
- (c) the alleged offender's antecedents;
- (d) the staleness of the alleged offence including delay in the prosecution process which may be oppressive;
- (e) the degree of culpability of the alleged offender in connection with the offence;
- (f) the obsolescence or obscurity of the law;
- (g) whether a prosecution would be perceived as counter productive to the interests of justice;
- (h) the availability or efficacy of any alternatives to prosecution;
- (i) the lack of prevalence of the alleged offence and need for deterrence, either personal or general;
- (j) whether the alleged offence is of minimal public concern;
- (k) the attitude of the victim of an alleged offence to a prosecution;
- (l) the likely length and expense of a trial;
- (m) whether the alleged offender has cooperated in the investigation and prosecution of others or has indicated an intention so to do;
- (n) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
- (o) the likely effect on public order and morale;
- (p) whether a sentence has already been imposed on the offender which adequately reflects the criminality of the episode;
- (q) whether the alleged offender has already been sentenced for a series of other offences and the likelihood of the imposition of an additional penalty, having regard to the totality principle, is remote.

28. Against these factors may be weighed others which might require the prosecution to proceed in the public interest. These include—

- (a) the need to maintain the rule of law;
- (b) the need to maintain public confidence in basic constitutional institutions, including Parliament and the courts;
- (c) the entitlement of the State or other person to criminal compensation, reparation or forfeiture, if guilt is adjudged;
- (d) the need for punishment and deterrence;
- (e) the circumstances in which the alleged offence was committed;
- (f) the election by the alleged offender for trial on indictment rather than summarily.

*Irrelevant Factors*

29. The following matters are not to be taken into consideration in evaluating the public interest—

- (a) the race, colour, ethnic origin, sex, religious beliefs, social position, marital status, sexual preference, political opinions or cultural views of the alleged offender;
- (b) the possible political consequences of the exercise of the discretion;
- (c) the prosecutor's personal feelings concerning the alleged offender or victim;
- (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

**Juveniles**

30. Further special considerations apply to the prosecution of juveniles and decisions to continue a prosecution of a juvenile should have regard to—

- (a) the seriousness of the alleged offence;
- (b) the age and apparent maturity of the juvenile;
- (c) the capacity of the juvenile, if under 14, to know that at the time of doing an act, or making an omission, the juvenile knew that he or she ought not to do the act or make the omission;
- (d) the juvenile's antecedents;
- (e) any other special factor.

**Indemnities Against Prosecution**

31. In rare circumstances it may be necessary to grant concessions to people who have participated in alleged offences, in return for the provision of evidence against others. Such concessions may include—

- (a) an indemnity against prosecution;

- (b) an undertaking against the use of a statement in evidence;
  - (c) an acceptance of a plea of guilty to fewer charges or a lesser charge;
  - (d) submissions on sentence which make the extent of the cooperation of the person known to the Court.
32. A concession will only be given in the interests of justice, and as a last resort.
33. Normally, an accomplice should be prosecuted and sentenced for the offence that best reflects the criminal conduct before giving evidence against others.
34. The factors to be considered in deciding whether to grant an indemnity include—
- (a) Whether the person will give significant aid to the investigation of the criminal conduct.
  - (b) Whether the person is reasonably to be regarded as significantly less culpable than others who may be prosecuted.
  - (c) Whether the person agrees to be available to testify at any trial and to honestly answer all such questions as may be asked.
  - (d) The significance and reliability of the person's evidence;
  - (e) Whether the person is a witness in another prosecution where the person's evidence significantly strengthens the Crown case.
  - (f) the risk to the personal safety of the person and the need to provide protection inside or outside prison;
  - (g) Any inducement offered to the person;
  - (h) The character, credit and criminal record of the person.
35. An indemnity may be granted in respect of completed criminal conduct but will never be granted to cover future conduct.
36. Prior to being granted an indemnity, the person seeking it must provide a truthful, full and frank statement in writing or on video tape, detailing all that the person may know concerning the matter without embellishment and withholding nothing of relevance. If necessary, this statement may be made pursuant to an undertaking under s.20(2)(d) of the *Director of Public Prosecutions Act*.
37. A request from police to grant an indemnity to a person believed to be involved in criminal conduct in order to use their assistance to further investigations will not be acted upon unless approved by the Commissioner, Deputy Commissioner, Assistant Commissioner (Crime), Assistant Commissioner (Professional Standards), or their Federal counterparts.

### **Summary Trial for Indictable Offences**

38. Summary trial generally provides the speediest and least costly disposition of justice.
39. The *Criminal Code* allows for a range of offences to be dealt with summarily. When the conditions are met, then that mode of trial should be preferred to trial on indictment.
40. There will be occasions when a prosecutor may submit that it is appropriate for the court to refrain from exercising its powers of summary disposition. The factors relevant to this decision include—
- (a) whether the circumstances of the alleged offence, especially any aggravating circumstances, render it more serious than usual for that type of offence and make it appropriate to try the offence on indictment;
  - (b) whether there are any alleged co-offenders who are to be, or have been tried on indictment;
  - (c) special features of the case.
41. In considering the appropriate mode of trial, the prosecutor may have regard to—
- (a) whether a trial on indictment would have a serious adverse effect on the victim of the offence or a witness;
  - (b) any advantages (including deterrence) of a speedier resolution;
  - (c) whether there is any implied legislative preference for a particular mode of trial;
  - (d) the attitude of victims of an alleged offence;
  - (e) the available sentencing options; and
  - (f) the criminal antecedents of the offender.

### **The Indictment**

42. The indictment is the written charge preferred against an accused in superior courts and may be presented whether or not there has been a committal for trial. In special circumstances an indictment may be presented by the Attorney General or the Director of Public Prosecutions *ex officio*, where there has been no committal for trial.
43. A magistrate presiding over a preliminary hearing performs a different function from that of a prosecutor considering an indictment. A decision made by the magistrate as to whether to commit an accused person for trial cannot absolve a prosecutor from independently reviewing the available evidence and deciding, in accordance with this Statement, whether to indict and for what charge.

44. While the circumstances which govern particular indictments are infinitely variable the following guidelines should always be considered—

- (a) The indictment should best express the essential criminality of the alleged conduct. Normally the counts of the indictment will reflect the most serious offences revealed by the evidence.
- (b) There may be instances where, having regard to possible lines of defence and sufficiency of proof, and the certainty of a conviction by way of a plea of guilty, a less serious offence can be indicted if the offence charged is still appropriate to the nature of the facts alleged and the court's sentencing powers are adequate.
- (c) Where evidence discloses a large number of offences of a similar nature, and a victim will not be disadvantaged in a claim for restitution or compensation, the use of representative counts should be carefully considered and is encouraged. A multiplicity of charges can impose an unnecessary burden on the criminal justice system.
- (d) Multiplicity of charging should never be used in order to provide scope for plea negotiation.
- (e) The offence of conspiracy should be charged sparingly. Wherever possible substantive charges should be laid. When a conspiracy count is the only appropriate charge on the evidence then the indictment must ensure that a trial will not become unduly complex, lengthy or otherwise cause unfairness to the persons accused

#### **Indictments *Ex Officio***

45. Where, after a preliminary hearing, a magistrate has discharged a defendant and consideration is being given to proceeding by way of an *ex officio* indictment, the defendant so discharged should be notified.

46. An *ex officio* indictment will not be signed in circumstances where, through the conduct of the prosecution in the Court of Petty Sessions, a person has been effectively deprived of a preliminary hearing. In that event, the charge must be laid again and proceedings recommenced to avoid prejudice to the defendant.

47. An *ex officio* indictment following a discharge after a preliminary hearing may only be signed by the Attorney General or Director of Public Prosecutions. Such an indictment is exceptional in character and due weight will be given to the reasons of the magistrate, particularly on matters affecting the credibility of witnesses.

#### ***Nolle Prosequi*—Publication of Reasons**

48. Generally, reasons for discontinuance of a prosecution will be given to an enquirer who has a legitimate interest in the proceedings, including representatives of the media. Reasons will not be given if to do so would prejudice the administration of justice or would cause significant harm to a victim, witness or accused person.

#### **Plea Negotiation**

49. The law recognises that a plea of guilty is a factor to be taken into account in mitigation of sentence. The acceptance of a plea to some offence other than that set forth in the indictment or in discharge of the indictment can only be made with the consent of the Crown.

50. The following factors are relevant in considering whether a plea to a lesser offence, or to part only of an indictment, can be accepted—

- (a) where the plea reasonably reflects the essential criminality of the conduct and provides an adequate basis for sentencing;
- (b) where the evidence available to support the Crown case may be weak in a particular, or the Crown case may be fraught with difficulty, and the public interest will be satisfied with an acknowledgment of guilt to certain criminal conduct;
- (c) when the saving of cost and expense to the community is great when weighed against the likely disposition if the matter proceeded to trial without acceptance of the plea;
- (d) where there has been a financial loss, whether the accused person has made, or made arrangements for, restitution or compensation;
- (e) when to do so will save witnesses, particularly vulnerable and other special witnesses, from the trauma of a court appearance.

51. A plea will not be accepted if—

- (a) to do so would distort the facts disclosed by the available evidence and result in an artificial basis for sentence;
- (b) the accused person intimates that he or she is not guilty of any offence.

52. In considering whether to accept a plea, regard shall be had to the views of the victim of the offence.

53. When a plea is offered by a person who may later give evidence for the Crown against other alleged offenders in the same criminal enterprise, regard shall be had to—

- (i) the strength of the Crown case without such evidence;
- (ii) the culpability of that person compared with others.



54. It will not be in the public interest to accept a plea to a lesser offence from a principal offender in order to use that person's evidence to convict less culpable offenders of the major offence.

55. Acceptance of a plea to a lesser offence or to part only of an indictment may only be approved by the Director of Public Prosecutions, the Deputy Director of Public Prosecutions, or a duly authorised crown prosecutor.

#### **Crown Consent to "Trial by Judge Alone"**

56. The Crown's discretion to consent to trial by judge alone pursuant to s.651A of the *Criminal Code* should be exercised with due regard to the accused's choice of manner of trial, while recognising that the community has an important and continuing role to play in the administration of justice by serving as jurors in criminal trials.

Each case is to be considered on its merits with a view to achieving justice by the fairest and most expeditious means. There is no presumption in favour of, or against, consent to trial by judge alone.

57. Consent can only be given where there has been strict compliance with the requirements of s.651A(4) of the *Criminal Code*.

58. Predictions as to the likelihood of conviction by either trial by jury or trial by judge alone, or as to the possibility of a jury failing to agree a verdict, will not be a consideration.

59. Consent to trial by judge alone may only be given by a person authorised to sign and present indictments.

#### *Factors Operating in Favour of Trial by Jury*

60. Trials in which judgment is required on issues raising community values—for example: the reasonableness, dangerousness, honesty or dishonesty of particular conduct, or whether conduct was provocative, indecent or obscene—should ordinarily be heard by a jury.

61. Cases where the interests of a victim require a decision by representatives of the community may be better suited to trial by jury.

#### *Factors Operating in Favour of Trial by Judge Alone*

62. Cases where the evidence is of a technical or complex nature may be better suited to trial by judge alone.

63. Cases in which there is a real and substantial risk that directions by a trial judge or other measures will not be sufficient to overcome prejudice arising from pre-trial publicity may be better suited to trial by judge alone.

64. Cases which are likely to continue over a long period of time may be better suited to trial by judge alone.

65. Other cases which may be better suited to trial by judge alone include those where—

- (a) the facts are not substantially in issue or the only issue is a matter of law;
- (b) factors, such as the likely conduct of witnesses or the accused, may cause a trial before a jury to be aborted; or
- (c) significant hurt or embarrassment to any alleged victim may be reduced.

66. Consideration will be given to any other sufficient factor arising from the nature and circumstances of the particular case.

### **The Trial**

#### *Duty of Prosecuting Counsel*

67. Counsel for the Crown has a duty to ensure that the prosecution case is presented properly and with fairness to the accused. The following passage from C S Kenny, *Outlines of the Criminal Law*, 'The Proper Role of Prosecuting Counsel' is commended as a model to prosecuting counsel—

"A prosecuting counsel stands in a position quite different from that of an advocate who represents the person accused or represents a plaintiff or defendant in civil litigation. For this latter advocate has a private duty - that of doing everything that counsel honourably can to protect the interests of the client. He is entitled to 'fight for a verdict'. But the Crown counsel is a representative of the State, 'a minister of justice'. Counsel's function is to assist the jury in arriving at the truth. Counsel must not urge any argument that does not carry weight in his or her own mind, or try to shut out any legal evidence that would be important to the interests of the person accused. 'It is not his or her duty to obtain a conviction by all means; but simply to lay before the jury the whole of the facts which compose the case, and to make these perfectly intelligible, and to see that the jury are instructed with regard to the law and are able to apply the law to the facts'. 'It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done'."

68. The observance of these canons is not incompatible with the adoption of an advocate's role. Counsel for the Crown is obliged to put the Crown case to the jury and, when appropriate, counsel is entitled to firmly and vigorously urge the Crown view about a particular issue and to test and, if necessary, attack that advanced on behalf of the accused. But counsel must always do so temperately and with restraint, bearing constantly in mind that the primary function is to aid in the attainment of justice, not the securing of convictions.

*Expedition*

69. It is in the interests of justice that matters are brought to trial expeditiously. The Crown should actively assist in attaining this objective. As far as practicable adjournments after a trial has been allocated a hearing date should be avoided by prompt attention to the form of indictment, the availability of witnesses and any other matter which may cause delay.

*Jury Selection*

70. Selection of a jury is within the general discretion of prosecuting counsel. However, no attempt should be made to select a jury that is unrepresentative as to race, age or sex.

*Disclosure of Crown Case*

71. The Crown has a general duty to disclose the case in-chief for the prosecution to the defence.

72. Normally full disclosure of all relevant evidence will occur unless in exceptional circumstances full disclosure prior to the trial will undermine the administration of justice, or when such disclosure may endanger the life or safety of a witness.

*Disclosure of Information to the Defence*

73. When information which may be exculpatory comes to the attention of a prosecutor and the prosecutor does not intend adducing that evidence, the prosecutor will disclose to the defence—

- (a) the nature of the information;
- (b) the identity of the person who possesses it; and
- (c) when known, the whereabouts of the person.

74. These details should be disclosed in good time.

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

76. In either case, the Crown, if requested by the defence, should subpoena the person.

77. If the prosecutor possesses such exculpatory information but forms the view that the statement is not credible or that the subject matter of the statement is contentious, the prosecutor is not obliged to disclose the contents of the statement to the defence, but should inform the defence of the existence of the information and its general nature.

78. However, if the prosecutor is of opinion that the statement is credible and not contentious, then a copy of that statement should be made available to the defence in good time.

79. When the prosecutor knows that a Crown witness is indemnified in respect of the matter before the court, that shall be revealed to the defence.

*Disclosure of Inconsistent Statement of Witness*

80. Where a witness called by the prosecution gives evidence on a material issue and the prosecutor has an earlier statement that may be inconsistent with the present testimony, the prosecutor should inform the defence of that fact and make available the statement.

*Disclosure of Material Additional to the Crown Case Generally*

81. Guidelines for the disclosure of material additional to the Crown case appear as Appendix 2 to this *Statement*.

*Victims as Witnesses*

82. A victim of crime when called to testify may need to relive the emotional and physical distress suffered from the offence. A prosecutor should pay due regard to this fact.

83. Victims are entitled to have their role in the prosecution process fully explained and are entitled, where possible, to be consulted as to the various decisions made in the processes which may directly affect them.

*Calling of Witnesses*

84. The following general propositions which relate to a prosecutor's duty as to calling of witnesses are taken from *R v. Apostilides* (1984) 154 CLR 563 and are applicable to the conduct of criminal trials in Western Australia—

- (a) The prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown.
- (b) The trial judge may but is not obliged to question the prosecutor in order to discover the reasons which lead the prosecutor to decline to call a particular person. The judge is not called upon to adjudicate the sufficiency of those reasons.
- (c) Whilst at the close of the Crown case the trial judge may properly invite the prosecutor to reconsider such a decision and to have regard to the implications as then appear to the judge at that stage of the proceedings, the judge cannot direct the prosecutor to call a particular witness.
- (d) When charging the jury, the trial judge may make such comment as is then thought appropriate with respect to the effect which the failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial. No doubt that comment, if any, will be affected by such information as to the prosecutor's reasons for the decision as the prosecutor thinks is proper to divulge.

**The Effect of A Jury's Failure to Reach a Verdict**

85. If a jury fails to reach a verdict in a particular case, consideration should be given as to whether the public interest requires a second trial of the issue and the likelihood that a jury on a retrial could deliver a verdict on the available evidence.

86. Both the cost to the community and the cost to the accused should be considered.

87. Where a second jury disagrees the public interest would rarely require a third trial of the accused person and special reasons to justify that course will be necessary.

**Sentence**

88. It is the duty of the prosecutor to make submissions on sentence to—

- (a) assist in the attainment of an appropriate disposition;
- (b) prevent the judge from falling into appealable error;
- (c) put before the court such information as may be necessary to decide an appropriate disposition.

89. Where facts are asserted on behalf of a convicted person which are contrary to the prosecutor's instructions or understanding, the prosecutor should press for a trial of the disputed issues if the resolution of such disputed facts is in the interests of justice or is material to sentence.

90. Where a convicted person is unrepresented, the prosecutor should, as far as practicable, assist the court by putting all known relevant matters before the court, including such matters as may amount to mitigation.

**Victims**

91. A victim should be offered the opportunity of presenting a an oral or written statement to the Court particularising any injury, loss or damage suffered by the victim as a direct result of the offence, and describing the effects on the victim of the commission of the offence.

**Convicted Persons—Cooperation with Authorities**

92. On occasions, a convicted person will have rendered such significant assistance to the police in an investigation as to warrant a letter from the police to the court advising the nature of the assistance.

93. In order to have substantial mitigatory effect, the assistance should extend beyond the investigation of the criminal enterprise in respect of which the person has been convicted.

94. To ensure that the assistance merits the unusual action of a letter to the court, and the consequent effect on sentence, such letters may only be presented when sanctioned by the Director of Public Prosecutions or Deputy Director of Public Prosecutions who in turn will only accept such letters from the Commissioner, Deputy Commissioner, or Assistant Commissioner (Crime), or their Federal counterparts.

**Crown Appeals against Sentence**

95. The purpose of Crown appeals against sentence is to ensure that there are established and maintained adequate, just, and proportionate standards of punishment for crime. Crown appeals have been held by the courts to raise considerations not present in an appeal by a defendant seeking a reduction in sentence. They have been described as cutting across time-honoured concepts of criminal administration and as putting the convicted person in jeopardy a second time.

96. The following factors are relevant in considering whether or not to institute an appeal—

- (a) whether a sentence is so disproportionate to the seriousness of the crime as to reflect error in sentencing principle by the trial judge;
- (b) whether a sentence is so disproportionate to the seriousness of the crime as to shock the public conscience;
- (c) whether a sentence is so out of line with other sentences imposed for the same or similar offences without reasonable cause for that disparity;
- (d) whether the idiosyncratic views of individual judges as to particular crimes or types of crimes require correction;
- (e) whether disputed points of sentencing principle are giving, or are likely to give, rise to disparity of sentences imposed for crimes of the same or similar type;
- (f) whether existing sentences are already subject to wide and inexplicable variations and the need to reduce this disparity and variability in order to promote uniform standards of sentencing.

97. A Crown appeal will not be initiated simply because it is perceived as inadequate or inappropriate in a particular case. Crown appeals must be considered against the background of many complex circumstances and legal principles. For any offence there is a range of sentencing options and a court must have regard, in choosing which option seems appropriate, to the principles laid down by Parliament and in other cases. For any offence there may be a number of different dispositions none of which are necessarily wrong.

**Extradition and Interstate Transfer of Prisoners**

98. The extradition of persons required to answer any charge of an offence or to serve a sentence imposed in Western Australia will always involve expense to the State. It will

generally be appropriate to incur that expense where there are reasonable prospects of conviction, in order to maintain confidence in the administration of the law and to deter offenders fleeing from justice.

99. When application is made to take steps to secure extradition, in addition to the assessment of the prosecution case in accordance with these guidelines, the following factors will be relevant—

- (a) any delay after discovery of the suspected offender;
- (b) any compensation or resolution which might be ordered following conviction;
- (c) the likely disposition following conviction. Where the person to be extradited is already serving a sentence in another jurisdiction this factor will have greater weight;
- (d) the likely cost to the State.

100. The following factors, if applicable, will be taken into consideration in deciding whether approval is given—

- (a) The country or state from which the fugitive is to be extradited.
- (b) The nationality of the fugitive.
- (c) Whether the fugitive is to be charged with an offence or, having been charged, has absconded.
- (d) The nature and gravity of the offence or offences alleged against the fugitive.
- (e) The existence of reasonable prospects of conviction.
- (f) Any delay after discovery of the fugitive's whereabouts.
- (g) The likely disposition following conviction.
- (h) Where a person is in custody, whether the provisions of the *Prisoners (Interstate Transfer) Act 1983* should be utilised.
- (i) The likely cost of extradition or transfer.
- (j) The existence of assets held by the fugitive that could satisfy an order in relation to breach of bail or a confiscation order and where such assets are to be found.
- (k) Whether the victim has expressed a wish for the matter to proceed.

101. Procedures for extradition and interstate transfer of prisoners appear as Appendix 3 to this *Statement*.

#### **Forfeiture, Confiscation of Assets and Restitution Of Property**

102. It is in the interests of justice to strip an offender of the proceeds of crime and to have forfeited objects used to commit or to facilitate the commission of offences.

103. When appropriate, orders should be sought to ensure that—

- (a) an offender does not profit from the criminal conduct;
- (b) property used in the commission of an offence is subject to forfeiture;
- (c) the rights of victims of crime to restitution and compensation are protected.

104. Regard should be had to the rights of any innocent party who may be affected by an order.

#### **Taking over a Prosecution**

105. Normally proceedings commenced in a Court of Petty Sessions for indictable offences will be allowed to run their course. The Director of Public Prosecutions however may take over any such proceedings with a view to their continuance or termination in accordance with this *Statement*.

106. In considering whether to take over a prosecution the following factors are relevant—

- (a) the wishes of the parties;
- (b) whether the public interest will be advanced if the prosecution is taken over;
- (c) whether the prosecution will be taken over to be terminated.

107. In considering whether a prosecution will be taken over to be terminated, regard shall be had to whether—

- (i) the proceedings are vexatious or oppressive;
- (ii) a decision already taken by the Director of Public Prosecutions will be thwarted.

108. The public interest may at times override the individual interests or wishes of particular police officers, government departmental officers and others who institute criminal proceedings.

109. The taking over of preliminary proceedings is exceptional. Access by citizens to the courts should not be impeded except in special circumstances. Courts of Petty Sessions have power to prevent abuses of their process and powers to redress injustice.

110. If a Court of Petty Sessions makes an order committing a person to stand trial on indictment, the public interest will almost always require the Director of Public Prosecutions take over the matter.

**Effect of Policy and Guidelines**

111. An act or omission of the Director of Public Prosecutions or a person acting on behalf of the Director of Public Prosecutions shall not be called into question or held to be invalid on the grounds of a failure to comply with this *Statement: Director of Public Prosecutions Act 1991*, s.24(3).

112. While this *Statement* is intended to guide and assist prosecutors in the performance of their function, prosecutors must at all times have regard to their role as ministers of justice, and exercise their professional judgment and common sense in their decision-making consistent with that role.

ROBERT COCK QC, Director of Public Prosecutions.

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**APPENDIX 1****GUIDELINES ON THE ROLE OF PROSECUTORS**

[Adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990]

**Qualifications, Selection and Training**

1. Persons selected as prosecutors shall be individuals of integrity and ability with appropriate training and qualifications.

2. States shall ensure that—

- (a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;
- (b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognised by national and international law.

**Status and Conditions of Service**

3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession

4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal and other liability.

5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.

6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.

7. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.

**Freedom of Expression and Association**

8. Prosecutors, like other citizens, are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organisation. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognised standards and ethics of their profession.

9. Prosecutors shall be free to form and join professional associations or other organisations to represent their interests, to promote their professional training and to protect their status.

**Role in Criminal Proceeding**

10. The office of prosecutor shall be strictly separated from judicial functions.

11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecutions and, where authorised by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.

12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

13. In the performance of their duties, prosecutors shall—

- (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
- (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- (c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
- (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violation of human rights and other crimes recognised by international law and, where authorised by law or consistent with local practice, the investigation of such offences.

16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods or inform the court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

#### **Discretionary Functions**

17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

#### **Alternatives to Prosecution**

18. In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of the suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatisation of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.

19. In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special consideration shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.

#### **Relations with other Government Agencies or Institutions**

20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

#### **Disciplinary Proceedings**

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.

22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines.

#### **Observance of the Guidelines**

23. Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.

24. Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

**APPENDIX 2****GUIDELINES FOR DISCLOSURE OF MATERIAL ADDITIONAL TO THE CROWN CASE**

1. The duties of the Crown to disclose the case for the prosecution are set out in paragraphs 71-80 of the *Statement of Prosecution Policy and Guidelines* 1999. These Guidelines deal with disclosure of material not directly relevant to the Crown case.

**Duties of Police**

2. In all matters following a committal for trial on indictment, police must deliver to the Director of Public Prosecutions, as soon as possible after committal, all other documentation, material, and any other information held by any police officer concerning any proposed prosecution witness, which might be of assistance or interest to either the prosecution or the defence.

3. A police officer shall certify that to the best of that officer's knowledge or belief, all such documentation material or information has been disclosed.

**Obligations of the Prosecution**

4. The prosecution, upon request by the defence, shall, subject to any claim for immunity on the grounds of public interest, disclose all such documentation, material or information either by making copies available or allowing inspection.

5. Some material however may raise for consideration the need to balance competing public interests. On the one hand there is a public interest in full disclosure to assist the attainment of justice. On the other hand there is also a public interest in maintaining the confidentiality of certain material, particularly material not directly relevant to the case.

6. A prosecutor may withhold or delay disclosure of specific material where the prosecutor is of opinion that, in the public interest, the material should be immune from disclosure.

7. Some of the factors to be considered are where—

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

8. Where the prosecutor declines to disclose material, or alternatively delays disclosure of material, the prosecutor should advise the defence that material has been withheld and claim an immunity against disclosure in respect of that material.

9. If a dispute arises as to the claim for immunity, the matter should be submitted to the court for resolution prior to trial.

10. Where the circumstances require, a prosecutor may seek an undertaking that the material will not be disclosed to parties other than the accused's legal advisers and the accused.

11. The Crown's duty of disclosure is a continuing obligation.

ROBERT COCK QC, Director of Public Prosecutions.

**APPENDIX 3****PROCEDURES FOR EXTRADITION AND INTERSTATE TRANSFER OF PRISONERS**

1. These procedures are to be read in conjunction with paragraphs 98-100 of the *Statement of Prosecution Policy and Guidelines* 1999.

2. Approval for extradition or the interstate transfer of prisoners may be sought by Police, the Ministry of Justice or other relevant government agency.

3. Before determining such a request, the Director of Public Prosecutions may consult with and require information from a relevant agency.

4. Applications for approval should be in writing, presenting reasons for the extradition or transfer of a particular fugitive offender.

5. In urgent cases, approval may be sought and given orally. An oral approval must be followed by a full report of the circumstances from the requesting agency as soon as possible.

6. In seeking approval for extradition in providing information, the Director of Public Prosecutions should be advised if and to what extent the fugitive might reasonably constitute a risk to the public, either at large or for the purposes of transportation to Western Australia. Advice to the Director of Public Prosecutions should include recommendations as to whether the fugitive should be extradited on bail or in custody. If in custody advice should include information on the number of officers required to effect extradition, cost of economy airfare for the fugitive and officer(s).

7. Approval for the extradition or interstate transfer of a prisoner may be given by the Director of Public Prosecutions, the Deputy Director, or any duly authorised crown prosecutor.

ROBERT COCK QC, Director of Public Prosecutions.

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