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DIRECTOR OF PUBLIC PROSECUTIONS ACT 1991

**STATEMENT OF PROSECUTION
POLICY AND GUIDELINES 2018**

**POLICY AND GUIDELINES FOR
VICTIMS OF CRIME 2018**

**PUBLIC OFFICER
GUIDELINES 2018**

DIRECTOR OF PUBLIC PROSECUTIONS ACT 1991**STATEMENT OF PROSECUTION POLICY AND
GUIDELINES 2018****INTRODUCTION**

1. The statutory entity called the Director of Public Prosecutions (the Director) was created by the *Director of Public Prosecutions Act 1991* (the Act), commencing on 3 February 1992, to provide an effective, fair and independent criminal prosecution service for the people of Western Australia.
2. The Act also provides that staff necessary for the performance of the functions of the Director shall be appointed or made available under Part 3 of the *Public Sector Management Act 1994*. Those staff are part of the Office of the Director of Public Prosecutions (ODPP).
3. Pursuant to the Act, the Director and the staff of the ODPP cannot be directed by the Attorney General in relation to any particular case as to the decisions to be made in that case. The Attorney General retains the power to issue directions to the Director as to the general policy to be followed in the performance of any function of the Director. The text of any such direction shall be included in the annual report of the Director.
4. The Act also ensures that there is a separation of the investigative and prosecutorial functions of the Western Australian criminal justice system. Once a prosecution has been commenced and referred to the ODPP, the decision whether to proceed with that prosecution is made by the Director independently of those who were responsible for the investigation.

APPLICATION

5. The *DPP Statement of Prosecution Policy and Guidelines* (this Statement) is issued pursuant to section 24(1) of the *Director of Public Prosecutions Act 1991* and will become operative from 1 September 2018. The policies expressed by this Statement apply to—
 - (a) prosecutions for offences on indictment;
 - (b) summary prosecutions;
 - (c) matters before the Children’s Court;
 - (d) appeals arising out of criminal proceedings;
 - (e) proceedings under the *Criminal Property Confiscation Act 2000*;
 - (f) proceedings under the *Dangerous Sexual Offenders Act 2006*; and
 - (g) extradition proceedings.

THE DECISION TO CHARGE

6. The primary responsibility for investigating and charging offences resides with investigative agencies, such as the Western Australia Police (WAP).
7. 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 some other reason, it will be appropriate for the WAP or investigative agency to seek the opinion of the Director as to whether a charge should be laid. In such cases, the decision to charge will still be one for the WAP or investigative agency, although they will be entitled to act on the recommendation of the Director.

THE ROLE OF THE PROSECUTOR

8. A prosecutor is not entitled to act as if representing private interests in litigation. A prosecutor represents the community as a whole and not any individual or group interest. A prosecutor does not have a “client” in the conventional sense and acts independently in the public interest.
9. Prosecutors carry out duties which are fundamental in a democratic society. They are entitled to certain rights to enable them to properly perform these duties. The ODPP adopts the International Association of Prosecutors’ *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* which are set out in **Appendix 1**.
10. Prosecutors must act in compliance with the statutory obligations contained in the *Public Sector Management Act 1994 (WA)* and the *Legal Profession Conduct Rules 2010 (WA)*.

Duty to be Fair

11. The duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of justice. The role of prosecutor 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 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.*¹

12. A central, even the central, element in that role is ensuring that the prosecution case is presented with fairness to the accused.²

13. A prosecutor is entitled to firmly and robustly put the prosecution case and to properly test and, if necessary, challenge, any case put on behalf of an accused. However, this must be done temperately and with restraint.

14. A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

15. A prosecutor must inform the court of authorities or trial directions appropriate to the case, even where unfavourable to the prosecution, and must, in accordance with the law, adduce all admissible prosecution evidence during the prosecution case.

THE DECISION TO PROSECUTE

16. For the purpose of this Statement, a prosecution begins when a person is charged with an offence.

17. The decision to prosecute 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.

18. 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 protect the community; and
- (d) to facilitate the provision of expeditious compensation and restitution to victims of crime.

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

- (a) the rights of the accused;
- (b) the rights and interests of victims; and
- (c) the public interest.

20. Prosecutorial discretion will be exercised so as to recognise the central role of the courts in the criminal justice system in determining guilt and imposing appropriate sanctions for criminal conduct.

PRIMA FACIE CASE

21. A *prima facie* case is established if the available material appears on its face or initial assessment to prove the offence which has been charged. Whether there is a *prima facie* case is a threshold test which governs the decision to charge. In the absence of a *prima facie* case, a person should not be charged.

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

23. Where the available material does not establish a *prima facie* case, the prosecution should be discontinued.

THE PUBLIC INTEREST

24. If a *prima facie* case exists, a prosecution should only proceed when it is in the public interest.

Evaluation of the Public Interest

Reasonable prospects of conviction

25. A prosecution is not in the public interest if it does not have reasonable prospects of conviction. The term “conviction” in this Statement includes, where the context permits, an acquittal on account of unsoundness of mind.

26. The requirement that a prosecution has reasonable prospects of conviction 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 usurpation of the role of the court but rather as an exercise of discretion in the public interest.

27. The evaluation of prospects of conviction is a matter of dispassionate judgment.

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

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

- (a) The admissibility of the evidence available to the prosecution, including—
 - (i) the voluntariness of any alleged admissions and whether there are grounds for reaching the view that an admission will not meet the various criteria for admissibility;
 - (ii) the likelihood of the exclusion from the trial of an admission or other important evidence in the exercise of a judicial discretion. In the case of an alleged admission, regard should be given to whether an admission may be unreliable having regard to the cognitive functioning of the accused, or linguistic or cultural factors;

¹ *Boucher -v- The Queen* [1955] SCR 16 at 23-24

² *Richardson* [1974] HCA 19; (1974) 131 CLR 116 at 119

- (b) the competence, reliability, credibility, availability and compellability of witnesses; and
 - (c) matters known to the prosecution which may significantly lessen the likelihood of acceptance of the prosecution case, such as—
 - (i) the existence of a significant conflict in the evidence;
 - (ii) where identity is in issue, the cogency and reliability of the identification evidence;
 - (iii) any lines of defence which have been indicated by, or are reasonably open to the defence;
 - (iv) reasonable inferences consistent with innocence; and
 - (v) the onus and standard of proof.
30. 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; and
 - (c) assertions or facts upon which a defence or excuse are based which are contentious, or not supported by cogent evidence.
31. If the prosecutor considers that, on the available admissible evidence, there is no reasonable prospect of conviction by a properly instructed tribunal of fact, then unless further prompt investigation will remedy any deficiency in the prosecution case, the prosecution should be discontinued.

Other Relevant Public Interest Factors

32. Even if the evidence establishes a *prima facie* case and reasonable prospects of conviction, consideration must be given to whether it is in the public interest to proceed. Factors to be considered in evaluating the public interest include—
- (a) the need to maintain the rule of law;
 - (b) the need to maintain public confidence in the basic constitutional institutions;
 - (c) the objectives of sentencing, including deterrence, retribution, protection of the community, punishment and rehabilitation;
 - (d) the circumstances of the alleged offence;
 - (e) the age, health or vulnerability of the victim or a witness;
 - (f) the circumstances of the accused, including their criminal history;
 - (g) the lapse of time since the alleged offence, including delay in the prosecution process;
 - (h) the degree of culpability of the accused;
 - (i) the availability or efficacy of any alternatives to prosecution;
 - (j) the attitude of the victim of an alleged offence to a prosecution;
 - (k) the attitude of the investigating officer responsible for the prosecution;
 - (l) the likely length and expense of a trial if disproportionate to the seriousness of the alleged offending;
 - (m) whether the alleged offender has cooperated in the investigation and prosecution of others or has indicated an intention to do so;
 - (n) the likely sentence in the event of a finding of guilt;
 - (o) the entitlement of the State or other person to compensation, reparation or forfeiture; and
 - (p) the operation of the *Dangerous Sexual Offenders Act 2006*, the *Community Protection (Offender Reporting) Act 2004* and the *Working with Children (Criminal Record Checking) Act 2004*.

Irrelevant Factors

33. The following matters are irrelevant to the evaluation of the public interest—
- (a) the ethnicity, gender, religious beliefs, social position, marital status, sexual preference, political opinions or cultural views of any person involved in the prosecution (unless relevant to the elements of the offence);
 - (b) the possible political consequences of the exercise of the discretion;
 - (c) the prosecutor's personal feelings concerning the prosecution; and
 - (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

PROSECUTION OF CHILDREN

34. Additional considerations apply to the prosecution of children. Decisions to continue a prosecution of a child should have regard to—
- (a) the availability of care, supervision and support for the child;
 - (b) whether a prosecution would be counterproductive to the objectives of youth justice; and
 - (c) the sentencing options available if the matter were prosecuted.
35. Under no circumstances should a child be prosecuted solely to secure access to the welfare powers of a court.

PROSECUTION OF ACCUSED WITH A MENTAL IMPAIRMENT

36. When deciding whether to proceed with a prosecution, additional consideration must be given to whether the accused has, or had at the time of the alleged offence, a mental impairment within the meaning of the *Criminal Code*.

37. People with a mental impairment should not be prosecuted for minor offences if there is no threat to the community.

38. Consideration should be given to the willingness of the accused to undergo appropriate treatment (if such treatment is available), the availability of such treatment and any change in circumstances since the alleged offending.

CASES INVOLVING VULNERABLE WITNESSES

39. In some cases, a victim may be particularly vulnerable to an offence due to their relationship with the accused, either alone or in combination with some other characteristic or circumstance which renders them more susceptible to intimidation, exploitation or undue influence.

40. In prosecutions of such cases, special care should be taken before deciding not to proceed with a prosecution on the basis of the victim's attitude.

41. If there is available evidence which establishes reasonable prospects of conviction, it will ordinarily be in the public interest to prosecute.

INDEMNITIES AND UNDERTAKINGS

42. An indemnity from prosecution, whether on indictment or otherwise, under section 20(2)(c) of the Act, or an undertaking to a person that an answer given or a statement or disclosure made by that person will not be used in evidence against that person pursuant to section 20(2)(d) of the Act, may only be granted by the Director or, in the absence of the Director, the Deputy Director.

43. The powers in subsections 20(2)(c) and (d) of the Act will only be exercised in rare circumstances.

44. An indemnity may be granted in respect of past conduct but will never be granted to cover future conduct.

45. If the WAP identify a participant in the criminal activity being investigated as a person who is likely to be of more value as a prosecution witness than an accused, and potentially worthy of an indemnity or an undertaking under the Act, the WAP should seek advice from the Director before proceeding on that basis.

46. Prior to being granted an indemnity, the person seeking it must provide a truthful, full and frank statement, 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 section 20(2)(d) of the Act.

47. Normally, instead of receiving an indemnity or undertaking, a person should be prosecuted and sentenced for the offence which best reflects their criminal conduct before giving evidence against others.

48. In those circumstances, the appropriate course may be for the person to provide an undertaking to give truthful evidence in response to all questions asked at any trial and in accordance with their statement or disclosure in the matter, pursuant to section 37A of the *Sentencing Act 1995 (WA)*, and to receive any appropriate sentence reduction under that section.

49. If the person will not be required to give evidence or future assistance, or has provided other assistance to law enforcement authorities, the person may instead, or in addition, be given a Letter of Recognition to enable their assistance to be taken into account in their sentencing proceedings.

50. A request from the WAP to the Director to grant an indemnity to a person believed to be involved in criminal conduct, in order to use their assistance for further investigations, will not be acted upon unless approved by the Commissioner or Deputy Commissioner of the WAP, or their Federal counterparts. Requests for indemnities may also be sought by the Commissioner of the Corruption and Crime Commission.

51. The factors to be considered in deciding whether to grant an indemnity or undertaking under the Act include—

- (a) whether the person's evidence is necessary to the prosecution case;
- (b) whether the person is significantly less culpable than others who may be prosecuted;
- (c) whether the person undertakes to give truthful evidence in response to all questions asked at any trial;
- (d) the cogency of the person's evidence;
- (e) the risk to the personal safety of the person;
- (f) any other benefit offered or given to the person;
- (g) the character of the person; and
- (h) whether there is any more appropriate means of securing the giving of truthful evidence by the person.

SUMMARY TRIAL FOR INDICTABLE OFFENCES

52. A summary trial is generally the most efficient and least costly disposition of justice.

53. A range of indictable offences may be dealt with summarily. Unless the conditions in section 5(3) of the *Criminal Code* are met, a summary trial should be preferred to a trial on indictment.

THE INDICTMENT

54. The indictment is the written charge preferred against an accused in a superior court.

55. The indictment should reflect the nature and extent of the alleged criminal conduct. In the ordinary course the charge or charges laid or proceeded with will be the most serious disclosed by the evidence. Nevertheless, when account is taken of such matters as the strength of the available evidence, the probable lines of defence to a particular charge and the appropriate sentence for the conduct disclosed by the evidence, it may be appropriate to lay or proceed with a charge which is not the most serious revealed by the evidence.

56. Where the 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, consideration should be given to the number of counts necessary to reflect the extent of the alleged criminal conduct.

57. Charges should never be instigated or continued in order to provide scope for plea negotiation.

58. Whether an accused would be liable to a mandatory sentence if convicted of a particular charge is not a relevant consideration if the particular charge is otherwise the most appropriate in accordance with these guidelines.

INDICTMENTS EX OFFICIO

59. An *ex officio* indictment is an indictment presented when there has been no committal of any related charges from the Magistrates Court to the superior court.

60. The committal process is the preferred course of bringing a charge before a superior court.

61. *Ex officio* indictments must be approved and signed by the Director or the Deputy Director.

62. Where an accused has not been committed, if appropriate the accused should be advised that an *ex officio* indictment is under consideration and be given an opportunity to make a submission.

CHARGE NEGOTIATIONS

63. A plea of guilty is a factor to be taken into account in mitigation of sentence. There are obvious benefits to the criminal justice system resulting from a plea of guilty. The earlier a plea of guilty is entered, the greater will be the benefits.

64. Charge negotiations between the parties are encouraged and may occur at any stage of the proceedings. They can be initiated by either party. They must be based on the evidence and the public interest. A written record of the charge negotiation must be kept.

65. Where the appropriate authorisation has been obtained, the prosecution may agree to discontinue a charge or charges upon the accused pleading guilty to another or others. The prosecution may also agree to amend the factual basis of a charge or charges upon a plea of guilty.

66. Charge negotiations should take into account—

- (a) Whether the plea of guilty reasonably reflects the essential criminality of the conduct and provides an adequate basis for sentence;
- (b) Whether the strength of the evidence is such that the public interest will be satisfied by the acknowledgment of guilt and certainty of conviction achieved by the negotiated plea;
- (c) The benefits to the community as a result of the negotiated plea;
- (d) Where there has been a financial loss, whether the accused has made, or made arrangements for, restitution or compensation; and
- (e) Whether the plea of guilty will save witnesses, particularly vulnerable witnesses, from the trauma of protracted criminal proceedings.

67. Whether the State is to make an application for a drug trafficker declaration is not to be part of any charge negotiations.

68. A statement of material facts must be settled before a negotiated plea is accepted.

69. In considering whether to accept a plea the investigator and victim must, if reasonably possible, be consulted. Consultations with the investigator and victim must be recorded in writing prior to any decision.

70. The views of the victim and the investigator are important but not determinative public interest factors in deciding whether to accept a negotiated plea.

71. When a plea is offered by a person in a case involving multiple accused, consideration must be given to the consequences of the acceptance of the plea for the case against the remaining accused.

72. 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 prosecute less culpable co-accused on the more serious charge.

SUMMARY PROSECUTIONS

73. It is a function of the Director to commence, conduct and take over the prosecution of summary matters ("the summary jurisdiction function"). Summary matters are ordinarily prosecuted by the WAP, the State Solicitor's Office, or other authorised agencies.

74. The extent of the exercise by the Director of the summary jurisdiction function is dependent on resources. In the absence of resources to facilitate the conduct of summary matters, the Director will not exercise the summary jurisdiction function unless it is overwhelmingly in the public interest that the Director commence, conduct or take over the particular summary matter.

DISCONTINUANCE

75. A Notice of Discontinuance is the formal notice by which the ODPP advises the superior court that the prosecution of an indictable charge will not be further proceeded with.

76. In certain circumstances, the prosecution will discontinue a charge or charges. This may occur at any stage of the proceedings.

77. A charge or charges should only be discontinued if—

- (a) there is no prima facie case; or
- (b) there are no reasonable prospects of conviction; or
- (c) there is no public interest in proceeding; or
- (d) the Notice of Discontinuance is of an administrative nature.

78. In considering whether to discontinue a charge which significantly alters the prosecution case, the investigator and victim must, if reasonably possible, be consulted. Consultations with the investigator and victim must be recorded in writing prior to any decision.

79. The views of the victim and the investigating officer are important but not determinative public interest factors in deciding whether to discontinue a charge.

80. Where a decision has been made to discontinue a charge, a prosecution of that charge will not recommence unless in all the circumstances it is in the interests of justice to do so.

81. 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 cause harm to a victim, witness or the accused.

82. Unless entered for administrative purposes, reasons for a discontinuance should ordinarily be announced in open court.

APPLICATION FOR TRIAL BY JUDGE ALONE

83. The position taken by the State to an accused's application that a trial be conducted by a judge alone pursuant to section 118 of the *Criminal Procedure Act 2004* should be determined by the State on a case by case basis.

84. It is relevant to the determination of the State's position that the community has an important and continuing role to play in the administration of justice by serving as jurors in criminal trials.

85. In determining the State's position as to an application for trial by judge alone, predictions as to the likelihood of conviction or the possibility of a jury failing to agree upon a verdict are not relevant considerations.

86. Factors relevant to the determination of the State's position as to an application by an accused for trial by judge alone include—

- (a) whether the case involves a factual issue requiring the application of objective community standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness;
- (b) whether the evidence is of a highly technical or complex nature;
- (c) whether the evidence is of such a nature that directions by a trial judge or other measures will not be sufficient to ensure a fair trial to the parties;
- (d) whether 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;
- (e) the likely length of the trial; and
- (f) whether the facts are substantially in issue or whether the only issue is a matter of law.

THE TRIAL

87. Prosecutions should be progressed without undue delay. It is in the interests of justice to finalise proceedings as soon as practicable.

88. The State should actively participate in ensuring that a prosecution is progressed without undue delay, having regard to the interests of all parties to the proceedings.

JURY SELECTION

89. The prosecution's right of jury challenge should only be exercised if there is reasonable cause for doing so. One such basis is if there are grounds to believe that the prospective juror may not be impartial.

90. Jury challenges should not be exercised on the basis of race, age, religion or gender.

DISCLOSURE BY THE STATE

91. Primarily, the prosecution's disclosure obligations are set out in the *Criminal Procedure Act 2004* (the CPA).

92. For charges of indictable offences, the obligation of disclosure commences with the investigating and/or charging agency whilst the charges are in the summary jurisdiction. When the ODPP takes over a matter, its disclosure obligation commences, but the obligation also continues for the investigative and/or charging agency.

93. Subject to section 137A and any order made pursuant to section 138, the prosecution must disclose all evidentiary material and confessional material in accordance with section 95 of the CPA.

94. The disclosure obligations of the prosecution include the requirement to disclose to the accused—

- (a) a copy of every statement, in the possession of the prosecution, of any person who may be able to give relevant evidence at the trial and a copy of every document or object to which the statement refers;

- (b) if a person's statement is served, any other statement of that person in the possession of the prosecution which contains material inconsistent with that statement;
- (c) if the prosecution knows of a person whom they believe may be able to give relevant evidence who has not yet provided a statement, report or deposition, the name and, if known, the address of that person, and a written summary of the relevant evidence;
- (d) a copy of every document or exhibit that the prosecution proposes to tender in evidence at the trial, or if it is not practicable to copy the document or exhibit, a description of it and when it can be inspected;
- (e) a copy of their criminal record;
- (f) if a State witness has been indemnified or has been offered or granted a concession in respect of the matter before the court, that fact;
- (g) any other information which the prosecution receives or obtains which might affect the credibility or reliability of a State witness whose credibility or reliability might potentially be in issue in the proceeding before the court; and
- (h) every other document, object or information in the possession of the prosecution that may assist the accused's defence.

95. The prosecution's disclosure obligations are to be exercised having regard to the common law principles of relevance. Subject to any written laws, considerations of privilege and public interest immunity, the prosecution's disclosure obligations should be exercised with the primary aim of ensuring that the trial is fair.

Exceptions to Disclosure Requirements

96. In considering whether to claim immunity from disclosure pursuant to section 137A of the CPA, there is a need to balance the public interest in disclosing all relevant material against that in maintaining the confidentiality of certain material on the basis of privilege or public interest immunity. The court may make an order dispensing with all or part of the disclosure requirement if it is satisfied that there is a good reason to do so, and no miscarriage of justice will result.

Certification

97. The charging officer or other member of the investigative agency with knowledge of the investigation must certify that, to the best of that officer's knowledge or belief, and subject to section 137A and any order made under section 138 of the CPA, all evidentiary material has been disclosed.

UNREPRESENTED ACCUSED

98. Caution must be exercised by a prosecutor when dealing with an unrepresented accused.

99. The accused should be properly informed of the prosecution case.

100. It is not a prosecutor's function to advise an accused about legal issues, evidence, inquiries and investigations which might be made, possible defences or the conduct of the defence.

101. Communications with an unrepresented accused should, when possible, be in writing. Verbal communications should, when possible, be witnessed and always recorded in writing.

VICTIMS

102. A victim of crime is a person who has suffered injury, loss or damage as a direct result of an alleged offence, whether or not the injury, loss or damage was reasonably foreseeable by the offender. Where an alleged offence results in a death, the term "victim" includes any member of that person's immediate family or a nominated representative.

103. Victims should refer to the separate *DPP Policy and Guidelines for Victims of Crime* for information relating to the DPP's policy in relation to primary and family victims.

WITNESSES

104. The ODPP recognises that witnesses need to be informed about court processes, and often require professional support. The ODPP will refer victims and witnesses to the Victim Support Service and Child Witness Service in order for that support to be provided.

Calling of Witnesses

105. 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 cases cited therein and are still 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 State.
- (b) In making the decision as to which witnesses will be called, the prosecutor may be required to take into account many factors, for example whether the evidence of a particular witness is essential to the unfolding of the State case, whether the evidence is truthful and reliable and whether it is in the interests of justice that the evidence should be subject to cross-examination by the State.
- (c) What is important is that it is for the prosecutor to decide in the particular case what are the relevant factors and, in the light of those factors, to determine the course which will ensure a proper presentation of the State case conformably with the dictates of fairness to the accused.
- (d) 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.

- (e) Whilst at the close of the State 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.
- (f) 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.

106. In circumstances where the prosecution declines to call a material witness, the prosecution should make reasonable efforts to make the witness available for the accused to call as part of their case.

RETRIAL

107. If a trial does not result in a verdict, consideration should be given to whether a retrial should occur. Factors to consider include—

- (a) whether the public interest requires another trial;
- (b) whether or not another jury would be in any better position to reach a verdict;
- (c) the cost to the community;
- (d) the cost to the accused;
- (e) the seriousness of the alleged offence; and
- (f) the length of time the accused has already spent in custody for the charge, if any.

108. The considerations listed in paragraph 107 also apply where a retrial is ordered after an appeal.

SENTENCE

109. The responsibility of a prosecutor at a sentencing hearing is to put before the court all known information that is relevant to determining the appropriate sentence.

110. When a plea in mitigation asserts facts which are contrary to the prosecution case, and the resolution of those facts is material to the appropriate sentence, a prosecutor should seek that those facts be determined by the court in accordance with the principles set out in *LAW v The State of Western Australia* [2009] WASCA 193 at [25]-[34].

111. Where an offender is unrepresented, the prosecutor should, as far as practicable, assist the court by making appropriate submissions as to known matters which should be taken into account in mitigation.

112. A prosecutor should not in any way limit the discretion of the Director to appeal against the inadequacy of a sentence, including by informing the court or the defence whether the Director would, or would be likely to appeal or whether a sentence imposed is regarded as appropriate and adequate.

113. Where the provisions of section 32A(1) of the *Misuse of Drugs Act 1981* are satisfied, an application must be made by the prosecutor for the offender to be declared a drug trafficker under that section, unless authorised not to do so in writing by the Director or the Deputy Director.

Offenders—Cooperation with Authorities

114. On occasion, an offender will have rendered assistance to the WAP or other investigative agency in one or more investigations. In such cases, it will be appropriate for the investigative agency to provide a letter to the court advising of the nature, extent and significance of that assistance.

115. If the offender has given an undertaking to assist law enforcement authorities in the future, and their sentence is reduced for that reason, the court must state that fact and the extent of the reduction in open court.

116. Otherwise, the assistance and the extent of it may, in the public interest, be required to be dealt with other than in open court, and in accordance with procedures formulated from time to time in consultation with the courts, investigative agencies and defence representatives.

117. It is a matter for the court to determine, for sentencing purposes, the nature, extent and value of an offender's cooperation and the extent of any discount to the sentence that would otherwise be imposed.

118. A letter may only be presented to a superior court when sanctioned by the Director or Deputy Director, who in turn will only accept such letters from the Commissioner, Deputy Commissioner, Assistant Commissioner (Intelligence) or their Federal counterparts.

APPEALS

State Appeals Against Acquittals

119. The State's right to appeal against a judgment of acquittal entered after a jury's verdict of not guilty is limited to cases in which the statutory penalty for the charge is or includes imprisonment for 14 years or more or life.

120. The State's right to appeal against a judgment of acquittal is only to be exercised when—

- (a) a substantial error is likely to have affected the verdict;
- (b) there is a public interest in correcting the error;
- (c) there are reasonable prospects that the appeal will be allowed; and
- (d) a retrial is appropriate in all of the circumstances.

State Appeals Against Sentence

121. The purpose of State appeals against sentence is to ensure that adequate, just, and proportionate standards of punishment for crime are established and maintained.

122. Factors which are relevant in considering whether to institute an appeal against sentence include—

- (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 significantly out of line with other sentences imposed for the same or similar offences without reasonable cause for that disparity;
- (c) 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; and
- (d) whether existing sentences are already subject to wide and inexplicable variations and there is a need to reduce this variation in order to promote uniform standards of sentencing.

123. A State appeal against sentence will not be initiated simply because it is perceived as inadequate or inappropriate in a particular case. State 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, in choosing which option seems appropriate, a court must have regard to the principles laid down by Parliament and in other cases.

Prosecuting Acquitted Accused

124. In making any decision under section 46C(4)(b) of the *Criminal Appeals Act 2004* (the Criminal Appeals Act) to authorise the investigation of a serious offence or administration of justice offence (as defined in section 46A of the Criminal Appeals Act), the public interest will be assessed in accordance with the factors set out in [32] and, where applicable, [34]-[41] of this Statement.

EXTRADITION AND INTERSTATE TRANSFER OF PRISONERS

125. The extradition of a person required to answer any charge of an offence or to serve a sentence imposed in Western Australia will always involve expense to the State. Where there are reasonable prospects of conviction and it is in the public interest to proceed with a prosecution, it will generally be appropriate to incur that expense, in order to maintain confidence in the administration of the law and to deter offenders fleeing from justice.

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

- (a) any delay after discovery of the whereabouts of the accused;
- (b) the nature and gravity of the offence or offences alleged against the accused;
- (c) whether the victim has expressed a wish for the matter to proceed;
- (d) the likely disposition in the event of a conviction;
- (e) the country or state from which the accused is to be extradited;
- (f) the nationality of the accused;
- (g) where a person is in custody, whether the provisions of the *Prisoners (Interstate Transfer) Act 1983* should be utilised;
- (h) any compensation or restitution which might be ordered in the event of conviction; and
- (i) the existence of assets held by the accused which could satisfy an order in relation to breach of bail or a confiscation order and the location of any such assets.

127. Approval for extradition or the interstate transfer of prisoners may be sought by the WAP, the Department of Justice or other relevant government agency.

128. Before determining such a request, the Director may consult with and require information from a relevant agency.

129. Applications for approval should be in writing, presenting reasons for the extradition or transfer of a particular accused.

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

131. Approval for the international extradition of a prisoner may only be given by the Director or Deputy Director. Decisions regarding interstate extradition or interstate transfer of a prisoner may be given by the Director, the Deputy Director, the Director Legal Services or a Consultant State Prosecutor.

FORFEITURE, CONFISCATION OF ASSETS AND RESTITUTION OF PROPERTY

132. The procedure for prosecutors dealing with the forfeiture, confiscation and restitution of property is contained in **Appendix 2**.

MEDIA POLICY

133. The procedure for interaction between the ODPP and the media is contained in **Appendix 3**.

EFFECT OF POLICY AND GUIDELINES

134. An act or omission of the Director or a person acting on behalf of the Director 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*, section 24(3)).

AMANDA FORRESTER, SC,
Director of Public Prosecutions for Western Australia.

Appendix 1

International Association of Prosecutors

STANDARDS OF PROFESSIONAL RESPONSIBILITY AND STATEMENT OF
THE ESSENTIAL DUTIES AND RIGHTS OF PROSECUTORS**1. Professional Conduct**

Prosecutors shall—

- (a) at all times maintain the honour and dignity of their profession;
- (b) always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession;
- (c) at all times exercise the highest standards of integrity and care;
- (d) keep themselves well-informed and abreast of relevant legal developments;
- (e) strive to be, and to be seen to be, consistent, independent and impartial;
- (f) always 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;
- (g) always serve and protect the public interest;
- (h) respect, protect and uphold the universal concept of human dignity and human rights.

2. Independence

2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.

2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be—

- transparent;
- consistent with lawful authority;
- subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

3. Impartiality

Prosecutors shall perform their duties without fear, favour or prejudice in particular they shall—

- (a) carry out their functions impartially;
- (b) remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;
- (c) act with objectivity;
- (d) have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- (e) in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;
- (f) always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.

4. Role in criminal proceedings

4.1 Prosecutors shall perform their duties fairly, consistently and expeditiously.

4.2 Prosecutors shall perform an active role in criminal proceedings as follows—

- (a) where authorised by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally;
- (b) when supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights;
- (c) when giving advice, they will take care to remain impartial and objective;
- (d) in the institution of criminal proceedings, they will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence;
- (e) throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence;
- (f) when, under local law and practice, they exercise a supervisory function in relation to the implementation of court decisions or perform other non-prosecutorial functions, they will always act in the public interest.

4.3 Prosecutors shall, furthermore—

- (a) preserve professional confidentiality;

- (b) in accordance with local law and the requirements of a fair trial, consider the views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights; and similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible;
- (c) safeguard the rights of the accused in co-operation with the court and other relevant agencies;
- (d) disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial;
- (e) examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;
- (f) refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment;
- (g) seek to ensure that appropriate action is taken against those responsible for using such methods;
- (h) in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate.

5. Co-operation

In order to ensure the fairness and effectiveness of prosecutions, prosecutors shall—

- (a) co-operate with the police, the courts, the legal profession, defence counsel, public defenders and other government agencies, whether nationally or internationally; and
- (b) render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual co-operation.

6. Empowerment

In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled—

- (a) to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability;
- (b) together with their families, to be physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions;
- (c) to reasonable conditions of service and adequate remuneration commensurate with the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished;
- (d) to reasonable and regulated tenure, pension and age of retirement subject to conditions of employment or election in particular cases;
- (e) to recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures;
- (f) to expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards;
- (g) to objective evaluation and decisions in disciplinary hearings;
- (h) to form and join professional associations or other organisations to represent their interests, to promote their professional training and to protect their status; and
- (i) to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.

Appendix 2

CRIMINAL PROPERTY CONFISCATION ACT 2000 GUIDELINES

Application

1. These Guidelines apply to all decisions to commence or continue proceedings under the *Criminal Property Confiscation Act 2000* ('CPCA') or to otherwise exercise powers under the CPCA.

Definitions

2. Terms used in these Guidelines have the same meaning as in the CPCA.

General

3. The CPCA acts as a complement to the criminal justice system, by operating to deprive offenders of the proceeds of their criminal conduct and to act as a significant deterrent to those who would engage in serious drug related and other offending.

4. The Director of Public Prosecutions (‘the DPP’) commences and conducts confiscation proceedings on behalf of the State of Western Australia (‘the State’) as part of a civil litigation practice, conducted separately from the DPP’s criminal prosecution practice.

5. Any action under the CPCA should be commenced as soon as practicable. Where a person has been charged with an offence, and the confiscation of property is potentially a mitigating factor, then action should be commenced before conviction and/or sentence.

6. The potential revenue to be gained from confiscation proceedings must not be permitted to influence the effective investigation and prosecution of criminal offences, nor to be the sole factor considered in making the decision to take or continue confiscation proceedings.

7. The DPP will not negotiate in confiscation proceedings in order to secure or influence the entry of a plea of guilty to any offence, including the confiscation offence, by the accused, or to secure any other concession by the accused in any criminal proceedings being conducted against the accused.

8. Confiscation of property under the CPCA will almost invariably affect the interests of third parties by reason of their connection to the confiscated property. To the extent that it is consistent with the express terms of the CPCA and the intention, purposes and objectives of it, decisions under the Act should be determined with due regard to ensuring as far as possible that third parties do not suffer undue hardship.

9. The nature and extent of any interest of a third party in property the subject of confiscation proceedings is to be determined according to law. Where the DPP considers that sufficient evidence exists to establish an interest by a third party, the DPP may agree to recognize that interest. Alternatively, the nature and extent of a third party’s interest may need to be determined by the court.

10. It is in the interest of the State and all other parties to confiscation proceedings that resolution of the proceedings occurs through negotiation if possible. The settlement of confiscation proceedings has the capacity to achieve the objectives of the CPCA, maximize the efficient use of available resources and avoid the costs and uncertainty of litigation. Settlement negotiations may properly be initiated by the accused, a third party or the DPP. However, there are some cases in which settlement would be against the public interest.

11. In deciding whether to settle confiscation proceedings, and in deciding upon a fair and appropriate settlement amount, the DPP will have regard to the—

- (a) Likely return to the State if it was successful in the confiscation proceedings;
- (b) Prospects of the State achieving a successful outcome in the proceedings;
- (c) Direct and indirect savings to the State by reason of a negotiated settlement;
- (d) Views of the investigating agency in relation to the proposed settlement;
- (e) Costs of litigation; and
- (f) Any other factor which appears relevant.

12. Confiscated property other than cash must be sold and the proceeds paid into the Confiscation Proceeds Account created by the CPCA. In certain cases, it is appropriate for the State to sell confiscated property to a co-owner. In deciding upon a fair and appropriate sale price, the DPP will have primary regard to the likely return to the State if the confiscated property were sold on the open market and any cost savings to the State from a sale to a co-owner.

13. It is not appropriate for the DPP to take into account moral or ‘value’ judgments regarding the circumstances of an offence, an offender or a third party in—

- (a) Commencing or continuing confiscation action;
- (b) Settlement negotiations; or
- (c) The sale of confiscated property to a co-owner.

Confiscation of Crime-Used and Crime-Derived Property

14. The objectives of confiscating crime-used property are—

- (a) To act as a deterrent to members of the community who use, or might use, their property or the property of another for a criminal purpose; and
- (b) To prevent the use of the confiscated property in the commission of further offences.

15. The objectives of confiscating crime-derived property are—

- (a) To remove the financial incentive for engaging in criminal conduct; and
- (b) Ensuring that no person benefits from criminal conduct.

16. Confiscation proceedings will not be commenced or continued in relation to crime-used and crime-derived property unless there are reasonable prospects that the proceedings will result in the confiscation of the property taking into account the strength of the evidence that the property is crime-used or crime-derived, the claims of third party objectors or potential objectors to confiscation and the likely realisable value of the property;

17. Where the potential financial return to the State from the confiscation of crime-used property is significant, it will not be appropriate to commence or continue with confiscation action in relation to the property in the absence of one or more of the other factors set out in these Guidelines.

Factors Relevant to Confiscation of Crime-Used or Crime-Derived Property

18. In considering whether to commence or continue proceedings to confiscate crime-used or crime-derived property, consideration should be given to—

- (a) The seriousness of the confiscation offence;
- (b) Whether it is in the public interest to seek to confiscate the property;
- (c) The need for general deterrence and/or specific deterrence of the underlying confiscation offence;
- (d) If the property is crime-used, the extent to which the property was set up or actually used to facilitate the commission of the confiscation offence and whether it was incidental or integral to the commission of that offence;
- (e) If the property is crime derived, the degree to which proceeds from the commission of a confiscation offence have been used to acquire the property;

19. The co-operation of a person responsible for criminally using property is a relevant consideration. However, even where that cooperation is significant, it may nevertheless be in the public interest to confiscate the property.

20. Where commencing or continuing confiscation proceedings will deprive the victim of the confiscation offence of compensation, it will not ordinarily be in the public interest to proceed.

21. Where the cost of recovering confiscated property exceeds the likely return to the State, in the absence of other public interest factors, it may not be in the State's interest to seek recovery of the property.

22. The combined effect on an offender of the confiscation of crime-used property and the sentence imposed in respect of the relevant confiscation offence is not relevant to a determination as to whether confiscation proceedings should be instituted or continued in respect of property used in connection with that offence.

Declared Drug Traffickers

23. If a person is convicted of a serious drug offence under the *Misuse of Drugs Act 1981 (WA)* ("the MDA") and section 32A of the MDA is applicable, the DPP will make an application for an order that the person be declared a drug trafficker at the time of conviction or within 6 months from the date of the conviction.

24. If a person is declared a drug trafficker pursuant to section 32A of the MDA, but the cost of recovering the property exceeds the likely return to the State, in the absence of other public interest factors, it may not be in the State's interest to seek recovery of particular property.

Appendix 3

MEDIA POLICY

1. The public's interest in information must be balanced against the need to maintain the integrity of the criminal process, and the ODPP's stated tenets of fairness and justice.

Policy and Its Objectives

2. It is in the common interest of the ODPP and the public for the public to know that cases are being dealt with in accordance with the law and the *DPP Statement of Prosecution Policy and Guidelines*.

3. The appropriate dissemination of accurate and reliable information regarding criminal prosecutions facilitates informed debate and a better understanding of the criminal justice system.

4. The ODPP recognises that the news media is often the only effective means by which such information about matters of topical interest can be disseminated in a timely manner.

5. Accordingly, and subject to any legal prohibition or competing public interest consideration, the ODPP should assist the news media, where possible, to obtain information from the ODPP, to enable the ODPP to achieve the following objectives—

- (a) to inform and educate the public about the functioning of the criminal justice system and the ODPP's role in that system;
- (b) to reassure the public about the proper functioning of the criminal justice system;
- (c) to be open and accountable;
- (d) to explain the reasons for decisions to commence, continue, or terminate prosecutions; and
- (e) to ensure that reports concerning the ODPP's activities and the operation of the criminal justice system are complete, accurate, and fair.

6. ODPP employees should always be conscious of the right of all participants in the criminal justice system to have their information treated with due regard to confidentiality and privacy. While some information is of a public nature or is in the public interest to disclose, other information, including personal details, is likely to be information which it is inappropriate to disseminate.

7. Except where provided in this Policy, or as otherwise authorised by the Director or Deputy Director, ODPP employees are not permitted to make public comment—

- (a) critical of a verdict or sentence, or suggesting that a case might or will be the subject of appeal;

- (b) on policy not covered by the *DPP Statement of Prosecution Policy and Guidelines* or other Gazetted policy documents;
- (c) critical of existing or proposed legislation, any court decision, Parliament, any government department or authority;
- (d) on investigations being conducted by WA Police or any other investigative or intelligence organization; or
- (e) Regarding specific criminal prosecutions, or the operations of the ODPP generally.

8. For the purposes of this Policy “public comment” includes the expression of views as a member of the ODPP to the press, on social media, in letters, books, journals, notices, at meetings, or interviews for radio or television.

9. The prohibition on making public comment does not prevent the making of appropriate submissions or statements to a court or the making of statements in the course of discussions held for the purpose of advising on a criminal investigation or the conduct of a criminal prosecution.

Guidelines Regarding the Provision of Information

10. In the ordinary course, news media organisations should direct enquiries for information from the ODPP by emailing media@dpp.wa.gov.au.

11. The Director or the Deputy Director will determine, in their discretion, the extent of any information which can be provided to the news media in a particular case, having regard to the following factors—

- (a) The paramount need to ensure the integrity of the criminal trial process;
- (b) Any orders of the court or legislative restriction on the publication of information;
- (c) Whether the information was heard in open court;
- (d) The sensitivity of the information sought;
- (e) The interests of victims and witnesses;
- (f) The purpose for which the information is sought;
- (g) The public interest in the information and the need to clarify any inaccurate or incorrect information;
- (h) The stage of the proceedings;
- (i) The availability of resources to respond to the request in a timely manner;
- (j) Whether the information is more appropriately sought from another source; and
- (k) The distinction between making comment and providing information.

12. It is in the public interest that media reports of criminal proceedings should be accurate. Accordingly, subject to any court-ordered or legislative restrictions and the other matters referred to in this Policy, if a reporter attending court seeks clarification or assistance as to statements made in open court from the State Prosecutor appearing, the State Prosecutor is permitted to provide that clarification or assistance.

13. Witnesses and victims’ addresses and contact details should never be disclosed to unauthorised third parties without the permission of the witness or victim. If a member of the news media wishes to contact a witness or victim, the ODPP may, in its discretion, agree to contact the witness or victim of the inquiry so that they can decide whether to contact the inquirer directly.

14. If a State appeal is to be commenced, details will not be released to the media until the appeal is filed and served.

15. Permission may be granted, on a case by case basis, by the Director, Deputy Director or their delegate to an ODPP employee to participate in speaking engagements and interviews.

Comment on Decisions to Terminate Prosecutions

16. It is ODPP policy to give reasons to a court for the discontinuance of a prosecution, unless the discontinuance is for administrative purposes only, or to do so would prejudice the administration of justice or cause harm to a victim, witness, or accused [see Paragraphs [81] and [82], *DPP Statement of Prosecution Policy and Guidelines*].

17. It is proper to publicly explain the ODPP’s approach to the question of whether a prosecution is to continue or be terminated by reference to the factors in the *DPP Statement of Prosecution Policy and Guidelines*, for example, by reference to the lack of a *prima facie* case, lack of reasonable prospects of conviction, or that there is no public interest in proceeding. Where appropriate, brief additional information by way of explanation can be provided.

Requests to Film Prosecutors

18. Newspapers and television stations have a legitimate interest in obtaining photographs or film of State Prosecutors for use in reports of cases. It is a matter for individuals as to how they will respond to such a request.

DIRECTOR OF PUBLIC PROSECUTIONS ACT 1991**POLICY AND GUIDELINES FOR VICTIMS OF CRIME 2018****INTRODUCTION**

1. Victims of crime have an important place in the criminal justice system.
2. These guidelines set out how the Office of the Director of Public Prosecutions for Western Australia ("the ODPP") interacts with victims of crime during criminal prosecutions, and the rights that victims of crime have during the proceedings.
3. A victim of crime ("victim") is a person who suffers personal harm, loss or damage as a direct result of an alleged offence or, in the event of the death, incapacity, or young age of the victim, an immediate family member of, or other person responsible for, the victim.
4. Whether they are required to give evidence or not, the ODPP is committed to the welfare of victims and minimising the adverse impact of their involvement in the criminal justice process.

LEGISLATIVE FRAMEWORK

5. The ODPP's statutory responsibilities to victims are found in the *Victims of Crime Act 1994 (WA)* ("the Victims of Crime Act").
6. **Appendix 1** sets out the guidelines contained in Schedule 1 of the Victims of Crime Act.
7. Public officers and bodies are authorised to have regard to and apply the guidelines in Schedule 1 and should do so to the extent it is within or relevant to their functions to do so and it is practicable for them to do so.
8. If a particular agency fails to comply with the Victims of Crime Act, victims may contact the Commissioner for Victims of Crime, or make a complaint to the Western Australian Ombudsman.

INTERACTION WITH OTHER AGENCIES

9. The Victims of Crime Act allows certain information about victims to be shared between Western Australian public sector agencies.
10. The ODPP principally works with Western Australia Police, the Victim Support Service, the Child Witness Service, and/or the Criminal Injuries Compensation Assessor to assist victims.
11. During the conduct of a prosecution, Western Australia Police and the ODPP work together to provide support and information to victims about the criminal justice process.
12. The Victim Support Service and Child Witness Service also perform an important role in the criminal justice system by providing counselling, information and general support to victims. In addition, they assist victims with the preparation and submission of their victim impact statements.
13. The Prisoners Review Board, the Mentally Impaired Accused Review Board, the Victim Notification Registry and the Courts also work to assist victims in the criminal justice system.

STATEMENT OF PROSECUTION POLICY AND GUIDELINES

14. The *DPP Statement of Prosecution Policy and Guidelines* contains general provisions relating to the role of prosecutors in criminal proceedings.
15. The ODPP is not an investigative agency. It prosecutes alleged offenders in proceedings which are commenced by another investigative agency, usually WA Police.
16. Depending on the place where the proceedings are commenced, the ODPP takes over the conduct of a prosecution either shortly before, or upon, transfer of a prosecution to either the District Court or the Supreme Court. If the accused has pleaded guilty, the matter will proceed to sentence. If the accused has pleaded not guilty, the matter will be prepared for a criminal trial.
17. At the time it takes over the conduct of the proceedings, the ODPP makes an independent assessment of the evidence gathered by the investigative agency. The matters considered by the ODPP in making that independent assessment are set out in the *DPP Statement of Prosecution Policy and Guidelines*.
18. While the decision whether to commence or continue a prosecution is fundamental to the interests of victims, there are many other factors which are required to be taken into account by the ODPP in arriving at that decision.
19. The evaluation of whether to proceed with some prosecutions is a difficult one and may, at times, appear to be inconsistent with the interests of victims. For example, if there are no reasonable prospects of conviction, a prosecution cannot proceed, regardless of the desire of the victim that it should do so. There are also occasions where the public interest conflicts with the interests of the victim, such as where the seriousness of the allegations require that the matter proceed, against the wishes of the victim.

20. As the *DPP Statement of Prosecution Policy and Guidelines* sets out, the view of the victim is a very important factor in the assessment of the public interest. However, it is not the only factor, and a victim's views are not determinative of the issue.

21. An ODPP prosecutor is not a victim's lawyer in criminal justice proceedings. A prosecutor represents the public interest, by presenting the prosecution case to the best of their ability, in accordance with the law.

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

- (a) the rights and interests of victims;
- (b) the rights of the accused; and
- (c) the public interest.

ODPP PROSECUTION PRACTICES

23. Consultation with victims is essential to the provision of a quality prosecution service to the Western Australian public.

24. The ODPP's primary means of communication with victims is by telephone and in writing (including by email). If these are not appropriate means of communication for a victim, alternative arrangements can be made on a case by case basis.

25. Upon receipt of a brief of evidence from the Western Australia Police that identifies a victim, the case is allocated within the ODPP and assessed by a State Prosecutor. Initial contact is then made with the victim by the State Prosecutor or the case paralegal. This contact may be by a combination of telephone calls and a letter or email. The primary purpose of this communication is to provide information to the victim about—

- (a) the relevant contact people at the ODPP;
- (b) the status of the case and the next court date; and
- (c) their role in the prosecution process.

26. While it is always desirable that a victim deal with the same State Prosecutor and paralegal, this may not always be possible. The ODPP attempts to minimise the number of different people with whom a victim has communication over the course of a prosecution.

27. As soon as the ODPP receives a new case it ensures all victims have been referred to the Victim Support Service or Child Witness Service (as applicable). Those agencies are able to assist with support, information about the court process and preparation of victim impact statements.

28. The ODPP will also notify victims of their entitlements to seek restitution and compensation.

29. During the proceedings, ODPP paralegals send standard letters to victims which contain relevant information about the prosecution at the following critical stages—

- Where the matter is being heard in the Perth metropolitan area, prior to a disclosure committal hearing (a hearing where, if appropriate, a matter will be transferred to the District or Supreme Court);
- Prior to a sentencing hearing (if the accused pleaded guilty before or at the disclosure committal hearing);
- Prior to a hearing to list the matter for trial (if the accused pleaded not guilty at the disclosure committal hearing);
- Prior to the sentencing of an accused;
- Following sentencing to notify the sentencing outcome;
- In the event that an appeal is lodged by the offender against conviction or sentence, or the State against an acquittal or sentence; and
- At the conclusion of any appeal proceedings.

30. Other correspondence may also be sent to a victim during the proceedings by the paralegal or the State Prosecutor responsible for the prosecution, as appropriate.

31. In some matters, the State Prosecutor with the conduct of the prosecution may seek to confer with a victim early in the proceedings, to ensure proper preparation of the prosecution. If that is required, the State Prosecutor will contact the victim and make the necessary arrangements.

32. Decisions which significantly alter or discontinue charges may only be made by authorised State Prosecutors. In cases involving the homicide or attempted homicide of a victim, only the Director, the Deputy Director, the Director Legal Services or a Consultant State Prosecutor may make such decisions.

33. Prior to making a decision to amend or discontinue a charge which significantly alters the prosecution case, a State Prosecutor must, if reasonably possible, discuss the potential decision with the victim.

34. If any decision to amend or discontinue a charge which significantly alters the prosecution case is made, the victim must, if reasonably possible, be informed. If sought, an explanation about a decision that has been made will be given to a victim in writing.

35. If there is to be a criminal trial, whether or not the victim is to be a witness, the State Prosecutor with the conduct of the trial will speak with the victim, preferably in person, shortly before the trial to explain how the trial will proceed, and to assist with any questions the victim may have about the proceedings. If the victim is to be a witness, this conference will also assist the State Prosecutor to ensure that the prosecution's obligations of disclosure have been complied with.

36. If a victim wishes to meet or speak to the relevant State Prosecutor prior to any sentencing proceeding, such a request will be accommodated if reasonably possible.

REVIEW OF ODPD DECISIONS

37. The ODPD understands that a victim may, on occasion, be dissatisfied with a decision made by a State Prosecutor in relation to a prosecution. In such a situation, a victim may seek a review be conducted by the ODPD.

38. Any victim who is directly affected by a decision made by a State Prosecutor may apply to have that decision reviewed in accordance with paragraphs [43]–[59] of these Guidelines. Where the victim is under 18 years of age or has a disability, a parent, guardian or spokesperson for the victim may instead apply for the decision to be reviewed. Where the alleged criminal conduct has caused the death of a person, immediate family members of that person may apply for a decision to be reviewed.

39. State Prosecutors making a decision which affects a victim must, if possible, refrain from communicating that decision to the court or an accused until the victim has positively confirmed that they will not seek a review of the decision, or 7 days have elapsed since the victim was notified of the decision.

40. Where a trial date has been fixed, and the decision has been made close to the trial date, it may not be possible for a review to be sought or conducted before the decision must be communicated to the court. In such circumstances, a review can still be undertaken. However, in the event that the review determines that a different decision ought to have been made, the fact that the original decision has been communicated to the court may prevent its impact being reversed.

41. If the decision of which a review is sought was made by the Director, no review will be carried out. However, the Director or the Deputy Director will offer to meet with the victim to ensure that all relevant matters have been considered and the decision explained.

42. There are two kinds of review possible. The first is an “initial review”. The second is an “internal independent review”.

Initial Review

43. An initial review is available to a victim who is dissatisfied with an amendment or discontinuance of a charge or charges which significantly alters the prosecution case in relation to which they are the victim.

44. In the event that a victim seeks an initial review, they should write or verbally communicate to the State Prosecutor or paralegal with the conduct of the file, clearly stating that they seek an internal review, within 7 days of being notified of the decision. While it is not essential that reasons for seeking the review are given, they may be helpful to the reviewer, and are therefore encouraged.

45. An initial review of the decision will then be undertaken by a State Prosecutor who is senior to the State Prosecutor who made the original decision.

46. An initial review may involve consultation with the victim, if appropriate.

47. If the State Prosecutor conducting the initial review considers the original decision to have been incorrect, the decision should be overturned if it has not already been communicated to the Court. If the decision has been communicated to the Court, the matter will be escalated to the Director or the Deputy Director, who will offer to meet with the victim.

48. Unless there are exceptional circumstances, the initial review should be completed within 14 days of the original decision. The outcome will be communicated and explained to the victim, verbally and, if sought, in writing.

49. The reasons for the decision made as a result of the initial review must be recorded in writing on the ODPD file.

Internal Independent Review

50. An internal independent review is only available to a victim where the decision with which they are dissatisfied is one in which the result is that there is to be no prosecution of any charge relating to that victim.

51. A victim to whom this section applies is not obliged to seek an internal independent review, but may elect to seek an initial review. In such a case, the victim may seek an internal independent review if dissatisfied with the outcome of the initial review. However, the victim should take into account fixed court dates in determining the type of review sought.

52. In the event that a victim seeks an internal independent review, they should write or verbally communicate to the State Prosecutor or paralegal with the conduct of the file, clearly stating that they seek an internal review, within 7 days of being notified of the decision to be reviewed. While it is not essential that reasons for seeking the review are given, they may be helpful to the reviewer, and are therefore encouraged.

53. An internal independent review will be conducted by a State Prosecutor of equal to, or higher, seniority than the State Prosecutor who authorised the decision being reviewed.

54. The State Prosecutor undertaking the internal independent review will, as much as possible, have had no involvement in the matter prior to the review. In some cases, it may not be possible to avoid the State Prosecutor having had incidental involvement (such as attending an administrative court appearance), but they will still be regarded as independent for the purposes of the review.

55. An internal independent review will involve a critical examination of the evidence, and the original decision. It may involve consultation with the victim.

56. If the State Prosecutor conducting the initial review considers the original decision to have been incorrect, the matter will be escalated to the Director or the Deputy Director for final determination.

57. If the Director or Deputy Director considers the decision should be overturned, and the decision has not already been communicated to the Court, the decision will be overturned. However, if the decision has already been communicated to the Court, the Director or the Deputy Director will offer to meet with the victim to ensure a full explanation is provided.

58. Unless there are exceptional circumstances, an internal independent review should be completed within 28 days of the decision being reviewed. The outcome will be communicated and explained to the victim, verbally and, if sought, in writing.

59. The reasons for the decision made as a result of an internal independent review must be recorded in writing on the ODPP file.

VICTIM IMPACT STATEMENTS

60. The impact of a crime on a victim is able to be assessed by the Court in criminal proceedings, prior to the sentencing of an offender, as a result of the legislative framework in relation to victim impact statements set out in sections 23A, 24, 25 and 26 of the *Sentencing Act 1995 (WA)*.

61. People who are entitled to submit victim impact statement are listed in section 23A of the *Sentencing Act 1995 (WA)*.

62. A victim impact statement is a statement containing particulars of personal harm suffered by a victim as a direct result of the offence, or, in the case of a family victim, the impact of the primary victim's personal harm on the members of the primary victim's immediate family. "Personal harm" means bodily harm or psychological or psychiatric harm.

63. Victims are entitled to make a victim impact statement. Victim impact statements are not, however, compulsory.

64. The Victim Support Service and Child Witness Service will assist a victim to prepare a victim impact statement should they wish to make one. The statement should not be prepared until the accused has pleaded guilty or is found guilty after trial.

65. If a victim impact statement is prepared prior to the accused pleading guilty or being found guilty after trial, the victim impact statement may need to be disclosed to the defence at that time. In such circumstances, the victim may be cross-examined as to its contents during the trial proceeding.

66. A copy of the victim impact statement must be provided to the defence prior to it being presented at the sentencing hearing. If an offender is legally represented, copies are provided to their defence practitioners on the basis that they—

- will take appropriate steps to ensure that the contents of the victim impact statement remains confidential;
- will not disclose the contents of the victim impact statement to any person other than the offender; and
- will not use the statement for any purpose other than the purpose of making submissions at the sentencing of the offender.

67. Further, at the conclusion of the sentencing or their involvement in it, a defence practitioner is to—

- deliver to the court the hard copy of the victim impact statement; and
- delete any electronic copies of the victim impact statement.

68. If an offender is not legally represented, the victim impact will be shown to them prior to the sentencing hearing, but they will not be provided with a copy.

69. Victims may seek to have their victim impact statement presented to the court in writing, or to read it aloud during the sentencing hearing. The State Prosecutor will assist to facilitate the victim's request in this regard. However, the manner in which a victim may present their victim impact statement is ultimately a matter for the judicial officer presiding over the sentencing hearing.

70. The extent to which a victim impact statement is taken into account in sentencing ultimately remains a matter in the discretion of the judicial officer, who may rule the whole or any part of the statement inadmissible.

71. In rare circumstances, defence may seek to cross-examine a victim as to the content of their victim impact statement during the sentencing hearing. If this occurs, the ODPP will discuss the process with the victim.

72. From 1 October 2017, in all cases in which a sentence of imprisonment is imposed on an offender, the court must make a copy of any victim impact statement available to the Prisoners Review Board.

RESTRAINING ORDERS

73. The ODPP will generally only make an application for a restraining order if that application is directly associated with sentencing proceedings of which the ODPP has conduct. Until the conclusion of criminal proceedings, protective bail conditions are usually imposed, if necessary, to ensure the protection of the victim and/or witnesses.

74. Otherwise, applications for restraining orders are civil proceedings in which the ODPP has no involvement. Assistance for victims of crime in relation to restraining orders is available at www.police.wa.gov.au and www.legalaid.wa.gov.au. Information as to how to apply for a restraining order in the Magistrates Court of Western Australia is available at www.magistratescourt.wa.gov.au/R/restraining_orders.aspx.

75. If an accused is found guilty of certain sexual or other violent offences, the Court must make a lifetime restraining order against that accused, unless the victim objects to the making of that order. **Appendix 2** sets out the offences which, in the absence of objection, a lifetime restraining order must be made.

76. Where the safety of a victim is clearly in issue, the ODPP may, in its discretion, accede to a request by a victim to seek a violence restraining order or family violence restraining order in circumstances other than those provided in this Guideline. The request should preferably be made in writing, but can be made verbally to the State Prosecutor or paralegal with the conduct of the prosecution.

77. If an accused is convicted of certain sexual or other violent offences against a family member, a victim may state in their victim impact statement that they want to be protected by a family violence restraining order. In the absence of exceptional circumstances, this will be taken to be grounds for making a family violence restraining order against the offender and the court may make a family violence restraining order of 2 years' duration without the need for the victim to make a separate application in the Magistrate's Court. **Appendix 2** sets out the offences which, on conviction, allow a victim to apply for a restraining order in their victim impact statement.

78. Where applicable, the ODPP will endeavour to communicate with a victim prior to the sentencing hearing to ascertain their attitude towards the imposition of a mandatory lifetime restraining order and any appropriate conditions of such an order.

79. Where the making of a restraining order on conviction is not mandatory, but may be made on application to the court, the ODPP will advise victims of their entitlement to seek the imposition of a restraining order against the offender as part of the sentencing proceedings. A victim should advise the ODPP, preferably in writing, if they seek the imposition of a restraining order and the conditions sought as part of that order. If possible and appropriate, the ODPP will then make an application for a restraining order to be imposed against the offender for the protection of the victim.

80. The ODPP is unable to provide guarantees as to the whether a restraining order will be imposed or, if imposed, what conditions will be made part of such an order, as these are ultimately matters for the court to determine.

81. If possible, the ODPP will advise a victim, in writing, of any restraining order imposed by the court for their protection, and the conditions of any such order.

COURT ORDERED RESTITUTION AND COMPENSATION

82. In sentencing proceedings, the ODPP may seek an order for restitution or compensation on behalf of victims when requested to do so and where the victim is entitled to such an order. Such an order is called a "reparation order" under the *Sentencing Act 1995 (WA)*.

83. The ODPP will generally only seek a reparation order be made in sentencing proceedings when the loss is quantifiable by documentary evidence which has been provided to the ODPP. Documentary evidence should be provided to the ODPP at least 14 days before the sentencing hearing.

84. The ODPP is not able to provide legal advice to victims in relation to reparation orders. A victim should consider obtaining independent legal advice before requesting the ODPP to apply to the court for a reparation order, particularly if the victim has suffered significant injuries or financial loss.

85. If a victim of crime thinks that any property loss and/or damage may be covered by an insurance policy, then the victim should talk to their insurance company before seeking a reparation order as part of sentencing proceedings.

86. Factors which will be considered by the ODPP when determining whether to seek a reparation order include—

- (a) whether sufficient documentary evidence has been produced which justifies the making of a reparation order in the amount sought;
- (b) the attitude of the accused to the making of the reparation order; and
- (c) whether civil proceedings have already been commenced.

87. The financial circumstances of the offender are not a consideration relevant to the making of a reparation order.

88. An application for reparation will only be made by the ODPP after an offender is convicted and as part of the sentencing proceedings.

89. In proceedings in the District Court and Supreme Court, if the ODPP does not seek a reparation order during the sentencing proceedings, the victim retains the right to personally seek such an order within 12 months after the date when the offender was sentenced. If the proceedings are in the Children's Court, an application must be made by the prosecutor during the proceedings.

90. If a reparation order is made by the court, but the offender does not comply with it, it is a matter for the victim to personally take any enforcement action by way of civil proceedings. The ODPP is not able to commence any such proceedings, or act for a victim in them.

91. After an offender has been prosecuted for an offence, WA Police may sometimes still hold personal property of a victim or victims. Victims should contact the investigating officer or their local Police Station to find out whether the Police have possession of any of the victim's property. If so, arrangements can be made with WA Police for the return of any such property.

CRIMINAL INJURIES COMPENSATION

92. If a victim of crime has suffered an injury or loss, they may be able to make a claim for criminal injuries compensation. An application for criminal injuries compensation is made to the Assessor of Criminal Injuries Compensation and is separate from a compensation order made by the court.

93. Information about criminal injuries compensation, including application forms and guidelines for victims is available at <http://www.courts.dotag.wa.gov.au/C/compensation.aspx>.

94. The ODPP is unable to make an application for criminal injuries compensation on behalf of a victim of crime, and is unable to provide legal advice about making such an application. However, subject to the ODPP Release of Materials Policy, the ODPP may be able to provide documents or information to a victim to enable them to complete a criminal injuries compensation application.

RELEASE OF DOCUMENTS TO VICTIMS

95. In the course of their duties, ODPP staff have access to a range of confidential and sensitive information. The release and use of such information is restricted.

96. Victims may wish to obtain information or copies of documents relating to a criminal prosecution from the ODPP.

97. The approach of the ODPP to the release or disclosure of documents or other information to victims is set out in the ODPP's Release of Materials Policy. **Appendix 3** contains an extract of the relevant provisions of the Release of Material Policy.

ADDITIONAL INFORMATION

98. In addition to providing information to victims by letter and telephone, the ODPP has the following pamphlets available to assist witnesses—

- *About the DPP;*
- *Information for Victims of Crime;*
- *Information for Witnesses;*
- *Compensation for Victims of Crime;*
- *Court Support;*
- *Victim Support Service;*
- *Child Witness Service;*
- *Information for parents or guardians of child victims or witnesses.*

99. Electronic copies of these pamphlets are available on the ODPP website homepage at <http://www.dpp.wa.gov.au>. This website also contains a dedicated page for Victims of Crime that includes links to other useful websites, including information on the following—

• Prosecution process	• Compensation and Restitution
• Keeping informed	• Criminal Injuries Compensation
• Input into the prosecution process	• Child Victims
• Victim Impact Statements	• Vulnerable Witnesses
• Special Needs	• Services for Victims of Crime

AMANDA FORRESTER, SC,
Director of Public Prosecutions for Western Australia.

Appendix 1

GUIDELINES AS TO HOW VICTIMS SHOULD BE TREATED

Schedule 1 of the *Victims of Crime Act 1994 (WA)*

1. A victim should be treated with courtesy and compassion and with respect for the victim's dignity.
2. A victim should be given access to counselling about the availability of welfare, health, medical and legal assistance services and criminal injuries compensation.
3. A victim should be informed about the availability of lawful protection against violence and intimidation by the offender.
4. Inconvenience to a victim should be minimized.
5. The privacy of a victim should be protected.
6. A victim who has so requested should be kept informed about—
 - (a) the progress of the investigation into the offence (except where to do so may jeopardize the investigation); and
 - (b) charges laid; and
 - (c) any bail application made by the offender; and
 - (d) variations to the charges and the reasons for variations.
7. A victim who is a witness in the trial of the offender and has so requested should be informed about the trial process and the role of the victim as a witness in the prosecution of the offence.
8. A victim who has so requested should be informed about any sentence imposed on the offender, or any other order made in respect of the offender, as a result of the trial and about any appeal and the result of any appeal.
9. A victim's property held by the Crown or the police for the purposes of investigation or evidence should be returned as soon as possible.
10. Arrangements should be made so that a victim's views and concerns can be considered when a decision is being made about whether or not to release the offender from custody (otherwise than at the completion of a term of imprisonment or detention).

11. A victim who has so requested should be informed about the impending release of the offender from custody and, where appropriate, about the proposed residential address of the offender after release.

12. A victim who has so requested should be informed of any escape from custody by the offender.

Appendix 2

MANDATORY RESTRAINING ORDERS AND APPLICATIONS FOR RESTRAINING ORDERS IN VICTIM IMPACT STATEMENTS

Restraining Orders Act 1997

FVRO—Family Violence Restraining Order

VRO—Violence Restraining Order (for people not related to each other)

“family relationship”—a relationship between 2 persons—

- (a) who are, or were, married to each other; or
- (b) who are, or were, in a de facto relationship with each other; or
- (c) who are, or were, related to each other; or
- (d) one of whom is a child who—
 - i. ordinarily resides, or resided, with the other person; or
 - ii. regularly resides or stays, or resided or stayed, with the other person; or
- (e) one of whom is, or was, a child of whom the other person is a guardian; or
- (f) who have, or had, an intimate personal relationship, or other personal relationship, with each other.

<i>Criminal Code provision</i>	Family member can indicate they want FVRO in Victim Impact Statement s63(4AA) Restraining Orders Act 1997	Mandatory VRO/FVRO s63A Restraining Orders Act 1997
s 279 (Murder)		
s 280 (Manslaughter)		
s 281 (Unlawful assault causing death)		
s 283 (Attempt to unlawfully kill)		✓
s 292 (Disabling to commit Offence)		✓ if in “family relationship”
s 293 (Stupefying to commit offence)		✓ if in “family relationship”
s 294 (Act intended to cause GBH)		✓ if in “family relationship”
s 297 (GBH)		✓
s 301 (Wounding)	✓	
s 304(1) (Act or Omission causing harm/danger)	✓	
s 304(2) (Intent to harm/endanger)		✓ if in “family relationship”
s 313 (Assault)	✓	
s 317 (Assault causing bodily harm)	✓	
s 317A (Assault with intent)	✓	
s 320 (Sexual offences—Child u/13)		✓ if in “family relationship”
s 321 (Sexual offences—Child o/13 u/16)		✓ if in “family relationship”
s 321A (Persistent sexual conduct—child u/16)		✓ if in “family relationship”

<i>Criminal Code provision</i>	Family member can indicate they want FVRO in Victim Impact Statement s63(4AA) Restraining Orders Act 1997	Mandatory VRO/FVRO s63A Restraining Orders Act 1997
s 323 (Indecent assault)	✓	
s 324 (Aggravated indecent assault)	✓	
s 325 (Sexual penetration without consent)		✓
s 326 (Aggravated sexual penetration without consent)		✓
s 327 (Sexual coercion)		✓
s 328 (Aggravated sexual coercion)		✓
s 329 (Sexual offences by relatives)		✓ if in "family relationship"
s 332 (Kidnapping)		✓ if in "family relationship"
s 333 (Deprivation of Liberty)	✓	
s 338A (Threat to gain)	✓	
s 338B (Threats)	✓	
s 338C (Creating false apprehension)	✓	
s 338E (Stalking)	✓	
s 444 (Criminal Damage)	✓ (if Summary)	✓ (if Indictable)

Appendix 3

DOCUMENTS WHICH MAY BE PROVIDED TO VICTIMS OF CRIME

ODPP Release of Materials Policy (Extract)

When permitting inspection of, or providing a copy of, transcript, the ODPP must not disclose the fact of a dismissal of a charge against a child or the conviction or finding of guilt against a child in a manner that would identify or be likely to identify the child (section 36(1) *Children's Court of Western Australia Act 1988*).

Further, in accordance with the spirit of section 35(1) and (3) of the *Children's Court of Western Australia Act 1988*, when permitting inspection of, or providing a copy of, transcript, care should be taken to delete any particulars likely to lead to the identification of *any* child concerned in the proceedings.

The following provisions of the ODPP Release of Materials Policy are relevant to victims—

TRANSCRIPT

17. Subject to paragraph [18], a copy of the transcript of the sentencing proceedings will be provided, at no cost, to a victim of crime. The sentencing proceedings means the Judge's comments, which usually include a statement of the facts. If, in a particular case, the Judge has not recited the facts the State's statement of facts can be provided.

18. The name of, or any reference which may identify—

- (a) any accused who is a child, or was a child at the time the offence was committed;
- (b) any complainant in a sex related offence except the victim who has requested the transcript; and
- (c) any complainant who is a child except the victim who has requested the transcript;

must be deleted from the copy of sentencing transcript before it is provided to the victim or to their legal representative.

19. Victims of crime, including insurance companies pursuant to a right of subrogation, may have a legitimate interest in the whole of the transcript of the prosecution of the offence relevant to that victim.

20. A victim of crime has a legitimate interest in the transcript if it is required—

- (a) in relation to an application for criminal injuries compensation;
- (b) in relation to civil litigation; or
- (c) to assist in the counselling or rehabilitation of the victim.

21. Where a victim of crime has a legitimate interest in the transcript, as provided by paragraph [20], then, subject to the conditions specified in paragraph [22], the following persons may, by prior arrangement, inspect the transcript at the office of the DPP—

- (a) the victim;
- (b) the victim's legal representative; and/or
- (c) a qualified medical adviser or qualified counsellor assisting the victim.

22. The transcript will be available for inspection only if—

- (a) each person who inspects the transcript provides a written undertaking that the transcript will be used solely for the specified purpose for which it will be inspected; and
- (b) in relation to persons referred to in paragraph [21(c)], the victim, or if a child, their parent/guardian, provides written approval for the transcript to be inspected.

THE INDICTMENT

45. Subject to paragraph [46], a victim of crime or their legal representative will be provided, at no cost, with a copy of—

- (a) the whole of the indictment, excluding the list of witnesses, if all counts relate to that victim; and
- (b) only that portion of the indictment disclosing those counts which relate to that victim, if there are additional complaints, and excluding the list of witnesses.

46. The name of any accused who is a child, or was a child at the time the offence was committed must be deleted from the copy of the indictment before it is provided to the victim of crime or to their legal representative.

WITNESS STATEMENTS

50. A State witness will be provided, at no cost, with a copy of their statement.

DOCUMENTARY EVIDENCE

72. Where a victim of crime has a legitimate interest in the transcript, as provided by paragraph [20], then, except as provided in paragraph [73], a victim of crime will be provided, at no cost, with a copy of documentary exhibits.

73. A copy of documentary exhibits will not be provided where the volume of documentary exhibits and the relevance of that evidence is such that it would be unreasonable to produce a copy of all documents and there are other means available for the documents to be inspected or provided.

DIRECTOR OF PUBLIC PROSECUTIONS ACT 1991**GUIDELINES TO POLICE OFFICERS AND OTHER PUBLIC OFFICERS FOR THE EXERCISE OF THE DISCRETION NOT TO PROSECUTE INDICTABLE OFFENCES****INTRODUCTION**

Every decision whether or not to charge a person with an indictable offence must be in the public interest.

When a charge is laid there is a written record of the charge and the evidence in support is available in due course for review.

These Guidelines are intended to clarify the exercise of discretion by police officers and public officers in situations where the public interest does not require a person to be charged with an indictable offence.

These Guidelines should not discourage Police Officers and other Public Officers from exercising the discretion. The Guidelines are to promote consistency and to improve accountability.

The Director of Public Prosecutions is the only person with statutory authority to grant indemnities from prosecutions.

Furthermore, the only bodies able to grant an undertaking that answers given or statements made by a person will not be used in evidence are Courts and the Director of Public Prosecutions.

Police Officers and other Public Officers do not have these powers.

Therefore, the decision not to proceed with a prosecution in the public interest is one that must always be capable of review.

GUIDELINES

1. There will be occasions, when despite sufficient credible evidence Identifying a person as having committed an offence, a Police Officer or Public Officer will exercise a discretion not to charge that person.
2. Such a discretion should only be exercised in the public interest and by applying to the particular facts and circumstances the *Statement of Prosecution Policy and Guidelines* issued by the Director of Public Prosecutions for Western Australia and published in *Government Gazette*, and as amended from time to time.
3. The reasons for the exercise of a discretion not to lay a charge in a particular case must be recorded in writing.
4. The exercise of a discretion not to lay a charge in a particular case should be subject of routine review within the Police Service or other responsible authority. The review must also be recorded in writing.
5. These Guidelines apply to all indictable offences, including indictable offences triable summarily, and are operative from 1 September 2018.

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Director of Public Prosecutions for Western Australia.
