



DIRECTOR of
PUBLIC PROSECUTIONS
VICTORIA

• DIRECTOR'S POLICY •

PROSECUTORIAL DISCRETION

Last updated: 24 November 2014

Quick reference

Overview

This policy sets out the criteria governing the decision whether or not to prosecute.

In this policy, 'prosecutor' means Crown Prosecutor, counsel briefed by the Solicitor for Public Prosecutions or the solicitor with conduct of the prosecution.

Summary

A prosecution may only proceed if:

- there is a reasonable prospect of a conviction; and
- a prosecution is required in the public interest.

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The decision to prosecute

Introduction

1. The decision whether or not to prosecute is the most important decision in the prosecution process.¹ It can profoundly affect people's lives.

The criteria

2. A prosecution may only proceed if:
 - there is a reasonable prospect of a conviction; and
 - a prosecution is required in the public interest.

Reasonable prospect of conviction

3. Prosecutors must be satisfied that there is a reasonable prospect of a conviction. Factors to which regard should be had in assessing this include:
 - the possibility of evidence being excluded
 - any possible line of defence
 - whether the prosecution witnesses are available², competent and compellable³
 - the credibility and reliability of the prosecution witnesses
 - how the witnesses are likely to stand up to giving evidence in court
 - whether any witnesses have a motive for telling less than the whole truth
 - any conflict between eye-witnesses
 - whether there is any reason to suspect that a false story may have been concocted
 - the reliability of any admissions⁴
 - the existence and reliability of any forensic or medical evidence
 - the reliability of any identification evidence
 - in the case of a child witness, whether the child will give sworn evidence, and if not, whether there is any evidence which corroborates the child's evidence.
 - any other matter relevant to whether a jury would find the person guilty.

¹ See generally, Christopher Corns, *Public Prosecutions in Australia Law, Policy and Practice* (Thomson Reuters (Professional) Australia Limited 2014) 185-186.

² See [Evidence Act 2008](#) s 65.

³ See [Evidence Act 2008](#) ss 12-19.

⁴ See [Evidence Act 2008](#) s 85.



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Public interest

4. Once satisfied that there is a reasonable prospect of a conviction, prosecutors must consider whether a prosecution is required in the public interest. This is the dominant consideration.⁵
5. If the prosecutor is satisfied that there is a reasonable prospect of a conviction, the prosecution should proceed unless there are public interest factors tending against prosecution which outweigh those tending in favour. Public interest factors include:
 - the seriousness of the offence.
 - the degree of culpability of the offender
 - any mitigating or aggravating circumstances
 - the youth, age, intelligence, physical health, mental health or special infirmity of the offender, a victim or witness
 - the offender's antecedents and background
 - the staleness of the offence
 - the obsolescence or obscurity of the law
 - whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute
 - the availability and efficacy of any alternatives to prosecution
 - the prevalence of the offence and the need for deterrence, both personal and general
 - whether the consequences of any resulting conviction would be unduly harsh and oppressive
 - whether the offence is of considerable public concern
 - any entitlement of the State, the victim or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken
 - the attitude of the victim to a prosecution
 - the likely length and expense of a trial
 - whether the offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the offender has done so
 - the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court
 - special circumstances that would prevent a fair trial from being conducted
 - whether the offence is triable only on indictment
 - the need to maintain public confidence in basic constitutional institutions such as the Parliament and the courts
 - whether a sentence has already been imposed on the offender which adequately reflects the criminality of the episode.

⁵ This principle was enunciated by Sir Hartley Shawcross in 1951, as Attorney-General of the United Kingdom, and is equally applicable in Victoria. See United Kingdom, House of Commons, *Debates*, Vol 188, col 981, 28 January 1951.



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6. In the following types of cases, particular attention should be given to whether a prosecution is required in the public interest:
- children offenders. The prosecution of a child is a severe step. The public interest will not normally require the prosecution of a child who is a first offender where the offence is not serious.
 - a young person who has committed an offence in the context of a consenting sexual relationship with another young person (for example, sexual penetration of a child under 16 where the offender is 18 and the complainant is 15). In such cases, regard should be had to:
 - the relative ages, maturity and intellectual capacity of the complainant and the offender
 - whether the offender and complainant were or are in a relationship
 - whether the complainant was capable of consenting and did consent
 - whether the offending involved any grooming, duress, coercion or deception
 - the attitude of the complainant and her family or guardians towards prosecution
 - offenders with cognitive impairments, including intellectual disabilities, acquired brain injuries, mental illnesses, personality disorders and neurological disorders.
 - persons who commit offences while detained involuntarily in psychiatric hospitals. In such cases, regard should be had to:
 - whether the offence was committed while the offender was resisting detention. It may be inappropriate for a mentally ill person who was detained involuntarily to be prosecuted for resisting that detention
 - the person's treatment and medication regime both at the time of the offence and at the time the prosecution is being considered
 - whether a prosecution would be likely to be harmful to the person or medically inappropriate.
7. While there may be public interest factors tending against a particular prosecution, often the appropriate course will be to proceed with the prosecution and for those factors to be put to the court in mitigation of sentence.

Improper considerations

8. A decision whether or not to prosecute must not be influenced by:
- the race, religion, sex, national origin or political associations, activities or beliefs of the offender or any other person involved
 - personal feelings concerning the offence, the offender or a victim
 - possible political advantage or disadvantage to the Government or any political group or party



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- the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

Discontinuances

9. A discontinuance may be entered at any time except during a trial, whether or not an indictment has been filed.⁶ The exercise of the power to discontinue a prosecution must be determined in accordance with the criteria governing the decision to prosecute set out above. The question as to whether a discontinuance should be filed may be raised on application by the defence or by the prosecution at any time before the trial.
10. A decision to enter a discontinuance may be made only by the Director.
11. A decision to enter a discontinuance is a ‘special decision’⁷ within the meaning of the *Public Prosecutions Act 1994* if:
 - the Director decides to file a discontinuance after being advised by a Crown Prosecutor or another legal practitioner to proceed with the prosecution⁸
 - the decision is in relation to an offence with a level 1 penalty (life imprisonment)⁹
 - the decision is in relation to a matter of high public profile or notoriety
 - the decision is one which, for any other reason, the Director believes should be a special decision.
12. The views of the informant and victims should be sought and recorded before a discontinuance is filed. Their views should be taken into account but are not determinative. The informant and victims should be informed of the decision to enter a discontinuance before it is publicly announced.

Direct indictments

13. A ‘direct indictment’ is an indictment filed against an accused:
 - who has not been committed for trial in respect of the offence charged in the indictment or a ‘related offence’¹⁰; or
 - whose prosecution for the offence charged in the indictment or a ‘related offence’ was discontinued or the subject of a *nolle prosequi*.¹¹

⁶ *Criminal Procedure Act 2009* s 177(2).

⁷ See *Public Prosecutions Act 1994* ss 45C-45H.

⁸ *Public Prosecutions Act 1994* s 3.

⁹ On 28 April 2008 the Committee for Public Prosecutions issued a guideline which provided that a decision to enter a discontinuance is to be treated as a ‘special decision’ in this and the following two circumstances.

¹⁰ See *Criminal Procedure Act 2009* s 3.



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14. A decision to file a direct indictment is a ‘special decision’¹² unless the accused or their legal representative gives written consent or indicates in writing an intention to plead guilty.¹³

Direct indictment where accused not committed for trial

Accused discharged at committal

15. A Magistrate’s decision to discharge an accused at committal is not binding on the Director. However, such a decision should stand unless the Magistrate made a significant error. Where a direct indictment is being considered following a discharge at committal, it may be appropriate to invite the accused to make a submission as to why a direct indictment should not be filed. A decision to directly indict after a discharge at committal must be made soon as possible after the committal.

No committal held

16. If no committal has been held, a direct indictment may be filed only if:
- the criteria governing the decision to prosecute set out above are satisfied
 - there are strong grounds justifying a trial without a committal; and
 - a trial without a committal would not be unfair to the accused.
17. Circumstances which may justify a trial without a committal include where the case against the accused has already been ventilated in curial proceedings such as an inquest or a Royal Commission.¹⁴
18. While the filing of a direct indictment is not judicially reviewable, the court may order a stay of the trial if it deems that a trial without a committal would be unfair to the accused.¹⁵ In determining this, the court will balance the interests of the Crown acting on behalf of the community and the interests of the accused.¹⁶

Direct indictment after discontinuance

19. A discontinuance does not amount to an acquittal and an accused may be directly indicted on a charge in respect of which an earlier

¹¹ [Criminal Procedure Act 2009](#) s 3.

¹² See [Public Prosecutions Act 1994](#) ss 45C-45H.

¹³ See [Public Prosecutions Act 1994](#) s 3.

¹⁴ See for example, *R v Smith & Ors* [1995] 1 VR 10.

¹⁵ *Barton v The Queen* (1980) 147 CLR 75; [1980] HCA 48.

¹⁶ *Barton v The Queen* (1980) 147 CLR 75; [1980] HCA 48. For guidance on how the court approaches this balancing exercise, see *Barton and Williams v DPP* (2004) 151 A Crim R 42; [2004] VSC 516.



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prosecution has been discontinued.¹⁷ Where a discontinuance has been filed, a person may be directly indicted for the same offence only if:

- significant fresh evidence is available; or
- the decision to enter a discontinuance was obtained by fraud; or
- the decision was based on a mistake of fact; and
- it is in the interests of justice that the prosecution proceed. In determining this, regard should be had to whether the accused would receive a fair trial.

Cases wholly or substantially reliant upon DNA evidence

20. In any matter in which the prosecution case is wholly or substantially reliant upon DNA evidence, the prosecution should not be instituted or continued until instructions have been sought from the Director, or in his absence, the Chief Crown Prosecutor.

Review

21. This policy will be reviewed and updated as necessary.

¹⁷ [Criminal Procedure Act 2009](#) s 177(6) & (7).