Office of the Director of Public Prosecutions

Annual Report 2010 - 2011

Queensland Government
Department of Justice and Attorney-General

25 Years of Service
1985 - 2010

Introduction

The Director of Public Prosecutions (referred to throughout this report as 'the Director') is required by s 16 of the *Director of Public Prosecutions Act 1984* to report each year before 31 October to the Attorney-General and Minister responsible for the operations of the Office of the Director of Public Prosecutions (referred to throughout as 'the ODPP'). The report is to be laid before the Legislative Assembly within 14 sitting days after the Minister receives the report.

This report is designed to inform both the Parliament and the community regarding the functions performed by the ODPP and covers operations for the period 1 July 2010 to 30 June 2011.

fair

independent

dynamic

professional

Letter of Transmission

12 October 2011

The Honourable Paul Lucas MP
Attorney-General, Minister for Local Government
and Special Minister of State
Parliament House
Brisbane Qld 4000

Dear Attorney

I present to you a report on the operations of the Office of the Director of Public Prosecutions (ODPP) for the financial year of 1 July 2010 to 30 June 2011 pursuant to s 16(1) of the *Director of Public Prosecutions Act 1984*. This is the twenty-fifth full year report furnished regarding the operations of the ODPP.

The 'Director's Guidelines' are also included as required by s 11(2)(b) of the *Director of Public Prosecutions Act 1984*.

Yours sincerely

A W MOYNIHAN SC

Level 5 State Law Building
50 Ann Street Brisbane

GPO Box 2403 Brisbane
Queensland 4001 Australia
DX 40170

Telephone: +61 7 3239 6840
Facsimile: +61 7 3220 0035
Website:
www.justice.qld.gov.au

ABN 13 846 673 994

Table of Contents

Director's Overview

I am pleased to present the twenty-fifth Annual Report for the Office of the Director of Public Prosecutions (ODPP).

2010 marked the 25th anniversary since the ODPP was established as an independent prosecuting office. The three previous Directors (Mr Des Sturgess QC 1985-1990, Mr Royce Miller QC 1990-2000 and Her Honour Judge Leanne Clare SC 2000-2008) joined me, invited guests and staff to mark this significant milestone at a function at the Brisbane Magistrates Court.

The ODPP has seen many changes over the last 25 years however our goal remains unchanged. It is simply to provide the people of Queensland with a prosecution service of excellence – one that is fair, independent, professional and dynamic.

The establishment of the ODPP as an independent prosecuting office was one of the most significant improvements to our criminal justice system. It is significant to note that 25 years later far reaching changes have been implemented with the passing of the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* which aims to achieve efficiencies in court processes by redefining the jurisdiction of the Queensland Courts.

Although the criminal justice system has continued to evolve over the years, our significant workload has remained constant. During the reporting period from 1 July 2010 to 30 June 2011, 39,849 charges relating to 10,075 accused were referred to the ODPP for prosecution. I congratulate my staff for their dedication and professional approach to their work.

Organisationally, the positions of Deputy Director of Public Prosecutions were approved by the Governor in Council. Ross Martin SC and Michael Byrne SC were appointed as statutory officers for a period of three years. Together with Assistant Directors Todd Fuller SC and Michael Copley SC, they undertake court work and monitor workload and performance within their areas of responsibility.

I am also pleased to record that for the third consecutive year, one of our senior prosecutors was awarded the distinction of Senior Counsel. Todd Fuller was this year's recipient. Mr Fuller's appointment as Senior Counsel recognises his exceptional work as an advocate in the superior courts of Queensland. This professional recognition is a clear example of the career opportunities open to lawyers working for the ODPP.

Enhancing the skills and capabilities of prosecutors and other staff members continued during 2010-2011. Officers participated in a range of training and development opportunities and a number of officers were supported in further study through the Study and Research Assistance Scheme. The ties with university law schools continued through the ODPP's work experience program. Through this program and other recruitment activities, the ODPP continues to actively seek the brightest and most enthusiastic students to join our team.

I was also pleased to host full day conferences for Victim Liaison Officers, Legal Officers and Crown Prosecutors. A total of 159 staff from Brisbane and regional locations participated in the three one-day conferences developed specifically for each position category.

In addition to developing the skills of our own staff, we also commenced a program with the Papua New Guinea Office of the Public Prosecutor. Through the Visiting International Prosecutors Program the ODPP has agreed to host four prosecutors from Papua New Guinea each year. The first placement occurred in April 2011. Each placement is for a one month period and participants are allocated to an ODPP chambers where they observe a range of court proceedings. In addition, participants have the opportunity to attend training activities delivered by internal and external presenters. This cooperative program is aimed at providing valuable cross jurisdictional experience to fellow prosecutors.

One of our regional chambers moved to a new location when staff in Maroochydore relocated to the Mike Ahern Centre where they occupy modern and safe accommodation. The building design has incorporated the principles of ecologically sustainable development, achieving a "6 star Greenstar office design v2" rating from the *Green Building Council of Australia*.

In June 2011 my appointment as Director was extended for five years. I look forward to continuing to work with my ODPP colleagues and other stakeholders to deliver a dynamic, modern and professional prosecution service for Queensland. I remain committed to continuing to build upon the ODPP's reputation as a fair, accountable and efficient prosecution service.

A W Moynihan SC
Director of Public Prosecutions

12 October 2011

ODPP Senior Counsel – June 2011

From left: Michael Copley SC [Assistant Director], Michael Byrne SC [Deputy Director], Anthony Moynihan SC [Director of Public Prosecutions], Ross Martin SC [Deputy Director], Todd Fuller SC [Assistant Director]

1 About Us

The *Director of Public Prosecutions Act 1984* (the Act) created the independent Director of Public Prosecutions who is responsible to the Attorney-General. The Director's Office is known as the Office of the Director of Public Prosecutions (ODPP) and is a business unit of the Department of Justice and Attorney-General.

The Director, with the help of officers appointed under the Act and the *Public Service Act 2008*, has the primary function of prosecuting on behalf of the State of Queensland people charged with criminal offences in the High Court, Supreme Court, District Court, Magistrates Court (limited) and Mental Health Court and Mental Health Review Tribunal.

The ODPP also provides information to victims of crime and their families to assist them to interact with the criminal justice system. In addition, the ODPP has a role in restraining and confiscating proceeds of crime (in conjunction with the Crime and Misconduct Commission) under the *Criminal Proceeds Confiscation Act 2002.*

Our vision

To be a cutting edge prosecution service by:

- effectively performing our prosecution functions
- delivering professional prosecution services
- utilising contemporary approaches to emerging criminal justice and organisational issues
- sustaining excellence in our service delivery.

Our values

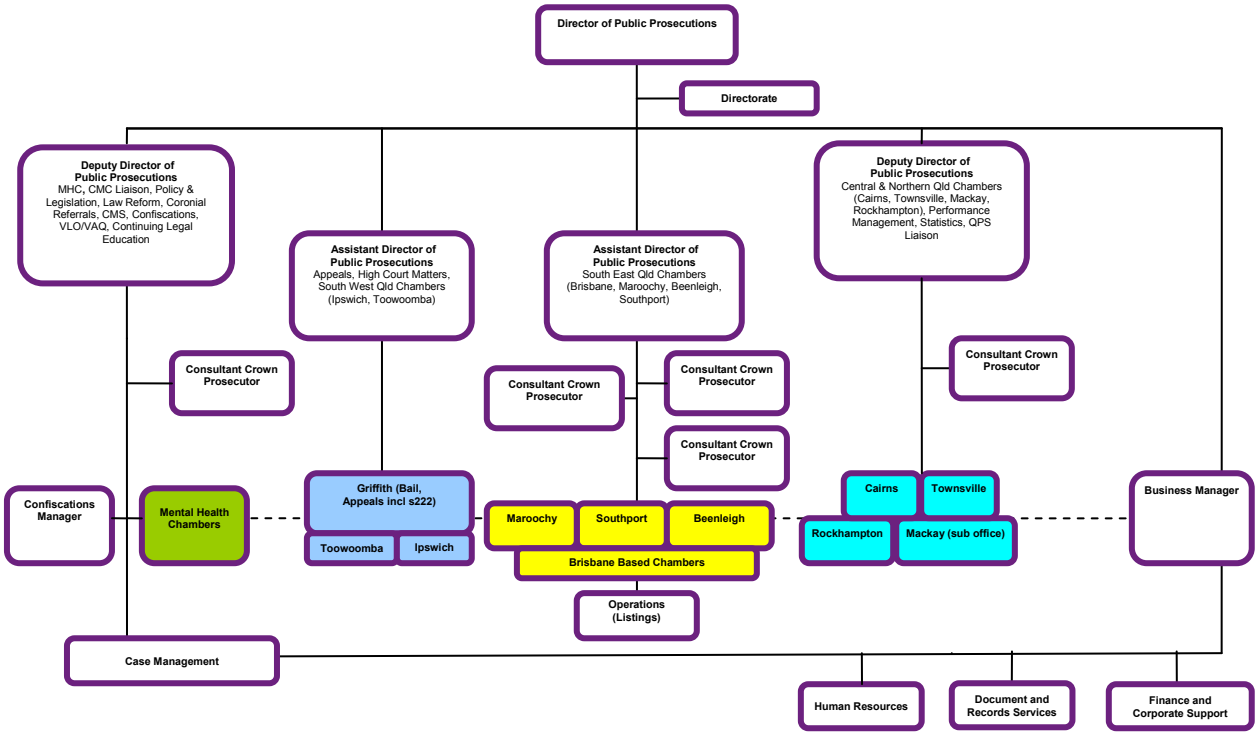
We value results, professional growth, workforce diversity and a balance between work and life commitments. ODPP members are actively encouraged and supported as individuals and have access to excellent working conditions, a range of work experiences, and learning and development opportunities.

The ODPP strives to be:

- fair
- dynamic
- independent
- professional

Organisational Structure

During the 2010-11 financial year, the ODPP organisational structure was further refined. As a result of a merit based selection process, two positions of Deputy Director of Public Prosecutions were recruited. The Deputy Directors are statutory officers employed under the *Director of Public Prosecutions Act 1984* who, together with the two Assistant Directors, assume functional and resource responsibilities in addition to their court work.



Locations of the ODPP
Brisbane

Brisbane contact details

Level 5
State Law Building
50 Ann Street
Brisbane Qld 4000

GPO Box 2403
Brisbane Qld 4001

DX 40170 Brisbane Uptown

Telephone: (07) 3239 6840
Facsimile: (07) 3220 0035

Brisbane Chamber email addresses

Confiscations:	DL-Confiscations@justice.qld.gov.au
Given Chambers:	DL-DPPGivenChambers@justice.qld.gov.au
Griffith Chambers:	DL-DPPSpecialistChambers@justice.qld.gov.au
Haxton Chambers:	DL-BrisbaneDPP-Haxton@justice.qld.gov.au
Sheehy Chambers:	DL-SheehyChambers@justice.qld.gov.au
Sturgess Chambers:	DL-DPPBrisbaneSturgess@justice.qld.gov.au
Wakefield Chambers:	DL-DPPWakefield@justice.qld.gov.au
Mental Health Chambers:	DL-MHCChamber@justice.qld.gov.au

Locations of the ODPP
Regional

Beenleigh

Level 1
12-14 James Street
Beenleigh Q 4207

PO Box 717
Beenleigh Q 4207

DX: 40466 Beenleigh

DL-BeenleighDPP@justice.qld.gov.au
Phone: (07) 3884 7070
Fax: (07) 3884 7077

Cairns

Level 6
CitiCentral Building
63-67 Spence Street
Cairns Q 4870

PO Box 1095
Cairns Q 4870

DX: 41340 Cairns

DL-CairnsDPP@justice.qld.gov.au
Phone: (07) 4039 8444
Fax: (07) 4039 8888

Ipswich

Level 2
Ipswich Courthouse
43 Ellenborough Street
Ipswich Q 4305

PO Box 27
Ipswich Q 4305

DX: 41227 Ipswich

DL-IpswichDPP@justice.qld.gov.au
Phone: (07) 3280 1719
Fax: (07) 3812 0559

Mackay (sub-office)

Mackay Courthouse
12 Brisbane Street
Mackay Q 4740

PO Box 170
Mackay Q 4740

DX: 41355 Mackay

DL-MackayDPP@justice.qld.gov.au
Phone: (07) 4967 0710
Fax: (07) 4967 0942

Maroochydore

Level 4
Mike Ahern Centre
12 First Avenue
Maroochydore Q 4558

GPO Box 1105
Maroochydore Q 4558

DX: 41876 Maroochydore

DL-MaroochydoreDPP@justice.qld.gov.au
Phone: (07) 5470 8199
Fax: (07) 5470 8193

Rockhampton

Old District Court Building
48 East Street
Rockhampton Q 4700

PO Box 1304
Rockhampton Q 4700

DX: 41184 Rockhampton

DL-RockhamptonDPP@justice.qld.gov.au
Phone: (07) 4938 4555
Fax: (07) 4938 4922

Southport

Level 1, Southport Courthouse
Hinze Street
Southport Q 4215

PO Box 1891
Southport Q 4215

DX: 41524 Southport

DL-SouthportDPP@justice.qld.gov.au
Phone: (07) 5583 6155
Fax: (07) 5532 2026

Toowoomba

Toowoomba Courthouse
159 Hume Street
Toowoomba Q 4350

PO Box 1800
Toowoomba Q 4350

DX: 41061 Toowoomba

DL-ToowoombaDPP@justice.qld.gov.au
Phone: (07) 46153438
Fax: (07) 4639 1759

Townsville

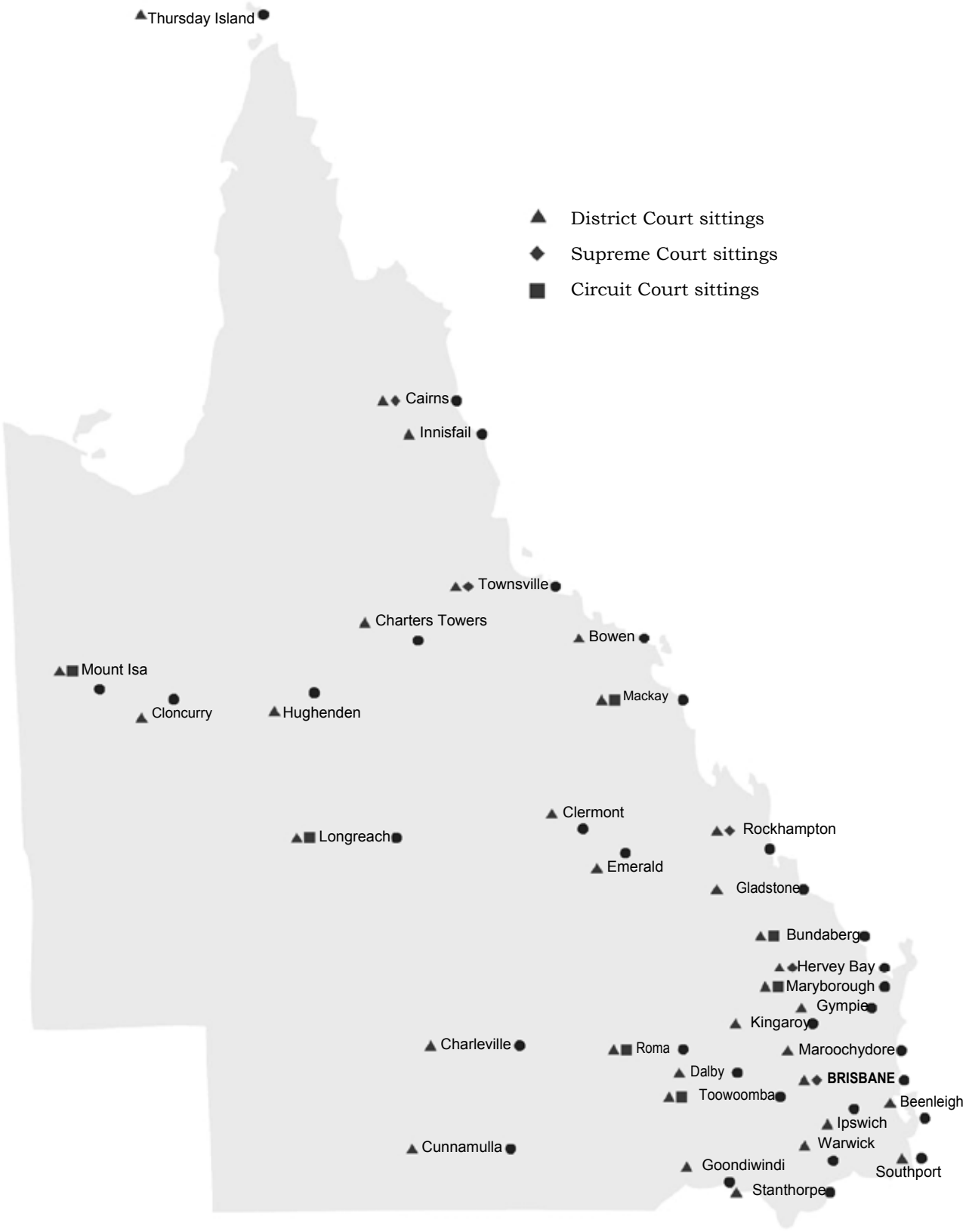
Level 8
Suncorp Metway Building
61-73 Sturt Street
Townsville Q 4810

PO Box 989
Townsville Q 4810

DX: 41427 Townsville

DL-TownsvilleDPP@justice.qld.gov.au
Phone: (07) 4799 7328
Fax: (07) 4799 7330

Location of Supreme Court, District Court and Circuit Court Sittings



2

Office of the Director of Public Prosecutions

25 Years of Service

2010 marked the 25th anniversary since the Office of the Director of Public Prosecutions (ODPP) was established as an independent prosecuting office. The three previous Directors (Mr Des Sturgess QC 1985-1990, Mr Royce Miller QC 1990-2000 and Her Honour Judge Leanne Clare SC 2000-2008) joined invited guests and staff at a function at the Brisbane Magistrates Court to mark this significant milestone.

The establishment of an independent prosecuting office was one of the most significant improvements to our criminal justice system in the last century.

In his second reading of the speech on the *Director of Prosecutions Bill*, the Attorney-General of the day, the Honourable Neville Harper, anticipated that the legislation would provide the State *"with a superior Court prosecutions service incorporating the better aspects of free enterprise to the benefit of all sectors in the community"*. He sought independence both real and apparent for prosecutorial decisions. Prosecuting was to be finally separated from other legal functions performed by the Crown Law Office on behalf of government. The new specialist office was to be headed by an independent statutory officer.

Since those early days the legal independence of the ODPP remains paramount. The neutrality and integrity of decisions have been preserved through the succession of Guidelines implemented by each of the Directors. The most important of these govern the basic decision to prosecute or not prosecute.

The work of the ODPP is central to the administration of criminal justice in this State and to the quality of that justice. Prosecutorial decisions and the way we do our work can have profound impact on victims, witnesses, police, Courts, the defence and the community at large.

Our history includes a number of notable prosecutions. For each of these cases there are thousands more where prosecutors, legal officers and support staff have worked tirelessly to adhere to the rule of law.

Our staff are spread throughout the State. The past 25 years has seen many different people make important contributions to this service. At the commencement of the ODPP in 1985 there were 40 prosecutors. Regional offices were established in Townsville, Rockhampton and Southport. Today, we have doubled the number of prosecutors, and have established an additional five regional chambers (Cairns, Ipswich, Toowoomba, Beenleigh and Maroochydore) and a sub office in Mackay. New responsibilities have been introduced or expanded such as Mental Health proceedings, civil and criminal confiscations, and proceedings for breach of court orders.

Trial processes have become more complex. The nature of some crimes has become more sophisticated and organised. We now engage closely with victims of crime, respecting and better promoting their rights. We have more onerous responsibilities in respect of disclosure.

The strategy for efficient preparation in 1985 was a structure where pairs of prosecutors and clerks clustered in groups of six. Admitted clerks undertook sentences and unadmitted clerks prepared the briefs. Later legal officers were introduced and clerks no longer performed legal duties. The Brisbane office split into preparation and prosecution divisions.

The Chambers model we now operate sought to combine the best of the previous structures. Each chamber is a self contained legal team, in an integrated cycle of preparation, prosecution and support. The goals are continuity, consistency, efficiency and performance.

The first chamber established was Wakefield in September 2004, with Haxton, Sheehy, Sturgess, Given and Griffith established in 2005. The Mental Health Chamber was established in 2007 as a result of the 2006 Butler Report. In 2009 Brisbane-based and regional chambers were divided into four groups each headed by an Assistant Director. This model was further refined with the implementation of two Deputy Directors who, together with two Assistant Directors, provide leadership within their areas of responsibility in addition to their court work.

The structure of the ODPP has changed over the years. However, the goal remains unchanged. It is simply to provide the people of Queensland with a prosecution service of excellence – one that is fair, independent, professional and dynamic.

25 Years of Service

Directors' Profiles

From left: Royce Miller QC, Anthony Moynihan SC, Leanne Clare SC, Desmond Sturgess QC

Desmond Sturgess QC

Appointed 1985

Mr Des Sturgess QC was appointed to the position of Director of Prosecutions by the Attorney-General of the time, the Honourable Neville Harper. Mr Sturgess was the first Director of the newly created Office of the Director of Prosecutions. Bringing a wealth of experience to the newly created office from his extensive time in practice as a Barrister at the Private Bar, Mr Sturgess strove throughout his term as Director to develop a thoroughly skilled Criminal Prosecutions Service for the people of Queensland. Mr Sturgess was committed in those very early days to ensuring the ODPP was a robust and independent authority. He retired in 1990, handing over the leadership to Mr Royce Miller QC. Mr Sturgess then went on to become a published author in his retirement.

Royce Miller QC

Appointed May 1990

Mr Royce Miller QC was appointed in 1990 to the position of Director of Public Prosecutions. Taking over from the outgoing Director, Mr Des Sturgess QC, Mr Miller became the longest serving Director to date, serving for a 10 year period until his retirement.

Prior to his appointment as Director of Public Prosecutions, Mr Miller was a District Court Judge, a position to which he was appointed in 1980. Before that, he was Chief Crown Prosecutor in the Office of the Solicitor-General. Mr Miller originally joined the public service in 1950 as a clerk in the Solicitor-General's Office. Upon admission to the Bar in 1958, he became a Crown Prosecutor and Senior Crown Prosecutor before his appointment as Public Defender in 1977. He took silk during this time. In 1978 he was appointed Chief Crown Prosecutor, before his appointment to the bench.

Leanne Clare SC

Appointed June 2000

Her Honour Judge Leanne Clare SC was appointed as Director of Public Prosecutions on 22 June 2000 replacing Mr Royce Miller QC who retired.

Judge Clare was admitted as a Barrister of the Supreme Court of Queensland on 29 July 1985. Prior to her appointment as Director, Judge Clare performed the role of Special Counsel, Appeals within the Office of the Director of Public Prosecutions. Her Honour had also acted as a Judge of the District Court between March and August of 1999 and between February and March of 2000.

Judge Clare was appointed Senior Counsel in 2006. She was elevated to the position of Judge of the District Court of Queensland on 2 April 2008.

Anthony Moynihan SC

Appointed June 2008

Mr Anthony Moynihan SC was admitted to the Queensland Bar in 1991 and took silk in November 2006.

Mr Moynihan practised at the private bar for five years before becoming a Crown Prosecutor with the Queensland Office of the Director of Public Prosecutions and was appointed Deputy Public Defender with Legal Aid Queensland in 1999.

During his time as Deputy Public Defender, Mr Moynihan specialised in appellate work before the Court of Appeal and High Court. Mr Moynihan is also involved in teaching advocacy skills with the Australian Advocacy Institute and has also served on the Council of the Bar Association of Queensland.

Mr Moynihan was appointed Director of Public Prosecutions in June 2008 and is a member of the Sentencing Advisory Council. The Sentencing Advisory Council is an independent body established in December 2010.

Deputy Directors

Previous Deputy Directors of Public Prosecutions have included Mr Tom Wakefield, His Honour Judge Marshall Irwin, His Honour Judge Brendan Butler AM SC, His Honour Judge Kerry O'Brien, Mr Michael Byrne QC and Mr Paul Rutledge.

Mr Michael Byrne SC and Mr Ross Martin SC are currently appointed as Deputy Directors of Public Prosecutions.

Long Serving Staff

The following members of staff have served 25 years with the ODPP: Mr Ross Martin SC, Mr David Meredith, Mr Brendan Campbell, Mr Richard Pointing, Ms Donna Beale and Mr Peter Fanti.

3

Performance During 2010 – 2011

The ODPP received ***39,849 offences*** for prosecution during the reporting period

Incoming Offences

The ODPP received 39, 849 offences for prosecution during the reporting period.

Table 1: Offences received for prosecution

2010-2011	Total
Summary	262
Pre Committal	8,007
Committed for Trial	13,394
Committed for Sentence	1,190
Ex Officio	3,133
Breach	754
Bail	2,351
s 222	593
Appeal	1,363
Mental Health	8,802
TOTAL	**39,849**

Note: A dissection of incoming offences processed by the ODPP is shown in Table 2.

Table 2: Offences received for prosecution during 2010-2011 by offence classification and location.

Offence Category (and sub-category)		Bne	MH	Been	Cns	Ips	Mdor	Rock	Spt	Tba	Tsv	TOTAL
Homicide	Murder	66	134	0	4	3	1	4	0	0	3	**215**
	Attempted Murder	43	191	0	0	8	0	1	0	1	2	**246**
	Manslaughter	32	2	0	2	0	0	2	0	0	3	**41**
	Dangerous Driving causing Death	12	4	7	2	1	10	1	20	1	4	**62**
Sexual	Adult	326	131	36	60	23	14	28	36	28	86	**768**
	Maintaining Sexual Relationship	47	8	0	0	0	0	2	13	2	0	**72**
	Child	1279	363	297	380	260	160	149	82	188	295	**3453**
	Computer Related	266	11	10	38	25	21	112	12	19	117	**631**
Violence	Grievous Bodily Harm	201	175	34	36	24	31	29	66	18	57	**671**
	Other Assaults	1205	1438	151	250	234	97	81	104	135	200	**3895**
Drugs	Trafficking	275	4	0	13	13	0	10	2	2	45	**364**
	Production	300	10	1	29	39	6	31	7	25	47	**495**
	Supply	1604	25	4	65	15	2	63	6	25	159	**1968**
	Possession	1527	260	6	138	99	35	60	30	44	248	**2447**
Property	Robbery	618	141	143	48	77	71	26	104	37	48	**1313**
	Burglary and Break & Enter	1920	353	296	215	156	209	132	79	173	177	**3710**
	Arson and Wilful Damage	1347	855	117	77	209	127	34	25	55	84	**2930**
	Fraud	2377	190	185	109	118	207	407	185	62	170	**4010**
	Stealing / Receiving	1810	465	260	98	165	141	67	20	155	87	**3268**
Motor Vehicle	Dangerous Driving	114	69	30	19	25	21	5	20	8	20	**331**
	UPMV and UUMV	609	198	191	68	81	69	11	18	46	45	**1336**
*Other Offences**	Other Offences	2256	3776	104	86	95	125	39	49	287	199	**7016**
Breaches	Suspended Sentence	118	0	32	30	0	19	3	18	11	52	**283**
	Intensive Correction Order/ Intensive Supervision Order	28	0	1	3	0	6	2	8	1	3	**52**
	Probation	57	0	36	35	0	14	3	14	10	21	**190**
	Community Service	22	0	30	1	0	7	1	4	6	8	**79**
	Sentence Reopening	1	0	0	0	0	0	0	0	1	0	**2**
	Show Cause	1	0	0	0	0	0	0	0	0	0	**1**
TOTAL		**18461**	**8803**	**1971**	**1806**	**1670**	**1393**	**1303**	**922**	**1340**	**2180**	**39849**
Summary		220	1	0	2	0	35	1	0	2	1	**262**
Pre Committal		6205	0	0	0	1668	0	0	133	0	1	**8007**
Committed for Trial		5966	0	1479	1225	0	949	1255	472	980	1068	**13394**
Committed for Sentence		401	0	33	361	0	141	36	65	59	94	**1190**
Ex Officio		1275	0	343	126	2	209	0	152	221	805	**3133**
Breach		335	0	98	57	0	46	9	49	63	97	**754**
Bail		2337	0	1	2	0	1	0	0	0	10	**2351**
s222		365	0	17	32	0	12	2	51	12	102	**593**
Appeal		1357	0	0	1	0	0	0	0	3	2	**1363**
Mental Health		0	8802	0	0	0	0	0	0	0	0	**8802**
TOTAL		**18461**	**8803**	**1971**	**1806**	**1670**	**1393**	**1303**	**922**	**1340**	**2180**	**39849**
TOTAL CHARGES		18461	8803	1971	1806	1670	1391	1303	922	1340	2180	**39849**
TOTAL ACCUSED		3851	2240	589	575	582	402	285	426	400	761	**10075**

Note:
*Offences that do not fall within the established categories and sub-categories e.g. unlawful stalking, threatening violence and miscellaneous drug-related offences

Bne:	Brisbane	Ips:	Ipswich	Tba:	Toowoomba
MH:	Mental Health	Mdor:	Maroochydore	Tsv:	Townsville
Been:	Beenleigh	Rock:	Rockhampton	UUMV:	Unlawful use of a motor vehicle
Cns:	Cairns	Spt:	Southport	UPMV:	Unlawful possession of a motor vehicle

Outcomes delivered by the ODPP

During 2010-2011, the ODPP continued to standardise data collection and reporting. The recorded data captures all the charges of the accused regarding an individual matter. The data also provides workload information across Chambers during the reporting period and is used as a significant determinant of resource allocation throughout the ODPP.

Committal

The ODPP prepared and conducted 1,523 committal matters in the Brisbane, Ipswich and Southport Magistrates Courts during the 2010-2011 reporting period. Of those, 863 matters were progressed through the committal stage and into the Supreme, District and Childrens Courts. A total of 368 matters were disposed of in the Magistrates Courts through summary trials and summary pleas of guilty.

Table 3: Committal matters processed

2010-2011	Total
Committed for trial	779
Committed for sentence	77
Summary trial	2
Summary plea of guilty	366
Discharged/withdrawn	222
Ex-officio	7
Transfer jurisdiction	17
Returned to police	53
TOTAL	1,523

The ODPP prepared and conducted ***1,523*** committal matters

Post-Committal

A total of 4,164 indictments were presented in the Supreme, District and Childrens Courts. ODPP prosecutors conducted 1,090 trials, and prosecutors and legal officers appeared at 5,433 sentences and breaches. In addition, 212 bail applications were processed.

Table 4: Post-Committal Outcomes

2010-2011	Total
Indictments presented	4,164
Trials	1,090
Sentences and breaches	5,433
Discontinuances (No True Bills [111] and nolle prosequi [264] presented at court event, not trial/sentence)	375
Bail	212

The ODPP conducted ***1,090*** trials and ***5,433*** sentences and breaches

Appeals

In total, 523 appeals against conviction and sentence (not including Attorney-General's Appeals) were processed in the 2010-11 financial year. Of these, 414 appeals achieved an outcome.

523 appeals were processed in the 2010-11 financial year

Table 5: Appeals against conviction and sentence

2010-2011	Total
s222	172
Court of Appeal	235
High Court	7
TOTAL OUTCOMES	**414**
Reserved	**109**
TOTAL PROCESSED	**523**

Attorney-General's Appeals

The Attorney-General of Queensland may lodge an appeal against a sentence if it is considered to be manifestly inadequate and/or if it is considered that there is an error of law. In specified circumstances, the Attorney-General may refer a point of law that has arisen at trial or at pre-trial application to the Court of Appeal for its consideration and opinion. During 2010-2011 there were no such references.

Table 6: Attorney-General's Appeals that ODPP was responsible for prosecuting

AG Appeals Filed	9
Outcomes during 2010-2011	
AG appeals allowed	2
AG appeals dismissed	2
AG appeals - judgment reserved	4

A total of ***9*** Attorney-General's Appeals were filed in the 2010-11 financial year

Director's Guidelines

The Director amended seven guidelines pursuant to s 11 of the *Director of Public Prosecutions Act 1984*. The amendments relate to:

- Guideline 7: Competency of Child Witnesses
- Guideline 12: Ex-officio Sentences
- Guideline 13: Summary Charges
- Guideline 23: Victims
- Guideline 28: Queensland College of Teachers and Commission for Children and Young People
- Guideline 34: Immunities
- Guideline 50: District Court Appeals

The Director also added a new guideline:

- Guideline 15: Consent to Calling a Witness at Committal

References to "COVA" were amended to "VOCA" throughout the guidelines pursuant to the *Victims of Crime Assistance Act 2009*.

The complete Director's Guidelines appear on page 37.

Indemnities

A total of 17 people were granted indemnities or use-derivative-use undertakings by the Attorney-General. The Attorney-General, in considering whether indemnities or use-derivative-use undertakings should be given, considers the advice furnished by the Director.

Prosecutions requiring the Attorney-General's consent

There were no cases in which the Attorney-General's consent to prosecute was granted.

Prosecutions requiring the Director's consent

The Director's consent to prosecute was granted in 67 cases pursuant to s 229B (maintaining a sexual relationship with a child under 16 years) of the *Queensland Criminal Code*.

3

Notable Prosecutions

High Court

Roach v The Queen

Kerry Raymond Roach was convicted by a jury of assault occasioning bodily harm against a woman with whom he had been in an intermittent relationship for two and a half years. Mr Roach had repeatedly punched her face and arms.

At Mr Roach's trial in the District Court of Queensland, the trial judge admitted evidence of other assaults by Mr Roach upon the complainant in the course of their relationship. The basis for admission was s 132B of the *Evidence Act* 1977 (Qld) ("the Act"), which applies, inter alia, to proceedings for assault occasioning bodily harm and states that *"relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding."*

In the Court of Appeal, Mr Roach argued that the evidence was prejudicial because it revealed a criminal propensity and therefore should not have been admitted unless there was no reasonable view of the evidence consistent with innocence ("the rule in *Pfennig*"). The rule in *Pfennig* applies at common law to the admission of evidence that is used to prove a specific criminal propensity on the part of an accused. This argument was rejected by the Court of Appeal.

In the High Court, Mr Roach advanced the same argument. He argued further, and in the alternative, that the rule in *Pfennig* ought to be considered and applied in connection with s 130 of the Act. Section 130 provides that nothing in the Act *"derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence."*

The High Court dismissed the appeal, finding in favour of the submissions advanced by the Crown. It held that s 132B has a potentially wide operation not restricted to similar fact evidence tendered to prove propensity on the part of the accused, and that the sole test of admissibility for evidence of domestic violence in the history of relationship is relevance. The Court observed that, while the rule in *Pfennig* addressed the same factors as are relevant to a court's discretion to exclude evidence on the basis of unfairness, the rule in *Pfennig* was of the nature of an exclusionary rule of law rather than a discretion. Therefore the rule could not be imported into the power referred to in s 130, which is discretionary in nature.

In both the Court of Appeal and High Court, Mr Roach also raised as a ground of appeal the adequacy of the directions given in respect of the evidence admitted pursuant to s 132B of the Act. In both Courts, this argument was also rejected.

(Source: High Court of Australia – Judgment Summary)

Court of Appeal

R v Nuttall

An indictment was presented in the Brisbane District Court on 4 February 2010 charging Gordon Nuttall with five counts of perjury and five counts of official corruption relating to money received from Brendan McKennariey. This was the second indictment presented against Nuttall.

The trial commenced on 11 October 2010 and on 27 October 2010 Nuttall was found guilty on all counts. On 16 December 2010, Nuttall was sentenced to five years imprisonment, cumulative upon his earlier sentence. The then Attorney-General, the Honourable Cameron Dick MP, lodged an appeal with respect to the sentence imposed.

The appeal was heard on 10 May 2011 and on 7 June 2011 the Court of Appeal allowed the Attorney-General's appeal against sentence. Gordon Nuttall had his original five year sentence increased to seven years imprisonment, cumulative upon his other sentence, with a parole eligibility date of 17 July 2015.

Supreme Court

R v SBU & Weazel

SBU, a 14 year old juvenile, and Roderick James Weazel were each charged with murder following the bashing death of a 52 year old man in Musgrave Park at South Brisbane on 6 July 2008. It was alleged that both SBU and Weazel were under the influence of alcohol when they confronted the deceased in the park. After exchanging heavy punches, the accused pair proceeded to inflict multiple head injuries to the deceased with a fence paling. Medical experts described the level of trauma suffered by the deceased as similar in nature to those suffered in a car accident which would have caused rapid, if not instantaneous, death.

The trial for both accused commenced on 18 October 2010 and on 22 October 2010 both accused were found guilty of murder. Weazel, an adult, was sentenced to mandatory life imprisonment. While life imprisonment is not mandatory for juvenile offenders convicted of murder, on 15 December 2010 the sentencing judge exercised his discretion to impose life imprisonment on SBU due to the brutal and unprovoked nature of the attack on the deceased and an apparent lack of remorse. SBU was the youngest person in Queensland to be convicted of murder.

SBU lodged an appeal against the sentence on 22 December 2010 and as at 30 June 2011, the appeal was yet to be heard.

District Court

R v Shand

An indictment was presented in the Brisbane District Court on 19 December 2008 which charged Harold Shand with one count of paying a secret commission. The charge corresponded to one of 36 counts of receiving a secret commission committed by Gordon Nuttall.

The initial trial against Harold Shand commenced in the District Court on 8 March 2010 and the trial concluded on 19 March 2010 with the jury unable to reach a verdict.

The trial was later re-listed and commenced on 21 March 2011 before His Honour Judge Griffin SC. On 31 March 2011, the jury found Harold Shand guilty of paying a secret commission and on 1 April 2011 he was sentenced to fifteen months imprisonment, suspended after serving four months.

Committal

R v Sica

Massimo Sica was charged with the murder of the Singh siblings, Neelma, Kunal and Sidhi. The offences allegedly occurred in April 2003 and after five years of investigation, the Queensland Police Service charged Massimo Sica. The committal commenced in the previous reporting period in the Brisbane Magistrate's Court and was conducted over a total of 95 days. On 13 October 2010, Magistrate Hine ruled that there was sufficient evidence to commit the matter for trial to the Supreme Court.

An indictment was presented in the Brisbane Supreme Court on 4 February 2011 charging Massimo Sica with three counts of murder. The trial is listed to commence in the week beginning 30 January 2012 with an estimated duration of between 15 to 20 weeks.

To date, this complex matter has involved the review of voluminous documentation including approximately 1,100 witness statements taken from 821 witnesses and thousands of audio, video and documentary exhibits.

5

Support of Victims

Victim Liaison Service

The obligation on the ODPP to implement the fundamental principles of justice which includes treating victims with courtesy, compassion and respect, continues under the *Victims of Crime Assistance Act 2009.* The ODPP Victim Liaison Service provides a critical link between victims of crime and the prosecution.

The ODPP provides information to victims of crime regarding the court process through Victim Liaison Officers (VLOs) across the State. VLOs are allocated to each Brisbane-based Chamber as well as each regional Chamber ensuring information is provided to victims and their families regarding the prosecution of the offender, the trial process and the victim's role as a prosecution witness. Referral to support agencies, including Victims Assist Queensland (VAQ), is also provided.

The Director's Guidelines provide advice to ODPP staff on their obligations to observe the fundamental principles of justice for victims of violent crime, to treat victims in a way that is responsive to his or her age, gender, ethnic, cultural and linguistic background or disability or other special needs.

The ODPP continues to strive to enhance skills and improve services to victims of crime and their families. The Victim Liaison Service conference, held in Brisbane in June 2011 welcomed a diverse range of speakers who shared their knowledge and expertise with the VLOs. The conference sought to further develop the capability of VLOs to better assist victims of crime and their families.

Table 7: Instances of contact with victims or family members during 2010-11

Instances of contact with victims or family member/s	34,810
Correspondence	19,908
Telephone	13,899
Face to face	1,003

The ODPP had ***34,810*** instances of contact with victims or family member/s during 2010-11

6

Confiscations

The *Criminal Proceeds Confiscation Act 2002* (CPCA) commenced on 1 January 2003. The primary focus of the Act is to remove the financial gain and increase the financial loss associated with illegal activity. Two separate schemes within the Act achieve this: Chapter 2 (confiscation without conviction) and Chapter 3 (confiscation after conviction).

The Confiscations Unit is a civil litigation team within the ODPP whose role it is to confiscate the proceeds of crime. The Confiscations Unit is responsible for administering chapter three of the *Criminal Proceeds Confiscation Act 2002*. In relation to chapter three proceedings, a direct connection between the property and the criminal charges must exist.

The Confiscations Unit also conducts the legal work on behalf of the Crime and Misconduct Commission (CMC) as the 'solicitor on the record'. The CMC instructs the ODPP who apply for the restraining order and subsequent forfeiture of the relevant assets or proceeds of crime. Chapter two proceedings do not require the property to have any correlation with the criminal offence.

Achievements

During the financial year, 34 new confiscation proceedings were commenced and 44 new restraining orders were obtained (in some cases two restraining orders were obtained). Additional restrained property was valued at $14.11 million. Since the civil confiscation scheme commenced, property valued at $124.9 million has been restrained and $31.5 million has been forfeited.

Under Chapter 2 of the CPCA, approximately $9.32 million was forfeited to the State (included as consolidated revenue). In addition, $458,074 was forfeited to the State under Chapter 3 of the CPCA.

Table 8: Chapter 2 historical statistical results 2006–2007 to 2010–2011

	2006–2007	2007–2008	2008–2009	2009–2010	2010–2011
New matters	43	55	51	69	34
Restraining orders	50	78	78	97	44
Value of assets restrained	$11.743m	$18.56m	$24.37m	$19.5m	$14.11m
Value of assets forfeited	$4.245m	$4.675m	$3.31m	$5.57m	$9.32m

Table 9: Chapter 3 historical statistical results 2006–2007 to 2010–2011

	2006–2007	2007–2008	2008–2009	2009–2010	2010–2011
* Pecuniary Penalty Orders Collected	*$282,806	*$467,771	*$750,071	*$1,120,894	$164,819
Forfeiture Orders	$1.373m	$948,220	$646,592	$571,430	$458,074
Total monies collected	$1.656m	$1,415,992	$1,396,663	$1,692,324	$622,894

* Note: Pecuniary Penalty Orders represent the amount collected not orders made as has been reported in previous years

7
Our People

During the reporting period there was a continued focus on recruitment activities and development opportunities for our staff. The stability of work units and chambers was a priority. 49 permanent appointments were made to positions at all levels. In addition, two three-year appointments were made to the positions of Deputy Director of Public Prosecutions. Twelve staff were granted secondments to other government departments as part of their professional development and nine staff from other government departments sought secondment to the ODPP.

Learning and development

Development opportunities have been provided to staff in Brisbane and regional Chambers. A variety of delivery methods were used including presentations utilising internal expertise, on-the-job involvements, mentoring, and external specialist providers. All internal training sessions were video-linked in real time to regional chambers. In addition, sessions were recorded and uploaded to the ODPP online Training Library to ensure staff have future access to these development opportunities. Where applicable, internal training sessions received continuing legal education accreditation by the Bar Association of Queensland.

Building staff capability remained a priority throughout the reporting period as evidenced by the attendance rates below. Throughout the 2010-2011 financial year, there were 3,216 instances of training attendance by ODPP staff in the 55 internal training seminars and workshops. Experienced ODPP staff presented 26 of these sessions while 14 training sessions were presented by external expert presenters from a variety of different disciplines within the criminal justice system.

In addition to providing internal training, the ODPP conducted full day conferences for Victim Liaison Officers, Legal Officers and Crown Prosecutors. 159 staff throughout Queensland participated in these conferences that were developed specifically for their work roles.

Table 10: Training during 2010–2011

Training	Sessions	Overall attendance
ODPP Seminars & Workshops		
- Internal presenter	26	2,166
- External presenter	14	792
ODPP Conferences		
- Internal & External presenters	3	159
ODPP Induction		
Face-to-face Induction Seminar	12	99
TOTAL	**55**	**3,216**

Moot court training

During the 2009-2010 financial year, two moot court training sessions were delivered to Queensland Health forensic scientists. Expert prosecutors from the ODPP were commissioned to deliver court-based evidence training to 8 forensic scientists. The training program includes a simulated court room experience, including evidence in chief, cross examination, evaluation and feedback and is considered valuable to the development of the forensic scientists.

Study and Research Assistance Scheme

The ODPP received 21 applications from staff for assistance under the Study and Research Assistance Scheme (SARAS). The applications ranged from assistance with undergraduate and post graduate studies. Financial assistance was also provided to staff undertaking the Bar Practice Course and the Practical Legal Training Course.

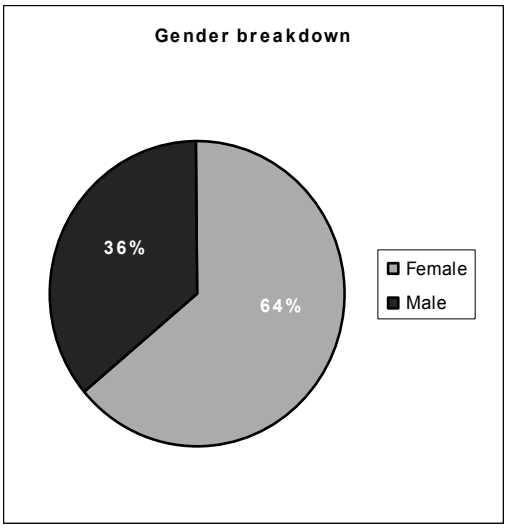
Work Experience Placement Program

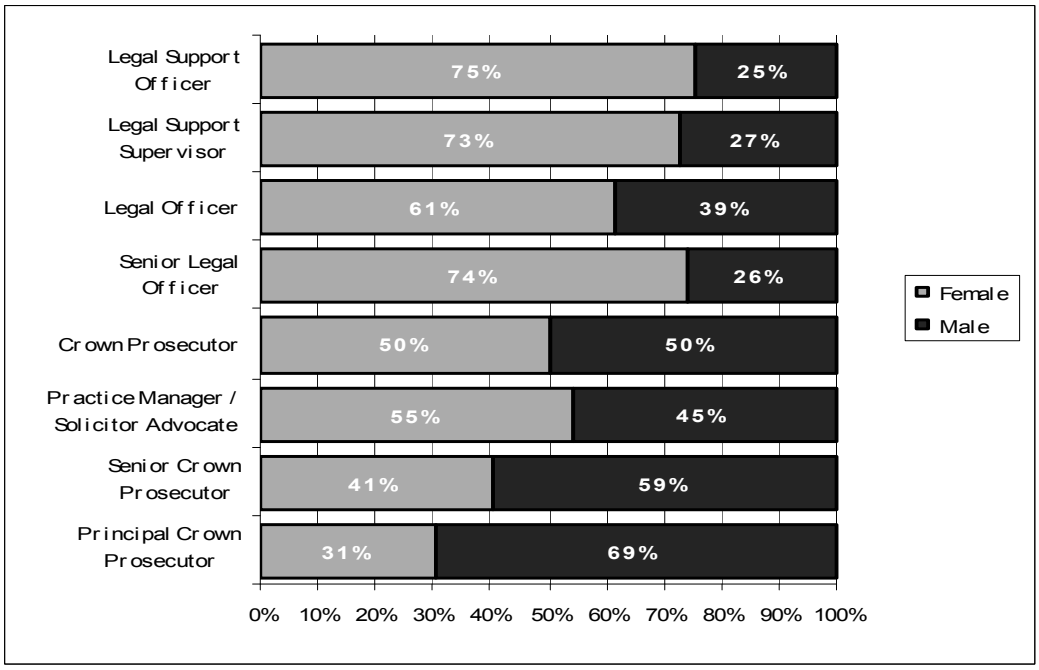
The ODPP has continued to promote its Work Experience Placement Program to leading universities including Queensland University of Technology, University of Queensland, Griffith University and Bond University. The provision of training to law students through a structured work experience program continues to be a key recruitment initiative. Students are exposed to a wide range of real criminal cases before the courts and given the opportunity to attend with Crown Prosecutors at trials and sentences. During the financial year work experience placement was offered to 48 students.

Staffing Levels / Establishment

Table 11: Staffing levels of the ODPP as at 30 June 2011.

Position Type	Total
Director	1
Deputy Director	2
Assistant Director	2
Business Manager	1
Crown Prosecutor	72
Practice Manager/ Solicitor Advocate	10
Legal Officer	97.6
Legal Support	131
Corporate Services and Administration	37.4
Victim Liaison Officer	15
Total (full-time equivalent)	**369**





8

Case Management System

The case management system (CMS) was developed specifically for the Queensland ODPP to integrate information regarding participants, charges, court events, exhibits and administration of matters referred for prosecution. In addition to the core prosecution module of the CMS (including ex-officio matters), three specialist modules for breaches, appeals and Supreme Court bail were implemented in June 2011. A CMS solution for Mental Health matters is scheduled for release during the 2011-2012 reporting period. The CMS underpins the standardisation of work practices and the collection of consistent workload data across all ODPP teams and chambers throughout the State.

Operational expenditure during 2010-2011:

Operational budget	$1,139,400
2010–2011 expenditure	$1,122,876
2010–2011 underspend	$16,524

Capital budget for 2010-2011

Capital budget	$137,900
2010–2011 expenditure	$90,547
2010–2011 underspend	*$47,353

* To be expended on a specialist module for Mental Health Chambers

9

Financial Performance

2010–2011 Financial Year

Table 12: Revenue and expenditure

Revenue Category	Revenue	Actual Expenditure
Base	$39,790,619 *	$39,717,401
SURPLUS		$73,218

*Includes $184,019 self generated revenue derived from the Qld Police Service for the transcription of records of interview tapes and specialised training for Qld Health Forensic Scientists.

Glossary of Terms

accused

The accused is a person who is alleged to have committed an offence. In this report, a convicted person is also referred to as the accused for ease of reference.

appeal (upheld/dismissed)

This is the name given to the process by which all or part of a court's decision is reviewed.

Appeals are made to and determined by a court higher than the court which made the decision appealed against. The judicial hierarchy of courts in Queensland, from highest to lowest is the High Court of Australia, Court of Appeal (Queensland), Supreme Court (Queensland), District Courts (Queensland), and the Magistrates Courts (Queensland).

Appeals can be against sentence or conviction or both.

If, on appeal, a lower court is found to have made an error, the appeal is upheld and the decision of the lower court is quashed or overturned. In the case of an appeal against sentence, a different sentence will be substituted.

With respect to an appeal against conviction, a new trial can be ordered or a verdict of acquittal entered.

If no error is found or, in some cases, if there is no substantial miscarriage of justice, the appeal is dismissed and the decision of the lower court is confirmed.

appear/appearance

When a person physically goes before a court that person is said to appear before the court. When that person's lawyer physically goes before a court on that person's behalf, that lawyer is said to have appeared for that person. The action of that person or that person's lawyer, as the case may be, is called an appearance.

bail

Once a person has been arrested and charged with an offence, that person must remain in jail unless that person has legal authority to remain out of jail. When a person receives such authority that person

	is said to have been granted bail. Bail may be on the accused's own undertaking to appear or with sureties and subject to conditions.
Circuit Court	Circuit Court is the name given to the Supreme Court when it holds hearings elsewhere than Brisbane, Rockhampton, Cairns or Townsville.
charge	Charge is the name given to the formal record of an allegation that an accused has committed an offence. A person is usually charged by police and once charged that person must appear before a court at a specified place, date and time to be dealt with according to law.
committal (hand up)	A hand-up committal relates to a committal hearing at which the legal representative of the accused consents to all of the statements of witnesses being handed up to the magistrate without any of the witnesses then being required to give oral evidence.
committal hearing (committed for trial / committed for sentence)	A committal hearing is the name given to the procedure by which a magistrate determines if there is a prima facie case that is sufficient evidence to order that an accused person stand trial before a judge and jury. If the magistrate determines there is sufficient evidence, then the magistrate orders the accused to stand trial before a court (made up of a judge and jury) which has jurisdiction to try the accused. This will be a District Court or the Supreme Court. The word 'committal' is used because, when a magistrate makes such an order, the person is said to have been committed for trial. The word 'hearing' is used because most of the evidence is given by word of mouth (testimony) and the magistrate listens to, that is hears, that evidence. If at the committal hearing the accused admits to having breached the law as charged, the magistrate will order the accused person to appear before a District Court or the Supreme Court to be punished (sentenced) according to law. Such an accused is said to have been committed for sentence.
complaint and summons	When an accused is to stand trial or to be sentenced in a Magistrates Court, the document used to set out the charges is called a 'complaint and summons'. The document is so called because in the first part, a person, usually a police officer, 'complains' that the accused has committed an offence, and in the second part the accused is called or summoned to appear

before the Court.

Crown

The Crown refers to the Queensland Government representing the community of Queensland. All criminal proceedings are brought in the name of the Queen.

depositions

The evidence heard by the magistrate at a committal hearing is recorded on tape. When a person is committed for trial or committed for sentence, the tape recording of the committal hearing is transcribed onto paper. This transcript, along with any other evidence tendered at the committal hearing, such as photographs, maps and statements, are collectively called 'the depositions'.

Director

The Director means the person appointed as the Director of Public Prosecutions for the State of Queensland.

discontinuance

Discontinuance is the name given to the process by which it is decided and formally recorded that an accused is not to be prosecuted further and the criminal proceedings against an accused are to cease. Practically speaking, this means an accused no longer needs bail to remain out of gaol and will not stand trial or be sentenced.

If an indictment has been presented, a written record of the discontinuance is entered as well. This record is called a *nolle prosequi*, Latin for 'I do not wish to prosecute'.

If the indictment has not been presented, the discontinuance by way of the filing of what is known as a 'No True Bill' in the Court Registry.

ex officio indictment

This is the name given to an indictment presented to a court without a person being committed for trial or committed for sentence.

indemnity

Indemnity is the granting of an assurance that no criminal proceeding will be taken or continued in relation to criminal acts admitted by the person to whom the indemnity is granted in order to obtain the evidence of that person (see also 'use-derivative-use undertaking').

indictment

Indictment is the name given to the document which sets out the offence or offences that an accused is alleged to have committed and in relation to which the accused must stand trial and be sentenced if found guilty.

Indictments are presented to (lodged with) the Supreme Court or a District Court to

	notify the court of the offence/s with which the accused has been charged and in relation to which the accused must stand trial and be sentenced, if found guilty.
indictable offence	If an accused has been charged with an offence and has an initial right to stand trial before a judge and jury, the offence is an indictable offence. This is so, even though the accused or some other person may determine that the accused will stand trial before a magistrate only.
mention/adjournment/ list/sittings	A mention is an appearance before a court which is not for a specific purpose such as trial, sentence or committal hearing. It is a process to allow the court and the parties to monitor the progress of charges. Usually once a person has been charged, the charges will be mentioned at least once so a date for the committal hearing or trial may be set. The list is the written record kept by a court of all mentions, trials, sentences and bail applications (and committal hearings in the case of a Magistrates Court) to be heard by that court. The list is kept in a form similar to that of a diary. The District and Supreme Courts are available only between certain dates to hold trials or pass sentence. These periods are referred to as 'sittings'. For example when a person is committed for trial, the magistrate may say something similar to 'you are committed for trial to the sittings of the Supreme Court of Queensland at Brisbane commencing 30 January 2012'.
nolle prosequi	See 'discontinuance'
offence	An offence is any act or omission which is prohibited by the law of Queensland and for which you will be punished. Offences may be indictable or summary. Summary offences can be heard and determined in a Magistrates Court only.
Office of the Director of Public Prosecutions	The Office of the Director of Public Prosecutior body within the Department of Justice and Att under the Director's control. All Crown Prosec in the ODPP.
plea	A plea is the formal response of an accused at trial or sentence to an indictment. At the accused's trial or sentence the indictment is read out to the accused (the accused is 'arraigned') and the accused then formally responds by saying he or she is 'guilty' or 'not guilty'.
prosecutors	Prosecutors are barristers authorised to appear in the superior courts on behalf of the Crown.

	The term also includes both Crown Prosecutors from the Office of the Director of Public Prosecutions and members of the private bar who hold a commission to prosecute and are briefed to do work for the Director.
summary trial	A summary trial is a trial held in a Magistrates Court before a magistrate sitting alone.
superior courts	Superior Courts mean the District Court and the Supreme Court.
trial	'Trials' is the name of the hearing where all the evidence which supports the charge against the accused and the evidence advanced by the accused by way of defence is heard by the judge and jury. Subsequently, having regard to that evidence only, the jury decides whether the accused is guilty or not guilty. If it is determined that the charge is proved beyond reasonable doubt, the jury finds the accused guilty. This is called a verdict of guilty. If the court is satisfied that the jury has reached its verdict after proper deliberation and that it is lawful to do so, it will accept the verdict and formally convict the accused and then sentence the accused. In the case of a trial before a magistrate, the magistrate will consider the same issues as the jury before he or she reaches a guilty verdict and will then proceed to sentence the accused. If it is determined that the charge has not been proved then the magistrate or the jury finds the accused not guilty. This is called a verdict of not guilty. The judge or magistrate will then record that the accused has been acquitted and the accused is then released or discharged. A judge alone trial is one conducted by a Judge in the District or Supreme Court without a jury.
Use-derivative-use undertaking	This is an undertaking given to a potential witness on the understanding that the evidence to be given by the particular witness will not be used against him/her in any criminal proceeding, nor will any evidence discovered as a result of the giving of such evidence be used against him/her (see also 'Indemnity').
voir dire	Voir dire is the term given to a 'trial within a trial' which is conducted in the absence of the jury to enable the trial judge to determine matters of law.

Director's Guidelines

INDEX

GUIDELINES TO REPLACE ALL PREVIOUS GUIDELINES

GUIDELINE TO ALL STAFF OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS ACTING ON MY BEHALF, AND TO POLICE

ISSUED BY THE DIRECTOR OF PUBLIC PROSECUTIONS UNDER SECTION 11(1)(a)(i) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT* 1984

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

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

1. DUTY TO BE FAIR

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

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

2. FAIRNESS TO THE COMMUNITY

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

3. EXPEDITION

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

- cases should be prepared for hearing as quickly as possible;
- indictments should be finalised as quickly as possible;
- indictments should be published to the defence as soon as possible;
- any amendment to an indictment should be made known to the defence as soon as possible;
- as far as practicable, adjournment of any trial should be avoided by prompt attention to the form of the indictment, the availability of witnesses and any other matter which may cause delay; and
- any application by ODPP for adjournment must be approved by the relevant Legal Practice Manager, the Director or Deputy Director.

4. THE DECISION TO PROSECUTE

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

It is a two tiered test:-

(i) is there sufficient evidence?; and

(ii) does the public interest require a prosecution?

(i) Sufficient Evidence

- A prima facie case is necessary but not enough.

- A prosecution should not proceed if there is no reasonable prospect of conviction before a reasonable jury (or Magistrate).

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

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

(a) the availability, competence and compellability of witnesses and their likely impression on the Court;

(b) any conflicting statements by a material witness;

(c) the admissibility of evidence, including any alleged confession;

(d) any lines of defence which are plainly open; and

(e) any other factors relevant to the merits of the Crown case.

(ii) Public Interest Criteria

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

Discretionary factors may include:-

(a) the level of seriousness or triviality of the alleged offence, or whether or not it is of a 'technical' nature only;

(b) the existence of any mitigating or aggravating circumstances;

(c) the youth, age, physical or mental health or special infirmity of the alleged offender or a necessary witness;

(d) the alleged offender's antecedents and background, including culture and ability to understand the English language;

(e) the staleness of the alleged offence;

(f) the degree of culpability of the alleged offender in connection with the offence;

(g) whether or not the prosecution would be perceived as counter-productive to the interests of justice;

(h) the availability and efficacy of any alternatives to prosecution;

(i) the prevalence of the alleged offence and the need for deterrence, either personal or general;

(j) whether or not the alleged offence is of minimal public concern;

(k) any entitlement or liability of a victim or other person to criminal compensation, reparation or forfeiture if prosecution action is taken;

(l) the attitude of the victim of the alleged offence to a prosecution;

(m) the likely length and expense of a trial;

(n) whether or not the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;

(o) the likely outcome in the event of a conviction considering the sentencing options available to the Court;

(p) whether the alleged offender elected to be tried on indictment rather than be dealt with summarily;

(q) whether or not a sentence has already been imposed on the offender which adequately reflects the criminality of the episode;

(r) whether or not the alleged offender has already been sentenced for a series of other offences and what likelihood there is of an additional penalty, having regard to the totality principle;

(s) the necessity to maintain public confidence in the Parliament and the Courts; and

(t) the effect on public order and morale.

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

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

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

Impartiality

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

(a) race, religion, sex, national origin or political views;

(b) personal feelings of the prosecutor concerning the offender or the victim;

(c) possible political advantage or disadvantage to the government or any political group or party; or

(d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution.

5. THE DECISION TO PROSECUTE PARTICULAR CASES

Generally, the case lawyer should at least read the depositions and the witness statements and examine important exhibits before a decision whether or not to indict, and upon what charges, is made.

Where the case lawyer has prosecuted the committal hearing, it will generally not be necessary to wait for the delivery of the depositions before preparing a draft indictment. Unless the matter is complex or borderline, the case lawyer will often be able to rely upon his or her assessment of the committal evidence and its impact upon the Crown case without delaying matters for the delivery of the transcript.

(i) Child Offenders

Special considerations apply to child offenders. Under the principles of the Juvenile Justice Act 1992 a prosecution is a last resort.

- The welfare of the child and rehabilitation should be carefully considered;
- Ordinarily the public interest will not require the prosecution of a child who is a first offender where the offence is minor;
- The seriousness of the offence or serial offending will generally require a prosecution;
- Driving offences that endanger the lives of the child and other members of the community should be viewed seriously.

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

(a) the seriousness of the alleged offence;

(b) the age, apparent maturity and mental capacity of the child (including the need, in the case of children under the age of 14, to prove that they knew that what they were doing was seriously wrong and was deserving of punishment);

(c) the available alternatives to prosecution, and their efficacy;

(d) the sentencing options available to Courts dealing with child offenders if the prosecution was successful;

(e) the child's family circumstances, particularly whether or not the parents appear able and prepared to exercise effective discipline and control over the child;

(f) the child's antecedents, including the circumstances of any previous caution or conference and whether or not a less formal resolution would be inappropriate;

(g) whether a prosecution would be harmful or inappropriate, considering the child's personality, family and other circumstances; and

(h) the interest of the victim.

(ii) **Aged or Infirm Offenders**

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

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

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

(iii) **Peripheral Defendants**

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

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

(iv) **Sexual Offences**

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

(v) **Sexual Offences by Children**

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

A child should **not be prosecuted** for:-

(a) A sexual offence in which he or she is also the "**complainant**", as in the case of unlawful carnal knowledge or indecent dealing. The underage target of such activity cannot be a party to it, no matter how willing he or she is: R v Maroney [2002] Qd.R285 and Maroney v R (2003) 216 CLR 31.

(b) For sexual experimentation involving children of similar ages in consensual activity.

(vi) **Mental Illness**

- Mentally disordered people should **not** be prosecuted for **trivial** offences which pose no threat to the community.

- However, a prosecution may be warranted where there is a **risk of re-offending** by a repeat offender with no viable alternative to prosecution. Regard must be had to:-

(a) details of previous and present offences;

(b) the nature of the defendant's condition; and

(c) the likelihood of re-offending.

- In rare cases, continuation of the prosecution may so seriously aggravate a defendant's mental health that this outweighs factors in favour of the

prosecution. Where the matter would clearly proceed but for the mental deterioration, an independent assessment may be sought.

- The Director may **refer the matter** of a person's mental condition to the Mental Health Court pursuant to section 257 of the Mental Health Act 2000.

- Relevant issues should be brought to the Director's attention as soon as possible. The Director's discretion to refer will more likely be exercised in cases where:-

(i) either:-

- the defence are relying upon expert reports describing unfitness to plead, unsoundness of mind or, in the case of murder, diminished responsibility at the time of the offence; or

- there is otherwise significant evidence of unsoundness of mind or unfitness for trial; **and**

(ii) the matter has not previously been determined by the Mental Health Court; **and**

(iii) the defence has declined to refer the matter.

- Where the offence is "**disputed**" within the meaning of section 268 the Director will **not refer** the case unless there is an issue about fitness for trial.

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

(i) either:-

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

- the expert is uncertain as to fitness; **and**

(ii) the defence will not refer the matter to the Mental Health Court.

If the matter is not referred, consideration should be given to section 613 of the Criminal Code and *R* v *Wilson* [1997] QCA 423.

(vii) **Perjury during investigative hearings**

Where a witness has been compelled to give evidence under oath at an investigative hearing and the witness has committed perjury in the course of giving that evidence, it will generally not be in the public interest to prosecute the witness for the perjury if, the witness subsequently corrected the perjury and was otherwise reasonably considered by the Director, acting on the advice of the agency or agencies involved in the investigation, to have been fully truthful in giving evidence about all matters material to the investigation.

6. CAPACITY OF CHILD OFFENDERS – between 10 & 14 years (see also Guideline 5(v) Child Offenders)

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

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

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

7. COMPETENCY OF CHILD WITNESSES

(i) No witness **under the age of 5 years** should be called to testify on any matter of substance unless the competency of the witness has been confirmed in a report by an appropriately qualified expert.

(ii) A brief of evidence relying upon the evidence of witnesses less than 5 years of age will not be complete until the prosecution has received such a report.

(iii) Where a child witness is 5 years of age or older, that witness may be requested to undergo assessment as to his or her competency if that is considered necessary or desirable by the case lawyer responsible for the prosecution and the approval has been obtained from each of a Crown Prosecutor, Practice Manager and Assistant Director.

(iv) Generally, there should only be **one** assessment undertaken. A second assessment must not be sought without the **written consent** of a Practice Manager, Assistant Director, Director or Deputy Director. Consent will only be given in exceptional circumstances.

(v) A child witness is not an exhibit. The prosecution should not consent to a private assessment on behalf of the defence.

8. SECTION 93 A TRANSCRIPTS

In every case where the evidence includes a pre-recorded interview with a child witness, a transcript of the interview must be included in the police brief provided for the committal hearing.

9. AFFECTED CHILD WITNESSES

All cases involving affected child witnesses must be treated with priority to enable the pre recording of the child's evidence at the earliest date possible.

When notice is given by the defence of an intention to plead guilty, the case lawyer should seek an early arraignment, or at least obtain written confirmation of the defence instructions. This is to avoid loosing an opportunity to expedite the child's evidence should the anticipated plea does not eventuate.

Where a plea of guilty has been indicated:-

- Prosecution staff should not delay presentation of an indictment or defer the listing of a preliminary hearing for any significant period unless the accused has already pleaded guilty or has provided written confirmation of his or intention to plead guilty;

- Prosecution staff should not consent to the delisting of a preliminary hearing without an arraignment or written confirmation of the accused person's instructions to plead guilty.

10. INDICTMENTS

(i) Indictments can only be signed by crown prosecutors or those holding a commission to prosecute.

(ii) An indictment must not be signed and presented unless it is intended to prosecute the accused for the offence or offences charged in it.

(iii) Charges must adequately and appropriately reflect the criminality that can reasonably be proven.

(iv) Holding indictments must not be presented.

(v) It is not appropriate to overcharge to provide scope for plea negotiation.

(vi) Substantive charges are to be preferred to conspiracy where possible. However conspiracy may be the only appropriate charge in view of the facts and the need to reflect the overall criminality of the conduct alleged. Such a prosecution cannot commence without the consent of the Attorney-General. An application should only be made through the Director or Deputy Director.

(vii) In all cases prosecutors must guard against the risk of an unduly lengthy or complex trial (obviously there will be cases where complexity and length are unavoidable).

(viii) The indictment should be presented as soon as reasonably practicable, but **no later than 4 months** from the committal for trial.

(ix) If the prosecutor responsible for the indictment is not in a position to present it within the 4 month period, the prosecutor should advise in writing the defence, the Legal Practice Manager and the Director or Deputy Director of the situation.

(x) No indictment can be presented after the 6 month time limit in section 590 of the Criminal Code, unless an extension of time has been obtained from the Court.

11. EX-OFFICIO INDICTMENTS – Section 560 of the Code

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

(a) the defence has consented in writing;

(b) the counts on indictment and the charges committed up are not substantially different in nature or seriousness; or

(c) the person accused has been committed for trial or sentence on some charges, and in the opinion of the **Legal Practice Manager** or principal crown prosecutor, the evidence is such that some substantially different offence should be charged;

(d) in all other circumstances (namely where a matter has **not** been committed to a higher court on any charge and the defence has **not**

(e) consented) an ex-officio indictment should not be presented without consultation with *the Director or Deputy Director*. The accused must be advised in writing when an ex-officio indictment is under consideration and, where appropriate, should be given an opportunity to make a submission. A decision whether or not to present an ex-officio indictment should be made within **2 months** of the matter coming to the attention of the officer.

12. EX-OFFICIO SENTENCES

The ODPP will not, unless there are exceptional circumstances, present an ex-officio indictment for the purpose of sentence.

The ordinary procedure will be to have the matter committed for sentence pursuant to Part 5 of the *Justices Act 1886* (which includes registry committals in s. 114).

It will be necessary for a defendant who is applying for the presentation of an ex officio indictment to demonstrate what the exceptional circumstances are. An example would be where a defendant has a matter on indictment before a court for sentence and wants other offences to be dealt with at the same time.

The consent of the Director or Deputy Director/s must be obtained before an ex-officio indictment is presented for sentence.

If the Director or Deputy Director/s is satisfied that there are exceptional circumstances and consents to the presentation of an ex-officio indictment for sentence then the following protocol applies:

(i) A defendant may request an ex-officio indictment.

(ii) The use of ex-officio indictments for pleas of guilty is intended to fast-track uncontested matters.

(iii) The case lawyer must prepare an indictment, schedule of facts and draft certificate of readiness within one month of the receipt of the full ex-officio material.

(iv) The ex-officio brief is not a full brief of evidence. The following material will be required:-

(a) any police interviews with the defendant;

(b) a set of any photographs taken;

(c) any witness statements that have already been taken;

(d) for violent or sexual offences:-

- a statement from the victim;
- the victim's contact details for victim liaison; and
- if applicable, a medical statement documenting the injuries and treatment undertaken;

(e) for drug offences, an analyst's certificate, if applicable;

(f) a schedule of any property loss of damage including:-

- the complainant's name and address;
- the type of property;
- the value of the loss or damage;
- the value of any insurance payout; and
- any recovery or other reparation.

(g) a schedule of any property confiscated, detailing the current location of the property and the property number. The value of the property should also be included where the charges involve the unlawful production or supply of dangerous drugs and the property is to be forfeited pursuant to the Drugs Misuse Act 1986.

(v) Prosecutors must be vigilant to ensure that the indictment prepared fairly reflects the gravity of the allegations made against the defendant.

(vi) If summary charges are more appropriate, the case should be referred back to the Magistrates Court (see Guideline 11).

(vii) Where it appears that police have undercharged a defendant, the defence and police should be advised in writing as soon as possible. The preparation of the ex-officio prosecution should not proceed without reconfirmation of the defence request for it.

(viii) The ODPP *may decline* to proceed by way of ex-officio process where:-

(a) *The defence disputes significant facts:* A request for an ex-officio indictment signifies acceptance of all of the material allegations set out in the police QP9 forms. If there is any relevant dispute about those matters, the appropriate resolution will generally be through a committal hearing.

(b) *Police material is outstanding:* Police should forward the ex-officio brief within 14 days of its request.

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

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

(c) *The certificate of readiness is not returned:* The matter should be sent back for committal if the defence have not returned the certificate of readiness within 4 weeks of the delivery of the draft indictment and schedule of facts.

(d) A full brief of evidence has already been prepared.

(ix) The ODPP *will decline* to proceed by way of ex officio indictment for certain categories of cases involving violence or sexual offending, or co-offending.

(a) *Serious Sexual or Violent Offending*

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

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

(b) *Co-Accused*

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

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

- the accused is proceeding pursuant to section 13A of the Penalties and Sentences Act; and
- there is a clear and uncontested factual basis for the plea.

In other cases, the co-operative co-offender may choose to proceed by full hand-up, enter an early plea and be committed for sentence.

(x) PRESENTATION OF INDICTMENTS

If the accused is in custody the indictment should be presented to the court before the day of arraignment to allow the accused to be produced.

If the accused is not in custody, other than in exceptional circumstances, ex-officio indictments should not be presented to the Court until the day of arraignment. In most cases a failure to appear can be adequately dealt with by a warrant in the Magistrates Court at the next mention date.

(xi) BRISBANE

The following are additional instructions that apply only to Brisbane matters. They are in response to Magistrates Court Practice Direction No 3 of 2004, which operates in Brisbane only.

(a) *Drug Offences*:-

Consent for an ex officio indictment involving drug offences should not be given unless:-

(i) an analyst's certificate (where required) has issued prior to the committal mention date; and

(ii) the quantity exceeds the schedule amount (where relevant).

Where the quantity of drug is less than the schedule amount, the case should be dealt with summarily by the next mention date.

(b) *Complex or Difficult Matters*: Extension of Time

Particular attention should be paid to cases involving:-

- large or complex fraud or property offences;
- serious sexual offences;
- offences of serious violence.

In those cases or any other case: if it is apparent from the QP9 that 8 weeks is not likely to afford sufficient time to meet all requirements for arraignment, the legal officer should seek an extension of time. This is to be done promptly by letter through the Legal Practice Manager to the Chief Magistrate pursuant to paragraph 5 of Practice Direction No 3 0f 2004. The application should set out detailed reasons.

If the extension of time is refused, the request for ex-officio indictment must also be refused and the matter returned for committal hearing.

(c) *Timely Arraignment*

If the defence have returned the signed certificate of readiness and obtained a sentence date, the indictment should be presented and the accused arraigned before the date listed for committal mention or full hand up.

Early arraignment is necessary to avoid the matter being forced on for hearing in the Magistrates Court pursuant to the Magistrates Court Practice Direction No 3 of 2004.

If the accused pleads guilty the charges can then be discontinued at the next mention date in the Magistrates Court, regardless of whether the matter proceeds to sentence at that time or is adjourned.

If the accused fails to appear for arraignment or indicates that he or she will plead not guilty, the indictment should not be presented.

13. SUMMARY CHARGES

Where the same criminal act could be charged either as a summary or an indictable offence, the **summary offence should be preferred** unless either:-

(a) The conduct could not be adequately punished other than as an indictable offence having regard to:-

- the maximum penalty of the summary charge;
- the circumstances of the offence; and
- the antecedents of the offender; or

(b) There is some relevant connection between the commission of the offence and some other offence punishable only on indictment, which would allow the two offences to be tried together.

Prosecutors should be aware of the maximum penalties provided by section 552H of the Code for indictable offences dealt with summarily.

Below is a schedule of summary charges which will often be more appropriate than the indictable counter-part:-

Indictable Offence	Possible Summary Charge and Maximum Penalty
Threatening violence in the night: Section 75(2) Criminal Code	(a) Assault: Section 335 Code (3 years imprisonment) (b) Public Nuisance: Section 6 Summary Offences Act 2005 (6 months imprisonment)

Indictable Offence	Possible Summary Charge and Maximum Penalty
Threats: Section 359 Code	Public Nuisance: Section 6 Summary Offences Act (6 months imprisonment)
Stalking (simpliciter only): Section 359E Code	Section 85ZE Crimes Act 1914 (Commonwealth) Improper use of telecommunications device (1 year imprisonment)
Unlawful use of motor vehicle (simpliciter): Section 408A Code	Unlawful use of motor vehicle: Section 25 Summary Offences Act (12 months imprisonment and compensation)
Stealing: Section 391 Code	Sections 5 & 6 Regulatory Offences Act (value to $150 wholesale)
Stealing: Section 391 Code Receiving: Section 433 Code Burglary: Section 419 Code Break and enter: Section 421 Code	Unlawful possession of suspected stolen property: Section 16 Summary Offences Act (1 year imprisonment) Unlawfully gathering in a building/structure: Section 12 Summary Offences Act (6 months imprisonment) Unlawfully entering farming land: Section 13 Summary Offences Act (6 months imprisonment) Possession of tainted property: Section 92 Crimes (Confiscation) Act (2 years imprisonment)
Fraud: Section 408C Code	False advertisements (births, deaths etc): Section 21 Summary Offences Act (6 months imprisonment) Imposition: Section 22 Summary Offences Act (1 year imprisonment)

Indictable Offence	Possible Summary Charge and Maximum Penalty
Production of a dangerous drug: Section 8 Drugs Misuse Act	Possession of things used/for use in connection with a crime: Section 10 Drugs Misuse Act

"Commercial purpose"

Where a person is alleged to have unlawfully possessed a dangerous drug in contravention of s.9 of the *Drugs Misuse Act 1986*, the Crown should allege a commercial purpose when, on the whole of the evidence, it can reasonably be inferred that the defendant did not possess the drug for their own personal use: see s 14 of the *Drugs Misuse Act 1986*.

There will be cases where "personal use" can include small-scale social sharing in circumstances where there is limited scope and repetition, but this principle should not be allowed to be used to mask cases where the "sharing" spills over into the generation of financial or equivalent advantage.

Care must be taken when considering whether a summary prosecution is appropriate for an **assault upon a police officer** who is acting in the execution of his duty. Prosecutors should note the following:-

(a) Serious injuries to police:-

A charge involving grievous bodily harm or wounding, under sections 317, 320 or 323 of the Code, can only proceed on indictment. There is no election.

Serious injuries which fall short of a grievous bodily harm or wounding should be charged as assault occasioning bodily harm under section 339(3) or serious assault under section 340(b) of the Code. The prosecution should proceed upon indictment.

(b) In company of weapons used:-

A charge of assault occasioning bodily harm with a circumstance of aggravation under section 339(3) can only proceed on indictment, subject to the defendant's election.

(c) Spitting, biting, needle stick injury:-

The prosecution should elect to proceed upon indictment where the assault involves spitting, biting or a needle stick injury **if** the circumstances raise a real risk of the police officer contracting an infectious disease.

(d) Other cases:-

In all other cases an assessment should be made as to whether the conduct could be adequately punished upon summary prosecution. Generally, a scuffle which results in no more than minor injuries should be dealt with summarily. However, in every case all of the circumstances should be taken into account, including the nature of the assault, its context, and the criminal history of the accused.

A charge of assault on a police officer should be prosecuted on indictment if it would otherwise be joined with other criminal charges which are proceeding on indictment.

Where the prosecution has the election to proceed with an indictable offence summarily, that offence must be dealt with summarily unless:

(a) The conduct could not be adequately punished other than upon indictment having regard to:

- The maximum penalty able to be imposed summarily;
- The circumstances of the offence; and
- The antecedents of the offender

(b) The interests of justice require that it be dealt with upon indictment having regard to:

- The exceptional circumstances of the offence/s;
- The nature and complexity of the legal or factual issues involved;
- The case involves an important point of law or is of general importance

(c) There is some relevant connection between the commission of the offence and some other offence punishable only on indictment, which would allow the two offences to be tried together (see section 552D Criminal Code).

PROSECUTION OF DERM MATTERS

There are a number of statutes administered by the Department of Environment and Resource Management (DERM) containing offences (DERM offences) which may be prosecuted on indictment.

This guideline for the ODPP sets out:

- a list of indictable offences;
- the power for the prosecution to elect jurisdiction;
- the power for the accused to elect jurisdiction;
- the power for the magistrate to determine jurisdiction;

- the test to be applied by the prosecution;
- the procedure to be followed in determining prosecution election; and
- the procedure to be followed when the accused is committed for trial or consents to the presentation of an ex-officio indictment.

Indictable offences:

The following offences may be dealt with summarily or upon indictment:

Act	Section	Offence
Environmental Protection Act 1994	289(1) and (2)	False or misleading information about environmental audits
	357(5)	Contravention of Court order (transitional program)
	361(1)	Wilful contravention of environmental protection order
	430(2)(a)	Wilful contravention of an environmental Authority
	432(1)	Wilful contravention of a transitional environmental program
	434(1)	Wilful contravention of a site management plan
	435(1)	Wilful contravention of a development condition
	435A(1)	Wilful contravention of a standard environmental condition
	437(1)	Wilful unlawful serious environmental harm
	438(1)	Wilful unlawful material environmental harm
	480(1)	False, Misleading or incomplete documents
	481(1)(a) and (b)	False or misleading information

	505(12)	Contravention of a restraint order
	506(6)	Contravention of an interim order
	511(4)	Contravention of an enforcement order
Aboriginal Cultural Heritage Act 2003	23(1)	Breach of cultural heritage duty of care
	24(1)	Unlawful harm to cultural heritage
	25(1)	Prohibited excavation, relocation and taking away
	26(1)	Unlawful possession of cultural heritage
	32(6)	Contravene a stop order
Coastal Protection and Management Act 1995	59(6)	Failure to comply with a coastal protection notice
	60(5)	Failure to comply with a tidal works notice
	148(12)	Contravention of a restraint order
	149(6)	Contravention of an interim order
Marine Parks Act 2004	48(1)	Non-compliance with a temporary restricted access area declaration
	50(1)	Wilful serious unlawful environmental harm to a marine park
	114(4)	Contravention of an enforcement order or an interim enforcement
Nature Conservation Act 1992	62(1)	Taking of a cultural or natural resource of a protected area
	88(2)	Taking a protected animal (class 1 offence)

	88(5)	Keeping or using a protected animal (class 1 offence)
	88B(1)	Keeping or using native wildlife reasonably suspected to have been unlawfully taken (class 1 offence)
	89(1)	Taking a protected plant (class 1 offence)
	89(4)	Keeping or using a protected plant (class 1 offence)
	91(1)	Release of international and prohibited wildlife
	93(4)	Taking of protected wildlife in a protected area (by Aborigine or Torres Strait Islander)
	97(2)	Taking a native wildlife in areas of major interest and critical habitat
	109	Contravention of interim conservation order
	173G(4)	Contravention of enforcement order or interim enforcement order
Torres Straight Islander Cultural Heritage Act 2003	23(1)	Breach of cultural heritage duty of care
	24(1)	Unlawful harm to cultural heritage
	25(1)	Prohibited excavation, relocation and taking away
	26(1)	Unlawful possession of cultural heritage
	32(6)	Contravene a stop order
Water Act 2000	585(1)	Failure to act honestly
	585(3)	Improper use of information

	585(4)	Improper use of position
	617(12)	Knowingly make a false or misleading statement
	619(4)	Providing a document containing false or misleading or incomplete information
Wet Tropics World Heritage Protection and Management Act 1993	56(1)	Prohibited acts

Jurisdiction – Prosecution Election:

The prosecution's authority to elect jurisdiction in relation to DERM offences is contained in the following legislation:

Act	Section
Environmental Protection Act 1994	495(1)
Aboriginal Cultural Heritage Act 2003	156(2)
Coastal Protection and Management Act 1995	145(1)
Marine Parks Act 2004	131(1)
Nature Conservation Act 1992	165(1)
Torres Straight Islander Cultural Heritage Act 2003	156(2)
Water Act 2000	931(2)
Wet Tropics World Heritage Protection and Management Act 1993	82(1)

Jurisdiction – Accused Election / Magistrate Determination:

Even if the prosecution elects summary jurisdiction, the magistrate must not determine the matter if the accused requests that the charge/s be indicted, or if the magistrate believes that the charge/s should be indicted. The statutory basis for this accused election or magistrate determination is contained in the following legislation:

Act	Section
Environmental Protection Act 1994	495(2)
Aboriginal Cultural Heritage Act 2003	156(5)
Coastal Protection and Management Act 1995	145(2)
Marine Parks Act 2004	131(2)
Nature Conservation Act 1992	165(2)
Torres Straight Islander Cultural Heritage Act 2003	156(5)
Water Act 2000	931(5)
Wet Tropics World Heritage Protection and Management Act 1993	82(6)

The Test - Prosecution Election:

Summary jurisdiction will be preferred unless the conduct could not be adequately punished other than on indictment having regard to:

- the likely sentence in the event of a conviction on indictment;

- the maximum penalty a magistrate may impose if the offence is dealt with summarily;

- the antecedents of the alleged offender; and

- the circumstances of the alleged offence, including:
    - the harm or risk of harm to the environment caused by the offence;
    - the culpability of the offender;
    - whether a comparable offender has been dealt with for a similar offence on indictment; and
    - any other mitigating or aggravating circumstance.

Procedure – Prosecution Election:

If the DERM considers that a charge should be indicted, they must seek advice from the Director of Public Prosecutions (DPP). The request for advice *must* be made before the election of jurisdiction and *should* be made before charges are laid if possible.

The DERM request for advice from the DPP should include:

1. the brief of evidence;
2. the DERM's legal advice on the evidence, prospects of conviction and likely sentence;
3. any time limit within which summary charges must be charged; and

4. any other relevant material.

The DPP must respond to a request for advice from the DERM within one month of the receipt of this material.

Where DPP advises that summary jurisdiction should be elected:

If the DPP disagrees with the DERM's preference for prosecution on indictment, the DPP will explain their reasons in writing. Upon receipt of these written reasons the DERM must elect summary jurisdiction.

Where DPP advises that charges should be indicted:

If the DPP advice is to proceed on indictment the DERM will prosecute the committal hearing.

Procedure – Accused Election / Magistrate Determination:

Where the accused elects to be prosecuted upon an indictment or a magistrate considers that the charge should be indicted, the DERM will conduct the committal hearing.

If a Matter is Committed for Trial on Indictment:

Within one month of the committal hearing the brief of evidence, depositions from the committal, along with any other material the DERM considers relevant should be provided to the Director.

- The Director will decide, after consulting with the nominee of the DERM, whether an indictment should be presented.

- If an indictment is to be presented, it will be presented by the ODPP.

- The Director, in consultation with the DERM, will brief counsel to appear for the prosecution.

- The DERM will be responsible for all costs of the prosecution.

- The prosecution cannot be discontinued without the approval of the Director.

14. CHARGES REQUIRING DIRECTOR'S CONSENT

(i) Section 229B Maintaining an Unlawful Sexual Relationship with a Child

(a) For a charge under section 229B of the Code there must be sufficient credible evidence of continuity ie: evidence of the

maintenance of a relationship rather than isolated acts of indecency.

(b) Consent will **not** be given where:-

- the sexual contact is confined to **isolated** episodes; or
- the period of offending is **brief** and can be **adequately particularised** by discrete counts on the indictment.

(ii) **Chapter 42A Secret Commissions**

The burden of proof is reversed under section 442M (2) of the Criminal Code. Consent to prosecute secret commissions pursuant to section 442M (3) will **not** be given where:-

- the breach is minor or technical only: section 442J; or
- an accused holds a certificate under section 442L.

15. CONSENT TO CALLING A WITNESS AT COMMITTAL

The calling of a witness to give oral evidence or be cross-examined in a committal proceeding has, since the passing of the *Civil and Criminal Jurisdiction and Modernisation Amendment Act 2010*, been restricted.

In circumstances where the prosecutor has a discretion to agree to the calling of a witness to give oral evidence or be cross-examined at a committal hearing pursuant to sections 110A (5) & 110B (5) of the *Justices Act 1886*, the prosecutor must not consent to the calling of the witness unless there are substantial reasons why it is in the interest of justice that the person should attend to give oral evidence.

In determining if there are substantial reasons the prosecutor should consider:

1. The nature of the offence;
2. The nature of the witness, including-
    - Whether the evidence can be confined to an identified and limited issue;
    - Whether the witness is the best person to give the evidence concerning that issue; and
    - The purpose for which the evidence is to be used.

Finally, the cross-examination must be restricted to the area that gives rise to the interest of justice and is not at large.

16. CHARGE NEGOTIATIONS

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

Early negotiations (within this guideline) are therefore encouraged.

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

(i) **The Principles**

- The prosecution must always proceed on those charges which fairly represent the conduct that the Crown can **reasonably prove**;

- A plea of guilty will only be accepted if, after an analysis of all of the facts, it is in the general **public interest**.

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

(a) the fresh charge adequately reflects the essential criminality of the conduct and provides sufficient scope for sentencing;

(b) the prosecution evidence is deficient in some material way;

(c) the saving of a trial compares favourably to the likely outcome of a trial; or

(d) sparing the victim the ordeal of a trial compares favourably with the likely outcome of a trial.

A comparison of likely outcomes must take account of the principles set out in *R* v *D* [1996] 1 QdR 363, which limits punishment to the offence the subject of conviction and incidental minor offences which are inextricably bound up with it.

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

(ii) **Prohibited Pleas**

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

(a) it does not adequately reflect the gravity of the provable conduct of the accused;

(b) it would require the prosecution to distort evidence; or

(c) the accused maintains his or her innocence.

(iii) **Scope for Charge Negotiations**

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

(a) where the prosecution has to choose between a number of appropriate alternative charges. This occurs when the one episode of criminal conduct may constitute a number of overlapping but alternative charges;

(b) where new reliable evidence reduces the Crown case; or

(c) where the accused offers to plead to a specific count or an alternative count in an indictment and to give evidence against a co-offender. The acceptability of this will depend upon the importance of such evidence to the Crown case, and more importantly, its credibility in light of corroboration and the level of culpability of the accused as against the co-offenders;

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

(iv) **File Note**

- Any offer by the defence, the supporting argument and the date it was made should be clearly noted on the file.

- The decision and the reasons for it should also be recorded and signed.

- When an offer has been rejected, it should not be later accepted before consultation with the Directorate.

(v) **Delegation**

(a) In cases of **homicide, attempted murder or special sensitivity, notoriety or complexity** an offer should not be accepted without consultation with the Director or Deputy Director. The matter need not be referred unless the Legal Practice Manager or allocated prosecutor sees merit in the offer.

(b) In **less serious cases** the decision to accept an offer may be made after consultation with a senior crown prosecutor or above. If the matter has not been allocated to a crown prosecutor, the decision should fall to the Legal Practice Manager.

(vi) **Consultation**

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

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

17. SUBMISSIONS

(i) Any submission from the defence must be dealt with expeditiously;

(ii) If the matter is complex or sensitive, the defence should be asked to put the submission in writing;

(iii) Submissions that a charge should be discontinued or reduced should be measured by the two tiered test for prosecuting, set out in Guideline 4; and

(iv) Unless there are special circumstances, a submission to discontinue because of the triviality of the offence should be refused if the accused has elected trial on indictment for a charge that could have been dealt with in the Magistrates Court.

18. CASE REVIEW

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

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

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

- Admissibility of the evidence - the likelihood that key evidence might be excluded may substantially affect the decision whether to proceed or not.
- The reliability of any confession.
- The liability of any witness: is exaggeration, poor memory or bias apparent?

• Has the witness a motive to distort the truth?

• What impression is the witness likely to make? How is the witness likely to stand-up to cross-examination? Are there matters which might properly be put to the witness by the defence to undermine his or her credibility? Does the witness suffer from any disability which is likely to affect his or her credibility (for example: poor eyesight in an eye witness).

• If identity is an issue, the cogency and reliability of the identification evidence.

• Any conflict between eyewitnesses: does it go beyond what reasonably might be expected and hence thereby materially weaken the case?

• If there is no conflict between eyewitnesses, is there cause for suspicion that a false story may have been concocted?

• Are all necessary witnesses available and competent to give evidence?

19. TERMINATION OF A PROSECUTION BY ODPP

(i) A decision to discontinue a prosecution or to substantially reduce charges on the basis of *insufficient evidence* cannot be made without consultation with a Legal Practice Manager. If, and only if, it is not reasonably practicable to consult with the Legal Practice Manager, the consultation may be with a principal crown prosecutor, in lieu of the Legal Practice Manager.

(ii) Where the charges involve ***homicide, attempted murder*** or matters of ***public notoriety*** or high ***sensitivity***, the consultation must then extend further to the Director or Deputy Director. The case lawyer should provide a detailed memorandum setting out all relevant issues. The Director may assemble a consultative committee to meet with case lawyer and consider the matter. The consultative committee shall comprise the Director, Deputy Director and two senior principal prosecutors.

(iii) In all cases the person consulted should make appropriate notes on the file.

(iv) A decision to discontinue on ***public policy grounds*** should only be made by the Director.

If, after an examination of the brief, a case lawyer or crown prosecutor is of the opinion there are matters which call into question the public interest in prosecuting, the lawyer, through the relevant Legal Practice Manager, should advise the Director of the reasons for such opinion.

(v) Once a determination has been made to discontinue a prosecution, the decision will not be reversed unless:-

- significant fresh evidence has been produced that was not previously available for consideration or the decision was obtained by fraud; and

- in all the circumstances, it is in the interests of justice that the matter be reviewed.

20. CONSULTATION WITH POLICE

The relevant case lawyer or prosecutor must advise the arresting officer whenever the ODPP is considering whether or not to discontinue a prosecution or to substantially reduce charges.

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

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

If neither the arresting officer, nor the corroborator, is available for consultation within a reasonable time, the attempts to contact them should be recorded.
After a decision has been made, the case lawyer must notify the arresting officer as soon as possible.

21. CONSULTATION WITH VICTIMS

The relevant case lawyer or prosecutor must also seek the views of any victim whenever serious consideration is given to discontinuing a prosecution for violence or sexual offences (see Guideline 24).

The views of the victim must be recorded and properly considered prior to any final decision, but those views alone are not determinative. It is the public, not any individual interest that must be served (see Guideline 4).

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

22. REASONS FOR DECISIONS

(i) Reasons for decisions made in the course of prosecutions may be disclosed by the **Director** to persons outside of the ODPP.

(ii) The disclosure of reasons is generally consistent with the open and accountable operations of the ODPP.

(iii) But reasons will only be given when the inquirer has a legitimate interest in the matter and it is otherwise appropriate to do so.

- Reasons for not prosecuting must be given to the **victims** of crime;

- A legitimate interest includes the interest of the media in the open dispensing of justice where previous proceedings have been **public**.

(iv) Where a decision has been made not to prosecute prior to any public proceeding, reasons may be given by the Director. However, where it would mean publishing material too weak to justify a prosecution, any explanation should be brief.

(v) Reasons will **not** be given in any case where to do so would cause unjustifiable harm to a victim, a witness or an accused or would significantly prejudice the administration of justice.

23. DIRECTED VERDICT/NOLLE PROSEQUI

If the trial has not commenced, ordinarily, a nolle prosequi should be entered to discontinue the proceedings.
In the absence of special circumstances, once the trial has commenced, it is desirable that it end by verdict of the jury. Where a prima facie case has not been established, this will be achieved by a directed verdict.

Special circumstances which may justify a nolle prosequi instead of a directed verdict will include circumstances where:-

(a) without fault on the part of the prosecution, it is believed there cannot be a fair determination of the issues: for example: where a ruling of law may be the subject of a Reference;

(b) a prosecution of a serious offence has failed because of some minor technicality that is curable; or

(c) matters emerge during the hearing that cause the Director or Deputy Director to advise that it is not in the public interest to continue the hearing.

24. VICTIMS

This guideline applies to a victim as defined in section 5 of the Victims of Crime Assistance Act 2009 (VOCA). This is a person who has suffered harm either:-

(a) because a crime is committed against the person; or

(b) because the person is a family member or dependant of a person who has died or suffered harm because a crime is committed against that person; or

(c) as a direct result of intervening to help a person who has died or suffered harm because a crime is committed against that person.

(i) General Guidelines for Dealing with Victims

The ODPP has the following obligations to victims:-

(a) To treat a victim with courtesy, compassion, respect and dignity;

(b) To take into account and to treat a victim in a way that is responsive to the particular needs of the victim, including, his or her age, sex or gender identity, race or indigenous background, cultural or linguistic diversity, sexuality, impairment or religious belief;

(c) To assist in the return, as soon as possible, of a victim's property which has been held as evidence or as part of an investigation.

- Where appropriate, an application must be made under Rule 55 or 100 of the Criminal Practice Rules 1999 for an order for the disposal of any exhibit in the trial or appeal.

- Where a victim's property is in the custody of the Director of Public Prosecutions and is not required for use in any further prosecution or other investigation, it should be returned to the victim as soon as is reasonably possible.

- If the victim inquires about property believed to be in the possession of the police, the victim is to be directed to the investigating police officer. The victim should also be told of section 39 of the Justices Act 1886, which empowers a court to order the return of property in certain circumstances.

(d) To seek all necessary protection from violence and intimidation by a person accused of a crime against the victim.

- Where a **bail** application is made and there is some prospect that if released, the defendant, would endanger the safety or welfare of the victim of the offence or be likely to interfere with a witness or obstruct the course of justice, all reasonable effort must be made to investigate whether there is an **unacceptable risk** of future harm or interference. Where sufficient evidence of risk has been obtained, bail should be opposed under section 16(1) (a) (ii) or 16(3) of the Bail Act 1980. If it has not been practicable in the time available to obtain sufficient information to oppose bail on that ground, an adjournment of the bail hearing should be sought so that the evidence can be obtained.

- Where bail has been granted over the objection of the prosecution and there is a firm risk of serious harm to any person, a report must be given as soon as possible to the Director for consideration of an appeal or review.

- When a person has been convicted of an offence involving **domestic violence** and there is reason to believe that the complainant remains at significant risk the prosecutor should apply to the Court for a **domestic violence order** pursuant to section 30 of the Domestic Violence (Family Protection) Act 1989. If there is a current domestic violence order and a person has been convicted of an offence in breach of it, section 30 requires the Court to consider whether there ought to be changes to it. A copy of the **original order** is therefore required. If at the time of sentencing a prosecutor is aware of the existence of such an order he or she must supply the Court with a copy of it.

- If at the conclusion of a prosecution for **stalking** there is a significant risk of unwanted contact continuing, the prosecutor should apply for a restraining order under section 248F of the Code. This is so even if there is an acquittal or discontinuance.

(e) To assist in protecting a **victim's privacy** as far as possible and to take into account the victim's welfare at all appropriate stages.

Protection for victims of violence

- The Court has power to suppress the home address or contact address of a victim of **personal violence** (except where those details are relevant to a fact in issue). An application should be made under section 695A of the Criminal Code where appropriate.

Closed Court for sex offences

- The Court must be closed during the testimony of any victim in a sexual offence case: see section 5 Criminal Law (Sexual Offences) Act 1978; section 21A Evidence Act 1977

- The Prosecutor must be vigilant to ensure this is done.

- In the pre-hearing conference, the victim must be asked whether he or she wants a support person. If the victim is a child, he or she should also be asked whether he or she wants his or her parent(s) or guardian(s) to be present. If the victim does not want such person(s) present, then information as to why this is so should be obtained and file noted. If the victim does want such person(s) present, the prosecutor must make the application to the Court.

Anonymity for victims of sex offences

- In the initial contact, the victim must be told of the prohibition of publishing any particulars likely to identify the victim. The Court may permit some publication only if good and sufficient reason is shown.

- During criminal proceedings, the prosecutor should object to any application for publication unless the victim wants to be identified. In such a case, the prosecutor is to assist the complainant to apply for an order to allow publication.

Improper questions

- Prosecutors have a responsibility to protect witnesses, particularly youthful witnesses, against threatening, unfair or unduly repetitive cross-examination by making proper objection: see section 21 of the Evidence Act 1977.

- Questions should be framed in language that the witness understands.

- Prosecutors need to be particularly sensitive to the manner of questioning children and intellectually disabled witnesses.

- The difficulties faced by some Aboriginal witnesses in giving evidence are well catalogued in the government publication "*Aboriginal English in the Courts – a handbook"* and the Queensland Justice Commission's report *"Aboriginal Witnesses in Queensland's Criminal Courts"* of June 1996.

- Generally, questions about the sexual activities of a complainant of sexual offences will be irrelevant and inadmissible. They cannot be

asked without leave of the Court. The only basis for leave is "*substantial relevance to the facts in issue or a proper matter for cross-examination as to credit*".

Special witness

- Special witnesses under section 21A of the Evidence Act are children under the age of 16 and those witnesses likely to be disadvantaged because of intellectual impairment or cultural differences.

- The provision gives the Court a discretion to modify the way in which the evidence of a special witness is taken.

- The prosecutor must, before the proceeding is begun, acquaint himself or herself with the needs of the special witness, and at the hearing, before the special witness is called, make an application to the court for such orders under section 21A, subsection (2) as the circumstances seem to require.

- The prosecutor must apply for an order under section 21A, subsections (2)(c) and (4), for evidence via closed circuit television where the witness is:-

(a) 11 years old or younger; and

(b) to testify in relation to violent or sexual offences.

The application must be made in every such case except where the child would prefer to give evidence in the courtroom.

Information for Victims

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

(a) Every victim who is a witness must be advised of the trial process and his or her role as a prosecution witness.

(b) Where appropriate, victims must also be provided with access to information about:-

- victim-offender conferencing services;

- available welfare, health, counselling, medical and legal help responsive to their needs;

- Victims Assist Queensland, for advice and support in relation to financial assistance under the Victims of Crime Assistance Act 2009

- Penalties and Sentences Act 1992 - section 9(2) which requires the court, in sentencing an offender, to have regard to any damage, injury or loss caused by the offender; section 35 relating to the court's power to order the offender to pay compensation; and

- Juvenile Justice Act 1992 - section 192 relating to the power of the court to order that a child make restitution or pay compensation.

(c) In the case of a complainant of a sexual offence, the victim should be told:-

- that the Court will be closed during his or her testimony;

- that there is a general prohibition against publicly identifying particulars of the complainant.

(d) As soon as a case lawyer has been allocated to the case any victims involved must be advised of:-

- the identity of the person charged (except if a juvenile);

- the charges upon which the person has been charged by police, or, as appropriate, the charges upon which the person has been committed for trial or for sentence;

- the identity and contact details of the case lawyer; and

- the circumstances in which the charges against the defendant may be varied or dropped;

(e) If requested by the victim, the following information about the progress of the case will be given, including:-

- details about relevant court processes, and when the victim may attend a relevant court proceeding, subject to any court order;

- details of the availability of diversionary programs in relation to the crime;

- notice of a decision to substantially change a charge, or not to continue with a charge, or accept a plea of guilty to a lesser charge;

- notice of the outcome of a proceeding relating to the crime, including any sentence imposed and the outcome of any appeal.

A victim who is a witness for the prosecution in the trial for the crime committed against the victim is to be informed about the trial process and the victim's role as a witness for the prosecution if not already informed by another prosecuting agency.

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

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

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

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

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

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

(ii) Pre-trial Conference

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

(iii) Victim Impact Statements

At the pre-trial conference, if it has not already been done, the victim is to be informed that a Victim Impact Statement may be tendered at any sentence proceeding. The victim is, however, to be informed of the limits of such a Statement (see Guideline 45(iv)).

The victim is also to be advised that he or she might be required to go into the witness box to swear to the truth of the contents and may be cross-examined if the defence challenges anything in the Victim Impact Statement.

(iv) Sentencing

Pursuant to section 15 of VOCA, the prosecutor should inform the sentencing Court of appropriate details of the harm caused to the victim by the crime, but in deciding what details are not appropriate the prosecutor may have regard to the victim's wishes.

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

- Penalties and Sentences Act 1992 - section 9(2) (c), which states that a court, in sentencing an offender, must have regard to the nature and seriousness of the offence including harm done to the victim.

- Juvenile Justice Act 1992 - section 109(1) (g), which states that in sentencing a child a court must have regard to any impact of the offence on the victim.

The above are the minimum requirements in respect of victims (see also Guideline 45).

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

- To ensure, so far as it is possible, that victims and prosecution witnesses proceeding to court, at court and while leaving court, are protected against unwanted contact occurring between such person and the accused or anyone associated with the accused. The assistance of police in this regard might be necessary.

- In any case where a substantial reduction or discontinuance of charge is being considered, the victim and the charging police officer should be contacted and their views taken into account before a final determination is made (see Guidelines 19 and 20).

- In any case where it is desirable in the interests of the victim and in the interests of justice that the victim and some witnesses, particularly experts, are conferred with before a hearing, a conference should be held.

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

25. ADVICE TO POLICE

(i) **Appropriate References**

In circumstance where the Police have charged a person with an offence the Police may refer the matter to the Director for advice as to whether the prosecution should proceed only when:-

The Deputy Commissioner considers that the evidence is sufficient to support the charge, but the circumstances are such that there is a reasonable prospect that the ODPP may later exercise the discretion not to prosecute on public interest grounds.

(ii) **Form of Request and Advice**

(a) Advice will not be given without a **full brief of evidence**;

(b) All requests for advice must be answered within one month of receipt of the police material;

(c) Any **time limit** must be included in the referral; and

(d) As a general rule, both the police request for advice and the ODPP advice must be in **writing**.

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

(iii) **Nature of ODPP Advice**

Whether police follow the advice as is a matter for them. The referral of the matter for advice and any advice given is to be treated as confidential.

The ODPP will not advise the police to discontinue an investigation. Where the material provided by police is incomplete or further

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

(iv) **Source of Advice**

The advice must be provided by the **Director** in all matters.

26. HYPNOSIS AND REGRESSION THERAPY

This guideline concerns the evidence of any witness who has undergone regression therapy or hypnosis, including eye movement and desensitisation reprocessing. Evidence in breach of this guideline is likely to be excluded from trial.

Where it is apparent to an investigating officer that a witness has undergone counselling or therapy prior to the provision of his or her witness statement, the officer should inquire as to the nature of the therapy. If hypnosis has been involved the witness's evidence cannot be used unless the following conditions are satisfied:-

(1) (i) The victim **had recalled the evidence prior to any such therapy**; and

(ii) his or her prior memory can be established independently; or

(2) Where a "recollection" of the witness has **emerged for the first time during or after hypnosis**:-

1. The hypnotically induced evidence must be limited to matters which the witness has recalled and related prior to the hypnosis – referred to as "the original recollection". In other words evidence will not be tendered by the Crown where its subject matter was recalled for the first time under hypnosis or thereafter. The effect of that restriction is that no detail recalled for the first time under hypnosis or thereafter will be advanced as evidence.

2. The substance of the original recollection must have been preserved in written, audio or video recorded form.

3. The hypnosis must have been conducted with the following procedures:-

(a) the witness gave informed consent to the hypnosis;

(b) the hypnosis was performed by a person who is experienced in its use and who is independent of the police, the prosecution and the accused;

(c) the witness's original recollection and other information supplied to the hypnotist concerning the subject matter of the hypnosis was recorded in writing in advance of the hypnosis; and

(d) the hypnosis was performed in the absence of police, the prosecution and the accused, but was video recorded.

The fact that a witness has been hypnotised will be disclosed by the prosecution to the defence, and all relevant transcripts and information provided to the defence well in advance of trial in order to enable the defence to have the assistance of their own expert witnesses in relation to that material.

Prosecutors will not seek to tender such evidence unless the guidelines are met. Police officers should therefore make the relevant inquiries before progressing a prosecution.

27. BAIL APPLICATIONS

(i) Section 9 of the Bail Act 1980 prima facie confers upon any unconvicted person who is brought before a Court the right to a grant of bail.

(ii) Pursuant to section 16, the Court's power to refuse bail has three principal aspects:-

- the risk of re-offending;
- the risk of interfering with witnesses; and
- the risk of absconding.

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

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

(iii) Where a **bail** application is made and there is some prospect that if released, the defendant would endanger the safety or welfare of the victim of the offence or be likely to interfere with a witness or obstruct the course of justice, all reasonable effort must be made to investigate whether there is an **unacceptable risk** of future harm or interference.

Where sufficient evidence of risk has been obtained, bail should be opposed under section 16(1) (a) (ii) or 16(3) of the Bail Act 1980. If it has not been practicable in the time available to obtain sufficient information to oppose bail on that ground, an adjournment of the bail hearing should be sought so that the evidence can be obtained.

(iv) Where bail has been granted over the objection of the prosecution and there is a firm risk of serious harm to any person, a report must be given as soon as possible to the Director for consideration of an appeal or review.

(v) **Reversal of Onus of Proof**

Prosecutors should note that pursuant to section 16(3) of the Bail Act 1980, the defendant must show cause why his or her detention is not justified where there is a breach of the Bail Act, a weapon has been used or the alleged offence has been committed while the defendant was at large in respect of an earlier arrest.

(vi) **Reporting Conditions**

Reporting conditions are imposed to minimise the risk of absconding.

Some bail orders allow for the removal of a reporting condition upon the consent of the Director. Consent will not be given merely because of the inconvenience of reporting.

Where it is considered that the request has merit, it should be referred to a Legal Practice Manager, or above.

(vii) **Overseas Travel**

Staff should not consent to a condition of bail allowing overseas travel without the written authority of a Legal Practice Manager, the Director or the Deputy Director.

28. DISCLOSURE: Sections 590AB to 590AX of the Criminal Code

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

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

However, the address, telephone number and business address of a witness should be omitted from statements provided to the defence,

except where those details are material to the facts of the case: *section 590AP*. In the case of an anonymity certificate, the identity of the protected witness shall not be disclosed without order of the court: sections 21F and 21I of the Evidence Act 1977.

(i) **Criminal Histories**

The criminal history of the accused must be disclosed.

Where a prosecutor knows that a Crown witness has a criminal history, it should be disclosed to the defence.

Where the defence in a joint trial wishes to know the criminal history of a co-accused or witness it should be provided.

The prosecution must, on request, give the accused person a copy of the Criminal History of a proposed witness for the prosecution in the possession of the prosecution.

(ii) **Immunity**

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

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

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

(iii) **Exculpatory Information**

If a prosecutor knows of a person who can give evidence that may be exculpatory, but forms the view on reasonable grounds that the person is not credible, the prosecutor is not obliged to call that witness (see Guideline 38).

The prosecutor must however disclose to the defence:-

(a) the person's statement, if there is one, or

(b) the nature of the information:-

- the identity of the person who possesses it; and
- when known, the whereabouts of the person.

These details should be disclosed in good time.

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

(iv) **Inconsistent Statement**

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

(v) **Particulars**

Particulars of sexual offences or offences of violence about which an "affected child witness" is to testify, must be disclosed if requested: section *590AJ(2)(a)*.

(vi) **Sensitive Evidence: *sections 590AF; 590AO; 590AX***

Sensitive evidence is that which contains an image of a person which is obscene or indecent or would otherwise violate the person's privacy. It will include video taped interviews with complainants of sexual offences containing accounts of sexual activity, pornography, child computer games, police photographs of naked complainants and autopsy photographs.

Sensitive evidence:-

- **Must not** be copied, other than for a legitimate purpose connected with a proceeding;

- **Must not** be given to the defence without a Court order;

- **Must be** made available for viewing by the defence upon a request if, the evidence is relevant to either the prosecution or defence case;

- **May be** made available for analysis by an appropriately qualified expert (for the prosecution or defence). Such release must first be authorised by the Legal Practice Manager, upon such conditions as thought appropriate.

(vii) **Original Evidence*: section 590AS***

Original exhibits must be made available for viewing by the defence upon request. Conditions to safeguard the integrity of the exhibits must be settled by the Legal Practice Manager.

(viii) **Public Interest Exception: *section 590AQ***

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

- the need to protect the integrity of the administration of justice and ongoing investigations;

- the need to prevent risk to life or personal safety; or

- public interest immunity, such as information likely to lead to the identity of an informer, or a matter affecting national security.

These circumstances will be rare and information should only be withheld with the approval of the Director. When this happens, the defence must be given written notice of the claim (see Notice of Public Interest Exemption).

(ix) **Committal Hearings**

All admissible evidence collected by the investigating police officers should be produced at committal proceedings, unless the evidence falls into one of the following categories:-

(a) it is unlikely to influence the result of the committal proceedings and it is contrary to the public interest to disclose it. (See paragraph 25 (viii) above);

(b) it is unlikely to influence the result of the committal proceedings and the person who can give the evidence is not reasonably available or his or her appearance would result in unusual expense or inconvenience or produce a risk of injury to his or her physical or mental health, provided a copy of any written statement containing the evidence in the possession of the prosecution is given to the defence;

(c) it would be unnecessary and repetitive in view of other evidence to be produced, provided a copy of any written statement containing the evidence in the possession of the prosecution is given to the defence;

(d) it is reasonably believed the production of the evidence would lead to a dishonest attempt to persuade the person who can give the evidence to change his or her story or not to attend the trial, or to an attempt to intimidate or injure any person;

(e) it is reasonably believed the evidence is untrue or so doubtful it ought to be tested upon cross-examination, provided the defence is given notice of the person who can give the evidence and such particulars of it as will allow the defence to make its own inquiries

regarding the evidence and reach a decision as to whether it will produce the evidence.

- Any doubt by the prosecutor as to whether the balance is in favour of, or against, the production of the evidence should be resolved in favour of production.

- Copies of written statements to be given to the defence including copies to be used for the purposes of an application under *section 110A* of the *Justices Act 1886*, are to be given so as to provide the defence with a reasonable opportunity to consider and to respond to the matters contained in them: they should be given at least 7 clear days before the commencement of the committal proceedings.

- In all cases where admissible evidence collected by the investigating police officers has not been produced at the committal proceedings, a note of what has occurred and why it occurred should be made by the person who made the decision and attached to the prosecution brief.

(x) **Legal Professional Advice**

Legal professional privilege will be claimed in respect of ODPP internal advices and legal advice given to the Attorney-General.

(xi) **Witness Conferences**

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

(a) an inconsistent statement on a material fact;

(b) an exculpatory statement; or

(c) further allegations.

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

(xii) **Disclosure Form**

The Disclosure Form must be fully completed and provided to the legal representatives or the accused at his bail address or remand centre no later than:-

- 14 days before the committal hearing;

- again, within 28 days of the presentation of indictment, or prior to the trial evidence, whichever is sooner.

The police brief must include a copy of the Disclosure Form furnished to the accused. The ODPP must update the police disclosure but need not duplicate it: *section 590AN.*

Responsibility for disclosure within ODPP rests with the case lawyer or prosecutor if one has been allocated to the matter.

(xiii) **Ongoing Obligation of Disclosure**

When new and relevant evidence becomes available to the prosecution after the Disclosure Forms have been published, that new evidence should be disclosed as soon as practicable. The duty of disclosure of exculpatory information continues after conviction until the death of the convicted person: *section 590AL.*

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

Post conviction disclosure relates to reliable evidence that may raise reasonable doubt about guilt: *section 590AD.*

(xiv) **Confidentiality**

- It is an offence to disclose confidential ODPP information other than in accordance with the duty of disclosure or as otherwise permitted by legislation: *section 24A of the Director of Public Prosecutions Act 1984.*

- Inappropriate disclosure of confidential information may affect the safety or privacy of individuals, compromise ongoing investigations or undermine confidence in the office. This means sensitive material must be carefully secured. It must not be left unattended in Court, in cars or in any place where it could be accessed by unauthorised people.

29. QUEENSLAND COLLEGE OF TEACHERS AND COMMISSION FOR CHILDREN AND YOUNG PEOPLE

(Queensland College of Teachers Act) 2005 imposes a duty upon prosecuting agencies to advise the Queensland College of Teachers of the progress of any prosecution of an **indictable offence** against a person who is, or is thought to have been, a registered **teacher**.

Section 318 of the Commission for Children and Young People Act 2000 imposes a similar duty where the person is listed under section 310.

- In the case of committal proceedings or indictable offences dealt with summarily through police prosecutors, the obligation falls on the Commissioner of Police.

- In all other cases, the responsibility rests with the ODPP case lawyer.

30. UNREPRESENTED ACCUSED

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

(i) Staff should seek to avoid any contact with the accused unless accompanied by a witness;

(ii) Full notes should be promptly made in respect of:-

- any oral communication;

- all information and materials provided to the accused; and

- any information or material provided by the accused.

(iii) Any admissions made to ODPP staff or any communication of concern should be recorded and mentioned in open court as soon as possible.

The prosecutor should **not** advise the accused about legal issues, evidence or the conduct of the defence. But he or she should be alert to the judge's duty to do what is necessary to ensure that the unrepresented accused has a fair trial. This will include advising the accused of his or her right to a voir dire to challenge the admissibility of a confession see *McPherson* v *R* (1981) 147 CLR 512.

An accused cannot personally cross-examine children under 16, intellectually impaired witnesses, or the victim of a sexual or violent offence: see sections 21L to 21S of the Evidence Act 1977. Where the accused is unrepresented and does not adduce evidence, the crown prosecutor (other than the Director) has no right to a final address*: section 619* of the Criminal Code; *R v Wilkie* CA No 255 of 1997.

31. JURY SELECTION

Selection of a jury is within the general discretion of the prosecutor. However, no attempt should be made to select a jury that is unrepresentative as to race, age, sex, economic or social background.

32. OPENING ADDRESS

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

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

33. PRISON INFORMANT/CO-OFFENDER

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

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

34. IMMUNITIES

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

The Attorney-General has the prerogative power to grant immunity from prosecution. The power is also granted pursuant to Section 7(1) *Attorney-General Act 1999*. The immunity will usually be in the form of a **use-derivative-use undertaking** (an undertaking not to use the witness's evidence in a nominated prosecution against the witness, either directly or indirectly, as evidence against the witness or to use

that evidence to obtain other evidence against the witness), but may also be an indemnity (complete protection for nominated offences). Protection in either form will be dependent upon the witness giving truthful evidence. It is a last resort only to be pursued when the interests of justice require it.

Any application should be through the Director or Deputy Director in the first instance so that advice may be furnished to the Attorney-General if requested.

The witness' statement must exist in some form before an application for immunity is made. The application can only be considered in respect of completed criminal conduct. Any form of immunity granted does not operate to cover future conduct.

The application must summarise:-

(i) the witness' attitude to testifying without immunity;

(ii) the witness' attitude to testifying with immunity;

(iii) the existing prosecution case against the accused (without immunity for the witness);

(iv) the evidence which the witness is capable of giving (including the significance of that evidence and independent support for its reliability);

(v) the involvement and culpability of the proposed witness;

(vi) public interest issues: including the comparative seriousness of the offending as between the accused and the witness; whether the witness could and should be prosecuted (e.g. what is the quality of the evidence admissible against the witness and the strength of any prosecution case against him or her); and

(vii) reasons why the applicant believes that the application should be granted.

The application must contain:-

(i) Notification of the date by which the decision of the Attorney-General is requested;

(ii) A full copy of the brief of evidence, by way of attachment to the application;

(iii) The name and full contact details of the applicant, including the rank and registration number of that person where the applicant is a member of a police service;

(iv) The endorsement by way of signature of the applicant at the end of the application;

(v) The name and contact details of a senior member of the organisation responsible for the making of the application who holds the opinion that the granting of the immunity is in the interests of justice. Where that organisation is a police service, that person must be of the rank of Superintendent or higher;

(vi) Details of all matters concerning the credibility of the witness that are or may be relevant to the determination of the application;

(vii) A copy of the record of all conversations held with the witness. Where that record is an electronic record, a full transcript of the conversation must also be supplied;

(viii) A copy of the record of all conversations held with the alleged principal offender or offenders. Where that record is an electronic record, a full transcript of the conversation must also be supplied; and

(ix) The full criminal history of each of the witness and the alleged principal offender or offenders from each State and territory of Australia by way of an attachment to the application. Where it is asserted that the witness or alleged principal offender or offenders do not have any prior criminal convictions in any one or more State or territory, that fact must be stated in the body of the application.

In addition to the application and the other materials required to be provided, there must also be supplied an affidavit sworn or affirmed by the applicant attesting to the following facts:

(i) That the brief of evidence that accompanies the application contains all statements and other information and materials that would be required to be provided so as to comply with the requirements of Chapter 61 Chapter Division 3 *Criminal Code* if the brief had been supplied to the alleged principal offender or offenders; and

(ii) That the contents of the application are true and correct and that there are no further matters known to the applicant which are or may be relevant to the determination of the application.

All applications and other materials must be received at least 42 clear days ("the prescribed period") prior to the day by which the decision of the Attorney-General is requested, unless exceptional circumstances exist.

Where the application or the accompanying material is considered to be deficient and more information is requested to be provided, that further material must be provided at least 42 clear days prior to the day by which the decision of the Attorney-General is requested, unless exceptional circumstances exist.

In either case, where it is suggested that exceptional circumstances exist, the applicant must provide an affidavit attesting to what those

circumstance are and justifying why they are said to be "exceptional". Whether the circumstances are exceptional will be a matter solely for the decision of the Director or Deputy Director, as the case may be.

If all the required materials are not received prior to the prescribed period, and exceptional circumstances do not exist, the ODPP may not be able to provide any advice requested by the Attorney-General in sufficient time to allow the application to be determined by the requested date.

35. SUBPOENAS

Where subpoenas are required all reasonable effort must be made to ensure that the service of those subpoenas gives the witnesses as much notice as possible of the dates the witnesses are required to attend court.

36. HOSPITAL WITNESSES

This guideline applies to medical witnesses employed by hospitals in the Brisbane district.

(i) All hospital witnesses (other than Government Medical Officers) are to be served with a **subpoena**;

(ii) All subpoenas are to be accompanied by the appropriate form letter;

(iii) The subpoena should be prepared and served with as much notice as reasonably possible;

(iv) Service of the subpoena is to be arranged through the Hospital Liaison Officer where appropriate or through the Arresting Officer otherwise;

(v) Such subpoenas are to be accompanied by the form letter addressed to the Liaison Officer or Investigating Officer requesting confirmation of the service.

(vi) A file "**bring up**" should be actioned 2 weeks from the date of the letter, if there is no response.

(vii) Where the ODPP is advised of the hospital witness's unavailability, the file should be referred to a Legal Practice Manager or a Crown Prosecutor for consideration as to whether the witness is essential or whether alternative arrangements can be made. Such advice should be given to the relevant workgroup clerk within a week, or sooner, depending upon the urgency of the listing.

(viii) If the witness is essential and alternative arrangements cannot be made, the matter should be listed immediately for mention in the appropriate Court.

37. OTHER MEDICAL WITNESSES

Pathologists and Government Medical Officers do not require a subpoena, but should be notified of trial listings by the relevant form letter.

Medical practitioners in private practice will require written notice of upcoming trials, with the maximum amount of notice. Generally they will not require a subpoena.

38. WITNESSES

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

The prosecutor should not call:-

- unchallenged evidence that is merely repetitious; or

- a witness who the prosecutor believes on reasonable grounds to be unreliable. The mere fact that a witness contradicts the Crown case will not constitute reasonable grounds.

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

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

39. EXPERT WITNESSES

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

40. INTERPRETERS

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

41. CROSS-EXAMINATION

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

(i) they are based on information reasonably assessed to be accurate; and

(ii) they are justified in the circumstances of the trial.

The Crown cannot split its case. Admissions relevant to a fact in issue during the Crown case ordinarily should not be introduced during cross-examination of the accused: R v Soma [2003] HCA 13.

42. ARGUMENT

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

43. ACCUSED'S RIGHT TO SILENCE

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

- Where an accused has declined to answer questions, no evidence of this should be led as part of the Crown case (it will be sufficient to lead that the accused was seen by police, arrested and charged);

- Where a defence has been raised for the first time at trial:-

(a) if the accused has previously exercised his right to silence, the prosecutor should **not** raise recent invention;

(b) if the accused has previously given a version, but omitted the facts relied upon for the defence at trial, it may be appropriate for the prosecutor to raise recent invention.

44. JURY

No police officer, prosecutor or officer of the ODPP should:-

(a) communicate outside of the trial with any person known to be a juror in a current trial;

(b) obtain or solicit any particulars of the private deliberations of a jury in any criminal trial;

(c) release personal particulars of any juror in a trial.

Any police officer, prosecutor or ODPP officer who becomes aware of a breach of the Jury Act should report it.

45. SENTENCE

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

(a) inform the court of all of the relevant circumstances of the case;

(b) provide an appropriate level of assistance on the sentencing range;

(c) identify relevant authorities and legislation; and

(d) protect the judge from appealable error.

(i) **Notice**

The arresting officer should be advised through the Pros Index of the date for sentence.

(ii) **Mitigation**

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

Section 590B of the Code requires that advance notice of expert evidence be given.

- Where the defence seeks to rely, in mitigation, on reports, references and/or other allegations of substance, the prosecutor must satisfy

himself or herself as to whether objection should be made, or challenge mounted, to the same;

- The prosecutor must provide reasonable notice to the defence of any witness or referee required for cross-examination;

- If the prosecutor has been given insufficient notice of the defence material or allegations to properly consider the Crown's position, an adjournment should be sought;

- Whether there has been insufficient notice will depend upon, inter alia:-

    - the seriousness of the offence;

    - the complexity of the new material;

    - its volume;

    - the significance of the new allegations;

    - the degree of divergence between the Crown and defence positions; and

    - availability of the means of checking the reliability of the material.

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

Bogus claims have been made in relation to things like illness, employment, military service, and past trauma. Where the prosecution has not had sufficient notice to verify assertions prior to sentence, the truth may be investigated after sentence. The sentence may be reopened under section 188 of the Penalties and Sentences Act to correct a substantial error of fact.

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

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

- In cases of serious violence or sexual offences, the **victim's statement** should be tendered.

- When available, any **doctor's description** of injuries and **photographs** of the injuries should also be put before the judge.

- The court should also be told of any period of hospitalisation, intensive care or long term difficulties.

(iv) **Victim Impact Statements**

Where a victim impact statement has been received by the prosecution, a copy should be provided to the defence upon receipt.

Inflammatory or inadmissible material, such as a reference to uncharged criminal conduct, should be blocked out of the victim impact statement. If the defence objects to the tender of the edited statement, the unobjectionable passages should be read into the record.

(v) **Criminal Histories**

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

The Police Information Bureau will not forward any interstate history unless it is expressly ordered. Judgment about whether an out of state search should be conducted will depend upon the nature of the present offences, and any information or suspicion that the offender had been interstate or in New Zealand. For example:-

- a trivial or minor property would not normally justify an interstate search;

- an offence of personal violence by a mature aged person who has lived interstate would suggest a full search should be made.

If information regarding offences in New Zealand is required, QPS will require the details of the current Queensland proceeding: ie: the Court, its district and the date of the hearing, as well as the current offence/s against the accused. No abbreviations will be accepted.

(vi) **Risk of Re-Offending Against Children**

When an offender has been convicted of a sexual offence against a child less than 16 years of age, a judge has the power to make an order under section 19 of the Criminal Law Amendment Act 1945, if there is a **substantial risk** of re-offending against a child. A section 19 order requires the offender to report his or her address and any change of address to police for a specified period.

Such orders allow police to know the offender's whereabouts during the specified period. It also means that the Attorney-General can act under section 20 to provide information to any person with a legitimate and sufficient interest.

Prosecutors should apply for an order under section 19(1) if a substantial risk of re-offending may be identified from the present offences either alone or in conjunction with the criminal history, expert evidence and other relevant facts.

(vii) **Transfer of Summary Matters**

Sections 651 and 652 of the Criminal Code limit the circumstances in which a summary matter can be transferred to a Superior Court for a plea of guilty.

Importantly, the **consent of the Crown** is required.

The ODPP should respond in writing **within 14 days** to any application for transfer.

The Registrar of a Magistrates Court will refuse an application for transfer without the written consent of the ODPP.

Prosecutors should not consent unless the summary matter has **some connection** to an indictable matter set down for sentence. Circumstances in which consent may be given include:-

(a) An evidentiary relationship: where the circumstances of the summary offence would be relevant and admissible at a trial for the indictable offence.

For example:-

- an offender has committed stealing or receiving offences and during the period of offending he is apprehended with tainted property;

- in the course of committing indictable drug offences (such as production or supply) the offender has committed simple offences such as possession of a utensil, possession of proceeds.

(b) The facts form part of the one incident:-

For example:-

- the unlawful use of a motor vehicle or dangerous driving committed whilst driving unlicensed;

- the offender is unlawfully using a motor vehicle to carry tainted property.

(c) The offences overlap or are based on the same facts:-

For example:-

- the unlawful use of a motor vehicle or dangerous driving committed whilst driving unlicensed;

- an indictable assault which also constitutes a breach of a domestic violence order;

- grievous bodily harm and a firearm offence relating to the weapon used to inflict the injury.

(d) The summary offences were committed in resistance to the investigation, or apprehension, of the offender for the indictable offence:-

For example:-

- upon interception for the indictable offence, the offender fails to provide his or her name, or gives a false name, or resists, obstructs or assaults police in the execution of their duty;

(e) There is a substantive period of remand custody that could not otherwise be taken into account under section 161 of the Penalties and Sentences Act:-

For example:-

(i) the indictable and summary offences were the subject of separate arrests; and

- the accused was remanded in custody on one type of offence and bail was subsequently cancelled on the other offence; and

(ii) the unrelated summary matters number 5 or less and would not normally justify a significant sentence of imprisonment on their own; and

(iii) the period of remand otherwise excluded from a declaration on sentence is greater than 8 weeks.

Consent to a transfer of summary matters **should not be given**:-

(a) where all offences could be dealt with in the Magistrates Court.

This relates to the situation where:-

- the defence have an election under section 552B of the Code in respect of the relevant indictable offence/s; and

- the relevant indictable offence/s could be adequately punished in the Magistrates Court.

(b) for a breach of the Bail Act. Such offences should be dealt with at the first appearance in the Magistrates Court.

Driving Offences

When the application relates to traffic offences, the following principles should be considered, subject to the above:-

- the Magistrates Court ordinarily will be the most appropriate Court to deal with summary traffic offences;

- it is important that significant or numerous traffic offences be dealt with in the Magistrates Court unless all such offences have strong and direct connection to an indictable offence; and

- traffic matters should be dealt with expeditiously.

(viii) **Serial Offending**

Upon a sentence of 5 or more offences a schedule of facts should be tendered.

(ix) **Section 189 Schedules**

Where an accused person is pleading guilty to a large number of offences, it may be appropriate to limit the indictment to no more than 25 counts, with a schedule of outstanding offences to be taken into account on sentence pursuant to section 189 of the *Penalties and Sentences Act 1993*; see also section 117 of the *Juvenile Justice Act 1992*. This is only possible where the accused is represented and agrees to the procedure.

(a) Defence Consent: If the prosecutor elects to proceed by section 189 schedule, the defence must be given a copy of:-

- the draft indictment;

- the draft section 189 schedule;

- evidence establishing the accused's guilt for the schedule offences (if not already supplied); and

- the draft consent form.

The matter can only proceed if the defence have filled out the consent form.

If the accused will plead to only some of the offences on the draft schedule, the prosecutor must consider whether the section 189 procedure is appropriate. If it is, a new draft schedule and form should be forwarded to the defence for approval.

A copy of the defence consent must be delivered to the Court, at least **the day before** sentence.

(b) Limitations of the Schedule: If a section 189 schedule is used, the following instructions apply:-

- the most serious offences must appear on the indictment, not in the schedule;

- generally, all serious indictable offences should be on the indictment, not the schedule: for example: *Vougdis* (1989) 41 A Crim R 125 at 132; *Morgan* (1993) 70 A Crim R 368 at 371;

- all dangerous driving offences must be on the indictment, not the schedule;

- the indictment should reflect the full period of offending;

- Supreme Court offences cannot be included in a schedule for the District or Children's Court;

- the schedule must not contain offences of a sexual or violent nature involving a victim under the VOCA legislation; and

- the schedule must not contain summary offences.

(x) **Financial Loss**

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

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

Compensation must have priority over the imposition of a fine: section 48(4) of the Penalties and Sentences Act 1993.

(xi) **Submissions on Penalty**

A prosecutor should not fetter the discretion of the Attorney-General to appeal against the inadequacy of a sentence.

While an undue concession by a crown prosecutor at the sentence hearing is not necessarily fatal to an appeal by the Attorney-General, it is a factor which strongly militates against such appeals. McPherson JA said in *R v Tricklebank ex-parte Attorney-General*:-

"The sentencing process cannot be expected to operate satisfactorily, in terms of either justice or efficiency, if arguments in support of adopting a particular sentencing option are not advanced at the hearing but deferred until appeal".

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

- Concessions for non custodial orders should not be made unless it is a clear case.

- In determining the appropriate range, prosecutors should have regard to the sentencing schedules, the appellate judgments of comparable cases, changes to the maximum penalties and sentencing trends.

- The most recent authorities will offer the most accurate guide.

46. REPORTING OF ADDRESS OF SEXUAL OFFENDERS AGAINST CHILDREN

(i) At any sentence proceeding in the District or Supreme Court which involves sexual offences against children, the prosecutor must consider whether an application for reporting under section 19(1) of the Criminal Law Amendment Act 1945 should be made.

(ii) If an order is sought, a draft order should be prepared with the duration of the reporting period left blank.

(iii) An order cannot be made unless the Court is satisfied a **substantial risk** exists that the offender will, after his or her release, re-offend against a child.

(iv) In assessing the risk, all relevant circumstances should be considered including:-

(a) the nature and circumstances of the present offence;

(b) the nature of any past criminal record; and

(c) any expert reports.

A reporting order will allow police to know the offender's whereabouts during the reporting period. It will also allow the Attorney-General to release information about the sexual offences to any person with a legitimate interest: section 20. This might include a potential employer or a neighbour.

47. YOUNG SEX OFFENDERS

The Griffith Adolescent Forensic Assessment and Treatment Centre is the joint venture of Griffith University (Schools of Criminology and Criminal Justice and Applied Psychology) and the Department of Families. Its objective is the rehabilitation of young sexual offenders.

To formulate a program of assessment and treatment, the Centre requires information about the offence. That information would, most conveniently, be available in the form of the statements or transcripts of interviews with complainant(s) and transcripts of interviews with the accused, where available.

The prosecutor should tender clean copies of such documents upon the conviction of a child for sexual offences. This is for all cases: whether the conviction is by plea or by jury.

This then allows the Court to control the sensitive information that may be released. Requests for such information should be directed to the Court rather than the ODPP.

If the Court requires a pre-sentence assessment, the Court can order that copies of relevant statements or interviews be forwarded to the Centre for that purpose.

If after sentence, the Department of Families makes a referral to the Centre as part of the rehabilitation program for a probation or first release order, it is again appropriate for the Court to determine what material, including Court transcripts, is released.

48. APPEALS AGAINST SENTENCE

In every case the prosecutor must assess the sufficiency of the sentence imposed. The transcript should be ordered and a report promptly provided to the Director if it is considered that either:-

(i) there are reasonable prospects for an Attorney-General's appeal; or

(ii) the case is likely to attract significant public interest.

- The report should be finalised within **2 weeks** of the sentence. It should follow the template, and include the transcript and sentencing remarks (if available), any medical or pre-sentence reports, the criminal history, victim impact statements and a copy of any judgments relied upon.

- The report should only be forwarded through the relevant Legal Practice Manager.

- An analysis of the prospects for an Attorney's appeal should have regard to the following principles:-

(a) An Attorney-General's appeal is exceptional: it is to establish and maintain adequate standards of punishment and to correct sentences that are so disproportionate to the gravity of the crime as to undermine confidence in the administration of justice;

(b) The Court of Appeal will not intervene unless there is:-

(i) a material error of fact;

(ii) a material error of law; or

(iii) the sentence is manifestly inadequate.

(c) The sentencing range for a particular offence is a matter on which reasonable minds might differ;

(d) For reasons of double jeopardy the Court of Appeal will be reluctant to replace a non custodial sentence with a term of actual imprisonment, particularly if the offender is young or if the proper period of imprisonment is short;

(e) The Court of Appeal will be reluctant to interfere where the judge was led into error by the prosecutor, or the judge was unassisted by the prosecutor; and

(f) The issue on appeal in relation to fact finding, will be whether it was reasonably open to the judge to find as he or she did.

49. RE-TRIALS

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

Relevant factors include:-

- the reason why the trial miscarried (for example: whether the jury was unable to agree or because of a prejudicial outburst by a key witness, etc);
- whether the situation is likely to arise again;
- the attitude of the complainant;
- the seriousness of the offence; and
- the cost of re-trial (to the community and the accused).

The prosecutor must provide a report to the Directorate after a **second hung jury**. A third trial will not be authorised except in special circumstances.

In **other** cases of mistrial, the prosecution should not continue after the **third trial**, unless authorised by the Director or Deputy Director.

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

50. DISTRICT COURT APPEALS

(i) The ODPP may represent police on appeals to the District Court from a summary hearing involving a prosecution under any of the following:-

- *Bail Act 1980*
- *Corrective Services Act 2000*
- *Crimes (Confiscation) Act 1989*
- *Criminal Code*
- *Domestic Violence (Family Protection) Act 1989*
- *Drugs Misuse Act 1986*
- *Peace and Good Behaviour Act 1982*
- *Police Powers and Responsibilities Act 2000*
- *Regulatory Offences Act 1985*
- *Transport Operation (Road Use Management) Act and related legislation*
- *Summary Offences Act 2005*
- *Weapons Act 1990*

(ii) The ODPP may decline to accept the brief if it involves any issue of constitutional law.

(iii) The ODPP will not appear in respect of any other District Court Appeals.

(iv) Costs

(a) The maximum award for costs under section 232A of the Justices Act is $1800.

(b) No order for costs can be made if the appeal relates to an indictable offence dealt with summarily (see section 232(4) (a) of the Justices Act) or if the relevant charge is under the Drugs Misuse Act 1986 (section 127).

(c) A prosecutor cannot settle any agreement as to costs without prior instructions from the Queensland Police Service Solicitor.

(v) Police Appeals

(a) A police request for an appeal against a summary hearing must be in writing and forwarded to the ODPP by the Queensland Police Service Solicitor. Direct requests from police officers, including police prosecutors, will not be considered but returned to the Queensland Police Service Solicitor.

(b) Such requests must be received at least **5 business days** before the expiration of the 1 calendar month time limit.

(c) The ODPP will then consider whether or not the proposed appeal has any merit. If so, the ODPP shall draft a notice of appeal. If not, the ODPP shall advise both the Queensland Police Service Solicitor and the officer initiating the request as to the reasons it was declined.

(d) Where a Notice of Appeal has been drafted, the ODPP shall send it to the Queensland Police Service Solicitor who shall then make the necessary arrangements for service of the notice of appeal on both the respondent and the clerk of the court. The ODPP shall also send a blank pro-forma recognisance with the notice of appeal to the Queensland Police Service Solicitor. It will then be the responsibility of the appellant police officer to enter into the recognisance within the applicable time limit.

(e) The appellant police officer shall then, as soon as possible, advise the ODPP in writing of the details of the steps taken as per paragraph (d) above, including:-

- the date and time the notice of appeal was served on the respondent;

- the place where service was effected;

- the method of service, ie: person service (for example, *"by personally handing a copy of the notice of appeal to …"*); and

- full details of the police officer effecting service including full name, station, rank and contact details.

The purpose of this information is so that the ODPP can attend to the drafting of an affidavit of service which will then be sent to the officer effecting service for execution and return. A copy of the recognisance must also be sent to the ODPP.

51. EXHIBITS

All non-documentary exhibits are to be kept in the custody of police. The ODPP must not retain any dangerous weapons or dangerous drugs.

52. DISPOSAL OF EXHIBITS

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

(a) the disposal of exhibits under rule 55 of the Criminal Practice Rules 1999; or

(b) the delivery of property in possession of the Court under section 685B of the Code.

Rule 55(2) of the Criminal Practice Rules 1999 allows for the return of exhibits to the tendering party in the event that no specific order is made.

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

(a) upon the determination of any appeal; or

(b) if no appeal, at the expiration of any appeal period;

to:-

(a) the rightful owners; or

(b) the investigating officer (in the case of weapons, dangerous drugs or illegal objects etc).

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

If the identity of the person lawfully entitled to it is unknown, the prosecutor should seek such order with respect to the property as to the Court seems just.

(iv) All other "exhibits" not tendered in Court should be returned to police.

53. CONVICTION BASED CONFISCATIONS

(i) Legal officers preparing matters for trial or sentence are required to address confiscation issues in preparation as per observations form and where confiscation action is appropriate, prepare a draft originating application and draft order and forward copies of those documents to the defence with a covering letter advising that it is proposed to seek confiscation orders against the accused at sentence.

(ii) If the benefit from the commission of the offence is more than $5,000, a real property and motor vehicle search is to be obtained by the legal officer preparing the case and the Confiscation Unit is to be consulted regarding the obtaining of a restraining order.

(iii) Crown Prosecutors (including private counsel briefed by the Director of Public Prosecutions) and legal officers are instructed **to apply** for appropriate confiscation orders **at sentence**.

(iv) Where a confiscation order is made at sentence, instructing clerks are required to forward a draft order, with the words "order as per draft" written on it, to the Confiscation Unit, as soon as possible.

(v) The forfeiture provisions of the Criminal Proceeds Confiscation Act 2002 are not to be used as a means of disposing of exhibits. As a general guide, only property approximated to be $100 or greater is to be so forfeited.

(vi) When property is not forfeited or returned to the accused, an order for disposal should be sought under section 685B of the Criminal Code or section 428 of the Police Powers and Responsibilities Act 2000 (see also Guideline 46).

(vii) No application should be brought after the sentence proceeding **unless** the property exceeds:-

- in the case of a forfeiture order – $1000
- in the case of a pecuniary penalty – $2000
- in the case of a restraining order – $5000

(viii) In the case of a restraining order, any **undertaking** as to costs or damages should be authorised by the Legal Practice Manager or Principal Crown Prosecutor. Where the property is income producing or there is a real risk that liability will be incurred, the commencement of the proceeding and the giving of the undertaking must be approved by the Director or Deputy Director.

(ix) Once a restraining order has been obtained, the **Confiscations Unit** must be included in any negotiations regarding confiscations orders.

(x) Negotiations should proceed on the understanding that there is a reversal of onus in respect of restrained property that has been acquired within 6 years of a serious criminal offence (maximum of 5 years or more imprisonment).

(xi) Similarly, under the Criminal Proceeds Confiscations Act 2002, property will be automatically forfeited 6 months after conviction for a serious drug offence unless the respondent demonstrates that property was lawfully acquired.

54. NON-CONVICTION BASED CONFISCATIONS – Chapter 2 Criminal Proceeds Confiscations Act 2002

(i) Where substantial assets are identified, the Confiscations Unit should be advised.

(ii) The ODPP is the solicitor on the record for the CMC. Instructions should therefore be obtained from the CMC throughout the course of the proceedings regarding any step in the action.

(iii) No matter is to be settled or finalised without first obtaining **instructions from the CMC**. No undertaking in support of a restraining order should be given without instructions.

(iv) Where possible, no more than one confiscation matter per day should be set down on the chamber list.

(v) Examinations are to be conducted before a Registrar of the Supreme Court. They are to be set down on Monday and Tuesday afternoons. If they will take longer than 2 hours, a letter should be sent to the Deputy

Registrar advising of the requirement to set the examination down for an extended date.

(vi) Directions as to the conduct of the matter are to be agreed upon between the parties, where possible.

(vii) Matters are not to be set down for trial unless they are ready to proceed.

(viii) All telephone conversations and attendances should be file noted.

(ix) Details of orders made and applications filed should be entered into the confiscations system as they occur.

55. LISTING PROCEDURES AND APPLICATIONS FOR INVESTIGATION

It is undesirable that a matter should be listed for hearing before a Judge who has previously heard an application to authorise any investigative step in the case, such as an application for a warrant under Part 4 of the Police Powers and Responsibilities Act 2000.

(i) The officer in charge of an investigation must forward to the ODPP with the brief of evidence:-

- a note to the prosecutor setting out the nature of any application, when it was made and the name of the Judge who heard it; and

- a copy of any warrant or authority, if obtained.

(ii) The ODPP should submit to the listing Judge that it would not be suitable to list the trial before the Judge who heard the application.

(iii) Investigators should be mindful of the fact that there is only one Supreme Court Judge resident in each of Cairns, Townsville and Rockhampton. Where any resulting trial is likely to be held in one of those Courts, the investigative application should be made to a Judge in Brisbane or in a district not served by the Judge in whose Court the case might be tried.

56. MEDIA

(i) Public servants are not permitted to make public comment in their professional capacity without approval from the Director-General of the Department.

(ii) Section 24 A of the Director of Public Prosecutions Act imposes a duty of confidentiality.

(iii) There is no prohibition against confirming facts already on the public record. Indeed the principle of open justice and the desirability of accurate reporting would support this. But there is no obligation to provide information to the media.

(iv) Staff may confirm:-

- information given in open court; or
- the terms of charges on an indictment that has been presented (but not the name of any protected complainant).

(v) Matters which **should not be discussed** with the media, include:-

- the likely outcome of proceedings;
- the intended approach of the prosecution (for example: discontinuance, ex-officio indictment, appeal/reference);
- the correctness or otherwise of any judicial decision;
- any part of the trial which was conducted in the absence of the jury;
- the name or identifying particulars of any juvenile offender unless authorised: see Juvenile Justice Act 1992;
- the name or identifying particulars of a complainant of a sexual offence;
- the contact details for any victim or lay witness;
- any details which would breach the protection given to informants under section 13A of the Penalties and Sentences Act 1993; and
- details of any person who carries some personal risk: for example: informants: section 120 of the Drug Misuse Act 1986.

(vi) The media should not be given copies or access to tapes of any recorded interviews, re-enactments, demonstrations or identifications.

(vii) The media should not be given any medical, psychological or psychiatric reports on offenders or victims.

57. RELEASE OF DEPOSITIONS

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

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

58. LEGISLATIVE RESTRICTIONS ON PUBLICATION

The Criminal Law (Sexual Offences) Act 1978 (CLSOA) prohibits publication of the name of the accused in two ways – one is for the protection of the accused and the other is for the protection of the complainant.

Other prohibitions on naming offenders are contained in the Juvenile Justice Act 1992 (JJA) and the Child Protection Act 1999 (CPA).

ODPP staff should be aware of the statutory restrictions on publication.

(i) **Protection for the Accused**

- Persons accused of a prescribed sexual offence (ie: **rape**, **attempted rape**, **assault with intent to commit rape** and **sexual assault**) cannot have their name or identifying details published until after being committed. This protection **does not apply to sexual offences generally**. Persons charged with incest, indecent dealing or sodomy are **not protected** unless they fall within the protection afforded to complainants.

- Specifically, under section 7 of the CLSOA, any report made or published concerning an examination of witnesses (ie: the committal) in relation to a **prescribed sexual offence**, other than an exempted report (see section 8) shall not reveal the name, address, school or place of employment of a defendant or any other particular likely to lead to the identification of the defendant unless the Magistrate conducting the committal "for good and sufficient reason shown" orders to the contrary.

The protection ends once the person is committed for trial.

- An accused is also protected under section 10(3) of the Act, which prohibits the making of a statement or representation revealing identifying particulars (other than in a report concerning a

committal or trial), **before the defendant is committed for trial** upon the charge. There are some exceptions, set out in section 11.

- **Juvenile accused** are protected from being identified by section 62 of the JJA. No "identifying matter" (name, address, school, or place of employment or any other particular likely to lead to the identification of the child charged, or any photo or other visual representation of the child or of any person that is likely to identify the child charged) can be published about a criminal proceeding. "Criminal proceeding" should be taken to include the process of a person being charged.

(ii) **Protection for the Complainant**

- Accused persons may also benefit from the protection afforded to complainants in sexual offences, which protection extends indefinitely. This will usually occur when there is a relationship between the accused and the complainant.

- Section 6 of the CLSOA prohibits the making or publishing of any report concerning a committal or trial, other than an exempted report, which reveals the name, address, school or place of employment of a complainant, **or any other particular likely to lead to the identification of the complainant**, unless the Court "for good and sufficient reason shown" orders to the contrary.

- Section 10 protects the complainant from publication at any other time, even if no-one is actually charged with an offence.

This protection **is not restricted to prescribed sexual offences**.

- Child witnesses **in any proceeding** in a Court are also protected under section 193 of the CPA.

- For offences of a sexual nature, if a child is a witness or the complainant, a report of the proceeding must not disclose prohibited matter relating to the child, without the Court's express authorisation. "Prohibited matter" means the child's name, address, school or place of employment, **or other particular likely to lead to the child's identification**, or any photo or film of the child or of any person that is likely to lead to the child's identification.

- For any other offences, the Court may order that any report not include any prohibited matter relating to a child witness or complainant.

- The accused may benefit from these provisions if identifying the adult would inevitably identify the child.

59. CONFIDENTIALITY

ODPP has obligations in respect of confidentiality (section 24A of the Director of Public Prosecutions Act 1994) and privacy (Queensland Government policy).

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

(i) the release of information to **complainants** to meet VOCA obligations, as set out in guidelines;

(ii) the release of information to **police** as required or investigative, prosecution and consultative processes; and

(iii) the duty of full and early disclosure of the prosecution case to the **defence**.

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

Internal memoranda should not be released in any circumstances without prior approval.

Further information on privacy can be accessed from the Department's website www.justice.qld.gov.au or contact the Privacy Unit on (07) 3247 5474.

Director's Guidelines – current as at 7 October 2011

A W MOYNIHAN SC
DIRECTOR OF PUBLIC PROSECUTIONS

fair ▪ independent ▪ dynamic ▪ professional

Office of the Director of Public Prosecutions
Annual Report 2010 – 2011
www.justice.qld.gov.au/odpp