

# OFFICIAL

## Guideline Number 15

### THE ODPP BAR LIST AND THE BRIEFING OF THE INDEPENDENT BAR BY THE ODPP

Issued: 10 October 2023

#### INTRODUCTION

The Office of the Director of Public Prosecutions (ODPP) in South Australia has a policy of briefing criminal trial work to members of the Independent Bar who are suitably qualified to undertake such work. The purpose of this Guideline is to set out the procedure and policy governing briefing out by the ODPP and the ODPP's expectations of those members of the Independent Bar who are briefed.

This Guideline will be reviewed from time to time and republished as necessary to ensure it remains appropriate and effective. This Guideline does not apply to decisions made to brief members of the Independent Bar in relation to matters that do not form part of the ordinary conduct of a criminal trial and sentencing.

#### POLICY

The ODPP will endeavour to conduct as much of its counsel work as possible in-house.

The ODPP will brief members of the Independent Bar where:

- (a) in-house prosecutors are unavailable, or
- (b) the matter requires expertise or experience not available in-house, or
- (c) to avoid any situation of conflict and related ramifications.

Save in exceptional circumstances, the ODPP will only brief members of the Independent Bar who have been accepted onto the "ODPP Bar List". In briefing members of the Independent Bar who are on the ODPP Bar List, the ODPP will endeavour to brief a wide range of suitably qualified and experienced counsel. Further, consistent with the Law Council of Australia's *Equitable Briefing Policy*, the ODPP will endeavour to brief or select women barristers with relevant seniority and expertise, experience or interest in the criminal law, for at least 30% of all briefs and at least 30% of the value of all brief fees.

#### MATTERS TO BE BRIEFED TO THE INDEPENDENT BAR

In determining which matters will be retained in-house and which matters will be briefed to the Independent Bar, the following criteria will apply:

##### 1. Factual and Legal Complexity

Ordinarily, matters of significant factual and legal complexity will be retained in-house and will only be briefed in the event that there are special circumstances.

##### 2. Victim sensitivity

Any special needs or requirements of the victim, the victim's family, or of the prosecution witnesses more generally, will be taken into account.

## OFFICIAL

### **3. Type of Offence**

Ordinarily, trials involving the most serious criminal offences will be retained in-house and will only be briefed in special circumstances.

### **4. Length of Trial**

Ordinarily, trials listed for in excess of 7 days will be retained in-house.

### **5. Venue of the Trial**

Ordinarily, matters listed for trial on circuit will be retained in-house.

### **6. The Public Interest**

Ordinarily, matters of significant public interest or sensitivity will be retained in-house.

### **7. Expertise Required**

If a trial requires expertise not available in house but available at the Independent Bar this will weigh heavily in favour of briefing out.

### **8. Other matters of relevance**

Any other matter of relevance.

## **THE ODPP BAR LIST**

The ODPP is committed to transparency in the conduct of external briefing. As mentioned, in accordance with this Guideline the ODPP may brief counsel on the ODPP Bar List.

Members of the Independent Bar who wish to be considered for admission to the ODPP Bar List should write to the Director expressing their interest in being admitted to the ODPP Bar List, setting out their experience in the conduct of criminal trials, and enclosing a current CV and practising certificate.

Members of the Independent Bar who have been briefed to conduct criminal trials in the twelve months immediately preceding the issue of this Guideline will automatically be included in the ODPP Bar List and will remain on the list until they request to be removed or are removed in accordance with this Guideline.

The ODPP Bar List will be maintained by the ODPP Allocations Clerk.

On behalf of the Director, the ODPP Allocations Committee will consider all letters received from members of the Independent Bar wishing to be admitted to the ODPP Bar List and advise the Director accordingly. The Director will write to a member of the Independent Bar who has sought admission to the ODPP Bar List advising them of whether they have been admitted to the list. The ODPP will brief from the ODPP Bar List save in exceptional circumstances.

It is mandatory that the members of the Independent Bar who are admitted to the ODPP Bar List adhere to the ODPP Statement of Prosecution Policy and Guidelines as published from time to time, and the statutory, common law, and professional duties that apply to prosecutors

## OFFICIAL

(including all duties and obligations imposed by the Victims of Crime Act 2001 (SA)) in addition to the professional duties and obligations that apply to practitioners appearing as counsel.

The Director may remove a member of the Independent Bar from the ODPP Bar List for cause. If a member of the Independent Bar is removed from the ODPP Bar List the Director shall write to them informing them of the fact. No member of the Independent Bar may be removed from the ODPP Bar List without cause and without them having the opportunity to respond to the reasons for removal and any answer thereto being considered before removal is effected.

### **MONITORING THE PERFORMANCE OF INDEPENDENT COUNSEL BRIEFED BY THE ODPP**

It is expected that Independent Counsel briefed will meet the highest standards of the profession when undertaking prosecution work on instruction from the ODPP.

It is expected that Independent Counsel briefed will at all times act in accordance with the relevant law, practice directions and the intent of the ODPP Statement of Prosecution Policy and Guidelines and any policies issued from time to time by the Director. In addition, as indicated above, Independent Counsel briefed must discharge the duties of a prosecutor imposed by the common law, statute and professional conduct rules to the highest standard.

The performance of Independent Counsel briefed will be monitored as necessary through an examination of briefs after completion of the trial, and, if necessary, by direct observation in court and feedback from stakeholders including judicial officers.

It is expected that all Independent Counsel briefed will provide a report at the conclusion of the trial or matter, setting out:

- (a) the outcome.
- (b) an explanation for the outcome.
- (c) difficulties encountered in presenting the case for the prosecution.
- (d) the likelihood of any appeal and the anticipated issues arising on appeal.
- (e) in the case of an acquittal, what if any action the Director might consider in the way of appeal.
- (f) systemic issues or oversights in the investigation or conduct of the matter by the ODPP that the Director may wish to address.
- (g) positive feedback that the Director may wish to pass on.

Independent Counsel briefed should bear in mind that their report is a public record.

### **INSTRUCTIONS MORE GENERALLY**

A letter of instruction will accompany the brief. If the instructions are inadequate, or unforeseen exigencies arise, Independent Counsel should seek instructions from the SAES1 Prosecutor directly responsible for managing the matter, the contact details of whom shall be included in the letter of instruction. In the event that the manager is unavailable, Independent Counsel may seek instructions from the Executive Managing Prosecutor (Ms Lisa Dunlop), the Chief Crown Prosecutor (Mr Jim Pearce KC), the Deputy Director or the Director. Any instructions given should be recorded in the brief in writing by Independent Counsel and confirmed in writing by the ODPP Executive who provided the instructions. The ODPP Executive's instructions must also be saved on the ODPP electronic file to which the brief relates.

### **THE ODPP ONLINE GUIDE**

## OFFICIAL

Independent Counsel briefed will not be given access to the ODPP Online Guide (an internal legal database). Independent Counsel may, however, request the latest material on the guide relating to a legal issue arising in the conduct of the brief or that it is anticipated will arise.

### **COMPLAINTS / CONCERNS**

Should Independent Counsel briefed have any concerns or complaint about a matter briefed or its conduct that is of significance to the operation of the ODPP, Counsel should write to the Director in confidence.

The Director will consider every concern or complaint and advise Counsel of the action to be taken, if any. Nothing written above should be understood as intending in any way to undermine Independent Counsel's professional obligations regarding unprofessional or unlawful conduct on the part of a practitioner.

### **WITNESS ASSISTANCE TEAM**

The letter of instruction will include the name and contact details of any ODPP Witness Assistance Officer involved with the victim or witnesses.

### **THE INVESTIGATING OFFICER**

The letter of instruction will include the name and contact details of the member of the South Australia police with responsibility for the investigation to which the brief relates.

### **CONFERENCE**

Shortly after accepting the brief, Independent Counsel briefed will be contacted by the ODPP solicitor with conduct of the related file for the purposes of arranging a conference, if required. The purpose of the conference is to brief counsel orally on the matter, its history, and any concerns or issues relevant to its prosecution.

In addition, the conference may be used to introduce counsel to the investigating officer and any witness assistance officer.



.....  
M G Hinton KC  
Director of Public Prosecutions

10 October 2023