



Director of Public Prosecutions South Australia

# Statement of Prosecution Policy & Guidelines



**Government of South Australia**

Director of Public Prosecutions



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# Statement of Prosecution Policy & Guidelines

October 2014

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# INTRODUCTION

The Office of the Director of Public Prosecutions was established in 1992 to provide an effective, fair and independent criminal prosecution service for the people of South Australia. Since that time all major criminal prosecutions have been conducted by the Office in Adelaide and in the country areas of Port Augusta and Mount Gambier.

The Office is committed to the highest ethical and professional standards and strives to achieve the most effective and appropriate criminal prosecutions. It is integral to the process that all members of the Office adopt and implement the same set of values and standards when evaluating charges and conducting prosecutions.

The Prosecution Policy was first issued upon the establishment of the Office in 1992 and since that time has been under review. Given recent amendments to legislation and the fact that the policy was last published in 1993, I felt it appropriate to update and republish the policy and guidelines.

The policy is available to all interested members of the public, legal profession and the police and can be accessed via the DPP website ([www.dpp.sa.gov.au](http://www.dpp.sa.gov.au)).

This policy and the annexed guidelines are those governing the decision to prosecute criminal offences in South Australia. They form part of the uniform prosecution policy adopted by the Directors of Public Prosecutions of all States and the Commonwealth of Australia in 1990.



**Adam Kimber SC**  
Director of Public Prosecutions

# THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

The Office of the Director of Public Prosecutions (the Office) is divided into a number of smaller units that conduct the functions of solicitors and prosecutors with a close working relationship. In this document the legal staff within the Office and members of the private profession briefed to appear on behalf of the Director are referred to as prosecutors.

The Office's first contact with most criminal matters is through the State Committal and Disclosure Section (SCADS) of the South Australia Police once charges for major indictable offences have been laid and a date for the provision of declarations has been set by the Court. The Office then assumes conduct of these matters until their final resolution. The Office also conducts summary trials in complex or sensitive matters and appeals from the Magistrates Court on indictable offences. This document provides a framework for those conducting prosecutions on behalf of the State.

In addition to the legal staff the Office has a Witness Assistance Service (WAS) that provides assistance to witnesses involved in major indictable proceedings and referral to other agencies if necessary.

All staff within the Office work on the instructions of the Director who has been appointed pursuant to the *Director of Public Prosecutions Act, 1991* (the Act) (Annexure A).



# THE DIRECTOR OF PUBLIC PROSECUTIONS

The obligations of the Director of Public Prosecutions are no different from those imposed on every prosecutor or prosecuting authority in the common law system.

The primary obligation on a prosecutor is one of fairness. Fairness must dictate eventually the discharge of all of a prosecutor's functions. But the question must be asked as to whom these obligations are owed. Obviously a prosecutor must be fair to an accused but that cannot be the sole consideration. There are other parties with legitimate interests who are also entitled to expect a prosecutor to act in a particular way. Sometimes these interests will conflict with those of the accused.

A prosecutor has obligations to varying degrees to the following:

- the court (judge and jury)
- the community
- the accused
- victims
- witnesses
- defence counsel

A prosecutor must play his or her part in securing a fair trial for persons accused of criminal offences. A fair trial is one that results in justice being done i.e. conviction of the guilty as well as acquittal of the innocent. A fair trial may be described also as one where all relevant credible evidence is presented, tested and adjudicated upon according to law. The obligations of the prosecution to the various parties flow from those concepts.

# THE ROLE OF THE PROSECUTOR

In order to understand the obligations of a prosecutor in any given situation or at any particular stage of the trial process, it is necessary to define the role of the prosecutor. The exercise has been attempted on numerous occasions by various commentators. The role is usually expressed in terms such as “a minister of justice” or “an officer of the court”. It may be more easily understood in terms of what it is not. It is not about winning or losing where convictions are wins and acquittals are losses. A conviction obtained on insufficient or doubtful evidence should be regarded as a loss just as much as a failure to obtain a conviction on a strong credible prosecution case. Again, it is a matter of striking a balance.

Some quotations from commentators may assist in defining the role of the prosecutor:

*“(The role of the prosecutor) is not to obtain a conviction: it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing: his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.”* (Per Rand J in *Boucher v R* (1954) 110 CCC 263 at 270).

*“Finally there is or has been a tendency for Counsel for the prosecution not to prosecute firmly enough. The last half century has seen a welcome transition in the role of a prosecuting counsel from a persecuting advocate into a minister of justice, but in some places the pendulum has swung so far and the ministry has moved so close to the opposition that the prosecution’s case is not adequately presented and Counsel, frightened of being accused of excessive fervour tend to do little except talk of reasonable doubt and leave the final speech on the facts to the Judge. The result of the deficiency is that the duty of seeing that the prosecution’s case is effectively put to the jury is sometimes transferred to the Judge and thus the balance of the trial is upset.”* (Lord Devlin, *Trial by Jury* pp.122-123)

But in the end it may come back to the words of Christmas Humphreys QC:

*“It is the duty of prosecuting counsel to prosecute, and he need not rise to his feet and apologise for so doing. It is not unfair to prosecute.”* (1955 Crim LR 739 at 741)

And again -

*“Always the principle holds that Crown counsel is concerned with justice first, justice second and conviction a very bad third.”* (Ibid p.746).

The Office of the Director of Public Prosecutions in South Australia is committed to those ideals.

# THE DECISION TO PROSECUTE

A prosecution should not proceed if there is no reasonable prospect of a conviction being secured. This basic criterion is the cornerstone of the uniform prosecution policy adopted in Australia.

The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, tends to undermine the confidence of the community in the criminal justice system.

It has never been the rule in this country that suspected criminal offences must automatically be the subject of prosecution. A significant consideration is whether the prosecution is in the public interest. The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue those cases worthy of prosecution.

The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution. A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused. There is a continuing obligation to assess the evidence as the matter proceeds.

The decision as to whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the accused and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course, there can never be an assurance that a prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and pursuing a futile prosecution resulting in the unnecessary expenditure of public funds.

When evaluating the evidence regard should be had to the following matters:

- a. Are there grounds for believing the evidence may be excluded bearing in mind the principles of admissibility at common law and under statute?
- b. If the case depends in part on admissions by the accused, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused?
- c. Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable?
- d. Has a witness a motive for telling less than the whole truth?

- e. Are there matters which might properly be put to a witness by the defence to attack his or her credibility?
- f. What sort of impression is the witness likely to make? How is the witness likely to stand up to cross-examination?
- g. If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the accused?
- h. If there is conflict between eye witnesses, does it go beyond what one would expect and hence materially weaken the case?
- i. Is there anything which causes suspicion that a false story may have been concocted?
- j. Are all the necessary witnesses available and competent to give evidence, including any who may be out of the jurisdiction?
- k. Is any witness likely to obtain an exemption from giving evidence pursuant to section 21 of the *Evidence Act, 1929*?
- l. Where child witnesses are involved, are there statutory difficulties in the reception and evaluation of their evidence?

This list is not exhaustive, and of course the matters to be considered will depend upon the circumstances of each individual case.

Having satisfied himself or herself that the evidence is sufficient to justify the institution or continuation of a prosecution, the prosecutor must then consider whether, in light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued. It is not the rule that all offences brought to the attention of the authorities must be prosecuted.

The factors which can properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. While some public interest factors may militate against a decision to proceed with a prosecution, there are public interest factors which operate in favour of proceeding with a prosecution, for example the seriousness of the offence and the need for deterrence. In this regard, generally speaking, the more serious the offence the less likely it will be that the public interest will not require that a prosecution be pursued.

Factors which may arise for consideration in determining whether the public interest requires a prosecution include:

- a. the seriousness or, conversely, the triviality of the alleged offence or that it is of a “technical” nature only
- b. any mitigating or aggravating circumstances
- c. the youth, age, intelligence, physical health, mental health, or special infirmity of the accused, a witness or victim
- d. the accused’s antecedents and background
- e. the staleness of the alleged offence
- f. the degree of culpability of the accused in connection with the offence
- g. the effect on public order and morale
- h. the obsolescence or obscurity of the law

- i. whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute
- j. the availability and efficacy of any alternatives to prosecution
- k. the prevalence of the alleged offence and the need for deterrence, both personal and general
- l. whether the consequences of any resulting prosecution or conviction would be unduly harsh and oppressive
- m. whether the alleged offence is of considerable public concern
- n. any entitlement of the State or other person or body to criminal compensation, reparation or forfeiture
- o. the attitude of the victim of the alleged offence to a prosecution
- p. the likely length and expense of a trial
- q. whether the accused is willing to co-operate in the investigation or prosecution of others, or the extent to which the accused has done so
- r. the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the Court
- s. whether the alleged offence is triable only on indictment
- t. the necessity to maintain public confidence in such institutions as the Parliament and the Courts.

The weight to be given to these and other factors will depend on the particular circumstances of each case.

As a matter of practical reality the proper decision in most cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. Although there may be mitigating factors present in a particular case, often the proper decision will be to proceed with a prosecution and for those factors to be put to the sentencing court in mitigation. Nevertheless, where the alleged offence is not so serious as plainly to require prosecution the prosecutor should always apply his or her mind to whether the public interest requires a prosecution to be pursued.

A decision whether or not to prosecute must clearly not be influenced by:

- a. the race, religion, sex, national origin or political associations, activities or beliefs of the accused or any other person involved
- b. personal feelings concerning the accused or the victim
- c. possible political advantage or disadvantage to the Government or any political group or party
- d. the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

Special considerations apply to the prosecution of young offenders. Prosecution of a young offender should always be regarded as a severe step, and generally speaking a much stronger case can be made for methods of disposal which fall short of prosecution unless the seriousness of the alleged offence or the circumstances of the young offender concerned dictate otherwise. In this regard, ordinarily the public interest will not require the prosecution of a young offender who is a first offender in circumstances where the alleged offence is not serious.

In deciding whether or not the public interest warrants the prosecution of a young offender regard should be had to such factors that apply to adults as appear to be relevant, but particularly to:

- a. the seriousness of the alleged offence
- b. the age, apparent maturity and mental capacity of the young offender
- c. the available alternatives to prosecution, such as a caution, and their efficacy
- d. the sentencing options available to the relevant Youth Court if the matter were to be prosecuted
- e. the young offender's family circumstances, particularly whether the parents or guardians of the young offender appear able and prepared to exercise effective discipline and control over the young offender
- f. the young offender's antecedents, including the circumstances of any previous caution the young offender may have been given, and whether they are such as to indicate that a less formal disposal of the present matter would be inappropriate
- g. whether a prosecution would be likely to be harmful to the young offender or be inappropriate, having regard to such matters as the personality of the young offender and his or her family circumstances.

Under no circumstances should a young offender be prosecuted solely to secure access to the welfare powers of the Court.

Pursuant to section 17 of the *Young Offenders Act, 1993*, all young offenders charged with homicide, or an offence consisting of an attempt to commit or assault with intent to commit homicide, are to be dealt with by an adult court. In other cases an application by the DPP or police prosecutor can be made to have a young offender dealt with as an adult if it is considered that it is warranted by the gravity of the offence or because the offence was part of a pattern of repeated offending.

# GUIDELINE NUMBER 1: Choice of Charges

In many cases the evidence will disclose a number of possible offences. Care must therefore be taken to choose a charge or charges which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will provide the Court with an appropriate basis for sentence.

In the ordinary course the charge or charges laid or proceeded with will be the most serious disclosed by the evidence. Nevertheless, when account is taken of such matters as the strength of the available evidence, the probable lines of defence to a particular charge and other considerations including the appropriate sentence, it may be appropriate to lay or proceed with a charge which is not the most serious revealed by the evidence.

Under no circumstances should charges be laid with the intention of providing scope for subsequent charge bargaining.

The High Court in *R v Hoar* (1981) 148 CLR 32 at 38 has highlighted the need for restraint in laying conspiracy charges:

*“Generally speaking, it is undesirable that conspiracy should be charged when a substantive offence has been committed and there is a sufficient and effective charge that this offence has been committed.”*

Whenever possible substantive charges should be laid. However, there are occasions when a conspiracy charge is the only one which is adequate and appropriate on the available evidence. Where it is proposed to lay or proceed with conspiracy charges against a number of accused jointly, those responsible for making the necessary decision must guard against the risk of the joint trial being unduly complex or lengthy.

It will never be appropriate to overcharge on an information to gain a benefit in relation to charge bargaining or for some other perceived benefit to the prosecution. In cases where there have been numerous offences committed, the prosecutor should strive to charge counts that sufficiently reflect the gravity of the incidents or the course of conduct.

# GUIDELINE NUMBER 2:

## Charge Bargaining

Charge bargaining involves negotiations between the defence and the prosecution in relation to the charges to proceed. Such negotiations may result in the accused pleading guilty to fewer than all of the charges he or she is facing, or to a lesser charge or charges, with the remaining charges either not being proceeded with or taken into account without proceeding to conviction.

These guidelines have earlier referred to the care that must be taken in choosing the charge or charges to be laid. Nevertheless, circumstances can change and new facts can come to light. Agreements as to charge or charges and plea must be consistent with the requirements of justice.

A proposal should not be entertained by the prosecution unless:

- a. the charges to be proceeded with bear a reasonable relationship to the nature of the criminal conduct of the accused
- b. those charges provide an adequate basis for an appropriate sentence in all the circumstances of the case
- c. there is evidence to support the charges.

Any decision whether or not to agree to a proposal advanced by the defence, or to put a counter-proposal to the defence, must take into account all the circumstances of the case and other relevant considerations including:

- a. whether the accused is willing to co-operate in the investigation or prosecution of others, or the extent to which the accused has done so
- b. whether the sentence that is likely to be imposed if the charges are varied as proposed (taking into account such matters as whether the accused is already serving a term of imprisonment) would be appropriate for the criminal conduct involved
- c. the desirability of prompt and certain resolution of the case
- d. the accused's antecedents
- e. the strength of the prosecution case
- f. the likelihood of adverse consequences to witnesses
- g. in cases where there has been a financial loss to the State or any person, whether the accused has made restitution or arrangements for restitution
- h. the need to avoid delay in the resolution of other pending cases
- i. the time and expense involved in a trial and any appeal proceedings
- j. the views of the investigating police officers
- k. the views of the victim or others significantly affected.

In no circumstances should the prosecution entertain a charge bargaining proposal if the accused maintains his or her innocence with respect to a charge or charges to which the accused has offered to plead guilty.



# GUIDELINE NUMBER 3: Giving Advice to Investigators

All requests for advice by police investigators should be made in writing to the Office. This includes advice in relation to:

1. the availability of criminal charges involving:
  - a. the sufficiency of evidence
  - b. the admissibility of evidence
  - c. the most appropriate charge in the circumstances.
2. the present state of the law with respect to a certain subject matter (where this requires detailed evaluation)
3. whether a matter should be disposed of summarily rather than on information
4. the availability of an ex officio information; and appeal to the Supreme Court on sentence; a case stated or judicial review.

In the ordinary course these requests are to be answered in writing within two months.

There is no distinction to be drawn between “formal” and “informal” advice, and “provisional” advice should not be given.

Should the person seeking advice be unable, due to the urgency of the matter, to seek advice by way of a written request, this should not preclude advice being provided. In such instances the written advice should recite the particular request made of this Office and the information provided upon which the advice is given.

In the ordinary course a letter confirming the oral advice should be sent within twenty four hours.

Where the request for advice relates to whether or not there is a basis for charging, any advice must only be provided after an examination of the complete police brief. Ordinarily, such advice will only be given after the alleged offender has been provided with an opportunity to answer or comment upon the substance of the allegations by interview or otherwise.

Advice will not be given on any individual exercise of police powers or on operational matters generally.

Requests for advice relating to matters of law which require a detailed evaluation, or involve police or other investigative powers, are to be referred to the Deputy Director (Solicitor).

The following requests for advice must be referred to the Director unless such matters have been specifically delegated to other officers:

- a. whether or not a prosecution should proceed following a proposed extradition
- b. whether or not an immunity (indemnity or undertaking) should be granted
- c. whether or not an appeal should be lodged (including an application for judicial review)
- d. whether or not a police officer should be prosecuted
- e. whether or not an ex officio information should be filed

- f. where the Director's or the Attorney-General's sanction or approval is required for the commencement of proceedings
- g. matters of particular sensitivity, including allegations of corruption or serious misconduct by any public official.

Where the charge is one for an offence resulting in death, the prosecutor's advice is to be referred to their relevant manager for final consideration before it is communicated to the investigating officer.

# GUIDELINE NUMBER 4:

## Ex Officio Information

To present an information in the absence of prior committal proceedings must be regarded as constituting a significant departure from accepted practice. Given that a purpose of committal proceedings is to filter out those cases where there is an insufficient basis for the accused being placed on trial, to indict in the absence of committal proceedings will deny the accused the opportunity of securing a discharge before the Magistrate.

A decision to indict in the absence of prior committal proceedings will only be justified if any disadvantage to the accused that may thereby ensue will nevertheless not be such as to deny the accused a fair trial. Further, such a decision will only be justified if there are strong and powerful grounds for so doing. An ex officio information should not be presented in the absence of committal proceedings unless the evidentiary and public interest considerations outlined in the prosecution policy are satisfied.

Where an ex officio information is presented in the absence of committal proceedings the accused will be provided with all relevant witness statements and full details of the case that the prosecution will present at the trial and any other material in accordance with disclosure principles.

On the other hand, a decision to indict, notwithstanding the accused was discharged at the committal proceedings, will not constitute as great a departure from accepted practice. The result of committal proceedings has never been regarded as binding on those who have the authority to indict. An error may have resulted in the Magistrate discharging the accused, and in such a case the filing of an ex officio information may be the only feasible way that the error can be corrected. Nevertheless, a decision to indict following a discharge at the committal proceedings should never be taken lightly. An ex officio information should not be presented in such cases unless it can be confidently asserted that the Magistrate erred in declining to commit, or fresh evidence has since become available and it can be confidently asserted that, if the evidence had been available at the time of the committal proceedings, the Magistrate would have committed the accused for trial. In the event that fresh evidence is received, consideration will be given to reinstating the committal proceedings.

# GUIDELINE NUMBER 5: Declining to Proceed after Committal

After the accused has been committed for trial the question may arise whether the trial on that information should proceed. Pursuant to section 7(1)(e) of the Act, the Director has power to enter a nolle prosequi or otherwise terminate a prosecution in appropriate cases.

Notwithstanding that a committal order has been obtained, events may have occurred after the committal that make it no longer appropriate for the prosecution to proceed. Alternatively, the strength of the prosecution case may be re-assessed having regard to the course of the committal proceedings. Where a question arises as to the exercise of the power under section 7(1)(e), it is to be determined on the basis of the criteria governing the decision to prosecute set out earlier. In the normal course, any person or agency significantly affected will be consulted before any decision is made.

A defence application may be based on the fact that the offence charged is a relatively minor one and does not warrant the time and expense involved in a trial on information. Such an application is most unlikely to receive favourable consideration if the alleged offence is one that could have been determined summarily but the accused refused to consent to the matter being dealt with in that way.

Where a decision has been made not to proceed with a trial where an information has been laid, that decision will not be reversed unless:

- a. significant fresh evidence has been produced that was not previously available for consideration
- b. the decision was obtained by fraud
- c. the decision was based on a mistake of fact or law; and in all the circumstances it is in the interests of justice that the decision be reversed.

Where a trial has ended with the disagreement of the jury, consideration should always be given to whether the circumstances require a re-trial, and whether a second jury is likely to be in a better position to reach a verdict. The seriousness of the alleged offence and the cost to the community and the accused should be taken into account. If it is decided to proceed with a re-trial and the second jury also disagrees, it will only be in rare and exceptional circumstances that the accused will be required to stand trial a third time.

# GUIDELINE NUMBER 6:

## Immunity from Prosecution

The Director is empowered by section 7(1)(f) of the Act to grant immunity from prosecution in appropriate cases. This power will normally be exercised in order to secure an accomplice's testimony for the prosecution.

A decision whether to call an accomplice to give evidence for the prosecution frequently presents conflicting considerations calling for the exercise of careful judgment in the light of all the available evidence. Inevitably, however, there will be instances where there is a weakness in the prosecution evidence that makes it desirable, or even imperative, for the prosecution to call an accomplice.

In conjunction with the question whether to call an accomplice the question may arise whether that accomplice should also be prosecuted. In this regard, unless the accomplice has been dealt with in respect of his or her own participation in the criminal activity the subject of the charge against the accused, he or she will be in a position to claim the privilege against self-incrimination in respect of the very matter the prosecution wishes to adduce in evidence. Where, however, an accomplice has been given an immunity under section 7(1)(f) that immunity will override what would otherwise be an allowable claim of privilege.

In principle it is desirable that the criminal justice system should operate without the need to grant any concessions to persons who participated in alleged offences in order to secure their evidence in the prosecution of others. (For example, by granting them immunity from prosecution). However, it has long been recognised that in some cases this course may be appropriate in the interests of justice. Nevertheless, an immunity under section 7(1)(f) will only be given as a last resort. In this regard, as a general rule an accomplice should be prosecuted irrespective of whether he or she is to be called as a witness, subject of course to the usual evidentiary and public interest considerations being satisfied. Upon pleading guilty the accomplice who is prepared to co-operate in the prosecution of another can expect to receive a substantial reduction in the sentence that would otherwise have been appropriate. However, this course may not be practicable in some cases. For example, time may not permit charges against the accomplice to proceed to conviction before the trial of the principal offender, or there may be insufficient admissible evidence to support charges against the accomplice alone.

Apart from being a course of last resort, an immunity under section 7(1)(f) of the Act will only be given provided the following conditions are met:

- a. The evidence that the accomplice can give is considered necessary to secure the conviction of the accused, and that evidence is not available from other sources.
- b. The accomplice can reasonably be regarded as significantly less culpable than the accused.

The central issue in deciding whether to give an accomplice an immunity is whether in the overall interests of justice the prosecution of the accomplice should be foregone in order to secure that person's testimony in the prosecution of another. In determining where the balance lies, the following factors will be taken into account:

- a. the significance to a successful prosecution of the evidence which it is hoped to obtain

- b. the degree of involvement of the accomplice in the criminal activity in question compared with that of the accused
- c. whether any inducement has been offered to the person concerned
- d. the character, credit and previous criminal record of any accomplice concerned
- e. whether the accomplice concerned made, or is prepared to make, full disclosure of all facts and matters within his or her knowledge.

When an accomplice receives any concession from the prosecution in order to secure his or her evidence, whether as to choice of charge or the granting of immunity from prosecution, the terms of the agreement or understanding between the prosecution and the accomplice should be disclosed.

# GUIDELINE NUMBER 7: Unrepresented Accused

The prosecutor must not advise an unrepresented accused on legal issues or the general conduct of the defence. In the event that there is evidence that the prosecutor intends leading that is arguably inadmissible this should be raised with the Trial Judge prior to the evidence being called.

All materials and witness statements must be provided in the usual manner and the accused should acknowledge receipt in writing.

Telephone communications should be kept to a minimum and recorded in writing immediately. All oral communications should be witnessed by a third party and noted. The notes should be kept on the file or with the brief.

In the event of a trial, the witnesses should be advised that the accused is unrepresented and advised of the procedures that will be adopted in the Court.

# GUIDELINE NUMBER 8:

## The Court Process

A prosecutor must not appear in a contested matter or an ex parte action before a judicial officer where there may be an appearance of partiality.

A prosecutor must fairly assist the Court to arrive at the truth, seek impartially to have the whole of the relevant and admissible evidence placed intelligibly before the Court, and assist the Court with submissions of law that enable the law to be properly applied to the facts.

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

A prosecutor must not argue any proposition of fact or law that is not reasonably open on the evidence and does not accurately represent the law. If there is contrary authority to the propositions being put to the Court by the prosecutor, the Court must be informed of them. A prosecutor must call, as part of the prosecution case, all apparently credible witnesses whose evidence is relevant and admissible for the presentation of the complete factual case whether it supports the prosecution case or not, unless:

- a. the defence consents to the witness not being called
- b. the matter has been established by the calling of other evidence and there is no prejudice to the accused in not calling the witness
- c. the witness is, in the opinion of the prosecutor, plainly unreliable or untrustworthy
- d. the witness is unavailable due to serious illness, death or any other good reason.

In the event that the prosecutor declines to call a witness the defence must be informed as soon as reasonably practicable and where possible arrangements should be made to have the witness at court if the defence so request.

The prosecutor's right to challenge a juror should only be exercised if there is reasonable cause for doing so. It should never be exercised so as to attempt to select a jury that is not representative of the community as to age, sex, ethnic origin, religious belief, marital status, economic, cultural or social background.

Cross-examination of an accused as to credit or motive must be fairly conducted. Material put to an accused must be considered on reasonable grounds to be accurate and its use justified in the circumstances of the trial.

When addressing the jury or the Court a prosecutor must not use inflammatory language and must at all times put an accurate and fair interpretation of the facts and the law. The prosecutor is expected to present the case fearlessly, vigorously and skilfully. When appearing on sentence the prosecutor has an active role to play but must not seek to persuade the Court to impose an improper sentence, nor should a sentence of a particular magnitude be advocated. It is the duty of the prosecutor to adequately and fairly present the prosecution case on sentence and assist the Court to avoid falling into appealable error.



To do this the prosecutor should where appropriate:

- a. comply with sections 7 and 7A of the *Criminal Law (Sentencing) Act, 1988* with respect to injury, loss or damage suffered by the victim
- b. tender the relevant antecedents of the accused
- c. correct any error of fact or law
- d. refer the Court to any relevant authority or legislation that may assist in determining the appropriate sentence
- e. make submissions on the appropriate sentencing options that are available including non-custodial options
- f. acknowledge any co-operation of the accused with the law enforcement agencies when this has occurred and proved to be of value. This must be done in a manner that does not endanger the safety of the accused or prejudice the operations of those agencies.

# GUIDELINE NUMBER 9:

## Disclosure

Disclosure to the defence of material that is within the possession of the prosecuting authority is one aspect of the duty to ensure that the Crown case is presented with fairness to the accused. In South Australia the extent of the duty to disclose is determined by both statutory and common law principles and encompasses both the obligation of investigators to disclose relevant material to the prosecution, and also the obligation of the prosecution to disclose relevant material to the defence.

### Statutory obligations

Section 10A of the *Director of Public Prosecutions Act, 1991* imposes an obligation on a police officer in charge of an investigation of an indictable offence to disclose to the Director all documentary material collected or created in the course of the investigation that might reasonably be expected to assist the respective cases for the prosecution or the defence.

Section 104 of the *Summary Procedure Act, 1921* requires the prosecution to file in the Magistrates Court in major indictable matters:

- a. statements of witnesses for the prosecution on which the prosecutor relies as tending to establish the guilt of the accused
- b. copies of any documents on which the prosecutor relies as tending to establish the guilt of the accused (other than sensitive material or documents that are of only peripheral relevance)
- c. a document describing any other evidentiary material on which the prosecutor relies as tending to establish the guilt of the accused (including sensitive material or documents that are of only peripheral relevance) together with a statement of the significance that the material is alleged to have
- d. any other material relevant to the charge that is available to the prosecution.

This section entails early disclosure and filing of all relevant admissible material irrespective of whether it assists the Crown case. These statutory requirements combine to provide for early disclosure and filing of all relevant and admissible material that may be relied upon by the prosecution as tending to establish the guilt of the accused or which might reasonably be expected to assist the case for the defence.

### Common law obligations

The common law requires wider disclosure than section 104. The limits of this duty are not precisely delineated but depend upon the circumstances of each case. Moreover, the duty to disclose is an ongoing one and turns upon the matters that are realistically in issue at any time. It is acknowledged that material is often obtained, or brought to the attention of the DPP after the preliminary hearing. Prompt consideration will be given to the need to disclose such material. Furthermore, the DPP is committed to ensuring that the police deliver to the DPP a full brief, including sufficient information to enable this disclosure guideline to be properly implemented.

In the ordinary course on request disclosure will be made of the following in a prosecution for an indictable offence in the Supreme or District Court:

- a. particulars of the accused's prior conviction
- b. copies of all written statements, and an opportunity to examine electronically recorded interviews of all witnesses to be called, together with a copy of any prior inconsistent statements of those witnesses
- c. copies of any written or electronically recorded statement obtained from the accused by a person in authority
- d. copies of any photographs, plans, documents or other representations which will be tendered by the prosecution at trial
- e. an opportunity to examine exhibits which will be tendered
- f. copies of statements of any expert witnesses to be called and the prosecution will facilitate an opportunity for a defence expert from the same or a similar discipline to speak with that expert, pre-trial
- g. copies of any warrant or any statutory authority used in the gathering of evidence to be adduced at trial
- h. an opportunity to inspect bank records, books of account or other records or documents relevant to the prosecution case which may not be introduced into evidence but be relied upon.

In any case where the prosecutor declines to call a witness, the defence should receive details of any material or statements which are, or may be, exculpatory. The defence should also receive details of the whereabouts of that witness and if requested, the prosecution should make that witness available for the defence to call.

However, the DPP recognises that a number of factors may be relevant to the extent of disclosure required in a particular prosecution. The prosecutor also has a number of obligations in relation to the material that comes into his or her possession. These obligations include a need to consider whether documents are within the power of the prosecution to disclose and whether there are any immunities or privilege that should be claimed by the prosecution or individuals.

In addition to the above the prosecutor should also consider the following factors in respect of any material for which disclosure is contemplated or requested:

- a. whether the material is relevant
- b. whether the material may divulge the identity of an informer
- c. whether the material is subject to legal professional privilege or some other privilege, or statutory prohibition upon its disclosure
- d. whether the material could prejudice the investigation, or facilitate the commission, of other offences
- e. whether disclosure of the material could tend to endanger, prejudice, or embarrass any person

- f. whether there is any apparent, or demonstrated, legitimate forensic purpose for the defence to have access to the material.

The extent to which any of these factors will affect the decision whether or not to disclose particular material will vary. Application of these factors will always be subject to the over-riding duty to ensure that the Crown case is presented with fairness.

# GUIDELINE NUMBER 10: Media Contact

No public comment is to be made without the Director's, or his designated representative's approval in relation to matters that are the subject of criminal proceedings or that have been referred to the Office for an opinion in relation to potential criminal proceedings. All media contact should be referred to the Director's Office.

# GUIDELINE NUMBER 11:

## Witnesses

Prosecutors will deal with all witnesses in a dignified, professional and proper manner.

At the earliest opportunity consideration should be given to whether a witness should be referred to the Witness Assistance Service (WAS).

In accordance with the principles governing the treatment of victims set out in the *Victims of Crime Act, 2001*, a victim who is to be a witness for the prosecution is to be informed about the trial process and of his or her rights and responsibilities as a prosecution witness. When dealing with witnesses under 16 years of age, a person who suffers from an intellectual disability, a victim of an alleged sexual offence or a person who is at some special disadvantage, consideration must be given to the provisions of section 13A of the *Evidence Act, 1929*. In cases where the section might apply, a witness should be advised of the options that are available under the *Evidence Act* including a screen, closed circuit television, a court companion and a closed court. If the section is applicable to a witness the application should be made after consulting with the witness where possible prior to the commencement of the trial.

The prosecutor with the conduct of the file should make the application notwithstanding any forensic advantage that is perceived in not making the appropriate arrangements.

Consideration must be given in the early stages of contact with the victim to involvement by the WAS. If a witness wishes to have a court companion and is unable to obtain the services of a suitable person, the Witness Assistance Service will either make arrangements in consultation with the prosecutor or refer the witness to Victim Support Services.

# GUIDELINE NUMBER 12:

## Victims of Crime

In all dealings with victims of crime due regard must be had by all members of the Office to the Declaration of Principles Governing Treatment of Victims in the Criminal Justice System in the *Victims of Crime Act, 2001* (Annexure B).

Victims are to be accorded fair and dignified treatment. They have a right to information including about the progress of investigations and the prosecution and particular circumstances of the offender. If they are a victim of a serious offence they are entitled to be consulted in relation to certain decisions, such as a decision to amend a charge or to not proceed with a charge. A victim may request consideration of an appeal.

Consideration must be given in the early stages of contact with the victim, and/or their families, to involvement in the case by the WAS. In all appropriate cases they should be advised of the service provided by the WAS and where necessary referred to it. Contact will then be made by a Witness Assistance Officer directly with the victim.

A victim should be informed about health and welfare services that may be available to alleviate the consequences of injury suffered as a result of the offence (section 11 *Victims of Crime Act, 2001*).

Information as to the proceedings and the victim's role must be given at an early stage and there is a continuing obligation to keep the victim informed. Where possible, information about the proceedings and the legal implications should be given by the prosecutor. An effort must be made to minimise the number of staff members with responsibility for contacting the victim and handling the file.

Parents of child victims must be given adequate information about the legal system and the impact upon children in order to make informed decisions. The views of parents or caregivers must always be given appropriate consideration by the prosecutor and where possible their views should be accorded significant weight. However, the public interest must at all times be the paramount consideration.

Prosecutors should ensure that the opportunity to prepare an adequate victim impact statement has been given and that when one is prepared it contains relevant material to assist the Court in the sentencing process. They must also ensure that victims are aware of their right to present the statement orally if they wish. Victims should be advised of the procedure for giving the statement orally and appropriate arrangements made for them to do so.

Victims must be informed of the outcome of finalised court proceedings in a timely fashion.

# GUIDELINE NUMBER 13:

## Victim Impact Statements

Victim impact statements (VIS) should be prepared prior to sentencing submissions by the person who is eligible to submit it to the Court. The statements may be in the written form or presented verbally to the Court. Victims should be advised of their right to give a verbal presentation to the Court. A VIS must be completed at a time that will not delay the sentencing process.

A victim may prepare a VIS to be read to the Court. All victims must be advised of the following if they wish to prepare and submit this statement:

- a. The statement must be prepared in writing and provided to the DPP. A VIS must contain only relevant and adequate information to assist the Court in the sentencing process. What is permissible is set out in the *Criminal Law (Sentencing) Act, 1988*. Subject to the content of the statement complying with what is permitted by the *Criminal Law (Sentencing) Act, 1988*, the statement will then be provided to the Sentencing Judge who will then appoint a time for it to be read to the court. It may be read by the victim or by a person nominated by the Court.
- b. The Court will not be closed to the public (unless an order of the Court is made).
- c. The prosecutor can apply for a closed court and/or a suppression order in appropriate cases.
- d. The statement will not be disclosed to the defence prior to conviction unless it contains inconsistencies that go to a material matter. In the event of such inconsistencies the usual practice of disclosure should be adopted.
- e. The victim may amend the statement at any time prior to it being read to the Court.
- f. The victim may withdraw the statement at any time in accordance with the Rules of Court. A copy of the VIS will only be provided to defence counsel or to an unrepresented accused with an undertaking that the document is not to be reproduced in any way without the consent of the DPP. The document must be returned to the DPP upon request.



# GUIDELINE NUMBER 14:

## Prosecution Appeals

The prosecution has a right to appeal in certain circumstances. This right will always be exercised with restraint and only where there is a reasonable prospect of success.

### Appeals against sentence

In *The Queen v Osenkowski* (1982) 30 SASR 212 King CJ made the following observations concerning the role of prosecution appeals against sentence:

*“It is important that prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where a judge’s sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender’s life might lead to reform. The proper role for prosecution appeals in my view, is to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience.”*

This passage is reflective of the care with which the Director of Public Prosecutions must approach the question whether to institute an appeal against sentence.

The prosecution’s right to appeal against sentence should be exercised sparingly and it is the policy of the Director of Public Prosecutions not to institute such an appeal unless it can be asserted with some confidence that the appeal will be successful. In considering a prosecution appeal against sentence it is to be borne in mind that the sentence for a specific offence will vary according to its nature, the circumstances of its commission, the antecedents of the prisoner, and the effect on the victim. Consequently, for any given offence there exists a range of legitimate penalty options. An appellate court will not interfere with the exercise of a Judge’s or Magistrate’s sentencing discretion unless an error in the exercise of that discretion can be demonstrated. In practical terms, the Court must be satisfied that the sentence imposed falls clearly outside the appropriate penalty range and may consequently be characterised as manifestly inadequate. Mere disagreement with the sentence passed is insufficient. The High Court decisions are clear that there must be a matter of principle to be established by the appeal in relation to the matter of the sentence *Everett and Phillips v The Queen* (1994) 181 CLR 295.

### Magistrates Appeals

The Office conducts appeals from the Magistrates Court to the Supreme Court on indictable offences. The prosecution has a right to appeal against acquittal where there has been an error of law or fact by the Magistrate. These appeals are only instituted on rare occasions and in accordance with the authorities. The same considerations apply to appeals against sentence brought by the prosecution for a sentence imposed by a Magistrate or a Judge. This was confirmed by the Full Court in *Police v Cadd* (1997) 69 SASR 150.

## Other rights of appeal

There is no prosecution right of appeal against a verdict of acquittal in the District or Supreme Court unless the acquittal was directed by a judge. The prosecution can appeal against an acquittal if the trial was by judge alone.

The prosecution may seek a re-trial in circumstances where it can be demonstrated that an acquittal was tainted, or in respect of certain serious offences, where there is fresh and compelling evidence: Part 10 of the *Criminal Law Consolidation Act, 1935*.

The prosecution can apply to the Court during the trial or sentencing process, or after an acquittal, for the Court to refer a question of law for consideration to the Full Court. This power should be exercised sparingly. The Director of Public Prosecutions should not seek to have a question of law referred to the Full Court unless it can be asserted with some confidence that the Court will answer the question in the manner sought by the prosecution. The question of law must be of sufficient importance to require the attention of the Full Court.

# CONCLUSION

This statement does not attempt to cover all questions that can arise in the prosecution process and the role of the prosecutor in their determination. It is sufficient to state that throughout a prosecution the prosecutor must conduct himself or herself in a manner which will maintain, promote and defend the interests of justice, for in the final analysis the prosecutor is not a servant of government or individuals. He or she is a servant of justice. At the same time it is important not to lose sight of the fact that prosecutors discharge their responsibilities in an adversarial context. Accordingly, while the case must at all times be presented to the Court fairly and justly, the community is entitled to expect that it will also be presented fearlessly, vigorously and skilfully.

This statement will be kept under review, and any changes will be made public.

# ANNEXURE A:

## *Director of Public Prosecutions Act 1991*

### ***Director of Public Prosecutions Act 1991***

An Act to establish the Office of Director of Public Prosecutions; and for related purposes.

#### **Contents**

- 1 Short title
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- 4 Director of Public Prosecutions
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#### Schedule 1 — Transitional provisions

- 1 Retrospectivity
- 2 Director to take over from Attorney-General

#### Legislative history

#### **The Parliament of South Australia enacts as follows:**

##### **1—Short title**

This Act may be cited as the *Director of Public Prosecutions Act 1991*.

##### **3—Interpretation**

In this Act—

*Director* means the Director of Public Prosecutions and includes a person acting in the

position of Director of Public Prosecutions;

*Office* means the Office of the Director of Public Prosecutions.

#### **4—Director of Public Prosecutions**

- (1) There will be a Director of Public Prosecutions.
- (2) The Director will be appointed by the Governor.
- (3) A person is not eligible for appointment as the Director unless he or she is a legal practitioner of at least seven years standing.
- (4) The Director will be appointed—
  - (a) for a term of office of seven years; and
  - (b) on terms and conditions determined by the Governor.
- (5) At the expiration of a term of office, the Director will be eligible for re-appointment.
- (6) The Director must inform the Attorney-General in writing of—
  - (a) any direct or indirect pecuniary interest that the Director has or acquires in any business, or in any body corporate carrying on a business, in Australia or elsewhere; and
  - (b) any other direct or indirect interest that the Director has or acquires that conflicts, or may conflict, with the Director's duties.
- (7) The Director must not—
  - (a) engage in legal practice outside the duties of his or her office; or
  - (b) engage, without the consent of the Attorney-General, in any other remunerated employment.
- (8) The Governor may terminate the Director's appointment if the Director—
  - (a) is guilty of misbehaviour; or
  - (b) becomes physically or mentally incapable of carrying out official duties satisfactorily; or
  - (c) becomes bankrupt or applies to take the benefit of a law for the relief of bankrupt or insolvent debtors; or
  - (d) is absent, without leave of the Attorney-General, for 14 consecutive days, or for 28 days in any period of 12 months; or
  - (e) contravenes or fails to comply with subsection (6) or (7).
- (9) Except as provided in subsection (8), the Director's appointment cannot be terminated.

#### **5—Acting Director**

- (1) If the Director is temporarily absent, or the Director's position is temporarily vacant, the Attorney-General may assign a suitable person to act in the Director's position during the temporary absence or vacancy.
- (2) A person is not eligible to act in the Director's position unless he or she is a legal practitioner of at least seven years standing.
- (3) The terms on which a person is assigned to act in the Director's position will be as determined by the Attorney-General.

## 6—Office of Director

- (1) The Office of the Director of Public Prosecutions is established.
- (2) The Office consists of—
  - (a) the Director of Public Prosecutions; and
  - (b) Public Service employees assigned to work in the Office.
- (3) The Director has the administration and control of the Office.

## 6A—Delegation

- (1) The Director may delegate to a suitable person (including a person for the time being performing particular duties or holding or acting in a particular position) a function or power of the Director under this or any other Act (unless the contrary intention appears).
- (2) A delegation under this section—
  - (a) must be by instrument in writing; and
  - (b) may be absolute or conditional; and
  - (c) does not derogate from the power of the Director to act in any matter; and
  - (d) is revocable at will.
- (3) A function or power delegated under this section may, if the instrument of delegation so provides, be further delegated.

## 7—Powers of Director

- (1) The Director has the following powers:
  - (a) to lay charges of indictable or summary offences against the law of the State;
  - (b) to prosecute indictable or summary offences against the law of the State;
  - (c) to claim and enforce, either on behalf of the Crown or other persons, civil remedies that arise out of, or are related to, prosecutions commenced by the Director;
  - (d) to take proceedings for or in relation to the confiscation of profits of crime;
  - (da) to institute civil proceedings for contempt of court;
  - (e) to enter a *nolle prosequi* or otherwise terminate a prosecution in appropriate cases;
  - (f) to grant immunity from prosecution in appropriate cases;
  - (fa) to undertake to a person not to use, or make derivative use of, information or a thing against the person in a proceeding, other than in relation to the falsity of evidence given by the person in a proceeding;
  - (g) to exercise appellate rights arising from proceedings of the kind referred to above;
  - (h) to carry out any other function assigned to the Director by any other Act or by regulation under this Act;
  - (i) to do anything incidental to the foregoing.
- (2) The Attorney-General may, by notice in the Gazette, transfer to the Director any powers or functions of the kind referred to above, or any power to consent to a prosecution, vested in the Attorney-General by an Act passed before the commencement of this Act.
- (3) A person who has power to consent to a prosecution, or to allow an extension of the period for commencing a prosecution, for an offence of a particular kind under the law of

the State may, by notice in the Gazette, delegate that power to the Director.

(4) A delegation under subsection (3)—

(a) is revocable by subsequent notice in the Gazette; and

(b) does not prevent the person from acting personally in a matter,

but, once a decision on a particular matter has been made by the Director in pursuance of a delegation, the delegator is bound by that decision.

(5) A document apparently signed by the Director and stating that the Director consents to a particular prosecution or that the Director allows a specified extension of the period for commencing a particular prosecution is to be accepted, in the absence of proof to the contrary, as proof of the fact so stated.

(6) Where an information or complaint charging an offence is apparently signed by the Director or a person acting on the Director's authorisation, the information or complaint will, in the absence of proof to the contrary, be taken to have been duly signed by or on behalf of the Director.

(7) In any legal proceedings, the Director may appear personally or may be represented by a member of the staff of the office who is a legal practitioner or by counsel or solicitor (including the Crown Solicitor or the Solicitor-General).

(8) Details of any notices published under this section must be included in the Director's annual report.

## **8—Consultation**

(1) The Director must, if requested to do so by the Attorney-General, consult with the Attorney-General with respect to the exercise of the Director's powers or functions.

(2) The Attorney-General must, if requested to do so by the Director, consult with the Director with respect to the exercise of the Director's powers or functions.

## **9—Independence of Director**

(1) Subject to this section, the Director is entirely independent of direction or control by the Crown or any Minister or officer of the Crown.

(2) The Attorney-General may, after consultation with the Director, give directions and furnish guidelines to the Director in relation to the carrying out of his or her functions.

(3) Directions or guidelines under this section—

(a) must, as soon as practicable after they have been given, be published in the Gazette; and

(b) must, within six sitting days after they have been given, be laid before each House of Parliament.

(4) Subsection (3) need not be complied with in relation to directions or guidelines under this section relating to individual matters if, in the opinion of the Attorney-General, disclosure may be prejudicial to an investigation or prosecution, but, in that case, the directions or guidelines must be published in the Gazette, and laid before each House of Parliament, as soon as practicable after the matter is determined or otherwise completed.

(5) If the Attorney-General is satisfied that disclosure under this section would place human life or safety at risk or cause some other form of severe prejudice to any person, the Attorney-General may withhold material from disclosure so far as necessary to avoid that consequence.

## 10—Investigation and report

The Commissioner of Police must, so far as it is practicable to do so, comply with any request from the Director to investigate, or report on the investigation of, any matter.

### 10A—Disclosure of information to Director

(1) A police officer in charge of the investigation of an indictable offence (the *chief investigator*) has a duty to disclose to the Director all documentary material collected or created in the course of the investigation that might reasonably be expected to assist the case for the prosecution or the case for the defence.

(2) The chief investigator must, when so required by the Director, provide the Director with—

(a) a list, certified by the chief investigator, of all documentary material so far collected or created in the course of the investigation that might reasonably be expected to assist the case for the prosecution or the case for the defence; and

(b) copies of documentary material referred to in the list.

(3) The duty of disclosure under subsection (1)—

(a) extends to material that would be exempt from production in court because it is protected by privilege or for any other reason; and

(b) continues until the termination date.

(4) The chief investigator must ensure that all material disclosed, or liable to disclosure, under subsection (1), is retained until the termination date.

(5) The chief investigator must, at the request of the Director, provide the Director with copies of specified documentary material collected or created in the course of the investigation that is not liable to disclosure under subsection (1).

(6) Copies of documentary material to be provided under this section may be provided in electronic form.

(7) A police officer must not, without good and sufficient cause, fail to carry out a duty under this section promptly and diligently.

(8) The police officer in charge of the investigation of an indictable offence will, for the purposes of this section, be the police officer appointed by the Commissioner for that purpose.

(9) In this section—

*termination date* means the date when—

(a) the Director decides that the person suspected of having committed the alleged offence not be prosecuted for the offence; or

(b) the prosecution is terminated; or

(c) the accused person is convicted or acquitted, and all rights of appeal have expired or been exhausted.

## 11—Directions and guidelines by Director

(1) The Director may give directions or furnish guidelines to the Commissioner of Police or other persons investigating, or prosecuting, offences on behalf of the Crown.

(2) Any such directions or guidelines must be published in the Director's annual report.



(3) If the Director is satisfied that publication of material under this section would place human life or safety at risk or cause some other form of severe prejudice to any person, the Director may withhold the material from publication so far as necessary to avoid that consequence.

## **12—Annual reports**

(1) The Director must, before 30 September in each year, prepare and provide the Attorney-General with a report on the operations of the Office during the year that ended on the preceding 30 June, including the number of applications for warrants under the *Listening and Surveillance Devices Act 1972* considered, and the number approved, by the Director.

(2) The Attorney-General must have a copy of the report laid before each House of Parliament within six sitting days after the date of its receipt.

(3) The Director may at any time report to Parliament on any matter affecting the proper carrying out of the functions of the Office.

(4) The report must be given to the Speaker of the House of Assembly and the President of the Legislative Council and they must lay copies of the report before their respective Houses as soon as practicable after its receipt.

## **13—Saving provision**

This Act does not derogate from the right of the Attorney-General to appear personally in any proceedings on behalf of the Crown.

## **14—Regulations**

The Governor may make such regulations as are contemplated by this Act or as are necessary or expedient for the purposes of this Act.

# **Schedule 1 — Transitional provisions**

## **1—Retrospectivity**

(1) This Act applies in relation to proceedings commenced before the commencement of this Act.

(2) This Act applies in relation to offences committed before the commencement of this Act.

## **2—Director to take over from Attorney-General**

Where, before the commencement of this Act, the Attorney-General had exercised, in relation to particular proceedings, a power or function of a kind vested in the Director under this Act, the Director may assume and continue to exercise that power or function as if it had been exercised by the Director from the inception of the proceedings.

# ANNEXURE B:

## *Victims of Crime Act 2001*

### ***Victims of Crime Act 2001***

An Act to lay down principles to govern the treatment of victims of crime in the criminal justice system; to provide limited rights to statutory compensation for injury suffered as a result of the commission of criminal offences; to repeal the *Criminal Injuries Compensation Act 1978*; and for other purposes.

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- 2 Transitional provision
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## Legislative history

### The Parliament of South Australia enacts as follows:

#### Part 1 — Preliminary

##### 1 — Short title

This Act may be cited as the *Victims of Crime Act 2001*.

##### 3 — Objects

The objects of this Act are—

- (a) to give statutory recognition to victims of crime and the harm that they suffer from criminal offending; and
- (b) to establish principles governing how victims of crime are to be treated by public agencies and officials; and
- (c) to help victims of crime recover from the effects of criminal offending and to advance their welfare in other ways; and
- (d) to provide from public funds limited monetary compensation to victims most directly affected by criminal offending.

##### 4 — Interpretation

In this Act, unless the contrary intention appears—

*child*—a reference to a child is not limited to biological and adopted children—it extends to a person in relation to whom another (who is not a biological parent) stands in the position, and undertakes the responsibilities, of a parent; but a reference to a child does not, in the absence of an indication to the contrary, extend to an adult child;

*claimant* means a person by whom, or on whose behalf, an application for statutory compensation is made;

*Commissioner* means the Commissioner for Victims' Rights appointed under Part 3 Division 2;

*conviction* includes a formal finding of guilt and *to convict* has a corresponding meaning;

*court* means the District Court;

*custody* includes—

- (a) home detention; and
- (b) detention in a training centre within the meaning of the *Young Offenders Act 1993*; and
- (c) detention as a result of being declared liable to supervision under Part 8A of the *Criminal Law Consolidation Act 1935*;

*dependants*, in relation to a victim, means any spouse, domestic partner, parents or

children (including adult children) of the victim who are financially dependent on the victim;

*domestic partner* means a person who is a domestic partner within the meaning of the *Family Relationships Act 1975*, whether declared as such under that Act or not;

*harm* means injury, damage or loss;

*homicide* means murder, manslaughter or an offence against section 14 of the *Criminal Law Consolidation Act 1935* (criminal neglect) where the victim dies;

*immediate family* of a person means any one or more of the following:

- (a) a spouse or domestic partner;
- (b) a parent;
- (c) a grandparent;
- (d) a child (including an adult child);
- (e) a grandchild (including an adult grandchild);
- (f) a brother or sister;

*immediate victim*, in relation to an offence, means a victim of any of the following classes:

- (a) a person who suffers physical injury as a result of the commission of the offence;
- (b) a person who suffers psychological injury as a result of being directly involved in the circumstances of the offence or in operations in the immediate aftermath of the offence to deal with its consequences;
- (c) if the offence was committed against a child—a parent or guardian of the child;
- (d) if the offence was committed against a person who dies as a result of the offence—a member of the immediate family of the deceased;

*injury* means physical or mental injury, and includes pregnancy, mental shock and nervous shock;

*non-financial loss* means—

- (a) pain and suffering;
- (b) loss of amenities of life;
- (c) loss of expectation of life;
- (d) disfigurement;

*offence* includes conduct on the part of a person that would constitute an offence if it were not for that person's age or mental impairment;

*offender*, in relation to an offence, means—

- (a) the person who committed the offence; or
- (b) in the case of conduct that would constitute an offence if it were not for the person's age or mental impairment—the person who engaged in that conduct;

*parent* includes a person who stands in the position, and undertakes the responsibilities, of a parent;

*serious offence* means an indictable offence—

- (a) that resulted in the death of, or physical harm to, a victim; or

(b) that is a sexual offence within the meaning of the *Evidence Act 1929*, and includes an offence of aiding, abetting, counselling or procuring the commission of such an offence, conspiring to commit such an offence or being an accessory after the fact to such an offence;

*spouse*—a person is the spouse of another if they are legally married;

*statutory compensation* means compensation under this Act;

*victim*, in relation to an offence, means a person who suffers harm as a result of the commission of the offence (but does not include a person who was a party to the commission of the offence).

## Part 2—Treatment of victims of crime

### Division 1—Explanatory provisions

#### 5—Reasons for declaration and its effect

(1) In this Part, Parliament seeks to declare the principles that should govern the way victims are dealt with by public agencies and officials.

(2) The need for the declaration arises out of national and international concern about the position of victims of crime.

(3) The principles—

(a) are not enforceable in criminal or civil proceedings; and

(b) do not give rise to any right to damages for breach; and

(c) do not affect the conduct of criminal proceedings.

(4) However, public agencies and officials are authorised and required to have regard, and to give effect, to the principles so far as it is practicable to do so having regard to the other obligations binding on them.

### Division 2—Declaration of principles governing treatment of victims

#### 6—Fair and dignified treatment

A victim should be treated—

(a) with courtesy, respect and sympathy; and

(b) with due regard to any special need that arises—

(i) because of the victim's—

- age; or
- sex; or
- race or ethnicity; or
- cultural or linguistic background; or

(ii) for any other reason.

#### 7—Right to have perceived need for protection taken into account in bail proceedings

If a police officer or a person representing the Crown in bail proceedings is made aware

that the victim feels a need for protection from the alleged offender—

- (a) the police officer or other person must ensure that the perceived need for protection is brought to the attention of the bail authority (1); and
- (b) reasonable efforts must be made to notify the victim of the outcome of the bail proceedings and, in particular, any condition imposed to protect the victim from the alleged offender (unless the victim indicates that he or she does not wish to be so informed).

Note—

(1) See also section 10(4) of the *Bail Act 1985* which requires that where there is a victim of an offence, the bail authority must, in determining whether an applicant for bail should be released on bail, give primary consideration to the need that the victim may have, or perceive, for physical protection from the applicant.

## 8—Right to information

(1) A victim should be informed, on request, about the following:

- (a) the progress of investigations into the offence;
- (b) the charge laid and details of the place and date of proceedings on the charge;
- (c) if a person has been charged with the offence—the name of the alleged offender (1);
- (d) if an application for bail is made by the alleged offender—the outcome of the application;
- (e) if the prosecutor decides not to proceed with the charge, to amend the charge, or to accept a plea to a lesser charge or agrees with the defendant to make or support a recommendation for leniency—the reasons for the prosecutor's decision;
- (f) the outcome of the proceedings based on the charge and of any appeal from those proceedings;
- (g) details of any sentence imposed on the offender for the offence;
- (ga) details of any order made by a court on declaring the offender to be liable to supervision under Part 8A of the *Criminal Law Consolidation Act 1935*;
- (h) if the offender is sentenced to imprisonment and later makes an application for release on parole—the outcome of the proceedings and, in particular, any condition imposed to protect the victim from the offender;
- (i) if the offender is subject to a supervision order under Part 8A of the *Criminal Law Consolidation Act 1935* and the offender, or any other person, later makes an application for variation or revocation of the order or an application for review of the supervision order is made—the outcome of the proceedings and, in particular, if the offender is released on licence, any conditions imposed on the licence.

(2) A victim should be informed, on request, about the following:

- (a) if the alleged offender absconds before trial—the fact that he or she has absconded;
- (b) if the offender escapes from custody—the fact that he or she has escaped;
- (c) if the offender, having escaped from custody, is returned to custody—the fact that he or she has been returned to custody;
- (d) if the release of the offender into the community is imminent—details of when the offender is to be released;

(e) if the offender was ordered to undertake community service—whether the offender completed the community service;

(f) if the offender was subject to a bond—whether the conditions of the bond were complied with.

(3) However, a victim is not entitled to information that might jeopardise the investigation of an offence.

(4) A victim should be informed, on request, about procedures that may be available to deal with a grievance the victim may have for non-recognition or inadequate recognition of the victim's rights under this Part.

Note—

(1) Section 64 of the *Young Offenders Act 1993* provides a mechanism for exercising this right in relation to a young offender.

## **9—Victim to be advised on role as witness**

(1) A victim who is to be a witness for the prosecution at the trial of the offence should be informed by the prosecution about the trial process and the victim's rights and responsibilities as a witness for the prosecution.

(2) The information should be given (if practicable) so as to allow the victim sufficient time to obtain independent advice, and arrange independent support, in relation to the exercise of those rights or the discharge of those responsibilities.

## **9A—Victim of serious offence entitled to be consulted in relation to certain decisions**

A victim of a serious offence should be consulted before any decision is made—

(a) to charge the alleged offender with a particular offence; or

(b) to amend a charge; or

(c) to not proceed with a charge; or

(d) to apply under Part 8A of the *Criminal Law Consolidation Act 1935* for an investigation into the alleged offender's mental competence to commit an offence or mental fitness to stand trial.

## **9B—Victim's entitlement to be present in court**

A victim of an offence is entitled to be present in the courtroom during proceedings for the offence unless the court, in accordance with some other Act or law, orders otherwise (1).

Note—

(1) See also section 29A of the *Evidence Act 1929* (which requires that, where a victim of an offence is a witness in the proceedings, the court can only order the victim to leave the courtroom until required to give evidence if the court considers it appropriate to do so) and section 24 of the *Youth Court Act 1993* (which allows a victim and a person chosen by the victim to provide support for the victim to be present during Youth Court proceedings for the relevant offence).

## **10—Victim entitled to have impact of offence considered by sentencing court and to make submissions on parole**

(1) A victim is entitled to have any injury, loss or damage suffered as a result of the offence considered by the sentencing court before it passes sentence (1).

(2) A victim of an offence is entitled to make written submissions to the Parole Board on questions affecting the parole of a person imprisoned for the offence (2).



Notes—

(1) Section 7A of the *Criminal Law (Sentencing) Act 1988* provides a mechanism for exercising this right. See also section 7 of that Act under which the prosecutor is obliged to place before the sentencing court details of injury, loss or damage resulting from the offence.

(2) See section 77(2)(ba) of the *Correctional Services Act 1982*.

### **10A—Victim may request consideration of appeal**

(1) A victim who is dissatisfied with a determination made in relation to the relevant criminal proceedings (being a determination against which the prosecution is entitled to appeal) may request the prosecution to consider an appeal against the determination.

(2) A request under this section must be made within 10 days after the making of the determination.

(3) The prosecution must give due consideration to a request made under this section.

### **11—Victim to be informed about access to health and welfare services**

A victim should be informed about health and welfare services that may be available to alleviate the consequences of injury suffered as a result of the offence.

### **12—Rights in relation to compensation and restitution**

(1) A victim should have access to information about how to obtain compensation or restitution for harm suffered as a result of the offence.

(2) If the prosecutor is empowered to make an application for restitution or compensation on behalf of a victim in criminal proceedings—

(a) the prosecutor should bring that fact to the attention of the victim; and

(b) should, if asked to do so by the victim—

(i) make the application on the victim's behalf; and

(ii) bring to the attention of the court any relevant information provided by the victim in connection with the application.

### **13—Return of property**

If a victim's property is taken for investigation or for use as evidence, the property should, if practicable, be returned to the victim as soon as it appears that it is no longer required for the purposes for which it was taken.

### **14—Protection of privacy**

(1) There should be no unnecessary intrusion on a victim's privacy.

(2) In particular, a victim's residential address should not be disclosed unless it is material to the prosecution or defence.

(3) A victim should be protected as far as practicable from unnecessary contact with the alleged offender and defence witnesses during the course of the trial and in proceedings under this Act (1).

(4) A victim should only be asked to attend proceedings related to the offence if the victim's attendance is genuinely necessary.

Note—

(1) See also section 13 of the *Evidence Act 1929* which contains special provisions for the protection of a person who is a vulnerable witness within the meaning of that section.

## **Part 3—Victims of Crime Advisory Committee and Commissioner for Victims’ Rights**

### **Division 1—Victims of Crime Advisory Committee**

#### **15—Power to establish advisory committee**

- (1) The Attorney-General may establish an advisory committee to advise on—
  - (a) practical initiatives that the Government might take—
    - (i) to ensure that victims of crime are treated with proper consideration and respect in the criminal justice system; and
    - (ii) to help victims of crime to recover from harm suffered by them; and
    - (iii) to advance the interests of victims of crime in other ways; and
  - (b) any other matter referred to the advisory committee by the Attorney-General for advice.
- (2) A member of the advisory committee will be appointed and hold office for a term and on conditions determined by the Attorney-General.

### **Division 2—Commissioner for Victims’ Rights**

#### **16—Commissioner for Victims’ Rights**

- (1) The Governor may appoint a suitable person to be the Commissioner for Victims’ Rights.
- (2) The person appointed as the Commissioner must not be a member of the Public Service.
- (3) The Commissioner has the following functions:
  - (a) to marshal available government resources so they can be applied for the benefit of victims in the most efficient and effective way;
  - (b) to assist victims in their dealings with prosecution authorities and other government agencies;
  - (c) to monitor and review the effect of the law and of court practices and procedures on victims;
  - (d) to carry out other functions related to the objects of this Act assigned by the Attorney General;
  - (e) if another Act authorises or requires the Commissioner to make submissions in any proceedings—to make such submissions (either personally or through counsel);
  - (f) to carry out any other functions assigned under other Acts.
- (4) The Commissioner is a member ex officio of the advisory committee.
- (5) The Commissioner is to be appointed on conditions determined by the Governor and for a term, not exceeding 5 years, specified in the instrument of appointment.
- (6) At the expiration of a term of office, the Commissioner will be eligible for re appointment.
- (7) The Governor may terminate the Commissioner’s appointment if the Commissioner—
  - (a) is guilty of misbehaviour; or

(b) becomes physically or mentally incapable of carrying out official duties satisfactorily; or

(c) becomes bankrupt or applies to take the benefit of a law for the relief of bankrupt or insolvent debtors; or

(d) is absent, without leave of the Attorney General, for 14 consecutive days, or for 28 days in any period of 12 months.

(8) Except as provided in subsection (7), the Commissioner's appointment cannot be terminated.

### **16A—Powers of the Commissioner**

(1) A public agency or official must, if requested to do so by the Commissioner, consult with the Commissioner regarding steps that may be taken by the agency or official to further the interests of—

(a) victims in general; or

(b) a particular victim or class of victim.

(2) If, after consultation with a public agency or official, the Commissioner is satisfied that the public agency or official—

(a) has failed to comply with the requirements of Part 2 in circumstances where such compliance would have been practicable; and

(b) has not apologised or otherwise dealt with the victim in relation to the failure in a satisfactory way,

the Commissioner may, by notice in writing to the public agency or official, recommend that the agency or official issue a written apology to the relevant victim.

(3) The Commissioner must provide the relevant victim with a copy of the notice given under subsection (2).

(4) The Commissioner must, in his or her report under section 16F, specify the number of notices given by the Commissioner under subsection (2), and the public agencies or officials to whom the notices were given, during the year to which the report relates.

(5) The Commissioner must, in exercising his or her powers in relation to a particular victim, have regard to the wishes of that victim.

### **16B—Appointment of acting Commissioner**

(1) If the Commissioner is temporarily absent, or the Commissioner's position is temporarily vacant, the Attorney General may assign a suitable person to act in the Commissioner's position during the temporary absence or vacancy.

(2) A person who is a member of the Public Service is eligible to act in the Commissioner's position.

(3) The terms on which a person is assigned to act in the Commissioner's position will be as determined by the Attorney General.

(4) A person appointed to act in the Commissioner's position has, while so acting, all the functions and powers of the Commissioner.

### **16C—Staff**

(1) The Commissioner will have such staff as is necessary for the effective performance of his or her functions.

(2) The Commissioner's staff will consist of Public Service employees.

## **16D—Delegation**

(1) The Commissioner may delegate to a body or person (including a person for the time being holding or acting in a specified office or position) a function or power of the Commissioner under this or any other Act.

(2) A delegation under this section—

(a) must be by instrument in writing; and

(b) may be absolute or conditional; and

(c) does not derogate from the power of the Commissioner to act in any matter; and

(d) is revocable at will.

(3) A function or power delegated under this section may, if the instrument of delegation so provides, be further delegated.

## **16E—Independence of Commissioner**

(1) Subject to this section, the Commissioner is entirely independent of direction or control by the Crown or any Minister or officer of the Crown.

(2) The Attorney General may, after consultation with the Commissioner, give directions and furnish guidelines to the Commissioner in relation to the carrying out of his or her functions.

(3) Directions or guidelines under this section—

(a) must, as soon as practicable after they have been given, be published in the Gazette; and

(b) must, within 6 sitting days after they have been given, be laid before each House of Parliament.

## **16F—Annual report**

(1) The Commissioner must, on or before 30 September in each year, present a report to the Attorney General on the operations of the Commissioner during the previous financial year.

(2) The Attorney General must, within 12 sitting days after receipt of a report under this section, cause copies of the report to be laid before each House of Parliament.

# **Part 4—Compensation**

## **17—Eligibility to make claim**

(1) A person is eligible to claim statutory compensation for injury caused by an offence if—

(a) the person is an immediate victim of the offence; and

(b) at least one of the following conditions is satisfied:

(i) the offence involved the use of violence or a threat of violence against the person or a member of the person's immediate family;

(ii) the offence created a reasonable apprehension of imminent harm to the person or a member of the person's immediate family;

(iii) the offence is a sexual offence;

- (iv) the offence caused death or physical injury.
- (2) A person is eligible to claim statutory compensation for grief suffered in consequence of the commission of a homicide if the person is—
- (a) a spouse or domestic partner of the deceased victim; or
  - (b) where the deceased victim was a child—a parent of the deceased victim.
- (3) A person is eligible to claim statutory compensation for financial loss suffered by the dependants of a deceased victim if—
- (a) the victim died as a result of the injury caused by the offence; and
  - (b) no previous order for statutory compensation has been made in respect of the injury; and
  - (c) the person is, in the opinion of the court, a suitable person to represent the interests of the dependants.
- (4) A person is eligible to claim statutory compensation for funeral expenses if—
- (a) a victim dies in consequence of the offence; and
  - (b) the person has paid, or is responsible for payment of, the victim's funeral expenses.
- (5) However—
- (a) a person is not entitled to statutory compensation if the injury arises from a breach of statutory duty by the person's employer that occurs in the course of the person's employment; and
  - (b) a person is not entitled to statutory compensation if the person has received, or is entitled to receive, workers compensation for the same harm under Division 5 or 6 of Part 4 of the *Workers Rehabilitation and Compensation Act 1986*; and
  - (c) a person is not entitled to statutory compensation if the injury is caused by, or arises out of the use of, a motor vehicle in circumstances in which the injury falls within the ambit of a compulsory third-party insurance scheme covering the motor vehicle (whether the vehicle is in fact insured under the scheme or an action for damages lies against a nominal defendant); and
  - (d) a person is not entitled to statutory compensation for hospital or medical expenses that would, if no award for compensation were made, be recoverable from a health fund or scheme; and
  - (e) a prisoner is not entitled to statutory compensation for psychological injury resulting from an offence committed in the prison unless the prisoner was assaulted or suffered physical injury.
- (6) If workers compensation and statutory compensation are paid for the same harm (1), the payment of statutory compensation does not give rise to a right to recovery under a law relating to workers compensation.

Note—

- (1) Note that this provision will only apply in the comparatively rare cases where the payment of, or right to, workers compensation does not operate to the exclusion of a right to statutory compensation under subsection (5)(b) above.

## 18—Application for compensation

- (1) A person who is eligible to claim statutory compensation may, within the initial application

period, apply for statutory compensation.

(2) The initial application period is—

- (a) for an application by a victim—3 years after the commission of the offence;
- (b) for an application arising from the death of a victim—12 months after the date of death.

(3) An application is to be made in the first instance to the Crown Solicitor.

(4) The following requirements apply to and in relation to the application:

(a) the application must—

- (i) contain the information required by the regulations; and
- (ii) be accompanied by any medical reports relevant to the injury in the possession of, or accessible to, the claimant; and
- (iii) be accompanied by any further documents required under the regulations; and

(b) the information contained in an application must be verified by statutory declaration; and

(c) a copy of the application must be served on the offender unless—

- (i) the identity of the offender is unknown; or
- (ii) the Crown Solicitor exempts the applicant from this requirement on the ground that the whereabouts of the offender are unknown and cannot be readily ascertained.

(4a) If—

(a) the claimant is a child or other person who is not of full legal capacity; and

(b) the Crown Solicitor and the person acting on behalf of the claimant propose to settle the claim for statutory compensation by agreement; and

(c) an application is made to a court for an order or orders in respect of that agreement, the offender must not be joined as a party to the proceedings before the court on that application.

(5) If a claim for statutory compensation has not been settled by agreement between the Crown Solicitor and the claimant within 3 months after the application is made or a longer period agreed between the Crown Solicitor and the claimant (the period for negotiation), the claimant may apply to the court for an order for statutory compensation.

(6) An application to the court under subsection (5) must be made on or before the later of the following:

(a) the end of the initial application period; or

(b) the end of the period of 6 months that follows immediately after the end of the period for negotiation.

(7) The court may, for any proper reason, extend a period of limitation fixed by this section.

## **19—Joinder of offender as party to court proceedings**

(1) If an application for statutory compensation is made to the court, the offender is (subject to this section) to be a party to the proceedings before the court.

(2) A claimant who makes an application to the court must (subject to this section) serve a copy of the application on the offender.

(3) The above requirements are subject to the following qualifications:

(a) if the identity of the offender is not known, there is no need to serve a copy of the application on the offender and the offender does not, in that case, become a party to the proceedings;

(b) if the whereabouts of the offender are not known and cannot be readily ascertained, the court may, on application by a claimant, exempt the claimant from the obligation to serve a copy of the application on the offender and, if such an exemption is granted, the offender is not a party to the proceedings.

## 20—Orders for compensation

(1) Subject to this Act, on an application for statutory compensation, the court may order—

(a) that the victim be paid by the Crown such amount as the court thinks fit by way of compensation for the injury arising from the offence; or

(b) that the dependants of a dead victim be paid by the Crown such amount as the court thinks fit by way of compensation for the financial loss suffered by them (to be proportioned between the various claimants as the court thinks fit); or

(c) in the case of an application for compensation for grief—that a claimant be paid by the Crown such amount (not exceeding \$10 000) as the Court thinks fit by way of compensation for the grief suffered by the claimant; or

(d) in the case of an application for compensation for funeral expenses—that the claimant be paid—

(i) the amount of funeral expenses incurred by the claimant; or

(ii) \$7 000,

whichever is the lesser.

(2) If the Crown consents to the making of an order for statutory compensation, the court may, without further inquiry, make an order on terms agreed by the claimant and the Crown but—

(a) the settlement does not bind the offender in any way unless the offender was a party to the settlement agreement; and

(b) the settlement does not limit rights that the claimant may have independently of this Act against the offender (whether or not the offender is a party to the settlement).

(3) In awarding statutory compensation, the court must observe the following rules:

(a) in the case of an award under subsection (1)(a) or (b)—

(i) if financial loss is to be compensated and the amount that would, but for this subparagraph, be awarded exceeds \$2 000, the amount awarded will, subject to subparagraph (iii), be \$2 000 plus three-quarters of the excess; and

(ii) if a claim for non-financial loss is made—

- the total non-financial loss must be assigned a numerical value on a scale running from 0 to 50 (the greater the severity of the non-financial loss, the greater the number); and

- if the numerical value so assigned is 2 or less, no award will be made for non-financial loss but, if the numerical value exceeds 2, the amount awarded will be arrived at by multiplying the number so assigned by \$1 000; and

(iii) in any case—where an amount arrived at to compensate financial loss, or the aggregate of amounts arrived at to compensate financial loss and non-financial loss, would, but for this subparagraph, exceed \$50 000, the amount awarded will be \$50 000;

(b) in the case of an award of compensation for grief—if both the spouse and the domestic partner of a person killed by homicide, or both parents of a child killed by homicide, have applied for such compensation, the aggregate of the amounts awarded to them by way of such compensation will not exceed \$10 000;

(c) subject to the following qualifications, statutory compensation amounting in aggregate to more than \$50 000 cannot be awarded to any single claimant.

**Qualifications—**

1 If the claimant claims both as a dependant or representative of the dependants of a deceased victim and in some other capacity, the limitation applies separately to each capacity in which the claimant claims.

2 An amount to which an applicant is entitled by way of funeral expenses will not be brought into account in determining whether the limitation has been exceeded.

(4) In determining an application for, and the quantum of, statutory compensation, the court must have regard to—

(a) any conduct on the part of the victim (whether or not forming part of the circumstances immediately surrounding the offence or injury) that contributed, directly or indirectly, to the commission of the offence, or to the injury to the victim; and

(b) such other circumstances as it considers relevant.

(5) The court must not make an order for compensation in respect of injury to a claimant caused by an offence if the court—

(a) is satisfied beyond reasonable doubt that the injury to the claimant occurred while the claimant was engaged in conduct constituting an indictable offence; and

(b) is satisfied on the balance of probabilities that the claimant's conduct contributed materially to the risk of injury to the claimant,

(unless the court is satisfied that, in the circumstances of the particular claim, failure to compensate would be unjust).

(5a) The court must not make an order for compensation for grief or funeral expenses in favour of a claimant if the court—

(a) is satisfied beyond reasonable doubt that the victim's death occurred while the claimant was engaged in conduct constituting an indictable offence; and

(b) is satisfied on the balance of probabilities that the claimant's conduct contributed materially to the death of the victim,

(unless the court is satisfied that, in the circumstances of the particular claim, failure to compensate would be unjust).

(6) For the purposes of subsections (5)(a) and (5a)(a), a relevant conviction or acquittal is to be regarded as conclusive of the claimant's guilt or innocence of the indictable offence.

(7) The court must not make an order for compensation in favour of a claimant if it appears to the court that the claimant, without good reason—



(a) failed to report the offence to the police within a reasonable time after its commission; or

(b) refused or failed to provide information to the police that was within the claimant's knowledge as to the offender's identity or whereabouts; or

(c) refused or failed to give evidence in the prosecution of the offender; or

(d) otherwise refused or failed to co-operate properly in the investigation or prosecution of the offence,

and, in consequence, investigation or prosecution of the offence was not commenced or was terminated or hindered to a significant extent.

(8) In deciding the amount of compensation to be awarded, the court must take into account—

(a) any failure by the claimant to avail himself or herself of proper medical treatment or rehabilitative therapy; or

(b) any other failure to take proper steps to mitigate his or her loss.

(9) No interest may be awarded by the court in respect of the whole or any part of the amount of statutory compensation ordered.

(10) If the court has made an order for compensation under this section—

(a) it must, where the offender has been convicted, or adjudged or found guilty, of the offence, endorse on or annex to the order a statement of the offender's means (so far as they are ascertainable by the court); and

(b) it must endorse on or annex to the order a statement of any payments that the claimant has received, or would, were the claimant to exhaust all other available remedies, be likely to receive, in respect of the injury or the death of the victim, apart from this Act.

(11) The court may make such orders for the costs of proceedings under this Act as the court thinks fit.

## **21—Medical examination of claimant**

(1) A claimant must, if the Crown so requires, submit himself or herself for medical examination by a medical practitioner nominated by the Crown.

(2) The costs of the medical examination, and any expenses reasonably incurred by the claimant in complying with the request for the examination, must be borne by the Crown.

(3) If an offender is a party to proceedings under this Act, the court may, on application by the offender, order a claimant to submit himself or herself for medical examination by an appropriate medical practitioner (at the offender's expense).

(4) The court may order that the proceedings on an application for statutory compensation be stayed until a medical examination has been completed.

(5) A party must, on receiving the report of the medical practitioner on the results of the examination, furnish the other parties with a copy of the report.

## **22—Evidence and proof**

(1) Subject to this Act, any fact to be proved by a claimant in proceedings under this Act is sufficiently proved if it is proved on the balance of probabilities.

(2) No order for statutory compensation may be made (except by consent of the Crown)

on an application unless—

(a) the commission of the offence to which the application relates—

(i) has been admitted, or proved beyond reasonable doubt, in proceedings before a court; or

(ii) has been admitted in statutory proceedings related to the offence or can be reasonably inferred from admissions made in any such proceedings; and

(b) the other facts on which the application is based have been proved on the balance of probabilities.

(3) If an order for compensation is sought in respect of an offence, and no person has been brought to trial charged with the offence, the evidence of the claimant as to the commission of the offence, unless supported in a material particular by corroborative evidence, is not sufficient to establish the commission of the offence.

(4) In proceedings under this Act, the court may receive in evidence a transcript of evidence in proceedings in any other court, and may draw any conclusions of fact that it considers proper.

## **23—Joint offences**

(1) If an application is made for statutory compensation in respect of injury suffered by a victim, financial loss suffered by a dependant, or grief suffered by a spouse, domestic partner or parent, in consequence of an offence committed by more than one offender, the court may make only one order for statutory compensation in respect of that injury, loss or grief.

(2) If an application is made for statutory compensation in respect of injury suffered by a victim, financial loss suffered by a dependant, or grief suffered by a spouse, domestic partner or parent—

(a) in consequence of a series of offences committed consecutively by one offender, or a series of offences committed simultaneously or consecutively by offenders acting in concert; or

(b) in circumstances in which those offences constitute a single incident,

the court may make only one order for statutory compensation in respect of the injury, loss or grief.

## **24—Appeals**

(1) A party to proceedings under this Act may, subject to the rules of the Supreme Court, appeal to the Full Court of the Supreme Court against any final order made by the court in those proceedings.

(2) However, if an order for statutory compensation is made by consent of the Crown, the offender cannot appeal against that order (1).

(3) The Supreme Court may—

(a) dismiss the appeal; or

(b) quash the order and, if it thinks fit, substitute any other order that the court in the first instance could have made; or

(c) vary the order in any respect; or

(d) remit the subject matter of the appeal for rehearing,

and may make such other ancillary orders (including, subject to this Act, orders relating to the costs of the appeal) as it thinks fit.

Note—

(1) Note that in these circumstances, the order does not necessarily bind the offender when the Crown applies for reimbursement—see section 28.

## 25—Legal costs

(1) Despite any Act or law to the contrary—

(a) costs awarded in proceedings under this Act must not exceed the amount allowable under the prescribed scale (plus GST); and

(b) a legal practitioner must neither charge nor seek to recover in respect of proceedings under this Act an amount by way of costs in excess of the amount allowable under the prescribed scale (plus GST).

(2) The Governor may, by regulation, prescribe a scale of costs for the purposes of subsection (1).

(3) In this section—

GST means the tax payable under the GST law;

GST law means—

(a) *A New Tax System (Goods and Services Tax) Act 1999* (Commonwealth); and

(b) the related legislation of the Commonwealth dealing with the imposition of a tax on the supply of goods, services and other things.

## 26—Representation of Crown in proceedings

The Crown may be represented by any person nominated by the Attorney-General in preliminary or interlocutory proceedings under this Act or at a hearing for an order under this Act to be made by consent.

## Part 5—Payment of compensation

### 27—Payment of compensation etc by Attorney-General

(1) Subject to subsection (2), the Attorney-General must satisfy an order for statutory compensation (or for statutory compensation and costs) within 28 days of—

(a) the day on which a copy of the order is lodged by the claimant with the Attorney-General; or

(b) if an appeal has been instituted against the order, the day on which the appeal is withdrawn or determined,

whichever is the later.

(2) If—

(a) the claimant has received or is entitled to payments apart from this Act in respect of the injury or loss (*other payments*); and

(b) the Attorney-General is satisfied that, in view of the other payments, it is just to exercise the powers conferred by this subsection,

the Attorney-General may decline to satisfy an order for statutory compensation (or

for statutory compensation and costs), or may reduce the payment to be made to the extent it appears just to do so.

- (3) In the exercise of the discretion conferred by subsection (2), the Attorney-General—
- (a) should have regard to the extent to which the other payments represent an adequate compensation for the injury or loss; and
  - (b) should (in appropriate cases) have regard to the extent to which the other payments compensate (or would compensate) the claimant for pain, suffering and other non-economic loss; and
  - (c) if the other payments do not, in the Attorney-General's opinion, represent an adequate compensation for pain, suffering and other non-economic loss, should not reduce the amount to be paid under this Act below the lesser of the following two amounts:
    - (i) the amount that represents the extent of the deficiency;
    - (ii) \$10 000.
- (4) The Attorney-General has an absolute discretion to make the following payments:
- (a) an interim payment of compensation (not exceeding the limits prescribed by this Act in relation to an order for compensation) to a claimant who, in the opinion of the Attorney-General, is in necessitous circumstances and is likely to be awarded statutory compensation; or
  - (b) an *ex gratia* payment (not exceeding the limits prescribed by this Act in relation to an order for compensation) to a person in the following circumstances:
    - (i) the person suffers injury, financial loss or grief in consequence of conduct alleged to constitute an offence;
    - (ii) the alleged offender is acquitted of the offence;
    - (iii) the acquittal appears to the Attorney-General to have arisen—
      - in a case of rape—from lack of *mens rea*;
      - in any other case—from duress, drunkenness or automatism;
    - (iv) the person would, in the Attorney-General's opinion, probably have been awarded statutory compensation if the offence had been established; or
  - (c) an *ex gratia* payment (not exceeding the limits prescribed by this Act in relation to an order for compensation) to the victim of conduct capable of constituting the objective elements of an offence if it appears to the Attorney-General that, because of lack of evidence, absence of capacity to incur criminal responsibility or other matters personal to the perpetrator, or for any other reason that does not reflect adversely on the victim, an offence has not been, or cannot be, established; or
  - (d) an *ex gratia* payment (not exceeding the limits prescribed by this Act in relation to an order for compensation) to a person in the following circumstances:
    - (i) the person suffers injury, financial loss or grief in consequence of an offence committed outside this State;
    - (ii) the victim is at the time of the commission of the offence ordinarily resident in this State;
    - (iii) some person is convicted of the offence;

(iv) if the law of the place where the offence is committed establishes a right to compensation—the claimant has taken reasonable steps to obtain compensation under that law but without success;

(v) the claimant would, in the Attorney-General's opinion, probably have been awarded statutory compensation if the offence had been committed in this State;

(vi) the claimant is, in the Attorney-General's opinion, in necessitous circumstances;  
or

(e) such other ex gratia payments (not exceeding, in any particular case, the limits prescribed by this Act in relation to an order for compensation) as the Attorney-General considers necessary, and consistent with the objects and policy of this Act, to compensate harm resulting from criminal conduct or conduct of the kind described above.

(5) A decision by the Attorney-General in the exercise of a discretion under this section cannot be challenged or called in question before any court.

## **28—Right of Attorney-General to recover money paid out from offender etc**

(1) If the Attorney-General makes a payment to a claimant, the Attorney-General is subrogated, to the extent of the payment, to the rights of—

(a) the claimant, as against the offender or any other person liable at law to compensate the claimant for the injury, financial loss or grief in respect of which the payment was made; and

(b) the offender, as against any insurer or other person from whom the offender is entitled to indemnity or contribution in respect of liability arising from the injury or death in respect of which the payment was made.

(2) The Attorney-General may—

(a) bring a claim against an insurer or other person against whom the subrogated right lies by way of third party proceedings in the proceedings founded on the application for statutory compensation; or

(b) bring such a claim in separate proceedings against the person against whom the subrogated right lies (including an offender who was not a party to the proceedings founded on the application for statutory compensation).

(3) If the offender is a party to proceedings founded on an application for statutory compensation—

(a) the Attorney-General may file in the court a certificate certifying—

(i) the amount of the statutory compensation paid out on the claim; and

(ii) the applicant's costs (so far as they have been or are to be paid by the Crown);  
and

(b) judgment must then be entered in favour of the Crown and against the offender for the aggregate amount so certified.

(4) However, if the claim was settled by agreement between the Crown and the claimant, and the offender was not a party to the agreement for settlement—

(a) the offender may, within 1 month after the offender receives notice of a judgment entered under subsection (3), apply to have the judgment set aside or varied as may be reasonable in the circumstances of the case; and

(b) the court may set aside the judgment or vary it accordingly.

(5) If an application for statutory compensation is settled without court proceedings, or proceedings were brought in court but the offender was not a party to those proceedings, the Attorney-General may—

(a) file in the court a certificate certifying—

(i) the amount of the statutory compensation paid out on the claim; and

(ii) the applicant's costs (so far as they have been or are to be paid by the Crown);  
and

(b) apply for summary judgment in favour of the Crown and against the offender for the aggregate amount so certified.

(6) The court must, on an application by the Attorney-General under subsection (5), enter summary judgment in accordance with the application unless the offender satisfies the court, on application made by the offender within 1 month after receiving notice of the Attorney-General's application, that there is good reason for not entering judgment in accordance with the Attorney-General's application.

(7) If a debt arises from a judgment entered in favour of the Crown and against an offender in accordance with this section, the Fines Enforcement and Recovery Officer may take action on behalf of the Crown to recover the debt and for that purpose may, subject to subsection (8), exercise any power or do any thing that the Fines Enforcement and Recovery Officer is authorised or required to exercise or do in relation to an enforcement determination under the *Expiation of Offences Act 1996* as if—

(a) the debt that may be recovered from the offender in accordance with this section was the amount due under the expiation notice to which the enforcement determination relates; and

(b) the offender was a person against whom enforcement action was being taken.

(8) The Fines Enforcement and Recovery Officer, in acting under subsection (7) in relation to an offender—

(a) may not enter into an arrangement requiring the offender to complete community service under section 9 of the *Expiation of Offences Act 1996*; and

(b) may only waive payment under section 14A of that Act with the approval of the Attorney General.

(9) Section 14B of the *Expiation of Offences Act 1996* does not apply to a debt to be recovered under this section.

(10) Section 61 of the *Criminal Law (Sentencing) Act 1988* applies in relation to a debt under this section in the same way as it applies to an expiation amount (other than an expiation fee).

## 29—Recovery from claimant

(1) If the Attorney-General makes an interim payment of statutory compensation to a claimant and no order for statutory compensation is subsequently made in favour of that claimant, or an order is made but for a lesser amount, the Attorney-General may recover the amount so paid or the amount of the excess (as the case requires) from the claimant as a debt.

(2) If—

- (a) the Attorney-General makes a payment under this Act to a claimant; and
- (b) the claimant is subsequently paid compensation or damages by some other person for the injury, financial loss or grief for which the payment under this Act was made; and
- (c) the compensation or damages received from the other source was not taken into account by the Attorney-General in making the payment or exceeds the amount taken into account by the Attorney-General,

the Attorney-General may recover from the claimant, as a debt, the amount of the payment or the amount of the excess (as the case requires) but may not recover more than the amount received from the other source.

## **Part 6—Victims of Crime Fund**

### **30—Victims of Crime Fund**

(1) The Fund previously known as the *Criminal Injuries Compensation Fund* continues in existence as the *Victims of Crime Fund*.

(2) The Fund consists of—

- (a) the money provided by Parliament for the purposes of the Fund; and
- (b) any amounts paid into the Fund under subsection (3); and
- (c) any amounts recovered by way of levy under this Part; and
- (d) any amounts recovered by the Attorney-General under this Act; and
- (e) any money paid into the Fund under any other Act.

(3) In each financial year, the prescribed proportion of the aggregate amount paid into General Revenue by way of fines will be paid into the Fund.

(5) A deficiency in the Fund will be met from the Consolidated Account.

### **31—Payments from Fund**

(a1) The following payments must be made from the Fund:

- (a) all payments made by the Attorney General under this Act;
- (b) the salary of the Commissioner;
- (c) the salaries of other staff of the Commissioner if those staff are designated by the Attorney General as being staff to whom this provision applies.

(1) The Attorney-General has an absolute discretion to make payments from the Fund to a government or non-government organisation or agency for a purpose that will, in the Attorney-General's opinion, assist in the prevention of crime or advance the interests of victims of crime.

(2) The Attorney-General also has an absolute discretion to make other payments from the Fund to or for the benefit of victims of crime that will, in the Attorney-General's opinion, help them to recover from the effects of crime or advance their interests in other ways.

(3) A decision by the Attorney-General in the exercise of a discretion under this section cannot be challenged or called in question before any court.

## 32—Imposition of levy

- (1) A levy is imposed for the purpose of providing a source of revenue for the Fund.
- (2) Subject to subsection (3) and any exceptions prescribed by the regulations, the levy is imposed on—
  - (a) all persons convicted of offences after the commencement of this section (whether the offence was committed before or after the commencement of this section); and
  - (b) all persons who expiate offences under expiation notices issued after the commencement of this section.
- (3) A levy is not imposed on a person convicted of an offence if the person has paid the levy under an expiation notice issued for the same offence.
- (4) The amount of the levy is to be fixed by regulation.
- (5) The amount of the levy may vary according to any one or more of the following factors:
  - (a) the nature of the offence;
  - (b) whether the offence is a summary or an indictable offence;
  - (c) whether or not the offence is expiated;
  - (ca) whether the offence is expiated by payment of the expiation fee, or other arrangements in relation to payment of the expiation fee, during the expiation period or otherwise;
  - (d) whether or not the offender is an adult;
  - (e) variations in the consumer price index.
- (6) If a levy is payable under this section by a person who expiates an offence, the amount of the levy must be shown on the expiation notice.
- (7) If a levy is payable under this section by a person who is convicted of an offence—
  - (a) the amount of the levy must be shown in—
    - (i) any formal record of the conviction and sentence; and
    - (ii) any notice of the conviction and sentence given to the defendant; and
    - (iii) any warrant of commitment issued for the imprisonment of the defendant for the offence; and
  - (b) the court may not, at the time of convicting or sentencing the defendant for the offence, reduce the levy or exonerate the defendant from liability to pay it; and
  - (c) the levy is recoverable under the *Criminal Law (Sentencing) Act 1988*.

## Part 7—Miscellaneous

### 32A—Victim may exercise rights through an appropriate representative

- (1) Rights granted to a victim under this, or any other, Act may be exercised on behalf of the victim by an appropriate representative chosen by the victim for that purpose.

Note—

Such rights would include (without limitation) the right to request information under this or any other Act, the right to make a claim for compensation under this or any other Act and the right to furnish a victim impact



statement under the *Criminal Law (Sentencing) Act 1988*.

(2) This section does not apply to rights, or rights of a kind, prescribed by the regulations.

(3) In this section—

*appropriate representative*, in relation to a victim, means any of the following:

- (a) an officer of the court;
- (b) the Commissioner for Victims' Rights or a person acting on behalf of the Commissioner for Victims' Rights;
- (c) an officer or employee of an organisation whose functions consist of, or include, the provision of support or services to victims of crime;
- (d) a relative of the victim;
- (e) another person who, in the opinion of the Commissioner for Victims' Rights, would be suitable to act as an appropriate representative.

### **33—Interaction between this Act and other laws**

This Act does not exclude or derogate from rights to damages or compensation that exist apart from this Act.

### **34—Date as at which compensation is to be assessed**

If a person is entitled to statutory compensation, the amount of the compensation must be assessed in accordance with the provisions of this Act as in force at the time of the commission of the offence from which the injury arose.

### **35—Delegation**

(1) The Attorney-General may, by instrument in writing, delegate to a specified person, or the holder of a specified position, any of the Attorney-General's powers or functions under this Act.

(2) A delegation under this section—

- (a) may be made subject to conditions or limitations; and
- (b) is revocable at will and does not derogate from the power of the Attorney-General to act in any matter.

(3) However, a delegation cannot be made under this section of the Attorney-General's power to decline to satisfy an order for statutory compensation (or for statutory compensation and costs) or to reduce the payment to be made under such an order (1).

Note—

- (1) See section 27(2).

### **36—Annual report**

(1) The administrative unit of the Public Service responsible, under the Attorney-General, for the administration of this Act must, on or before 30 September in each year, present a report to the Attorney-General on the operation and administration of this Act during the previous financial year.

(2) A report required under this section may be incorporated in the annual report of the relevant administrative unit.

(3) The Attorney-General must, within 12 sittings days after receipt of a report under this section, cause copies of the report to be laid before each House of Parliament.

## 37—Regulations

The Governor may make regulations for the purposes of this Act.

## Schedule 1—Repeal and transitional provisions

### 1—Repeal of *Criminal Injuries Compensation Act 1978*

The *Criminal Injuries Compensation Act 1978* (the repealed Act) is repealed.

### 2—Transitional provision

(1) Subject to subclause (2), the repealed Act applies to an application for compensation in respect of an injury arising from an offence committed before the commencement of this Act.

(2) However, if compensation (other than interim compensation) had not been paid under the repealed Act before the commencement of this Act, Part 5 of this Act applies to the exclusion of the corresponding provisions of the repealed Act as if the order for compensation were an order under this Act.

(3) This Act applies to a claim for statutory compensation for an injury caused by an offence committed on or after the commencement of this Schedule.

### 3—Operation of certain amendments

An amendment made by a provision of the *Statutes Amendment (Domestic Partners) Act 2006* to this Act applies only in relation to a claim for statutory compensation for an injury caused by an offence committed after the commencement of the amendment.





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**Government of South Australia**

Director of Public Prosecutions