IN THE MATTER OF THE ROYAL COMMISSION INTO FAMILY VIOLENCE

ATTACHMENT PR-9 TO STATEMENT OF SENIOR SERGEANT PAUL RUDD

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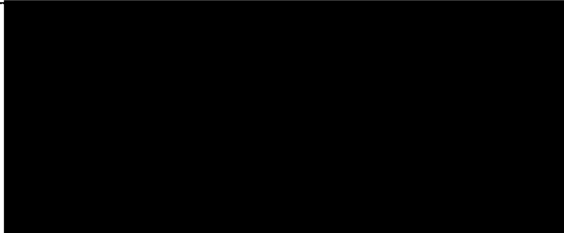

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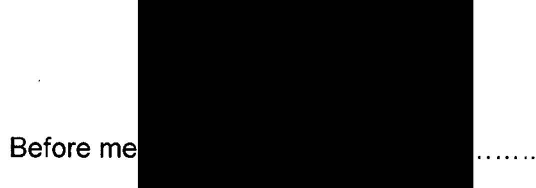
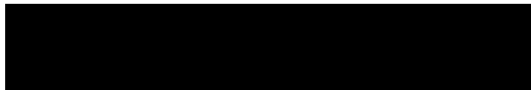
Before me  ....



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Attachment PR-9

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• DIRECTOR'S POLICY •

THE PROSECUTORIAL DISCRETION

27 July 2013

POLICY 2

2.1. Criteria Governing the Decision to Prosecute

2.1.1. 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.

2.1.2 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 alleged offender. (The term "alleged offender" includes an accused person.)

2.1.3 In deciding whether the evidence is sufficient to justify the institution or continuation of a prosecution, the existence of a bare prima facie case is not enough. Once it is established that there is a prima facie case it is then necessary to give consideration to the prospects of conviction. A prosecution should not proceed if there is no reasonable prospect of a conviction being secured. In indictable matters this test presupposes that the jury will act in an impartial manner in accordance with its instructions.

2.1.4 The decision 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 alleged offender 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 the useless expenditure of public funds.

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2.1.5 When evaluating the evidence regard should be given 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 (where it still applies)? For example, prosecutors will wish to satisfy themselves that evidence of admissions has been properly obtained. The possibility that any evidence might be excluded should be taken into account and, if it is crucial to the case, may substantially affect the decision whether or not to institute or proceed with a prosecution.

(b) If the case depends in part on admissions by the alleged offender, are there any grounds for believing that they are of doubtful reliability, especially in light of Part 3.4 of the Evidence Act 2008, in particular sections 84, 85 and s.90?

(c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either unfavourable to the prosecution or friendly to the accused, or may be otherwise unreliable? Note perceived problems with an 'unfavourable witness" may be overcome pursuant to s.38 of the Evidence Act 2008, a provision that "may" permit the prosecution to cross-examine a witness in respect of evidence that is 'unfavourable' to the prosecution case.

(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? It should be noted that a witness can only be cross-examined on issues relevant only to credibility when the evidence adduced would "substantially affect the assessment of the credibility" of the witness - s. 103 Evidence Act 2008.

(f) What sort of impression is the witness likely to make? How is the witness likely to stand up to cross-examination? Does the witness suffer from any physical or mental disability which is likely to affect his or her credibility? Note again that the Evidence Act 2008 defines 'credibility' quite broadly, and arguably includes ability to communicate - therefore the impact of Part 3.7 of the Evidence Act 2008 on any evidence in the matter must be considered.

(g) If there is conflict between eyewitnesses, does it go beyond what one would expect and hence materially weaken the case?

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(h) If there is a lack of conflict between eyewitnesses, is there anything which causes suspicion that a false story may have been concocted?

(i) Are all the necessary witnesses available and competent to give evidence, including any who may be abroad? The fact a witness is unavailable to attend a hearing may not be detrimental to the Prosecution case if the person has died or it can be proven reasonable steps were taken to secure attendance (refer to the Evidence Act 2008 Dictionary Part 2 definition of "unavailability of persons"). Is any witness likely to object to being required to give evidence pursuant to s.18 of the Evidence Act 2008?

(j) Where child witnesses are involved, are they likely to be able to give sworn evidence or, if not, is there corroboration in some material particular by some other evidence implicating the alleged offender?

(k) If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the alleged offender? See Evidence Act 2008 Part 3.9.

(l) Where two or more alleged offenders are charged together, is there a realistic prospect of the proceedings being severed? If so, is the admissible evidence sufficient to prove the case against each alleged offender should separate trials be ordered?

(m) Is there expert forensic/medical evidence available and, if so, is it reliable? (Note: See para.2.1.13, in this regard).

2.1.6 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 the 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.

2.1.7 Lord Shawcross, when he was Attorney-General of the United Kingdom, expressed the following view in a House of Commons debate: "It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should prosecute 'wherever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest.' That is still the dominant consideration." (H.C. Debates, Vol.483, col.681, 29 January 1951).

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2.1.8 This view, which has been endorsed by Lord Shawcross' successors, is equally applicable to Victoria. 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 with some vigour those cases worthy of prosecution.

2.1.9 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 many public interest factors 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, 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.

2.1.10 Factors which may arise for consideration either alone or in combination 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 alleged offender, a victim or witness;

(d) the alleged offender's antecedents and background;

(e) the staleness of the alleged offence (as discussed in the Charter of Human Rights and Responsibilities, s 24);

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

(g) the obsolescence or obscurity of the law;

(h) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;

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

(j) the prevalence of the alleged offence and the need for deterrence, both personal and general;

(k) whether the consequences of any resulting conviction would be unduly harsh and oppressive;

(l) whether the alleged offence is of considerable public concern;

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(m) any entitlement of the State, the victim or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken;

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

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

(p) whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;

(q) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;

(r) special circumstances that would prevent a fair trial from being conducted;

(s) whether the alleged offence is triable only on indictment;

(t) the need to maintain public confidence in basic constitutional institutions such as the Parliament and the courts; and

(u) whether a sentence has already been imposed on the offender which adequately reflects the criminality of the episode.

2.1.11 As a matter of practical reality the proper decision in many 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 court in mitigation at sentence. Nevertheless, where the offence is not so serious as plainly to require prosecution, the prosecutor should also apply his or her mind to whether the public interest requires a prosecution to be pursued.

2.1.12 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 alleged offender or any other person involved;

(b) personal feelings concerning the offence, the offender or a victim;

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

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

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2.1.13 In any matter in which the prosecution case is wholly or substantially reliant upon DNA evidence, the prosecution should not be instituted or continued until specific instructions have been sought from the Director or in his absence, the Chief Crown Prosecutor. The purpose of this requirement is to ensure that very close scrutiny is given to this category of cases, to ensure that they proceed only if the DNA evidence is clearly reliable and highly probative, and/or where there is sufficient non-DNA evidence available to support the prosecution case.

2.2 *Prosecution of Juveniles*

2.2.1 Special considerations apply to the prosecution of juveniles Prosecution of a juvenile 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 offence or the circumstances of the juvenile concerned dictate otherwise. In this regard, ordinarily the public interest will not require the prosecution of a juvenile who is a first offender in circumstances where the offence is not serious. A juvenile should never be prosecuted solely to obtain access to the welfare powers of the court.

2.2.2 In deciding whether or not the public interest warrants the prosecution of a juvenile, regard should be had to such of the factors set out in paragraph

2.1.10 as appear to be relevant, but particularly to:

(a) the seriousness of the offence;

(b) the age and apparent maturity and mental capacity of the juvenile;

(c) the available alternatives to prosecution, such as a caution, and their efficacy;

(d) the sentencing options available to the relevant Children's Court if the matter were to be prosecuted;

(e) the juvenile's family circumstances, particularly whether the parents of the juvenile appear able and prepared to exercise effective discipline and control over the juvenile;

(f) the juvenile's antecedents, including the circumstances of any previous caution the juvenile 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 juvenile or be inappropriate, having regard to such matters as

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the personality of the juvenile and his or her family circumstances.

2.3 Declining to Proceed After Committal

2.3.1 In cases where the accused was committed for trial or directly presented before 1 January 2010, the Director shares with the Attorney-General the power to enter a nolle prosequi ((lit. "to refuse to pursue"). In cases where the accused was committed on or after 1 January 2010 the Attorney General retains the power to enter a Nolle Prosequi (s.25(2) Public Prosecutions Act 1994) however in such cases the Director will now issue a notice of discontinuance. The power to issue a discontinuance is set out in s.177 of the Criminal Procedure Act 2009. A discontinuance can be entered at any time except during a trial and whether or not an indictment against the accused has been filed (s.25 Public Prosecutions Act 1994 and s.177 Criminal Procedure Act 2009).The entry of a nolle prosequi/ discontinuance effectively results in the discontinuance of a prosecution. In practice, that power is now exclusively exercised by the Director except where a situation of conflict requires the referral of a matter to the Attorney-General.

2.3.2 The question whether the accused should be indicted, or, if a presentment/indictment has already been filed, whether the trial on that presentment/indictment should proceed, may arise either on the initiative of the Office of Public Prosecutions solicitor or legal executive who is handling the prosecution, or as the result of an application made by the accused.

2.3.3 Even though a person has been committed for trial, events may have occurred after the committal that make it inappropriate for the prosecution to proceed. Alternatively, the strength of the prosecution case may have to be re assessed having regard to the course of the committal proceedings.

2.3.4 The decision to enter a discontinuance, or not to take within the period prescribed under s.353(2) Crimes Act 1958 (where the accused has been committed/directly presented prior to 1 January 2010) any step mentioned in that section, or not to file an indictment within the period specified in section 163(1),(2) or (3) of the Criminal Procedure Act 2009, as the case requires, is a decision to be made by the Director.

2.3.5 In these three circumstances, the decision to enter a nolle prosequi or notice of discontinuance is a special decision within the meaning of the Public Prosecutions Act 1994:

(1) The decision is in relation to an offence with a prescribed Level 1 penalty (life imprisonment);

(2) The decision is in relation to a matter of high public profile or notoriety;

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(3) The decision is one which, for any other reason, the Director believes should be a special decision.

2.3.6 Note that the criteria for determining in what circumstances a decision to enter a nolle prosequi or notice of discontinuance is a special decision, has changed recently. On 28 April 2008, the Committee for Public Prosecutions issued a guideline (pursuant to its power in section 43(1)(d) of the Public Prosecutions Act 1994) which stated that only in the above-listed circumstances will the decision to enter a nolle prosequi be treated as a special decision. This has significantly decreased the number of nolle prosequi applications to be treated as special decisions.

2.3.7 The exercise of the power to discontinue a prosecution will be determined on the basis of the criteria governing the decision to prosecute set out above. The view of the police informant and the alleged victim, or, where appropriate, the relatives of the alleged victim, are sought. Their views are taken into account but are not determinative as the ultimate decision whether a prosecution should be discontinued is a legal decision. The police informant and the victim or appropriate relatives should be informed of the decision to enter a discontinuance before it is publicly announced in the Supreme or County Court.

2.4 The Decision to Re-Present Despite Existence of a discontinuance

2.4.1 A discontinuance does not amount to an acquittal and an accused may be indicted on a charge in respect of which an earlier prosecution has been discontinued. (refer s.177(6) & (7) Criminal Procedure Act). However, it should be noted that the definition of "direct indictment" in s.3 of the Criminal Procedure Act does not extend to circumstances in which the proceedings have been discontinued but it is hoped that there will be legislative amendment to address this issue) .Where a discontinuance or a nolle prosequi has been entered, a person will only be presented for trial for the same offence in the following circumstances:

(a) where significant fresh evidence is available; or

(b) where the decision to enter a discontinuance was obtained by fraud; or

(c) where the decision was based on a mistake of fact; and it is in the interests of justice that the prosecution proceed. In determining whether it is in the interests of justice that a prosecution proceed, particular regard will be had to whether or not the accused person could receive a fair trial.

2.5 Direct presentment/indictment

2.1.5.1 From 1 January 2010 the Director has the power to file an indictment. The term "direct indictment" is defined in section 3 of the *Criminal Procedure Act 2009*, and means an indictment filed against an accused

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who has not been committed for trial in respect of the offence charged in the indictment or a related offence, or whose prosecution for the offence charged in the indictment or a related offence was discontinued under section 177 or was the subject of a nolle prosequi. "Related Offence" is also defined in section 3 of the *Criminal Procedure Act 2009* as meaning an "offence or offences that are founded on the same facts or a part of a series of offences of the same or a similar character". A direct indictment commences a criminal proceeding against the accused (s.161 *Criminal Procedure Act 2009*). There are five situations in which it may be appropriate to file a direct indictment:

(a) where a Magistrate has declined to commit an accused for trial in regards to all or some offences;

(b) where agreement is reached between the Crown and an accused person to dispense with a committal proceeding, either prior or during it (normally because the accused has indicated an intention to plead guilty);

(c) where the case against an accused person has already been ventilated in curial proceedings such as an inquest or Royal Commission so as to render it not unfair to present that person for trial without a committal proceeding being held;

(d) where otherwise no committal or curial proceedings have been held or concluded, regardless of whether a charge-sheet has been filed or signed; and

(e) where a prosecution for the offence charged in the indictment or related offence was discontinued or the subject of a *nolle prosequi*.

2.1.5.2 The Magistrate's decision following committal proceedings has never been regarded as binding on those who have the authority to indict. However, a Magistrate's decision not to commit for trial should stand unless it can be demonstrated that the Magistrate has misunderstood the relevant law or misapplied it to the fact situation, or has made a factual finding which is not sustainable on the evidence. Where the filing of a direct indictment is being considered following a Magistrate's decision to discharge an accused, in some cases it may be appropriate to invite the accused to make written submissions as to why a direct indictment should not be given. A decision should be made as soon as possible after the matter has been referred to the Office for consideration.

2.1.5.3 In light of the definition of "direct indictment" and "related offence" in s.3 of the *Criminal Procedure Act 2009,* a direct indictment pursuant to section 3(a) is only required when the accused is to be indicted on a charge that he/she has not been committed for trial (for instance where the accused was discharged on all charges following the committal

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hearing) OR the charge he/she is to be indicted on is not **related** to a charge that he/she was committed for trial.

2.1.5.3A When a direct indictment is required, it is a special decision unless the accused or his legal practitioner gives written consent to the filing of the direct indictment or the accused or his legal practitioner has indicated an intention in writing to plead guilty to that offence (Section 3 of the *Public Prosecutions Act*). Pursuant to section 45C(1) of the *Public Prosecutions Act* 1994, before making a special decision, the Director must hold a meeting of the Director's Committee so that the latter can provide advice to the Director on the special decision in relation to which the meeting is held. Where a Director's Committee meeting is not required to be held (pursuant to section 45E of the *Public Prosecutions Act* 1994), written advice is instead to be provided to the Director by prescribed persons of the Director's Committee.

2.1.5.3B The filing of a direct indictment is not subject to judicial review. However, the court at which the criminal proceeding is commenced may postpone or stay the proceeding if it deems that that proceeding is an abuse of process and/or unfair to the accused [*Barton* (1980) 147 C.L.R. 75].

2.1.5.3C The filing of a direct indictment in circumstances pertaining to paragraph 2.1.5.1(d) will only be pursued where all the ordinary considerations that go into a decision to file an indictment have been met (as outlined in this Policy) <u>and</u> where it is held to be justified on strong grounds. Further, it will only occur where it is determined that doing so will not hinder the continued fulfilment of the Director's lawful functions and obligations, nor be sufficiently unfair to the accused. In regards to the latter consideration of unfairness, it is necessary to consider where, on the balance of the interests of the accused and the community, justice lies [*Barton v R* (1980) 147 C.L.R. 75].For guidance as to what factors may constitute such interests, solicitors may want to bear in mind those interests considered in *Barton* and *Williams v DPP* (2004) 151 A Crim R 42; [2004] VSC 516.

2.5.4 Where a direct indictment is filed in the absence of committal proceedings the accused will be provided with all relevant witness statements and full details of the case which the Crown will present at the trial. When a direct indictment is filed a copy of the indictment must be served personally on the accused in accordance with s.339 of the Criminal Procedure Act 2009 (as required by s.171(2) Criminal Procedure Act 2009). Upon filing an indictment the DPP may apply for a summons or warrant to arrest to compel the attendance of the accused (s.174 Criminal Procedure Act 2009). When a summons or warrant is issued it must be served in accordance with s.175 and s.176 of the Criminal Procedure Act 2009.

2.6 Plea Negotiation (or "Charge Bargaining")

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2.6.1 A plea of guilty is a factor to be taken into account in mitigation of sentence. There are obvious benefits also to the criminal justice system resulting from a plea of guilty. The earlier it is offered, the greater will be the benefit accruing to the accused - see s.5(2)(e) Sentencing Act 1991.

2.6.2 The Office endeavours to ascertain at the earliest possible point in the criminal process whether a plea of guilty is likely to be entered in respect of any charge brought. The term "plea negotiation" refers to negotiations between the defence and the prosecution in relation to the charges to be proceeded with. Such negotiations may result in the accused pleading guilty to fewer than all the charges, or pleading guilty to a lesser charge or charges.

2.6.3 Plea negotiation is to be distinguished from the American practice of "plea bargaining" whereby the prosecutor, the defence counsel and the judge confer, usually in the judge's chambers, for the purpose of obtaining a judicial indication of the probable sentence should a plea of guilty be entered. This procedure has not been practised in Victoria since it was condemned by the Full Court of the Supreme Court in R. v. Marshall[1981] VR 725. The Court stated at page 732: "Anything which suggests an arrangement in private between a judge and counsel in relation to the plea to be made or the sentence to be imposed must be studiously avoided. It is objectionable because it does not take place in public, it excludes the person most vitally concerned, namely the accused, it is embarrassing to the Crown and it puts the judge in a false position which can only serve to weaken public confidence in the administration of justice."

2.6.4 There are clearly dangers in seeking to crystallise in any exhaustive set of criteria the vast variety of circumstances giving rise to the exercise of the prosecutorial discretion as to whether a plea should or should not be accepted. However, it is helpful to identify some of the major factors which cause the Crown to accept an accused's offer of a plea.

2.6.5 No plea will be accepted by the Crown unless it reasonably reflects the nature of the criminal conduct of the accused and provides an adequate basis upon which the Court can impose an appropriate sentence. In exercising this discretion it has to be borne in mind that in a particular case the public interest may be better served by the certainty of a conviction secured by the acceptance of a lesser plea than by the unpredictability inherent in a contested trial.

2.6.6 The major factors which may cause the Crown to accept an accused's offer of a plea may be briefly listed as follows:

(a) The Crown case on the principal charges may be fraught with forensic difficulty. Such problems may relate to the admissibility of evidence or to the credibility or availability of

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witnesses, or to the reluctance of some major witnesses (particularly victims) to give evidence.

(b) The acceptance of a plea may save witnesses, especially elderly people and young children, from the trauma of a court appearance.

(c) Where a presentment/indictment contains a number of counts/charges and the imposition of concurrent sentences will effectively result in the same total penalty, a plea to a lesser number of counts/charges may be warranted. This consideration may also arise where an accused person is already serving a substantial term of imprisonment.

(d) Where the community is faced with a long and expensive trial on minor matters with a negligible penalty as a likely result, the foreshortening of procedures may be seen as desirable in the public interest.

(e) Occasions sometimes arise where an accused person will offer to plead guilty to a specific count/charge on a presentment/indictment and thereafter give evidence on behalf of the Crown. The acceptability of such a course will depend upon the importance of such evidence to the Crown case and the level of culpability of the accused compared with those whom it is sought to convict by the use of this evidence.

(f) While the circumstances involved in this decision making process are infinitely variable, no plea will be accepted unless, after analysis of all the facts, it is concluded that it is in the public interest to do so.

(g) It is essential to the fair and just operation of the criminal justice system that multiple or inappropriate counts/charges are not filed with the object of strengthening the plea negotiating position of the Crown.

(h) Internal office procedures embody a system of checking and accountability designed to ensure that concluded plea negotiations accommodate the interests of the Crown, the defence, the community and the victim.

(i) In considering whether to accept a plea, regard shall be had to the views of the police informant, the alleged victim or the alleged victim's relatives - however, they have no right of veto in the negotiating process.

(j) It is absolutely vital that an accused person's plea should be freely made. This would normally be ensured by the ethical requirements of the law and the Bar, namely that the plea should

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be voluntary and that defence Counsel should act on the instructions of the client.

(k) In virtually all cases the initial approach in a plea negotiation situation is made not by the Crown but by the defence. However, there is no compelling reason why, in appropriate cases, the Crown should not initiate discussions, subject to the qualification that on no account should this occur where an accused is unrepresented. Whilst plea negotiations are pursued out of Court they remain part of an adversarial legal process requiring considerable legal expertise and tactical experience. To seek to conduct them with an unrepresented accused is patently unfair.

2.6.7. At all stages of the process, the solicitor must ensure that adequate file notes are taken, and in particular must ensure that if a plea is negotiated, the basis of the plea (both as to factual matters and as to any sentencing submissions) is recorded in writing and is agreed upon by the Crown and the defence so that there is no basis for subsequent disputation as to the terms of the agreement in issue. Solicitors should bear in mind the observations made by the High Court on this issue in *R v GAS and SJK* (2004) 206 ALR 116 at paras 35-44.

2.7 The Decision to Proceed Summarily

2.7.1 Many indictable offences can be heard summarily. As a general rule all indictable offences which are punishable by level 5 imprisonment (10 years imprisonment) or less can be dealt with in the Magistrates' Court. This is subject to the magistrate and the offender consenting to this jurisdiction. Accordingly, this policy only relates to the situations when the accused and Magistrate desire summary determination.

2.7.2 There are many reasons why it is preferable to have matters finalised in the Magistrates' Court as opposed to the County Court.

2.7.3 From the accused's perspective the matter is heard more quickly; the cost of legal representation is less; and if he or she is acquitted costs may be awarded in his or her favour. It is largely for these reasons that when given a choice most accused prefer to have offences finalised in the Magistrates' Court.

2.7.4 This procedure is also advantageous to the community. There are normally enormous cost savings associated when matters are dealt with summarily. Matters dealt with in the Magistrates' Court do not involve the participation of a jury and, experience has shown, finish far more expeditiously than had they been heard in a higher court. The community is also spared the cost of committal proceedings and witnesses do not run the risk of being compelled to give evidence twice.

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2.7.5 Against this, it is sometimes felt that it is inappropriate to deal with some indictable matters which are triable summarily in the Magistrates' Court. The reason for this is because despite the advantages detailed above, some matters are so serious that they can only properly be dealt with in a superior jurisdiction.

2.7.6 The critical issue when deciding whether the prosecution should consent to the indictable matters being heard summarily is when they become too serious to be dealt with in this fashion. In considering this it is not uncommon to propound a number of considerations which are commonly relevant to penalty, particularly matters which are aggravating. These often include things such as the level of planning involved in the offence; the vulnerability of the victim; the relationship between the accused and victim; the prevalence of the offence, the criminal history of the offender, and so on.

2.7.7 Parliament has laid down guidelines in Section 29 (2) of the Criminal Procedure Act 2009, which sets out matters the Court should have regard to when determining if an indictable matter triable summarily should be dealt with summarily. They include:

(a) the seriousness of the offence (a number of criteria for determining which are also set down in the legislation);

(b) the adequacy of the available sentencing orders in the Magistrates' Court considering relevant matters, including any previous findings of guilt or convictions of the accused; the maximum penalty which can generally be imposed is two years imprisonment, or five years where the offender is charged with more than one offence;

(c) any decision by the Court as to how a charge of the same offence against a co-accused is to be heard and determined; and

(d) any other relevant matter.

2.7.8 It is rare, even in the County Court, that a person would receive a penalty approaching the maximum penalties available to the Magistrates' Court for matters which theoretically could have been heard summarily. It is important to note that apart from the two and five year penalty ceilings, a magistrate has virtually all of the sentencing powers and discretions of a judge. It should also be noted that the Director has a duty to perform his functions in an effective, economic and efficient manner (Public Prosecutions Act 1994, s 24 (b)).

2.7.9 In light of this, the only coherent and justifiable test of seriousness which can be, and is, applied in determining whether or not the Director of Public Prosecutions will consent to summary determination of an indictable matter triable summarily is: Whether there is any real prospect that if the offender is found guilty a properly informed court may impose a sentence beyond the Magistrates' Court ceiling. In

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applying this test all matters relevant to penalty are to be carefully considered. If at the end of this process the answer is no, consent to summary jurisdiction should be given. More detailed criteria for the exercise of this discretion appear in Policy 7.2.1.

2.8 Exercise of the prosecutorial discretion in specific factual circumstances

2.8.1 The general prosecutorial criteria, as set out above, are applicable to all potential prosecutions, regardless of the circumstances of individual cases. However it is recognized that matters regularly arise involving certain categories of offences, or categories of offenders, in which particular attention needs to be given to the prosecutorial criteria, and in particular the "public interest" test, before a decision is made to commence or continue a prosecution. This part of the Policy addresses certain specific categories of offences or offenders (other than juveniles, who are addressed in 2.1.2 above)

2.9. Sexual offences in "boyfriend/girlfriend" cases

2.9.1 In the great majority of cases involving allegations of sexual offences, the objective circumstances of the alleged offending are such that (subject to the application of the general prosecutorial criteria and the sufficiency of evidence) a prosecution should proceed. In most such instances, "the public interest" will strongly suggest that the prosecution should proceed, as doing so will not only tend to uphold the rule of law, but will also validate and promote the welfare of the victim, and will permit a Court (in the event of a conviction being sustained) to sentence the offender, and thus ensure that the various purposes of sentencing (such as punishment, denunciation, deterrence, rehabilitation, and so on) are achieved. However, in some cases, the circumstances of the offending itself and of the complainant and alleged offender will be such that a careful application of the "public interest" test may indicate that a prosecution should not be instituted (or if already instituted, should be discontinued).

2.9.2 One circumstance in which careful attention must be given to the "public interest" test is in "boyfriend/girlfriend" cases involving sexual offences, in which, typically, it is clear upon the admissible evidence that an offence has technically been committed, but that the objective circumstances of the offending itself in combination with the personal circumstances of the complainant and offender, do not satisfy the "public interest" test. When assessing the "public interest" test in such cases, close attention should be given to the following factors:

- the relative ages, maturity and intellectual capacity of the complainant and the offender;
- whether the complainant and offender were in a relationship at the time of the offending and if so, the length of the relationship;
- whether the offending was "consensual", in the sense that (despite consent being irrelevant to the primary issue) the complainant was capable of consenting and did in fact consent;

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- whether the offending to any extent involved grooming, duress, coercion or deception;
- whether, at the time of considering whether the matter should proceed, the complainant and the offender are in a relationship ;
- the attitude of the complainant and her family or guardians toward the prosecution of the offender;
- whether the offending resulted in pregnancy and if so, the sequelae of the pregnancy; and
- any other circumstance which might be relevant to assessing the "public interest" in these circumstances.

2.9.3 If in a case in which the evidentiary situation is clear and would otherwise suggest that a prosecution should proceed, an application of the "public interest" test, according to the criteria above, suggests that proceeding with the prosecution would not be in the public interest, then it may be appropriate that advice be given that no prosecution be instituted (or that if charges have been filed, that the prosecution be discontinued).

2.9.4 In any case in which the "public interest" test, as discussed here, may be invoked to advise the non-commencement or discontinuance of a prosecution which would otherwise proceed but for the application of that test, no formal advice should be given or relevant steps taken except upon the express instructions of the Director or his nominee.

2.10 Prosecution of cognitively impaired persons

2.10.1 Special considerations apply to the prosecution of persons with cognitive impairment. In this context "cognitive impairment" includes intellectual disabilities (eg. autism, Down Syndrome, and developmental delay), personality disorders, acquired brain injury, neurological disorders (eg. dementia) as well as the forms of mental illness as defined by the Mental Health Act 1986.(i.e. depression, bipolar mood disorders and schizophrenia)

2.10.2 In deciding whether or not the public interest warrants the prosecution of an offender with cognitive impairment, regard should be had to such of the factors set out in paragraph 2.1.10 as appear to be relevant, but particularly to –

(a) the seriousness of the offence;

(b) the age and apparent maturity and mental capacity of the offender;

(c) the sentencing options available to the Court if the matter were to be prosecuted;

(d) the offender's antecedents, including the circumstances of any previous offending; and

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(e) whether a prosecution would be likely to be harmful to the offender or be inappropriate, having regard to such matters as the personality of the offender and his or her family circumstances.

2.11 Prosecution of involuntary psychiatric inpatients

2.11.1 Factual situations often arise involving involuntary psychiatric inpatients committing assaults upon each other, or assaults upon nursing staff, or performing acts of property damage within the confines of the institution in question. In many such instances, it is clear that but for the fact of the person committing the act being involuntarily detained, and perhaps lacking the capacity to form the relevant intent to attract criminal liability, such matters would (subject to the other standard criteria) proceed as criminal prosecutions.

2.11.2 There are several difficulties which may affect any prosecution in these circumstances. Firstly, the fact that the person in issue is an involuntary psychiatric inpatient, and possibly under psychiatric medication, may strongly suggest that he or she lacks the capacity to form any, or any sufficient, criminal intent, for any criminal proceeding to be properly founded. Secondly, as a matter of public policy, it may be seen as inappropriate or oppressive that a person who is involuntarily detained be prosecuted for acts which may be seen as resisting or protesting such detention. Thirdly, as a matter of public policy, it may be inappropriate to proceed with any prosecution which, even if successful, could only result in the making of orders which had the effect of the person remaining in some form of psychiatric detention.

2.11.3 Accordingly, it is the Director's policy that when considering or advising as to the institution or continuation of a prosecution in these circumstances, very close attention should be given to whether it is in the public interest that such prosecution commence or continue, having regard to;

(a) the seriousness of the acts in issue, including the effects upon the complainant;

(b) the mental capacity of the person to form a criminal intent;

(c) the nature of the detention and medication regime to which the person was subject at the relevant time;

(d) the sentencing options available to the Court if the matter were to be prosecuted;

(e) the person's antecedents, including the circumstances of any previous offending; and

(f) whether a prosecution would be likely to be harmful to the person or be medically inappropriate .

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2.11A The prosecution of additional offences in homicide cases

2.11A.1 It was previously the Director's policy that in homicide cases, only the principal offence should be alleged on the indictment, despite there being evidence of other lesser offences. This was a pleading convention from the era when homicides were capital offences. However, the rule survived the abolition of capital punishment. In *R v Pollitt* [1991] 1 VR 299, 302, Beach J said that 'it is highly undesirable to include any other count on a presentment that contains one or more counts of murder and that course should only be permitted in exceptional circumstances'. Further, in *R v Debs & Roberts* [2005] VSCA 66, [249], Vincent JA said that Beach J's comments reflected the 'generally accepted approach'. Vincent JA further said that the rationales for this approach 'include a desirability ... that the number of counts which the jury will need to consider, and about which the trial judge will be required to provide instructions, be kept to the minimum necessary in the circumstances, and concerns about the introduction of undue complexity, prejudice and the potential diversion of jury deliberations into what might be, in the context of the specific case peripheral areas that may result.' It is now the Director's Policy that this rule should no longer be followed. It is the Director's Policy that where there is evidence of a lesser offence in a homicide case, the indictment should be pleaded in accordance with the general principles and rules applicable to the creation of any other indictment. However, before a lesser offence is joined on an indictment containing a charge of murder, regard must be had to.

- the seriousness of the offence;
- the need to avoid unnecessary complexity in the trial;
- the potential diversion of jury deliberations into peripheral areas; and
- the likely impact on the total effective sentence.

2.12 The Director's Role in the Investigation of Alleged Offences

2.12.1 Under the current legislation the Director of Public Prosecutions has no powers of investigation and any police request that may entail the DPP conducting investigations should be refused. The DPP may request the police to investigate criminal proceedings which are under consideration or being conducted by the Director (Public Prosecutions Act 1994, s 28(1)). Although it is customary for the DPP to provide legal advice to police at the investigative stages there is no legislative basis for doing so.

2.12.2 Where police have already initiated an investigation and have either filed charges or are still in the evidence gathering stage there is often a need for correspondence between the Director of Public Prosecutions and police. Following an independent review of the evidence by the Director it may be necessary for further inquiries to be made. In such situations the Director will routinely request that further investigation be undertaken. Conversely, police may request advice on legal matters arising during an investigation, including the question of whether

charges should be filed. The need for cases to be fully and properly presented will normally require that such requests should be acceded to. This does not threaten the independence of either the Director or the police given that at all times each organisation maintains ultimate authority over its activities and final decisions.

2.13 Review

This Policy will be kept under review and may be re-issued in amended form at a later date.