Consumer Affairs Victoria

Guidelines for Criminal Prosecutions

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# Introduction

The guidelines for criminal prosecutions are intended to articulate the role and responsibilities of the Director of Consumer Affairs Victoria (“the Director”) when Consumer Affairs Victoria (CAV) conducts a criminal prosecution.

We conduct criminal prosecutions on behalf of the Director for breaches of offence provisions within consumer-based legislation (collectively referred to as Consumer Acts) including:

* *Australian Consumer Law and Fair Trading Act 2012*
* *Conveyancers Act 2006*
* *Domestic Building Contracts Act 1995*
* *Estate Agents Act 1980*
* *Fundraising Act 1998*
* *Motor Car Traders Act 1986*
* *Residential Tenancies Act 1997*
* *Retirement Villages Act 1986*
* *Sex Work Act 1994 and*
* other legislation we administer.[[1]](#footnote-1)

The guidelines are to be read in the context of, and subject to, the *[Consumer Affairs Victoria Regulatory Approach and Compliance Policy](https://www.consumer.vic.gov.au/about-us/regulatory-approach-and-compliance-policy/our-compliance-policy)*.

The power to commence a criminal prosecution is one of many enforcement options available to the Director. These guidelines

do not limit in any way the Director's discretion to use any enforcement option deemed appropriate.[[2]](#footnote-2)

We recognise that when filing a criminal charge or conducting a criminal prosecution, CAV is functioning as a prosecution agency within the criminal justice system. We comply with the Victorian model litigant guidelines.

The aim of these guidelines is to provide clarity on the processes and considerations we take into account throughout a criminal prosecution, and to ensure consistency in our approach with these matters. The guidelines are modelled on the *Policy of the Director of Public Prosecutions for Victoria* (DPP Policy).[[3]](#footnote-3)

# 1. Prosecutorial discretion

The decision to proceed (or not to proceed) with a criminal prosecution resides with the Director of Consumer Affairs Victoria (“the Director”). In accordance with sections 3.3–3.5 of the *Consumer Affairs Victoria Regulatory Approach and Compliance Policy*, a criminal prosecution will be contemplated in circumstances where:

* there is a reasonable likelihood the conduct would constitute an offence against the *Australian Consumer Law* (Victoria) or other Consumer Acts[[4]](#footnote-4)
* the conduct is serious and there is evidence of, or potential for, a high degree of consumer harm, particularly where the conduct is ongoing
* the conduct demonstrates a blatant disregard for the law
* special circumstances exist, such as conduct affecting vulnerable or disadvantaged groups
* the conduct is industry-wide, or involves a new or emerging issue or has a significant impact on market integrity
* a criminal prosecution is likely to have a worthwhile educative or deterrent effect
* other modes of ensuring compliance are not appropriate
* the imposition of a criminal sanction is appropriate.

Where a criminal prosecution is considered the appropriate action, such prosecution must only proceed where:

* there is a reasonable prospect of a conviction and
* it is in the public interest to conduct a prosecution.

## 1.1 A reasonable prospect of conviction

When determining whether a prosecution has a reasonable prospect of conviction, we will consider:[[5]](#footnote-5)

* all the admissible evidence
* the possibility of evidence being excluded
* whether there is any reason to suspect that evidence may have been concocted
* any possible contamination of evidence
* the reliability of the evidence
* whether the prosecution witnesses are available, competent and compellable
* the credibility and reliability of the prosecution witnesses
* any substantive conflict between eye-witnesses
* how the witnesses are likely to stand up to giving evidence in court
* any possible defence
* any other matter relevant to whether a jury or magistrate would find the person guilty.

## 1.2 Public interest

Where a reasonable prospect of a conviction exists, consideration must be given to whether the prosecution is in the public interest.[[6]](#footnote-6) Only where the public interest factors against a prosecution outweigh those in favour, will a prosecution not proceed.

Other public interest factors relevant to a decision to commence a criminal prosecution include but are not limited to:[[7]](#footnote-7)

*Offence related factors:*

* the seriousness of the offence
* whether the offence is of considerable public concern
* the age of the offence.

*Offender related factors:*

* the culpability of the offender
* the offender’s antecedents and background
* the age, physical health, mental health or special infirmity of the offender
* whether the offender is willing to cooperate in the investigation or prosecution of others, or the extent to which the offender has done so.

*Victim related factors:*

* the attitude of the victim to a prosecution
* the entitlement of the victim to compensation
* the age, physical health, mental health or special infirmity of the victim.

*Other factors:*

* community protection
* the likely sentence
* the prevalence of the offence and the need for deterrence, both specific and general
* the need to maintain public confidence in basic constitutional institutions such as the Parliament and the courts
* whether the consequences of any resulting conviction would be unduly harsh and oppressive
* any special circumstances that would prevent a fair trial from being conducted
* the age, physical health, mental health or special infirmity of any witnesses
* the obsolescence or obscurity of the law
* whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute
* the availability and efficacy of any alternatives to prosecution
* the likely length and expense of a trial
* whether a sentence has already been imposed on the offender which adequately reflects the criminality of the episode
* any mitigating or aggravating circumstances.

## 1.3 Consultation with the Director of Public Prosecutions

Where time and circumstances permit, the Director must request advice from the Director of Public Prosecutions (DPP) prior to commencing a criminal prosecution for indictable offences.[[8]](#footnote-8)

Any advice received from the DPP is subject to client legal privilege.[[9]](#footnote-9)

## 1.4 Consent of the Director of Public Prosecutions

Where the consent of the DPP is required prior to laying charges,[[10]](#footnote-10) we will be guided by the criteria set out in this chapter when determining whether or not to refer the matter to the DPP.

# 2. Prosecutorial ethics – obligations and duties

In the performance of their duties, all our prosecutors must:[[11]](#footnote-11)

* act independently, as prosecutors represent the Director, not the victim or any other person
* act fairly to the accused
* act impartially
* disclose to the accused any material which:
  + is relevant or possibly relevant to an issue in the case or
  + raises or possibly raises a new issue whose existence is not apparent from the evidence the prosecution proposes to use or
  + holds out a real, as opposed to fanciful, prospect of providing a line of inquiry which goes to (i) or (ii) above or
  + is or is possibly exculpatory

unless the material is subject to any claim of public interest immunity or client legal privilege or any statutory provisions to the contrary

* assist the court to avoid appellable error
* treat victims of and persons adversely affected by crime with courtesy, respect, dignity and sensitivity
* not make any submissions of fact or law which are not soundly based
* endeavor to ensure that criminal proceedings are completed expeditiously
* use temperate and dispassionate language
* avoid any real or potential conflict of interest
* endeavour to ensure that any conflict of interest involving a defence practitioner is acted upon
* not communicate with the accused except in the presence of the accused’s legal representative and
* to the extent applicable, comply with the *Legal Profession Uniform Law Application Act* *2014*, the *Legal Profession Uniform General Rules* *2015*, the *Legal Profession Uniform Conduct (Barristers) Rules 2015* and the *Victorian Model Litigant Guidelines*.

# 3 Victims and persons adversely affected by crime

We are committed to treating victims and persons adversely affected by crime with courtesy, respect and dignity and to ensuring compliance with the *Victim’s Charter Act* *2006*.

## 3.1 Keeping victims informed

In communicating with victims, we will take into account:

* whether the victim wishes to be contacted in relation to the prosecution
* the victim’s preferred method of communication
* the particular circumstances of the victim.

Where a victim wishes to be informed of the proceedings, we must provide information about the court process, the victim’s role as a witness, support services, possible entitlement to compensation, legal assistance and the victim’s register.[[12]](#footnote-12)

We will also advise victims:

* when and what charges are laid, along with any decision:
  + to substantially modify the charges
  + not to proceed with some or all of the charges or
  + to accept a plea of guilty to a lesser charge.
* how to find the date, time and location of court hearings
* the date, time and location of any:
  + summary hearing
  + plea prosecuted by CAV
  + sentence where CAV is the prosecuting agency
  + contested committal
* the outcome of any court hearings
* when an appeal is lodged and that the appeal will be conducted by the Director of Public Prosecutions
* if an offender is charged with a contravention of their sentence including:
  + the contravention process
  + hearing date of the contravention
  + outcome of the contravention.

Where circumstances allow, we will make all reasonable attempts to seek the victim’s views prior to any decision regarding:

* resolution of the charges and
* withdrawal of all charges.

The decision to resolve or withdraw all charges lies with the Director or the DPP[[13]](#footnote-13) and must be made in accordance with Chapters 1 and 4 of these Guidelines. The victim’s views on resolution or withdrawal of all charges is a factor to be considered when determining whether a prosecution is in the public interest.

Where withdrawal of all charges is considered on the grounds that there is no reasonable prospect of a conviction due to insufficient evidence, the views of the victim may have no impact on the decision.

## 3.2 Obligations to victims at court

Victims are entitled to attend court hearings and will be advised accordingly. When at court we have a duty to minimise the victim’s contact with the accused, defence witnesses and family members as much as practicable. Where appropriate, we will refer victims to Court Network for the provision of support at court.[[14]](#footnote-14) Victims will also be shown rooms within the court building where they can wait privately if they desire.

## 3.3 Victim Impact Statements

On a plea or finding of guilt, we must advise victims of their right to make a Victim Impact Statements in accordance with Part 3 Division 1C of the *Sentencing Act* *1991*. Victims must also be informed of the manner in which a Victim Impact Statement can be presented to the court and that they may be subject to cross examination about the contents of their Victim Impact Statement.

Where a victim intends to make a Victim Impact Statement, we must provide the victim with *Guide to Victim Impact Statements* and *Victim Impact Statements Made Easy*[[15]](#footnote-15) and refer the victim to the Victims of Crime Helpline on 1800 819 817 for assistance in preparing the statement. We are not able to assist in the preparation of a Victim Impact Statement.

## 3.4 Compensation and financial assistance for victims

We must advise victims of their potential entitlement to restitution, compensation or financial assistance.

In a summary prosecution,[[16]](#footnote-16) the Director may apply for a compensation or restitution order on behalf of a victim where:[[17]](#footnote-17)

* the offender pleads guilty to or is found guilty of an offence which caused the pain and suffering or property loss and
* there is sufficient evidence of pain and suffering, property loss, damage or medical expenses to justify the application and
* the quantum of compensation or restitution can be readily determined and
* the application is not opposed by the offender and
* there is reason to believe, on the basis of information concerning the offender’s financial situation, that there is a reasonable prospect that the order could be wholly or substantially enforced.

If one of the above conditions is not met, we must refer the victim to the Victims of Crime Helpline if they still wish to pursue compensation or other civil proceedings.

We must not provide victims with any legal advice in relation to potential entitlements to compensation, financial assistance or civil causes of action.

## 3.5 Protection of victims’ and witnesses’ personal information and privacy

We must not disclose a victim’s or a person adversely affected by crime’s personal information including date of birth, address, telephone number and email address, except:

* on instruction from the Director where disclosure is permitted or required by law or prosecutorial ethics[[18]](#footnote-18) or
* where a court orders otherwise.

# 4 Resolution

Resolution of matters, particularly early resolution, plays an important role in achieving effective and efficient prosecutions.

Resolution removes the obligation on victims and witnesses to give evidence and provides certainty of outcome as well as significant financial savings to the community.

We must try to reach resolution of prosecutions at all stages of the proceeding.[[19]](#footnote-19)

## 4.1 Process of resolution

Plea offers should be made in writing. If a verbal offer is made by a defence practitioner, we must respond in writing.

We must record any resolution in writing and provide a copy of the document to the accused’s legal representatives prior to the resolution being entered at court. The document must include:[[20]](#footnote-20)

* the charges to which the accused will plead guilty
* any agreed facts
* any agreement about sentencing submissions
* any agreement about ancillary orders and
* any other matter relevant to the accused’s decision to plead guilty.

Where it is impractical to record a resolution in writing prior to it being entered at court, the above factors relevant to the resolution must be entered into the record of the court at the time of entering the plea. The resolution must then be confirmed in writing as soon as practicable after court has concluded.

Prior to resolution being reached, we must make reasonable attempts to seek the view of the victim regarding the proposed resolution, unless the victim does not want to be contacted regarding the prosecution.

A victim’s views will be taken into consideration when determining whether a resolution is in the public interest. However, it is ultimately the Director’s or Director of Public Prosecution’s decision whether to resolve a matter.

Where an accused is unrepresented, any plea offers from the accused must be made and responded to in writing. We may only initiate resolution discussions with an unrepresented accused on instructions from the Director.

## 4.2 Summary Prosecutions

Resolution of a summary prosecution requires the consent of the Director. The Director must consider whether the proposed resolution is in the public interest and in doing so must have regard to:[[21]](#footnote-21)

* whether there is a reasonable prospect of conviction on each charge
* the strength of the evidence on each charge
* any defences
* the likelihood of an acquittal on any of the charges
* whether the charge or charges to which the accused will plead guilty:
  + adequately reflect the accused’s criminality
  + allow for the imposition of an appropriate sentence
  + allow for the making of all appropriate ancillary orders
* the views of the victims
* the need to minimise inconvenience and stress to witnesses, particularly those who may find it onerous to give evidence
* any proceeds of crime implications.

## 4.3 Indictable prosecutions

Where the Director is conducting a prosecution of indictable offences at the committal phase in the Magistrates’ Court, all reasonable plea offers must be referred to the DPP.

As part of the referral, the Director may include a recommendation as to whether the plea offer is acceptable having regard to the criteria set out at Chapter 4.2 above.

The DPP is responsible for the decision whether or not to resolve an indictable prosecution.

# 5 Prosecutorial jurisdiction

## 5.1 Summary offences

The Director has jurisdiction to prosecute summary offences pursuant to the Consumer Acts in the Magistrates’ Court.

## 5.2 Indictable offences

Indictable offences are prosecuted by the Director from the filing of charges through to the conclusion of the committal phase in the Magistrates’ Court. Matters are then transferred to the DPP to be prosecuted in the County and Supreme Courts.

All our indictable prosecutions will be heard in the County Court unless the DPP has consented to the matter being heard in the Supreme Court. A matter must be referred to the DPP for a determination on the appropriate jurisdiction if the Director is of the view that the matter:

* raises a complex or novel question of law or
* is of special public significance because of the identity of the accused or the victim, the number of victims, the notoriety of the crime, the uniqueness of the offending, or the impact of the offending on the public mind or public safety.

A referral must be made prior to committal to ensure that the accused is committed to the appropriate jurisdiction.

## 5.3 Indictable offences triable summarily

Where permitted at law, the Director may charge an indictable offence in the summary stream of the Magistrates’ Court. In determining the appropriate jurisdiction we will consider:[[22]](#footnote-22)

* the seriousness of the offending
* the complexity of the proceeding
* adequacy of sentences available to the court, having regard to the seriousness of the offences and the criminal record of the accused
* if a co-accused is charged with the same offence, which stream that charge is in
* any proceeds of crime implications
* any other relevant matter.

## 5.4 Referral of matters outside our jurisdiction

Where the Director has a reasonable belief that a serious criminal offence has been committed pursuant to a law other than a Consumer Act (for example an offence pursuant to the *Crimes Act* *1958*), the Director may refer the matter to Victoria Police or other appropriate prosecuting agency.

# 6 Appeals

All criminal appeals initiated by a prosecuting agency are conducted by the DPP.[[23]](#footnote-23)

## 6.1 Appeals from Magistrates’ Court decisions

Following the conclusion of any summary jurisdiction matter, the Director will consider whether there are any grounds for an appeal. Appeals can only be made in relation to an inadequate sentence or a point of law.

If the Director determines that an appeal ought to be lodged, a recommendation will be forwarded to the DPP. Any such recommendation must be made in a timely manner having regard to any time limits for filing an appeal.

## 6.2 Appeals from County or Supreme Court decisions

The DPP has the carriage of all criminal matters in the Supreme and County Courts. The DPP will consider whether any appeal may be lodged in respect of a decision from these courts.

The Director may, if appropriate, make a submission to the DPP regarding whether an appeal ought to be lodged. However, the decision to institute an appeal rests with the DPP.

# 7 Director’s authorisation to bring proceedings

Where appropriate, the Director may authorise another agency or person to bring a prosecution for contraventions of a Consumer Act in accordance with section 194(1)(b) of the *Australian Consumer Law and Fair Trading Act* *2012*.

Any prosecution so conducted by another person or agency is subject to any policies or guidelines of that person or agency. These guidelines only apply to prosecutions conducted by the Director.

# 8 Proceeds of crime

An offence against provisions of a Consumer Act may give rise to the ability to take action pursuant to the *Confiscation Act* *1997*. Where such power exists, the Director refers to and adopts Chapter 11 of the DPP Policy.

If appropriate, the Director may refer the matter to the DPP for consideration of an action pursuant to the *Confiscations Act* *1997*.

1. For a full list of legislation we administer, see [consumer.vic.gov.au/legislation](file:///C:\Users\mmcdonou\AppData\Roaming\Hewlett-Packard\HP%20TRIM\Offline%20Records%20(P1)\Compliance%20~%20-%20COMPLIANCE%20&%20ENFORCEMENT(3)\consumer.vic.gov.au\legislation). [↑](#footnote-ref-1)
2. For further information on the range of enforcement options available and the criteria for determining the appropriate options see our [Compliance policy page](file:///C:\Users\mmcdonou\AppData\Roaming\Hewlett-Packard\HP%20TRIM\Offline%20Records%20(P1)\Compliance%20~%20-%20COMPLIANCE%20&%20ENFORCEMENT(3)\consumer.vic.gov.au\about-us\regulatory-approach-and-compliance-policy\our-compliance-policy) at consumer.vic.gov.au/about-us/regulatory-approach-and-compliance-policy/our-compliance-policy [↑](#footnote-ref-2)
3. The full text of the Policy of the Director of Public Prosecutions for Victoria can be found at <http://www.opp.vic.gov.au/Resources/Policies>. [↑](#footnote-ref-3)
4. Consumer Acts as defined by section 3 of the *Australian Consumer Law and Fair Trading Act* *2012* [↑](#footnote-ref-4)
5. Adapted from Chapter 1, paragraph 4 of the DPP Policy. [↑](#footnote-ref-5)
6. Note that the public interest in the context of consideration of a criminal prosecution is different to the public interest considerations set out in section 3.5 of the *Consumer Affairs Victoria Regulatory Approach and Compliance Policy*. [↑](#footnote-ref-6)
7. Adapted from Chapter 1, paragraph 6 of the DPP Policy [↑](#footnote-ref-7)
8. An example where time may not permit the obtaining of advice is that where a notice of suspension has been served in accordance with section 120 of the *Australian Consumer Law and Fair Trading Act 2012*, the Director must commence proceedings within 14 days or the suspension will lapse (section 122). [↑](#footnote-ref-8)
9. See Chapter 13, paragraphs 15 and 16 of the DPP Policy. [↑](#footnote-ref-9)
10. For example, a charge pursuant to section 90 of the *Estate Agents Act* *1980*. [↑](#footnote-ref-10)
11. Adapted from Chapter 2, paragraph 3 of the DPP Policy. [↑](#footnote-ref-11)
12. Victims will be provided with the booklet A Victim’s Guide to Support Services and The Criminal Justice System published by the Victims Support Agency. See <https://www.victimsofcrime.vic.gov.au/a-victims-guide-to-support-services-and-the-criminal-justice-system> [↑](#footnote-ref-12)
13. See Chapter 4 – Resolution. [↑](#footnote-ref-13)
14. See [courtnetwork.com.au/](file:///C:\Users\mmcdonou\AppData\Roaming\Hewlett-Packard\HP%20TRIM\Offline%20Records%20(P1)\Compliance%20~%20-%20COMPLIANCE%20&%20ENFORCEMENT(3)\courtnetwork.com.au\). [↑](#footnote-ref-14)
15. These documents can be located at [victimsofcrime.vic.gov.au/guide-to-victim-impact-statements](file:///C:\Users\mmcdonou\AppData\Roaming\Hewlett-Packard\HP%20TRIM\Offline%20Records%20(P1)\Compliance%20~%20-%20COMPLIANCE%20&%20ENFORCEMENT(3)\victimsofcrime.vic.gov.au\guide-to-victim-impact-statements) and [victimsofcrime.vic.gov.au/victim-impact-statements-made-easy](file:///C:\Users\mmcdonou\AppData\Roaming\Hewlett-Packard\HP%20TRIM\Offline%20Records%20(P1)\Compliance%20~%20-%20COMPLIANCE%20&%20ENFORCEMENT(3)\victimsofcrime.vic.gov.au\victim-impact-statements-made-easy). [↑](#footnote-ref-15)
16. Note that any application for compensation or restitution in an indictable matter will be made by the DPP. [↑](#footnote-ref-16)
17. Adapted from Chapter 4, paragraph 25 of the DPP Policy. [↑](#footnote-ref-17)
18. For example section 114(1)(b) of the *Criminal Procedure Act* *2009* allows for disclosure of an address or telephone number where it is relevant to an offence charged and is not likely to present a reasonably ascertainable risk to the welfare or physical safety of any person. [↑](#footnote-ref-18)
19. Note Chapter 4.3 any proposed resolution of indictable matters must be consented to by the Director of Public Prosecutions before an agreement can be entered into. [↑](#footnote-ref-19)
20. Adapted from Chapter 4, paragraph 16 of the DPP Policy. [↑](#footnote-ref-20)
21. Adapted from Chapter 4, paragraph 3 of the DPP Policy. [↑](#footnote-ref-21)
22. Adapted from Chapter 5, paragraph 2 of the DPP Policy. [↑](#footnote-ref-22)
23. See Chapter 9 of the DPP Policy for the criteria governing when the DPP will lodge an appeal. [↑](#footnote-ref-23)