



Advisory Role of the CDPP

Last Updated: April 2013

Contents

1. Provision of pre brief advice by the CDPP.....	1
2. Roles in relation to charge and arrest	2
• The Decision to Charge	2
• The Decision to Arrest	3
3. Applications for Electronic Surveillance or Search Warrants	5
4. The decision to grant an indemnity or take an induced statement.....	5
5. The Advisory Role in Respect of the Institution of Prosecutions	5
6. Statutory Basis for the Giving of Legal Advice	6
7. Review of this guideline	6

1. Provision of pre brief advice by the CDPP

The CDPP regards the provision of pre brief advice to investigation agencies as a valuable practice that is in the interest of both the CDPP and the investigation agencies. When providing pre brief advice it is important that the separation of the investigative and prosecutorial functions in the Commonwealth criminal justice system is maintained and recognised. This separation is established under the DPP Act. The CDPP does not have an investigative function under the DPP Act.

The CDPP is available to provide pre brief advice to investigation agencies in:

- matters which are significant, complex or major;
- sensitive matters;
- matters of particular importance for the investigative agency's enforcement strategy; or
- matters that are likely to have an impact on a broader class of cases.

as agreed by the investigation agency and the CDPP, as resources permit for both agencies¹.

It is the investigating agency's responsibility to make operational decisions, including as to whether an investigation would be warranted, an investigation's scope, the ongoing management of an investigation, the prioritisation of investigations and the deployment of resources during

¹ Special arrangements for the provision of pre-brief advice in counter-terrorism matters are set out in the *Counter-Terrorism Qualified Advice (Evidence) Guidelines*

investigations. The CDPP will take into account an agency's prioritisation of their matters in providing pre brief advice.

The CDPP may be requested to provide legal advice on such things as:

- the identification of the elements of offences;
- any evidentiary issues;
- any substantive impediments to proving the offence and how these might be addressed;
- identifying particular witnesses who could be spoken to and lines of inquiry that may assist; and
- the seriousness of the offending.

In requesting advice, the investigation agency will need to identify the legal issues and potential offences on which advice is sought and provide sufficient factual information against which to frame the advice given. This information should be provided in writing and may be provided through a briefing paper or a summary briefing note.

Requests for urgent legal advice may be made and the CDPP will assist where possible, however, advice can only be provided when there is adequate time to consider all the material. In some circumstances it may not be possible to give legal advice in the time available.

Requests for advice should be settled by nominated senior officer in the investigation agency and the decision to accept a request for advice will be made by the Deputy Director or a nominated Branch Head for the CDPP regional office.

In drafting pre-brief advice, the CDPP lawyer should consider consulting with other senior CDPP staff before coming to a concluded view. If the matter has national implications the CDPP lawyer should consult with Head Office before finalising the advice. The advice should be settled by the lawyer's Branch Head or Deputy Director before it is provided to the agency.

The CDPP is also available to discuss in general terms a matter with an agency and provide the agency with an indication of the issues that may arise for consideration or deal with any straight forward issues. Any thoughts expressed in such are discussion or consultation are on the basis that they represent a best view on the information provided and are not determinative of an any more informed CDPP view.

2. Roles in relation to charge and arrest

- **The Decision to Charge**

The decision to charge is one ultimately for the investigative agency. In matters commenced by an information and summons or CANS (however that process might be described in the particular jurisdiction) that decision will usually be on the legal advice provided by this Office on whether the Prosecution Policy test has been made out and whether a charge should be instituted.

The decision whether to proceed by summons or arrest is a matter for the investigating agency. It is not a matter for the CDPP to provide advice on. This area is addressed in more detail below.

The decision to proceed on indictment, ultimately reflected in the filing of an indictment, is a decision for the Director and those CDPP officers who hold a delegation from the Director to sign indictments. It is not a decision of the investigative agency though the relevant authorised officer will have regard to the views of the agency in deciding whether to proceed on indictment.

- **The Decision to Arrest**

The decision to arrest is a statutory decision made by the decision maker identified in the statute. For example, s3W of the *Crimes Act 1914* provides a power of arrest for AFP officers. The decision to arrest is made by the AFP officer exercising the power. This, as distinct from advising on the Prosecution Policy of the Commonwealth, is not a matter for the CDPP to provide advice on.

Non-police agencies, with some very limited exceptions, do not have a power of arrest but those agencies can apply for a charge and warrant rather than a charge and summons if certain legislative preconditions are made out. This decision is provided for by statute and is made by the decision maker identified in the statute.

The CDPP makes decisions in the prosecution process in accordance with the Prosecution Policy. It is important to note that the Prosecution Policy provides that the test for the commencement and continuation of a prosecution is that there is a prima facie case with reasonable prospects of conviction and that the prosecution is in the public interest. This is different from the considerations that investigators have in deciding to arrest. Those considerations will be based upon the statutory requirements relevant to the exercise of that arrest power. Whilst a consideration of exercising the power of arrest involves a lower test than the Prosecution Policy demands, the decision to arrest should be exercised in the light that the case will ultimately be assessed against the requirements of the Prosecution Policy.

If a CDPP lawyer is asked to advise whether there is a sufficient basis for a person to be arrested or an arrest warrant is sought, then the appropriate procedure is for the CDPP lawyer to:

- explain that the decision to arrest is an operational decision for the police/agency to determine, particularly as the power is dependent on the belief of the officer concerned;
- advise the agency that CDPP can only provide advice on sufficiency of evidence in accordance with the Prosecution Policy and inform the agency whether or not sufficient information has been made available to address that question. Ordinarily that information will be provided in a brief of evidence;
- if the necessary material has been made available to make an assessment under the Prosecution Policy of the Commonwealth as to whether there is sufficient evidence to prosecute the offence, a view should be expressed on whether there is sufficient evidence, even if this is subject to provisos. If there are provisos they must be stated clearly;

- to provide such advice it will be necessary to have identified all the relevant physical and fault elements of the offence and considered whether there is reliable and admissible evidence in respect of each and every element of the offence; and,
- where the material made available to the CDPP is insufficient to support a view on the sufficiency of evidence, the police must be advised accordingly and that the CDPP is not able at that stage to express a view as to whether the evidentiary test set out in the Prosecution Policy is made out.

The CDPP will not provide advice on the legal pre-conditions for a police officer or agency to exercise the power of arrest or to make an application for an arrest warrant to a relevant court.

Any advice provided orally must be confirmed in writing at the earliest possibility. The advice should confirm that no advice was or can be provided as to whether the accused should be arrested, where the investigative officer has a power of arrest, as that is an operational decision dependent on the belief of the officer.

It will not be possible in every case for the CDPP to give legal advice on whether, on the evidence, there are reasonable prospects of a conviction when consulted in the investigative stage. The essential requirement is to have identified all the physical and fault elements of the offence and make very clear and confirm in writing at the earliest possibility the following:

- what material was provided;
- whether an opinion is able to be expressed on the prospects of success at that stage;
- if no view was expressed why not; and
- if advice was provided what it was and any qualifications or provisos that attach to the advice.

The material that has been assembled for the consideration of the CDPP at the investigation stage and particularly in urgent matters may be inadequate to make that assessment even with a number of provisos. In some instances it will be of assistance to the investigating agency to identify areas of deficiency, in order that they may be addressed.

Expressing a view on whether there is likely to be a reasonable prospect of a conviction prior to receiving a brief of evidence is fraught with difficulty and may not be possible. It follows that it is appropriate and expected when giving legal advice in the investigative stage and prior to the referral of a completed brief of evidence on whether the Prosecution Policy test is made out, that the case officer will involve and consult the relevant senior CDPP staff before expressing any view. This applies equally to urgent and non-urgent matters.

In some circumstances it may not be possible to give legal advice in the time available and in such circumstances, advice should not be given.

3. Applications for Electronic Surveillance or Search Warrants

The investigator is responsible for the preparation of documentation and the making of an application for search warrants, telephone interception warrants and stored communications warrants. In each of these applications the investigator is the applicant and it is an operational decision whether to apply for such a warrant or order.

The CDPP may be able to provide assistance in reviewing documentation for search warrants, telephone interception warrants and stored communications warrants in relation to matters which meet the requirements for the provision of pre brief advice.

As with the provision of pre brief advice, requests for reviewing documentation for warrants should be settled by nominated senior officer in the investigation agency and the decision to accept a request will be made by the Deputy Director or a nominated Branch Head for the CDPP regional office.

The CDPP will provide investigation agencies with access to electronic copies of the *Search Warrants Manual*, *Telecommunications Interception and Access Manual* or *Surveillance Devices Manual*.

4. The decision to grant an indemnity or take an induced statement

The decision to grant an indemnity is one for the CDPP. If it becomes apparent in the investigation that a successful prosecution will depend on an indemnity being given to a participant in the crime the investigative agency should seek the early advice of the CDPP. Where investigators consider that an indemnity or a commitment to obtain the testimony or evidence of a person by way of an induced statement may be required, the CDPP should be consulted. This consultation should take place prior to an induced statement being taken.

5. The Advisory Role in Respect of the Institution of Prosecutions

Paragraph 3.4 of the *Prosecution Policy of the Commonwealth* provides that, except for arrest matters, the established practice is for a brief of evidence to be referred to the CDPP before a prosecution is instituted.

Upon the receipt the brief of evidence the CDPP will:

- examine the brief to determine whether a prosecution should be instituted and, if so, on what charge or charges;
- advise the referring agency;
- if a prosecution is to be instituted, prepare an information or complaint; and
- send the information or complaint to the agency for execution and service.

6. Statutory Basis for the Giving of Legal Advice

Paragraph 6(1)(n) of the *Director of Public Prosecutions Act 1983* provides that it is a function of the CDPP: to do anything incidental or conducive to the performance of any of the functions referred to in paragraphs (a) to (m) and in subsection (2).

In *HIC v Freeman* (1998) 158 ALR 267 the Full Federal Court held that before the CDPP is empowered to give legal advice in reliance on the function in s6(1)(n), there must be some real, as opposed to theoretical, nexus between the matter in respect of which the legal advice is given and one or other of the Director's statutory functions.

Because of the uncertainty about the extent to which the CDPP could give advice in the abstract, regulations were made providing that the CDPP's functions include advising Commonwealth authorities (r3(1)(f)) and State and Territory authorities (r3(1)(g)) on:

- the investigation of an offence;
- the prosecution of an offence; or
- a related matter ;

whether or not the advice is for the purposes of a particular investigation.

7. Review of this guideline

This guideline will be reviewed within 6 months of commencement of this update, in consultation with investigation agencies.