



Undertakings (Indemnity from Prosecution) and Offers of Assistance

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1. Preliminary

- 1. The purpose of this National Legal Direction (NLD) is to provide guidance to prosecutors when dealing with persons involved in criminal activity who indicate a willingness to co-operate with authorities and give evidence against others.
2. As a general 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.
3. This NLD should be read in conjunction with the Guidelines for Investigative Agencies on Offers of Assistance to Authorities and any Practice Group-specific guidance in this area.
4. This NLD does not apply to immunity from prosecution action in relation to serious cartel offences under the Competition and Consumer Act 2010 (Cth) or corresponding State/Territory cartel offences.
5. This NLD also does not apply to immunity from prosecution action in relation to self-reporting market misconduct and financial products and services offenders under Part 7.10 of the Corporations Act 2001 (Cth).

1 Paragraph 6.5 of the Prosecution Policy.

## 2. Securing the evidence of persons involved in criminal activity

### Overview

6. There are several ways in which the evidence of a person who has been involved in criminal activity may be secured by investigators and used in the prosecution of others. Nothing prevents any such person who is willing to co-operate from giving evidence against another. However, any person who has been involved in criminal activity and who is called to give evidence against another enjoys the legal right to decline to answer questions which may incriminate him or her in criminal offending. As a result, prosecutors are usually unable to secure evidence from a person who has been involved in criminal activity unless that person has pleaded guilty and indicated a willingness to co-operate or unless that person has been provided with an undertaking that any evidence given will not be used against them.
7. The most desirable, common and transparent way in which to secure the evidence of a person who has been involved in criminal activity is via an **undertaking to provide future co-operation pursuant to s16AC of the Crimes Act 1914 (Cth)** ('*Crimes Act 1914*'). Section 16AC of the *Crimes Act 1914* provides a mechanism via which a person who has been involved in criminal activity may obtain a sentencing discount when they plead guilty to an offence and agree to assist authorities in the prosecution of others. Where such an offer of future co-operation is made, the sentencing court will declare the value of the sentencing discount that has been given in return for the offer of assistance. The discount will be declared by the sentencing court and the offender will be told that they stand to serve the discounted portion of that sentence should they fail to give evidence and co-operate in the prosecution of others. This method of securing the evidence of a person involved in criminal offending usually arise in cases where a number of co-offenders have been involved in criminal activity and one or more of the offenders decides to plead guilty and give evidence against one or more co-offender. Such an offender will usually have been jointly involved with others in the commission of the crime for which they decided to plead guilty.
8. Sometimes prosecutors may not have sufficient admissible evidence available against a person involved in criminal activity to secure a plea of guilty and an offer of future assistance from that person. Where such circumstances exist, it may be necessary to secure such evidence via an **undertaking under the Director of Public Prosecutions Act (Cth) ('DPP Act 1983')**. This undertaking not to prosecute (also commonly referred to as an indemnity) is a formal undertaking given by the Director under section 9(6), section 9(6B) or section 9(6D) of the *DPP Act 1983*. Such an undertaking, which is usually given prior to the person being charged with a criminal offence,<sup>2</sup> may take a number of different forms which are discussed in detail below. The need for such an undertaking may arise in circumstances where, for example, an accused who is charged with one commercial drug importation may be willing to give evidence of his participation with others in other commercial drug importations for which prosecutors would otherwise have insufficient evidence to prosecute and for which the person is accordingly unwilling to plead guilty and seek a discount.
9. There is an alternate mechanism available to the prosecution to assist in securing a person's evidence or co-operation, known as a **letter of comfort**, which is used where the CDPP has formed a view that the person has not committed any offence(s). This is later discussed under 'Letters of Comfort'.

### Terminology

10. Care should be exercised accessing legal resources and case law, because the same term can be used in different contexts and mean different things. Below are some common terms:

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<sup>2</sup> In rare circumstances, an undertaking may be considered by the CDPP after an accomplice has been charged. This may arise when defence contact the informant or the CDPP after charges have been laid, indicating their client wishes to give evidence for the prosecution. CDPP should refer any such approach to the Investigative Agency for the taking of an induced interview or statement. If an undertaking is considered appropriate, the prosecution against the accomplice will be discontinued. Refer to the separate NLD 'Discontinuing charges or proceedings'.

- a) **Undertaking** – a formal Undertaking under the *DPP Act 1983* (often referred to as an indemnity against prosecution).
- b) **Written s.16AC Undertaking to Co-operate** – a document signed by a charged person and filed with the court during a sentencing hearing detailing the future assistance he/she has agreed to give in exchange for a discount on sentence.
- c) **Co-offender**—a participant in the alleged criminal activity/offending.
- d) **Accomplice witness** –This term can be used to refer to either a person who is granted an Undertaking under the *DPP Act 1983* in circumstances where the person is an accomplice and intends to give evidence on behalf of the prosecution against the principal offender/ principal co-offender, or a participant for whom the CDPP has accepted offer of assistance made in exchange for a discount on sentence where the person similarly intends to give evidence on behalf of the CDPP.
- e) **Connected witness** –a person who may have participated in conduct linked to the alleged criminal activity/offending but (on the available evidence) has not committed any offences (refer ‘Letter of Comfort’).
- f) **Induced statement** – this is a statement provided by a person that outlines the evidence a person can give if called as a prosecution witness, but which also includes restrictions on how the contents of the statement might subsequently be used against the witness.
- g) **Letter of comfort** – within the CDPP, this refers to a letter of assurance issued by the CDPP to a person advising he or she is not liable for prosecution on the basis of the available evidence.
- h) **Letter of assistance** – this refers to a letter prepared by the Investigative Agency in respect of the past co-operation a charged person has given, and an assessment of the value of that assistance. It forms part of the documents submitted to the court during the sentencing hearing for the purposes of determining any discount under section 16A(2)(h).
- i) **Section 21E** – prior to the enactment of section 16AC,<sup>3</sup> section 21E was the analogous provision under the *Crimes Act 1914* used by the courts to affect a discount on sentence where a defendant promised to provide future co-operation and assistance. As such, you will find older legal authorities referring to section 21E rather than section 16AC.

‘Guidelines for Investigative Agencies on Offers of Assistance to Authorities’ (‘the Guidelines on Offers of Assistance’)

11. These Guidelines were prepared by the CDPP to provide practical assistance to investigators when dealing with persons wishing to co-operate with authorities. Investigators and prosecutors should refer to these Guidelines when an offer of assistance has been made or there is the likelihood of one being made. The Guidelines provide detailed information to investigators including: when investigators need to consult with the CDPP, the different types of assistance which may be offered, and the appropriate procedure for obtaining assistance.

Other Useful Resources

12. You should also refer to the following resources when considering Undertakings and Offers of Assistance:
  - a) *Prosecution Policy* – Paragraphs 6.1 to 6.10 and Annexures B, D, and E,
  - b) *Statement on Disclosure in Prosecutions Conducted by the Commonwealth* – Paragraph 14(f) (any concession or benefit which has been offered or granted to a witness in order to secure that person’s testimony for the prosecution), Paragraph 19 (Concessions to witnesses), Paragraph 25 (Disclosures and Sentencing) and Paragraph 26 (Timing of Disclosure),
  - c) *Guidelines on Disclosure for Prosecutors* – Paragraphs 16(e), and Annexure A (pages 15 and 24),
  - d) *Sentencing of federal offenders in Australia – a guide for practitioners* – section 3.3.1 (‘Crimes Act 1914, s16AC – future co-operation’) and section 7.7 (‘Specifying a reduction for undertaking to co-operate in future - Crimes Act 1914 s 16AC’), and

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<sup>3</sup> S16AC commenced on 27 November 2015.

- e) *Decision Making Matrix (DMM)* – sections 2.13 (Issue a letter of comfort to a party implicated in serious cartel conduct), 2.23 (Whether to take an induced statement from an accused or witness), 3.26 (Indemnify a witness), 3.27 (Issue a letter of comfort), 3.28 (Issue a letter of comfort to a party implicated in serious cartel conduct), 3.30 (Whether to take an induced statement from an accused or witness), 4.19 (Whether to take an induced statement for an accused or witness), 4.24 (Indemnify a witness), 4.25 (Issue a letter of comfort), 4.26 (Issue a letter of comfort to a party implicated in serious cartel conduct), and 5.4 (Whether to take an induced statement from the accused or witness).

#### The need to work collaboratively and seek guidance

- 13. In the event that an Undertaking or Offer of Assistance becomes a live issue in one of your matters, you will need to work collaboratively with the Investigative Agency, your Prosecution Team Leader (PTL) and your Branch Head to ensure the best possible prosecution outcome.

### **3. Role of the Investigative Agency**

- 14. The responsibilities/duties of the Investigative Agency are set out in full in the *Guidelines on Offers of Assistance*. See also paragraph 13 of the *Guidelines for Dealings Between Investigators and the Commonwealth Director of Public Prosecutions*.
- 15. When investigators are contemplating obtaining a witness statement or an induced statement from a person who may have been involved in criminal activity, investigators should engage with the CDPP at the earliest available opportunity to collaborate and seek advice.<sup>4</sup> Early consultation enables the CDPP to provide timely advice to investigators on the potential merits of a possible application for an undertaking. Such consultation enables investigators to have regard to the preliminary view of the CDPP when making significant decisions about the future conduct of the investigation. Where there is sufficient admissible evidence available to lay a criminal charge, a prosecutor may advise that a Section 16AC of the *Crimes Act 1914* discount following a plea of guilty will be the most appropriate way for the matter to proceed. Whilst it is not uncommon for police or defence counsel to ask, relatively few cases will have the necessary features to be considered eligible for a Director's undertaking.

### **4. Undertakings under the DPP Act 1983 (Cth)**

#### Statutory provisions

- 16. The *DPP Act 1983* empowers the Director to give an undertaking in order to secure a person's<sup>5</sup> testimony in the prosecution of another person in the following circumstances:
  - a) section 9(6) of the *DPP Act* authorises the Director to give a person an undertaking that any evidence the person gives in a Federal proceeding and anything derived from that evidence will not be used in evidence against the person, other than in proceedings for perjury. This is undertaking commonly referred to as “**use/derivative use immunity**”.<sup>6</sup> Such an undertaking prevents testimony given in proceedings under Commonwealth law from being used in future proceedings under Commonwealth, or State or Territory, law;
  - b) section 9(6B) of the Act authorises the Director to give a person an undertaking that any evidence he or she may give in proceedings under State or Territory law will not be used in evidence against the person in a Commonwealth matter. This is also a “**use/derivative use immunity**” but is one which prevents testimony given in proceedings under State or Territory law from being used in future proceedings under Commonwealth law; or

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<sup>4</sup> As previously discussed, this is because only the Director has the power to grant an Undertaking and further the Director exercises this power sparingly given the onerous requirements which must be met. See also paragraph 6.9 of the *Prosecution Policy*.

<sup>5</sup> References to a ‘person’ in this NLD include a corporation.

<sup>6</sup> This type of undertaking is also known as a ‘Use Undertaking’.

- c) section 9(6D) of the Act authorises the Director to give a different form of undertaking known as a “**transactional immunity**”.<sup>7</sup> Rather than undertake not to use any evidence given by a person against them, this mechanism allows the Director to give a person an undertaking that he or she will not be prosecuted for a specified Commonwealth offence or offences or in respect of specified acts or omissions that constitute or may constitute a Commonwealth criminal offence. Such an undertaking operates to prevent a person being prosecuted by the CDPP or by State or Territory DPPs in respect of the offence/s or conduct. Needless to say the Director cannot undertake not to prosecute for future acts or omissions which have not yet occurred.<sup>8</sup> Nor can the Director use this provision to undertake not to prosecute a person for a nominated State or Territory offence. Those will be matters for the relevant State or Territory DPP.

### Test for Granting an Undertaking

17. Paragraph 6.6 of the *Prosecution Policy* provides that an undertaking under the *DPP Act* will only be given where the evidence that the accomplice can give is necessary to secure the conviction of a defendant, that evidence is not available from other sources, and the person can reasonably be regarded as significantly less culpable than the defendant. To grant an undertaking, the Director needs to be satisfied that it is in the overall interests of justice to forego the opportunity to prosecute the accomplice in respect of his/her own conduct in order to secure that person’s testimony in the prosecution of another. Paragraph 6.7 of the *Prosecution Policy* sets out in detail the matters to be taken into account when making such an assessment. Each of these matters are required to be addressed in any submission to the Director relating to an application/proposal for an undertaking.
18. However, various Annexures to the *Prosecution Policy* outline the approach to be taken in three particular circumstances, details of which are set out below:
- a) Annexure D makes provision with respect to the circumstances in which the DPP will consider immunity in respect of an accomplice **who has already been prosecuted**<sup>9</sup>, who will (by giving evidence) incriminate themselves in relation to criminality for which they have not been prosecuted, and where it is not proposed to prosecute the accomplice for this criminality. The accomplice does not need to be “significantly less culpable” than the defendant to obtain an undertaking. However, the Director still needs to be satisfied that it is in the overall interests of justice to forego the opportunity to further prosecute the accomplice (in respect of the particular conduct) in order to secure that person’s testimony.
  - b) *Annexure B* to the *Prosecution Policy* and the memorandum of understanding between the CDPP and the Australian Competition and Consumer Commission make provision with respect to the circumstances in which the CDPP will consider applications for an undertaking (immunity from prosecution) by a party implicated in a serious cartel offence, namely; offences in section 44ZZRF and 44ZZRG of *the Competition and Consumer Act 2010*. This NLD does not deal with this particular situation.
  - c) *Annexure E* to the *Prosecution Policy* makes provision for immunity from prosecution action in relation to self-reporting market misconduct and financial products and services offenders under Part 7.10 of the *Corporations Act 2001* (Cth). This NLD does not deal with this particular situation.

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<sup>7</sup> This type of undertaking is also known as a ‘Transactional Undertaking’.

<sup>8</sup> Such an Undertaking cannot apply to future conduct of an accused - see *R v D’Arrigo* (1991) 58 A Crim R 71.

<sup>9</sup> In this context, ‘prosecuted’ means that the accomplice has been sentenced for offending connected to the criminal enterprise which they are now being indemnified for and giving evidence in relation to, and means that the prosecution is complete. Refer *R v Adrian Paul Lamella* (2015), Sydney matter SC13100024B, which was the impetus for Annexure D of the *Prosecution Policy*.

19. As a general rule, where an undertaking is given, it will be pursuant to section 9(6) of the *DPP Act 1983* (use/derivative use immunity for Federal proceedings). Undertakings under section 9(6D) of the *DPP Act* are very rarely given and will generally only be provided in exceptional circumstances.<sup>10</sup>
20. An undertaking may also be considered in circumstances where a prospective prosecution witness may be asked questions that could reveal his or her involvement in unrelated criminal activity. A proposal to give the person an undertaking under the *DPP Act 1983* will be required in order to allow the person to give evidence during trial and to preclude the person claiming the privilege against self-incrimination for those unrelated offences. The same matters above (with any necessary adaptations) should be addressed in any such recommendation.

#### The stage at which an undertaking is granted

21. An undertaking is usually given before laying charges against the accomplice witness.<sup>11</sup>

#### Who can make the decision to grant an undertaking

22. As previously discussed, decisions regarding undertakings are generally referred to the Director (DMM 3.26 and 4.24). There is an instrument of delegation in force for a small number of other senior CDPP officers to grant undertakings (other than for s.9(6D), which is not capable of delegation).<sup>12</sup> This may be useful if, for example, the Director has a conflict of interest. You should check current instruments of delegation prior to having someone other than the Director sign any undertaking.
23. A template submission minute is available and must be used (refer to the Templates section of this NLD). The minute should proceed via the relevant PGL, Assistant Director, and PTL. All recommendations seeking the grant of an undertaking under the *DPP Act 1983* need to be submitted to the Director via a CaseHQ Decision Task.<sup>13</sup>

#### If an Undertaking is granted

24. If the Director grants an undertaking under the *DPP Act 1983* to an accomplice witness on the basis of a 'CAN SAY' (unsigned) statement or record of interview, the case officer will need to ensure that the evidence is in admissible form and should discuss this with the informant. The informant will need to obtain a signed statement from the accomplice in the usual way.

#### Requests that the Director give "in principle" agreement for undertakings to be given in the future

25. There may be a particular class of witness identified at an early stage of proceedings, before any approaches have been made to these witnesses, where it can reasonably be expected that the evidence of these persons will be essential to the prosecution of the principal target of the investigation. One example is investigations involving migration agents alleged to be making multiple false visa applications, where the visa applicants are likely to be complicit in the offending. Employer sanction or forced labour investigations may be another category of case where evidence from unlawful workers may be required.

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<sup>10</sup> This is because an Undertaking under s9(6D) results in a person not being prosecuted for a specified offence or acts or omissions (broad protection), whereas a s9(6) undertaking is narrower because only particular evidence given by the witness or information obtained as a consequence of that testimony, will not be used in evidence against the person. That is, the grant of a s9(6) Undertaking could still be followed by a later prosecution against the person, so long as evidence other than their testimony is relied upon, whereas a s9(6D) Undertaking bars prosecution for the given offences/acts/omissions. 'Exceptional circumstances' is not defined in the *Prosecution Policy*. However, an example might be a situation where use of a s9(6) or s9(6B) Undertaking is not appropriate for the given matter, and in such circumstances, the memorandum to the Director must clearly set out why only a s9(6D) Undertaking will suffice.

<sup>11</sup> However, an Undertaking can be given at any time and consideration will depend on the information provided. It may include situations where an offender is still prosecuted for some offences but indemnified for others.

<sup>12</sup> This includes one of the Practice Group Leaders, and the Commonwealth Solicitor of Public Prosecutions.

<sup>13</sup> For an Undertaking for a person already charged: use the defendant's CaseHQ file. For an Undertaking for a person not yet charged/has no CaseHQ file: use the Principal Offender's CaseHQ file.

26. Investigators should approach the CDPP at an early stage in order to request that the Director give an “in principle” agreement for undertakings to be given to a relevant class of witness in the future, if required. Such matters should be referred to the Director (DMM 3.26 and 4.24), via the relevant PGL, Assistant Director and PTL, for consideration with a submission including as much of the supporting information as is available.

#### Breach by witness of conditions of a s9(6), s9(6B) or s9(6D) Undertaking

27. Unreasonable refusal to give evidence may result in contempt of court proceedings.<sup>14</sup>
28. Regarding a section 9(6D) undertaking, section 9(6F) of the *DPP Act 1983* provides: “An Undertaking under subsection (6D) may be subject to such conditions (if any) as the Director considers appropriate”. The template CDPP undertaking includes certain conditions. If a witness subsequently breaches the conditions of a section 9(6D) undertaking by, for example, unreasonable refusal to give evidence or by any other behaviour, the conditions of the template undertaking provide: “This undertaking may be revoked if you fail to comply with the above conditions”.

#### Undertakings under s9(6) prevent use of certain evidence in prosecutions for State/Territory offences

29. An undertaking pursuant to section 9(6) of the *DPP Act 1983* provides a use/derivative use immunity. Any evidence the person may give, and anything derived from that evidence will not be used in evidence against the person, other than in proceedings for perjury. This means that when the undertaking is given, not just the evidence given in the relevant criminal proceedings, but anything derived directly or indirectly as a consequence of the evidence given, is inadmissible in any civil or criminal proceedings, whether Federal or State/Territory. See *Registrar, Court of Appeal v Craven [No 2] (1995)*.<sup>15</sup> The protection is broad.
30. A person who receives an undertaking under section 9(6) of the *DPP Act* in respect of the prosecution of a Commonwealth offence is:
- a) effectively protected from incriminating himself or herself in respect of State or Territory offences; and
  - b) precluded from claiming the privilege against self-incrimination, even if an answer would implicate the person in the commission of some State or Territory offence.
31. For this reason, there may be occasions where there is a need to consult the relevant State or Territory DPP in connection with a proposal to give a person an undertaking under section 9(6) of the *DPP Act*.<sup>16</sup> The responsibility for consulting with a State or Territory DPP rests with the relevant Branch Head.

#### Matters involving joint Commonwealth and State/Territory offences prosecuted by CDPP (joint trials)

32. Where a person is being prosecuted for both Commonwealth and State/Territory offences, it may be necessary to seek a State or Territory indemnity from the State or Territory DPP, if the witness would disclose evidence of State or Territory offending during the proceedings.<sup>17</sup> See the Joint Trial Agreement between CDPP and the relevant State or Territory DPP. The responsibility for consulting with a State or Territory authority rests with the relevant Branch Head.

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<sup>14</sup> *Registrar, Court of Appeal v Craven [No 2] (1995)* 120 FLR 464.

<sup>15</sup> 80 A Crim R 272.

<sup>16</sup> That is because the effect of an Undertaking under s9(6) is to preclude a prosecution against the person for a State or Territory offence if the person’s involvement in that State or Territory offence is disclosed in the course of giving evidence and the State or Territory DPP is unable to show that the evidence necessary to support the conviction was not derived from the person’s protected testimony.

<sup>17</sup> This is because the *DPP Act 1983* does not provide the power for the Commonwealth Director to issue an Undertaking regarding State or Territory offences revealed in evidence given by a witness in State or Territory proceedings run by CDPP.

## 5. Offers of Future Assistance – Discount on Sentence

### Overview

33. An offer of assistance will frequently be dealt with by way of a discount on sentence pursuant to section 16AC of the *Crimes Act 1914*. A defendant is entitled to a discount on sentence for his or her future promised co-operation<sup>18</sup> in the prosecution of others involved in the criminal enterprise.
34. The rationale for the discount is to encourage offenders to come forward, confess their own involvement in the alleged offending and help bring all offenders in the criminal enterprise to justice. The different forms that assistance can take are listed fully in the Guidelines.
35. Usually an offer of assistance will come in the form of an approach by a defendant's lawyer. When a proposal is received from defence the following steps should be taken:
  - a) Discuss the offer with investigators;
  - b) If consensus is reached that the defendant is a person who could provide the type of information that may assist bringing co-offenders to justice, seek approval<sup>19</sup> and instruct the investigator to obtain an account of what the defendant can say (i.e. their version of events):

A defendant's account may be in the form of-

- i. an induced statement,
  - ii. a record of interview (compliant with the provisions of Part 1C of the *Crimes Act 1914*),
  - iii. a reverse caution record of interview (where an accomplice is informed that what he/she says will not be used against him/her), or
  - iv. an unsigned 'CAN SAY' statement.<sup>20</sup>
- c) Once the defendant's account has been obtained, undertake a review to reach an opinion as to its veracity and value. An assessment should be made as to the truthfulness of the potential accomplice witness. The investigator and counsel (if engaged at this stage) should be involved in this process. Consideration should be given to whether there is any independent corroboration of the accomplice's version of events. Any inconsistencies should be identified and critically examined. You should discuss your views with your PTL and/or Branch Head prior to submitting a CaseHQ decision task recommendation to accept the offer or not.
  - d) If the offer of assistance is accepted/approved, the defence will be informed of this. In matters where a signed statement has not yet been gained (e.g where only an unsigned 'CAN SAY' has been gained or Record of Interview), you will need to ensure that the evidence is in admissible form and should discuss this with the informant. The informant will need to obtain a signed statement from the accomplice in the usual way.
  - e) If the offer of assistance is not accepted you will need to inform defence and negotiations will come to an end.

### Requirement to Reduce Offer of Assistance to Writing

36. Any offer of assistance which is accepted by the CDPP for the purposes of a section 16AC discount on sentence, should be reduced to writing in the form of an undertaking signed by the defendant. The terms of the undertaking must be clear and sufficiently articulate i.e. including specifically that the offer of assistance is being given in contemplation of future proceedings. This avoids any

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<sup>18</sup> There is case authority that indicates that a genuine offer of assistance, even if not taken up, may be worthy of a discount on sentence – refer *R v Kokkinos* [1998] 4 VR 574, discussed in Sentencing of Federal Offenders in Australia: a guide for practitioners.

<sup>19</sup> In accordance with the DMM 4.19, you will first need to obtain approval at the Assistant Director level for the investigator to proceed and approach the witness to obtain his/her version of events.

<sup>20</sup> This sets out the evidence that a statement-maker can provide. It is deliberately left unsigned to ensure that it will not be used in evidence and reassures the statement-maker of the same.



misunderstanding by the defendant of what future assistance he or she has agreed to provide, provides the sentencing judge with a clear understanding of nature and extent of the future assistance, and provides a basis for the CDPP to institute sentence appeal proceedings under section 16AC if the defendant fails to co-operate and provide assistance and/or information as promised (in full or in part).<sup>21</sup> A copy of the undertaking is handed up to the court to enable the Judge to reduce the sentence accordingly.

### Charge Negotiations

37. In some cases, a defendant or defence may seek to put forward an offer of assistance in the context of discussing the potential for charge negotiations. For example, a defendant offering to plead guilty may also have offered to assist investigators on the basis that the Prosecution proceed only on certain charges or the CDPP frame the alleged criminality in a certain way. In other cases, it may be appropriate for you (after consultation with your PTL or Branch Head) to raise with defence during the charge negotiation stage whether their client would be willing to co-operate as an accomplice witness in the prosecution of others.
38. Paragraph 6.18(a) of the *Prosecution Policy* specifically provides that co-operation of a defendant in the prosecution of others (past and future) is a relevant consideration, which can be taken into account for the purposes of charge negotiations.<sup>22</sup>
39. In most cases, the Crown case is strong and any offer made by the prosecution is made regardless of any assistance being given/offered, because they are negotiations that the prosecution would have engaged in regardless of the accused's offer to assist. The defendant's credibility as a witness is therefore not undermined.
40. In rare cases, the accomplice defendant's credibility as a witness may be seen as undermined because the ultimate outcome of any plea negotiations (e.g. the amendment or withdrawal of some charges) has been influenced by the testimony the accomplice witness has agreed to provide, however such charge negotiations are permissible under the *Prosecution Policy*, and as further discussed under the section 'Disclosure', the defence lawyer for the Principal Offender is advised of any concessions received by witnesses.

## **6. Past Assistance – Letters of Assistance for Discount on Sentence**

41. A Letter of Assistance forms part of the documents submitted to the court during the sentencing hearing for the purposes of determining any discount under section 16A(2)(h) for past assistance. For full details on sentencing, refer to *Sentencing of Federal Offenders in Australia – A Guide for Practitioners*, and for details on the letter, refer to the [Guidelines for Investigative Agencies on Offers of Assistance to Authorities](#).

### State and Territory procedures for Letters of Assistance

42. The *Crimes Act 1914* is silent on procedural matters relating to letters of assistance and does not require that they be used (whereas State/Territory legislation may be detailed and may require letters of assistance to be used, as well as setting out protocols about how the letter is to be provided and handled by the court), therefore in CDPP matters, State/Territory procedure is utilised. Refer to the legislation and Practice Directions in your jurisdiction.
43. *HT v The Queen* [2019] HCA 40 explores the issues that may arise when the defence and the Crown both wish to use a letter of assistance but where the contents of the letter are subject to a claim of public interest immunity made by investigators.

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<sup>21</sup> s16AC(3) *Crimes Act* (Cth).

<sup>22</sup> Refer also to the Guidelines and Directions Manual Chapter 'Charge and Plea Negotiation' (March 2014). Note that this Chapter is currently available on e-hub as at the date of this NLD, however it is due to be reviewed.

## 7. Induced Statements

44. An induced statement is a document outlining the evidence that a person can give if called as a prosecution witness, but which cannot be used in evidence against that person. Induced statements are the ideal mechanism to find out what a potential accomplice witness can say when the CDPP is considering:
- a) an undertaking under the *DPP Act 1983* (i.e. an Indemnity); or
  - b) an offer of assistance for the purposes of securing a discount on sentence.
45. The CDPP has templates for induced statements in Annexures B (indemnity) and C (discounted sentence) of the Guidelines. Those templates make plain that telling lies in the statement will leave the maker open to prosecution for those falsities. Importantly, it also offers the witness protection against self-incrimination with respect to anything contained in that statement.

### Annexure B template

46. The Annexure B template is explicit. Other than with respect to proceedings relating to lies made in the statement, the statement will not be used in evidence against the witness.

### Annexure C template

47. As regards the Annexure C template, the situation is the same. Upon acceptance of the offer of assistance and the entry of a plea of guilty to the charges, the statement should be handed up to the court in the plea/sentence proceedings. Where the offender has made admissions to or provided further details on aspects of the offending that were previously unknown and are not supported by any other evidence, these admissions/further details should not be used for inclusion in the summary of facts or for outlining the part the offender played in the criminal activity. Where the statement is provided to the court, prosecutors must make clear that it is tendered on the basis that the information contained in it should not be used against the offender.<sup>23</sup> Offenders who provide induced statements as part of the s16AC sentence discount procedure do so in the knowledge that the information they provide will be used by the court as a mitigating factor because the offender has offered to assist authorities in the prosecution of others. Things said by the offender in the statement should not be used against the offender on sentence as a circumstance of aggravation.<sup>24</sup>
48. The reason why it is preferable for the statement to be handed up to the judge is that it provides the court with an independent opportunity to review the co-operation promised to be provided and for which a discount is being sought.<sup>25</sup> It allows the sentencing court to exercise its discretion in making its own assessment of the co-operation in order to ensure that the appropriate sentence is imposed.
49. Prosecutors can also hand up a copy of the offender's s16AC undertaking to cooperate, or any Police letter of assistance where available, as these two documents provide details of the offender's assistance as offered.<sup>26</sup>

### Further matters

50. In some cases, a person may ask for additional assurances from investigators before they will provide an induced statement. Investigators are encouraged to discuss such issues with the CDPP.
51. An investigator should not take an induced statement without first obtaining the consent of the CDPP. It may be the case that, given what is already known about the alleged offending/criminal

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<sup>23</sup> *MacAllister v R* [2020] NSWCCA 306, at [55].

<sup>24</sup> Refer *R v Bourchas* [2002] NSWCCA 373, at [99]. Similarly, *MacAllister v R* [2020] NSWCCA 306 involves discussion of this issue.

<sup>25</sup> *R v Gallagher* (1991) 23 NSWLR 220, at pages 259-260, covers this issue.

<sup>26</sup> Note that this tender by the prosecutor is an exception to the usual rule in sentencing proceedings that any exhibits/documents that mitigate the offending are handed up by the offender, and any exhibits/documents aggravating the offending are handed up by the prosecution. In sentence proceedings involving s16AC, the prosecution hands up evidence of the offender's mitigating behaviour, namely their offer of assistance to authorities as evidenced by a s16AC signed undertaking and/or Police letter of assistance, because the prosecution has first access to these documents. Refer *R v Bourchas* [2002] NSWCCA 373, at [99].

enterprise, there is no basis on which the Director could grant an undertaking or accept an offer of future assistance. The taking of an induced statement in these circumstances may be a waste of time and potentially cause difficulties for the prosecution in dealing with that accomplice/defendant in the future.

52. You will need to obtain approval from your Branch Head for the taking of an induced statement (DMM 2.23, 3.30, 4.19 and 5.4), via a CaseHQ Decision Task.

53. There are other mechanisms which can be used to obtain a version of events from the potential witness and these are listed in the Guidelines.

## 8. Letters of Comfort

54. A letter of comfort is a mechanism available to the prosecution to secure a potential witness' assistance and testimony in the event he or she is concerned about being prosecuted for a Commonwealth criminal offence. The issuing of a letter of comfort does not involve the exercise of any statutory function or power under the *DPP Act 1983*.

55. Letters of comfort are available in circumstances where you (in consultation with your PTL and/or Branch Head) form an opinion that on all the available evidence, an offence has not been committed by the individual concerned. The representation made in a letter of comfort by the CDPP to the potential witness is that based on the information available, the CDPP does not propose to prosecute him/her for conduct related to a proposed or already instituted prosecution against others. Letters of comfort are often more commonly used in less serious summary prosecutions.

56. It is inappropriate to issue a letter of comfort where there is information that the person has committed an offence involving matters linked with the prosecution. In that case, ordinary principles and practices for the consideration of granting of an undertaking should be applied.

57. A letter of comfort should not amount to a de facto undertaking and should not be expressed in terms of any of the undertakings under the *DPP Act 1983*. The form of a letter of comfort may differ depending of the particular circumstances of a matter, however, refer to the Templates section of this NLD for a template letter.

58. Approval to issue a letter of comfort is required from the PGL (DMM 3.27 and 4.25), via a CaseHQ Decision Task.

## 9. Other Relevant Considerations

### Disclosure

59. In the event an accomplice receives a concession of any type (for example, a concession as to choice of charge, an undertaking, or a section 16AC discount on sentence in return for giving evidence), this must be disclosed to the defendant or co-offenders, including any relevant material.<sup>27</sup> You may need to consider the timing of disclosure in consultation with your PTL and/or Branch Head in the event there are safety concerns in respect of any accomplice witnesses.

### Protected Testimony in Uniform Evidence Law Jurisdictions or in the Federal Court

60. Section 128 of the *Uniform Evidence Act* ('Privilege in respect of self-incrimination in other proceedings') enables a court to grant a certificate that confers immunity from either use or derivative use of evidence given in a criminal proceeding. This provision operates independently of the Director's powers to give an undertaking in section 9(6), 9(6B) or 9(6A) of the *DPP Act*. Prosecutors in Uniform Evidence Law jurisdictions or in Federal Court proceedings may elect to utilise section 128 in circumstances where the self-incriminating evidence has not been foreseen by the CDPP, i.e. where during the giving of the witness' evidence at trial it becomes apparent he or she may provide answers that would incriminate himself/herself.<sup>28</sup>

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<sup>27</sup> See paragraph 6.8 of the *Prosecution Policy* and Paragraph 19 *Statement on Disclosure*.

<sup>28</sup> See also Annexure D of the *Prosecution Policy* - Section 128 of the Uniform Evidence Act.

## 10. Templates

61. The following templates can be located on the National Ribbon, under the following: *CDPP tab>National>National Minutes>Undertakings and Letters of Comfort*, and should be attached to your CaseHQ decision task:
- a) Minute to Director - Undertaking under the *DPP Act* (Immunity/Indemnity)
  - b) Undertaking under s9(6) *DPP Act*
  - c) Undertaking under s9(6B) *DPP Act*
  - d) Undertaking under s9(6D) *DPP Act*
  - e) Letter of Comfort
  - f) Undertaking to co-operate - Section 16AC Crimes Act (Cth) (under *National>Sentencing*)
62. The following templates can be located inside the document Guidelines for Investigative Agencies on Offers of Assistance to Authorities:
- a) Induced Statement for Undertaking (Indemnity/Immunity) proposal
  - b) Induced Statement for Offer of Assistance proposal (s16AC Discount on Sentence)
  - c) Undertaking to co-operate - Section 16AC Crimes Act (Cth)
  - d) Section 16A(2)(h) Crimes Act (Cth) - Notes for Letter of Assistance (Note: this is a guidance document for Partner Agencies)