



Pre-Brief Advice

Last Update: May 2021

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Background

1. The Commonwealth Director of Public Prosecutions (CDPP)'s role in the institution and conduct of Commonwealth prosecutions is outlined in Chapter 3 of the *Prosecution Policy of the Commonwealth* and includes, among other things, providing legal advice to investigative agencies during the investigation of a federal offence. This advice is referred to as 'pre-brief advice' and is provided prior to a full brief of evidence being received.
2. The statutory basis upon which the CDPP can give this advice is found in section 6(1)(n) of the *Director of Public Prosecutions Act 1983* (DPP Act) and regulation 6 the *Director of Public Prosecution Regulations 2019* (DPP Regulations). Together, these provisions extend the functions of the CDPP to include:
 - giving to an authority of the Commonwealth, legal advice on law enforcement or a matter relating to law enforcement, whether or not the advice is for the purposes of a particular investigation (reg 6(1)(e)); and
 - giving to a State or Territory authority, legal advice on the investigation or prosecution of an offence against a law of the Commonwealth or a matter relating to the investigation or prosecution of such an offence, whether or not the advice is for the purposes of a particular investigation (reg 6(1)(f)).
3. These functions were expressly included in the legislation following the decision of the Full Court of the Federal Court in *Health Insurance Commission v Freeman (1998) 158 ALR 267*.
4. The CDPP has no investigative function. Criminal investigations are carried out by law enforcement agencies or by those departments or agencies responsible for administering the relevant legislation under which an alleged offence has been committed. All operational decisions regarding the conduct of a criminal investigation must be made by the investigative agency. Examples of

operational decisions include whether an investigation will commence or continue, whether resources will be committed to an investigation or to a particular aspect of it, the scope of an investigation, whether to exercise a specific statutory power (e.g. the power of arrest) and decisions relating to the ongoing management of an investigation or the prioritisation of the investigation.

5. If the CDPP is of the view that further investigation into a matter is necessary, section 13 of the DPP Act permits the Director to request this and specifies that the Commissioner of Police is to comply with the request, as far as practicable. Any such request must be made by an instrument in writing issued by the Director.

Types of pre-brief advice

6. Engagement with an agency before a brief is referred usually takes one of two forms:

- (1) straightforward/routine enquiries

Enquiries from partner agencies will usually be directed to the Branch Head¹ of the relevant practice area in the first instance. The enquiry will often be triaged, particularly if the nature of the enquiry is straight forward. The CDPP may, for example, respond to such an enquiry by reminding an investigator to be mindful of additional relevant offences when undertaking the investigation, drawing the investigator's attention to a relevant legal authority, canvassing avenues for the gathering of relevant evidence or flagging, in a general way, the sorts of issues that might arise if the matter was to proceed to prosecution. It is always worthwhile to pause before giving an immediate answer and to consider asking clarifying questions to better appreciate the context. Always make a file note and, if the advice relates to a specific matter, open a caseHQ file (refer to paras 18-23).

- (2) higher level or more complex pre-brief advice

The CDPP is available to provide pre-brief legal advice to investigative agencies in matters which are:

- significant, complex or high profile;
- sensitive;
- of particular importance for the investigative agency's enforcement strategy;
- significant, in terms of the resource implications; or
- are likely to have an impact on a broader class of cases,

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

7. The legal advice may pertain to a range of matters, including, the choice of charges, the elements of offences, any substantive impediments to proving the offence and how these might be addressed, identifying particular witnesses who could be spoken to and lines of enquiry that might assist, the seriousness of the offending, options for scoping the investigation and any likely public interest considerations. In more complex matters, regular meetings can be scheduled during the 'brief building phase' to ensure that the brief that is ultimately served will be in a form and have the content required for an effective and efficient prosecution.

¹ See DMM 1.1

8. In requesting advice, the investigative agency will need to identify the legal issues and potential offences on which the advice is sought. The investigative agency will also need to provide sufficient factual information against which to frame the advice given. Requests for legal advice in more complex matters should always be in writing and should provide a briefing paper or a summary briefing note.

Preparing pre-brief advice

9. Absent a complete brief of evidence, it will usually not be possible for the CDPP to give pre-brief legal advice on whether there are reasonable prospects of a conviction in a matter where the CDPP is consulted in the investigative stage.
10. Any pre-brief advice provided to an investigative agency should be in writing, identify all the physical and fault elements of the offence and make very clear:
 - what material was provided by the investigative agency when seeking the advice; and
 - the limits of the advice and qualifications or assumptions on which it is based.
11. The material that has been assembled for the consideration of the CDPP by the investigative agency may provide an inadequate platform on which to provide any substantive legal advice on the merits or otherwise of a matter. Where this is the case, the CDPP should decline to provide legal advice and explain the reasons why a qualitative assessment is not possible. In some instances, it will still be possible for the CDPP to provide assistance to the investigative agency in the form of offence guides and areas of deficiency to be addressed.
12. 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 will usually 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 with their PTL and/or Branch Head before expressing any view. This applies equally to urgent and non-urgent matters. If the matter has national implications, the case officer should also consult with the relevant Practice Group Leader before finalising the advice. The advice should be settled by the case officer's Branch Head before it is provided to the agency.²
13. In some circumstances it may not be possible to give legal advice in the time required by the investigative agency and, in such circumstances, the CDPP should decline to provide the advice.
14. The CDPP is always available to discuss a matter in general terms with an agency and provide the agency with an indication of the issues that may arise for consideration or deal with any straightforward issues. Any thoughts expressed in such a discussion or consultation are on the basis that they represent a best view on the information provided and are not determinative of a more informed CDPP view. Any pre-brief advice should be provided in writing. Where pre-brief advice is provided orally in urgent circumstances, it should be the subject of pre-approval by a Branch Head and must be confirmed in writing at the earliest possibility.

² See DMM 1.2

Approval by Branch Head

15. The Decision-Making Matrix (DMM 1.1) requires a Branch Head to make the decision to provide pre-brief advice to a partner agency. This decision should be made as soon as practicable after the request and all relevant material supporting the request has been received.
16. If pre-brief advice is to be provided, the content must be approved by either a Branch Head or a Principal Federal Prosecutor (PFP) following consultation with a Branch Head (DMM 1.2). This is subject to the following matters in which the advice must be approved by a Branch Head in every case:
 - Matters involving juvenile accused;
 - All OCCT Practice Group matters ;
 - Matters that are high profile, involve sensitive issues or significant public policy issues;
 - Matters that are politically sensitive; and
 - Matters that could be considered contentious.

OCCT matters

17. Special arrangements exist for the provision of pre-brief legal advice in all OCCT matters. These arrangements are set out in the [Practice Group Instruction OCCT - 02 Providing qualified pre-brief advice in counter-terrorism matters](#) and [Counter-Terrorism Qualified Advice \(Evidence\) Guidelines](#).

File management and record keeping

18. When a request for pre-brief advice is received, a new caseHQ prosecution file should be opened in the “pre-brief” phase. Consideration should be given to the appropriate name for the file, having regard to the sensitivity of the investigation, and whether restricted access to the caseHQ file is necessary.
19. During the pre-brief phase, all correspondence and file notes of meetings, conversations and conferences with an investigative agency should be recorded in the file.
20. There is no set timeframe for providing pre-brief advice however the progress of these matters should be closely monitored by PTLs and reviewed as part of the fortnightly case review meetings held with case officers.
21. Once the advice is provided to the agency, the file should be closed in a timely manner.
22. If an agency indicates that an investigation is ongoing and multiple requests for advice are likely, it may be appropriate for the file to remain open until such time as:
 - a. the agency confirms that the investigation has been terminated;
 - b. the agency advises that a brief will not be referred;
 - c. the person being investigated is arrested; or
 - d. a brief of evidence is received.
23. If a case officer is of the view that a file should remain open, they will need to obtain approval from their PTL and/or Branch Head. The matter should be reviewed regularly and follow up should occur with the agency to determine if any of the events above are contemplated, and if so, obtain an estimated timeframe.

Other policies

24. This NLD should be read in conjunction with the following other CDPP policies:

- (1) [Guidelines for dealings between Investigators and the CDPP](#)
- (2) [National Legal Direction – Prosecution Services for Partner Agencies](#)
- (3) [Prosecution Services for Partner Agencies – A Practical Guide for Prosecutors](#)
- (4) [Prosecution Policy of the Commonwealth](#)
- (5) [National Legal Direction – Timely Prosecutions](#)
- (6) Guidelines for Investigative Agencies on Offers of Assistance to Authorities
- (7) [Practice Group Instructions – Organised Crime and Counter-Terrorism ‘Providing Qualified Pre-Brief Legal Advice in Counter Terrorism Matters’](#)