Investigation and Prosecution Manual

This manual is designed to support and guide officers of the Specialised Investigations Unit as they conduct investigations into allegations of offences against the Child Support Acts. It is not intended as a 'road map' for conducting an investigation but as a reference tool that lays out the required elements of a successful investigation to its logical conclusion. While the manual is designed to give clear instructions and guidelines, it is up to each individual investigator to plan their investigation and decide what activities are required.

Note: This document is electronically controlled. Its accuracy can only be guaranteed when viewed electronically.

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Investigation and Prosecution Manual - Chapter 1: Child support program legislation: offence provisions and investigations

1. Introduction

The relevant legislation applying the Child Support Program is:

- Child Support (Registration and Collection) Act 1988 (the Registration and Collection Act);
- Child Support (Assessment) Act 1989 (the Assessment Act).

These Acts are collectively referred to in these Guidelines as 'the CSP legislation'.

The principle objects of the Registration and Collection Act are to ensure:

- that children receive from their parents the financial support that the parents are liable to provide;
- that periodic amounts payable by parents for the maintenance of their children are paid on a regular and timely basis; and
- that Australia gives effect to its international obligations.

The provisions in *Registration and Collection Act* focus on the registration and collection process for periodic maintenance payments and many of the offence provisions relate to the collection process. While it is not an offence to fail or refuse to pay child support, the CSP can raise a debt for child support liability and uses various debt recovery processes and procedures to recover the liability. This is underpinned by offences for failing to provide information, providing false or misleading information, failing to notify the CSP of child support liabilities (or variations), restrictions on travel overseas and the failure of employers to cooperate, provide information and collect and pass on child support payments.

The principle objects of the *Assessment Act* are to ensure:

- that the level of financial support provided by parents is determined according to their capacity;
- that the level of financial support is determined according to the costs of the children;
- that the persons who provide daily care for children should have ongoing financial support for the children without having to resort to Court;
- that the children share in any changes in living standards of the parents; and
- that Australia gives effect to its international obligations.

The provisions in the *Assessment Act* focus on determining the financial support payable by parents for their children and many of the offence provisions relate to the assessment process. The *Assessment Act* includes offence provisions for

failing to provide information, and providing false or misleading information in relation to assessments.

Other legislation that will be relevant to the prosecution of offences relating to the Child Support Program is:

- Commonwealth Crimes Act 1914 (the Crimes Act);
- Commonwealth Criminal Code 1995 (the Criminal Code).

The Crimes Act contains provisions that are relevant to:

- Search warrants;
- Rules about indictable and summary offences;
- Penalties;
- Time limits;
- Sentencing for Commonwealth crimes.

The Criminal Code contains provisions that are relevant to:

- The physical and fault elements that need to be established by the prosecution when prosecuting an offence;
- Specific misconduct by persons being investigated by the CSP that may be an offence under the Criminal Code.

A schedule detailing relevant powers and offences under the *Registration and Collection Act*, the *Assessment Act* and the *Criminal Code* are set out at Appendix A. This schedule is categorised by a reference to powers under the CSP legislation and offences under the CSP legislation and the Criminal Code by the paying parent, receiving parent, employer or third parties. The schedule also includes particulars of the relevant time limits for each offence, the fines and terms of imprisonment for each offence and the relevant prosecuting and investigation agency.

2. Misconduct

During the course of reviewing cases, CSP officers may identify certain conduct that is in breach of the CSP legislation or the *Criminal Code*. In some cases, the conduct may contravene both the CSP legislation and the *Criminal Code*.

If the seriousness of the offence warrants prosecution under the *Criminal Code*, the Commonwealth Director of Public Prosecutions (the CDPP) will charge under the provision which most appropriately reflects the criminality of the conduct.

The strength of the admissible evidence will also be an important factor in determining which charges will be preferred by the CDPP.

The type of conduct that may be investigated and referred to the CDPP is set out in more detail in Chapter 2.

The relevant offences and the evidence and/ or conduct that may establish those offences are discussed in Chapter 2.

3. Investigation of conduct

CSP officers may identify possible misconduct during the course administering the CSP legislation and conduct enquires under the relevant legislation for the purposes of the *Registration and Collection Act* or the Assessment Act as set out in 1 above.

CSP officers may issue notices, speak to witnesses and obtain information from a number of different sources, including from the CSP records and from other agencies, to investigate any suspected breaches under the CSP legislation.

These guidelines contain some useful information and precedents for CSP staff in conducting those enquiries and cover:

- Information gathering (source of the powers, rules that apply to the use of those powers and non-compliance) Chapter 3
- Document and evidence management (what procedures should be followed and why is it important) Chapter 4
- Evidence (how information that CSP officers obtain can be used as evidence in Court proceedings) Chapter 5
- Interviewing witnesses and taking statements (rules to follow and some useful tips and precedents) Chapter 6
- Communications during the course of investigations with witnesses, customers and other agencies (rules that apply, privacy) Chapter 7
- Remedies and interaction between the various actions that the CSP may take on cases (administrative, civil and criminal actions, possible overlaps and issues to consider) Chapter 8

4. Referral of briefs to the Commonwealth Director of Public Prosecutions (CDPP) or the Australian Federal Police (AFP)

If CSP officers identify offences during the course of their investigations and enquiries they may:

- refer a brief directly to the CDPP for consideration of prosecution; or
- refer a brief to the AFP so the AFP can conduct further investigations and refer a brief to the CDPP, if the evidence warrants a prosecution.

Not all matters referred to the AFP will be resourced for investigation and it is anticipated that most matters will be investigated by the CSP and referred directly to the CDPP. Certain matters should be referred to the AFP and those matters are set out in the Schedule of Offences at Appendix A. Those matters principally cover offences under the Commonwealth *Criminal Code 1995* relating to impersonation of Commonwealth Officers.

The CDPP does not have its own investigative powers so briefs to the CDPP should contain all evidence that will be used to support a prosecution. Briefs referred to the CDPP should be created in accordance with the CDPP guidelines (refer Appendix H) and should contain:

- A narrative of the facts of the case.

- The allegation made and reference to the relevant legislation.
- The evidence obtained that proves the elements of the possible offence, which will include witnesses, statements and copies of relevant documents (Note: The originals of documents and any exhibits should not be included in the brief and should be stored at the CSP pending any trial).
- Witness contact details.
- Witness and exhibits list.
- A covering letter from the investigator identifying any relevant information, such as:
  - possible defences and how they may be rebutted;
  - witness problems;
  - any public interest matters that may be relevant to the CDPP's decision.

The prosecution process and the matters considered by the CDPP are referred to in more detail in Chapter 10 (Court Procedures and Prosecution Process). This Chapter also sets out the relevant Court procedures.

Chapter 9 (Disclosure) contains an explanation of the obligations of the prosecution to disclose information to the defence during the prosecution process and outlines the CDPP's expectations and requirements of investigating agencies.

5. Appendices

The appendices to these guidelines contain:

- Schedules summarising the offences, types of misconduct and evidence matrices for particular offences. They are intended as a quick reference guide for CSP staff.
- Sample precedents for use by CSP staff to assist investigations and in preparation of briefs.
- Guidelines from the CDPP in relation to its prosecution policy, disclosure and brief preparation.
- Best practice guidelines for document handing (endorsed by HOCOLEA)

Investigation and Prosecution Manual - Chapter 2: Child support program legislation: offences, evidence matrix, examples of misconduct

1. Introduction

During the course of reviewing cases, CSP officers may identify certain conduct that is in breach of the CSP legislation or the *Criminal Code*. In some cases, the conduct may contravene both the CSP legislation and the *Criminal Code*.

If the seriousness of the offence warrants prosecution under the *Criminal Code*, the Commonwealth Director of Public Prosecutions (the CDPP) will charge under the provision which most appropriately reflects the criminality of the conduct.

The strength of the admissible evidence will also be an important factor in determining which charges will be preferred by the CDPP.

A schedule, which appears at Appendix B, identifies:

- Particular conduct that may contravene either the CSP legislation, the *Criminal Code* or both;
- The relevant offence provision under the CSP legislation and/or the *Criminal Code* that may have been contravened; and
- Any material differences between the various offence provisions.

2. Evidence matrix – proofs and elements of key offences

When the CSP is reviewing a case it will use a range of powers in order to make assessments of liability for child support payments, collect those payments and generally to give effect to the Child Support Scheme.

The *Registration and Collection Act* and the Assessment Act create a number of offences for specified misconduct.

The types of misconduct that both Acts cover are:

- Failure to comply with notices;
- Failure to do things required or doing things that are not allowed under the Registration and Collection Act and/or the Assessment Act;
- Providing false or misleading information, false documents or forgeries;
- Obstruction of the CSP and/or impersonation of Commonwealth officers

The *Criminal Code* also creates offences when a person provides false information to Commonwealth public officials, obstructs those officers from performing their

functions and duties or interferes with Commonwealth property or the exercise of Commonwealth functions (impersonation).

There is some overlap between offences under the CSP legislation and the Criminal Code offences, which tend to be more serious in nature and consequence.

The relevant offences have been analysed in the attached schedules (which appear at Appendix C) and have been categorised as follows:

- 2.1 Failure to comply with notices (Appendix C1);
- 2.2 Failure to do things required or doing things that are not allowed under the Registration and Collection Act and/or the Assessment Act (Appendix C2);
- 2.3 Providing false or misleading information, false documents or forgeries (Appendix C3);
- 2.4 Obstruction of CSP and/or impersonation of Commonwealth officers (Appendix C4);
- 2.5 Offences relating to Departure Prohibition Orders (Appendix C5).

Offences under Category 1 may also be offences under Category 4. Offences under Category 2, if they were repeated and serious, may also evidence misconduct under some of the offences set out in Category 4.

The misconduct schedule (Appendix B) identifies some of these overlaps.

3. Important principles about proving a criminal case: Physical and Fault Elements

The *Commonwealth Criminal Code* applies to Commonwealth offences, including offences under the *Registration and Collection Act* and the *Assessment Act*. The *Criminal Code* also creates offences.

Under the *Criminal Code*, an offence consists of physical and fault elements. In order for a person to be found guilty of an offence, the prosecution must establish both the physical elements under the Act creating the offence and one of the fault elements relevant to each physical element. It is therefore important to read the Schedules which appear at Appendix C by reference to the *Criminal Code* and the principles and examples set out in the Chapter.

The physical element of an offence may be:

- Conduct; or
- the result of the conduct; or
- the circumstance in which conduct, or a result of the conduct, occurs.

Conduct means an **act** or an **omission to perform an act**.

The fault element for a particular physical element may be:

- intention;
- knowledge;
- recklessness; or

- negligence.

In some cases the CSP legislation specifies a fault element in relation to a physical element of an offence. In some cases, it does not specify any fault element at all.

If there is no fault element specified and:

- the physical element of the offence consists only of conduct, intention is the fault element;
- the physical element of the offence consists only of a circumstance or result, recklessness is the fault element.

A person has intention with respect to:

- conduct, if he or she means to engage in that conduct;
- a circumstance, if he or she believes that it exists or will exist:
- a result, if he or she means to bring it about or is aware it will occur in the ordinary course of events.

A person has knowledge of a circumstance or a result if he or she is aware it exists or will exist in the ordinary course of events.

A person is reckless with respect to a:

- circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist and, having regard to what is known, it is unjustifiable to take the risk;
- result if he or she is aware of a substantial risk that the result will occur and, having regard to what is known, it is unjustifiable to take the risk.

In some cases, the law will create an offence which is a strict liability offence or where there are no fault elements for a particular physical element of an offence. Mistake of fact is the only defence available for strict liability offences.

In some cases, the law will create an offence which is an absolute liability offence or where there are no fault elements for a particular physical element of an offence and mistake of fact is not available in relation to that physical element. Mistake of fact will not be an available defence.

An example of how this works is as follows:

Elements s137.1 Criminal Code (offences committed on or after 16 January 2003)

- D gives information to another person (conduct)
  - **Fault**: As s 137.1 does not specify a fault element for this physical element, under s 5.6(1) of the Criminal Code intention is the relevant fault element that needs to be established.
- The information is false or misleading; or the information omits a matter or thing without which the information is misleading (circumstance)
  - **Fault**: Section 137.1 specifies a fault element which is this case is knowledge

- That other person is a Commonwealth entity; or that other person is a person exercising powers or performing functions under, or in connection with, a law of the Commonwealth; or the information is given in compliance or purported compliance with a law of the Commonwealth (circumstance)
    - **Fault**: Section 137.1 specifies that there is absolute liability in relation to this physical element.

Therefore, the CSP would need:

1. Evidence that D gave a information to a person and that they intended to give the information to the person;
2. Evidence that D knew the information was false and misleading;
3. Evidence that the person who D gave the information to was a CSP officer and/ or that the person was exercising a power or function under the CSP legislation and/or that the information was given in purported compliance with the CSP legislation.

It is difficult to obtain direct evidence about the state of mind of D unless D makes admissions during a voluntary or compulsory interview about this fact. However, a court would be prepared to infer the intention from the circumstances of that the information was given. For instance, if the CSP officer gave evidence that the CSP served D with a notice for information and D produced that information to the CSP officer, the Court would infer that D intended to give the information.

To establish 3, the CSP would need to give evidence of the fact and it would not be necessary to show that D knew this.

To establish 2, it would be necessary to have evidence that the information was false or misleading (ie what was the truth of the position). The CSP would have to have evidence that D knew about the true position. If the case was about incorrect income information given the CSP on which the CSP relied and under assessed D for child support liability, the CSP would have to establish what income D was in fact earning (by reference to source documents such as income returns, pay packets or tax invoices and/ or a statement from an employer). In the absence of voluntary admissions about knowledge, the CSP would have to establish that D was aware of the income receipts, say pay slips or group certificates or made admissions in documents about the income.

Reasonable excuse

- Under some offences, there is a defence of 'reasonable excuse'. It may be argued, for instance, that: the person did not receive the notice requesting compliance or seeking information.
  (***Note**: Although s16 of the Registration and Collection Act provides that a person who changes address and does not give the Registrar notice of this address can not plead the change of address as a defence)*; or
- The person did not owe or hold the money for the paying parent.
  (***Note***: *This would be a defence to s72A(2) of the Registration and Collection Act.)*

4. Particular types of misconduct: Issues to consider

4.1 Non-compliance with notices

The CSP has the power to issue notices to parties to require them to provide certain information or attend to answer questions.

If a person who is served with a notice fails to comply, they may be prosecuted.

Issues to consider are:

- The relevant provisions are mostly strict liability offences.
- As well as prosecuting the offence, the court can make orders requiring compliance.
- The offences are summary, will be heard in a Magistrates Court and will generally be punishable by a fine (*For instance, a failure to comply with a notice under s120(1) of the Registration and Collection Act punishable by a fine of up to $2,000 for a person and $10,000 for a corporation. A failure to comply with a notice under s161(1) of Assessment Act is punishable by a fine of up to $3,300 or 6 months imprisonment or both for a person and $16,500 for a corporation. However, it is unlikely that an offender would go to prison for breach of s 161(3) unless there was a history of breaches. The outcome for both is more likely to be a fine).*
- Failure to comply with court orders is a more serious offence and may be punishable by up to 12 months imprisonment.
- Proving service of the notice will be an important part of the case but the evidence required would otherwise be straight forward and is likely to be substantially from the CSP investigator.
- A person may refuse to answer questions or provide documents on the basis that it may incriminate them.
- There is a 12 month limitation period on prosecutions, so cases should be promptly actioned.
- A court may not convict for one off or first time breaches so a consistent internal enforcement policy of prosecuting after 2 or 3 breaches, with forewarning about prosecution, would not only be reasonable but would be more likely to secure a fine or order for compliance.
- Corporations can be prosecuted but the punishment will be limited to a fine. The maximum fines are generally substantially more than fines for individuals. A corporation can not claim the privilege of self incrimination.

4.2 Failure to do things required or doing things not allowed

There are a number of provisions under the *Registration and Collection Act* requiring a party to do something or to refrain from doing something.

If a person fails to do things required or does things that are prohibited, they may be prosecuted.

Issues to consider are:

- The relevant provisions are mostly strict liability offences.
- The offences are summary, will be heard in a Magistrates Court and will generally be punishable by a fine.

- There is a 12 month limitation period on most of these prosecutions, so cases should be promptly actioned.
- Evidence required may be from third parties as it will be necessary to prove the act done or the failure to do the act but much of the evidence is likely to be provided by a CSP investigator or officer.
- A court may be unlikely to convict for one off or first time breaches so a consistent internal enforcement policy of prosecuting after 2 or 3 breaches, with forewarning about prosecution, would not only be reasonable but would be more likely to secure a fine or order for compliance. However, it will depend on the seriousness and nature of the offence and this may not be appropriate for offences that relate to a failure to notify or a failure to deduct child support from wages this for a sustained period.
- Corporations can be prosecuted but the punishment will be limited to a fine. The maximum fines are generally substantially more than fines for individuals. A corporation can not claim the privilege of self incrimination.

4.3 False and Misleading Information/ Forgeries

If false and misleading information is provided to the CSP and, in reliance on that false information, the CSP assesses child support at a lower amount than would otherwise be assessed or assesses a liability that would otherwise not arise, there has been some harm created by the wrongful conduct.

The loss may ultimately be borne by the paying or receiving parent, however, because the debt is payable to the CSP, the CSP would initially bear the loss and the Commonwealth may bear a loss if the effect of the false information is to increase benefits paid but Centrelink. There is also a cost to the Commonwealth in funding investigations and recoveries, where false information is provided.

It is the CDPP's current position that offences under the Criminal Code relating to defrauding the Commonwealth may not be available. This means that conduct by paying or receiving parents in misleading the CSP through the information provided or, more seriously, through providing false or forged documents, will be the primary focus for the more serious CSP investigations.

Appendix C3 summarises the relevant offence provisions and the key issues to consider when investigating and prosecuting these cases are:

- The criminal sanctions for misleading statements under the CSP legislation are summary, will be heard in a Magistrates Court and will generally be punishable by a fine. (***Note***: *Breach of s119(1) of the Registration and Collection Act is punishable by a fine of $2,000 but breach of s159 (1) is punishable by a fine of $3,300 or 6 months imprisonment or both).*
- There is a 12 month limitation period on prosecutions of the CSP legislation offences, so cases should be promptly actioned.
- There are offences under the *Criminal Code* for forgery, false documents and false information. These offences are more serious and attract higher penalties.
- There are fault elements for all of these offence provisions and the more serious the offence, the higher the threshold of fault applies. For instance, forging and using forged documents is an offence under the *Criminal C*ode punishable up to 10 years imprisonment. The prosecution must establish dishonesty to establish this offence, which is more difficult than establishing recklessness.

- While the conduct may be similar in various cases, the offences laid by the CDPP will generally depend on the strength of the evidence available to support the necessary fault element.
- The more serious the conduct, the more likely offences under the *Criminal Code* will be established and these offences are punishable for periods from 12 months to 10 years imprisonment.
- To ensure the CSP gets the best result, CSP investigators should always consider the impact of the breach and present any information on this issue to the CDPP. This may influence the CDPP on which charges to lay and may influence a Court on sentencing. For instance, if the CSP in relying on false information has assessed child support liability at $5,000 less each year than it could have assessed child support and the receiving parent or Centrelink has borne the difference, evidence should be provided about this.
- The CDPP can seek orders for criminal compensation where a loss has been established.
- The CSP will need to establish that the information was false or misleading and therefore will have to establish the true position at the relevant time. This will generally be through source documents or third parties.
- Corporations can be prosecuted but the punishment will be a limited to a fine. The maximum fines are generally substantially more than fines for individuals. A corporation can not claim the privilege of self incrimination.

4.4 Obstruction and impersonation

During the course of investigations, persons may interfere with CSP enquiries or with the process. This may be through refusing to provide information (refer also 4.1 above) or actively hindering enquiries. It may also be through trying to obtain information about a receiving or paying parent by pretending to be a CSP officer.

The following issues should be considered:

- The course of conduct by a person being investigated may be so serious that the CSP should consider whether a prosecution under s149.1 of the *Criminal Code* may be more appropriate than a prosecution under the offence provisions referred to in 4.1 or s61(3) of the *Registration and Collection Act*.
- With the exception of a breach of s61(3) of the *Registration and Collection Act*, all offences are indictable and are under the *Criminal Code*.
- There are fault elements for all of the offences under the *Criminal Code*.
- Corporations can be prosecuted but the punishment will be a limited to a fine. The maximum fines are generally substantially more than fines for individuals. A corporation can not claim the privilege of self incrimination.

4.5 Departure Prohibition Orders

The CSP may make an order prohibiting a person from departing from Australia to another country under certain circumstances when a person has a child support liability (section 72D of the *Registration and Collection Act*).

Where such an order has been made there are offences created under the *Registration and Collection Act* for leaving Australia without authorisation and/or for providing false information to an authorised officer (usually a customs or the AFP) at the time of departure.

The offence of leaving Australia is punishable by a fine of up to $6,600 or 12 months imprisonment or both. There is no time limit on prosecution.

Failing to answer questions or give information is punishable by fine only but giving false information is punishable by a fine up to $3,300 or 6 months imprisonment or both.

5. Precedents

Sample statements for particular offences have been set out in Appendix D as follows:

Appendix D1	Example statement for non-compliance with compulsory notice.
Appendix D2	Example statement for failure to do things under the CSP legislation
Appendix D3	Example statement in relation to false and misleading statement
Appendix D4	Example statement in relation to obstruction

Investigation and Prosecution Manual - Chapter 3: Information Gathering

1. Introduction

The CSP has powers under the *Registration and Collection Act* and the *Assessment Act* to:

- Obtain specific information from payers, payees, employers or third parties.
- Require a person to attend to answer questions.
- Require a person to produce specified documents or categories of documents.
- Conduct on site reviews of records at an employee's premises.

There may be limitations on the use of the information obtained (refer 2.5 below) but generally this information may be used in investigation of offences for breach of the *Registration and Collection Act* or the *Assessment Act* and may subsequently be used as evidence in court proceedings.

In certain circumstances, information obtained by CSP officers may be used to prosecute offences under legislation other than the CSP legislation.

This Chapter deals with:

- The powers under the Registration and Collection Act and Assessment Act, which provide for the collection of information.
- Rules about how those powers can be used.
- Limitations on the use of those powers and the information gathered.
- Issues that arise from non compliance and enforcement of those powers.

2. Information gathering powers under the CSP legislation

2.1 Information gathering under the Registration and Collection Act and information gathering under the Assessment Act.

The Registration and Collection Act includes a number of provisions that allow CSP officers to obtain information. These provisions are:

- **Section 120(1)**. A Registrar may for the purposes of the Act, require a person to provide information, attend and answer questions and produce documents
- **Section 61(1)**. The Registrar may authorise a CSP officer to enter the premises of an employer, obtain free access at all reasonable times to documents retained by the employer and inspect, examine and make copies or take extracts from any document.

The above provisions under the *Registration and Collection Act* should be used when the CSP is seeking to obtain information to assist in the collection of child support. The power under s61(1) should only be used where the CSP is conducting enquiries or investigations in relation to the collection of child support by deductions from salary or wages by an employer.

The *Assessment Act* contains provisions that allow CSP officers to obtain information. These provisions are:

- **Section 161(1)**: The Registrar may, within a reasonable time and for the purposes of the Act, require a person to provide information, attend and answer questions and produce documents.
- **Section 162A(2)**: Where a payer/payee is or was resident in a reciprocating jurisdiction and the Registrar does not have sufficient information to determine that person's overseas income, the Registrar may send written notice to the person or to the relevant overseas authority requesting any information or documents that are necessary to enable the person's income to be determined.

The above provisions under the *Assessment Act* should be used when the CSP is determining child support liability.

CSP officers may commence enquiries because a paying parent has failed to make payments. The CSP officer will use notices under s120(1) of the *Registration and Collection Act* to gather this information. During these investigations, information from the paying parent, the receiving parent, an employer or third parties may become available which suggests that the paying parent has greater capacity to pay child support than originally assessed.

If this happens, the CSP officer can initiate a reassessment using information obtained through those notices but if further information is required, any notice issued should be under the *Assessment Act* as the purpose for obtaining the information has now changed.

CSP officers may change the focus of investigations in relation to particular child support debtors over a period of time and it is important to consider the purpose before issuing notices. If a notice is issued for a purpose that is not permitted under the relevant Act, the notice will be invalid.

2.2 Drafting of notices under section 120 of the Registration and Collection Act and sections 161 and 162A of the Assessment Act

Notices under sections 120 and 161 will be the most common notices issued under the CSP scheme.

It is important CSP officers:

- Have the relevant delegation to issue the notice;
- Use the correct notice for their purposes;
- Draft the notice clearly so that it is precise enough to allow the party responding to understand the information sought or information to be produced but not too narrow to exclude key documents;
- Give the respondent to the notice reasonable time to respond;

- Nominate the time, place and manner of production.

Care needs to be taken when drafting the notices as if the CSP wishes to prosecute for non-compliance or to rely on the fact that no information is produced as evidence of a negative fact, the content of the notice will become an important issue.

An example of this is where an employer says he or she deducted child support from a paying parent's wages and remitted it to the CSP. The CSP has no record of this. Asking the employer to produce copies of all records, including bank statements, showing or concerning the deduction and transfer of child support on a particular date (or between a range of dates) may support a prosecution under section 46(1) of the *Registration and Collection Act*.

An authorisation may be issued under s 61(1) of the *Registration and Collection Act* for CSP officers to conduct on site visits of the employer's premises to inspect documents. Using this provision could be an alternative to issuing a notice under s 120(1) and may be very effective for difficult cases (ie where employers are not cooperative). While prior notice may be given for access visits under s 61 (1), CSP officers should consider seeking assess to documents on a forthwith basis and without notice where the employer has been obstructive, is suspected of provide false information or is in collusion with another party and has a history of not cooperating.

It is important that any authorisations issued under s 61(1) are by the Registrar and that the CSP officer shows the employer the authorisation when access is sought.

2.3 Notices to attend and answer questions

Care also needs to be taken in drafting notices to attend to answer questions. It is important that the respondent to the notice:

- Is given enough notice to be able to attend;
- Is given sufficient detail about where and when to attend; and
- Has enough information about what is being asked so that they are sufficiently prepared.

It is not necessary to specify the questions in the notice but this may be helpful for cooperative third parties and of greater use to the CSP.

There may be a disadvantage in specifying questions for uncooperative parties as this will give the party forewarning of any concerns or inconsistencies and allow them to tailor answers. For potentially uncooperative witnesses, the better alternative is to issue notices requiring the production of documents, analyse the documents, then issue a notice to attend and answer questions.

The purpose of issuing notices to answer questions is for the CSP officer to:

- Obtain information that may not be recorded in documents;
- Gain an understanding of the witnesses views or opinions on particular issues; and
- Assist the CSP officer in understanding the origin, content or effect of certain documents already produced.

Sometimes notices to attend and answer will be issued so the CSP officer can hear the story of the paying parent, the receiving parent or employer. More often such notices will be issued because the CSP officer needs to delve beneath the documents and have inconsistencies explained. CSP officers may wish to test the veracity of information provided by the paying parent, the receiving parent or employer about payments or the capacity of a paying parent to pay or the existence of a liability.

If this is the case, an examination will be more effective if:

- Notices to produce documents have already been served on and produced by the party and any third parties;
- These documents have been analysed by the CSP officer;
- Any searches of the CSP files for information previously provided is reviewed and analysed;
- The CSP officer prepares for the interview and shows the witness documents in an orderly manner.

2.4 Practical considerations on when to use notices and which notices to use

If a case is referred to the Specialised Investigations Unit (the SIU) for consideration, it will generally be because there has been a history of non-compliance or serious misconduct is suspected.

While not all matters referred to the SIU will lead to formal enforcement action or prosecution, this is a possibility and it is therefore important for CSP officers to approach investigation in a strategic and disciplined manner.

How, when and in what order compulsory notices are used may become an important issue in any prosecution. The way in which information is gathered, the providence (or source) of the information and how it is stored and proven in a court will be crucial in any court action, including a prosecution. These issues are discussed in Chapter 4 (Document and evidence management). However, it is critical that CSP officers remember that all information gathered may ultimately be used as ‘evidence’ in a case.

If a case has been referred to the SIU it will be preferable to use compulsory notices for the production of documents, unless parties such as an employer, paying parent or other third party are cooperative and wish to provide information voluntarily rather than through a formal process. Most parties will want to have a formal notice issued to protect them if they provide information. There will also be certain advantages for the CSP in tendering documents in court (refer Chapter 5, Evidence).

Voluntary interviews may be undertaken with cooperative third parties but the information given to CSP officers generally can not be used as evidence unless the person subsequently agrees to provide a statement. Voluntary interviews of the person who is the subject of any investigation may also take place. Such interviews may be useful to understand any argument a party will make as to why they have not or can not pay child support or can not pay at a higher rate or to explain documents. However, such interviews are unlikely to be useful as evidence against the person unless they are recorded and the person has been given the appropriate warnings.

If interviews are conducted under s120(1) or s161(1), the person should be advised at the outset that they do not have to answer any questions that may incriminate them and that any information provided in the interview may be used as evidence in any subsequent proceedings against them. It is advisable to tape record or video any interviews and to advise the person that the interview will be recorded.

Formal interviews should only be conducted when necessary but when they are, they should be approached with caution and preparation. It is not advisable to conduct multiple interviews on the one person, unless new information is provided.

CSP officers should consider the sequence of any interviews. For instance, interviews are best conducted once all relevant information has been analysed. CSP officers may wish to speak to employers or contractors before they interview the person who is the subject of the investigation.

Interviewing witnesses and taking Statements is discussed in more detail in Chapter 6.

If the CSP officer forms the view they have evidence that a person has committed an offence, it would not be appropriate to issue a notice to attend and answer questions and the person should instead be offered the opportunity to attend a record of interview. This is where the person is advised of the nature of the suspected offence and is given the opportunity to explain. The interview is voluntary and should be recorded.

Records of interview are also discussed in Chapter 6.

Suggested scripts for compulsory interviews and records of interview appear in Appendix E.

2.5 Service

Service is prescribed under ss14-16 of the *Registration and Collection Regulations* and ss11A and 11B of the *Assessment Regulations*. The provisions for service under each Act are essentially the same.

If the person is a natural person, service may be by:

- serving the document on them personally,
- leaving the document at the person's address for service,
- sending it by pre-paid post to the person's address for service.

For a corporation, service may be by:

- leaving the document at the address for service or
- leaving or sending it by pre-paid post to the head office, the registered office or the principal place of business for the corporation.

The 'address for service' is the last address notified by a person to the Registrar. If no address is notified but the Registrar's records contain an address for the person or corporation, service at the last such address on record is sufficient.

Service is deemed to have been effected properly by prepaying and posting the letter, unless the contrary is proved, and is taken to have been effected on the 4th working day after posting.

A notice can be served by facsimile or email by consent but it is the CSP's policy that notices should be sent by post, with facsimile or email as a back up if the need for service is urgent.

A record should be made on the file at the time of service to assist in the preparation of any statement or affidavit of service which may be required if there is non-compliance.

2.6 Rules and limitations about the use of the powers and the information gathered

Notices or authorisations must be issued for the purposes of the legislation under which they are issued (refer 2.1 above) and respondents to the notice must be given a reasonable time to comply. T

The notice provisions referred to in 2.1 all have a requirement for 'reasonableness'. This means that notices must:

- Specify a reasonable time and place for production or attendance; and
- Be sufficiently clear to enable the respondent to the notice to understand the nature and type of documents that are required to be produced.

*[**Note**: Section 61(1) of the Registration and Collection Act requires authorisation by the Registrar for access to a site but does not expressly require the issue of a notice before hand. However, the authorisation will still have to be reasonable in the circumstances. This may require forewarning and/ or the opportunity to seek legal advice.]*

What is reasonable will depend on the circumstances. If the CSP requests a large number of documents from a third party, it would be expected that the third party should be given sufficient time to identify, collate and copy those documents. In these circumstances, 21 days for compliance may be reasonable. On the other hand, if the CSP had identified one or two documents that it required from an employer, paying parent or receiving parent, a period of 7 to 14 days may be more appropriate.

Both sections 120(1) and 161(1) are limited by the extent to which a person is capable of complying with the notice and there is a specific defence for breach of s 161(1) if the person has a 'reasonable excuse' for non-compliance.

Because breach of s161(1) is a more serious offence than breach of s120(1) (there may be a custodial sentence for breach) there is an express reservation for privilege and s161(4) provides that it is a reasonable excuse to refuse or fail to comply with the notice provisions if complying would tend to incriminate or expose the person to criminal prosecution. This is the privilege against self incrimination and means that a person who may be exposed to a criminal prosecution does not have to answer questions or provide documents that may be used against them to establish their guilt. In other words, they are entitled to the 'right to silence'.

A corporation can not claim this privilege.

There is no such express provision in relation to compliance with s120(1).

The compulsory notices referred to in 2.1 will not allow the CSP to obtain documents that are protected by legal professional privilege *(**Note:** There are three elements necessary to establish legal professional privilege over communications passing between legal adviser and client. First, the communications must pass between the client and the client's legal adviser acting as such. Secondly, the communications must be made for the dominant purpose of enabling the client to obtain legal advice, or for the purpose of actual or contemplated litigation. Thirdly, the communications must be confidential).*

Documents and answers to questions obtained by the CSP may be used for administrative orders or directions by CSP officers and may also be used as evidence in civil recovery or criminal proceedings.

The CSP can not use its powers under the *Registration and Collection* and *Assessment* Acts to investigate offences against other Commonwealth laws. However, when CSP investigations cover factual matters that may disclose a breach of not only the CSP legislation but other laws such as the *Criminal Code*, any information gathered as part of the enquiry into the breach of the CSP legislation may form part of a brief to the CDPP or a referral to the AFP.

Therefore, using information gathered under the CSP legislation for other prosecutions would be permissible, provided the information was properly obtained with the use of valid notices. On the other hand, issuing notices for the purpose of investigating a breach of the Criminal Code would not be permitted.

Notices should not be issued once proceedings are commenced under the CSP legislation as this may be considered to be in contempt of the Court processes. This is discussed in more detail in Chapter 8 (Remedies – interaction between administrative, civil and criminal actions).

2.7 Non-compliance with notices

If a person served with one of the notices referred to in 2.1 fails or refuses to comply with the notice and:

- The CSP can prove service of the notice;
- The notices has been issued under the correct Act and has not otherwise been issued for an improper purpose;
- The time for compliance with the notices was reasonable;
- The terms of the notice of the notice were clear;
- The recipient of the notice has not offered any reasonable excuse and they have the documents or information; and
- The recipient has not failed or refused to comply on the basis of legal professional privilege of the privilege against self incrimination.

The CSP may prosecute the recipient but should probably only do so after repeated breaches (after the second or third breach) and a warning in any covering letter of service. This is because the Court may not convict for ‘one-off’ breaches. A second breach or a history of non-compliance will be treated more seriously.

Breaches of sections 61(3) and 120(3) of the Registration and Collection Act and sections 161(3) and 162A (3) of the Assessment Act are summary offences that can be prosecuted in the Magistrates Court (refer Chapter 10, Court Processes and Prosecution of these offences). Sections 61(3) and 120(3) are punishable by fines of up to $1,000. Breach of section 161(3) is punishable by fines of up to $3,300 or 6 months imprisonment or both.

It is also possible under section 162 of the Registration and Collection Act to obtain an order from the Court requiring compliance. If the person fails to comply with this order, the penalties are more serious and the person may be fined up to $6,600 or 12 months imprisonment or both. There are similar provisions under s121 of the Registration and Collection Act and if a person fails to comply with a court order, they may be fined up to $5,000 or 12 months imprisonment or both. Contraventions by companies do not attract imprisonment (courts can not imprison a company) but the fines are generally higher (***Note**: Section 61(3): $5,000, s161(3): $16,500, s162(3): $33,000, s120(3): $10,000, s121(3): $25,000).*

Investigation and Prosecution Manual - Chapter 4: Document and evidence management

1. Introduction

Information is gathered from the use of CSP notices or authorisations and may ultimately be used as evidence in court proceedings. It is therefore important that:

- The source of all documents can be established.
- The documents produced can be tendered as evidence in proceedings.
- The documents produced are protected, stored, maintained and kept confidential.

This Chapter deals with:

- How documents should be managed.
- How to ensure the source of documents can be established and documents can be tendered in Court.
- How documents should be protected, including privacy issues.

2. How should documents be managed?

Once a case is referred to the Special Investigations Unit (SIU):

- Notices to produce information and/or documents should be recorded by the SIU officer in a central register for future reference. The officer should record the date, time and place of production, the name of the person producing the documents and the name of the person taking possession.
- The documents produced in answer to the notice should be given a unique identification number and recorded in a register maintained by the SIU officer. Each document should be individually identified and listed.
- The notices to produce documents should be linked with the identification number as a record of which documents were produced in answer to particular notices.
- The documents should be stored in a secure place.
- The SIU officer who has issued the notice should keep a record of any movements of the records outside his or her possession.

Where possible, originals should be produced as if documents need to be tendered, courts in criminal cases will usually require originals. However, copies of original documents should be provided to the CDPP or the AFP for assessment of any criminal brief.

Another reason why the CSP should keep clear, accurate records of documents produced is that if a matter is referred to the CDPP for prosecution, it will be

necessary for the CDPP to disclose certain information to the person who is being prosecuted. This may include information not relied on in the prosecution.

The CDDP relies on the investigating agency to inform it of all potentially relevant information so that proper disclosure can be made.

Disclosure in criminal prosecutions is dealt with in Chapter 9 (Disclosure) and is very important. Deficient or delayed disclosure of material information can prejudice a trial.

When investigations and/or prosecutions have been finalised and the documents are no longer required, the original documents should be returned to their owner and a notation to the file should be made accordingly.

CSP officers should exercise caution when disclosing documents or the contents of documents to third parties (refer to 4 below).

3. Tender of documents

It will often be important to ensure that certain documents, or information contained in those documents, is considered (or is able to be considered) by the tribunal of fact as part of the evidence that can be taken into account when deciding a matter. The tribunal of fact will either be a Judge or the jury.

A case may fail where a Court or jury is not able to take into account certain information because it has not been or can not be properly 'tendered' or is not in a form that the Court will admit ('admissible form').

When a party is seeking to rely on a document the party will seek to 'tender' the document as evidence in the proceedings. There are rules about how a document may be tendered. These rules are set out in more detail in Chapter 5 (Evidence) but it is important for CSP officers to remember these rules when collecting information so that if it later becomes necessary to use the document as evidence, the CDPP will be able to do so.

If a document is to be used in court proceedings it will be necessary to establish its source. It may also be necessary to establish that the document tendered is the same document that was originally produced to the CSP officer. This is sometimes referred to as 'continuity' or the 'chain of evidence'. This is why it is important to follow the steps referred to in 2 above.

Documents may be used in three ways: for hearsay purposes, for non hearsay purposes and because the document has a direct legal affect. There are evidentiary rules applying to the tender of these documents and this is referred to in Chapter 5.

If a document is produced by a person to the CSP in answer to a notice, it may be that the document was created by the person who produced it or it may be a copy or original of a document created by another which was sent, given or otherwise obtained by the recipient of the notice.

If the person who produces the document is a company, any documents formally produced by the company in answer to the notice may be tendered in the court as a 'business record'. This will assist with the tender and admissibility of the documents (refer Chapter 5).

To use a document in court it is necessary to tender the document by a witness who will be asked to identify the document, explain how it was created and, on occasion, explain its relevance. Often this will be the person who created or received the documents but if this is not possible, because the person refuses to cooperate, a CSP officer could provide a statement about the source of the document and produce the document to the court. However, it will be preferable for the person who created or compiled the document to give evidence about the document sought to be tendered and in contentious cases the CDPP is likely to insist on this evidence.

If a document is exhibited to a statement of a witness, the document should be recorded in an Exhibit Register for the matter, with a description of the document and accurate details recording its production (refer 2 above). The Register should also record any movements of the exhibit from the file.

If documents or copies of documents are obtained as a result of an onsite visit under s 61(1) of the *Registration and Collection Act*, the CSP officer who has conducted the onsite visit should:

- Keep an accurate and contemporaneous file note of where the documents came from (ie which register or book, which filing cabinet or office, who gave it to them).
- Where possible obtain a complete copy of the document, even if only part of the dcoument is relevant.
- Keep a record of the authorisation to which the onsite visit relates.
- Store and maintain the documents or copies by reference to the same system as that maintained for documents gathered under notice.

4. How should documents be protected, privacy issues

This section should be read together with Chapter 7 (Communications, Secrecy Provisions and Privacy).

Documents (including information contained in those documents) that come into possession of a CSP officer must be treated with care and CSP officers must have regard to:

- Section 16 of the Registration and Collection Act;
- Section 150 of the Assessment Act; and
- The Commonwealth Privacy Act 1988.

Under section 16(2) of the Registration and Collection Act and section 150(2) of the Assessment Act, it is an offence for a person to:

- Make a record of any protected information or document; or
- Communicate protected information or the contents of a protected document about a person to any third party;

unless the record is made or disclosed for the purposes of the CSP legislation or in the performance of duties under or in relation to the CSP legislation.

'Protected information' is information that concerns a person that is disclosed to a CSP officer under the CSP legislation.

A CSP officer may disclose protected information about a person:

- To the CDPP or the AFP, for the purposes of a prosecution under the CSP legislation or the Criminal Code (provided the Criminal Code offence is sufficiently connected to the CSP legislation offence);
- To a court, for the purposes of proceedings under the CSP legislation;
- To another person if it is necessary to obtain information from that person about a case.

If a CSP officer is disclosing protected information to a third party it is very important that the information disclosed be confined to the minimum required to progress the case.

For instance, if a CSP officer is asking an employer questions about a payer and the CSP officer wants to find out whether the imformation provided by the payer is correct, the CSP officer may have to show the employer documents referring to the information or may have to repeat information the payer told them in an interview. This would be permissble.

However, if a CSP officer also told the employer information about the payer's debts or personal circumstances and this information was not relevant to the information being sought from the employer, this would not be permissible and could expose the CSP officer to prosecution for breach of the secrecy provisions of the CSP or at least some disciplinary action (**Note**: A breach of sections 16(2) and 150(2) may expose a person to imprisonment for up to 1 year).

Disclosure may be authorised in certain circumstances and to certain parties and particulars of these authorised disclosures are set out in Chapter 7.

Given the seriousness of the secrecy provisions under the CSP legislation, CSP officers should:

- Store and maintain documents produced under notice securely;
- Keep the documents (and the contents) confidential unless disclosure is authorised;
- Keep records of any information disclosed to third parties.

5. Records and file management

SIU staff should maintain separate files for each investigation and should:

- maintain accurate and up to date records on each file;
- record any relevant activities on the file;
- attach all relevant correspondence to the file;
- record all relevant or significant conversations on the file;
- record all information and assistance provided by other agencies;
- attach copies of all notices issued.

Original documents produced under compulsory powers should not be stored on the investigation file but should be stored in a separate but secure area.

Investigation and Prosecution Manual - Chapter 5: The rules of evidence - An overview

1. Introduction

Information may be collected by the CSP from use of compulsory notices, other agencies and from information held within the CSP's own records.

CSP officers may suspect that an offence has been committed against the CSP legislation or the Criminal Code on the basis of this information. However, whether a case can be prosecuted will depend on whether this information can be admitted in Court proceedings as evidence. If the information can not be tendered in a form that the Court will accept as admissible, the information can not be taken into account and the prosecution may fail.

Ensuring that information is properly collected and is or can be put in admissible form will be crucial to a criminal prosecution.

This Chapter deals with:

- An explanation of evidence.
- An overview of the rules of evidence.
- Expert evidence.

This Chapter should be read in conjunction with Chapter 3 (Information Gathering) and Chapter 4 (Documents and Evidence Management).

2. What is evidence?

Evidence is essentially any object or information, other than legal submissions, which tends to prove or disprove the existence of a fact in issue in a court proceeding. There are several types of evidence that can be tendered or adduced in a proceeding. Broadly speaking, evidence is divided into two categories:

- direct; or
- circumstantial.

Direct evidence

Direct evidence is evidence which employs a linear pattern of inference, such as `If A then B'. Direct evidence is capable of proving a fact in issue without requiring complex inferences from indirect items of proof. It consists of the testimony of witnesses who observe events, are parties to conversations had with an accused, or are able to give evidence of a particular physical or mental state that is relevant. Direct evidence may also consist of some items of 'real evidence', which is evidence of a physical character or tangible objects such as fingerprint evidence, breathalyser test results, audio and visual recordings of conversations and articles found pursuant to a search.

Circumstantial evidence

Direct evidence is contrasted with circumstantial evidence, which gains its significance only if seen alongside other pieces of evidence. Circumstantial evidence (sometimes called 'indirect evidence'), consists of facts established in evidence independently of direct observation from which, either alone or in combination, the existence of a fact in issue may be inferred. It's useful to think of circumstantial evidence like a rope comprised of several cords twisted together - one strand of the cord may be insufficient to sustain the weight of an object, but three cords stranded together may be of sufficient strength. This is like circumstantial evidence - there may be a combination of circumstances, none on their own capable of proving a fact in issue beyond reasonable doubt, but when looked at together, create a conclusion of guilt to this high standard of proof.

3. What are the rules of evidence?

The rules of evidence control the admission of evidence in legal proceedings and they govern how that evidence, once admitted, can be used. They are based on considerations of fairness and reliability and are notoriously complex. Each State and Territory has their own Evidence Act which codifies, to some extent, the law of evidence that developed through the common law (Judge made law).

Queensland, South Australia, Western Australia and the Northern Territory still predominately rely on the law of evidence developed through the common law, rather than legislation, to govern the law of evidence. The Evidence Acts in those jurisdictions are not uniform and do not attempt to legislate every rule of evidence, their aim is to complement those rules as found in the common law in some areas.

The Australian Capital Territory, New South Wales, Tasmania and Victoria have largely codified the Commonwealth Evidence Act, which attempted to be a more exhaustive codification of the laws of evidence as developed through the common law. The Acts in these States are largely uniform and are a much more exhaustive statement of the rules of evidence. However, the common law still has a significant application in its own right in the explanation of many of the statutory provisions. The applicable Evidence Act in each state can be found at Table A.

Some of the most commonly referred to rules of evidence will be addressed in this chapter in order to assist the investigator in their evidence gathering task. This list is by no means exhaustive and is intended to be used as a guide only.

4. Is the evidence relevant?

The most fundamental principle of evidence law is that evidence has to be relevant to a fact in issue in order to be admissible. Once an item of evidence is held to be relevant, it will be admissible in a proceeding unless one of the exclusionary rules of evidence operates to exclude it.

For evidence to be relevant there needs to be a logical or rational connection between the evidence and a fact in issue in the proceeding. The test of relevance is very wide and only a minimal connection is required. The Judge in assessing whether the evidence is relevant will ask themselves 'could the evidence, if accepted, affect the probability of a fact in issue?' The decision of whether evidence is relevant or not is an assessment is ultimately ground in life experience. Some States and Territories have codified the test of relevance into

their Evidence Act. The test is that evidence will be relevant if it could 'rationally affect (directly or indirectly) the assessment of the probability of a fact in issue in the proceeding'.

5. Do any of the exclusionary rules of evidence operate to exclude the evidence?

5.1 Hearsay

Perhaps the most well known and complex rule of evidence is the rule against hearsay. The rule against hearsay was developed through the common law but has now been legislated into the Evidence Act in some States and Territories. The rule states that 'evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation'. A previous representation is a statement or representation made outside of giving evidence in court. Commonly, hearsay takes two forms:

- **Where the previous representation is an oral statement.** Hearsay in this instance can be conceptualised as a statement by a witness that a fact occurred, when they didn't actually see it occur, and are doing no more than repeating what another person, who did see the fact occur, said about it. A very simple way to remember the definition is to split the word 'hearsay' into two distinct words – if a witness 'hears' another person 'say' that a fact occurred, without the witness actually observing it, the witness cannot give evidence of that conversation to the court to prove that the fact actually occurred. The evidence would need to come from the person who actually observed the fact occur.

For example, If Jack said to Jill 'I saw it raining today', Jill could not give evidence of Jack's statement to the court in order to prove that it was raining, because Jill didn't actually see it raining. Jack would need to tell the court that it was raining that day.

- **Where the previous representation is in a document.** A statement in any document that a fact occurred, irrespective of who made that statement, is also hearsay. A document is not admissible to prove its contents if it contains a statement about the occurrence of a fact in issue, even if it is written by the person who observed the fact occur. This is because a statement written in a document will always constitute a previous representation regardless of who wrote it, as it was made outside of giving evidence in the court proceeding.

For *example, if Jack wrote in a document 'I saw it raining today', that document cannot be admitted to the court as evidence of the fact that it was raining that day. Jack would need to tell the court in oral testimony that* she saw it raining that day.

The general rationale of excluding hearsay evidence is to confine the evidence to direct testimony, that is, to evidence by a witness who actually observed the event happening. This allows the defence the opportunity to properly test the truth of that evidence in cross-examination.

There are a number of exceptions to the rule against hearsay that will permit hearsay evidence to be admitted in certain circumstances. It is important to note that generally, these rules only apply to evidence of **first-hand hearsay**.

Hearsay is 'first hand hearsay' where the maker of the statement had personal knowledge – meaning knowledge gained through direct perception – of the asserted fact. This is best illustrates by examples.

For example, where Jack saw that it was raining and later told Jill 'I saw it raining today', that statement to Jill is first hand hearsay. If Jack's statement fell under any of the exceptions to the hearsay rule, Jill could give that evidence to prove that it was raining. However, if Jack said to Jill 'Peter told me it was raining today', without Jack actually witnessing the rain, that does not constitute first-hand hearsay and so could not fall under any of the exceptions to the hearsay rule.

Another example of first-hand hearsay is a written statement by Jack in a document that she saw it raining. Again, if Jack's statement fell under any of the exceptions to the hearsay rule, the document containing Jack's statement might be tendered to prove that it was raining that day. However a written statement by Jack in a document 'Peter told me it was raining today' does not constitute first-hand hearsay and so could not fall under any of the exceptions to the hearsay rule.

5.2 Exceptions to the rule against hearsay – hearsay evidence admissible in some instances

5.2.1 The hearsay rule does not apply to evidence relevant for other (non hearsay) purposes.

If the purpose of a witness' testimony about a statement another person made to them is only to prove that the other person simply made that statement, rather than to prove what the other person said was true or actually occurred, that testimony does not amount to hearsay.

Equally, if the purpose of a document is only to prove what another person wrote or the existence of the document, and not what they wrote was true or actually happened, the statement and the document are not hearsay. This is because in both instances the evidence does not amount to hearsay in the first place. It is classified as 'original evidence' and is admissible for a non-hearsay purpose, that is, to prove that a statement was made, or that a document was authored, by a person.

For example, if it was important in a case that Jack said it was raining, irrespective of whether it was raining or not, Jill may be permitted to give the evidence 'Jack told me it was raining that day'. This is because the evidence is being led to prove that Jack said that it was raining, not to prove that it was actually raining that day. Thus the evidence is being led for a non-hearsay purpose, and not to prove that facts asserted by the statement (i.e. that it was raining).

If it was important in a case that Jack wrote in a document 'I saw it raining today', that document might be led to prove that Jack wrote that statement in the document, and not to prove that it was actually raining that day. Again that document would be relevant for a non-hearsay purpose. Further, if Jack wrote that statement in his diary, and it was important in the case that a diary exists, the diary would be admissible as it is relevant for a non-hearsay purpose.

Under the common law, if such evidence is admitted for a non-hearsay purpose, it can only be used for that purpose. However, legislation in some States and Territories now provides that if a statement is admitted for a non-hearsay purpose, it can then be used for all purposes, including to prove the truth of the fact asserted in the statement. This is still a contentious issue before the courts in these jurisdictions and in many instances the Magistrate or Judge will use their discretionary powers to limit the use that can be made of the evidence.

5.2.2 Confessions and admissions in criminal cases.

Generally, a statement by an accused person admitting guilt or in some way inculpating the accused is admissible, despite the fact it is hearsay, as proof of the facts asserted in the statement. However the statement must first pass a number of common law and statutory restrictions. Perhaps the most important is that the confession or admission must have been voluntary and made in the exercise of a free choice to speak or remain silent. It cannot have been made by reason of duress or inducement, otherwise there would be doubts as to its reliability.

For example, If Jack said to Jill 'I lied to Peter', and Jack was later charged with providing false and misleading statements and bought to trial, Jill could give evidence in court of what Jack said in order to prove that Jack lied to Peter. If Jack wrote in a document (say a diary) that he lied to Peter and Jack was later charged with providing false and misleading statements and bought to trial, that document could be admissible to prove that he lied to Peter.

There is special provision in some States and Territories for confessions or admissions made by an accused person in the course of official questioning. Generally, admissions made by an accused in the course of official questioning will be rejected unless the prosecutions shows that:

- In the circumstances it was unlikely that the truth of the admission was adversely affected; and
- In the case of a document, that the accused accepted the document by signing it.

The term 'official questioning' is broadly construed as questioning by an investigating official in connection with the investigation of the commission, or possible commission, of an offence.

Even if otherwise admissible, the Judge or Magistrate can refuse to admit evidence of an admission if that evidence is adduced by the prosecution and having regard to all the circumstances in which the admission was made, it would be unfair to the accused to use the evidence.

5.3 Statutory exceptions to the hearsay rule in criminal proceedings

5.3.1 Where the maker of the statement is not available.

Where the maker of a statement or previous representation is not available to give evidence, legislation in some States and Territories allows the admission of that statement or previous representation in certain prescribed circumstances.

This exception only applies to 'first hand hearsay' (see discussion of what constitutes 'first-hand hearsay at 5.1').

When is a witness unavailable?

A witness is unavailable if they are dead, not competent to give evidence, it would be unlawful for them to give the evidence or all reasonable steps have been taken to secure their attendance at court or compel them to give evidence, without success. In relation to the last consideration, it is important that the investigator document any attempts made to secure the witness' attendance at court, as the prosecution will often need to tender this evidence to the Judge or Magistrate in order to convince them that the witness is unavailable. If the Judge or Magistrate is not satisfied that all reasonable attempts have been made to secure attendance the evidence might be excluded, which could have significant ramifications on the prosecutions case.

Prescribed circumstances - reliable statements and representations.

This rule generally applies to representations that that have some sort of reliable basis, such as being made pursuant to a duty, against the maker's interests, or being made in circumstances which make it unlikely that the representation was fabricated, such as when or shortly after the asserted fact occurred.

For example, if it was raining outside and Jack came into a room with an umbrella and said to Jill 'It's raining outside' and later Jack was unavailable to give this evidence in court, Jill may be able to give evidence of Jack's statement to prove that it was raining that day as Jack's statement was made to Jill when, or shortly after, it was raining.

Similarly, if a documentary statement is taken from a witness contemporaneously (i.e. shortly after an event) and that witness is later unavailable under this rule, the document might be admissible to prove the facts asserted by the witness within it. Therefore it is always in the interests of the investigator to take statements from witnesses as soon as possible.

The defendant does not need to show that the statement is reliable in the same way the prosecution does, and merely needs to show that the maker is unavailable in order to have hearsay evidence admitted under this rule.

5.3.2 Where the maker of a statement is available.

Where the maker of a representation is to be called to give evidence, evidence may be given in the normal course as to what they observed. If a person is available in this way, legislation in some States or Territories also permits:

- That person to give evidence about any previous representation or statement they made to another person about what they observed; or
- The other person, to whom the statement or previous representation was made, to give evidence about that statement made.

But only if the statement or previous representation was made when the event observed by the maker of the statement was 'fresh in their memory' (i.e. is immediate or recent).

The accused may rely on this section without qualification. The only qualification on the prosecution is in a statement that has been prepared for litigation. The exception to this qualification is that the prosecution may adduce a statement or previous representation in these circumstances which concerns the identity of a person, thing or place. Therefore this exception can be a handy tool for the prosecution to get in identity evidence that would otherwise be excluded under the rule against hearsay.

For example: Peter observes Jack forge a signature on a cheque. Peter runs into the house and says to Jill 'I just saw Jack forge a signature on a cheque'. If Peter is available to give evidence, Jill can give that evidence to prove that Jack forged a signature on a cheque under this rule because:

- *Peter is available to give evidence;*
- *It's first hand-hearsay, i.e. Peter actually observed Jack forging the signature before she made the statement to Jill;*
- *It was a statement made by Peter to Jill immediately after the event, when the event she observed was 'fresh in her memory'; and*
- *It concerns the identity of the forger, namely Jack.*

Once admitted that statement or previous representation can then be used to prove the facts asserted by the statement.

If the previous representation does not concern identity, the qualification in this rule effectively means that a documentary statement of a witness taken by the investigator cannot simply be handed to the Judge or read out to the court in order to prove what the witness saw, when that witness is available to give evidence (although this can occur in some instances, such as if defence consents to the tender of the statement without the witness being called).

Nevertheless, documentary statements taken contemporaneously are still a useful tool during the course of a proceeding as they can be used to 'refresh the memory' of the witness if they are struggling to recall events in oral testimony. Thus it is *always* in the interests of the investigator to take statements from witnesses as *soon as possible* after they have observed an event in order to minimise the risk that it will be deemed inadmissible for not satisfying the 'fresh in the memory' test.

5.3.3 Business Records

There is a specific exception to the rule against hearsay in relation to business records. The majority of the States and Territories have this rule legislated into their respective Evidence Acts. Business records are those documents that document the operation of a business, particularly its financial transactions and position, but may go beyond these to include internal communications and communications between the business and third parties. The definition of 'document' is very wide and can include things such as audio or visual recordings, maps, photographs and anything on which there is writing.

If a business record contains a previous representation made in the course of, or for the purpose of, the business, the hearsay rule does not apply to exclude that previous representation or record provided that the person who made it might reasonably be supposed to have personal knowledge of the asserted fact, or the record was made on the basis of information supplied by a person who might

reasonably be supposed to have had personal knowledge of the asserted fact. There is a qualification in relation to business records that were prepared in connection with an investigation relating to a criminal proceeding – the rationale behind this qualification is to stop people doctoring or creating exculpatory business records once they know they are being investigated.

5.3.4 The Best evidence rule

The best evidence rule dictates that the primary source of evidence is preferable in proving a fact in issue - in other words, that a copy will not suffice. Under the best evidence rule, only original documents could be produced in evidence and secondary evidence (i.e. copies) of the contents of documents could not be adduced unless the absence of the original was accounted for and excused. The best evidence rule has largely been abolished in most States and Territories through their various Evidence Acts however the original of a document should always still be preferred to a copy where available.

6. Opinion Evidence and the expert evidence exception

The general rule is that opinion evidence is inadmissible to prove the fact about which the opinion is expressed. Therefore witnesses can only testify to facts which they know to be true (i.e. what they perceived with their own senses) and not to their opinion of what was probably true.

For example, Jack cannot give evidence that it was raining unless he actually saw that it was raining. He cannot say in evidence 'I saw a lot of people with umbrellas so it must have been raining that day' as that is expressing her opinion, rather than what she actually observed.

6.1 Expert evidence

An exception to this rule is that expert opinion evidence is admissible, provided the subject matter of the testimony is within the scope of that witness' expertise. Experts include doctors, engineers, scientists, accountants, handwriting specialists and many other persons with specialised knowledge or expertise. Whether a certain person is an expert or not is matter which the court may have to decide on the balance of probabilities if there is any argument between the parties as to that persons classification as an expert witness.

For example, Tom, a meteorologist, can give evidence that, in his opinion, it was raining that day based on weather maps and rain gauge readings, regardless of whether he observed it raining or not.

7. Judicial Discretion to exclude admissible evidence

The primary consideration of the rules of evidence is fairness. It would be clearly unfair to admit evidence against an accused where its probative value is slight in comparison to its prejudicial effect. Therefore the Magistrate or Judge has discretion to exclude unfair evidence, even though it is otherwise admissible under the rules of evidence. This discretion exists at common law and has been legislated into the Evidence Acts of some States and Territories.

Table A

Jurisdiction	Evidence Act
South Australia	Evidence Act 1929 (SA)
Queensland	Evidence Act (Qld)
Western Australia	Evidence Act 1906 (WA)
Northern Territory	Evidence Act (NT)

Investigation and Prosecution Manual - Chapter 6: Interviewing witnesses and taking statements

1. Introduction

Interviewing witnesses and taking statements from witnesses is a crucial part of any investigation.

Witnesses may be needed to give evidence about facts or to tender documents in proceedings before a court.

Witnesses can be interviewed without the use of compulsory powers if they are co-operative but often witnesses will require notices to be served to ensure they are protected in the event that they disclose confidential information about a person.

This Chapter deals with:

- Interviewing co-operative witnesses.
- Statements from witnesses.
- Formal interviews of unco-operative witnesses and persons suspected of committing an offence.
- Interviewing Aboriginal persons and Torres Strait Islanders.
- Interpreters.
- Records of interview.

2. Interviewing co-operative witnesses

Witnesses such as bank officers, employers, complainants, customers and other government officials may be relevant witnesses to interview in investigations under the CSP legislation.

CSP officers should adopt a consistent approach to interviewing these witnesses, regardless of whether they are being interviewed under compulsion or on a voluntary basis.

CSP officers should:

- Identify what relevant information the witness could give;
- Plan the interview;
- Ensure the witness is asked about all relevant documents produced by them;
- Allow the witness to tell the story or the facts without being ‘led’ on a particular topic;

- Establish what the witness can recall about what they observed or what was said to them;
- Disclose only that information about another person that is necessary to ask the witness questions;
- Ask whether there is any further information or documents that may be relevant to the case.

3. Witness statements

3.1 Process

During the interview process it may become apparent to the CSP officer that a statement from a witness may be needed to prove certain facts.

The statement may be taken and signed at the time of the interview but if it is lengthy, the investigator may take notes of the interview and prepare a draft statement for consideration by the witness at a later time.

If the witness has a limited understanding of English, they should be offered the services of an interpreter.

3.2 Content and format of witness statements

A witness statement should contain the following:

- Date;
- A heading, for instance 'Statement of (details) in the matter of …';
- Personal details of the witness, including their name, address and occupation;
- Details of the identity and relevance of the witness, including professional occupation, qualifications or relationship to the person who is the subject of the investigation;
- Details of what the witness saw, conversations they had with the person who is the subject of the investigations (**Note**: Any conversation should be in the first person ('I said …' or 'He said …') but if the witness is unable to recall an exact conversation, it is acceptable to use the following phrase 'I cannot now remember the exact words used but he said words to the effect of …'.;
- Details of any documents the witness created or compiled and anything they did that is relevant to the case (**Note**: These details should include times, places and names and should be in a logical order, which will usually be chronological.);
- Any relevant documentation should be exhibited to the statement with a reference number.
- The witness statement should be signed at the bottom of each page and on the last page and the date, time and place where the statement was taken should be recorded.

Sample templates for the preamble or jurat for witness' statements appears at Appendix E1.

4. Formal interviews of unco-operative witnesses (under compulsory notice)

Some witnesses may not wish to co-operate with a CSP investigation, either because they are:

- Involved in the possible breach by the person who is the subject of the investigation; or
- Do not want to get involved in an investigation and possible court case; or
- Know or are associated with the person who is the subject of the investigation.

If this happens but the witness is important and has produced documents or can give evidence of crucial facts, the CSP officer should use compulsory powers to ask the witness questions under either s120(1) of the *Registration and Collection Act* or s161(1) of the *Assessment Act*.

If the witness was involved in a possible breach, they may be entitled to refuse to answer questions on the basis of the privilege against self incrimination (refer to Chapter 3).

If the witness was not involved in the breach but is otherwise unco-operative but important, the CSP officer should:

- Tape the interview;
- Take the same approach as set out in 2 above;
- Plan the interview carefully;
- Ask questions of the witness in a similar format and sequence as if preparing a statement as set out in paragraph 3 above.

The tape recording should be transcribed and a copy of the tape and transcript should be provided to the witness.

It is important to identify the parties involved in the interview. A sample of a compulsory interview, setting out the relevant explanations, appears at Appendix E2.

The CDPP will require statements from witnesses but may be prepared to proceed with a prosecution on the basis of a transcript of evidence from a witness.

The CSP cannot compel a witness to sign a statement or transcript, however, the CDPP may take the transcript into account when making a decision about prosecution. There are different procedures available in each of the State courts to deal with unco-operative witnesses and the failure of a witness to provide a statement may not be fatal to a prosecution.

5. Formal interviews of a person suspected of committing an offence (under compulsory notice)

The CSP officer should adopt a similar approach as set out in 4 above, but it is important to follow the suggested script set out in Appendix E2.

Any admissions made by the person during the interview will be admissible **provided** the person has received the appropriate cautions and warnings about self-incrimination.

6. Records of interview

When a CSP officer has investigated a matter and has formed a view that a brief should be referred to the CDDP, the CSP officer should offer the person a record of interview before referral of the brief.

This is an opportunity for the person to respond to the allegations 'on the record'.

It is voluntary and a sample of a suggested record of interview preamble appears at Appendix E3.

Most people who are offered a record of interview decline the opportunity. However, some people may attend to explain their actions or statements.

A record of interview should be taped and the tape recording should be provided to the person interviewed as soon as practicable after the interview has concluded. A transcript should be made of the record of interview.

7. Aboriginal persons and Torrens Strait Islanders

Special care should be taken when interviewing witnesses who are Aboriginal or Torres Strait Islanders, particularly if they are suspected of committing an offence.

CSP officers should be prepared to allow a friend, associate or legal advisor to be present during any interview and should make certain that the person has been given the opportunity to be represented by the Aboriginal Legal Aid Service.

8. Interpreters

Where a CSP officer believes that a witness or person suspected of committing offence may not have adequate knowledge of the English language, the CSP should, before starting any questioning, arrange for an interpreter to be present to assist that witness or person suspected of committing an offence.

9. Retaining an expert witness

In some cases, it may be necessary for the CSP to retain the services of a witness with technical expertise in a given field. For instance, proving a case may require expert evidence from an accountant or expert evidence from a handwriting expert. If a CSP officer retains an expert, it is important that any expert's report or statement sets out the qualifications, experience and relevant expertise of the expert. It is also important that the expert clearly explain in any report or statement:

- Their opinion;
- The reasoning and methodology used to form their opinion; and
- Any documents or information relied on.

Instructions to an expert will need to be disclosed to the defence in criminal proceedings so it is important to prepare written instructions with care.

Investigation and Prosecution Manual - Chapter 7: Communications, secrecy provisions and privacy

1. Introduction

During the course of investigations, CSP officers will come into possession of confidential information about persons who are the subject of investigation and third parties who are not. There will be times when CSP officers need to communicate certain information obtained to:

- Witnesses;
- Other agencies;
- Law enforcement agencies;
- Prosecutors and courts;
- Complainants;
- The relevant minister.

These communications will be authorised if they are in performance of duties under the CSP Legislation. However, because the information obtained, often with the use of compulsory powers, is highly confidential and sensitive, special care needs to be taken by CSP officers when collecting, maintaining, securing and disclosing information.

This Chapter deals with:

- The secrecy provisions under the CSP Legislation.
- Obligations under the Privacy Act.
- Taxation information.
- Authorised disclosures.
- Collection and use of third party information.

This Chapter should be read in conjunction with Chapter 3 (Information Gathering) and Chapter 4 (Document and Evidence Management).

2. Secrecy provisions under the CSP Legislation

Under s16(2) of the *Registration and Collection Act* and s150(2) of the *Assessment Act*, it is an offence for a person to:

- Make a record of any protected information or documents; or
- Communicate protected information or the contents of a protected document about a person or a third party,

unless the record is made or disclosed for the purposes of the CSP legislation or in performance of duties under or in relation to the legislation.

'Protected information' is information that concerns a person that is disclosed to a CSP officer under the CSP legislation.

The secrecy provisions of the CSP legislation apply to all people occupying positions where they may obtain protected information about a CSP customer. These people include the CSP Registrar, the relevant Ministers and Secretaries of the Departments, the CEOs of Centrelink and Medicare, CSP officers and parties who receive the protected information, such as the CDPP.

It is an offence to collect, use and/or disclose protected information other than for its authorised use and the offence is punishable by up to 12 months imprisonment.

3. Obligations under the Privacy Act 1988

The CSP is subject to the *Privacy Act*, which:

- Protects personal information that governments and business collect about individuals, including tax file numbers; and
- Establishes standards and safeguards (through privacy principles) for information collection, storage, use, disclosure and access.

'Personal information' includes any information or opinions about an individual whose identity is apparent or can be reasonably ascertained.

In summary, these principles impose obligations on CSP officers to:

- Only collect personal information for a purpose directly related to the performance of functions or duties under the CSP legislation;
- Collect the information lawfully and in a fair manner;
- Take reasonable steps to ensure the person knows why the CSP is collecting the personal information and any other person or agency the CSP may give the information to;
- Ensure that information collected is relevant and does not unreasonably intrude on the personal affairs of the person concerned;
- Take reasonable steps to ensure the information is protected against loss and unauthorised use or disclosure;
- Take reasonable steps to ensure the person can find out about the personal information the CSP holds;
- Take reasonable steps to ensure the information is accurate, up to date and complete before using it;
- Only use the information obtained for the purposes for which it was collected;
- Not disclose information to another unless:
  - it is being disclosed in performance of a functional duty under the CSP legislation and has been disclosed for the purposes for which it was collected;
  - the person consents to its disclosure;
  - disclosure is reasonably necessary to enforce a criminal law or penalty or for the protection of public revenue;

- the use of the information would prevent a serious and imminent threat to a person's life or health;
- disclosure is otherwise authorised by the law.

Whether the collection of information will 'unreasonably intrude' on the personal affairs of a person will depend on the circumstances of each case. For instance, if a CSP officer is making investigations into the affairs of a person and, in particular, whether there should be a change of assessment of child support liability or whether the person has the capacity to pay child support debts, it will be necessary for the CSP officer to examine the personal and financial affairs of the person very closely. It would therefore not be unreasonable to request detailed personal information from the person who is the subject of the investigation. On the other hand, if a CSP officer is issuing notices to third parties who may have dealt with the person who is the subject of an investigation the CSP officer should only request documents or information that relate to the personal affairs of the payer and should avoid requesting documents of the third party that may not be relevant to this issue.

4. Taxation information

The CSP legislation allows the CSP to use taxation information to assess child support liability and collect debts (though tax refunds).

The CSP may provide information to the ATO for administration of the tax legislation.

The CSP may also provide this information to prosecutors as part of a criminal brief but other disclosures would not be permissible.

5. Authorised disclosures

Certain disclosures will be expressly authorised by the CSP legislation or may be authorised by reason of the fact that the CSP officer is entitled to use or disclose protected information in performance of their functions and duties.

The CSP legislation authorises the disclosure of protected information in certain circumstances. Those authorised disclosures include:

- Disclosures by consent;
- Disclosure to the other parent (refer below);
- Disclosure to third parties (refer below);
- Disclosure to the customer's authorised representatives;
- Disclosure to specified government agencies such as the Department of Human Services, the Department of Veterans' Affairs and Centrelink;
- Disclosure information to prevent a credible threat to a person's life or health;
- Disclosure to a court or to the Social Securities Appeals Tribunal;
- Disclosure to Commonwealth investigating and audit agencies, such as the Privacy Commission and the Australian National Audit Office;
- Disclosure to the Minister;
- Disclosure to overseas agencies.

Under the CSP legislation, CSP staff are required to provide information to one parent about another parent for the purposes of child support assessment notices. The CSP is also authorised to inform a paying parent of action taken to recover child support arrears and certain information about the paying parent will be included in such notices. When there has been a change of assessment, the CSP must send a copy of any application form, which will include detailed financial information, to the other parent and when a parent has objected to a CSP decision, the CSP is required to send the objection and accompanying documents to the other parent. These disclosures are authorised.

There will be cases where a CSP officer must disclose protected information to a witness to obtain information or evidence from the witness about a case.

For instance, if the CSP was examining the capacity of a paying parent to pay child support arrears or is making an assessment of child support liability, the CSP officer may need to discuss protected information about a paying parent with a joint bank account holder or a business partner. Revealing protected information during the course of these discussions would be permissible.

If a CSP officer is obtaining a statement from a bank officer or customer, the CSP may need to explain why they need the information and, thereby, disclose protected information about the person or the case. This is permissible but any disclosure should be kept to a minimum. Only information that **needs** to be disclosed should be disclosed.

This may be particularly difficult for CSP officers who deal with complainants who are the other parent, relatives or associates of parents.

CSP officers may provide general information about the progress of an investigation or the investigation of a complaint but should not disclose protected and/or personal information unless it is authorised (as referred to above). This includes information provided by third parties. To disclose protected information or to disclose too much information about an investigation may:

- Breach secrecy provisions; and
- Prejudice the investigation or any prosecution.

While it can be frustrating for complainants, investigators should not provide information about the investigation other than that the CSP is considering the complaint and any information provided. Constant and courteous communication with complainants is important. Even though CSP officers may not be able to provide too much information, if this is explained, most will understand the position.

Avoiding or not returning calls or providing a response that gives no real explanation of possible timeframes and the importance of keeping investigations and information confidential, will unnecessarily antagonise complainants.

The same approach should be taken with other witnesses.

CSP officers should be careful when disclosing information to customers and should always seek proof of identity before discussing matters.

If a person, whether it be another parent or an associate or relative of the parent, seeks to obtain protected information by pretending to be the customer or

pretending to be a CSP officer, this may be a criminal offence and could be prosecuted (refer Chapter 2).

6. Collection and use of third party information

During an investigation, the CSP may need to collect information from third parties and use or disclose that information to others.

For instance, a third party may provide information or documents to the CSP and the CSP may need to verify that information or may need to show those documents to another person to obtain a comment or explanation. This is permissible. However, third parties should be advised that this may happen, particularly if they agree to provide information voluntarily, as the third party may be operating under the incorrect assumption that this information will be kept confidential. If the third party had known that the information would be disclosed or used, they may prefer to have a compulsory notice issued.

The disclosure of third party information to others should be kept to a minimum.

Investigation and Prosecution Manual - Chapter 8: Remedies – interaction between administrative, civil and criminal actions

1. Introduction

The CSP administers both the *Registration and Collection Act* and the *Assessment Act* and may be involved in administrative, civil and criminal proceedings on CSP matters. In some matters, one case could raise all three possible actions.

This Chapter deals with:

- The three different types of proceedings and how they may arise.
- The interaction between these actions and the legal and practical issues that need to be taken into account.

2. Administrative Civil and Crimination Actions under the Registration and Collection Act

Under the *Registration and Collection Act*, once the CSP registers a registrable maintenance liability for collection, amounts payable are debts due to the Commonwealth and may be recovered through civil recovery proceedings.

These matters will be referred to the National CSP Litigation Team. However before matters are referred for litigation, issues may be raised about:

- The extent of any registrable maintenance liability (refer Part III, Divisions 1 and 2 of the *Registration and Collection Act*).
- Variations of any maintenance liabilities (Part III, Division 3 of the *Registration and Collection Act*).
- Collection of maintenance liabilities from salary or wages (Part IV of the *Registration and Collection Act*).
- Payment and recoveries of child support arrears (Part V of the *Registration and Collection Act*).

Parts III and IV of the *Registration and Collection Act* contain offences for doing or failing to do certain things under the *Registration and Collection Act*. Breaches of any one of these provisions are summary offences that are designed to assist in the registration and collection of child support payments. Actions under these offence provisions would be criminal prosecutions.

Part IV of the *Registration and Collection Act*, contains provisions dealing with recovery of child support arrears, including penalties for late payment. Any proceedings for recovery under these provisions would be civil proceedings.

Under Part VII of the *Registration and Collection Act* certain decisions of the Registrar of the CSP may be reviewed internally and, if the party objecting to the

decision is unhappy with the review, there is a right of appeal under Part VIIA of the *Registration and Collection Act* to the Social Security Appeals Tribunal (SSAT). Any actions for review will be administrative proceedings.

Therefore, one case being considered by a CSP officer may involve the issue of compulsory notices under the Registration and Collection Act together with civil recovery proceedings, administrative appeals and criminal prosecutions.

If the CSP forms a view during these investigations about registration and collection that the paying parent should be reassessed, further investigations may be undertaken under the Assessment Act. This means that for some of the more complicated or long running cases there could multiple and concurrent civil, administrative and criminal proceedings. This will be discussed in more detail in 4 below.

3. Administrative, Civil and Criminal Actions under the Assessment Act

As referred to above, a CSP officer may initiate a reassessment of a paying parent's liability for child support after obtaining information under the *Registration and Collection Act*. Alternatively, a paying parent or receiving parent may apply for reassessment.

If this happens, the CSP officer must use powers to gather any further information under the Assessment Act.

Assessments for child support may be made by the Registrar under Parts 4, 4A, 5 and 6A of the *Assessment Act*. The Registrar may also make 'notional' assessments under Part 7A of the Assessment Act.

Determinations made by Registrar under certain of these provisions will involve the CSP exercising administrative powers. The Registrar's decisions relating to assessments may also be internally reviewed.

Under Part 7 of the *Assessment Act* a person may obtain a court review of certain decisions of the Registrar about assessments. The fact that any application is pending before a court will not affect the assessment or any recovery action under the *Registration and Collection Act* (unless there is a stay under section 111C of that Act). These proceedings will be in the civil courts but will be administrative in nature.

The CSP can issue compulsory notices under the *Assessment Act* and may prosecute offences under Part 9 of the Act for false and misleading statements, reckless statements, failure to notify the Registrar of certain information and failure to comply with notices.

The offence provisions under Part 9 are not indictable offences (with the exception of s162 (3)) but are more serious than the *Registration and Collection Act* offences and have custodial sentences, except for s159A (1) which is punishable by a fine.

The conduct under the assessment investigations are more likely to disclose an offence under the Criminal Code although it is possible that offences relating to obstruction and false and misleading information may be disclosed as a result of investigations on registration and collection of child support.

4. Interaction between civil, administrative and criminal proceedings and remedies – legal and practical issues to consider

The best way to illustrate how these issues may arise is through a theoretical example.

For instance, many cases will start off as child support arrears that have not been paid for some time. The CSP may commence investigating the collection of the arrears and this may lead to a sequence of possible actions or interventions by the CSP.

- The CSP issues notices to the paying parent to produce documents and attend to answer questions under s120(1) of the Registration and Collection Act and seeks access to the employer's records at the employer's premises under s61 of the Act.
- The paying parent and the employer do not comply with the notices.
- Because the paying parent and the employer have a history of non-compliance, the CSP refers briefs to the CDPP for breach of ss120(3) and 61(3) respectively.
- The Court orders the paying parent to produce documents under s121(1) of the Registration and Collection Act but the paying parent still refuses to properly comply.
- The employer does comply with the notice and based on the information, the CSP commences a recovery action against the paying parent. It also appears from this information that the employer has failed to make deductions from the paying parent's wages (as required by s45) and has failed to notify the CSP of this. This breaches ss46(1) of the Registration and Collection Act.
- In the meantime, the paying parent lodges an estimate of income on the basis that their taxable income has fallen by 50%. The paying parent provides this information over the telephone. The CSP officer adjusts the liability based on this information but does not back date the assessment. The child support liability is substantially reduced. The recovery proceedings continue and there is no application for a stay.
- The paying parent pays the new liability for reduced child support but not the old arrears. The payee advises the CSP they suspect the paying parent is earning much more than the estimated income on which the new assessment is based. This discloses potential breaches of ss159 (1), 159A (1) and 160(3) of the Assessment Act.

This raises a number of issues for the CSP to consider:

- The CSP officer must initially issue any notices under the Registration and Collection Act. Once there is an investigation of whether the reassessment of child support liability is correct, notices should be issued under the Assessment Act.
- If the recovery proceedings have commenced, the CSP could still issue notices to investigate the possible assessment breach but it would be important that the 2 actions were conducted separately and by different teams to ensure there is no argument about use of notices for an improper purpose or contempt of the civil court action.
- If the criminal prosecution has commenced in respect of the breach of s121(3) of the Registration and Collection Act, the CSP could still issue notices

to investigate the possible assessment breach but it would be important that all 3 actions were conducted separately and by different teams to ensure there is no argument about use of notices for an improper purpose or contempt of the court.

- The existence of concurrent criminal proceedings and exercise of administrative powers may raise concerns about abuse or oppression (or at least an appearance of such) and in these circumstances the CSP should consider whether it delays or does not prosecute the section 121(3) breach until it has completed its investigations into the possible Assessment Act breaches. Once all conduct has been reviewed, the brief to the CDPP can be referred covering all potential issues.
- The CSP could proceed with a brief to the CDPP in relation to the employer's possible breach of s46(1) of the Registration and Collection Act but, if the employer has agreed to provide a statement to the CSP in relation to the possible breach by the payer of the Assessment Act, this could complicate the position.
- While the issues would need to be discussed with the CDPP at an early stage, relevant issues may be:
  - Breach of s 121(3) may be punishable by 12 months imprisonment whereas breach of s 159(1) of the Assessment Act may only be 6 months imprisonment.
  - Both offences could be prosecuted and the CSP could ask the CDPP to also obtain orders for criminal compensation representing the amount that the CSP reduced the child support liability based on the incorrect income information provided by the payer.
  - A more serious breach could be pursued under the Criminal Code if the CSP is able to show dishonesty or a more serious and deliberate attempt to mislead the CSP.
  - If the employer's evidence is crucial to a more serious case, the CSP should not refer briefs to the CDPP in relation to the employer without first discussing the strategic and forensic issues that may arise in pursuing various criminal cases involving a payer and employer that may be in collusion.

There are no easy answers to these issues but it is important for CSP officers to recognise the complexities that may arise when there are multiple, concurrent actions and investigations in relation to one case and consider the appropriate strategy or outcome as early as possible in the investigation and enforcement process. Preliminary discussions and/or advice from the CDPP may also be appropriate to assist in scoping any CSP enquiries.

Investigation and Prosecution Manual - Chapter 9: Disclosure

1. Introduction

When a criminal matter is prosecuted, the prosecutor must disclose certain information about the case to the defence.

This obligation not only arises at the time charges are laid but continues for the life of the prosecution, after a brief of evidence has been provided and both before and during a trial. It extends to all information that the CSP investigator becomes aware of that effect, or may affect issues of fact in the case or the credibility of a witness.

It is imperative that the CDPP's disclosure guidelines are complied with during the course of a prosecution. If evidence is not disclosed in accordance with the guidelines it may give the defence grounds to argue for an adjournment of the proceedings so that they can consider the previously undisclosed material, which may lead to lengthy delays in the matter being finalised. The worst case scenario is that the previously undisclosed material is deemed inadmissible evidence, which may have serious ramifications for the prosecutions case.

This is important for CSP officers to remember when gathering information, speaking to witnesses or taking statements. This is also why it is important to have an accurate system in place for recording information gathered as the CSP will have to comply with disclosure obligations at the time of referral of a brief to the CDPP or shortly thereafter.

This Chapter deals with:

- What is disclosure and why CSP investigators need to understand the disclosure obligations.
- What needs to be disclosed in summary and indicatble matters.
- Disclosure affecting the credibility or reliability of a prosecution witness.
- Disclosure of unused material.

This Chapter should be read in conjunction with Chapter 10 (Court Procedures and the Prosecution Process).

If a CSP investigator has any questions or concerns regarding their disclosure obligations they should contact the CDPP for advice as soon as possible.

2. What is disclosure?

In a criminal proceeding, the burden of proof rests on the prosecution to prove its case against the defendant to the requisite criminal standard of 'beyond reasonable doubt'. This burden never shifts to the defendant. Another way to express this principle is that the defendant does not have to prove their innocence, rather the prosecution must prove their guilt. In practice, this means that there is no obligation on the defendant to call any witnesses or adduce any

other evidence and it is not uncommon for the defence not to produce any evidence in their case at all. However, should the defendant choose to adduce evidence in their case, generally there is no obligation on them to provide this evidence to the prosecution prior to it being adduced or called in court (with limited exceptions, such as Alibi evidence, which must be disclosed to the prosecution).

The reverse is true of the prosecution, who is under a strict duty of disclosure. That duty arises out of one of the fundamental tenet's of the criminal justice system - that an accused person is entitled to know the case that is to be made against them in order to be able to properly defend the charges. A defendant is therefore entitled to know the evidence that is to be brought in support of the charges as part of the prosecution case, and also whether there is any other material which may be relevant to the defence of the charges.

'Disclosure' refers to informing the defendant of:

- The prosecution's case against him/her;
- Any information in relation to the credibility or reliability of the prosecution witnesses; and
- Any unused material (see part 6 of this Chapter).

The CDDP's disclosure obligations are set out in its 'Statement on Prosecution Disclosure' which is attached to these guidelines at Appendix G. This Chapter provides a summary of those obligations, and should be read in conjunction with that Statement.

3. Why do CSP investigators need to understand the CDPP's disclosure obligations?

The CDPP has no investigative function and relies on investigative agencies, such as the CSP and the AFP, to provide the brief of evidence and any additional evidence that may be required following the briefs referral, in order to prosecute the charges against the defendant.

The 'Statement on Prosecution Disclosure' relates to information and material held by the CDPP, investigation agencies and third parties. In order for the prosecution to meet its disclosure obligations, the CDPP depends on investigation agencies such as the CSP advising it of information and material covered by the Statement. The CSP investigator will also be required to assist the CDPP in the disclosure of the evidence to the defence during the course of the prosecution. Therefore it is important that CSP investigators understand and comply with the disclosure obligations.

4. Disclosure of the Prosecution's case

The CDPP's disclosure obligations may vary depending on whether the matter is a summary or indictable matter (see Chapter 10 for distinction between summary and indictable matters).

4.1 Disclosure in summary matters

Where a defendant has indicated that they intend to enter a plea of guilty to the charge/s against them there is no general disclosure obligation imposed on the CDPP.

Where a not guilty plea is entered, the CDPP should provide the defence, with as much notice as reasonably practicable:

- Copies of any written statements by persons whom the prosecution intends to call to give evidence at the hearing. If the prosecution intends to call a person who has not made a written statement, the defence should be advised; and
- Reasonable access to inspect proposed exhibits and, where it is practicable to do so, photocopies or photographs of such exhibits should be provided.

If the CDPP is of the view that disclosure of certain evidence may lead to intimidation of a witness, they may delay disclosure of the evidence to a time more proximate to the witness giving evidence in Court, or decline to disclose the evidence. In either case the defence must be informed. CSP investigators should consult with the CDPP if such a concern arises.

4.2 Disclosure in Indictable matters

Generally, disclosure of the prosecution case in matters proceeding on indictment will take place in the course of committal proceedings in the lower court.

If further evidence is provided for inclusion in the prosecution brief after the committal has taken place, or evidence that was not relied on by the CDPP during committal is now sought to be relied on, that evidence should be disclosed to the defence with as much notice as reasonably practicable. If the further evidence pertains to a witness, the defence should be provided with a copy of that witness' written statement, or if they haven't provided a written statement, an outlined on their anticipated evidence. If the further evidence is an exhibit, the defence should be given reasonable access to that exhibit and a photocopy or photograph of the exhibit where practicable.

If the CDPP is of the view that disclosure of certain evidence may lead to intimidation of a witness, they may delay disclosure of the evidence to a time more proximate to the witness giving evidence in Court. Defence must be informed of this decision. CSP investigators should consult with the CDPP if such a concern arises.

5. Disclosure affecting credibility or reliability of a prosecution witness

The prosecution is under a duty to disclose to the defence information in its possession which is relevant to the credibility or reliability of a prosecution witness. Examples include, but are not limited, to:

- A relevant previous conviction or finding of guilt;
- A statement made by a witness which is inconsistent with any prior statement;

- A relevant adverse finding in other criminal proceedings or in non-criminal proceedings (such as disciplinary proceedings, civil proceedings or a Royal Commission);
- Evidence before a court, tribunal or Royal Commission which reflects adversely on a witness (e.g. allegations in relation to civil penalty proceedings or dishonesty offences which are yet to be finalised);
- Any physical or mental condition which may affect reliability;
- Any concession which has been granted to a witness in order to secure that person's testimony for the prosecution.

5.1 Previous convictions

Previous convictions are recorded on a person's criminal history, which can be accessed by the AFP and the CDPP and printed as a document. A check of every prosecution witness' criminal history will not be undertaken as a matter of course and will only be done where there is reason to believe that the credibility of a witness may be in issue.

Where the CDPP is aware that a previous conviction is recorded against a prosecution witness, that information should be disclosed unless the CDPP is satisfied that the conviction could not reasonably be seen to affect credibility having regard to the nature of, and anticipated issues in, the case. In that regard, previous convictions for perjury and offences involving dishonesty will always be disclosed.

Where the defence specifically requests that the CDPP provide details of any criminal convictions recorded against a prosecution witnesses that request should be complied with, provided that it serves a legitimate forensic purpose.

5.2 Adverse findings in non-criminal proceedings

Where a witness has been the subject of adverse findings in other criminal proceedings, or non-criminal proceedings such as disciplinary proceedings, civil proceedings or a Royal Commission, these findings should be disclosed to the defence unless the CDPP is satisfied that the finding could not reasonably be seen to affect credibility having regard to the nature of, and anticipated issues in, the case. Findings involving dishonesty should always be disclosed. On the other hand, it may not be necessary to disclose adverse findings, for example, of inefficiency, incompetence or disobedience to orders.

5.3 Concessions to witnesses

The following should always be disclosed to the defence:

- Any concession provided to a witness with respect to their involvement in criminal activities in order to secure their evidence for the prosecution, such as choice of charges against them or any undertaking granted to them by the CDPP.
- Any monetary or other benefit that has been claimed by, offered or provided to, a witness. Exceptions include payments made in the ordinary course of securing the evidence of a witness, such as travel expenses or an expert witness' fees.

- Where the witness is a co-accused/co-offender in the criminal activity with which the defendant has been charged, whether the witness has been dealt with in respect of his or her own involvement and, if so, whether the witness received a discount on sentence as a result of undertaking to co-operate with law enforcement authorities in relation to the current matter.

5.4 Timing of disclosure affecting credibility or reliability or a prosecution

Where the prosecution is in the possession of any of the above information that requires disclosure this should be done:

- In summary matters – as soon as reasonably practicable after the defendant has entered a plea of not guilty and the case has been set down for hearing; and
- In indictable matters – prior to the committal proceedings.

The requirement to disclose this information continues throughout the life of the prosecution. Any further information affecting a prosecution witness' credibility or reliability that comes to hand during the course and if the prosecution should be disclosed as soon as possible.

6. Disclosure of unused material

There is an obligation on the CDPP to disclose all material and information gathered during a course of an investigation that is relevant to the charge/s against the accused, even where:

- The prosecution does not intend to rely on this material as part of its case;
- The material counters or does not assist the prosecution case or might reasonably be expected to assist the defence, including material in the possession of a third party.

The requirement to disclose unused material continues throughout a prosecution. If the prosecution becomes aware of the existence of unused material during the course of a prosecution which has not been disclosed, that material should be disclosed as soon as reasonably possible.

6.1 Exceptions to the requirement to disclose unused material

All unused material should be disclosed to the defence unless:

- **It is immune from disclosure on public interest grounds:** If material is withheld under this exception defence must be informed in general terms of the basis of the claim (e.g. disclosure would identify an informant or the location of premises used for surveillance) unless to do so would in effect reveal that which it would not be in the public interest to reveal.
- **Disclosure of the material is precluded by law / Statute**
- **Legal professional privilege should be claimed in respect of the material**: Legal professional privilege is a common law principle protecting the confidentiality of statements and other materials made between a legal practitioner and client. The privilege extends to legal practitioners employed by

government agencies, such as solicitor employed by the CDPP, in respect of confidential communications between them and their employer.

If a CSP investigator considers any of these exceptions may apply to unused material in their case the CDPP should be consulted prior to disclosure taking place.

6.2 Timing of disclosure of unused material

Unused material should be disclosed to the defence:

- **In summary matters**: as soon as reasonably practicable after the defendant has entered a plea of not guilty and the case has been set down for hearing.
- **In defended indictable matters**: prior to the committal proceedings, or if committal proceedings are not going to be conducted, as soon as reasonably practicable after the defendant has been informed of the decision to proceed with a trial on indictment.
- **Where the defendant has entered a plea of guilty on indictment**: The matter will be sent to an intermediate or higher Court for sentence and the prosecution should disclose to the defence any information in its possession which might reasonably be expected to be of assistance to the defence in the sentence proceeding.

The requirement to disclose unused material continues throughout a prosecution. If the prosecution becomes aware of the existence of unused material during the course of a prosecution which has not been disclosed, that material should be disclosed as soon as reasonably possible.

6.3 How unused material should be disclosed

Unused material should be disclosed by either:

- Providing copies of the unused material to the defence; or
- Providing a schedule listing the unused material and a description of the nature of that material in circumstances where the provision of copies is unfeasible. Defence should be informed that arrangements may be made to inspect the material.
- Providing the name, address and copy of the statement of any witness who could give material evidence but will not be called in the prosecution case because they are not credible.

6.4 Unused material held by third parties

Where the CDPP is aware that a third party possess material which runs counter to the prosecution case, or might assist the defendant, the defence should be informed of:

- The name of the third party;
- The nature of the material; and
- The address of the third party (unless there is good reason for not doing so. In such a case it may be necessary for the prosecutor to facilitate communication between the defence and the third party).

6.5 Other material

There may be cases where it is difficult to accurately assess whether particular material satisfies the description of unused material. This may arise where the CDPP are unaware of the lines of defence that the defendant will pursue, or because of the extent and complexity of the material gathered in the course of the investigation.

In such cases the CDPP will consult with the CSP and may permit the defence to inspect such material.

Investigation and Prosecution Manual - Chapter 10: Court procedures and the prosecution process

1. Introduction

Once the CSP officer has completed their investigation, they form a view that there is sufficient evidence of a contravention of an offence under the CSP legislation or the *Criminal Code* to warrant a referral to the Office of the CDPP for criminal prosecution.

This Chapter deals with:

- The brief assessment process and the CDPP decision to prosecute.
- Time limits for prosecutions.
- Summary and Indictable offences.
- Court processes and procedures in the different levels of State courts.
- Sentencing.
- The conduct of the trial.

This Chapter should also be read in conjunction with Chapter 9 (Disclosure).

2. Investigation

The CDPP prosecutes Commonwealth offences and has no investigative powers. It is the role of the investigator, such as the CSP or the AFP, to take statements from witnesses and collect evidence to be used in the prosecution. Once the investigator considers enough evidence has been gathered to substantiate a criminal charge, this evidence is compiled in a brief which is then referred to the CDPP. Once a prosecution is commenced the investigator becomes known as the 'informant'.

The CSP will continue to have a role in the prosecution and this is detailed in part 9 of this chapter.

3. Brief assessment and the decision to prosecute

Briefs referred to the CDPP are assessed by prosecutors in accordance with the 'Prosecution Policy of the Commonwealth'. A copy of the Prosecution Policy is attached to these guidelines at Appendix F. A decision of whether or not to prosecute is then made by the CDPP.

3.1 The decision to prosecute

A prosecution will only be instituted when there are reasonable prosects of securing a conviction and the public interest requires a prosecution.

Reasonable prosects of securing a conviction

In making a decision on reasonable prospects of conviction, the CDPP must evaluate how strong the case is likely to be when presented in court. This decision can only be made based on admissible evidence, not necessarily all the information gathered during the course of the investigation. The evaluation must take into account matters such as the availability, competence and credibility of witnesses, the admissibility of any confession or other evidence, possible lines of defence open to the alleged offender and the possibility that evidence might be excluded by a court.

Public interest

Once satisfied that there is sufficient evidence to justify the initiation or continuation of a prosecution, the CDPP must then consider whether the public interest requires a prosecution to be pursued. The factors to be considered will vary from case to case, but may include whether the offence is serious or trivial, any mitigating or aggravating circumstances, the age, intelligence, health or any special infirmity of the alleged offender, any witness or victim, the availability and efficacy of any alternatives to prosecution and the need for deterrance. This list is by no means exhaustive and other relevant factors that are considered contained in the Prosecution Policy. Generally, the more serious the alleged offence is, the more likely it will be that the public interest will require that a prosecution be pursued.

3.2 Choice of charges

In many case the evidence will disclose an offence against several different laws. Care must be taken to choose a charge or charges that **adequately** reflect the criminality disclosed by the evidence and which will provide the court with an appropriate base for sentencing.

In many cases the available evidence will support charges under both the CSP legislation and the C*riminal Code*. The penalties under the *Criminal Code* may be higher as the offence can be prosecuted on indictment and such charges may not be subject to the same time limits as those imposed under the CSP leiglsation. Oridinarily though, the CDPP will prefer the specific provisions of the CSP legislation rather than the general provisions of the *Criminal Code*, unless to do so would not adequelty reflect the criminality disclosed by the evidence. Charges will not be laid under the Criminal Code solely to avoid a time limit for a prosecution unless the conduct of the alleged offender contributed to the offence under the CSP legilsation being out of time. Delay on the part of the CSP in investigating the matter may also be a relevant factor that is taken into account in this decision and so it is important that the CSP investigate and refer matters to the CDPP as expeditiously as possible.

Finally, the CDPP will always prefer substantive charges over conspiracy charges, and will only lay a conspiracy charge where it is the only one which is adequte and approriate on the available evidence.

4. Time Limits

In accordance with section 15B of the *Crimes Act 1914* (Cth), the prosecution of an offence against a Commonwealth law is guided by the maximum penalty prescribed and must be commenced:

Where the accused person is an individual

- Where the maximum penalty is a jail term of 6 months or more: **No time limit applies**.
- In all other cases: A summons or information must be signed within **12 months** of the offence being committed.

Where the accused person is a company

- Where the maximum penalty is a fine of more than $15,000: **No time limit applies**.
- In all other cases: A summons or information must be signed within **12 months** of the offence being committed.

The schedules attached to Appendix A list the time limits for each relevant offence under both the CSP legislation and the *Criminal Code*. As a general rule, the offences under the *Criminal Code* will not be subject to the same time limits as those imposed on offences under the CSP legislation. This is due to the higher maximum penalties involved in *Criminal Code* offences. However, in accordance with the 'Prosecution Policy of the Commonwealth', the CDPP will not lay charges under the *Criminal Code* solely to avoid a time limit for a prosecution unless the conduct of the alleged offender contributed to the offence under the CSP legilsation being out of time. Delay on the part of the CSP in investigating the matter may also be a relevant factor that is taken into account in this decision and so it is important the the CSP investigate and refer matters to the CDPP as expeditiously as possible.

5. How serious is the offence? The distinction between summary and indictable offences

5.1 Summary offences

A summary offence is a less serious offence, not prosecuted on indictment. Under the Commonwealth law, what determines the nature of the offence is the maximum penalty prescribed. Summary offences are those punishable by a period of imprisonment not exceeding 12 months and include those offences not punishable by imprisonment. Summary offences are dealt with in the lower courts.

5.2 Indictable offences

An indictable offence is a more serious offence prosecuted on an indictment. An indictment is a document prepared by the CDPP that formally outlines the charge against accused. An offence is an indictable offence if it is punishable by more than 12 months imprisonment, unless the contrary intention appears. Some less serious indictable offences may be dealt with summarily at the election of the defendant or the CDPP.

That decision is ordinarily made by the CDPP and will depend on a number of factors, such as the facts of the case and whether the maximum penalty available

in the summary jurisdiction is appropriate in the circumstances. Indictable offences are dealt with in the intermediate courts or the Supreme Court in Tasmania and the Territories.

6. Where is the offence prosecuted? Different levels of court and summary of key court processes

If during the brief assessment stage the CDPP decides that charges should be laid, an initiating process will be sent to the defendant notifying them of the charge and the date they are first required to attend court. All matters start in a lower court.

6.1 Lower Court

All States have a lower level of court presided over by a Magistrate. They have both criminal and civil jurisdiction. When exercising criminal jurisdiction these courts are known as Magistrates Courts, Courts of Petty Sessions or Courts of Summary Jurisdiction. **Table A** at the end of this chapter shows the name of the lower court in each State or Territory in Australia.

Lower courts have the power to hear and impose sentence in summary offences under State or Federal legislation. In addition to the jurisdiction over summary offences, lower courts in each State and Territory have the power to try summarily a range of less serious indictable offences. Summary trial of less serious indictable offences can only proceed at the election of the defendant or the CDPP. The maximum penalty available to a Magistrate in a court of summary jurisdiction in Commonwealth matters is 2 years imprisonment or a fine of $66,000 (or $330,000 if the defendant is a body corporate).

Summary of key court process in the lower courts

Section 68 of the Judiciary Act confers summary jurisdiction on lower State courts with respect to offences against laws of the Commonwealth, including the *Criminal Code* and the CSP legislation. The law and procedure of the State or Territory applies in such cases, which means that the procedure in each State or Territory will differ slightly.

Generally, summary offences are commenced by way of a summons or initiating process with the name of the prosecutor as informant. This describes the offence with which the accused is charged, gives brief details of the circumstances in which the offence was committed and includes the date, time and location at which the defendant is first required to attend court.

The defendant is then required to appear in court on that date. These initial appearances are generally called ‘mentions’. The defendant may decide to plead guilty at the first mention and the case may be adjourned in order for the defendant to organise legal representation and/or organise any defence to the charge. At any stage the defendant may decide to plead guilty. If they are pleading guilty to a summary offence, or to an indictable offence that is being tried summarily, they are then sentenced by the Magistrate and the matter is at an end. If the plea of guilty is to an indictable offence, they are ordinarily ‘committed for sentenced’ to an intermediate or Supreme Court to be sentenced by a Judge, who has a higher maximum penalty available to them.

If the defendant maintains their plea of not guilty, the matter is then listed for a summary trial before a Magistrate, or for a committal proceeding if the matter relates to an indictable offence.

The procedure in a summary trial is similar to that followed in a trial by jury in so far as the taking of evidence and addresses is concerned, however proceedings in summary trials are generally quicker as they are presided over and decided by a Magistrate sitting alone without a jury. The prosecution must prove its case to the criminal standard of beyond reasonable doubt. The Magistrate decides the verdict. If it is a guilty verdict the Magistrate may impose sentence immediately or at a later date. If the verdict is not guilty, the matter is dismissed.

Committal proceedings involve the formal sending of a matter to an intermediate or Supreme Court for prosecution. The purpose of these proceedings is to ensure that all prosecution evidence against the defendant is disclosed and there is sufficient prosecution evidence to warrant the matter proceeding before a jury. This can be done 'on the papers' by handing up statements/evidence to the Magistrate (often referred to as a 'paper committal') or by calling prosecution witnesses to give evidence orally, which means they can then be cross-examined by the defence (often referred to as a 'committal hearing'). If the Magistrate decides that there is sufficient evidence to proceed before a jury then the defendant will be 'committed for trial'. This means the matter will be heard in one of the higher courts at a later date.

Once a defendant is committed for trial they become known as 'the accused'. Alternatively, the Magistrate may decide that there is not enough evidence and discharge the defendant, in which case the matter is then at an end.

6.2 Intermediate Court

All States except Tasmania, the Northern Territory and the Australian Capital Territory, provide for an intermediate level of court which is presided over by a Judge. Intermediate criminal courts are known as District Courts or County Courts. **Table A** at the end of this chapter shows the name of the lower Court in each State in Australia.

Intermediate Courts hear indictable or more serious offences, in the majority of cases with the assistance of a jury and also hear appeals on conviction or sentence of lower criminal courts in Queensland, New South Wales and Victoria. Where the accused is prosecuted on indictment for an offence against the Commonwealth law, such as under the Criminal Code or the Child Support legislation, the requirement for trial by jury is mandatory as a matter of public interest.

Summary of key court processes the intermediate courts

After the matter has been 'committed for trial' from the lower court, an indictment is presented before a Judge in the higher court. This is called an 'arraignment'. The charge on the indictment is formally read out against the accused and they enter a plea of either guilty or not guilty. If the accused pleads guilty, then they are sentenced by the Judge, either immediately or at a later date. If they plead not guilty, they are stood over for trial before a Judge and a jury, with a sentence proceeding to follow should they be found guilty by the jury after trial.

At a criminal trial, a jury is empanelled and then the accused is arraigned before them. If the accused maintains their plea of not guilty, the trial begins. The prosecution must prove the case against the accused 'beyond reasonable doubt'. The onus of this proof rests solely with the prosecution. The defence does not have to prove that the accused is innocent.

The prosecution begins by 'opening' to the jury, which is a speech that outlines the prosecution case against the accused and the evidence they expect to unfold during the course of the trial. The defence may also deliver an opening address on behalf of the accused but this is not mandatory.

The prosecution calls all the witnesses in their case, who are cross-examined by the defence. Following the close of the prosecution case, the defence may make a submission to the Judge that there is 'no case to answer'. This is an argument that the prosecution has not proved its case against the accused to the requisite criminal standard of 'beyond reasonable doubt' and accordingly, there is insufficient evidence to go before the jury. If the Judge accepts this submission, the jury is directed to enter a verdict of not guilty and the accused is discharged. If the Judge decides there is a prima facie case to answer, the trial proceeds into the defence case, where the accused may call any witnesses, who are cross-examined by the prosecution.

There is no obligation on the defence to call any witnesses and it is not uncommon for the defence not go into evidence at all. This is often referred to as 'putting the prosecution to proof' and can be done as there is no onus of the accused to prove their innocence, it is for the prosecution to prove the case against the accused 'beyond reasonable doubt'. The defence can submit to the jury during their closing address that a reasonable doubt exists in the prosecution case by reference to the prosecution evidence alone (for example, by reference to inconsistencies in witness testimony or unreliability in a witness' account), without the need to call any evidence to support or prove that doubt. If the jury agrees that this raises a reasonable doubt in their own minds, then the accused is entitled to an acquittal.

After the close of any defence case, the prosecution and defence deliver their closing addresses. The Judge 'sums up' the evidence for the jury and directs them as to the elements of the charges and on any important issues of law. The jury then go out to deliberate and decide on their verdict. Generally, their verdict must be unanimous.

If they find the accused **not guilty**, the accused is discharged and the matter is at an end. If the jury deliver a **guilty** verdict, the accused is sentenced by the Judge, either immediately or at a later date. It is also possible for the jury to find the accused **not guilty of the offence charged by guilty of another offence, usually an alternative or 'lesser' offence' in which case the Judge will sentence the offender in accordance** with the jury's finding.

If the jury cannot decide the verdict unanimously (for example, they are split between those who think the accused is guilty and those who think the accused is not guilty) then the trial results in a '**hung jury**'. The jury is discharged and the CDPP must decide whether to proceed to a 're-trial' or to whether the matter should be 'no billed'. A re-trial involves running the trial again before another jury. This may occur immediately but commonly occurs at a later date.

Alternatively, the CDPP may consider that the evidence in the original trial unfolded in such a way that the same result, or even a verdict of not guilty, would

likely occur on a re-trial. Following this analysis and by reference to the considerations outlined in the 'Prosecution Policy of the Commonwealth' they may decide to 'no bill' the indictment, which means that the charges against the accused are dismissed and they are discharged.

In Victoria, New South Wales and Queensland, intermediate courts also have an 'appellate' jurisdiction and can hear appeals from convictions and sentences from lower courts. In the other States and Territories, the 'appellate' jurisdiction rests with the Supreme Court.

6.3 Supreme Court

In each State and Territory, the Supreme Court has general jurisdiction to try indictable offences. In Tasmania, the Northern Territory and the Australian Capital Territory, where there is no intermediate court, the Supreme Court hears all matters triable on indictment. In States that have an intermediate court, the intermediate court shares a concurrent jurisdiction to deal with all but the most serious indictable offences and it is only those, such as some complex fraud matters, murder and treason, which are heard in the Supreme Court.

The key court processes in the conduct of a criminal trial in the Supreme Court are akin to those outlined for the conduct of a trial in the intermediate courts.

The Supreme Court also has an 'appellate' jurisdiction and can hear appeals from convictions and sentences from lower Courts.

7. Interlocutory applications and sentence proceedings

The time frames involved in the progression of a matter through the criminal courts will vary from case to case and are dependent on a number or factors. Generally, a case where the defendant pleads guilty or where the case proceeds to summary trial before a Magistrate will be finalised and disposed of much faster than a matter that is committed for trial on indictment to an intermediate or Supreme Court to be heard before a judge and jury. Often matters in the lower courts can be disposed of within six to twelve months, whereas matters that proceed to trial in higher courts may continue for two years or more. In saying this, every State and Territory jurisdiction is mindful of the need to dispose of matters as expeditiously as possible in the criminal jurisdiction and delays will not be tolerated without good reason.

There are a number of interlocutory applications that may be made before a court during the time that a matter is progressing before it. Some of the more common interlocutory applications are considered below.

7.1 Bail applications

Bail is the release from custody granted to a person charged with an offence, on the condition that he or she undertakes to return to the court at some specified time, and subject to any other conditions that the court may impose. Each State or Territory has its own legislation governing bail.

In most cases the CSP is likely to refer for prosecution the defendant will not be arrested and charged but will be served with a summons with a return date before the court.

If there is some concern about the defendant leaving the jurisdiction, the CDPP may apply for certain conditions to be imposed for bail. Bail applications may be listed on their own, or they may be made during the hearing of other interlocutory applications or substantive hearings such as the committal or the trial.

As a defendant is considered innocent until proven guilty, a refusal to grant bail is considered a serious matter. It usually only occurs if the defendant is likely to abscond and fail to appear in court, commit further offences, or intimidate prosecution witnesses. Although the defendant has a right to bail in most cases, the granting of bail is very often subject to conditions, such as the surrender of a passport, the promise not to associate or approach certain persons or to report regularly to a police station. Various conditions can be imposed to suit the circumstances of the case and the defendant.

If a CSP officer is has any of these concerns they should be brought to the attention of the CDPP.

7.2 Pre-trial applications and voir dire

It is not uncommon for the prosecution and defence to disagree on the admissibility of certain evidence in a proceeding. In such instances the matter needs to be argued before a Magistrate or Judge, who will then rule on whether the contested evidence is admissible or not according to the laws of evidence. In matters that are to be heard before a jury, this argument needs to take place in their absence.

Sometimes this argument can be listed and heard by a Judge prior to the commencement of a trial. More commonly it arises during the course of the trial when a jury has already been empanelled. If there is an objection to the admissibility of evidence during the course of a trial the Judge will hear the argument in the absence of a jury on a ‘voir dire’, which is a ‘trial within a trial’. Generally the evidence will be heard by the Judge (usually by calling the witness on the voir dire), each side will make submissions on its admissibility and the Judge will make a ruling.

Voir dire’s may occur frequently throughout the course of a criminal trial or not at all. They may last a few minutes or a few days, depending on the complexity of the evidence and the argument involved. Frequent and lengthy voir dire’s can significantly extend the length of a trial and are a major reason that a matter heard before a Judge and jury can take significantly more time than a summary hearing before a Magistrate.

8. Sentencing

If an accused pleads guilty or is convicted after summary hearing or trial, they become known as ‘the offender’ and the matter proceeds to sentence. This can happen immediately, however in most instances where a custodial sentence is possible the matter is adjourned in order to allow for both the prosecution and defence to prepare their case on sentence and to allow time for the preparation of any pre-sentence reports.

If the case is a summary prosecution with no custodial sentence but merely a fine, the Magistrate will probably impose the sentence immediately.

Most of the provisions under the *Registration and Collection Act* do not impose a custodial sentence. For instance, the maximum penalty for failure to comply with a notice under s120(1) of the *Registration and Collection Act* is a fine of $2,000. However, the penalties under the *Assessment Act* are generally more serious. The maximum penalty for a failure to comply with a notice under s161(1) of the *Assessment Act* is a fine of $3,300 or 6 months imprisonment or both.

Penalty for a false and misleading statement under the *Registration and Collection* Act is $2,000 whereas under the *Assessment Act* the penalty is a fine of $3,300 or 6 months imprisonment or both.

Penalties under the *Criminal Code* are more serious to reflect the criminality of the case. For instance, a breach of s61(3) of the *Registration and Collection Act* by failing to assist an officer with access to books and records has a maximum penalty of a fine of $1,000 for an individual or $5,000 for a company. If the employer is aggressive, intimidates the CSP officer and deliberately obstructs, they may be charged under s149(1) of the *Criminal Code* with a maximum penalty of $13,200 or 2 years imprisonment or both.

The case on sentence for the prosecution usually involves the tender of a bundle of relevant documents to the court. This usually includes, but is not limited to, a statement of facts (if the matter has been a plea of guilty), the offender's criminal history, any pre-sentence report that has been prepared by the corrections authority and any victim impact statement. It is uncommon for the prosecution to call any witnesses to give evidence on sentence but they are entitled to do so should the need arise.

In contrast, the defence case on sentence will often involve the calling of witnesses. The offender is commonly called to give evidence on factors that may go to mitigating their sentence, such as their difficult personal history, reasons for committing the offence, mental health issues and remorse. Character witnesses may also be called. The defence may also tender documents, such as written character references and any reports they have had prepared to assist in mitigation (for example, medical or psychological reports).

Both the prosecution and defence address on sentence once all relevant evidence is before the court. The prosecution's duty is to assist the Magistrate or Judge in their sentencing task, rather than to seek the most severe sentence. The prosecutor may submit on a range of appropriate sentences based on the maximum penalty stated in the legislation, the circumstances of the case and the applicable sentencing principles provided by *Crimes Act 1914* (Cth) and case law. The defence will make its submissions on applicable sentencing principles and how they should be applied.

In determining the sentence to impose, the Magistrate or Judge has the following options:

- **Full time imprisonment**: If the offender has been convicted of an offence that prescribes a period of imprisonment in the maximum penalty, they may be sentenced to a term of full-time imprisonment less than the maximum prescribed. This may be subject to a parole and non-parole period. The non - parole period is the time that the offender actually spends in custody and the parole period is a period they are subject to conditional release in the

community. If an offender breaches any of the conditions of their parole it may be revoked, which can see them return to custody to serve the balance of their sentence. A sentence of imprisonment is to be considered as a 'last resort' and must only be imposed after the Judge or Magistrate has considered all other sentencing options and is satisfied that no other sentence is appropriate in all the circumstances of the case.

- **A fine**: Many Federal offences provide for the maximum fine that may be imposed for an offence. Where a federal offence is punishable by imprisonment only, a fine may be imposed instead of, or in addition to, imprisonment unless the contrary intention appears. The maximum fine is arrived at by multiplying the maximum penalty of imprisonment, expressed in months, by five.
- **Discharge of offender without proceeding to conviction**: Where a court is satisfied that a charge is proved, it may nevertheless dismiss the charge, or dismiss the charge subject to conditions that the offender must meet. If the charge is dismissed with conditions the offender may be subject to a good behaviour bond for a period of up to three years and may be ordered to make reparation or pay compensation, or to comply with any other order the court thinks fit to specify. In determining whether to exercise this sentencing option the Judge or Magistrate can have regard to the character, antecedents, age, health or mental condition of the offender, the extent to which the offence is trivial and the extent to which the offence was committed under extenuating circumstances.
- **Conditional release of offenders after conviction – good behaviour bonds**: Where a court convicts an offender of a Federal offence, the Judge or Magistrate may nevertheless order the conditional release of the offender without passing sentence. The offender must give security that he or she will comply with the conditions of release. Conditions may include that the offender is subject to a good behaviour bond for a period of up to five years, that they make reparation or pay compensation or comply with any other order the court thinks fit to specify. There is also an additional condition that the person shall pay to the Commonwealth such pecuniary penalty as the court dictates. If the offender breaches any of these conditions during the period of the bond they may be called up before the court to be re-sentenced.
- **Reparation for offences**: Where a person is convicted of a federal offence or is discharged without having a conviction recorded, the court may, in addition to the penalty imposed on the person, order the offender to make reparation by way of monetary payment or otherwise, for any loss suffered or expense incurred by the Commonwealth or any person by reason of the offence.
- **Additional sentencing alternatives available to the Judge or Magistrate under State or Territory Law as prescribed by s 20AB of the Crimes Act 1914 (Cth) or cl 6 of the Crimes Regulations 1990 (Cth)**: These may include such things as community service orders, periodic detention or home detention, depending on the State or Territory that the offender is convicted in.

9. The conduct of the Prosecution – liaison with the CDPP

When a brief is referred to the CDPP for prosecution, the CDPP takes over carriage of the matter from the CSP. However the CDPP may still require the assistance of the CSP for a number of reasons throughout the prosecution and will require the contact details of the investigator at the CSP for this purpose.

As the CDPP does not have an investigative function, if they need further evidence or statements taken for inclusion in the brief it will be the responsibility of the CSP investigator (or AFP, if they are the informant) to obtain and provide these as required.

The CSP investigator will be required to assist in the disclosure of evidence to the defence (refer Chapter 9).

The CDPP may also request assistance from the CSP investigator in contacting and co-ordinating witnesses for court and in storing and handling exhibits. CSP officers who have provided statements in the brief may also be required to attend court as prosecution witnesses to give oral evidence if and when required.

It will also be important for the CSP to provide relevant information to the CDPP to assist in sentencing outcomes.

TABLE A

Jurisdiction	Lower Court	Intermediate Court
NSW	Local Court	District Court
VIC	Magistrates' Court	County Court
QLD	Magistrates' Court	District Court
SA	Magistrates Court	District Court
WA	Court of Petty Sessions	District Court
TAS	Court of Petty Sessions	N/A
ACT	Magistrates Court	N/A
NT	Court of Summary jurisdiction	N/A

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AFP	Australian Federal Police
Assessment Act (or CS (A) Act)	Child Support (Assessment) Act 1989
CDPP	Commonwealth Director of Public Prosecutions
Criminal Code (or CC)	Commonwealth Criminal Code 1995
CSP	Child Support Program
CSP Legislation	Child Support Program legislation being Child Support (Registration and Collection) Act 1988 and Child Support (Assessment) Act 1989
DPOs	Departure Prohibition Orders – under the Child Support (Registration and Collection) Act 1989
HOCOLEA	Heads of Commonwealth Law Enforcement Agencies
Paying parent	Parent who has a child support liability
Receiving parent	Parent who is entitled to receive child support payments
Registration and Collection Act (or CS (R&C) Act)	Child Support (Registration and Collection Act 1988
SIU	Specialised Investigations Unit

Investigation and Prosecution Manual - Appendices

Appendix A	Schedule of offences for misconduct relating to Child Support Program
Appendix B	Schedule for Misconduct: Case scenarios and possible offences
Appendix C1	Evidence Matrix: Offences relating to failure to comply with notices
Appendix C2	Evidence Matrix: Offences relating to failure to do things required or doing things not allowed under the Child Support Legislation
Appendix C3	Evidence Matrix: Offences relating to false or misleading information, false documents and forgery
Appendix C4	Evidence Matrix: Offences relating to obstruction and/or impersonation of Commonwealth officers
Appendix C5	Evidence Matrix: Offences relating to Departure Prohibition Order
Appendix D1	Example Statement for Contravention or Non-Compliance with Compulsory Notice
Appendix D2	Example Statement for failure to do things under the Child Support Legislation
Appendix D3	Example Statement in relation to false and misleading Statements
Appendix D4	Example Statement in relation to Obstruction
Appendix E1	Template Statements for each State: • Victoria • New South Wales • South Australia • Queensland • Tasmania • Western Australia • Northern Territory
Appendix E2	Compulsory Interview protocols and questions
Appendix E3	Record of Interview protocols and questions: • Example record of interview script • Witness statement - Blank
Appendix F	Commonwealth Director of Public Prosecutions – Prosecution policy
Appendix G	Commonwealth Director of Public Prosecutions - Disclosure guidelines

Appendix A	Schedule of offences for misconduct relating to Child Support Program
Appendix H	Commonwealth Director of Public Prosecutions – guidelines on brief preparation
Appendix I	HOCOLEA Best Practice Guidelines for Document Handling 1997