

## DPP PROTOCOL – PRIMA FACIE TEST CONSIDERATIONS (NSWPF INTERNAL USE)

Pursuant to the protocol between the NSW Police Force and the Office of the Director of Public Prosecutions (the “ODPP”) a matter should be referred to the ODPP if there is a prima facie case.

The ODPP will consider if it can be said there is no reasonable prospect of conviction and as the prosecuting authority will determine if charges should be laid.

### **The prima facie test**

- is concerned with the possibility of an accused being found guilty, not the probability.
- For there to exist a possibility of an accused being found guilty, each element of the offence charged must be covered.
- The question to be asked is: is it possible for the accused to be found guilty, or could the accused be found guilty.

In the context of determining a prima facie case, the court can only consider evidence that favours the prosecution. Credibility evidence that damages prosecution witnesses, evidence that contradicts prosecution witnesses and all other forms of evidence that weakens the weight of the prosecution case cannot be considered by the court at that point. The court must accept the prosecution case at its highest or strongest.

### **Practical considerations to take into account in determining if prima facie is reached:**

- A disclosure of sexual assault by a child, even a young child would in ordinary circumstances amount to a prima facie case being made out.
- A lack of corroboration including a lack of forensic, or medical evidence does not prevent a prima facie test being satisfied.

- When a young person is a suspect doli incapax needs to be comprehensively addressed. If doli incapax is not addressed then a prima facie case is not made out.
- Questionable credibility of a complainant or prosecution witness does not affect the prima facie test. These factors go towards the reasonable prospect of conviction in a matter, and are questions for the DPP to determine if the matter is referred to them.

**Prior to forwarding a brief to the ODPP for a sufficiency determination consider the following:**

- Brief should be well organised and indexed, all witnesses spoken to and statements obtained.
- The investigating officer should ensure that the manuscript report provides a summary of the evidence and refers to matters that either corroborate or contradict the evidence of the complainant.
- The suspect should be spoken to in relation to the allegation and afforded the opportunity to be interviewed.
- Any covert strategies available should be considered.
- The Team Leader and Investigations Manager should form a view if prima facie is satisfied on the available evidence.