

Prosecution Policy

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1. Purpose

The department undertakes prosecutions across a range of legislation where alleged breaches of the law are detected and investigated. These prosecutions are conducted by In-house Legal and in conjunction with legal service providers including Crown Law and external Counsel. This policy aims to enhance general regulatory compliance activity through the application of greater transparency and consistency.

2. Policy

This policy is designed to promote:

2.1 Openness and Transparency

The existence and consistent application of a prosecution policy ensures openness, transparency and accessibility in the department's dealing with the public. The policy enables the public to see that the department's procedures are appropriate and fair and what principles the department will have in regard to in the conduct of prosecutions.

2.2 Consistency

The existence of a prosecution policy assists in ensuring the quality and outcomes of regulatory procedures. It assists in assuring that the actual policies and decisions that regulators arrive at are coherent, intelligible and consistent between different parties. It is difficult to claim to have operating procedures consistent with satisfactory outcomes if there is a lack of clarity concerning the objectives of regulation, or if procedures used seem to allow interference, capriciousness, or personal whims to intrude in the exercise of prosecutorial discretion.

2.3 Cost Efficiency and the Public Interest

It is the department's duty to enforce the legislation it administers and decisions to prosecute are subject to the exercise of the prosecutorial discretion. The decision on which matters to investigate and prosecute is always a careful balancing act against the resources available to pursue the purpose. Regard to other suitable compliance options should always be considered where available and appropriate under the particular legislation.

In the absence of a policy there could be a tendency to take all charges to court where sufficient evidence exists even where the offence is trivial or technical. This is not in the public interest. In addition, a philosophy of prosecuting everything means that no judgment is applied on the best use of limited resources and no targeting of specific matters of priority can occur.

2.4 Strategic focus

Prosecution is only one of a number of sanctions that the department considers in the totality of the relevant legislative enforcement framework and other appropriate compliance options should be considered. Other examples include issuing of a Directive or caution, orders for restitution and issuing of penalty infringement notices in less serious cases, depending on the particular legislation.

Different regulators within the department may have developed their own enforcement frameworks for dealing with detected breaches of legislation. The existence of a prosecution policy facilitates a consistent and strategic focus being taken to matters referred for consideration to prosecute.

Offences that are regarded as more serious and important can be targeted thereby better serving the public interest. Prosecution ought only be relied upon where it is proportional to the non-compliance when considering prosecution.

This policy is intended to provide guidance in respect of the factors to be taken into account. It is not intended to be exhaustive nor inflexibly applied. Its application will necessarily be dictated by consideration of the individual circumstances of a particular case.

3. Principles

3.1 Criteria Governing the Exercise of the Discretion to Prosecute

The decision to prosecute involves consideration of two elements:

- (a) whether there exists sufficient evidence to justify prosecution – the existence of a prima facie case in conjunction with reasonable prospects of securing a conviction; and
- (b) whether the public interest requires prosecution. That is, a prosecution should be initiated or continued wherever it appears to be in the public interest. Consideration of the second element is not necessary until the first element is satisfied.

3.2 Prima Facie Case

A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that an offence known to the law has been committed by the alleged offender. The existence of a prima facie case does not, of itself, justify prosecution of a matter.

3.3 Prospect of Conviction

Consideration must also be given to the prospects of conviction in a matter. A prosecution should only proceed if there are reasonable prospects of a conviction being secured. A detailed and thorough examination of the strengths of the case, as it is likely to be when presented for hearing, is required to determine prospects of conviction.

Careful regard should also be had to any exculpatory matters, including defences or excuses available to the alleged offender raised in the evidence, or likely to be raised by the defence.

When evaluating the evidence in a matter, regard should be had to the following, which is not exhaustive. The individual circumstances of each matter will dictate the weight apportioned to any particular factor:-

- (a) Are there grounds for believing that the evidence may be excluded, bearing in mind the principles of admissibility at common law and under statute? For example, regard to whether confession evidence has been properly obtained.
- (b) Are there any grounds for believing that admissions by the alleged offender are of doubtful reliability having regard to the age, intelligence and apparent understanding of the alleged offender?
- (c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the alleged offender, or may be otherwise unreliable?
- (d) Has a witness a motive for telling less than the whole truth?
- (e) Are there matters which might properly be put to a witness by the defence to attack his or her credibility?
- (f) What sort of impression is the witness likely to make? How is the witness likely to stand up to cross-examination? Does the witness suffer from any physical or mental disability which is likely to affect his credibility?
- (g) If there is conflict between eye witnesses, does it go beyond what one would expect and hence materially weaken the case? Alternatively, if there is a lack of conflict between eye witnesses, is there anything that causes suspicion that a false story may have been concocted?
- (h) Are all the necessary witnesses available and competent to give evidence, including will they be available when the matter is likely to proceed to trial?
- (i) If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the alleged offender?
- (j) Where two or more persons are charged together, or is there a reasonable prospect of the proceedings being severed? If so, is the case sufficiently proved against each should separate hearings be ordered?

3.4 Public Interest

The public interest dictates that prosecutions are initiated or continued in circumstances where it is apparent that the offence or the circumstances of its commission are of such a nature that a prosecution is required in the public interest. The limit of public funds bears on the discretion to prosecute. Public moneys should not be wasted on inappropriate matters at the expense of worthy matters which require vigorous prosecution.

Generally speaking, the more serious the offence the more likely it will be that the public interest will require that a prosecution be pursued.

The factors to be taken into account when deciding whether or not the public interest requires prosecution will vary from case to case. The following factors are some of the considerations which may be relevant in determining whether the public interest requires prosecution of a matter. The relevance and weight of these factors will vary depending upon the particular circumstances of each case:

- (a) the seriousness or triviality of the alleged offence or that it is of a "technical" nature only;
- (b) the availability and efficacy of any alternatives to prosecution;
- (c) any mitigating or aggravating circumstances;
- (d) the age, intelligence, physical health, mental health or special infirmity of the alleged offender;
- (e) the alleged offender's antecedents and background, for example, previous relevant compliance action that has been taken against the alleged offender;
- (f) the age or staleness of the alleged offence;
- (g) the degree of culpability of the alleged offender in connection with the offence;
- (h) the effect on public order;
- (i) the obsolescence or obscurity of the law;
- (j) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
- (k) the prevalence of the alleged offence including the need for personal and general deterrence;
- (l) whether the consequences of any resulting conviction would be unduly harsh or oppressive;
- (m) whether the alleged offence is of considerable public / environmental concern;
- (n) any entitlement of the department or other person/body to compensation, reparation or forfeiture if prosecution action is taken;
- (o) the likely length and expense of a trial;
- (p) whether the alleged offender co-operated in the investigation, including the investigation or prosecution of others;
- (q) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
- (r) the necessity to maintain public confidence in the department and the courts;
- (s) the potential financial or other benefit the alleged offender stands to make from the illegal activity;
- (t) the likelihood of detection of the offence.

3.5 Improper Considerations

A decision whether or not to prosecute must clearly not be influenced by:

- (a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
- (b) personal feelings concerning the alleged offender or their legal representative;
- (c) possible political advantage or disadvantage to the Government or any political group or party;
- (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

In deciding whether or not a prosecution is to be instituted or continued, and if so, on what charge or charges, the views of the investigating officer and relevant officers of the department are carefully taken into account. However, ultimately, the decision is made by reference to legal advice having regard to the aforementioned considerations.

3.6 Other Matters

3.6.1 The Conduct of Prosecutions

Throughout the prosecution process, the Prosecutor must conduct him or herself in a manner that will maintain, promote and defend the interests of justice. It is the duty of the Prosecutor to ensure that the prosecution case is presented properly and with fairness to the accused. Accordingly, the Prosecutor should never seek to persuade through the use of prejudice or emotion.

A Prosecutor must not knowingly deceive or mislead the court. Accordingly, a Prosecutor who is aware of any relevant or persuasive decision on a point of law, or any relevant legislative provision, must ensure that the court is aware of it, irrespective of whether it supports or detracts from the prosecution's case.

A Prosecutor must at all times act with courtesy to the court and use his/her best endeavours to avoid unnecessary expense or delay.

3.6.2 Peripheral Defendants

Careful consideration should always be given to the appropriate defendants in any case, having regard to matters of culpability and the criminality the offence provision/s seek to address.

The Prosecutor should ensure that proceedings are brought and continued only against those whose involvement goes to the heart of the issue to be placed before the court. Charging an accused whose guilt is minimal in comparison to the principal offender may cloud the essential elements of the case as well as lead to unnecessary delay and costs.

3.6.3 Informers

The use of informers as prosecution witnesses is a matter which requires careful and well balanced judgments. In all cases where it is proposed to use an informer as a witness, the Prosecutor should find out whether or not the informer has been promised any reward for giving evidence or hopes to gain any benefit from testifying. The Prosecutor should look for substantial corroborative evidence to support the evidence of an informer.

3.6.4 Prosecution of Juveniles

Prosecution of a juvenile should be regarded as a severe step. Ordinarily the public interest will not require the prosecution of a juvenile who is a first offender in circumstances where the alleged offence is not serious. In deciding whether to prosecute a juvenile regard should be had to, in addition to the above matters:

- (a) the seriousness of the alleged offence;
- (b) the age and apparent maturity and mental capacity of the juvenile;
- (c) the available alternatives to prosecution;
- (d) the sentencing options available;
- (e) the juvenile's antecedents; and

(f) the juvenile's family circumstances.

3.6.5 Charge-bargaining

Charge-bargaining involves negotiations between the defence and the Prosecutor with respect to the charges to be proceeded with.

Such negotiations may result in the accused pleading guilty to fewer than all of the charges he/she is facing, or to a lesser charge/s, with the remaining charges not being proceeded with.

In order to be consistent with the requirements of justice a charge-bargaining proposal should **not** be initiated by the Prosecutor. Further, the Prosecutor should not entertain a charge-bargaining proposal unless the charges to be proceeded with provide an adequate basis for an appropriate sentence in all the circumstances of the case and there is evidence to support the charges.

The Prosecutor must not entertain a charge-bargaining proposal if the accused maintains his/her innocence with respect to a charge to which the accused has offered to plead guilty.

3.6.6 Disclosure

To assist with the efficient operation of the courts and prevent late pleas of guilty, the prosecution case should be fully disclosed to the defence at the earliest possible opportunity. This includes provision of a brief of evidence at the earliest opportunity – this, ideally, would be prior to the first mention of the matter in Court or soon thereafter depending on the circumstances of the case. The obligation to disclose is a continuing obligation until the finality of the prosecution.

The Prosecutor is under a duty to disclose to the defence information in its possession that is relevant to the credibility or reliability of a prosecution witness. Such information includes previous convictions, a statement made by a witness which is inconsistent with any prior statement, any physical or mental condition which may affect reliability or any concession which has been granted to a witness in order to secure that person's testimony for the prosecution.

The Prosecutor should disclose to the defence all material that meets the test for disclosure. Material can meet the test for disclosure if it either undermines the prosecution case or might reasonably be expected to assist the accused in advancing a defence.

The Prosecution is required to disclose a copy of any statement in its possession of each of its proposed witnesses. If there is no statement of the witness in the possession of the prosecution, a written notice naming the witness must be provided. If it is decided that a witness should be called at trial and a statement of that witness has not yet been provided to the defence, a copy of the witness' statement should be provided to the defence as soon as possible after that decision is made.

Disclosure of a witness statement should not include the address or telephone number of the witness unless the address or telephone number is relevant to the prosecution case. The Prosecutor may decline to make disclosure of particular information where such disclosure would be reasonably likely to lead to risking the life or personal safety of a prospective prosecution witness. Further, disclosure may be declined if it would result in interference with the administration of justice or ongoing investigations. In this event, the defence should be informed of the circumstances in writing.

4. Scope

This policy is not intended to be legally binding on the department and does not confine, restrain or limit the discretion of the department to take any action.

5. Review

This policy shall be reviewed within three years from the effective date of the policy.

6. Approval

<p>Kate Callaghan Deputy Director-General Business and Corporate Partnerships Department of Natural Resources and Mines and Department of Energy and Water Supply</p> <p>Date: 22 April 2013</p>	<p>Tony Grant Deputy Director-General Business and Corporate Partnerships Department of Agriculture, Fisheries and Forestry and Department of Tourism, Major Events, Small Business and the Commonwealth Games</p> <p>Date: 22 April 2013</p>
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7. Version history

Date	Version	Action	Description / comments
22 April 2013	1.0	Endorsed	New Policy

8. Keywords

prosecution; public interest; prima facie; reasonable prospects; witness; court; evidence; compliance