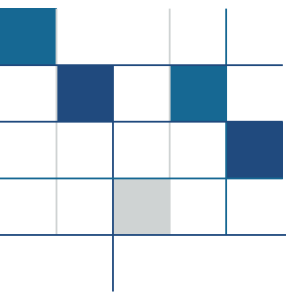




Guideline

Prosecutions

November 2020



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1. Purpose

This guideline is intended to guide the Department of Water and Environmental Regulation's (the department) approach to prosecutions for offences under the legislation it administers.

2. Scope

This guideline provides guidance on all aspects of prosecution undertaken by the department. It applies to prosecutions for offences under the legislation administered by the department and as the circumstances allow, to appeals arising out of proceedings in respect of any such prosecutions.

This guideline is intended to guide and assist department officers in the performance of their functions and is not a substitute for the professional judgment of those officers.

In some circumstances, other government departments, local governments and water service providers have an enforcement role under legislation administered by the department, through by-laws, delegations and legislative provisions. While officers of these agencies may be guided by this guideline, they are not bound by it and should exercise their responsibilities in line with the policies and guidelines of their own agencies.

3. Context

The department's *Compliance and Enforcement Policy* details the department's approach to ensuring compliance with the legislation it administers and responding to breaches of the law to deter and punish offenders, and rehabilitate damage caused to the environment.

The *Compliance and Enforcement Policy* provides information on the department's enforcement principles, types of enforcement actions, factors in selecting the most appropriate action and the appropriate party for enforcement action. Prosecution is one type of enforcement action. The department will refer to the *Compliance and Enforcement Policy* before determining if prosecution is appropriate for the particular circumstance.

This guideline aligns with the principles set out in the Western Australian Director of Public Prosecution's *Statement of Prosecution Policy and Guidelines 2018* (Office of the Director of Public Prosecutions, 2018).



4. Legislation

The state legislation to which this guideline is applicable includes the following acts and associated regulations:

- *Contaminated Sites Act 2003*
- *Country Areas Water Supply Act 1947*
- *Environmental Protection Act 1986*
- *Litter Act 1979*
- *Metropolitan Water Supply, Sewerage, and Drainage Act 1909*
- *Rights in Water and Irrigation Act 1914*
- *Waste Avoidance and Resource Recovery Act 2007*
- *Waste Avoidance and Resource Recovery Levy Act 2007*
- *Water Agencies (Powers) Act 1984*
- *Waterways Conservation Act 1976*
- *Water Services Act 2012.*

There are other acts which need to be applied when considering the rules of evidence and the prosecution process. These include but are not limited to:

- *Criminal Procedure Act 2004*
- *Evidence Act 1906*
- *Interpretation Act 1984*
- *Sentencing Act 1995.*

5. The decision to prosecute

Prosecution action commences when a prosecution notice is made under section 23 of the *Criminal Procedure Act 2004* that alleges an individual, corporation or other has committed an offence against the legislation.

The legislation defines who is responsible for issuing a prosecution notice.

Under some of the department's legislation, the authority to issue a prosecution notice may be specifically delegated. However, the Director General approves the commencement of all prosecution proceedings.

Primary consideration in any decision to prosecute is the extent to which prosecution will fulfil the statutory objectives and purpose of the legislation. The department will also consider its fundamental objectives of, and essential conditions for, a prosecution.



The legislation sets out the statute of limitations; that is, the maximum time in which the department has to initiate legal proceedings from the date of an alleged offence. A prosecution for an offence under an Act administered by the department needs to commence within the timeframe specified.

Prosecutorial discretion will be exercised so as to recognise the central role of the courts in the criminal justice system in determining guilt and imposing appropriate sanctions for criminal conduct.

The State Solicitor's Office and the department's in-house Legal Services prosecute offences on behalf of the department.

6. Prosecution objectives

The department's fundamental objectives of prosecution are to:

- achieve an outcome consistent with the objects of the legislation
- bring to justice those who commit offences
- punish those who deserve punishment for their offences
- protect the community
- deter others from offending and discourage repeat offences
- ensure a person or company complies with their duties and responsibilities.

In pursuit of these objectives the department will consider:

- the rights of the accused
- the rights and interests of victims
- the public interest.

7. Essential criteria for a prosecution

Two essential conditions must be met before the department proceeds with prosecution action:

1. There is sufficient evidence to establish a prima facie case.
2. It is judged to be in the public interest.

7.1 Sufficient evidence - Prima facie

A prima facie case is established if the available material appears on its face or initial assessment to prove that all the elements of the offence have been established.

When making a decision to prosecute, consideration will be given as early as possible as to whether the evidence establishes a prima facie case.



Where the available material does not establish a prima facie case, the department will not proceed with a prosecution.

7.2 Public interest

If a prima facie case exists, consideration is given to whether the prosecution of the offence is in the public interest. A prosecution should only proceed when it is in the public interest. Not every breach of law is prosecuted, the laying of charges is discretionary and a factor in that discretion is public interest.

Public interest is a matter of balance and exercise of appropriate judgment. All the relevant factors should be considered before a decision is made to initiate or continue with a prosecution.

Public interest is evaluated on reasonable prospects of a conviction and other relevant public interest factors.

It is in the public interest that prosecutions be conducted fairly and impartially. A prosecution conducted for improper purposes, capriciously or oppressively, is not in the public interest. A prosecution is not in the public interest if there are no reasonable prospects of conviction.

7.2.1 Public interest factor - reasonable prospects of conviction

The department will not initiate or continue with a prosecution which, based on the available material and advice, has no reasonable prospects of conviction. The exception being where further prompt investigation will remedy any deficiency in the prosecution case.

The evaluation of prospects of conviction is a matter of dispassionate judgment. This does not mean that only cases perceived as 'strong' will be prosecuted as generally the resolution of disputed questions of fact is for the court, not the department.

The prospect of conviction is evaluated through consideration of a range of factors. These include:

- whether any alleged confessions are given voluntarily
- whether there are grounds for reaching the view that a confession will not meet the various criteria for admission into evidence
- the likelihood of the exclusion from the trial of an admission or other important evidence in the exercise of a judicial discretion. In the case of an alleged admission, regard should be given to whether an admission may be unreliable having regard to the cognitive functioning of the accused, or linguistic or cultural factors
- the competence, reliability, credibility, availability and compellability of witnesses
- matters known to the prosecution which may significantly lessen the likelihood of acceptance of the prosecution case, such as:



- the existence of a significant conflict in the evidence
- where identity is in issue, the cogency and reliability of the identification evidence
- any lines of defence which have been indicated by, or are reasonably open to the defence
- reasonable inferences consistent with innocence
- the onus and standard of proof.

Evaluation of the prospects of conviction will generally not have regard to:

- material not disclosed to the prosecution by the defence
- notification of a defence which purports to rest upon unsubstantiated assertions of fact
- whether assertions or facts upon which a defence or excuse are based which are contentious, or not supported by cogent evidence.

7.2.2 Other public interest factors

If the evidence establishes a prima facie case and reasonable prospects of conviction, it may not be in the public interest to proceed if other factors, singly or in combination, render a prosecution inappropriate.

Factors that might require the prosecution to proceed in the public interest should be balanced against any factors that may weigh against prosecution.

Factors to be considered in evaluating the public interest include:

- the need to maintain the rule of law (i.e. the application of the law without the influence of arbitrary power; the equal accountability of all before the law)
- the severity or significance of the impact of the offence on public health, the environment and/or water resources
- the need to maintain public confidence in basic constitutional institutions
- the objectives of sentencing, including deterrence, retribution, protection of the community, punishment and rehabilitation
- the circumstances in which the alleged offence was committed
- the age, health or vulnerability of the victim or a witness
- the circumstances of the accused, including their history
- the lapse of time since the alleged offence, including delay in the prosecution process
- the degree of culpability of the accused
- the availability or efficacy of any alternatives to prosecution
- the attitude of the victim(s) of an alleged offence to a prosecution



- the likely length and public expense of a trial if disproportionate to the seriousness of the alleged offending
- whether the accused has cooperated in the investigation
- the likely sentence in the event of a finding of guilt
- the entitlement of the state or other person to be awarded compensation if guilt is adjudged
- whether a sentence or other penalty has already been imposed on the offender which adequately reflects the criminality of the circumstances.

When evaluating the public interest, not taken into consideration are:

- the ethnicity, gender, religious beliefs, social position, marital status, sexual preference, political opinions or cultural views of any person involved in the prosecution (unless relevant to the elements of the offence)
- the possible political consequences of the exercise of the discretion
- the personal feelings of those responsible for the decision regarding the accused
- the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

8. Selecting the appropriate defendant

As stated in the *Compliance and Enforcement Policy*, a wide range of people may have participated in, or contributed to, the commission of an offence. It is not always appropriate to prosecute every person who may be liable for an offence.

However, in some cases where more than one person or company combine to commit an offence, it may be appropriate to prosecute all of the relevant offenders.

In selecting the appropriate party for enforcement action, the department will generally consider:

- who is primarily responsible
- who formed intent, who committed the act, and who created the material circumstances leading to the offence
- in the case of strict liability, the role of the accused
- potential liability of the corporation, body corporate, directors and executive officers, including vicarious liability
- potential liability of employees and/or contractors
- potential liability of lending institutions, in particular, the categories of 'legal owners and occupiers'



- potential liability of public authorities
- likely effectiveness of court orders against the accused party.

9. Plea negotiation

A plea of guilty is a factor to be taken into account in mitigation of sentence. There are obvious benefits to the justice system resulting from a plea of guilty. Negotiations between the parties are encouraged and may occur at any stage during progress of a matter through the courts.

The department will consider the following factors when considering whether a plea to a lesser offence, or to proceed with only some of the charges in a prosecution notice:

- whether the plea reasonably reflects the essential criminality of the conduct and provides an adequate basis for sentence
- whether the strength of the evidence is such that the public interest will be satisfied by the acknowledgment of guilt and certainty of conviction achieved by the negotiated plea
- the benefits to the community as a result of the negotiated plea
- where there has been an environmental impact, whether the accused has commenced works to, or made arrangements to, rehabilitate the environmental damage
- when to do so will save witnesses, particularly those who are vulnerable, from the trauma of a court appearance or protracted criminal proceedings.

A plea to a lesser offence, or to only some of the charges in a prosecution notice, will not be accepted by the department if:

- to do so would distort the facts disclosed by the available evidence and result in an artificial basis for sentence
- the accused person intimates that he or she is not guilty of any offence.

In considering whether to accept a plea, regard should be given to the views of the victim of the offence and the environmental and other relevant impacts of the offending conduct.

10. Trial

Prosecutions should be progressed without undue delay. In the interests of justice, the department will endeavour to ensure that matters are progressed as soon as practicable, having regard to the interest of all parties to the proceedings.



10.1 Disclosure

The prosecutor has a general duty of disclosure. Disclosure obligations include the requirement to provide to the defence a copy of every statement, of any person who may be able to give relevant evidence at the trial and a copy of every document or object to which the statement refers.

The prosecutor is also required to disclose a copy of every document or exhibit that the prosecution proposes to tender in evidence at the trial, or if it is not practical to do so, a description of it and when it can be inspected.

The general duty of disclosure is also relevant to the department. The department provides the prosecutor with every document or object relevant to the case.

10.2 Unrepresented accused

It is the duty of the prosecutor to ensure the accused is properly informed of the prosecution case so that the accused can be prepared to respond. It is not the prosecutor's function to advise an accused about legal issues, evidence, inquiries and investigations which might be made, possible defences or the conduct of the defence. Communications with an unrepresented accused should, when possible, be witnessed and always recorded in writing.

10.3 Sentence

The responsibility of a prosecutor at a sentencing hearing is to put before the court all known information that is relevant to determining the appropriate sentence.

10.4 Appeals

The department may appeal against sentences the court has imposed. An appeal against sentence will not be initiated simply because it is perceived as inadequate or inappropriate in a particular case. Appeals will only be sought where there is a reasonable prospect of the appeal succeeding.

The right to appeal against a judgment of acquittal is only to be exercised when:

- a substantial error is likely to have affected the verdict
- there is a public interest in correcting the error
- there are reasonable prospects that the appeal will be allowed
- a retrial is appropriate in all of the circumstances.

Factors which are relevant in considering whether to institute an appeal against sentence include:

- whether a sentence is so disproportionate to the seriousness of the offence as to reflect error in sentencing principle by the trial judge
- whether a sentence is significantly out of line with other sentences imposed for the same or similar offences without reasonable cause for the disparity



- whether disputed points of sentencing principle are giving, or are likely to give, rise to disparity of sentences imposed for crimes of the same or similar type
- whether existing sentences are already subject to wide and inexplicable variations and there is a need to reduce this variation in order to promote uniform standards of sentencing.

11. Court orders

In addition to extensive provisions contained in the *Sentencing Act 1995*, some of the legislation administered by the department makes available, subsequent to the conviction of a person, additional powers to the courts. These powers include:

- orders for forfeiture
- disposal of forfeited things
- orders for prevention, restoration etc.
- orders for costs, expenses and compensation
- orders regarding monetary benefits
- orders requiring public notice to be given
- enforcing orders to pay.

Prevention or restoration court orders and those requiring public notice are additional tools ensuring post-conviction remedy of environmental harm. Consideration of the relevancy or benefits additional orders of the court may deliver should be examined and assessed in every prosecution.

A decision whether to apply to the court for one or more orders should be made based on merit on a case-by-case basis.

Court imposed publication orders are designed to be an additional deterrent and educational aid by sending a clear message to the community that breaches of environmental legislation are treated seriously.

12. Media guidance

In line with the department's *Compliance and Enforcement Policy*, where appropriate, information regarding prosecutions will be made publicly available. The department has an obligation and a right to inform the community about its activities promptly and accurately.

Where appropriate, prosecution information will be published on the department's website.

Where an individual, corporation or other has been investigated and charged, the department may release a media statement to:



- facilitate accurate reporting of the facts
- inform the community of the department's role and activities in areas in which it holds regulatory or other responsibilities
- educate the community and industry.

When appropriate, the department may release the following details regarding prosecution proceedings:

- age and gender of the person
- a business without mentioning its name or specific industry
- location (suburb or town)
- actual charges
- facts to be alleged to the court
- date and place of the first court appearance
- the maximum penalty.

The department will not release information that:

- prejudices an investigation or impending court proceeding
- interferes with an operation
- divulges departmental records about the person being charged
- identifies juveniles (those under 18 years of age at the time the alleged offence was committed) by name or date of birth
- reveals the identity of a person being charged before the case has appeared before the court
- relates to appeal proceedings
- discloses the identity of offenders where a spent conviction is recorded. In line with the *Spent Convictions Act 1988*, where a conviction is declared spent it effectively limits the disclosure of that conviction.

Following a conviction by a court, where appropriate, a media statement will be released, containing all the relevant information including the defendant's name and identifying details such as age and locality, the fine imposed and any relevant comments from sentencing.



Document implementation

This guideline comes into effect on the day it is published.



Related documents

| Non-department documents | |
|--|--|
| Author | Title |
| <i>Office of the Director of Public Prosecutions for Western Australia</i> | <i>Statement of Prosecution Policy and Guidelines 2018</i> |

| Department documents | |
|---|--|
| Author | Title |
| <i>Department of Water and Environmental Regulation</i> | <i>Compliance and Enforcement Policy</i> |



Custodian and review

The currency of this document will be continuously evaluated, and reviewed no later than three years from the date of issue or sooner as required.

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