



Department of Planning,
Lands and Heritage

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Enforcement and Prosecution Policy

The Department of Planning, Lands and Heritage acknowledges the traditional owners and custodians of this land. We pay our respect to Elders past and present, their descendants who are with us today, and those who will follow in their footsteps.

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Department of Planning, Lands and Heritage
Gordon Stephenson House
140 William Street
Perth WA 6000

Locked Bag 2506
Perth WA 6001

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website: www.dplh.wa.gov.au
email: info@dplh.wa.gov.au

tel: 08 6551 8002
fax: 08 6551 9001
National Relay Service: 13 36 77

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1. OVERVIEW

The Department of Planning, Lands and Heritage (the Department) is responsible for planning and managing land and heritage for all Western Australians – now and into the future.

Formed in 2017, the Department brings all land use and heritage responsibilities under the one umbrella to shape the future of our cities, regions and towns.

Responsible for state-level land use planning and management, and oversight of Aboriginal cultural heritage and built heritage matters, the Department supports the relevant Ministers and administers a wide range of legislation.

We plan how to make best use of the State's natural and built assets for the sustainable and responsible development of all Western Australian communities, through evidence-based research, integrated policy development and stakeholder engagement.

Our key focus areas are:

- Aboriginal heritage and lands management
- Crown land administration
- historic heritage conservation services
- integrated land and infrastructure policy development
- land use planning and policy development.

The Department also supports the Heritage Council of Western Australia, Western Australian Planning Commission, Pastoral Lands Board and the Aboriginal Lands Trust.

2. LEGISLATION

The acts and associated regulations administered by the Department include, but are not limited to:

ABORIGINAL AFFAIRS PORTFOLIO

- *Aboriginal Affairs Planning Authority Act 1972*
- *Aboriginal Communities Act 1979*
- *Aboriginal Heritage (Marandoo) Act 1992*
- *Aboriginal Heritage Act 1972*

HERITAGE PORTFOLIO

- *Heritage Act 2018*

PLANNING PORTFOLIO

- *Forrest Place and City Station Development Act 1985*
- *Hope Valley-Wattleup Redevelopment Act 2000*
- *Machinery of Government (Planning and Infrastructure) Amendment Act 2002*
- *Metropolitan Region Improvement Tax Act 1959*
- *Metropolitan Region Scheme (Fremantle) Act 1994*
- *Perry Lakes Redevelopment Act 2005*
- *Planning and Development (Consequential and Transitional Provisions) Act 2005*
- *Planning and Development Act 2005*
- *Planning and Development Amendment Act 2020*
- *Port Kennedy Development Act 2017*
- *Road Closure Acts (various)*
- *Swan Valley Planning Act 1995*

LANDS PORTFOLIO

- *Anglican Church of Australia Diocesan Trustees and Lands Act 1918*
- *Anglican Church of Australia Lands Vesting Act 1892*
- *Anglican Church of Australia School Lands Act 1896*
- *Browse (Land) Agreement Act 2012*
- *Cambridge Endowment Lands Act 1920*
- *Canning Lands Revestment Act 1954*
- *Chevron-Hilton Hotel Agreement Act 1960*
- *City of Perth (Lathlain Park Reserves) Act 1950*
- *City of Perth (Leederville Park Lands) Act 1950*
- *Dampier to Bunbury Pipeline Act 1997*
- *East Carey Park Land Vesting Act 1957*
- *Fremantle City Council Lands Act 1929*
- *Fremantle Endowment Lands Act 1929*
- *Fremantle Reserves Surrender Act 1912*
- *Geraldton Agricultural and Horticultural Society's Land Act 1914*
- *Geraldton Sailors and Soldiers' Memorial Institute Lands Vesting Act 1933*
- *Jennacubbine Sports Council (Incorporated) Act 1965*
- *Land Administration (South West Native Title Settlement) Act 2016*
- *Land Administration Act 1997*
- *Land Administration Amendment Act 2000*
- *Parks and Reserves Act 1895*
- *Perth Town Hall Act 1950*
- *Perth Town Hall Agreement Act 1953*
- *Reserves Acts (various)*
- *Roman Catholic New Norcia Church Property Act 1929*
- *Town of Claremont (Exchange of Land) Act 1964*
- *War Service Land Settlement Scheme Act 1954*

3. PURPOSE

The Department is committed to being a responsive and credible regulator by consistently applying and ensuring compliance with the legislation it administers. Compliance with the law is not a matter of choice but a requirement, and the Department has a range of regulatory tools to promote, monitor and enforce compliance.

This policy:

- a) guides the Department in exercising its enforcement and prosecution responsibilities
- b) explains how the Department approaches its statutory enforcement responsibilities
- c) outlines enforcement actions that are open to the Department
- e) provides the basis for consistent and coordinated enforcement action.

While this policy details how the Department undertakes its enforcement functions, it is general in nature and does not confine, restrain, or limit the discretion of the Department.

4. PRINCIPLES

The Department will apply the following principles when deciding what enforcement action/s it will utilise:

- a) **Accountability:** Decision-making will take place in accordance with legislation, guidelines and procedural requirements. Enforcement decisions will be justified and open to scrutiny.
- b) **Consistency:** Enforcement actions will be applied consistently, fairly, and equitably and will embrace impartiality, objectivity, and adherence to due process.
- c) **Proportionality:** Enforcement action will be responsive, timely, and in proportion to the risk and any real or potential impact of the legislative breach. The Department will consider the intent and conduct of individuals and companies, including their histories.
- d) **Transparency:** Enforcement action will be transparent, so all parties understand what is expected of them, and to create confidence in the Department's performance by ensuring stakeholders have a solid understanding of the Department's enforcement activities.
- e) **Targeting:** Enforcement actions will be focused on those activities or trends that have the potential to cause the greatest harm, generate significant risk or result in significant breaches of legislation.
- f) **Cost-effectiveness:** Enforcement action will be implemented to produce the desired outcome with cost-effective use of public resources.
- g) **Procedural Fairness:** Enforcement action will be carried out within the powers and processes of the legislation, applying principles of procedural fairness.

5. DISCRETION

The Department has discretion in considering what the appropriate enforcement action is to be applied.

6. DETERMINING FACTORS

The following factors are considered by the Department when determining whether to apply an enforcement action:

- a) cooperation with the Department and willingness to take remedial action
- b) failure to notify or delayed notification of the incident to the Department
- c) failure to comply with informal requests, lawful directions, or notices
- d) voluntary action taken by the alleged offender to mitigate any harm caused
- e) level of public concern or interest
- f) mitigating or aggravating circumstances
- g) the need for specific or general deterrence
- h) any precedent which may be set by failure to take enforcement action
- i) culpability, such as seriousness of the breach, and potential consequences
- j) impact caused by the offence
- k) history of the alleged offender
- l) intent of the alleged offender
- m) avoided costs and/or profits realised by the alleged offender
- n) statutory time limits for prosecution
- o) the staleness of the offence
- p) whether a sentence has already been imposed on the alleged offender which adequately reflects the criminality of the circumstances.

7. ENFORCEMENT MEASURES

The types of enforcement measures available to the Department include, but are not limited to, the following:

- a) Informal requests and notices – this can include providing advice and seeking voluntary compliance, improving education and awareness, and requests to stop activities or undertake remedial action.
- b) Caution – cautions may be issued for offences either verbally or in writing.
- c) Statutory notice – this can include written notices or directions that require certain actions to be taken or to be ceased within a specified timeframe. Statutory notices are issued under relevant legislation where applicable.
- d) Amending, suspending or revoking statutory approval – conditions on a statutory approval may be altered in response to a non-compliance. Depending on the severity of the non-compliance, the approval may be suspended or revoked.
- e) Seeking an order or injunction – the Department may apply to the appropriate court for an order or injunction requiring that an activity ceases, that items or constructed infrastructure is removed from Department land, and/or seeking costs if the Department has had to take physical action.
- f) Infringement notice – certain offences may result in an infringement notice being issued with a monetary fine.
- g) Prosecution – prosecution will be pursued by the Department where it is the appropriate response. The Department may choose to use prosecution in conjunction with other enforcement measures.

Enforcement actions are at times dictated by relevant legislation and not all enforcement options are available depending on the legislation relevant to the investigation.

8. PROSECUTION

Prosecution is one of the tools available to the Department to deal with non-compliance, therefore it is important to ensure a decision to prosecute is appropriate in the circumstances. The Department recognises that prosecution is a serious matter, and any decision to prosecute will have regard to the [Statement of Prosecution Policy and Guidelines](#).

The decision on whether to prosecute rests with the Director General or the Chairperson of the relevant statutory authority and may be referred to the State Solicitor's Office for advice.

The fundamental objectives of a prosecution are to punish those who deserve punishment for their offences and to deter others from offending.

Prior to pursuing a prosecution action, the Department will consider:

- a) whether there is a prima facie case
- b) the rights of the alleged offender
- c) the interests of victims
- d) whether prosecution is in the public interest.

Prima facie case

Consideration should be given, as early as possible in the prosecution process, as to whether the evidence discloses a prima facie case

The question whether there is a prima facie case is one of law. This involves a consideration whether on the available material there is evidence upon which a trier of fact could conclude beyond reasonable doubt that all the elements of the offence have been established.

Where the available material does not support a prima facie case, a prosecution should not proceed.

Public interest

Despite the existence of a prima facie case and reasonable prospect of conviction, it may not be in the public interest to proceed if other factors render a prosecution inappropriate.

When considering if a prosecution is in the public interest, balanced consideration of a broad range of factors, such as those outlined below, is required to determine whether it is appropriate to proceed.

Factors considered

The following factors are considered when determining whether to prosecute:

- a) the need to maintain the rule of law
- b) the severity or significance of the impact of the offence
- c) the need to maintain public confidence in basic constitutional institutions, including Parliament and the courts
- d) the entitlement of the State or other person to be awarded compensation if guilt is adjudged
- e) the need to ensure consistency in the application of the law
- f) the need for punishment and deterrence
- g) the circumstances in which the alleged offence was committed
- h) the trivial or technical nature of the alleged offence
- i) the youth, age, physical or mental health or special infirmity of the victim, alleged offender, or witnesses
- j) the alleged offender's previous history
- k) the staleness of the alleged offence, including delay in the prosecution process, which may be oppressive
- l) the degree of culpability of the alleged offender in connection with the offence
- m) the obsolescence or obscurity of the law
- n) whether a prosecution would be perceived as counterproductive to the interests of justice
- o) the availability or efficacy of any alternatives to prosecution
- p) the lack of prevalence of the alleged offence and need for deterrence, either personal or general
- q) whether the alleged offence is of minimal public concern
- r) the attitude of the victim of an alleged offence to a prosecution
- s) the likely length and public expense of a trial

- t) whether the alleged offender has co-operated in the investigation and prosecution of others or has indicated an intention to do so
- u) the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court
- v) the likely effect on public order and morale
- w) whether a sentence or other penalty has already been imposed on the offender which adequately reflects the criminality of the circumstances
- x) whether the alleged offender has already been sentenced for a series of other offences and the likelihood of the imposition of an additional penalty is remote.

Factors not considered

The following factors are not considered when determining whether to prosecute:

- a) the ethnicity, gender, religious beliefs, social position, marital status, sexual preference, political opinions, or cultural views of any person involved in the prosecution
- b) the possible political consequences of the exercise or non-exercise of discretion
- c) the personal feelings of the decision-makers
- d) the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

Fairness

Prosecutions must be conducted fairly and impartially. A prosecution which is conducted for improper purposes, capriciously or oppressively, is not in the public interest.

Prospect of conviction

The decision to prosecute must involve an assessment of the prospect of conviction. It is not in the interest of justice to commence a prosecution if there is no reasonable prospect of conviction.

A prosecution should be discontinued if, based on the available material and appropriate advice, the Department considers that there is no reasonable prospect of conviction, unless further prompt investigation will remedy any deficiency in the prosecution case.

The Department will exercise dispassionate judgement in assessing the prospect of conviction. However, this does not mean that only cases perceived as 'strong' should be prosecuted.

This assessment of the prospect of conviction does not replace the role of the courts but is an exercise of discretion in the public interest.

During this assessment process, the Department will consider the following:

- a) whether an alleged confession was voluntary and whether there are grounds for objecting to evidence being admitted
- b) the competence, reliability, and availability of witnesses
- c) known matters that may reduce the likelihood that a witness's evidence will be accepted; for example, a prior inconsistent statement by the witness, reduced memory of the events over time, attitude to the defence, or whether credibility is affected by any physical or mental impairment
- d) the existence of an essential conflict in any important particular of the prosecution case among prosecution witnesses
- e) whether the identity of the alleged offender is in issue, the cogency and reliability of the identification evidence
- f) any lines of defence which have been indicated by or are otherwise plainly open to the defence
- g) inferences consistent with innocence.

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

- a) material not disclosed to the prosecution by the defence
- b) notification of a defence which purports to rest upon unsubstantiated assertions of fact
- c) whether assertions of facts upon which a defence or excuse are based are contentious, or rest on information which would not in the opinion of the prosecutor, form the basis of credible cogent evidence.

Charge and plea negotiation

The following factors are relevant in considering whether a plea to a lesser offence, or to part only of a complaint, can be accepted:

- a) where the plea reasonably reflects the essential unlawful nature of the conduct and provides an adequate basis for sentencing
- b) where the evidence available to support the prosecution case may be weak in a particular aspect, or fraught with difficulty, and the public interest will be satisfied with an acknowledgment of guilt to other specified unlawful conduct
- c) when the saving of cost to the community is greater, when weighed against the likely disposition of the matter proceeding to trial without acceptance of the plea
- d) when to do so will save witnesses, particularly vulnerable and other special witnesses, from the trauma of a court appearance.

A plea will not be accepted if:

- a) to do so would distort the facts disclosed by the available evidence and result in an artificial basis for sentence
- b) the accused person intimates that they are not guilty of any offence.

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

Companies and individuals

Depending on the legislation, proceedings will be brought against the person/s responsible for the offence. In the case of a company, it will be usual practice to prosecute the company where the offence resulted from its activities. However, the Department will also consider any part played in the offence by the officer/s of the company, including directors and managers. Action may also be taken against individuals (as well as the company) where it can be shown the offence was committed with their authority, permission, or consent, or was due to their neglect.

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.

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.

Unrepresented accused

The prosecutor is required to ensure that the accused person is properly informed of the prosecution case so that the accused can be prepared to respond. While a prosecutor is required to be fair to the accused, it is not the prosecutor's role to advise the accused of legal issues, evidence, investigations that may be made, any available defences or how the defence ought to be conducted.

Should it be necessary, a prosecutor may communicate with an unrepresented accused person through the court.

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.

Penalties

Depending on the legislation, the court may impose a fine, injunctive relief, enforceable undertaking, or a prison sentence.

Outcome disclosure

The Department may choose to make the outcomes of enforcement actions publicly available. This is done as an additional deterrent and to educate the community, or in response to direct enquiries.

The Department may publicise enforcement outcomes on the Department's website, in the media, or through other broadcast avenues that the Department deems appropriate.

Following a conviction by a court, a media statement containing the defendant's name and identifying details such as age and locality, the penalty imposed and any relevant comments from sentencing, may be released.