

Prosecution Policy

PROSECUTION POLICY

DEPARTMENT OF PRIMARY INDUSTRIES AND FISHERIES

Introduction

The department undertakes prosecutions across a wide range of legislation, largely legislation relating either to fisheries or animal and plant health. These prosecutions are conducted in-house.

The Department of Primary Industries and Fisheries has developed this policy in order to enhance general regulatory compliance activity through the application of greater transparency and consistency.

This policy is designed to promote:

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. This applies to all aspects of the prosecution process from the decision whether or not to prosecute to decisions on what documents to disclose to the defence and when.

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, rules and decisions that regulators arrive at are coherent, intelligible and fair 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.

DPI&F's Prosecution Policy is designed to promote:

- Openness and transparency;
- Consistency;
- Cost efficiency;
- The public interest;
- Strategic focus

Cost efficiency and the public interest

In the absence of a policy there can 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 best public interest and can prove costly because the most trivial of charges can often take as much or more work on the part of prosecutors (as well as compliance officers) as more major offences. In addition, a philosophy of prosecuting everything means that no judgment can be made on the best use of limited resources and no targeting of specific key matters can occur.

Strategic focus

The existence of a prosecution policy facilitates a strategic focus being taken to prosecutions. Offences that are regarded as more important can be targeted, thereby better serving the public interest. This strategic focus can be enhanced if business groups further develop their own prosecution and compliance policies that would fit under the umbrella of this department policy.

Prosecution is only one of a number of sanctions that DPI&F considers in legislation in the totality of its deterrence strategy, for example on-the-spot fines is another option used. Prosecution is only used where it is proportional to the non-compliance.

This policy is intended to provide guidance in respect of the factors to be taken into account in the prosecution process both by inspectors and prosecutors. It is not intended to be exhaustive nor inflexibly applied. Its application will necessarily be dictated by the individual circumstances of the prosecution case.

Prosecution

Principles of Prosecution – Criteria Governing the Decision 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 a prospect 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.

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.

Prospect of conviction

Consideration must also be given to the prospects of conviction of a matter. A prosecution should not proceed if there is no prospect of a conviction being secured. A detailed and thorough examination of the strength of the case as it is likely to be when presented for hearing is required to determine prospects of conviction.

Decision to Prosecute

When evaluating the evidence of a matter, regard should be had to the following matters:-

- 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 has the confession evidence 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?

The decision to prosecute involves consideration of:

1. whether there exists sufficient evidence to justify prosecution;
2. whether the public interest requires prosecution.

Public moneys should not be wasted on inappropriate matters at the expense of worthy matters that 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.

- c) Does it appear that a witness is exaggerating, or that his 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 that might properly be put to a witness by the defence to attack his 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 that is likely to affect his credibility?
- g) If there is conflict between eyewitnesses, does it go beyond what one would expect and hence materially weaken the case? Alternatively, if there is a lack of conflict between eyewitnesses, 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 any who may be abroad?
- 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, is there a reasonable prospect of the proceedings being severed? If so, is the case sufficiently proved against each should separate hearings be ordered?

It should be noted that this list is not exhaustive and that the individual circumstances of a matter will dictate the material considerations involved in the decision to prosecute.

Public Interest

The public interest component 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 bear on the decision to prosecute. Public moneys should not be wasted on inappropriate matters at the expense of worthy matters that 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, which should be considered at all stages of the process, that is both by inspectors and prosecutors, are some of the considerations which may be relevant in determining whether the public interest requires prosecution of a matter:

- a) the seriousness or triviality of the alleged offence or that it is of a “technical” nature only;
- b) any mitigating or aggravating circumstances;
- c) the age, intelligence, physical health, mental health or special infirmity of the alleged offender/witness;
- d) the alleged offender’s antecedents and background (for example in relation to relevant compliance activity);
- e) the staleness of the alleged offence;
- f) the degree of culpability of the alleged offender in connection with the offence;
- g) the effect on public order;
- h) the obsolescence or obscurity of the law;
- i) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
- j) the availability and efficacy of any alternatives to prosecution;
- k) the prevalence of the alleged offence and the need for deterrence (including the likely deterrent value of the prosecution);
- l) whether the consequences of any resulting conviction would be unduly harsh and 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 is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
- 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 benefit the alleged offender stands to make from the illegal activity;
- t) the likelihood of detection of the offence.

The relevance and weight of these factors will vary depending upon the particular circumstances of the case.

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 to be made by reference to the expertise of the responsible legal officer having regard to the aforementioned considerations.

Throughout the prosecution process, the Prosecutor must conduct him or herself in a manner that will maintain, promote and defend the interests of justice.

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 is for or against 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 and waste of the court's time.

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.

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:

- 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.

Peripheral Defendants

The Prosecutor should ensure that proceedings are 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 can tend to cloud the essential elements of the case as well as lead to unnecessary delay and costs.

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.

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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.

In the event a witness must necessarily be called at trial without the witness's statement having already been tendered or supplied to the defence, a copy of the witness's statement should be provided to the defence as soon as possible after the decision is made to call the witness.

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 where disclosure of particular information would be reasonably likely to lead to a prospective prosecution witness being intimidated or result in some other interference with the course of justice. In this event, the defence should be informed of the circumstances. In some cases it may be sufficient to merely delay disclosure of the particular information.

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 relevant to the charges in his/her possession irrespective of whether the Prosecutor intends to rely on it as part of the prosecution case. This includes material that either runs counter to the prosecution case or might reasonably be expected to assist the accused in advancing a defence.

Conclusion

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.