



Planning,
Industry &
Environment

GUIDELINES

Prosecution Guidelines

September 2021





Prosecution Guidelines

Published by NSW Department of Planning, Industry and Environment

dpie.nsw.gov.au

Title: DPIE Prosecution Guidelines

First published: September 2021

© State of New South Wales through Department of Planning, Industry and Environment 2020. You may copy, distribute, display, download and otherwise freely deal with this publication for any purpose, provided that you attribute the Department of Planning, Industry and Environment as the owner. However, you must obtain permission if you wish to charge others for access to the publication (other than at cost); include the publication in advertising or a product for sale; modify the publication; or republish the publication on a website. You may freely link to the publication on a departmental website.

Disclaimer: The information contained in this publication is based on knowledge and understanding at the time of writing (October 2020) and may not be accurate, current or complete. The State of New South Wales (including the NSW Department of Planning, Industry and Environment), the author and the publisher take no responsibility, and will accept no liability, for the accuracy, currency, reliability or correctness of any information included in the document (including material provided by third parties). Readers should make their own inquiries and rely on their own advice when making decisions related to material contained in this publication.

Contents

1.	Introduction	2
1.1	Purpose.....	2
1.2	The Department’s regulators	2
2.	Principles of prosecution	3
3.	Making a decision to prosecute.....	3
3.1	Who may prosecute?	3
3.2	When may prosecution occur?.....	3
3.3	Prosecutor’s Duties	4
4.	Factors relevant to undertaking prosecutions	4
4.1	Evidence	4
4.2	Reasonable prospect of success	4
4.3	Discretionary factors	5
4.4	Irrelevant considerations	5
4.5	Alternatives to prosecution.....	6
5.	Penalty Notices	6
5.1	Factors to consider for penalty notices	6
6.	Decisions to not prosecute	7
7.	Who may be prosecuted?	7
7.1	Selecting defendants	7
7.2	Corporate and director / manager liability	7
7.3	Employee / worker liability.....	8
7.4	Prosecution of Government Authorities	8
8.	Determining charges	8
8.1	Similar charges for the same offence.....	9
8.2	Continuing offences	9
8.3	Charge-bargaining	9
9.	Commencing proceedings.....	9
9.1	Selecting the appropriate court.....	9
10.	Sentencing and Appeals	10
10.1	Costs.....	10
10.2	Sentencing considerations	10
10.3	Appeals against sentence.....	10
11.	Releasing information about prosecutions	10

1. Introduction

1.1 Purpose

This guideline explains the approach that the NSW Department of Planning, Industry and Environment (the Department) will take in response to breaches of legislative obligations under the regulatory frameworks that it administers. The Department's capacity to prosecute the entities it regulates is an important discretionary power and regulatory tool, and in appropriate circumstances prosecution action will be taken.

The overall goal of any prosecution undertaken by the Department is to achieve regulatory compliance and to seek to build and maintain community confidence in the regulatory oversight provided by the Department.

A decision to begin proceedings for a breach of legislation is a serious decision, with potential operational, financial and reputational impacts for both the Department and the alleged offender. A clear and consistent governance framework regarding the decision-making process for prosecutions is crucial, to ensure that proportionate and appropriate compliance action is taken in response to breaches.

This Guideline has been published to help explain:

- the basis on which the Department will make a decision to prosecute;
- the factors the Department will take into account in deciding which person is the appropriate defendant;
- how the Department will make a decision regarding the specific charges it lays; and
- factors to be considered in determining which court to commence proceedings.

This Guideline is not legally binding on the Department or on any other organisation. It is however intended to form part of the Department's policy on compliance and enforcement, and to provide guidance on the decision-making process the Department utilises when considering appropriate compliance action. The Guideline is also a key tool in educating the community and regulated entities on the processes undertaken and factors considered by the Department when assessing whether to proceed with prosecution action.

1.2 The Department's regulators

The Department brings together specialists in urban and regional planning, environment, energy, housing and property and water. The Department's regulators work to mitigate and manage risks to the community and the environment. They also help to build and maintain community and industry understanding and confidence in the regulatory systems across the Department.

The Department exercises regulatory functions across a wide range of industries, managed by various units that sit within the cluster. Each respective area has a number of pieces of legislation that it administers, and there are a number of regulatory response options available to address breaches of the legislation.

2. Principles of prosecution

Prosecution is one tool within the Department's overall enforcement strategy. There are a range of other enforcement tools that can be used depending on the nature and type of breach being dealt with. The Department applies the following principles in relation to prosecutions:

- The key aim of the enforcement action the Department chooses is to achieve compliance with legislative obligations. Prosecution is a strategic response the Department may choose based on the circumstances and supporting evidence. The Department considers all responses to non-compliance such as written warnings, statutory notices, penalty notices, enforceable undertakings, as well as prosecution, recognising that prosecution may not always be the most effective means of promoting compliance. Not all alternatives to prosecution are available to all regulators within the Department.
- Effective enforcement actions, including prosecutions, must be targeted, proportionate, consistent, fair, and considered in a timely fashion.
- Releasing information about enforcement supports transparency and draws attention to the consequences of breaking the law. When the Department releases information regarding prosecutions, this is done to help educate others and achieve compliance.
- Public interest considerations.

3. Making a decision to prosecute

Given the serious nature of a criminal conviction, and the significant penalties which may be imposed, a decision to prosecute requires careful consideration, and is to be guided by key principles, as discussed below. The basic pre-requisite of any prosecution action is that there is sufficient evidence to establish a prima facie case. However, the decision to undertake prosecution action is to be made in consideration of the public interest and should not be wasted pursuing inappropriate cases.

3.1 Who may prosecute?

The Department exercises regulatory functions conferred on it under legislation that it administers.

Where prosecution action is available as an enforcement tool under the legislation, authority to pursue prosecution is either directly vested in a person prescribed by the relevant legislation or established by virtue of section 14 of the *Criminal Procedure Act (NSW) 1986*.

The Department has established internal systems to define which officer (or group of officers) will develop proposals to commence proceedings and which officer (or group of officers) will make the decision to prosecute (or not).

3.2 When may prosecution occur?

The Department treats prosecution as one of its strongest regulatory responses to a breach of the legislation, along with other serious compliance actions such as licence or authorisation suspension/cancellation. As with all enforcement actions, the primary aim of prosecution is to achieve compliance. In appropriate circumstances, prosecution sends a message to industry and the community that a failure to comply with the law may be dealt with by the courts.

However, there are finite resources available to pursue enforcement actions like prosecutions, so informed decisions must be made on when this is the most effective response. This decision is made on a case-by-case basis with regard to the circumstances of the matter being dealt with. Generally, the Department will consider taking prosecution action for serious breaches of the legislation, or in situations where other enforcement actions have proven ineffective or the regulated entity has demonstrated a clear intention not to comply.

3.3 Prosecutor's Duties

The prosecutor's primary role is to assist the court in arriving at the truth according to law and the principle of fairness. A prosecutor is not entitled to act as if representing private interests. A prosecutor acts independently, and in the general public interest.

A prosecutor must act impartially and fairly according to law. This will involve the prosecution informing the defence and the court of directions, warnings or authorities which may be applicable to the circumstances of the case, even where unfavourable to the prosecution.

4. Factors relevant to undertaking prosecutions

The decision to prosecute an offence requires consideration as to whether prosecution is in the public interest. In determining this issue, the Department will consider whether:

- there is sufficient evidence;
- there are reasonable prospects of conviction; and
- discretionary factors are such that the matter should be prosecuted.

4.1 Evidence

A decision to prosecute or to continue a prosecution must consider where there is sufficient evidence available to establish each element of the offence, and whether there are reasonable prospects of the offence being proved. This decision requires an evaluation of how strong the case is likely to be when presented in court.

This evaluation must also take into account matters such as the reliability, availability, competence and credibility of witnesses and their likely impression on the court, the admissibility of any evidence, all potential defences and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of the offence being proved.

4.2 Reasonable prospect of success

A prosecution may only be commenced if legal advice indicates there are reasonable prospects of success. This requires an exercise of judgment that will depend in part upon an evaluation of the weight of the available evidence and the persuasive strength of the prosecution case in light of the anticipated course of proceedings, including the circumstances in which they will take place. A relevant consideration in the evaluation of the strength of a prosecution case will be the existence or otherwise of evidence to support any defence that may be raised by the alleged offender.

4.3 Discretionary factors

Consideration must be given to discretionary factors such as but not limited to:

- the seriousness or triviality of the offence and/or whether the breach is of a technical nature only;
- any mitigating or aggravating circumstances;
- the length of time since the alleged offence;
- the degree of harm arising from the alleged offence;
- the degree of culpability of the alleged offender in relation to the offence;
- whether the prosecution would be perceived as counterproductive, for example, by bringing the law into disrepute;
- the prevalence of the alleged offence and the need for both specific and general deterrence;
- any prior breaches of, or convictions under the legislation;
- whether the alleged offence is of considerable public concern;
- any precedent which may be set by not instituting proceedings;
- the age, physical or mental health, or special infirmity of the alleged offender or witnesses;
- the length and expense of a court hearing;
- whether proceedings are to be instituted against others arising out of the same incident;
- community expectations that proceedings will be instituted;
- the availability and efficacy of any alternatives to prosecution;
- whether another Government agency has taken a prosecution in respect to the same facts and circumstances;
- whether the consequences of any conviction would be unduly harsh or oppressive; and
- the availability of any alternatives to prosecution.

The applicability of and weight to be given to these and other factors will vary, depending on the circumstances of each case.

4.4 Irrelevant considerations

The Department has established policies and governance frameworks to ensure that its exercise of prosecutorial discretion is not influenced by any inappropriate considerations, such as:

- any elements of discrimination against the alleged offender or any other person involved, for example the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
- personal empathy or antipathy towards the alleged offender or victim;
- the political or other affiliations of those responsible for the prosecution decision;
- possible political advantage or disadvantage to the government or any political party, group or individual; or
- possible effect of the decision on the personal or professional circumstances of those responsible for the investigation or otherwise involved in its conduct.

4.5 Alternatives to prosecution

Some of the laws administered by the Department provide options to exercise strong regulatory responses that may be considered alternatives to prosecution. For example, enforceable undertakings may be accepted following breaches of some legislation. Enforceable undertakings are frequently able to achieve a greater benefit for the community than could be gained through prosecution alone.

Where there is an alternative but comparably strong regulatory response available under the relevant legislation, the Department will consider undertaking this action.

For proceedings in the Land and Environment Court, there are a range of alternative sentencing options available to apply to guilty criminal offenders whose sentences have not yet been determined. The court will be able to impose various orders in addition to, or as an alternative to, a monetary penalty for planning and environmental offences.

These will include orders such as:

- to prevent, control, abate or mitigate any harm to the environment caused by the commission of the offence, including orders to reverse or rectify any unlawful development or activity related to the commission of the offence;
- enabling a public authority to recover certain costs and expenses it has incurred as a result of the commission of the offence;
- requiring the offender to pay back any monetary benefits gained by committing the offence;
- requiring the offender to give public notice of the offence, for example in local or regional newspapers;
- requiring the offender to carry out public environmental projects or social or community activities for the benefit of affected communities; and
- requiring the offender to attend training or other courses.

A court order to carry out an environmental restoration or enhancement work or program can also be supported.

5. Penalty Notices

The penalty notice system provides an effective and efficient means to deal with minor breaches of criminal provisions which are not considered serious enough to warrant instituting court proceedings. A penalty notice carries a fixed penalty which is much less than the available maximum penalty applicable if the matter is determined by a court.

A penalty notice is issued because an offence apparently has been committed, but payment of the fine does not lead to the recording of a criminal conviction. Non-payment of the fine is not dealt with by way of criminal sanctions, but is recoverable as a civil debt. On the other hand, if a person elects to have the matter heard, proceedings are instituted in the criminal jurisdiction of the Local Court. Penalty notices may be issued by designated officers under the relevant legislation.

5.1 Factors to consider for penalty notices

Just as there is a discretion to prosecute criminal matters, so there is a discretion whether to issue a penalty notice. Any discretion exercised by individual officers must take into account the intention manifested in the legislation to penalise those breaches which may have otherwise gone unpunished.

Penalty notices are designed primarily to deal with one-off breaches that can be remedied easily. They are not appropriate in situations of an ongoing nature where further inquiries are needed to ascertain the nature of the problem and develop a long-term solution. It is generally not appropriate to issue contemporaneous or successive penalty notices for multiple statutory breaches.

The service of a penalty notice does not itself institute criminal proceedings. It can, however, lead to the institution of criminal proceedings at the election of the alleged offender.

In summary, penalty notices are appropriate where the:

- breach is minor;
- facts are apparently incontrovertible;
- breach is a one-off situation that can be remedied easily; and
- issue of a penalty notice is likely to be a practical and viable deterrent.

It is generally not appropriate to issue penalty notices where the:

- breach is on-going and not within the alleged offender's capacity to remedy quickly;
- penalty prescribed on the notice would be clearly inadequate for the severity of the offence;
- extent of the harm cannot be assessed immediately;
- evidence is controversial or insufficient; and
- multiple breaches have occurred.

6. Decisions to not prosecute

It is critical that there is integrity surrounding decisions to not prosecute. If the investigating officer has recommended prosecution and legal advice indicates that there are reasonable prospects of a conviction, any decision to not prosecute must be supported by written reasons by the decision maker.

7. Who may be prosecuted?

7.1 Selecting defendants

Liability under the relevant legislation is imposed on a wide range of entities who may have participated in or contributed to an offence. This can mean that multiple regulated entities may have committed an offence arising out of a single incident. It is not always appropriate to prosecute every entity who may be liable for an offence.

The Department will, when selecting appropriate defendants, assess:

- who is primarily responsible for the alleged offence, that is:
 - who was primarily responsible for the acts or omissions giving rise to the alleged offence;
 - who was primarily responsible for the material circumstances leading to the alleged offence; and
 - who formed any relevant intention; and
- the potential effectiveness of any court orders that might be made against the proposed defendant.

7.2 Corporate and director / manager liability

Where an offence is committed by employees, agents or officers of a corporation in the course of their employment, proceedings will usually be commenced against the corporation. Where, however, the offence has occurred because the employee, agent or officer has embarked on a venture of their own making and volition, outside the scope of their employment, proceedings may be instituted against the employee, agent or officer and not against the corporation.

In addition, managers and directors / officers may attract personal liability for offences under the legislation as a result of their actions or inactions. The relevant legislation will generally specify the offences for which director/managerial liability can arise and the circumstances in which this may occur. Generally, this will require the relevant person to be a director of the corporation, or an individual involved in the management of the corporation and in a position to influence the conduct of the corporation in relation to the commission of the offence.

7.3 Employee / worker liability

Proceedings may be brought by the Department against an employee, agent or worker where an offence has occurred, regardless of whether that person has embarked on a venture of their own making and volition, or one that is outside the scope of their employment / engagement and without the explicit approval of their employer.

The guiding principle in deciding whether to charge an employee is the degree of culpability involved. Factors relevant to assessing the degree of culpability include:

- whether the employee knew or should have known that the activity in question was illegal;
- the seniority of the employee and the scope of the employee's employment duties; and
- whether, having regard to the employee's seniority and employment duties, the employee had taken reasonable steps to draw to the attention of the employer or any other relevant person the impropriety of the practice.

7.4 Prosecution of Government Authorities

Government authorities have a responsibility to comply with the law and, unless the legislation provides otherwise, they can be guilty of the same offences as the rest of the community. There may be some limited exceptions, depending on the legislation.

As with all prosecutions, deciding whether prosecution of a Government authority is the appropriate method of enforcing compliance involves a consideration of the public interest. However, prosecution of one Government authority by another also involves competing public interests: on the one hand, the public interest in authorities abiding by the law and accepting responsibility for the consequences of a breach of legislation; on the other hand, the public interest in minimising the cost to the public, as it is the taxpayer that bears the cost of any prosecution of a public authority as well as the cost of its defence.

Generally, litigation between Government authorities is undesirable and should be avoided where possible. This principle is expressed in guidelines issued by the Premier's Department for litigation involving Government authorities (Premier's Memorandum M1997-26).

When considering whether to prosecute a Government authority, the Department is required to take the steps set out in the guidelines to consult with the authority against whom the prosecution is contemplated. A copy of Premier's Memorandum M1997-27 can be found on the website of the Department of Premier and Cabinet (<http://www.dpc.nsw.gov.au>).

8. Determining charges

Once a decision to prosecute has been made, it is in the public interest for that prosecution to succeed. The Department is responsible for selecting charges that it can prosecute successfully and are consistent with the seriousness of the offence and.

Any charges laid must reflect the nature and extent of the conduct disclosed by the evidence, with the

aim of providing a basis for the court to impose an appropriate penalty.

8.1 Similar charges for the same offence

The Department has a duty to refine its case to avoid laying duplicate or multiple charges for the same alleged offence. There will be occasions where an act or omission will be prohibited under two separate statutes and involve an offence under each. Laying duplicate or multiple charges will be avoided unless considered appropriate in the circumstances.

8.2 Continuing offences

The Department will assess whether to lay a charge for a continuing offence or separate charges depending on the act or omission. The main consideration when making this determination is:

- whether there was a single act or omission which gave rise to the offence; and
- whether the consequences of the act or omission continued over a period of time.

The Department will usually lay a charge for a continuing offence if a single act or omission has continuing consequences. Similarly, where there has been continuing or multiple acts or omissions, it would be appropriate to lay a charge for a continuing offence.

8.3 Charge-bargaining

'Charge-bargaining' involves negotiations between the defence and the prosecution in relation to the charges which will proceed to hearing. As a result of these negotiations, the defendant may opt to plead guilty to fewer than all the charges initially laid, or to a lesser charge or charges, in return for the prosecution offering no evidence on the remaining charges. However, if appropriate charges are laid initially, there is little scope for charge-bargaining and hence there will be only limited circumstances where bargaining will be considered.

A charge-bargaining proposal should not be entertained unless:

- the remaining charges reflect adequately the nature of the criminal conduct of the defendant, and
- those charges provide the basis for an appropriate sentence in all the circumstances of the case.

9. Commencing proceedings

Prior to commencing prosecution proceedings, the Department seeks appropriate legal advice as to whether there are reasonable prospects of conviction for the alleged offence.

Where possible and appropriate the Department will seek to recoup both its investigation and legal costs in respect to a successful prosecution.

9.1 Selecting the appropriate court

Prosecutions for summary offences can be instituted either in the Land and Environment Court or the Local Court. The Land and Environment Court is a specialist court for environmental planning and environment protection disputes, including criminal prosecutions.

Where the Department has carriage of the matter, it will consider the following factors in choosing the court for the summary hearing:

- unless the penalty is likely to exceed the jurisdictional limit for the Local Court or there are other

special circumstances, proceedings will be heard by the Local Court closest to the location of the alleged offence;

- all offences which are serious enough to attract possible penalties in excess of the jurisdictional limit for the Local Court will be commenced in the Land and Environment Court;
- those matters which have or are expected to give rise to applications for orders that can only be made by the Land and Environment Court will be commenced in the Land and Environment Court; and
- unless there are good reasons to the contrary, all charges arising out of the same incident will be instituted in the same jurisdiction (and preferably at the same time) so the court has the option to hear them together.

10. Sentencing and Appeals

10.1 Costs

The Department will generally seek costs in successful prosecutions.

10.2 Sentencing considerations

Where a person is found guilty of an offence, the court will consider a number of matters to determine a sentence which 'fits the crime'. The general principle is that a sentence must reflect the seriousness of the offence and the personal circumstances of the offender.

10.3 Appeals against sentence

Decisions to appeal a sentence following a decision by the court are treated in a similar way to the initial decision to prosecute. These decisions are made on a case-by-case basis with regard to all of the circumstances of the matter. In particular, the Department considers:

- whether there was a material error of law in the initial proceedings;
- how likely the appeal is to succeed; and
- whether the sentence was manifestly inadequate.

Any such appeal is to be brought within the timeframe specified in the relevant legislation.

11. Releasing information about prosecutions

The need for deterrence is a significant consideration in the decision to prosecute. This will only be successful if the regulated community is informed of the potential implications of breaching the law. Unless there are extenuating circumstances, the Department will generally issue a media release or otherwise publicise successful prosecutions. In doing so, care must be taken to ensure that the offence and resulting penalty is accurately described.