

DEPARTMENT OF CONSERVATION AND LAND MANAGEMENT

PROSECUTION POLICY AND GUIDELINES

Introduction

The Department of Conservation and Land Management (CALM) is responsible for conserving and managing Western Australia's native plants and animals and the lands, waters and resources entrusted to it for the benefit of present and future generations.

CALM, as the principal authority for the management of reserved land, forests and wildlife in Western Australia, has a statutory responsibility to enforce the legislation it administers. Regulation and enforcement are essential to the integrity of the systems that manage wildlife, lands, waters and resources and are therefore critical to achieving sustainability.

Prosecution Guidelines

This Policy Guideline has been adapted from the *Director of Public Prosecutions Act 1991 Statement of Prosecution Policy and Guidelines*.

For the purposes of this Guideline a prosecution begins when a person appears in court in response to a complaint.

The purpose of this Policy Guideline is to bring about correct decisions based on sound judgement and facilitate the sensible exercise of discretions. The Policy gives guidance to the factors to be taken into account at various stages of the prosecution process to achieve a reasonable and consistent approach in matters of prosecution.

A prosecution that is conducted fairly and impartially is in the public interest.

A prosecution that is conducted for improper purposes, capriciously or oppressively is not in the public interest.

A prosecution has an impact on the rights of the alleged offender, the interests of the victim and the community generally. The decision to continue a prosecution is at least as important as the decision to charge but may take into account factors beyond those that influence the officer authorising laying the complaint. The decision involves consideration of a number of factors.

A complaint of an offence should not be laid unless there is sufficient credible evidence identifying a person as having committed that offence.

In some cases, whether because of complexity, sensitivity or for any other reason, it will be appropriate for CALM to seek the opinion of the Crown Solicitor as to whether a charge should be laid. In such cases, the decision to charge will still be one for the complainant, although the complainant will be entitled to act on the recommendation of the Crown Solicitor.

Application

These Policy Guidelines apply to the staff of the Department of Conservation and Land Management involved in the prosecution process.

These Guidelines apply to any decision to authorise officers of another agency to take proceedings.

Field officers will not ordinarily be required to exercise prosecutorial discretion. Their task is to gather and present evidence so that an informed decision in relation to the most appropriate course of action can be made.

These Guidelines apply to the Conservation and Land Management Act 1984 (CLMA), the Wildlife Conservation Act 1950 as amended (WCA) and to subsidiary legislation made under those Acts.

In each case the initiation of a prosecution must be considered in the light of the public interest and should serve the best interests of the conservation and protection of the natural resources entrusted to CALM. Decisions on prosecutions are also made on an objective, case by case basis consistently applying the criteria specified below.

General policy statement

It is essential that this Department adopt a prosecution policy that is applied uniformly and fairly throughout Western Australia. The institution of legal proceedings pursuant to its legislation is at the discretion of CALM.

A range of options is available once an offence has been detected, depending on the circumstances. A three-tiered approach has been adopted in respect to offenders breaching the provisions of CALM administered legislation, that is:

- (i) written warnings for lesser offences or in the cases where the interests of land, wildlife and resource protection is better served by an alternative to prosecution.
- (ii) infringement Notices for minor offences; and
- (iii) prosecution for all other offences.

However, it is recognised that it is not possible to set pre-determined standards in regard to how a particular offender should be dealt with. The circumstances of each offence and the antecedents of the offender must be taken into consideration by the decision-maker in each case when determining what action is to be taken.

Decision-makers may exercise discretion in particular cases provided the appropriate processes are followed and the exercise of discretion is justified.

In formulating the Prosecutions Policy CALM has paid due regard to the 1981 Report of the UK Royal Commission on Criminal Procedure, which stated that a prosecution system should be judged by the broad standards of fairness, openness and accountability, and efficiency. The Report relevantly states:

“Is the system fair; first on the sense that it brings to trial only those whom there is adequate and properly prepared case and who it is in the public interest should be prosecuted ..., and secondly in that it does not display arbitrary and inexplicable differences in the way that cases or classes of case are treated locally or nationally? Is it open and accountable in the sense that those who make the decisions to prosecute or not can be called publicly to explain and justify their policies in actions in so far as that it is consistent with protecting the interests of suspects and accuseds? Is it efficient in the sense that it achieves the objects that are set for it with the minimum use of resources and the minimum delay? Each of these standards makes its own contribution to what we see as being the single overriding test of a successful system. Is it of a kind to have and does it in fact have the confidence of the public it serves?” (MND 8092, Report pp127-8)

Decision to prosecute

A complaint for an offence against the Conservation and Land Management Act may be made and prosecuted by any police officer or any person authorised in writing by the Executive Director (CLMA section 113).

All proceedings for offences under the Wildlife Conservation Act must be taken by and in the name of the Executive Director or by and in the name of a person authorised for that purpose by the Executive Director (WCA section 26).

The Department will ensure that appropriate authorisations to make Complaints under the Acts and delegations of authority to make decisions by suitably qualified and experienced officers are in place.

In deciding whether or not to prosecute, the following issues are considered:

Is there sufficient evidence to establish a prima facie case?

Attention should be given to whether the evidence discloses a prima facie case as early as practicable in the prosecution process, but in any event, before a charge is commenced.

The question whether there is a prima facie case is one of law. This question involves a consideration of 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 a case depends upon the inferences to be drawn from the circumstances, consideration must be given to the logical nature of these inferences and the facts from which they can be drawn.

Where, in the opinion of the decision-maker, the available material does not support a prima facie case, the prosecution should not proceed under any circumstances.

Are there reasonable prospects of a conviction?

It is neither fair nor just, to the accused or the community, to proceed with a prosecution that has no reasonable prospect of resulting in a conviction or is not otherwise in the public interest.

If the decision-maker considers that, on the material available, there is no reasonable prospect of conviction then unless further prompt investigation will remedy any deficiency in the prosecution case, the prosecution should be discontinued.

The evaluation of prospects of conviction is a matter of dispassionate judgment based on a decision-maker's experience and may, on occasions, be difficult.

However, this does not mean that only cases perceived as 'strong' should be prosecuted. Generally, the resolution of disputed questions of fact is for the court and not the decision-maker or the prosecutor. A case considered 'weak' by some may not seem so to others. The assessment of prospects of conviction is not to be understood as an usurpation of the role of the court but rather as an exercise of discretion in the public interest.

The evaluation of the prospects of conviction includes consideration of:

- (a) the voluntariness of any alleged confession and whether there are grounds for reaching the view that a confession will not meet the various criteria for admission into evidence;
- (b) the likelihood of the exclusion from the trial of a confession or other important piece of evidence in the exercise of a judicial discretion. In the case of an alleged confession, regard should be given to whether a confession may be unreliable having regard to the intelligence of the accused, or linguistic or cultural factors;
- (c) the competence, reliability and availability of witnesses;
- (d) matters known to the prosecution which may significantly lessen the likelihood of acceptance of the testimony of a witness. Regard should be given to the following:
 - (i) Has the witness made prior inconsistent statements relevant to the matter?
 - (ii) Is the witness friendly or hostile to the defence?
 - (iii) Is the credibility of the witness affected by any physical or mental impairment;
- (e) the existence of an essential conflict in any important particular of the Crown case among prosecution witnesses;

- (f) where identity of the alleged offender is in issue, the cogency and reliability of the identification evidence;
- (g) any lines of defence which have been indicated by or are otherwise plainly open to the defence.

Generally a prosecution will not be discontinued -

- (a) on the basis of material not disclosed to the prosecution by the defence;
- (b) on a notification of a defence that purports to rest upon unsubstantiated assertions of fact;
- (c) if assertions or 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.

Is the institution and maintenance of proceedings in the public interest?

Despite the existence of 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. These factors include -

- (a) the trivial or technical nature of the alleged offence in the circumstances;
- (b) the youth, age, physical or mental health or special infirmity of the victim, alleged offender or a witness;
- (c) the alleged offender's antecedents;
- (d) the staleness of the alleged offence including delay in the prosecution process which may be oppressive,
- (e) the degree of culpability of the alleged offender in connection with the offence;
- (f) the obsolescence or obscurity of the law;
- (g) whether a prosecution would be perceived as counter productive to the interests of justice;
- (h) the availability or efficacy of any alternatives to prosecution;
- (i) the lack of prevalence of the alleged offence and need for deterrence, either personal or general;
- (j) whether the alleged offence is of minimal public concern;
- (k) the attitude of the victim of an alleged offence to a prosecution;
- (l) the likely length and expense of a trial;

- (m) whether the alleged offender has cooperated in the investigation and prosecution of others or has indicated an intention so to do;
- (n) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court (whether the consequences of any resulting convictions would be unduly harsh or oppressive);
- (o) whether a sentence has already been imposed on the offender that adequately reflects the criminality of the episode;
- (p) whether the alleged offender has already been sentenced for a series of other offences and the likelihood of the imposition of an additional penalty, having regard to the totality principle, is remote.

Against these factors may be weighed others which might require the prosecution to proceed in the public interest. These include -

- (a) the need to maintain the rule of law;
- (b) the need to maintain public confidence in basic constitutional institutions, including Parliament and the courts;
- (c) the entitlement of the State or other person to criminal compensation, reparation or forfeiture, if guilt is adjudged;
- (d) the need for punishment and deterrence;
- (e) the circumstances in which the alleged offence was committed.

Further special considerations apply to the prosecution of juveniles and decisions to continue a prosecution of a juvenile should have regard to:

- (a) the seriousness of the alleged offence;
- (b) the age and apparent maturity of the juvenile;
- (c) the capacity of the juvenile, if under 14, to know that at the time of doing an act, or making an omission, the juvenile knew that he or she ought not to do the act or make the omission;
- (d) the juvenile's antecedents;
- (e) any other special factor.

The following matters are not to be taken into consideration in the exercise of the discretion -

- (a) the race, sex, religious beliefs, political opinions or cultural views of alleged offender;
- (b) the possible political consequences of the exercise of the discretion;
- (c) personal feelings regarding the offender; or
- (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

Forfeiture

A clear purpose of prosecution is to strip an offender of the proceeds of crime and to forfeit objects used to commit offences. When appropriate, orders will be sought to ensure that:

- (a) an offender does not profit from the criminal conduct;
- (b) property used in the commission of an offence is subject to forfeiture;
- (c) any rights of the Crown to restitution and compensation for loss of environmental qualities or restoration of damage to the environment are protected.

Regard should be had to the rights of any innocent party who may be affected by an order.

Context

These guidelines should be read in conjunction with related policy guidelines.

Keiran McNamara
ACTING EXECUTIVE DIRECTOR

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