

**REPORT OF THE PANEL TO REVIEW THE
DEPARTMENT OF CONSERVATION AND LAND
MANAGEMENT'S PROSECUTION POLICY AND
GUIDELINES AND ADMINISTRATIVE PROCEDURES
RELATING TO PROSECUTIONS**

APRIL 2004

Letter of Transmittal

7 April 2004

The Hon. Dr Judy Edwards MLA
Minister for the Environment
29th Floor, Allendale Square
77 St George's Terrace
PERTH WA 6000

Dear Minister,

In accordance with your direction issued to the Review Panel on 18 November 2003, we present to you our Report on the Review of the Department of Conservation and Land Management's Prosecution Policy and Guidelines and Administrative Procedures Relating to Prosecutions.

Yours sincerely,


Mr Peter Johnston
Chairperson


Dr Mike Bamford
Panel Member


Mr Shane O'Donoghue
Panel Member

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EXECUTIVE SUMMARY

On 18 November 2003 the Minister for the Environment appointed a Panel comprising Mr Peter Johnston, Barrister and Senior Fellow, Faculty of Law, University of Western Australia (Chairperson); Dr Mike Bamford, Ecological Consultant of M.J. & A.R. Bamford Consulting Ecologists; and Mr Shane O'Donoghue, Senior Commercial Program Officer, Fisheries Management Services Divisions, Department of Fisheries to review the Department of Conservation and Land Management's (CALM's) Prosecution Policy and Guidelines (the Policy). This Review contains the Panel's conclusions and recommendations.

The Review covers not only the Policy itself; it also addresses issues and concerns about the way the Policy is implemented and administered. A number of these concerns were identified in submissions made to the Panel. The Panel also received relevant information from CALM in response to matters that it raised with the Department.

The Review extends beyond CALM's process of deciding when to initiate, and in some cases, withdraw, prosecutions. It makes a number of recommendations about broader aspects of CALM's enforcement procedures. These include other modes of enforcement such as warning letters and infringement notices. Importantly, the Panel has reviewed aspects of how CALM is organised to respond to possible infringements of the two principal Acts that it administers; the *Conservation and Land Management Act 1984* (the *CALM Act*) and the *Wildlife Conservation Act 1950* (the *WC Act*).

Broadly summarised the Panel has found that while the Policy itself is adequate, in general terms, some additions and clarifications would improve it. The most important of these is a more explicit and comprehensive articulation of the notion of the "public interest". The public interest is the prime consideration in deciding whether to commence or withdraw a prosecution. At the moment the Policy contains no positive definition of that concept although it refers to considerations when a prosecution would *not* be in the public interest. The Review recommends that the Policy be amended to include a definition of "public interest" that places primary emphasis on the *legislative objects* of the legislation administered by CALM. These are the conservation of biodiversity, flora and fauna and the regulation of the use of public lands and marine areas.

Further, the Panel has concluded that while the administrative structure and process of CALM is generally appropriate to respond to offence situations, it is capable of improvement in ways that should promote public confidence and support for enforcement actions. The maintenance of that support is crucial to ensuring respect for the objectives of the relevant legislation.

To that end, the Review recommends the constitution of a prosecution advisory panel, preferably including the input of an independent external member such as an ex-magistrate, to review the relevant public interest considerations before prosecutions are commenced. This should assist, among other things, in the early identification of issues that could later become contentious and produce discord.

The Review also proposes that CALM introduce a system of informal internal review of decisions regarding lesser enforcement action such as Letters of Warning and Infringement Notices. Persons currently receiving the same have no clearly dedicated and publicised process allowing review of those decisions, especially where they fear that adverse inferences may be drawn from lesser enforcement actions that could prejudice their applications to CALM for commercial licences.

The Review recommends specific changes to the structure of CALM's enforcement decision-making and management. These in the main follow innovations currently being considered for the Department of Environment following a review of its compliance management. The Panel believes these changes could assist CALM in achieving greater consistency in enforcement action, particularly between different regions of the State. The recommendations are also directed to systemic improvements, such as the standardising of offence reporting and recording. This in turn would allow more effective monitoring of the system to ensure consistency.

In consequence of these recommendations regarding enforcement management, the Review recommends some alterations to the documentary instruments that presently guide CALM's enforcement action. The changes are intended to distinguish more clearly between prosecution decision-making, general enforcement management, and specific internal procedures. In place of the existing single Policy the Review proposes that there be:

- Enforcement and Prosecution Policy;
- Enforcement Management Policy and Framework; and,
- Standard Operating Procedures.

At least the first of these documents should be externally accessible for public information and guidance. The third would function as an operations manual for CALM officers.

Peter Johnston (Chair)

Michael Bamford

Shane O'Donoghue (Members)

ACKNOWLEDGEMENT

The Panel acknowledges and wishes to thank Ms Clair Hogg from the Department of the Premier and Cabinet for the invaluable assistance she provided as Executive Officer, research assistant and coordinator for the Review.

RECOMMENDATIONS

NUMBER	RECOMMENDATION
1.1	A CALM prosecution advisory panel be established, to assist in determining whether, in the public interest, particular prosecutions should be commenced.
1.2	Consideration be given to appointing as the third member a person external to the Department. This should be a person with the status, experience and independence of a retired magistrate.
2	The definition of “to take” in the respective Acts administered by CALM be amended to express more relevantly the essential elements of notion not incompatibly with the common understanding of the term.
3	The Panel recommends that if a new <i>Biodiversity Conservation Act</i> were not to be implemented for some time, separate consideration should be given to amend the definition of “to take” in the <i>WC Act</i> in the interim.
4	CALM seek advice and assistance from the State Solicitor’s Office and the Police Media Section concerning ways in which it may more extensively communicate with the media and public about prosecutions.
5.1	CALM develop and implement a system of internal review to enable a person to raise matters arising from all enforcement actions other than prosecution.
5.2	Letters of Warning and Infringement Notices should contain advice regarding the system of internal review.
5.3	All enforcement actions across CALM should be recorded to permit CALM to monitor these actions to ensure consistency and accountability.
6	The Minister for the Environment consider whether CALM decisions to revoke or refuse licenses under the Acts administered by CALM, particularly where prior convictions may be taken into account, should be subject to a process of internal and/or external independent review.
7	Any revised Prosecution Policy and Guidelines should be regularly reviewed (without prescribing a particular period).
8.1	<ol style="list-style-type: none"> 1) CALM replace its current Prosecution Policy and Guidelines with the following instruments: <ol style="list-style-type: none"> i) An Enforcement and Prosecution Policy; ii) An Enforcement Management Policy and Framework; iii) Standard Operating Procedures.

8.2	At least the first of these instruments (in Recommendation 8.1) should be available to the public.
9	The Minister consider whether the legislation administered by CALM should contain a statement of the statutory objectives of the legislation.
10	A statement to the following effect be included in the Guidelines. <p style="margin-left: 40px;">“A significant factor in assessing whether, in the public interest, to initiate or withdraw a prosecution should be the statutory objectives behind the legislation administered by the Department. The extent to which a prosecution will serve the purpose of maintaining public respect and support for the protection and conservation of biodiversity, flora and fauna and the regulation of the use of public lands and marine areas, should be the primary consideration in a decision to prosecute.”</p>
11	CALM consider adopting the alternatives and additions suggested in Appendix G to this Report. These alternative criteria elaborate some aspects of the public interest statement proposed in the previous recommendation.

1. ESTABLISHMENT OF REVIEW AND TERMS OF REFERENCE

On 18 November 2003, the Minister for the Environment, Hon. Dr Judy Edwards MLA, instituted a Review of the Department of Conservation and Land Management's Prosecution Policy and Guidelines and Administrative Procedures Relating to Prosecutions. The purpose of the Review is as follows:

The review panel will provide advice directly to the Minister for the Environment in relation to the Department of Conservation and Land Management's (CALM's) Prosecution Policy Guidelines and its administrative procedures and practices for compliance and enforcement activities.

The review panel will also be asked to provide any relevant advice on potential improvements to the existing statutory provisions under the Conservation and Land Management Act 1985 and the Wildlife Conservation Act 1950 (and their respective Regulations) and whether there is a need for reform.

The Review's terms of reference are:

To advise the Minister whether changes are required to CALM's Prosecution Policy Guidelines and administrative procedures and practices for compliance and enforcement, in order to ensure that they support the Department's statutory functions to administer the provisions of the Conservation and Land Management Act 1985 and the Wildlife Conservation Act 1950 and are fair, consistent and in the public interest.

On 20 November 2003 the Minister appointed a Review Panel comprising the following:

- Mr Peter Johnston, Barrister and Senior Fellow, Faculty of Law, University of Western Australia (Chairperson);
- Dr Mike Bamford, Ecological Consultant of M.J. & A.R. Bamford Consulting Ecologists; and,
- Mr Shane O'Donoghue, Senior Commercial Program Officer, Fisheries Management Services Divisions, Department of Fisheries

2. THE BACKGROUND TO THE REVIEW

The Minister initiated this Review after significant public interest had been raised with respect to CALM prosecutions. The CALM Prosecution Policy and Guidelines (the Policy) had not been reviewed since 2001¹ and recent controversies meant it was timely to conduct this Review. Concerns had been expressed in public and in Parliament with

¹ A copy of the current Policy is set forth in Appendix A.

respect to a number of specific prosecutions that had been instituted in the latter part of 2003. These prosecutions basically fell into three categories.² First, a prosecution alleging unlawful feeding of wildlife. This prosecution was subsequently withdrawn.³ The second group related to land clearing.⁴ The third group comprised prosecutions instituted against two farmers who allegedly cleared tracks on the Seagroatt Nature Reserve west of Narembeen. The Reserve has been a focal point in community debate about the use of deep drainage as a means of reducing land degradation resulting from encroaching salinity. In the latter cases, the Executive Director of CALM subsequently decided to withdraw the prosecutions.⁵

While these particular instances provided the background to this Review, it is evident from the terms of reference that the Minister's main purpose was to seek advice generally with a view to improving, where appropriate, the policies and practices underlying prosecution and enforcement actions by CALM.

The principal incidents that preceded this Review are discussed more fully below. However, several points should be made at the outset. First, the task of the Review Panel (the Panel), where prosecutions were withdrawn, is not that of a substitute court or commission of inquiry. Its function is not to decide whether those prosecutions would have been successful if they had proceeded to trial. The Panel's purpose in reviewing those incidents is to understand how the current administrative process operates with a view to drawing more general conclusions about how that process might be improved and made more effective and accountable.

While the specific incidents are important, the Panel has sought to ensure it addresses the central and broader tasks that it is required to address.

² The Hon R McSweeney raised a fourth incident in the Legislative Council on 16 October 2003. This related to the taking of trees and logs on private property without the appropriate license under regulations made under the *Conservation and Land Management Act 1984* (the CALM Act). As this is the subject of a continuing prosecution, to avoid prejudicing the proceedings, this Review does not canvass any issues concerning it. ("*Native Vegetation on Private Property, Access*", *Parliamentary Debates*, Legislative Council, p. 12150 – 12154).

³ The charging of Mr Jonathan Jones for feeding wildlife without a license as part of his commercial tour operation was raised with the Minister for the Environment by Mr B.K. Masters on 25 September 2003 (*Parliamentary Debates*, Legislative Assembly pp. 11748-11750). This charge was subsequently withdrawn by CALM as "CALM accepted there were inconsistencies in relation to the feeding of wild native birds elsewhere in the State and it would be more appropriate to resolve these inconsistencies in the first instance" ("Wildlife feeding charges withdrawn", 14 October 2003, <http://www.calm.wa.gov.au/news/news.cgi?item=1066379271>)

⁴ These prosecutions were undertaken by the Department of Agriculture under the *Soil and Land Conservation Act 1945*, not by CALM.

⁵ CALM withdrew these charges against the two farmers as "...a gesture of goodwill toward farmers and the farming community". The Executive Director "...reviewed both prosecutions and decided to withdraw the charges following receipt of further legal advice from the Crown Solicitor's Office." ("Statement by CALM Executive Director Keiran McNamara", 16 December 2003, <http://www.calm.wa.gov.au/news/news.cgi?item=1071540124>). For a fuller discussion of the Executive Director's reasons for withdrawing these prosecutions see pp.18-19 of this Report.

Secondly, the wildlife and land clearing issues, because of their special features, are the subjects of separate and discreet inquiries.⁶ Accordingly, they are not part of this Review except where some aspect of them touches upon, or illuminates, matters that are relevant and central to this inquiry.

3. DISTINCTIONS ADOPTED BY THE PANEL IN REVIEWING PROSECUTION POLICY AND GUIDELINES

a. Distinguishing between Forensic and Discretionary Elements of the Policy.

The Policy, as written, does not strictly distinguish between its various components. The Panel has found it useful, however, to draw a broad distinction between what may be called the *forensic elements* of the Policy and the elements that are more directly concerned with *discretionary considerations*.

The forensic aspects relate essentially to legal matters such as the admissibility of evidence, its sufficiency to support a charge, the credibility of witnesses, and issues of legal interpretation. Where CALM prosecutions are concerned, the Department seeks the advice of the State Solicitor's Office⁷ about those matters.⁸ They involve largely technical considerations in which there is little scope for the exercise of discretion. Evidence, for example, will be judged to be either sufficient or not.

The 'discretionary' aspects involve the particular features and circumstances of a breach of the legislation. Prime among these is the public interest. Other discretionary considerations include how substantial the breach was, the age of the offender, whether the offender had a history of breaches and similar considerations.

Of course, public interest considerations often overlap with forensic aspects. The two are not inseparable. For example, bringing a prosecution that is unlikely to succeed is contrary to the public interest as it may lead to disrespect for the rule of law.

⁶ On 10 October 2003, the Minister for the Environment announced an independent review of CALM guidelines for commercial tour operators interacting with and feeding wildlife ("Minister calls for review of CALM guidelines" www.naturebase.net/news/news.cgi?item=1066616022). A working group has been established to try to create some common ground on the draft land clearing regulations. Recent amendments to the Environmental Protection Act 1986 (WA) introduced the offence of environmental harm, which was designed specifically to protect against excessive land clearing. Land clearing regulations have been drafted with a view to clarifying how the environmental harm provisions will be enforced. These are currently under discussion by a working group.

⁷ Previously the Crown Solicitor's Office. The name changed on 1 January 2004.

⁸ Some criticisms were made to the Panel about the forensic criteria in the Policy. Since these essentially fall within the domain of the State Solicitor's Office, the Panel has not commented on them.

The submissions to the Panel were mainly directed to the application of the discretionary considerations set forth in the Policy. These will be considered later in this Report.

b. Distinction between Factors relating to Institution and Withdrawal of Charges.

This Review covers all aspects of the prosecution process. The Panel has distinguished between the considerations that are relevant to the institution of a prosecution and those that should be taken into account when deciding to withdraw a prosecution. Some of these coincide or overlap. In other instances, where relevant factors may have justified the institution of charges, further consideration might lead to the withdrawal of the prosecution. A classic example would be where further evidence or explanation indicates the charge could not be proven.

c. Distinction between Prosecution and Alternatives to Prosecution

As currently expressed, the Policy requires consideration of alternatives to prosecution. Specifically, it states:

“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 are better served by an alternative to prosecution.
- (ii) Infringement Notices for minor offences; and
- (iii) prosecution for all other offences.”

Enforcement actions other than prosecution therefore include oral warnings and advice, Infringement Notices, Letters of Warning, and other written action.

The Panel has considered aspects of these other modes of enforcement in this Report.

4. THE PROCESS EMPLOYED BY THE PANEL

To understand the issues and concerns about the Policy and associated administrative procedures and practices, and to obtain relevant views and information, the Panel did the following.

a. Consultation with the Minister for the Environment

The Panel met with the Minister for the Environment, Hon. Dr Judy Edwards MLA, on 16 December 2003 in order to gain an understanding of the objectives of the Review.

b. Preliminary Meeting with the Executive Director of CALM

On 19 December 2003 the Panel met the Executive Director of CALM, Mr Keiran McNamara, to develop an understanding of the way CALM conducts its prosecutions, ascertain the availability of relevant information and to establish contact with officers who could provide further input about the prosecution process.

c. Survey of Parliamentary Debates and Media Statements

The Panel conducted a survey of parliamentary debates, and articles, editorials, statements and letters in the media⁹ so that it could appreciate different aspects of public opinion regarding the issues raised by the Review. The substance of the Parliamentary Debates is summarised in Appendix D to this Report.

d. Survey of Comparative Materials

An important source of precedents is available to the Panel. These are prosecution policies that have been adopted by other government agencies. Basically, these have been developed at two levels. The first are policies that have been formulated by prosecution authorities such as the Commonwealth and Western Australian Directors of Public Prosecutions. The second are policies from departments in Western Australia and comparable departments elsewhere in Australia. To a large extent these are similar and share common features. In a few instances the Panel has selected particular formulations from these where it considers they would be an improvement on the way the Policy is presently expressed.¹⁰

e. Call for Submissions

A number of key organisations were identified as either having expressed a direct interest in the Policy or whose members could be expected to have an interest in the Review. These organisations, as well as relevant government agencies and individuals that had expressed their interest in making a submission to the Panel, were invited to provide submissions. The Review was well publicised by the Minister for the Environment and in

⁹ The three major sources of media were articles, letters and editorials in *The West Australian*, *Farmers Weekly* and *The Countryman*.

¹⁰ See Section 11)b) below and Appendix G.

the media. Following the receipt of written submissions, submittees were invited to make oral presentations if they so wished.

Formal written submissions were received from:

- a government agency associated with tourism;
- five non-government business associations;
- four conservation organisations; and,
- three individuals.

In addition, informal submissions were received from a non-government business association and a conservation organisation.

The submissions made by the various persons, agencies and organisations are summarised in Appendix B to this Report.

A table of the issues raised in the submissions is provided in Appendix C.

f. Oral Presentations Enlarging on Written Submissions

The Western Australian Farmers' Federation (Inc.)¹¹ and two individuals who provided written submissions made oral presentations made to the Panel on 2 March 2004

g. Interchange with the Executive Director and Chief Wildlife Officer of CALM

The Panel met with the Executive Director and the Chief Wildlife Officer of CALM on 23 February 2004. This allowed the Panel to gain a better understanding of a number of issues that had been raised in the course of its deliberations. This meeting also provided an opportunity for the Executive Director and Chief Wildlife Officer to respond to issues raised in the written submissions.

h. Further Meeting between the Minister for the Environment and the Chair of the Panel

On 25 March 2004, the Chair of the Panel met the Minister for the Environment. The meeting provided an opportunity for the Chair to update the Minister on the progress of the Review. The Minister also informed the Panel, through the Chair, of matters that had been raised with her through individual representations and at public meetings concerning the subject of the Review.

¹¹ Represented by Mr Colin Nicholls, President and Mr Andy McMillan, Director of Policy.

i. Further Meeting between the Chair of the Panel and the Executive Director, CALM

On 29 March 2004, the Chair of the Panel met with the Executive Director of CALM. This provided a final opportunity for the Executive Director to respond to certain matters raised by the Review and to clarify or correct factual assumptions made by the Panel.

5. THE CONSTITUTIONAL CONTEXT

It was evident from several submissions to the Review that, in some cases, there is public confusion about the proper roles of the Minister, the Executive Director and individual departmental officers of CALM in the prosecution process. It therefore may be helpful if the Panel explains at the outset the constitutional context in which prosecutions occur.

a. The Conventions affecting the Prosecutorial Function (Exercise of Public Power of the State)

A number of conventions¹² constrain the way the prosecutorial function should be performed. These conventions are not constitutional in the strict sense of enacted law. Rather, they are basic rules, principles and practices that have developed, in some cases over centuries, which regulate the relationship between the government and the individual citizen. The most basic of these is that the prosecutorial process should be apolitical, neutral and impartial. The corollary is that the process should not be arbitrary, inconsistent or unfair. The prosecutor should be seen as agent of the people in maintaining the rule of law. For these reasons, it has been considered appropriate to preserve prosecution from political influence.¹³

A consequence of the principle of neutrality is that, normally, persons or groups not part of the prosecution process should not be in a position to influence particular prosecutorial decisions.

b. The Minister's Role and Ministerial Accountability

One consequence of the convention that prosecutions should be apolitical is that a Minister who is responsible for administering a particular Act should not, as a general principle, be directly involved in determining which prosecutions under that Act should

¹² Conventions are unwritten rules of practice and principles that have evolved over time as part of the 'Westminster' tradition of responsible government as it has been adapted to Western Australian political institutions.

¹³ This is not always the case. On occasions particular statutes may provide that prosecutions may not be instituted without ministerial consent. That is not the case, however, with respect to the CALM prosecutions discussed in this report.

proceed.¹⁴ This is an essential safeguard to protect citizens against the misuse of executive government power.

That is not to say that the Minister can simply ignore public criticism of prosecutorial practices that affects her or his area of responsibility. Acts stand to be administered in a democratic context of 'representative government'. An important aspect of that system is ministerial accountability to the Parliament and ultimately to the people of the State. Where criticism is voiced, the Minister must determine whether remedial steps are necessary either by administrative direction or, where more serious, legislative reform.

c. The Role of the Head of Department and the Delegation of Responsibility to Officers

Given that the Minister should stand at arm's-length from the prosecutorial process, the primary responsibility for ensuring that prosecutions are properly instituted lies with the Head of Department. In this case that is the Executive Director of CALM.¹⁵

The Executive Director cannot be, nor should be involved in the everyday process of deciding which particular prosecutions should proceed. The exercise of that function, including the powers and discretions that go with it, is a task for appointed departmental officers. They exercise these powers under delegation or authorisation by the Executive Director.¹⁶ The Executive Director does not, however, relinquish the responsibility for maintaining the general oversight of prosecution administration. In fact, the Executive Director retains the residual power to make individual prosecutorial decisions. This includes, in appropriate cases, the discretion to intervene in the normal prosecutorial process to review a particular prosecution and, if he or she sees fit, to withdraw it for proper and relevant reasons.

d. Application to the Present Review

Translated to the circumstances of this Review, the Minister for the Environment, in seeking advice in relation to CALM's Prosecution Policy and Guidelines, should be seen as discharging her ministerial accountability to Parliament and the public in response to community concern. The object of this Review is not to enable her to intervene directly in the prosecution process. That would be inconsistent with the convention of political neutrality mentioned above. The object is, rather, that the Panel should investigate the

¹⁴ This principle is reflected in the answers provided by the Minister for the Environment to a question in the Legislative Assembly of 25 September 2003 Parliamentary Debates p. 11750, and also on behalf of the Minister for the Environment to a question in the Legislative Council on 11 December 2003, p. 14774. The minister's answers are reproduced in Appendix E.

¹⁵ Section 34 of the *CALM Act 1984* (WA) confers upon the Executive Director of CALM the necessary powers to perform the relevant functions under the Act.

¹⁶ Under s 113 of the *CALM Act* the Executive Director can authorise a person of to institute prosecutions.

concerns expressed by the public and interested groups. In the light of information received and submissions made to it, the Panel can then make recommendations to the Minister about ways in which CALM's prosecution and enforcement policies and processes could be improved, thereby promoting public confidence in these processes.

6. THE LEGAL FRAMEWORK

a. The Acts under which CALM conducts Prosecutions

The two main Acts under which prosecutions are instituted by CALM are the *Conservation and Land Management Act 1984* (WA) (the *CALM Act*) and the *Wildlife Conservation Act 1950* (WA) (the *WC Act*).

Under the *CALM Act*, CALM, subject to the Executive Director, has responsibility for administering a wide range of public lands. These include the following kinds of reserves: national parks, nature reserves, conservation parks, State forest, timber reserves, marine nature reserves, marine parks and marine management areas. The Department also has significant licensing responsibilities including licenses and permits to enable people to enter upon, and conduct commercial operations on and remove produce and materials from, forests and Crown land.¹⁷

An important function under the *CALM Act* is the conservation of biodiversity. To aid the carrying out of that function, the Act provides for a number of offences. These include the unlawful taking of flora and fauna.¹⁸ Other offences under the *CALM Act* include unlawful taking of forest produce,¹⁹ unlawfully lighting fires,²⁰ setting fire to bush or grass without notice to forest officer,²¹ and unlawful occupation of land.²²

Section 107 of the *CALM Act* sets out a wide range of miscellaneous offences. These include obliterating any departmental sign or mark, unlawfully damaging any fence of a reserve, and refusing to comply with a lawful direction of an authorised officer. It is also an offence to obstruct a departmental officer in the performance of any function under the Act.²³

As well as prosecution, s 114A of the *CALM Act* empowers certain departmental officers to issue infringement notices.

¹⁷ *CALM Act* s 88.

¹⁸ But only in marine nature reserve, marine park or marine management areas.

¹⁹ s 103.

²⁰ s 104.

²¹ s 105.

²² s 106.

²³ s 115.

The other Act under which CALM conducts prosecutions in relation to both flora and fauna is the *WC Act*. Section 6 of that Act provides definitions for “fauna”, “flora” and “to take”.²⁴ The principal offences under this Act include taking protected fauna without a license,²⁵ unlawful possession of protected fauna²⁶ and taking protected flora. The Act also provides for licenses to possess and deal with protected fauna. Corresponding offences are provided for failure to comply with the Act or licensing conditions. Taking of flora is also regulated by a licensing system. Taking of flora on Crown land, except as authorised by a license, is an offence.²⁷ On private land, flora can be taken with the consent of the owner or occupier; however, if it is to be sold a license is required.²⁸ In the case of declared rare flora, the Minister’s written consent is required on all land tenures.²⁹

b. The Scope and Purpose of the Relevant Laws

The *CALM Act* and the *WC Act* do not contain an express provision that spells out the purposes and objectives of the Act. Nevertheless, it is reasonably clear that an important aspect of each Act is the protection and conservation of biodiversity, flora and fauna, and the regulation of the use of public lands and marine areas.

For reasons that will be explained further in this Report, the Panel considers the scope and purpose of the relevant legislation are significant features of how the Acts should be administered. As a general principle, it may be expected that any prosecution policy and enforcement guidelines developed to implement the Acts should be consistent with their statutory objectives.³⁰

c. The Relationship of the Objectives of the Laws to the Public Interest

The scope and purpose of legislation has a further significance. One of the main considerations in considering whether to prosecute is the “public interest”. The concept and meaning of the “public interest”, as it relates to the legislation administered by CALM, will be discussed later in this Report. At this point is sufficient to note that, in the Panel’s opinion, any assessment of the public interest must take into account the purposes of the legislation administered by CALM.

²⁴ The definitions of ‘to take’ were criticised in submissions made to the Panel. The Panel’s recommendations in that respect are at Section 10(c)iii)b) of this Report.

²⁵ Section 16 deals with “taking of protected fauna”.

²⁶ Section 16A. Other offences relevant to fauna are provided under *WC Act* are ss 17 and s. 17A.

²⁷ See *WC Act* ss 23A, 23B, 23C.

²⁸ See *WC Act* s 23D.

²⁹ See *WC Act* s 23F.

³⁰ The concept of ‘scope and purpose’ has long been used by courts as a measure of how powers under an Act should be exercised; see *Water Conservation and Irrigation Commission (New South Wales) -v- Browning* (1947) 74 CLR 492, at 505.

d. The Effect of the Proposed Transition to More Contemporary Legislation

Before leaving the legislative framework, it is fair to say that the *WC Act* reflects some language and concepts that may have been appropriate in 1950 but are no longer so. It is self-evident that the prosecution process is more likely to receive public support where the legislation under which prosecutions are commenced reflects contemporary values and is readily understood by the community. Prosecutions under an Act that are not consistent with contemporary values and understandings can bring enforcement into disrepute. It is therefore relevant to note that currently steps are being taken to introduce a *Biodiversity Conservation Act* with the intention of replacing the *WC Act*.

7. THE PURPOSE OF PROSECUTION POLICIES

Prosecution policies have become an important feature of enforcement for offences across a wide variety of statutes.³¹ Originally devised to guide prosecution authorities,³² such as officers in the Crown service or those employed by Directors of Public Prosecutions, these instruments have now been adapted for use by departments and public authorities in pursuing prosecutions under the specific legislation that they administer.

It is important to appreciate that these administrative policies do not have legal effect. They are not the equivalent of statutes. Their function is to provide *guidance* as to how prosecutorial discretion should be exercised across a wide range of circumstances.

The main purpose of a prosecution policy is to ensure consistency of administration and to avoid arbitrary or discriminatory law enforcement. The latter is a direct contradiction of the rule of law. Further, unfair or unequal application of the law substantially undermines community respect. A prosecution policy cannot guarantee that every case will be treated exactly the same as another like it. This is because circumstances can vary markedly from case to case.

³¹ Prior to the development of prosecution policies, there was considerable evidence that government regulatory agencies, in particular, adopted very selective and arbitrary enforcement practices. This often gave rise to allegations of 'capture' by sectional interests. The original policies aimed to introduce consistency and fairness into prosecutorial decision-making. See P Grabovsky and J Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Agencies* (Oxford University Press, 1986) 189-201.

³² "Prosecution Policy of the Commonwealth", Second Edition 1990, Revised 1998, <http://www.cdpp.gov.au/Prosecutions/Policy/ProsecutionPolicy.pdf>
"Director of Public Prosecutions Act 1991: Statement of Prosecution Policy and Guidelines 1999" (Western Australia), <http://www.dpp.wa.gov.au/content/PolicyProc.pdf>

On the other hand, a prosecution policy should not be administered rigidly as if it had the force of law.³³ To apply a policy without proper regard to relevant circumstances and context is to act unlawfully by fettering the prosecutorial discretion.

8. FEATURES OF THE CALM PROSECUTION POLICY AND GUIDELINES (2001)

a. Amendments to the Policy

At the time the Panel commenced this Review, the CALM Prosecution Policy Guidelines (1999) displayed on the CALM intranet site was not the instrument used by CALM officers in making prosecution decisions. This was because the Policy was reviewed in 2001 to ensure it was consistent with a ‘whole of government’ uniform approach for all regulatory offences. Specifically the Executive Director wished to have addressed the matters of a clear definition of ‘public interest’ and alternatives to prosecution where these may have a “better conservation outcome”.³⁴ As a result of the Director of Public Prosecution’s advice, three amendments were added to clarify the document. These changes were:

- The inclusion of “and” in the title to become the “Prosecution Policy *and* Guidelines”;
- The inclusion of words to the section “Is there sufficient evidence to establish a *prima facie* case?” to clarify when evidence discloses a *prima facie* case. The first paragraph now reads: “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.*”
- A qualification in the section on Forfeiture, part (c), so it now reads “any rights of the Crown to restitution and compensation *for loss of environmental qualities or restoration of damage to the environment* are protected.”

b. Analysis of Key Features of CALM’s Prosecution Policy and Guidelines

As mentioned previously, for the purposes of this Report the Panel has notionally divided the considerations affecting prosecutorial discretion into two. The first relate to *forensic factors*. These concern the technical aspects of an infringement, such as whether there is sufficient credible evidence to support a prosecution. The Panel does not intend to deal with that aspect. The second set of criteria address *discretionary factors*, and in particular, whether a prosecution is in the public interest. The Panel has directed its findings and recommendations to that aspect.

³³ *British Oxygen Ltd v Minister for Technology* [1971] AC 610.

³⁴ Letter from Dr Wally Cox, Executive Director, CALM to Mr Robert Cock, Director of Public Prosecutions, 3 April 2003.

As presently expressed, the basic principles underpinning the Policy are designed to achieve the following outcomes:

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

These objectives are based on considerations of fairness, openness, accountability, efficacy and consistency. The ultimate aim of the Policy is that it should “apply uniformly and fairly throughout Western Australia.”

The Policy recognises that prosecutions have an impact on the rights of alleged offenders, the environment and the community generally. It also acknowledges that the decision to *continue* a prosecution is as important as the decision to charge. However, the decision to continue or withdraw a prosecution may take into account factors beyond those that most immediately affect an officer when deciding to lay a complaint. The decision involves consideration of a number of factors. The most important of these, in the Panel’s opinion, is the public interest.

c. The Concept of the Public Interest

The Policy poses as a central question: *Is the institution and maintenance of proceedings in the public interest?*³⁵

It is not possible to give a single and uniform meaning to the notion of public interest. To start with, what constitutes the public interest often requires the balancing of a number of

³⁵ The basis on which the public interest is a relevant factor in considering whether to institute a prosecution is expressed by a former English Attorney General, Sir Hartley Shawcross, QC, as follows:

It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should prosecute ‘whenever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest.’ That is still the dominant consideration (House of Commons Debates, Vol 483, col. 681, 29 January 1951).

For a discussion of prosecutorial discretion and its relationship with the public interest in the Australian context, see M Rozenes QC, ‘Prosecutorial Discretion in Australia’, Australian Institute of Criminology conference, Prosecuting Justice, Melbourne, 18-19 April 1996, 7ff; <http://www.aic.gov.au/conferences/prosecuting/rozenes.pdf>

different interests and values,³⁶ just as a molecule is composed of different atoms. In fact, the concept of ‘public interest’ sometimes involves weighing possibly contradictory, sectional elements of the public good against one another.³⁷ Further, the public interest is something that varies according to circumstances and context. The Panel notes that the Minister for the Environment provided an explanation to Parliament of her understanding of ‘public interest’, as it related to the prosecution of Mr. Carmody on 11 December 2003.³⁸ Her explanation generally accords with the Panel’s own understanding of the concept.

The most significant aspect of the public interest is, therefore, the scope and purpose of the Acts administered by CALM. Prosecutions should therefore always be directed to the goal of ensuring how the statutory objectives can best be achieved in the case of a particular prosecution. To the extent that a particular prosecution results in the deterrence, both of an individual and the public generally, the prosecution is in the public interest. If, however, a prosecution is likely to bring the legislation and its administration into disrepute, the public interest is not served. The ultimate and therefore predominant concern for CALM, as the Panel sees it, should be land management and conservation of biodiversity. That objective is for the general benefit. Sectional interests, such as those of particular constituencies, may be taken into account in assessing the overall public interest. However, a sectional interest, in the Panel’s opinion, should not be elevated to become the prime consideration.

The Policy does not define ‘public interest’ in specific terms. It does, however, set forth certain considerations that would be *contrary* to the public interest. These include whether the incident is ‘trivial’, ‘stale’, ‘counterproductive to the interests of justice’, or based on obsolete laws.

³⁶ The Worksafe Western Australia Prosecution Policy includes a statement about this aspect. It is reproduced in Appendix G to this Report.

³⁷ See, for example, Mason J in *Sankey v Whillam* (1978) 142 CLR 1, at 95-96. For example, in the field of restrictive trade practices a Tribunal called upon to assess whether, in the ‘public interest’, a price fixing agreement between traders should be terminated should start by putting significant weight on the interest of consumers in lower prices but the Tribunal might also have to take into account whether the agreement might produce more stable prices; *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 Commonwealth Law Reports 361. Where conservation is concerned, as the Panel will explain, the starting point is preservation of biodiversity consistent with the objects of the legislation, but that is not the exhaustive concern of the legislation.

³⁸ See Appendix F

d. Guidance from Department of Environment's Draft Enforcement and Prosecution Policy, Guidelines and Compliance Management System

The Department of Environment underwent three reviews covering all aspects of its operations.³⁹ This culminated in the Minister for the Environment announcing changes to environmental regulation in May 2003. The measures that were taken in response involved the establishment of a dedicated Pollution Response Unit and the Environmental Enforcement Unit as well as extra licensing officers and increased resources to address contaminated sites legislation, management and remediation.

One of the key roles for the Environmental Enforcement Unit is to improve environmental regulation capacity across the Department of Environment.⁴⁰ The Environmental Enforcement Unit provides the Department of Environment with an enhanced investigation capacity and, importantly, a central group to both support and monitor enforcement outcomes across the Department. This is intended to promote consistency, impartiality and accountability.

From the information provided to it about the establishment of the Environmental Enforcement Unit and the associated development of supporting policy and operational procedures, the Panel concluded that the Department of Environment has developed an enforcement management system to suit an organisation that, like CALM, has officers with combined roles and varying enforcement skill levels. The Panel is of the view that the some of the measures adopted concerning the Department of Environment's enforcement management system could provide useful guidance for CALM's enforcement management.⁴¹

The Panel notes these measures. It has taken them into account when proposing the development of similar enforcement management procedures later in this Report.⁴²

In that respect, information provided by the Chief Wildlife Officer for CALM, indicates that CALM is considering moving into an improved front-end enforcement management system. In the Panel's opinion, incorporating some of the features of the Department of

³⁹ The most relevant of those reviews for the purposes of this Review is the "*Review of the Enforcement and Prosecution Guidelines of the Department of Environmental Protection of Western Australia for the Minister for Environment and Heritage*" by Dr Brian Robinson AM FTSE.

⁴⁰ To provide relevant experience and guidance senior officers from the WA Police Service and the Department of Fisheries were seconded to the unit for a period of 12 months.

⁴¹ The Panel considers Recommendations 2, 3, 4, 5, 6, 7, 11, 16, 17 and 22 of the "*Review of the Enforcement and Prosecution Guidelines of the Department of Environmental Protection of Western Australia for the Minister for Environment and Heritage*" (the Robinson Report), *ibid*, provide useful guidance for measures that could be adapted to CALM's organisation. These are set forth in Appendix H of this Report.

⁴² Refer to Section 11)b) of this Report.

Environment's model should enable CALM to develop better procedures to deal with or handle many of the problems and complaints concerning its prosecution enforcement.

9. CALM'S MANAGEMENT OF PROSECUTION ACTION

The enforcement activities of CALM cover a broad spectrum of offences. This is due to the different types of public lands vested in it and the wide-ranging nature of its business activities. It reflects, historically, the different Government departments involved with forests, national parks, conservation reserves and marine parks that were amalgamated to form CALM in 1985. The different types of officers carrying on a role to enforce CALM legislation also reflect the Department's establishment. The officers concerned have differing levels of powers. These differing levels seem to be commensurate with the level of compliance skills and support available within the separate areas and regions in which the different types of officers work. The types of officers exercising powers under CALM legislation are: Wildlife Officers, Forest Officers, National Park Rangers and CALM Officers. Forest Officers, for example, are predominantly concerned with forest management. Wildlife Officers,⁴³ on the other hand, will have considerable experience in compliance activities and more extensive training. The Panel notes that all officers concerned with enforcement have the same basic training course, but that Wildlife Officers undertake further specialised enforcement training.

Under s 113 of the *CALM Act*, the Executive Director of the Department is charged with the responsibility of initiating action under that Act and section 26(3) of the *WC Act* states: "All proceedings in respect of any such offences shall be taken by and in the name of the Executive Director or by and in the name of any person authorised in that behalf by the Executive Director." The Executive Director has delegated this power to the Chief Wildlife Officer.

Trained officers develop prosecution briefs following an investigation and subsequent breach report. Breach reports recommending prosecution are forwarded to a central officer within CALM, this being the Supervising Wildlife Officer. The Supervising Wildlife Officer reviews the breach report in relation to the available evidence and the establishment of a *prima facie* case. The Supervising Wildlife Officer also considers issues of public interest in line with the Policy and drafts a covering report to the Chief Wildlife Officer in regard to the merits of the recommended prosecution.

CALM's management of enforcement actions are underpinned by a series of Instructions to Wildlife Officers and Standard Operating Procedures. These documents apply to CALM staff undertaking compliance actions and provide sound guidance across key operational areas. The Panel notes, however, that these documents do not cover all areas of compliance activity across CALM responsibilities.

⁴³ Section 20 of the *WC Act* outlines the authority of Wildlife Officers in undertaking their duties as a law enforcement officer.

The Panel will later make recommendations about how the Department's prosecutorial expertise and experience could be more evenly distributed and accessible to enforcement officers at the grassroots level. Those recommendations will also address how, through training of officers and the institution of appropriate, centralised checks and balances, the compliance process could be enhanced.

10. DISCUSSION OF ISSUES AND FINDINGS.

a. Specific Findings regarding CALM's Management of Enforcement Action

In terms of the way in which CALM is organised to discharge the prosecutorial function, the Panel considers that, subject to the recommendations it makes below, the administrative process in regard to prosecution across the Department is generally sound. Further, it conforms to similar Western Australian Government Departments with a compliance role.

The Panel has, however, noted some specific features of CALM's enforcement management process that it regards as capable of further development. These are:

- 1) The Supervising Wildlife Officer does not appear to have a uniform checklist to record the basis for each prosecution decision. Such a checklist would improve consistency and accountability of decision-making and as a result, assist any review by the Executive Director.
- 2) There is no explicit process to identify the individual prosecution decisions that warrant review by the Executive Director.
- 3) There is no mechanism, such as the advisory panel employed by the Department of Fisheries,⁴⁴ in place to present a wider review of the "public interest" considerations underpinning each decision to prosecute.

The Panel will later propose steps that can be taken to address these matters.

b. Findings and Matters arising from Submissions

Generally speaking, most of the submissions made to the Review clearly distinguished between the content of the *Policy itself* and CALM's *administration* of the prosecution process. For the most part, the submissions accepted that the Policy was appropriate. There were suggestions that some aspects, such as the meaning of 'public interest', could be better expressed but overall these amendments were not substantial. The greater part of the concerns addressed to the Panel related to how the Policy was implemented in practice (see Appendices B and C).

⁴⁴ The Panel enlarges on this in Section 10)c)iii)a) below.

The Panel has proceeded on the assumption that the legislative objectives regarding conservation of biodiversity and regulation of the use of public lands and marine areas that were identified earlier⁴⁵ retain community support. The maintenance of that support is obviously a relevant factor in the effective enforcement of the legislation. While it was implicit in the majority of submissions that the public generally supports the intentions behind the legislation, the Panel noted that a few submissions questioned that assumption.

c. Issues concerning Specific Prosecutions

i. Background to the Narembeen Prosecutions

This Review was established after the institution of specific prosecutions that raised issues of public concern. In particular, the prosecutions relating to Mr Yandle and Mr Carmody featured prominently in several submissions, and media and parliamentary debates relating to CALM Prosecutions. It is therefore appropriate that they be addressed at the outset.

As explained above, the Panel's purpose in considering particular incidents is to identify the issues that arose in these cases and how they relate to the terms of reference to this Review. The Panel does not intend to review the facts of those cases for the purpose of making general findings on the merits of each particular case. That is, in any case, beyond the scope of the Review.

The prosecutions against Mr Yandle and Mr Carmody centre on the Narembeen area where deep drainage has been a particularly contentious issue in the local community. Seagroatt Nature Reserve is a focal point for extensive debate on the drainage issue. CALM instituted the prosecutions against both Mr Yandle and Mr Carmody in relation to tracks that had been made on the Reserve.

The institution of prosecutions in both cases gave rise to public controversy. Both farmers received support from the members of the community, and organisations such as the Western Australian Farmers Federation (Inc.) and the Pastoralists and Graziers Association (Inc.). Proposals were made to withdraw voluntary support to CALM with respect to firefighting services.

The Executive Director of CALM, after receiving advice from the Crown Solicitor's Office, determined to withdraw the prosecutions against both Mr Yandle and Mr Carmody.

The Panel was informed that in reviewing the cases, the Senior Assistant Crown Counsel addressed each separately, on its merits, and in the light of the Prosecution Policy. The Panel understands that, considering Mr Yandle first, the advice indicated specific grounds

⁴⁵ Refer to Section 6)b) above.

existed for withdrawing the charges against him. The same grounds did not necessarily apply in the case of Mr Carmody. The Panel understands that the advice with regard to Mr Carmody was that continuation with the prosecution would not have been inconsistent with the Policy. It was, however, legally open to the Director to withdraw the charges in the exercise of discretion. This would depend on public interest considerations.

The Panel was provided with a Statement of the Executive Director's decision and reasons for withdrawal of the prosecutions of Mr Yandle and Mr Carmody. In the Statement, the Executive Director refers to the advice of the Senior Assistant Crown Counsel. The Executive Director considered each case in the light of this advice together with the Policy. He took into account "countervailing factors"⁴⁶ and determined that the Department should discontinue the prosecutions.

From the Executive Director's statement of reasons and the media statement he released, it appears that he acted on a specific understanding of "public interest"⁴⁷ in deciding to withdraw the prosecutions. It is reasonable to assume that one factor he took into account was the tension that had developed between CALM and sections of the rural community over these incidents. Withdrawal opened the way to improving relations between the Department and that section of the community. The Executive Director's statement suggests that he saw restoration of goodwill as necessary to further the aims of conservation.⁴⁸

ii. Panel's Observations about the Decision-Making Process Regarding Naremben Prosecutions.

The Panel is not in a position to make specific evidentiary findings, nor to express factual conclusions, about the specific incidents discussed above. In seeking to draw lessons for future guidance from the episode it would, however, make the following observations. The Panel emphasises that these observations address general principles relating to withdrawal decisions. No adverse inferences should therefore be drawn concerning the latter.

- 1) As mentioned previously, the basic principle is that the Executive Director is not normally involved in prosecution decisions. Consistent with that principle, CALM has a centralised prosecution structure under which the Executive Director has delegated the responsibility for deciding which charges will be prosecuted to the

⁴⁶ The Executive Director's Statement of Decision and Reasons, 15 December 2003, states: "In considering this matter, I am mindful of the fact that both offenders are farmers, both offences were in the same reserve, both related to track formation and both claimed they were undertaking the works to facilitate a field day to inspect the degradation of the reserve. Thus the issue of perceived consistency to prosecutorial action is important."

⁴⁷ The Executive Director's media statement released on 16 December 2003 stated that the charges against the farmers were withdrawn "in a gesture of goodwill toward the farmers and the farming community". The statement did not explicitly distinguish between the two sets of charges. <http://www.naturebase.net/news/news.cgi?item=1071540124>

⁴⁸ The media statement should be read in conjunction with the Executive Director's reasons for decision to withdraw the prosecutions against Mr Yandle and Mr Carmody.

highly experienced Chief Wildlife Officer. The underlying purpose of these arrangements is to ensure that political considerations do not influence the decision to prosecute. Under the existing arrangements the Executive Director is, therefore, not involved. Properly, in the Panel's opinion, he is kept at arm's length from everyday prosecution decision-making. This practice is similar to that of the Department of Fisheries, which has a clear policy that the Executive Director is not normally involved on a day-to-day basis. This affords the Executive Director with a degree of independence in maintaining overall responsibility for a department.

- 2) There is no doubt, on the other hand, that there will be occasions when it is proper for the Executive Director to intervene to review the original basis of a decision to prosecute. To persist with a prosecution in a way that is likely to bring the administration of the relevant legislation into disrepute is not in the public interest.
- 3) The Panel takes the view that in reviewing a prosecution, the Executive Director should place the greatest weight on the Policy. In the case of the Narembeen prosecutions, the Executive Director had the advantage of a considered opinion of the Crown Solicitor's Office. The Panel understands that advice had specific regard to public interest factors in the Policy. It apparently treated each prosecution on its merits, consistent with that document. The Panel endorses the view that consideration of how the Policy relates to a particular case is the proper starting point in any decision to review a prosecution.
- 4) Whether multiple prosecutions should be withdrawn as a single 'package' is a more complex matter of judgment. This is because some of the public interest considerations pull in different directions.
- 5) As the Panel understands it, under the CALM administered Acts, as reflected in the Policy, the public interest primarily concerns land management and the conservation and protection of Western Australia's biodiversity. The definition of public interest that the Executive Director appears to have used when withdrawing the Narembeen prosecutions included the relationship of CALM to the farming community.⁴⁹ There is no suggestion that the application of such an understanding of public interest is outside the bounds of lawful consideration. The Panel is of the view that resorting to such a consideration in a particular case needs exceptional and compelling justification.⁵⁰
- 6) The Panel's concern is that a decision to withdraw a prosecution to preserve community goodwill should not be perceived by the public to be based on social or political, rather than public interest, considerations. There is a thin line between two different positions. In the first, there is a relevant and legitimate public interest in withdrawing a prosecution with a view, permissibly, to reestablishing broader

⁴⁹ This observation is based on the explicit, though brief, reasons stated in the Executive Director's media statement.

⁵⁰ This is because otherwise local and personal factors could dominate consideration of the public interest and lower respect for the principal objectives of biodiversity conservation.

community support for the conservation objectives of the legislation. The second is the appearance that prosecutions may be withdrawn if there is sufficient public opposition. The latter proposition would be unacceptable in the Panel's opinion.

- 7) The Panel should make it clear, however, that in the present case representatives of the organisations that supported the two farmers disclaimed any intent to interfere with the judicial process. Their protests were directed to the administration of the prosecutorial process. The Panel recognises that there is a legitimate role for political protest regarding the administration of any legislation.⁵¹
- 8) The Panel is concerned that a possible perception that a decision to withdraw prosecution because of sectional considerations could appear to be inconsistent with the original basis on which the prosecution was instituted. The Panel does not suggest that, once initiated, the Executive Director should never consider withdrawing a prosecution. New factors can emerge that support withdrawal. Rather, the Panel is of the view that to avoid latter-day withdrawals based on community reactions, it would be better if the decision-making system can be improved at the *initial decision-making stage*. That should result in the public interest factors being considered more fully, in alignment with the Prosecution Policy, at the 'filtering' stage.
- 9) A further conclusion can be drawn from the Narembeen prosecutions. It is evident to the Panel that laying of the particular charge of "taking flora" was open to misinterpretation because of the technical definition of "taking" under the *WC Act*.⁵² The Panel accepts that this confusion would be remedied by adoption of better-expressed notions of damage to fauna and flora in the proposed *Biodiversity Conservation Act* to replace the *WC Act*.
- 10) The Panel's remaining concern is that there may have been inadequate public information regarding the actual nature of the charges in the Narembeen cases. Media coverage is part of the environment in which CALM's prosecution procedures must be executed. Therefore the enforcement process needs to take account of the role that the media can play. There appears to be a broad acceptance by the community (and therefore by the media) of actions involving, for example, fisheries offences and wildlife trafficking, but poor acceptance or understanding of biodiversity conservation issues. It is essential that the media has relevant information and commentary to understand the background to prosecutions.⁵³
- 11) It was put to the Panel that the Executive Director has only a limited ability to respond to allegations in the media, as any detailed explanation he provides concerning CALM's position could prejudice a prosecution. The Panel accepts that

⁵¹ The freedom of political communication has, in fact, constitutional recognition. The Australian High Court so held in *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106.

⁵² See definitions and accompanying recommendations in Section 10(c) (iii) b).

⁵³ In the case of the Narembeen prosecutions the Panel believes the Executive Director did provide sufficient public information to permit a proper and full investigation of the factual background but he felt constricted by the sub-judice rule as to how much comment he could make.

the Executive Director has a responsibility to observe, scrupulously, the *sub-judice* rule. It considers, however, that in the past CALM officers, acting on a narrow interpretation of advice from the Crown Solicitor's Office, have possibly fettered their capacity to respond to community criticism by adopting an overly strict application of the *sub-judice* rule. The Panel is aware that agencies like the Police Service have considerable experience in dealing with how potential charges are reported in the media.

iii. Suggested Solutions to Problems Associated with the Narembeen Prosecutions

a. Establishment of a Prosecution Advisory Panel

In reviewing the problems that emerged with the institution of prosecutions against Mr. Yandle and Mr. Carmody, the Panel has concluded that the system adopted by CALM is capable of improvement to provide a more effective filtering process before charges are laid.

The Panel considers that a *panel* rather than single person should decide whether it was in the public interest to *initiate* a prosecution. The intention is that this should produce an earlier and clearer articulation of the factors that need to be balanced in contentious cases.

A precedent currently exists in the Department of Fisheries where a prosecution panel consists of the Manager Regional Services, a Program Manager and, a Lawyer in the Department. The prosecution panel is convened by the Prosecution Officer. The Prosecution Officer equates to the Supervising Wildlife Office in CALM. The Department of Fisheries prosecution panel is in place to review the public interest aspects of all recommendations to prosecute. The panel can overturn a recommendation to prosecute where the decision of the panel is unanimous, or to refer a decision to the Executive Director for resolution where the position of the panel is not unanimous.

The Panel considers that the adoption of a CALM prosecution advisory panel similar to the Department of Fisheries and as part of its prosecution process, would enhance the review of competing public interest considerations earlier and more effectively.

The Panel notes, however, that CALM has no dedicated legal officer within its organisation. That would limit the effectiveness of a purely internal prosecution advisory panel. In order to maintain legal expertise as part of the panel process it may be necessary to include expertise from outside of CALM.

The Panel considered that inclusion of an external member could be problematic if that member were to represent some sector of the community. The Panel does not accept, in that regard, proposals made by several of the submitting organisations that representatives of a particular organisation, body or community should have a role in making or reviewing prosecution decisions. It believes participation by a person or

persons representing *specific* community interests would prove both impracticable and unworkable. There are several reasons why the Panel rejects those proposals.⁵⁴

However, the Panel considered that a *neutral* external person with relevant legal experience, such as an ex-magistrate, would be a suitable member for a CALM prosecution advisory panel. This would satisfy the need to be apolitical and independent. An ex-magistrate should also be in touch with community values. In addition, an ex-magistrate would be experienced in hearing summary prosecutions, which are the type of offences in the *CALM* and *WC* Acts.

The Panel assumes that a prosecution advisory panel could be instituted with little additional expenditure or workload. The Panel agreed that meetings of the prosecution advisory panel should occur in a regular fashion so as not to affect the timeliness of prosecutions.

RECOMMENDATION 1

The Panel therefore **recommends**:

- 1) A CALM prosecution advisory panel be established, to assist in determining whether, in the public interest, particular prosecutions should be commenced;
- 2) Consideration be given to appointing as the third member a person external to the Department. This should be a person with the status, experience and independence of a retired magistrate.

b. Improvements to Legislation

It was evident from a number of submissions to the Panel that a major cause of confusion in the case of a number of prosecutions was the unusual and extended meaning of the term “take”. This was not confined to the Naremben prosecutions. Several submissions suggested that the definitions of “to take” in the *WC* and *CALM Acts* were ambiguous and that this has created frustration and misunderstanding among those charged with offences involving taking. The Panel agrees with that proposition.

⁵⁴ The first is that it would be the contrary to the principle of political neutrality regarding prosecutions. Prosecutions should not be instituted according to whether or not the offender has some person or body to represent his or her interest. Secondly, if a person with a particular bias or interest were to participate in prosecution decisions, the question is: from what representative body should that person come? Thirdly, if there were to be a representative member of the panel, it would be reasonable that, to maintain equilibrium, someone else on the panel should speak for other, potentially conflicting, interests.

The term “to take” is used in both the *CALM* and *WC Acts*.⁵⁵ Section 6 of the *WC Act* defines “take” with respect to both fauna and flora. The definitions read:

“**to take**” in relation to any fauna, includes to kill or capture any fauna by any means or to disturb or molest any fauna by any means or to use any method whatsoever to hunt or kill any fauna whether this results in killing or capturing any **fauna** or not; and also includes every attempt to take fauna and every act of assistance to another person to take fauna and derivatives and inflections have corresponding meaning;

“**to take**” in relation to any flora includes to gather, pluck, cut, pull up, destroy, dig up, remove or injure the flora or to cause or permit the same to be done by any means.

The definition of “take”, in relation to marine flora and fauna, also appears in s101A of the *CALM Act*. It reads:

“**take**” includes —

- a. to injure, destroy or otherwise interfere with, or cause or permit the doing of any of those things;
- b. to hunt any fauna even though no fauna is actually taken; and
- c. an attempt to take.

The Panel accepts that these statutory definitions do not coincide with the everyday use of the term “take”.

The Executive Director, CALM, informed the Panel that there are legislative proposals to address this problem. The Panel notes, in that respect, that drafting instructions for a *Biodiversity Conservation Act* are currently being prepared to replace the antiquated *WC Act*.⁵⁶ It is expected that, if enacted, the *Biodiversity Conservation Act* will probably eliminate the issue about the term “take” in the *WC Act*. It will not, however, remove the problem with the *CALM Act*.

RECOMMENDATION 2

The Panel therefore **recommends** that the definition of “to take” in the respective Acts administered by CALM be amended to express more relevantly the essential elements of notion not incompatibly with the common understanding of the term.

⁵⁵ A range of offences involving “taking” is indicated in Section 6(a) of this Report.

⁵⁶ The Panel notes that “A *Biodiversity Conservation Act for Western Australia: Consultation Paper*” (2002) proposes that the “taking” offence is modernised to adequately describe the range of activities that should be covered by modern biodiversity conservation legislation.

That should remove one source of contention associated with enforcing the legislation. With respect to addressing deficiencies in the *WC Act*, the Panel cannot make recommendations about Government priorities for drafting legislation.

RECOMMENDATION 3

The Panel recommends that if a new *Biodiversity Conservation Act* were not to be implemented for some time, separate consideration should be given to amend the definition of “to take” in the *WC Act* in the interim.⁵⁷

c. Public Information

The Panel has referred to problems that CALM encountered in conveying relevant information to the public because of the limitation imposed by the *sub-judice* rule.

RECOMMENDATION 4

The Panel **recommends** that CALM seek advice and assistance from the State Solicitor’s Office and the Police Media Section concerning ways in which it may more extensively communicate with the media and public about prosecutions.

d. Use of Infringement Notices and Letters of Warning

CALM has only recently introduced the use of Infringement Notices to address minor offences under CALM legislation. Whilst provision for dealing with infringements short of prosecution has always been available in the *CALM Act*, it was the *Conservation and Land Management Regulations 2002* that introduced the full range of offences with modified penalties. A training program backed up by a departmental Standard Operating Procedure has underpinned the use of these Notices. This process appears sound and incorporates adequate checks and monitoring to ensure lawful and consistent application of this type of enforcement sanction.

The Panel considers that the continued development of this system will meet the call made in some submissions for the use of more appropriate alternatives to prosecution for minor infringements. The Panel notes, however, that one matter raised in submissions was the possible inconsistent and arbitrary use by CALM of Letters of Warning.

⁵⁷ This would require consequential amendments to cover cognate expressions such as “damage”. The Panel understands that proposed amendments will address those situations.

A number of examples were provided to the Panel in which it was alleged that the matters addressed in warning letters were unfounded or where the recipients had been subject to inconsistent treatment. Samples of Letters of Warning were provided to the Panel in support of submissions about encounters with CALM officers in the field. A submittee suggested that these letters bordered on the vexatious. This was because CALM provides no established avenue for redress where the recipient could contest the assertions made in the warning letter. The Panel noted that these letters do not refer to any process for justification.

The Panel is not in a position to comment on specific instances individually. Because of confidentiality constraints it has not been able to verify the details of specific cases with CALM. However, from its scrutiny and assessment of particular Letters of Warning and correspondence and having been informed about the circumstances leading to the issuing of particular letters provided to it, the Panel is concerned that some of the letters may have been insufficiently grounded on facts. There was also some evidence of inconsistency in the administration of Letters of Warning. The importance of giving careful consideration to substantiating information prior to sending a Letter of Warning need not be stressed.

The Executive Director of CALM has advised the Panel that in place of the past practice where Regional Managers wrote directly to alleged offenders, he proposes that Letters of Warning in future will be issued under the direction of the Chief Wildlife Officer. In the Panel's view that is an appropriate step to address the problem of inconsistency. It should add another level of accountability to the system to ensure greater consistency in decision-making.

Whether the examples provided were justified or not, the Panel considers that CALM should implement an effective internal review system to allow persons aggrieved by a Letter of Warning to contest the basis on which the letter was issued. More specifically, the Panel considers there should be a dedicated point of first contact between CALM and persons to whom Letters of Warning are sent. The existence of a person or officer who can be contacted about Letters of Warnings or Infringement Notices should be publicised in the letters or notices.⁵⁸ Complaints or requests for reconsideration could be made, informally, to that person in the first instance.

Where the recipient of a Letter of Warning wants to challenge it, a number of options could be considered. One is that the Regional Wildlife Officer or Regional Manager, or a delegated officer, should be a first mediator. The relevant officer would presumably be reasonably accessible and have some knowledge of the matter, yet some detachment from the primary action. CALM might prefer, on the other hand, that the first opportunity of

⁵⁸ The Panel notes that, in the Letters of Warning it has viewed, a contact name for 'enquiries' is provided. That does not meet the concern of the Panel that the letter should inform the recipient of their right of review if they dispute the allegations made by CALM. Further, the Letters considered by the Panel were signed by delegates of, and in the name of, the Executive Director. This provides no clear indication of the officer to whom recipients can complain or from whom they can seek internal review.

informal review be in one of its centralised branches, such as the Wildlife Branch. That would be consistent with the proposal of the Executive Director that Letters of Warnings be under the direction of the Chief Wildlife Officer. If required, the Executive Director of CALM, or a delegate, such as the Chief Wildlife Officer, could be the second level of review for a person wanting redress with respect to a Letter of Warning or Notice of Infringement. In effect, this would provide a system of internal review. Internal review is now a well-established form of “troubleshooting”, particularly where large Commonwealth departments are concerned.

Essentially, the concern raised in the submissions was that uncontested Letters of Warning, which may have no foundation, can accumulate on a person’s file in CALM. Letters of this kind create anxieties for license holders who have no opportunity to demonstrate that they have not infringed. The provision of internal administrative review, where a person disagrees with the basis for the Letter of Warning would, in the Panel’s opinion, alleviate these fears.

The Executive Director has provided advice to the Panel that the Department has no policy of automatically revoking licences because of infringements, even in the case of convictions. Each licence situation is dealt with on its merits. Nevertheless, a system of administrative review is still relevant where a recipient of a Letter of Warning feels it was not fairly issued.

On a broader front, much of the disquiet expressed to the Panel about CALM’s prosecution administration stemmed from primary, on site, interactions with CALM officers. Again, the Panel is unable to investigate specific instances. A system of accessible internal checks and balances in the enforcement system of the kind outlined in this Report should, in the Panel’s opinion, reduce the level of hostility arising from misunderstanding or poor handling of minor incidents by some CALM officers.

That system of review should include reporting and recording instances of issuing warnings of the various kinds. This would permit CALM, through a centralised enforcement management process, to monitor the incidence of complaints across various regions of the State, leading to greater consistency of enforcement practice.

A similar review system is in the early stages of development by the Department of Environment. The principles of that Department’s Local Environmental Enforcement Group system could provide a basis for the development of a CALM enforcement management system. The key to the success of such a system is the underpinning operational policy together with the monitoring of enforcement outcomes to ensure consistency. Adequate training of personnel who will be responsible to operate the system is also essential to ensure the enforcement process remains impartial and professional. More specific recommendations along these lines are made later in this Report.⁵⁹

⁵⁹ See Section 11(b) below.

RECOMMENDATION 5

Accordingly, the Panel **recommends** that:

- 1) CALM develop and implement a system of internal review to enable a person to raise matters arising from all enforcement actions other than prosecution.
- 2) Letters of Warning and Infringement Notices should contain advice regarding the system of internal review.
- 3) All enforcement actions across CALM should be recorded to permit CALM to monitor these actions to ensure consistency and accountability.

e. **The Relationship between Prosecution, Conviction and CALM's Licensing System.**

Some submissions to the Panel alleged that there appears to be an interrelationship between CALM's enforcement process and its regulation of licensing. There is nothing to suggest that CALM automatically declines to grant or revokes licences simply on the basis of convictions. In fact, as mentioned above, the Executive Director has informed the Panel of instances where licences have been renewed despite conviction of the licensee for offences against the Acts administered by CALM.⁶⁰

The Panel notes that separation of prosecution and disciplinary procedures from the licensing and regulatory function of an agency is a fundamental principle underlying the proposed legislation to establish a State Administrative Tribunal⁶¹. The legislation administered by CALM does not, however, clearly separate these two functions.

Further, the Panel sees a connection between the fears raised about licence renewals and the fact that there appears to be no general provision⁶² under the *CALM Act* or the *WC Act* for a review process in licensing. Under the *Wildlife Conservation Act 1950*, the Minister has an unfettered discretion regarding licensing. This can be compared with the *Fisheries Resources Management Act 1994 (WA)*. The latter has provisions for internal and external review. The latter also has specific provisions regarding prior notification of a number of authorisation functions and the ability of persons to seek redress through the mandatory establishment of a tribunal to hear the matter.

⁶⁰ If it were thought appropriate to establish a nexus between revocation of CALM licences upon certain convictions, explicit provision could be made for the same in its legislation. This could be done by stipulating that a certain number of convictions could be a basis for finding that a person is not fit and proper to hold a licence for a specified period.

⁶¹ The creation of a State Administrative Tribunal is presently before Parliament; see the *State Administrative Tribunal Bill 2002*.

⁶² There is a very limited right of review under the regulations under the *CALM Act* in relation to forest products licences; see *CALM Amendment Act 2000*, Schedule 1, cl 10. The question posed by the Panel is whether review should be expanded to encompass other decisions to refuse to grant or to revoke licences. That is an issue for Government to decide.

Consideration should also be given to the implications of the proposed State Administrative Tribunal legislation for CALM's licensing regime.⁶³

RECOMMENDATION 6

The Panel **recommends** that the Minister for the Environment consider whether CALM decisions to revoke or refuse licenses under the Acts administered by CALM, particularly where prior convictions may be taken into account, should be subject to a process of internal and/or external independent review.

This recommendation is consistent with its recommendation that there be a system for internal review of complaints relating to enforcement actions other than prosecution.

While the above recommendation may be on the borderline of the Panel's terms of reference, the Panel takes the view that some concerns about the implications of warnings and convictions would be alleviated if an administrative review mechanism were put in place.

f. Allegations that CALM does not Pursue Difficult Prosecutions

The Panel has had regard to infringement, prosecution and conviction information provided by CALM. These include statistical data (Appendix I) and interviews with CALM officers. It is satisfied that CALM does not decline to pursue cases that entail legal problems such as obscure provisions of Acts. The Panel was given instances where CALM, having Crown Solicitor's Office advice, had proceeded with difficult prosecutions. As mentioned elsewhere in this Report, the enactment of the *Biodiversity Conservation Act* would remove some of the problems of legal ambiguity in the *WC Act*.

g. The Demarcation between Department of Fisheries and CALM regarding Offences in Marine Areas

It was informally raised with the Panel a concern in regard to CALM not dealing with some offences involving fish within marine parks. It was put to the Panel that CALM was "hand balling" these issues to the Department of Fisheries.

The Panel notes that this matter is specifically dealt with in the *CALM Act* by s 101B (3) whereby the *Fish Resources Management Act 1994 (WA)* takes precedent in regard to recreational fishing provisions. Incidents where officers from the Department of Fisheries

⁶³ As the Panel understands the situation, because there is no existing general administrative appeal right under the *CALM and WC Acts*, the State Administrative Tribunal Bill does not propose to confer any general jurisdiction over CALM licence refusals or revocations.

have been observed taking enforcement actions in marine areas administered by CALM may therefore be a result of this legislative provision. The Panel has no evidence otherwise to suggest CALM does not discharge its responsibilities in marine areas. It has been informed in fact of a number of cases where CALM has pursued enforcement actions in those areas under its jurisdiction.

h. Consultation with Industry and Community Liaison Groups

The Panel has rejected proposals in submissions that representatives of outside sectional interests should be involved in prosecution decisions. However, it recognises and commends moves taken by CALM and some industry and community associations for general consultation on the wider concerns that have created difficulties between CALM and sections of the public. Those avenues for expression of opinions should afford concerned representative bodies alternative forums for discussion of contentious prosecutions, among other things. Better understanding of these wider issues should also serve in appreciation of the core values that underpin the legislation enforced by CALM.

i. Periodic Review of Policy and Guidelines

The Panel has recommended in this Report a number of amendments to the existing enforcement procedures and prosecutorial regime of CALM. It accepts the point made in a submission that any revised Prosecution Policy and Guidelines should be regularly reviewed.

RECOMMENDATION 7

The Panel **recommends** that any revised Prosecution Policy and Guidelines should be regularly reviewed (without prescribing a particular period).

11. OTHER MATTERS NOT RAISED IN SUBMISSIONS REGARDING CALM's PROSECUTION POLICY AND GUIDELINES

a. Restitution of Landform and Biodiversity as a Consideration under the CALM Prosecution Policy and Guidelines.

The Panel has referred to the amendment made to the 2001 version of the CALM Prosecution Policy and Guidelines that include restitution and restoration of landform, flora and fauna habitat as a matter to be taken into account when considering enforcement action. The Panel regards restitution and restoration as a significant factor in assessing the

“public interest” in prosecution and agrees with the amendment. Offers of restitution will obviously be a factor to be taken into account in sensible enforcement particularly where damage to biodiversity or land is relatively minor. It does not suggest, however, that offers to restore should automatically lead to non-institution or withdrawal of prosecutions. The Panel notes that there will be instances where it may be better to allow natural restoration rather than intrusive intervention.

b. CALM’s Enforcement Management System – Better Delineation and Documentation

After reviewing CALM’s current compliance regime,⁶⁴ the Panel proposes that CALM adopt an integrated compliance management package as outlined below.

The overall package would consist of the following three components:

- Enforcement and Prosecution Policy;
- Enforcement Management Policy and Framework;
- Standard Operating Procedures

i. Enforcement and Prosecution Policy

This document would replace the current Policy and would have a broader scope. The Enforcement and Prosecution Policy would outline the goals of legislation administered by CALM. Secondly, it would set out all available enforcement tools and the principles, considerations and discretions of their use. This would include a separate section relating to prosecution to ensure that that process remains clear and distinct.

The Enforcement and Prosecution Policy document would be made available to the public. The revised document would provide both the community and CALM officers with consistent and accurate knowledge of the Department’s enforcement operations. Further guidance could then be provided to departmental officers in the form of Standard Operating Procedures as outlined below.

ii. Enforcement Management Policy and Framework

A more comprehensive enforcement management framework should provide CALM with an integrated method to provide impartial, accountable and consistent enforcement outcomes across the Department. At present, such processes are in place for the prosecution function of CALM but do not cover all other enforcement sanctions available and used by the Department. The most appropriate section to carry out this function would appear to be the Wildlife Branch.

⁶⁴ The Panel also investigated other compliance instruments in use or being developed by other Government Departments.

The Department of Environment has established what are essentially regional enforcement management groups.⁶⁵ The groups provide investigational support and prioritisation of resources within respective areas and then review completed investigations to ascertain evidentiary requirements, review discretion issues and enforcement sanction recommendations. Recommendations involving prosecution and modified penalty (not infringement notices) briefs are all forwarded to the Environmental Enforcement Unit for review and further processing. Other forms of enforcement sanctions are decided upon by the regional groups and the outcomes monitored by the Environmental Enforcement Unit in a quality assurance role.

A key element of the Department of Environment's enforcement management process is to ensure that a *prima facie* case is established prior to undertaking letter of warning, infringement notice or prosecution enforcement action where investigating offences under legislation administered by the Department of Environment. To ascertain whether a *prima facie* case exists, the Department of Environment officers must complete a concise checklist that outlines the elements of the offence and the evidence to support the case. The briefing sheets also record discretionary considerations and the investigating officers resulting recommended enforcement action.

The Panel has noted advice from the Executive Director of CALM of proposals he intends to put in place to put oversight of enforcement action more clearly under the direction of the Chief Wildlife Officer. While that is one measure that should improve consistency of regional practice, the Panel considers CALM's enforcement structure and regime should be explicitly set forth in a document accessible to the public, as is proposed in the example of the Department of Environment.

iii. Standard Operating Procedures

These are internal documents that provide operational standards and direction to officers in the field.

CALM's management of enforcement actions are currently underpinned by a series of Instructions to Wildlife Officers and Standard Operating Procedures. These documents apply to CALM staff undertaking compliance actions and provide sound guidance across key operational areas. The Panel notes, however, that these documents do not cover all areas of compliance activity and enforcement policy across CALM responsibilities.

The Panel advises that these documents are reviewed, updated as necessary and further developed to cover all aspects of CALM enforcement action.

⁶⁵ As noted above, Section 8(d), the compliance enforcement process of the Department of Environment has undergone review. The Panel has commented that a number of the recommendations of the Robinson Report, provide a template for adaptation by CALM in line with the recommendations made in this Section. Relevant recommendations of the Robinson Report are provided in Appendix H.

RECOMMENDATION 8

The Panel **recommends** that:

- 1) CALM replace its current Prosecution Policy and Guidelines with the following instruments:
 - i) An Enforcement and Prosecution Policy;
 - ii) An Enforcement Management Policy and Framework;
 - iii) Standard Operating Procedures.
- 2) At least the first of these instruments should be available to the public.

12. ALTERNATIVE FORMULATIONS OF ELEMENTS IN THE CURRENT CALM PROSECUTION POLICY AND GUIDELINES.

a. Addition of Positive Definition of “Public Interest”.

A central theme that ran through many of the submissions was that the various considerations that make up the public interest should be more explicitly explained in the Policy. This would be for the benefit both of the public and the officers of CALM that have to administer the relevant legislation. The Panel agrees.

In that context, the Panel notes that while it has proceeded on the basis that the "public interest" involves pursuit of the statutory objectives of the legislation administered by CALM, neither Act has a provision stating the purposes of the Act.

RECOMMENDATION 9

The Panel recommends that the Minister consider whether the legislation administered by CALM should contain a statement of the statutory objectives of the legislation.

RECOMMENDATION 10

Further, the Panel recommends that a statement to the following effect be included in the Guidelines.

“A significant factor in assessing whether, in the public interest, to initiate or withdraw a prosecution should be the statutory objectives behind the legislation administered by the Department. The extent to which a prosecution will serve the purpose of maintaining public respect and support for the protection and conservation of biodiversity, flora and fauna and the regulation of the use of public lands and marine areas, should be the primary consideration in a decision to prosecute.”

b. Adoption of Formulation of Criteria in Other Prosecution Policies.

As stated previously, the Panel has had regard to prosecution policies adopted by other agencies in Australia. It has considered the contents of these policies in the light of some of the proposals in submissions made to the Panel that CALM's Policy and Guidelines should clearly articulate some of the factors that affect the decision to prosecute.

RECOMMENDATION 11

The Panels **recommends** CALM consider adopting the alternatives and additions suggested in Appendix G to this Report. These alternative criteria elaborate some aspects of the public interest statement proposed in the previous recommendation.

APPENDIX A

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

8 November 2001

APPENDIX B: SUMMARY OF SUBMISSIONS

Pastoralists and Graziers Association (Inc.)

- Guidelines considered adequate to form the basis for implementation of relevant Acts.
- Guidelines are not being adhered to by CALM personnel, particularly with respect to fairness, alternatives to prosecution, avoiding triviality and other caveats contained within the guidelines.
- Concern expressed that decisions to prosecute are influenced by criticism of CALM.
- General concern expressed at poor consultation in the development of legislation that affects PGA members.

Conservation Council of Western Australia Inc.

- Consider that the current laws are unworkable, in particular the *WC Act*. Therefore, the greater need is for the government to introduce the *Biodiversity Conservation Act*.
- The guidelines need to make clear the purpose of environmental legislation and should include principles relating to key CALM functions. The guidelines should make it clear that prosecutions should protect or enhance WA's biodiversity.
- The derivation of the guidelines from generic DPP prosecution guidelines means that some aspects of the guidelines are irrelevant to CALM prosecutions (e.g. antecedents of offender, attitude of victim, likely outcome if guilty, criminal compensation). Other aspects of the guidelines could lead to incorrect decisions not to prosecute (e.g. obscurity of law and lack of public concern on an issue may not be valid reasons not to prosecute).
- Concern expressed that decisions to prosecute are influenced by criticism of CALM.
- The level at which decisions to prosecute are made is queried and the recommendation is made that breaches be reported to an internal investigator, and the guidelines be applied at that level.
- The guidelines do not encourage feedback to members of the public who report breaches.

Environmental Defender's Office and Western Australia Forest Alliance

- The guidelines should include an over-arching principle such as: will prosecution uphold the law to protect wildlife, biodiversity and the natural environment?" This principle should be included in the guidelines "to prompt prosecutors to ask themselves the threshold question".
- Forfeiture mechanisms currently in place prevent the establishment of a fund, such as could be used to cover the cost of remediation.
- Some aspects of the guidelines are irrelevant to CALM prosecutions (e.g. antecedents of offender, attitude of victim).

- The level at which decisions to prosecute are made is queried and the recommendation is made that breaches be reported to a dedicated investigative team.
- The guidelines should require reporting of all breaches whether or not prosecution is attempted.
- Concern expressed that the number of prosecutions attempted is low.
- The guidelines should identify the need for periodic review of regulations.
- The guidelines do not encourage feedback to members of the public who report breaches.

Western Australian Farmers' Federation (Inc.)

- The guidelines provide for adequate flexibility and common sense with respect to prosecution, but problems arise with individual CALM officers. Some CALM officers have a heavy-handed approach, and do not sufficiently consider alternatives to prosecution provided in the guidelines.
- General concern expressed at poor consultation in the development of legislation that affects WAFF members.
- The WAFF feels that involving their organisation in a “disputes committee” with CALM would help resolve disputes that may arise over decisions to prosecute.
- Prospective defendants are treated as if presumed guilty until proven innocent, and that CALM officers do not advise them of their legal rights.
- Concern is expressed as to the conduct of CALM within rural communities as both a landholder and therefore neighbour, but with a policing role.
- The oral presentation by the WAFF reiterated concerns raised in the written submission, particularly with respect to unnecessary prosecutions and the overall relationship between CALM and rural communities.

Tourism Council Western Australia

- Guidelines considered adequate to form the basis of implementation of relevant Acts.
- Guidelines not being applied consistently and alternatives to prosecution not always considered. Concern with over-zealous conduct of some CALM personnel.
- Industry involvement in the regulation of tourism activities where these involve wildlife interactions, perhaps through the existing Tourism Industry Reference Group, could circumvent prosecutions.
- Animal interactions are seen as a major potential tourist attraction that may be frustrated by strict applications of the guidelines.

Western Australian Tourism Commission

- Concern expressed at occasional anecdotal reports received by the WATC of inconsistency in the application of regulations by CALM personnel.

Western Australian Fishing Industry Council Inc.

- No specific comments or suggestions.

Birds Australia Western Australia Inc.

- The guidelines need to provide guidance in the area of wildlife feeding. If commercial operators are to feed wildlife, they need to be licensed to do so, thus allowing regulation. They are effectively exploiting the natural environment like flower-pickers, beekeepers and commercial fishers, all of whom are regulated by licensing.

Waterbird Conservation Group

- Guidelines considered adequate to form the basis of implementation of relevant Acts.
- Concerns with the consistent implementation of guidelines with respect to wildlife feeding. The WCG would favour a policy of no feeding of wildlife, particularly waterbirds.

Chamber of Minerals and Energy

- The timing of the Review queried as new biodiversity legislation will soon be in place.
- Questions that section of the guidelines that suggests prosecutions are needed to “maintain public confidence in basic constitutional institutions”.
- Questions the emphasis, made in the guidelines, of the likelihood of success influencing the decision to prosecute. The suggestion is made that the likelihood of success should be placed at the end of the “Decision to prosecute” section of the guidelines.

Individual Submissions**Individual Submission One**

- Concerns about prosecutions of people keeping reptiles prior to the new reptile pet legislation.
- The Wildlife Branch has a reputation for opacity.
- Alienation of reptile enthusiasts has worked against the effectiveness of conservation.
- Oral submission provided more information on this topic.

Individual Submission Two

- Concern about the consistency of judgements between different CALM officers.
- Alleged offenders should have the right of reply before Letters of Warning are issued.
- Concern raised that Letters of Warning remain on record even when the issue is found to be a misunderstanding.
- Oral presentation provided additional information.

Individual Submission Three

- Boundaries of CALM reserves, particularly marine parks, need to be clearly recognisable.
- CALM personnel should identify themselves, particularly when not in uniform.

APPENDIX C: SUMMARY OF ISSUES RAISED IN SUBMISSIONS

Guidelines adequate.		5 submissions
Suggested changes to Guidelines.	Guidelines should contain a statement making purpose of legislation clear and there should be an overarching conservation principle.	2 submissions
	Irrelevant statements such as attitude of victim should be removed from the guidelines.	2 submissions
	Guidelines could encourage feedback from people who report breaches.	2 submissions
	Guidelines should identify the need for periodic review.	1 submission
	Guidelines should require that all breaches be reported.	1 submissions
	Concern with emphasis in guidelines that likelihood of success should contribute to the decision to prosecute.	2 submissions
	There is no mechanism under current guidelines for the establishment of a fund to cover the cost of remediation.	1 submission
Concern with implementation of guidelines by CALM personnel.	Implementation of guidelines considered inconsistent.	6 submissions
	Written warnings are issued before people have the right of reply and these warnings remain on record.	1 submission
	Some personnel considered over-zealous.	4 submissions
	Lack of consideration of alternatives to prosecution.	2 submissions
	Treatment of prospective defendants is poor.	2 submissions
Other issues.	Decisions to prosecute influenced by criticism of CALM and by political agendas.	2 submissions
	Current laws unworkable and emphasis on new <i>Biodiversity Conservation Act</i> is needed.	2 submissions
	Decisions to prosecute should be centralised through a dedicated investigative team.	2 submissions
	Numbers of prosecutions too low.	2 submission
	Industry representatives could be involved in some way, such as through a disputes committee or through regulation of activities such as wildlife feeding.	2 submissions
	Consultation in the development of environmental legislation is poor.	2 submissions
	The relationship of CALM with rural communities is poor and is not aided by CALM being both a neighbour but having a policing role. Poor relations adversely impact upon conservation outcomes.	2 submissions

APPENDIX C

	The community does not value the basis of CALM's prosecution procedures and probably does not recognise the "public interest" in recent controversial cases.	1 submission
	Animal interactions such as wildlife feeding require consistent regulation.	3 submissions
	Reserve boundaries need to be clearly delineated	1 submission

APPENDIX D: SUMMARY OF PARLIAMENTARY DEBATES

Debates in Parliament regarding prosecutions by CALM and the prosecution processes were confined to the last four months of 2003. Debates centred on the prosecutions of Mr Jonathon Jones,⁶⁶ Mr Alan Yandle,⁶⁷ Mr Laurie Carmody,⁶⁸ Mr Michael Linney⁶⁹ and Mr Steve Ziverts,⁷⁰ the last of which is still to be heard in court. Many of the issues discussed in the debates regarding prosecutions by CALM and the prosecution processes are outside of the terms of reference to the Review but go to highlight the interconnected and complex political context in which this Review is only part of. Such issues include wildlife-feeding, inconsistencies in application of Acts, concerns about clearing regulations under the *Environmental Protection Amendment Act 2002*, native wildlife smuggling, deep drainage and salinity. Discussion in this section does not extend beyond the terms of reference to the Review.

One of the key issues raised in these debates was the “heavy handed and bureaucratic”⁷¹ way in which CALM dealt with alleged offenders. This issue was raised directly in the context of tour operators feeding wildlife without a license and alluded to in discussions regarding the charging of Mr Carmody and Mr Yandle.

A related issue that was also discussed in a number of contexts was the perception that CALM undertook trivial prosecutions at the expense of focussing on broader issues of conservation and land management, this was most clearly expressed in the question from Mr R Ainsworth regarding “CALM Prosecution of Landholders”.⁷² In responding to these allegations the Minister for the Environment noted that between 1 July 2000 to 31 October 2003 of the 1320 potential offences reported to CALM, 243 had been taken to court, all had resulted in a conviction.⁷³

A number of debates called upon the Minister to involve her or direct the Department in cases where the prosecutions were controversial.⁷⁴ The Minister rebuked this, citing the relevant parts of the *CALM Act* and noting the separation of powers and functions

⁶⁶ “Kalgan Queen Scenic Cruises and Wildlife Interpretation- Grievance”, Hansard – Legislative Assembly, 25 September 2003, p. 11748 – 11750.

⁶⁷ “Salinity”, Hansard – Legislative Council, 15 October 2003, p. 12009 – 12010.
“CALM, Charges against Mr Yandle, Sea Groatt [sic] Reserve”, Hansard – Legislative Council, 16 October 2003, p. 12146 and the response in “Questions Without Notice 1358, Supplementary Information”, Hansard – Legislative Council, 22 October 2003 p. 12438 – 12439.

⁶⁸ “Mr Laurie Carmody, Cost of Prosecution for Environmental Damage”, Hansard – Legislative Council, 11 December 2003 p. 14774.

⁶⁹ “Native Wildlife, Smuggling”, Hansard – Legislative Assembly, 21 October 2003 p. 12319 – 12320.

⁷⁰ “Native Vegetation on Private Property, Access” Hansard – Legislative Council, 16 October 2003, p. 12150-12154.

⁷¹ Mr B.K. Masters, p. 11749

⁷² p. 13923

⁷³ p. 13924, p. 14072

⁷⁴ p. 11749, p. 14071, p. 14774

between the executive arm of government and the administration of prosecution functions. The Hon Tom Stephens in responding on behalf of the Minister stated, "*It is inappropriate for me to intervene in a properly established and exercised legal process*".⁷⁵

⁷⁵ Hansard p. 14774

APPENDIX E: RESPONSE OF MINISTER FOR THE ENVIRONMENT REGARDING HER ROLE WITH RESPECT TO PROSECUTIONS BY CALM

[FIRST PARLIAMENTARY ANSWER] “The Act makes it very clear that there is no role for the Minister to get involved in prosecutions. I am clear about that, as I am sure also was the previous minister on the member’s side of the House. I say to the executive director that if there is enough evidence for a prosecution, then by all means proceed, because those decisions are entirely up to the executive director.”⁷⁶

[SECOND PARLIAMENTARY ANSWER]⁷⁷ “The executive director of the Department of Conservation and Land Management is subject to my broad direction and control in accordance with section 33(1) of the *CALM Act 1984*. However, it is proper for the executive director to exercise prosecutorial discretion in accordance with section 113 of the Act, which states that a complaint for an offence against this Act may be made and prosecuted by any police officer or any person authorised in writing by the executive director⁷⁸ and section 26(3) of the *Wildlife Conservation Act 1950*, which states that all proceedings in respect of any offences shall be taken by and in the name of the executive director or by and in the name of any person authorised in that behalf of the executive director”⁷⁹

⁷⁶ Hansard p. 11750

⁷⁷ Hansard p. 14774

⁷⁸ s 113 “Authority to prosecute”:

“(1) A complaint for an offence against this Act may be made and prosecuted pursuant to the *Justices Act 1902* by any police officer or any person authorised in writing for the purpose of the proposed proceedings by the Executive Director.

(2) In any proceedings under this Act the authority of any person to prosecute for an offence shall be presumed unless the contrary is proved.”

⁷⁹ s 26. “Offences”

(3) All proceedings in respect of any such offences shall be taken by and in the name of the Executive Director or by and in the name of any person authorised in that behalf by the Executive Director.

APPENDIX F: RESPONSE OF THE MINISTER FOR THE ENVIRONMENT REGARDING THE PUBLIC INTEREST SERVED BY THE PROSECUTION OF MR. CARMODY

“The public interest served by this prosecution is in protecting the values of the Seagroatt Nature Reserve in particular and nature reserves generally by providing a personal and general deterrent to unlawful activities that damage the conservation values of nature reserves that are set aside for the protection of flora and fauna. There are more than 600 nature reserves in the department’s wheatbelt region alone. Given the highly cleared and fragmented nature of most of the wheatbelt, the remaining nature reserves are extremely important for the conservation of the State’s biodiversity. It is not acceptable for people to enter onto nature reserves and drive vehicles off formed tracks and thereby damage or destroy flora and vegetation without authority.”⁸⁰

⁸⁰ Hansard p.14774

APPENDIX G: POSSIBLE PRECEDENTS OF CRITERIA THAT COULD BE ADOPTED FROM OTHER PROSECUTION POLICIES.

a. Additions to existing factors

Two criteria in the current CALM Policy and Guidelines that could be expanded are:

- (a) the **serious**,⁸¹ **or conversely, the** trivial or technical nature of the alleged offence in the circumstances;⁸²
- (g) whether a prosecution would be perceived as counter productive to the interests of justice; **for example, by bringing the law or its administration into disrepute**;⁸³ (suggested additions in bold)

b. Guidelines that could be added.

Other factors to be considered include:

- objectives of the relevant legislation;⁸⁴
- the likely public perception of the breach and the manner with which it was dealt;⁸⁵
- whether the use of a particular response option in a specific case would create a desirable or undesirable precedent;⁸⁶
- whether the alleged contravention involves a blatant disregard for or significant indifference to the law.⁸⁷

c. Elaborating on the Public Interest.

⁸¹ An alternative to the seriousness of the offence is the seriousness of the harm caused by the alleged contravention to other people and the environment. This focuses on the damage to the subject matter of the legislation. See Environment Australia Compliance and Enforcement Policy, p 6 and New South Wales EPA Prosecution Guidelines - Section A, para 3.7(b), Queensland Environment Protection Agency Enforcement Guidelines paras 3.2.2 ("Discretion") and 3.2.3 ("Factors to be considered").

⁸² Prosecution Policy of the Commonwealth DPP, para 2.10 (a).

⁸³ *Ibid*, para 2.10 (f). This would be relevant to situations similar to the Narembeen prosecutions of Messrs Yandle and Carmody.

⁸⁴ Environment Australia Compliance and Enforcement Policy, p 6. This would pick up one of the major inadequacies that the Review Panel has identified in the current CALM Prosecution Policy and Guidelines.

⁸⁵ *Ibid*, p6.

⁸⁶ *Id*.

⁸⁷ *Ibid* p 7. (In that case, Environment Australia includes this criterion under the heading "Civil Action" but it is equally relevant to prosecution evaluations.)

The Worksafe Western Australia: Prosecution Policy⁸⁸ includes a statement expanding on the balancing aspect of the public interest. It reads:

5. “THE PUBLIC INTEREST

If a *prima facie* case exists, the prosecution of an offence must also be in the public interest.

This requires the balancing of a broad range of factors, as they relate to the particular case. The presence of a particular factor does not necessarily mean it would be against, or in, the public interest to proceed with a prosecution, and the same factor could equally weigh in favour of prosecution in one particular case, yet weigh against it in another. Ultimately it is all the relevant factors taken together which will determine, on balance, whether it is in the public interest to proceed.

As mentioned earlier in this policy, it is the role of the courts to determine guilt or innocence. While all prosecutions must be in the public interest, the test of public interest must be applied in a manner which does not remove the central role of the courts in the prosecution process. As is the case with other issues relating to the public interest, it is a matter of balance and exercise of appropriate judgement.

It is in the public interest that prosecutions be conducted fairly and impartially.

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

The Panel suggests this could be adapted as a precedent for a revised CALM Policy.

⁸⁸ <http://www.safetyline.wa.gov.au/pagebin/wswapoly0004.pdf>

APPENDIX H: REVIEW OF THE ENFORCEMENT AND PROSECUTION GUIDELINES OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF WESTERN AUSTRALIA FOR THE MINISTER FOR ENVIRONMENT AND HERITAGE (THE ROBINSON REPORT) RECOMMENDATIONS RELEVANT TO THIS REVIEW

2. A clear policy statement be prepared and published in hard copy and placed on the DEWCP website to provide the community with a clear understanding of the Department's approach to enforcement. This should reflect the above principles, and emphasise that the purpose of enforcement is to achieve environmental improvement through compliance. This should be written in a manner that will enhance understanding that enforcement action pursued by the Department, in the public interest, will be the most appropriate, in terms of desired outcomes, for each particular circumstance. The document should reference other public information mechanisms that would further enhance awareness and understanding;
3. A policy, supported by additional guidelines, be prepared in relation to the new powers conferred by the *Environmental Protection (Amendment) Bill 2002*, on proclamation. In particular, environmental harm and potential environmental harm introduce new concepts that need to be integrated into, but not constrained by, existing processes. The system for managing vegetation clearance has important enforcement elements, including injunctions, that should be included in the guidelines;
4. Confusion over the existing policy should be removed by a clear unambiguous statement which emphasises that prosecution is an enforcement tool to be employed where it is the appropriate response to particular circumstance (ie not a last resort);
5. Revised guidelines, which provide a decision matrix and criteria for use by all staff involved in enforcement decision making, be developed for the implementation of the above Policy. The tone and substance of the guidelines should reflect an equivalence of enforcement measures so that full consideration can be given to selecting the appropriate action(s) for specific circumstances;
6. The Policy should be kept under constant review and revised, where appropriate, to include other factors for consideration in decision making. The Policy should also reflect that enforcement is part of a continuum in regulating potentially environmentally damaging activities, requiring close liaison between all relevant sections of the Department;

7. A field investigation guide in the form of a check list be developed to assist staff in the field with enforcement related decisions;
11. Early flagging of potential compliance difficulties be instituted through a formal system with regular monitoring of staff reports to identify when enforcement action should be initiated;
16. Training courses be reviewed to reflect the intent of the policy and revised guidelines and to ensure that enforcement is conducted within the revised context and not using past benchmarks;
17. All enforceable statutory instruments be worded in an unambiguous manner that facilitates enforcement and that makes clear which conditions or requirements are enforceable;
22. A small number of staff (2-3) be tasked with developing high level investigations and prosecution skills (including accessing training in other jurisdictions) that would enable them to guide other staff undertaking complex investigations that may result in prosecution, to lead tier one prosecutions and to conduct minor prosecutions on behalf of the DEWCP.

APPENDIX I: STATISTICS ON REPORTED BREACHES AND OUTCOMES– 1 January 1999 to 31 December 2003

CATEGORIES	Reported to Head Office	Prosecuted	Contested (if known)	Successful	Withdrawn by CALM	Dismissed by Court
Wildlife Conservation Act & Regulations						
Illegal taking/possession of protected fauna	302	117	14	110	5	2
Illegal importation, selling or taking for sale of fauna	88	5	0	5	0	0
Use of illegal devices in taking fauna	8	0	0	0	0	0
Offences relating to the taking or possession of rare or threatened fauna	107	46	3	46	0	0
Illegal taking of protected flora	608	237	126	212	22	3
Offences relating to the sale of protected flora	108	26	2	26	0	0
Taking declared rare flora without the Minister's consent	104	1	1	0	1	0
Offences against Wildlife Officers	42	12	4	12	0	0
Failing to comply with licence conditions	133	16	11	11	1	4
Offences relating to the acquisition, possession, control and disposal of fauna	163	45	17	41	0	4
Conservation and Land Management Act Regulations						
Illegal taking or possession of forest produce	199	42	4	40	2	0
Offences relating to the occupation of CALM land	27	5	2	2	3	0
Offences relating to Marine Parks and Reserves	11	2	2	2	0	0
Offences relating to disease risk areas	27	2	0	2	0	0
Offences relating to activities on State Forests, Nature Reserves and National Parks	324	71	12	53	8	10
Agriculture and Related Resources Protection Act & Regulations						
Offences relating to the importation and keeping of Declared Animals	48	15	13	15	0	0
TOTALS	2299	642	211	577	42	23

Breaches Reported to Head Office (%) (2 d.p.)

CATEGORIES	% Breaches Reported to Head Office
Wildlife Conservation Act & Regulations	
Illegal taking/possession of protected fauna (302)	13.14
Illegal importation, selling or taking for sale of fauna (88)	3.83
Use of illegal devices in taking fauna (8)	0.35
Offences relating to the taking or possession of rare or threatened fauna (107)	4.65
Illegal taking of protected flora (608)	26.44
Offences relating to the sale of protected flora (108)	4.70
Taking declared rare flora without the Minister's consent (104)	4.52
Offences against Wildlife Officers (42)	1.83
Failing to comply with licence conditions (133)	5.79
Offences relating to the acquisition, possession, control and disposal of fauna (163)	7.09
Conservation and Land Management Act Regulations	
Illegal taking or possession of forest produce (199)	8.66
Offences relating to the occupation of CALM land (27)	1.17
Offences relating to Marine Parks and Reserves (11)	0.48
Offences relating to disease risk areas (27)	1.17
Offences relating to activities on State Forests, Nature Reserves and National Parks (324)	14.09
Agriculture and Related Resources Protection Act & Regulations	
Offences relating to the importation and keeping of Declared Animals (48)	2.09
TOTAL (2299)	100

Breaches Reported to Head Office that are Prosecuted (%) (2 d.p.)

CATEGORIES	Reported to Head Office Prosecuted
Wildlife Conservation Act & Regulations	
Illegal taking/possession of protected fauna	38.74
Illegal importation, selling or taking for sale of fauna	5.68
Use of illegal devices in taking fauna	0
Offences relating to the taking or possession of rare or threatened fauna	42.99
Illegal taking of protected flora	38.98
Offences relating to the sale of protected flora	24.07
Taking declared rare flora without the Minister's consent	0.96
Offences against Wildlife Officers	28.57
Failing to comply with licence conditions	12.03
Offences relating to the acquisition, possession, control and disposal of fauna	27.61
Conservation and Land Management Act Regulations	
Illegal taking or possession of forest produce	21.11
Offences relating to the occupation of CALM land	18.52
Offences relating to Marine Parks and Reserves	18.18
Offences relating to disease risk areas	7.41
Offences relating to activities on State Forests, Nature Reserves and National Parks	21.91
Agriculture and Related Resources Protection Act & Regulations	
Offences relating to the importation and keeping of Declared Animals	31.25
TOTAL BREACHES REPORTED TO HEAD OFFICE THAT ARE PROSECUTED (%)	27.93

Successful Prosecutions (%) (2 d.p.)

CATEGORIES	% Prosecuted that are successful
Wildlife Conservation Act & Regulations	
Illegal taking/possession of protected fauna (110/117)	94.02
Illegal importation, selling or taking for sale of fauna (5/5)	100
Use of illegal devices in taking fauna (0/0)	N/A
Offences relating to the taking or possession of rare or threatened fauna (46/46)	100
Illegal taking of protected flora (212/237)	89.45
Offences relating to the sale of protected flora (26/26)	100
Taking declared rare flora without the Minister's consent (0/1)	0
Offences against Wildlife Officers (12/12)	100
Failing to comply with licence conditions (11/16)	68.75
Offences relating to the acquisition, possession, control and disposal of fauna (41/45)	91.11
Conservation and Land Management Act Regulations	
Illegal taking or possession of forest produce (40/42)	95.24
Offences relating to the occupation of CALM land (2/5)	40
Offences relating to Marine Parks and Reserves (2/2)	100
Offences relating to disease risk areas (2/2)	100
Offences relating to activities on State Forests, Nature Reserves and National Parks (53/71)	74.65
Agriculture and Related Resources Protection Act & Regulations	
Offences relating to the importation and keeping of Declared Animals (15/15)	100
TOTAL CASES PROSECUTED THAT ARE SUCCESSFUL (%) (577/642)	89.88

Contested x Cases Prosecuted (Total) = 32.87%

Cases Withdrawn x Cases Prosecuted (Total) = 6.54%

Cases dismissed by Court x Cases Prosecuted = 3.58%