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Enforcement and Prosecution Policy

May 2008



Explanatory notes

Organisational background

The mission of the Department of Environment and Conservation (DEC) is:

“Working with the community, we will ensure that Western Australia’s environment is valued, protected and conserved, for its intrinsic value, and for the appreciation and benefit of present and future generations.”

The department has responsibility for protecting and conserving the State’s environment on behalf of the people of Western Australia. This includes managing the State’s national parks, marine parks, conservation parks, State forests and timber reserves, nature reserves, marine nature reserves and marine management areas.

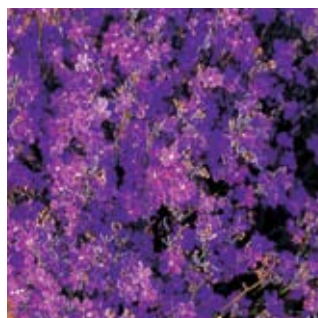
Its key responsibilities include broad roles in managing, regulating and assessing many aspects of the use of the State’s natural resources. The department contributes to the development of environmental protection policies, managing the environmental impact assessment process and carrying out regulatory functions to achieve improved biodiversity and environmental outcomes. It is also responsible for management of contaminated sites and coordination of pollution incident responses.

A reference to DEC in this policy includes a reference to the Swan River Trust and the Keep Australia Beautiful Council.

What is the purpose of this Enforcement and Prosecution Policy?

The purpose of this policy is to:

- provide a guide to the department in its task of enforcement and prosecution;
- provide a broad understanding of how the department approaches enforcement of the legislation it administers, including the exercise of prosecutorial discretion;
- explain how the department determines the appropriate defendant to pursue, and the appropriate enforcement action to take in a particular case;
- outline the possible enforcement actions able to be administered by the department;
- encourage a community and corporate culture of positive action, accountability, consultation and cooperation with the department; and
- foster consistent, integrated and coordinated enforcement action across all sections of DEC.



Regulation and enforcement are essential to the integrity of the systems that manage the State’s natural resources and protect and conserve the environment to ensure ecological sustainability.

The policy is intended to guide and assist officers in the performance of their functions and is not a substitute for the professional judgment of those officers.

To whom does this Enforcement and Prosecution Policy apply?

This policy will be applied by the department in dealing with the community as a whole in regard to matters that it regulates. In particular the policy applies to:

- industry and commercial enterprises, whether regulated or unregulated;
- members of the public;
- Federal, State and local government agencies;
- non-government organisations and interest groups;
- legal practitioners; and
- DEC officers.



To what does this Enforcement and Prosecution Policy apply?

The scope of this policy covers all legislation administered by DEC and includes:

- *Conservation and Land Management Act 1984;*
- *Contaminated Sites Act 2003;*
- *Environmental Protection Act 1986;*
- *Litter Act 1979;*
- *Sandalwood Act 1929;*
- *Swan and Canning Rivers Management Act 2006;*
- *Waste Avoidance and Resource Recovery Act 2007;* and
- *Wildlife Conservation Act 1950.*

This policy also covers legislation administered by other government departments for which DEC wildlife officers are authorised and have statutory responsibilities. These statutes include:

- *Agriculture and Related Resources Protection Act 1976;* and
- *Animal Welfare Act 2002.*

What is the legal status of this Enforcement and Prosecution Policy?

This policy is provided for information purposes only to provide general guidance on how enforcement and prosecution is approached by the department.

This policy:

- is not legally binding on the department, on any other organisations such as other government departments, local councils, the police, or individuals in the community;
- is general in nature and does not exhaustively address all the specific statutory limitations and considerations that may be relevant under the legislation administered by the department;
- does not confine, restrain or limit the discretion of the department to take any action; and
- is not intended to be viewed as a substitute for legal advice or legal processes.

Individuals, corporations and others should obtain independent legal advice on their legal obligations where needed.

How do I report an incident?

The department encourages the community to report alleged offences as soon as possible to minimise any possible detrimental impacts on the State's environment, biodiversity and lands and waters managed by the department. The department also encourages voluntary disclosure and cooperation by alleged offenders as early notification of an incident and full cooperation will often enable steps to be taken to minimise harm to the environment.

If you wish to report an environmental incident or any illegal activity involving wildlife or lands and waters managed by DEC, the following contacts are provided:

After Hours Pollution Reports	1800 018 800
Pollution Incident Reporting Line	1300 784 782
Swan River Pollution Line	0419 192 845
Swan River Trust	(08) 9278 0400
Wildcare	(08) 9474 9055
Wildlife Watch	1800 449 453

Reports can also be made to your local DEC office.

For urgent notification or when an incident is being witnessed, please use the above emergency numbers or telephone Crimestoppers on 1800 333 000 (rewards are offered for certain types of information).

Where can I find information about enforcement actions that have been undertaken by DEC?

Summary information in relation to reported breaches and enforcement actions undertaken is available on DEC's website - www.dec.wa.gov.au

Where can I obtain further information or provide comment?

Should you wish to provide comments or suggestions on this policy or to receive further information, please contact:

Department of Environment and Conservation
 The Atrium
 168 St Georges Terrace
 PERTH WA 6000
 Phone: (08) 6364 6500
 Email: info@dec.wa.gov.au



Enforcement

Principles of enforcement

1. Enforcement action will be taken by the department where biodiversity or the environment requires protection or other relevant objectives under DEC legislation require enforcement action.
2. Enforcement action will only be taken when the statutory prerequisites for that action are satisfied. In any case where a breach of the legislation is established, some form of written enforcement action will result.
3. Prosecution is an enforcement tool to be employed where it is the appropriate response to a particular circumstance and is not an enforcement option to be applied only as a last resort.
4. This policy recognises that the fundamental objective of prosecution is to bring justice to those who commit offences, to punish those who deserve punishment for their offences, to provide expeditious compensation and restitution to victims of crime and to protect or restore the environment and protect the community.
5. Prosecution is dealt with in a specific section of this policy and will be considered equally together with all other enforcement tools in line with the principles outlined in this policy.
6. DEC officers do not have the authority to condone or authorise the continuation of an offence once detected.
7. Enforcement action will be taken in proportion to the magnitude of the alleged offence and/or the environmental impact, taking into account the conduct of the parties and implications for the administration of the legislation.
8. Decisions on enforcement action will be taken in a timely fashion, however flexibility will be retained to be able to respond to additional information or changes in circumstance.

9. In exercising enforcement powers, the department will have regard to the likelihood that the desired outcome will be achieved in a cost effective manner. Desired outcomes include the environmental outcome in a particular case, compliance with other principles of this policy, and implications for the administration of the legislation.
10. Requirements set by enforcement action will be sufficiently clear to assist all parties to understand what constitutes compliance or breach.
11. DEC legislation and enforcement will be applied consistently across all sectors of the community, industry and government. All requirements will be administered fairly.
12. Enforcement action will be carried out in accordance with the legislative powers conferred on the department.

Discretion

The department has discretion in considering what is the appropriate enforcement action to be applied. Key points in making this determination include:

- the appropriate defendant to pursue;
- the appropriate enforcement action to use in the circumstances; and
- withdrawal of an enforcement action that has been taken.

The withdrawal of an enforcement action will be documented.

The duty to notify, voluntary disclosure and co-operation

Under some DEC legislation there are mandatory requirements to notify the department as soon as an individual or corporation becomes aware of a breach of legislation and where that notification does not occur an offence is normally committed.

Even in situations of mandatory disclosure, expeditious notification and the quantity and quality of information provided may be taken into account as mitigating factors.

DEC will consider whether:

- the individual/corporation/other promptly notified the department;
- the information assisted the control or mitigation of any harm to the environment;
- the information substantially aided the department's investigation of the incident; and
- the disclosure occurred prior to the department or any other regulatory body obtaining knowledge of the incident.



Where there is not a requirement for mandatory disclosure, the department will consider voluntary and complete notification and reporting of an incident, in deciding the type of enforcement action to take. Regardless of the level of voluntary disclosure of information and co-operation, prosecution may still be the appropriate enforcement action.

Choosing the appropriate defendant

A wide range of people may have participated in, or contributed to, a legislative offence. It is not always appropriate to take enforcement action against every person who may be liable for an offence. However, in many cases where more than one person or company combine to commit an offence, it may be appropriate to prosecute all of the relevant offenders.

In selecting the appropriate defendant for enforcement action, the department will generally consider the following criteria:

- who was primarily responsible for the offence, i.e. who formed the intent, who committed the act, and who created the material circumstances leading to the breach;
- in the case of strict liability, what was the role of the potential defendant;
- potential liability of the corporation, body corporate, directors and executive officers, including vicarious liability;
- potential liability of employees and/or contractors;
- potential liability of lending institutions (in particular, the categories of 'legal owners and occupiers');
- potential liability of public authorities; and
- the likely effectiveness of court orders against the potential defendant.

Choosing the appropriate enforcement action

To identify the appropriate enforcement action to take in a particular circumstance, the department will generally consider the following criteria:

- the enforcement measures that are necessary to ensure compliance with the objects of the legislation, and those most likely to achieve the best biodiversity, conservation or environmental outcomes or to promote the objects of the relevant DEC legislation;
- the seriousness of the incident having regard to the potential impacts on biodiversity or the environment, the impacts on people, impacts on the statutory responsibilities imposed by DEC legislation and implications for the administration of DEC legislation. Seriousness includes location, severity, quantity, extent and duration of that damage or impact, or potential thereof, or the undermining of an administrative process designed to prevent detrimental impacts on biodiversity and the environment or promote the objects of DEC legislation;
- voluntary action by the offender to mitigate any harm to the environment, biodiversity or other impacts of relevance under DEC legislation and to put into place mechanisms to prevent any recurrence;
- failure to notify or delayed notification of the incident to the department;
- failure to comply with informal requests, lawful directions or notices given by the department;
- cooperation given to the department by the offender, and willingness to commit to appropriate remedial actions;
- the existence and effective implementation of environmental management systems or other measures or procedures, such as restoration and rehabilitation systems, to address relevant impacts under DEC legislation;



- actions taken in adherence to requirements of existing environmental management systems or other measures or procedures, such as restoration and rehabilitation systems, to address relevant impacts under DEC legislation;
- previous history of the offender with regard to compliance with DEC legislation, and frequency of offences;
- whether false or misleading statements have been made;
- avoided costs and/or profits realised;
- culpability of the offender, including any mitigating or aggravating circumstances;
- issues of public concern, including the need for specific and general deterrence;
- legal precedents; and
- statutory time limits.

Available enforcement tools

Each statute which DEC is responsible for administering has its own range of enforcement actions available to deal with legislative breaches. The type of actions, or a combination thereof, able to be taken in the case of a legislative breach occurring are outlined below:

1. Prosecution

Prosecution is an enforcement tool to be employed where it is the appropriate response to a particular circumstance and is not an enforcement option to be applied only as a last resort.

Prosecution is specifically dealt with at the end of this policy and will be considered equally together with all other enforcement tools in line with the principles outlined in this policy.

2. Infringement notice

An Infringement Notice (IN) is a written allegation that a person has committed an offence which requires the payment of a fine or the election to have the matter heard in court. Payment of the fine does not lead to the recording of a criminal conviction. If the recipient of an IN elects to have the matter heard, prosecution will be commenced in the Magistrates Court.

An IN will be issued in accordance with the requirements of the legislation which authorises the issue of the IN. It should be issued promptly as it may be the first notification the alleged offender has of the offence, and to allow the person to gather evidence so the matter can be defended in court if desired.

An IN may be issued when:

- the offence is one that may be dealt with by issue of an IN under the legislation;
- there is *prima facie* evidence of a legislative breach;
- a one-off legislative breach has occurred which is of minor impact and which can be remedied easily;
- a breach is the result of failure to comply with normal operating procedures or requirements which would have prevented that breach;
- the facts are apparently indisputable; and
- it is likely to be a sufficient deterrent.

An IN will not be issued when:

- large-scale environmental harm or serious impacts on biodiversity have occurred;
- the extent of the harm to the environment or the impact on biodiversity cannot be assessed immediately;
- the breach has had a significant impact upon other persons or property;
- the breach is continuing, and it is not within the alleged offender's ability to remedy quickly;
- multiple breaches have occurred (unless the breaches are entirely unrelated);
- another notice, direction or order has been issued by the department to do specified work within a time limit and the limit has not yet expired; or
- another government department has issued a notice for the same or similar offence in the same period.



Any IN which is not paid may be referred to the Fines Enforcement Registry (FER) for collection or action in accordance with the provisions of the *Fines Penalties and Infringement Notices Enforcement Act 1994*. Additional enforcement action may be taken by the department if there is a failure to comply with an IN. The department also retains the right to initiate prosecution if an IN is not paid within the specified time.

3. Caution notice/written warning

A written warning in the form of a field issued caution notice or a formal letter of warning is notice to an offender that an offence has been committed.

A written warning may be given when:

- an administrative, minor or technical breach has occurred;
- the detrimental impact, or potential detrimental impact, is minor or trivial in nature;
- the matter is one which can be quickly and simply put right; and
- a written warning would be appropriate in the circumstances.

4. Modified penalty notice (*Environmental Protection Act 1986*)

A modified penalty notice is a written notice of an alleged Tier 2 offence under the *Environmental Protection Act 1986* (EP Act). It requires the payment of a penalty or the election of court action.

A modified penalty notice may be issued when the criteria set out in s99A of the EP Act have been met.

Payment of the penalty is not regarded as an admission for the purposes of any proceedings, whether criminal or civil. If the recipient of a modified penalty notice elects to have the matter heard, proceedings will occur in the Magistrates Court. Prosecution will be initiated by the department if a modified penalty notice is not paid within the specified time.

5. Statutory notices and directions

A statutory notice or direction is a written notice/direction that requires certain actions to be taken or to be ceased within the specified time.

Legislation authorising the giving of statutory notices or directions identifies the matters on which the department must be satisfied before issuing the notice. A notice may be issued where those statutory prerequisites are satisfied.

It is an offence to fail to comply with a statutory notice or direction.

Further enforcement action may be taken by the department if a statutory notice or direction is not complied with in the specified time.

The following are examples of statutory notices and directions:

- Environmental protection directions;
- Directions on the discharge of waste and causing pollution;
- Direction to comply with licence conditions under the EP Act;
- Noise abatement directions; and
- Vegetation conservation notices.



6. Other written notices

The department may use an Environmental Field Notice, Management Letter or Work Improvement Notice as non-statutory written notices to require certain actions to be taken to achieve compliance with DEC legislation or to protect biodiversity or the environment. Failure to act in accordance with any of these notices may result in further enforcement action.

The legislative breach, although rectified, may also result in further enforcement action; for example, the issue of a written warning, infringement notice, modified penalty or the commencement of prosecution proceedings.

7. Amendment to licence conditions/permit

The department may amend an existing licence to require certain actions to be taken to achieve compliance with the legislation or to protect the environment or biodiversity. Amendment of licence conditions may be preferred as an alternative to the issue of statutory notices or directions.

Amendment of licence conditions may occur when there is a need to take additional action because of the breach of legislation, the licence, or other instrument. It is an offence to fail to comply with any licence condition.

Further enforcement action may be taken by the department if there is a failure to comply with an amended licence condition.

8. Physical intervention

The department may take physical action itself to remedy a breach, rehabilitate an area or to clean up pollution. If this occurs, the offender may be pursued for the cost of the clean-up. Such action will be taken only when authorised by legislation and in accordance with that legislation.

9. Suspension or revocation of works approval or licence/permit

The department may by written notice suspend or cancel a works approval, licence or permit. This may result in the closure of premises or cessation of activity until the legislative breach has been remedied.

Revocation or suspension of a works approval, licence or permit may be used when:

- there has been contravention of a licence condition;
- false or misleading information has been provided in or supporting the application to obtain an approval or licence/permit;
- the person's offence history indicated that the licensee is not a fit and proper person;
- circumstances exist that pose a serious and unacceptable risk to biodiversity or the environment;
- there is evidence of a deliberate attempt to gain financial advantage from non-compliance; or
- the current business address of the holder of the approval, licence or permit is unknown.

When considering the exercise of this power, the department will give the alleged offender a reasonable opportunity, as specified by the appropriate legislation, to show cause in writing why the power should not be used. Such action will be taken only where authorised by DEC legislation and in accordance with that legislation.

The right of appeal and challenge

For the majority of enforcement actions, the right to challenge or appeal exists as an avenue for the alleged offender to pursue.



Application

This policy applies to all prosecutions for offences under the legislation administered by the department and as the circumstances allow, to all appeals arising out of proceedings in respect of any such prosecutions.

To ensure there is consistency in enforcement action undertaken by the department, the Environmental Enforcement Unit or the Nature Protection Branch will review all prosecution briefs across the activities of the department. This is to ensure that all statutory obligations are met and allows for close liaison with the State Solicitor's Office regarding further advice.

Decisions on whether or not to prosecute rest with the Director General or any officer delegated to act on his behalf in matters relating to decisions to prosecute. Matters may be referred to the State Solicitor's Office for advice concerning issues of public interest.

It is not the intent of this policy that any act or omission of any officer of the department shall be called into question or held to be invalid on the grounds of a failure to comply with this policy.

The decision to prosecute

A prosecution action commences when a prosecution notice is made under section 23 of the *Criminal Procedures Act 2004* that alleges an individual/corporation/other has committed an offence against the legislation.

A primary consideration in any decision to prosecute is the extent to which a prosecution will fulfil the statutory objectives and purpose of the legislation.

The fundamental objectives of a criminal prosecution are:

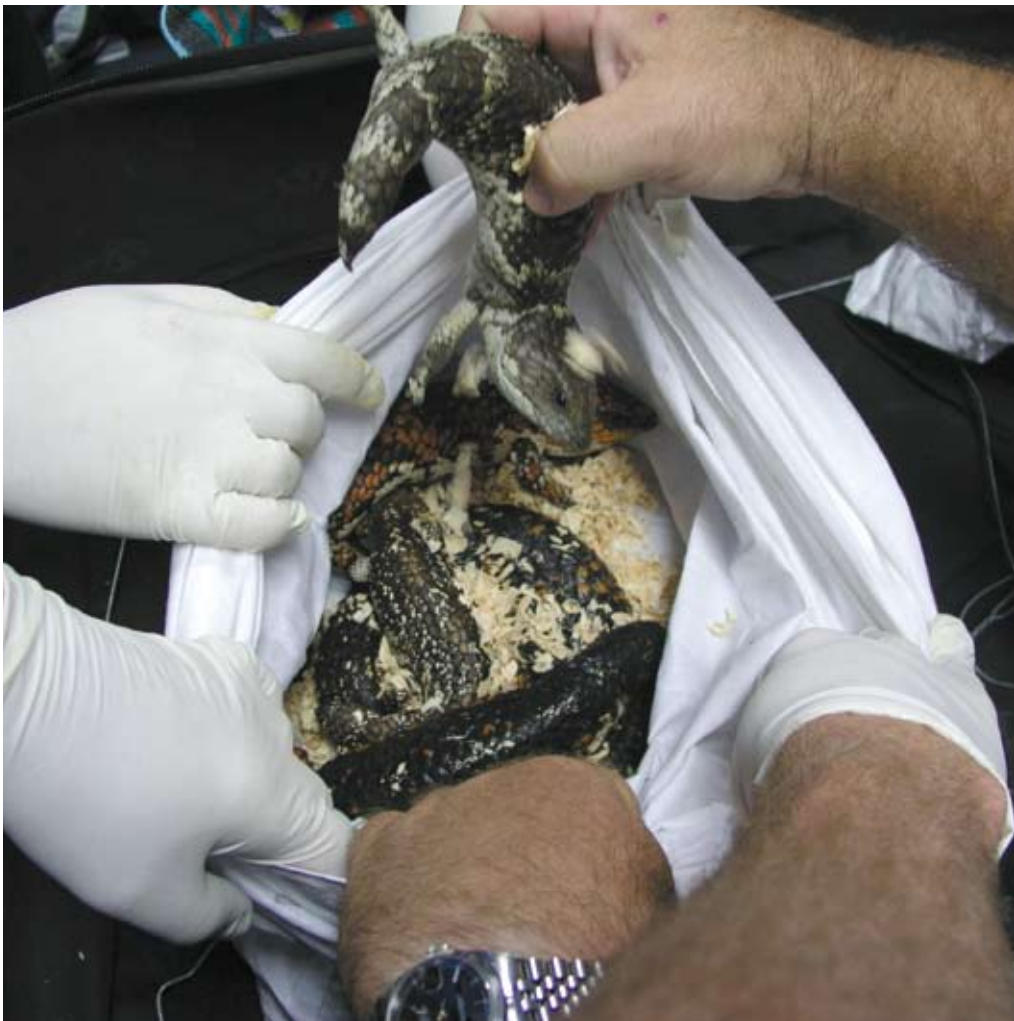
- to bring justice to those who commit offences;
- to punish those who deserve punishment for their offences;
- to provide expeditious compensation and restitution to victims of crime; and
- to protect or restore the environment and protect the community.

In pursuit of these objectives it is necessary to consider:

- the rights of the alleged offender;
- the interests of victims; and
- the public interest.

Ordinarily, prosecutorial discretion will be exercised so as to recognise the courts' central role in the criminal justice system in determining guilt and imposing appropriate sanctions for criminal conduct.

Two essential conditions are to be met before commencing the prosecution action. Firstly, that there is sufficient evidence to establish a *prima facie* case, and secondly that it is judged to be in the public interest.



1. Is there sufficient evidence to establish a *prima facie* case?

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

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

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

2. Are the proceedings in the public interest?

If a *prima facie* case exists, the prosecution of an offence must also be in the public interest. This requires consideration of a broad range of factors, as they relate to the particular case.

All the relevant factors taken together will determine on balance, whether it is in the public interest to proceed.

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.

Despite the existence of a *prima facie* case and reasonable prospect of conviction, it may not be in the public interest to proceed if other factors, singly or in combination, render a prosecution inappropriate. In each case all relevant factors should be considered before a decision is made in favour or against initiating or continuing with a prosecution. The decision must be made after the 'for and against' factors are weighed against each other.

Factors which may weigh in favour of prosecution

Factors which might require the prosecution to proceed in the public interest, and which should be balanced against any factors weighing against, include:

- the need to maintain the rule of law (i.e. the application of the law without the influence of arbitrary power; the equal accountability of all before the law; and the protection of the rights and freedoms of individuals through the courts);
- the need to maintain public confidence in basic constitutional institutions, including Parliament and the courts;
- the entitlement of the State or other person to be awarded compensation if guilt is adjudged;
- the need to ensure consistency in the application of the law;
- the need for punishment and deterrence; and
- the circumstances in which the alleged offence was committed.



Factors which may weigh against prosecution

Factors which may singly or in combination, render a prosecution inappropriate in the public interest include:

- the trivial or technical nature of the alleged offence in the circumstances;
- the youth, age, physical or mental health or special infirmity of the victim, alleged offender or witness;
- the alleged offender’s previous history;
- the staleness of the alleged offence, including delay in the prosecution process, which may be oppressive;
- the degree of culpability of the alleged offender in connection with the offence;
- the obsolescence or obscurity of the law;
- whether a prosecution would be perceived as counterproductive to the interests of justice;
- the availability or efficacy of any alternatives to prosecution;
- the lack of prevalence of the alleged offence and need for deterrence, either personal or general;
- whether the alleged offence is of minimal public concern;
- the attitude of the victim of an alleged offence to a prosecution;
- the likely length and expense of a trial;
- whether the alleged offender has co-operated in the investigation and prosecution of others or has indicated an intention to do so;
- the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court;
- the likely effect on public order and morale;
- whether a sentence has already been imposed on the offender which adequately reflects the criminality of the circumstances; and
- whether the alleged offender has already been sentenced for a series of other offences and the likelihood of the imposition of an additional penalty is remote.

The following matters are not to be taken into consideration in evaluating the public interest;

- The race, colour, ethnic origin, sex, religious beliefs, social position, marital status, sexual preference, political opinions or cultural views of alleged offender;
- The possible political consequences of the exercise of the discretion;
- The personal feelings of those responsible for the decision regarding the offender; or
- The possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

Fair process

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.

Reasonable prospects of conviction

It is not in the interest of justice to initiate or continue with a prosecution which has no reasonable prospect of resulting in a conviction.

A prosecution should be discontinued if based on the available material and appropriate advice, the department considers that there is no reasonable prospect of conviction, unless further prompt investigation will remedy any deficiency in the prosecution case. The evaluation of prospects of conviction is a matter of dispassionate judgment which may on occasion 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 department. A case considered weak by some might not seem so to others.

The assessment of the 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.



Evaluation of the prospect of conviction will be based on all available advice and experience of the department and includes consideration of:

- whether any alleged confession was given voluntarily and whether there are grounds for reaching the view that a confession will not meet the various criteria for admission into evidence;
- 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;
- the competence, reliability and availability of witnesses;
- 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:
 - Has the witness made prior inconsistent statements relevant to the matter?
 - Is the witness friendly or hostile to the defence?
 - Is the credibility of the witness affected by any physical or mental impairment?
- the existence of an essential conflict in any important particular of the prosecution case among prosecution witnesses;
- where the identity of the alleged offender is in issue, the cogency and reliability of the identification evidence; and
- any lines of defence which have been indicated by, or are otherwise plainly open to the defence.

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

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

Plea negotiation

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

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

A plea will not be accepted if:

- to do so would distort the facts disclosed by the available evidence and result in an artificial basis for sentence; or
- the accused person intimates that he or she is not guilty of any offence.

In considering whether to accept a plea, regard should be had to the views of the victim of the offence and the environmental and other relevant impacts of the offending conduct.

