



Government of **Western Australia**
Department of **Mines and Petroleum**

Prosecution Guidelines

(June 2015)

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Introduction

The Department of Mines and Petroleum (the Department) is the lead agency in developing and efficiently managing the State's resources sector for the benefit of all Western Australians, while helping to care for workers, the public and the environment.

These Prosecution Guidelines (Guidelines) are to ensure legislation administered by the Department is applied impartially, and in a fair and consistent manner.

The Guidelines should be read in conjunction with the Department's overarching [Enforcement Policy](#) (Revised June 2015).

These Guidelines have been developed within the broader Western Australian Government law enforcement policy context and should be read in conjunction with the 2005 [Statement of Prosecution Policy and Guidelines](#), gazetted under Section 24 of the *Director of Public Prosecutions Act 1991* (known as the [DPP Guidelines](#)).

The Department aims to recognise and promote a culture of safety and best practice environmental management in relation to dangerous goods, mining and petroleum operations in Western Australia.

1. Purpose

These Guidelines are intended to guide the Department's approach to prosecuting an individual or company under the legislation it administers.

Prosecution is just one of the enforcement tools available to the Department to deal with non-compliance, and it important therefore to ensure a decision to prosecute is appropriate in the circumstances.

Subject to these Guidelines, and in accordance with the Department's overarching Enforcement Policy, where there is sufficient evidence to establish a *prima facie* case and there is a reasonable prospect of conviction, consideration will be given to taking prosecution action instead of, or in addition to, applying other enforcement action.

2. Objectives

The key objectives of prosecution by the Department are to:

- a) achieve an outcome consistent with the objects of the legislation;
- b) bring to justice those who commit offences;
- c) punish those who deserve punishment for their offences;
- d) provide a message of deterrence to industry, either broadly or to one or more particular sector(s), to improve compliance with the law;
- e) discourage repeat offences and/or recalcitrance by duty holders, and thereby to improve compliance with the law; and
- f) ensure a licensee or tenement holder complies with their duties and responsibilities.

3. Key Principles

The Department adopts the principles in the [DPP Guidelines](#) that a proposed prosecution must disclose a *prima facie* case and must be in the public interest before it can proceed.

What is also required for a prosecution to proceed is a sufficient, admissible and reliable body of logical evidence to meet proof 'beyond reasonable doubt', otherwise known as having reasonable prospects of conviction.

3.1 *Prima Facie* Case

A proposed prosecution must disclose a *prima facie* case before it can proceed.

Whether or not there is a *prima facie* case is a question of law. It means – if the available evidence is believed by the court, is it capable of proving, beyond reasonable doubt, all the elements of the offence.

In some cases, there may be evidence capable of proving some elements of the offence, but not all. This is not enough to proceed.

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

3.2 Prospects of conviction

In deciding whether to commence a prosecution, consideration must also be given to the prospects of conviction. It is not in the public interest to proceed with a prosecution if there is no reasonable prospect of a conviction being secured.

There may be sufficient *prima facie* evidence, but a combination of factors such as technical or complex facts and law, or witnesses' testimony which may be unreliable or inconsistent, could reduce the likelihood the evidence will be accepted by the court.

The Department will exercise dispassionate judgement, based on experience, in assessing the prospects of a conviction.

It is also important that not only cases perceived as 'strong' should be prosecuted. A case which is perceived as 'weak' may not seem so to others. In these cases, The Department may consider whether a prosecution should proceed on the basis of public interest.

In assessing the prospects of conviction, the Department will consider the following:

- a) whether an alleged confession was voluntary and whether there are grounds for objecting to evidence being admitted;
- b) the competence, reliability and availability of witnesses;
- c) known matters that may reduce the likelihood that a witness' evidence will be accepted – for example a prior inconsistent statement by the witness; memory of the events over time; attitude to the defence; or whether credibility is affected by any physical or mental impairment;
- d) inferences consistent with innocence; and
- e) the standard of proof, beyond reasonable doubt.

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

- a) material not disclosed to the prosecution by the defence; and
- b) notification of a defence that purports to rest on unsubstantiated assertions of fact.

3.3 Public interest

Once it has been concluded there is a *prima facie* case with reasonable prospects of conviction, the Department must consider whether pursuing the matter is in the public interest. The Enforcement Review Panel can consider the public interest and provide advice as to whether it recommends prosecution.

Public interest factors that can be taken into account will vary from case to case.

The following will be considered by the Department in taking a decision to prosecute an individual or company:

- a) whether the offence is serious or trivial including the risks posed, and any damage or injury that has been caused
- b) whether there are any mitigating or aggravating circumstances;
- c) the alleged offender's past history, background, physical and mental situation;
- d) the staleness of the offence;
- e) the degree of culpability of the alleged offender to the offence;
- f) the attitude of the victim;
- g) the likely outcome in the event of a finding of guilt;
- h) the need for deterrence; and
- i) whether a sentence has already been imposed on the offender which adequately reflects the criminality of the circumstances.

When prosecution action is taken, victims can be assisted by the Victim Support Service, contactable via the relevant court.

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

- a) race, colour, ethnic origin, sex, religious beliefs, social position, marital status, sexual preference, political opinions or cultural views of the offender. See the [DPP Guidelines](#) for exceptions;
- b) the possible political consequences of the exercise or non-exercise of discretion;
- c) the prosecutor's personal feelings concerning the alleged offender or victim; and
- d) the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

Prosecutions are conducted by a the Department lawyer, a lawyer from the State Solicitor's Office or a lawyer engaged by the State Solicitor's Office to act on its behalf.

4. Charge negotiation

The [DPP Guidelines](#) discuss the benefits of a plea of guilty and indicate that negotiations between the parties (with a view to securing a guilty plea) are encouraged and may occur at any stage of the progress of a matter through the courts.

Subject to certain considerations, the Department may agree to discontinue a charge or charges, or reduce a charge to a less serious charge, on the promise of an accused to plead guilty to one or more other charges.

A plea of guilty in those circumstances may be accepted if the public interest is satisfied after consideration of the following matters where or when:

- a) the plea of guilty reasonably reflects the essential criminality of the conduct and provides an adequate basis for sentencing;
- b) the evidence available to support the prosecution case may be weak in a particular area, or the prosecution case may be fraught with difficulty, and the public interest will be satisfied with an acknowledgement of guilt to certain criminal conduct;
- c) the saving of cost and expense to the State is great when weighed against the likely outcome of the matter if it proceeded to trial without acceptance of the plea; and
- d) when to do so will save a witness or witnesses, particularly a victim or other vulnerable witness, the trauma of testifying at trial.

A plea will not be accepted if:

- a) to do so would distort the facts disclosed by the available evidence and result in an artificial basis for sentence; and
- b) the accused intimates they are not guilty of any offence.

When considering whether to accept a plea regard may be given to the views of the investigating inspector and, where known, of the victim.

Charge negotiations must be based on principle and reason, and not on expedience alone, recognising the benefit of a plea of guilty in providing finality to the prosecution process, avoiding the uncertainty of a trial, and having the accused publicly acknowledge guilt.

5. Who to prosecute?

Where a prima facie case can be established, prosecution action may be taken against any person or legal entity. The Department will consider prosecuting all of those who have allegedly failed in their duties under the relevant legislation. Prosecution action will be commenced following a thorough consideration of the part played by those involved. Factors which may be considered when determining who to pursue are shown below. They are in addition to the usual factors outlined above, and do not override the public interest considerations which must be taken into account in all prosecutions.

5.1 Prosecution of individuals, directors and other officers

To achieve a deterrent effect in accordance with the objects of the legislation, companies responsible for the breach, will usually be subject to prosecution. It is important to identify the company by its correct Australian Company Number (ACN).

5.2 Prosecution of individuals, directors and other officers

Factors that will be considered in taking prosecution action against individuals, directors or other officers are the:

- a) circumstances, seriousness and the outcome of the breach;
- b) level of criminal culpability of the alleged offender against whom a charge is proposed;
- c) alleged offender's knowledge of the risk of the potential harm, including whether or not the hazard was obvious or would have been obvious to a reasonable person in their position;
- d) level of involvement of the alleged offender in the events that led to the breach, including the degree to which the alleged offender was personally responsible for what occurred;

- e) ease with which the breach could have been avoided or rectified; and
- f) the need to conduct a criminal prosecution of an individual, consistent with the objects of the legislation.

5.3 Prosecution of Partners in a business

If a business is not incorporated, but is operated as a partnership with two or more individuals carrying on the business, then the business does not have a distinct legal identity, unlike a person or a company. The persons responsible for the actions of the business are the partners who operate it.

As a partnership is not a legal entity, the Department will consider the level of each partner's culpability, as individuals in a partnership may undertake different roles and one or more partners may have little or no involvement.

6. Trial

In the interests of justice, matters are brought to trial as soon as possible.

As far as is practicable, adjournments will be avoided once a matter has been allocated a trial date.

6.1 Disclosure

The Prosecution has a general duty of disclosure. In most cases, the Prosecutor is required to disclose to the defence a copy of every statement or disposition obtained by the prosecution, of any person who may be able to give relevant evidence at the trial.

The Prosecutor is also required to disclose a copy of every document or exhibit, or if it is not practicable to do so, a description of it and when and where it can be inspected.

6.2 Unrepresented Accused

The Prosecutor is required to ensure that the accused person is properly informed of the prosecution case so that the accused can be prepared to respond. While a Prosecutor is required to be fair to the accused, it is not the Prosecutor's role to advise them regarding legal issues, evidence, investigations that may be made, any available defences or how the defence ought to be conducted.

Should it be necessary, a Prosecutor may communicate with an unrepresented accused person through the court.

7. Sentence

The Prosecutor is required to read out the statement of material facts at the sentencing hearing and will provide the court such information as is necessary to assist the court to decide an appropriate penalty. It is the duty of the Prosecutor to make submissions on sentence to prevent the magistrate from falling into appealable error;

8. Publication of Prosecution Outcomes

The Department considers the publication of enforcement action, and the outcomes of that action, is an effective tool to provide a deterrent for engaging in similar non-compliant behaviour, and to educate industry and define legal obligations.

The Department publicises its enforcement related information on the Department's website, in media statements, in publications such as the Department's Annual Report and Fact Sheets.