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# OEH Prosecution Guidelines

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# 1 Introduction

**In respect of prosecutions that would be brought in the name of the Environment Protection Authority (EPA), refer to the EPA Prosecution Guidelines at <http://www.epa.nsw.gov.au/legislation/prosguid.htm>**

The Office of Environment and Heritage (OEH) is a separate agency in the Planning and Environment Cluster. The *OEH Prosecution Guidelines* were created in 2011 to provide a set of guidelines for all prosecution activities of OEH.

OEH is not the only body which may institute criminal proceedings under the environment protection legislation. Organisations such as the EPA may bring proceedings under legislation administered by the EPA. The *OEH Prosecution Guidelines* are consistent with the *EPA Prosecution Guidelines*.

## 2 Office of Environment and Heritage

OEH has a broad range of responsibilities and administers legislation in respect of conservation, heritage, national parks, Aboriginal heritage, flora, fauna and threatened species. Broadly, OEH:

- works towards a healthy environment cared for and enjoyed by the whole NSW community
- manages much of the state's natural resources, including biodiversity and native vegetation
- manages natural, cultural and built heritage across the state, and
- undertakes biodiversity, plant, environmental and cultural heritage science and research to improve decision making.

OEH's wide-ranging responsibilities include:

- national parks and reserves management
- biodiversity, threatened species and native vegetation management
- Aboriginal culture and heritage protection
- built, natural heritage and historic houses protection
- sustainability programs, including environmental education, energy efficiency and water conservation programs and renewable energy policy

OEH operates under a number of well-recognised 'brands'. The National Parks and Wildlife Service logo remains associated with our national parks. OEH also provides services and other support to the Royal Botanic Gardens and Domain Trust, NSW Environmental Trust, Western Sydney Parkland Trust, Parramatta Park Trust, Centennial Park and Moore Park Trust, Historic Houses Trust, Taronga Conservation Society Australia, Jenolan Caves Reserve Trust, and the Environment Protection Authority

## 3 Principles of prosecution

### 3.1 Purpose of these guidelines

The purpose of these guidelines is to identify for the benefit of the public, including those mostly affected by the legislation administered by OEH, and other prosecutorial organisations:

- (a) the basis on which OEH will make a decision to prosecute
- (b) the factors to be taken into account in deciding which persons are the appropriate defendants
- (c) the factors to be taken into account in deciding which charges to lay
- (d) the factors to be considered in determining the appropriate jurisdiction to bring the trial
- (e) those significant cooperative measures that may influence OEH's decision to prosecute or which OEH will submit may operate as important mitigating factors on sentence
- (f) instances in which OEH may recommend the indemnification of witnesses, and
- (g) factors considered by OEH before commencing an appeal against a sentence imposed on an offender.

The guidelines are not legally binding on OEH or any other organisation. They reflect the current policies of OEH. Those policies will be kept under review and any changes will be notified publicly.

OEH administers a wide range of legislation. In some cases the legislation allows organisations or persons other than OEH to institute criminal proceedings for certain offences. Although those organisations or persons are not bound by these guidelines, it is intended that the guidelines will provide a framework to encourage a consistent, fair and efficient approach.

### 3.2 The decision to prosecute

The basic prerequisite of any prosecution is that the available evidence establishes a prima facie case. However, as noted in the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*:

It has never been the rule in this country...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 'wherever 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. (Sir Hartley Shawcross QC, UK Attorney General and former Nuremberg trial prosecutor, speaking in the House of Commons on 29 January 1951, at p. 3.)

This statement is equally applicable to OEH. The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue with vigour those cases worthy of prosecution.

### 3.3 Evidence

A prosecution should not be instituted or continued unless the available evidence is capable of establishing each element of the offence and there are reasonable prospects of the offence being proved. This decision requires an evaluation of how strong the case is likely to be when presented in court.



The evaluation should not just consider whether or not there is a prima facie case but it must take into account matters such as the availability, competence and credibility of witnesses and their likely impression on the court, the admissibility of the evidence, all potential defences and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of the offence being proved. When making this evaluation in respect of environmental offences, it is also important to consider the availability and strength of any scientific evidence and the capabilities and expertise of any expert witness.

### 3.4 Discretion

Sufficiency of evidence is not the sole criterion for prosecution:

- (a) not every breach of the criminal law is automatically prosecuted – the laying of charges is discretionary, and
- (b) the dominant factor in the exercise of that discretion is the public interest.

The Prosecution Policy of the Commonwealth states:

The decision whether or not to prosecute is the most important step in the prosecution process ...The criteria for the exercise of this discretion cannot be reduced to something akin to a mathematical formula; indeed it would be undesirable to attempt to do so. The breadth of the factors to be considered in exercising this discretion indicates a candid recognition of the need to tailor general principles to individual cases. (At paragraphs 2.2 and 2.3).

In criminalising breaches of OEH administered legislation, a primary, though not the sole, aim of Parliament is deterrence. By extending criminal liability to a wide range of people who may be involved in some way with contraventions, for example, the landowners, owners of vehicles and vessels, licence holders, directors and managers of corporations, the legislation encourages increased awareness and responsibility for compliance both vertically within corporate hierarchies and laterally across a broad spectrum of those responsible for preventing harm or damage to the environment and our natural, cultural and built heritage. Potential liability, however, does not mean automatic prosecution.

Parliament has recognised that prosecution may not always be the appropriate response. OEH has a discretion as to how to proceed in relation to breaches of laws it administers.

Prosecution will be used, therefore, as part of OEH's overall strategy for achieving its objectives. Each case will be assessed to determine whether prosecution is the appropriate strategic response. It will be used as a strategic response where it is in the public interest to do so.

### 3.5 Factors to be considered

Factors which alone or in conjunction arise for consideration in determining whether the public interest requires a prosecution include:

- (a) the seriousness or, conversely, the triviality of the alleged offence or whether it is of a 'technical' nature only
- (b) the harm or potential harm to the environment or our natural, cultural or built heritage caused by the offence
- (c) any mitigating or aggravating circumstances
- (d) the degree of culpability of the alleged offender in relation to the offence
- (e) the availability and efficacy of any alternatives to prosecution
- (f) the antecedents of the alleged offender and whether the alleged offender had been dealt with previously by prosecutorial or non-prosecutorial means

- (g) whether the alleged offender had been prosecuted by another agency for a related offence, arising from the incident for which OEH is considering prosecution
- (h) whether the breach is a continuing or repeat offence
- (i) whether the issue of Court orders are necessary to prevent a recurrence of the offence or to recompense for the harm caused by the offence
- (j) the prevalence of the alleged offence and the need for deterrence, both specific and general
- (k) the length of time since the alleged offence
- (l) the age, physical or mental health or special infirmity of the alleged offenders or witnesses
- (m) whether there are counter-productive features of the prosecution
- (n) the length and expense of a court hearing
- (o) the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court
- (p) any precedent which may be set by not instituting proceedings
- (q) whether the consequences of any conviction would be unduly harsh or oppressive
- (r) whether proceedings are to be instituted against others arising out of the same incident
- (s) whether the alleged offender acted in accordance with OEH advice or advice from another government agency, and
- (t) whether or not the alleged offender is willing to co-operate or has cooperated in the investigation or prosecution of others.

OEH adopts the cardinal principle that a prosecution must not be brought for improper purposes. A decision whether or not to prosecute will not be influenced by:

- (a) any elements of discrimination against the alleged offender or any other person involved, for example, race, religion, sex, nationality, social affiliation or political associations, activities or beliefs of the alleged offender or any other person involved
- (b) personal empathy or antipathy towards the alleged offender
- (c) the political or other affiliations of those responsible for the prosecution decision, or
- (d) the possible advantage or disadvantage to the government or any political party, group or individual.



## 4 Selecting the appropriate defendant

### 4.1 General principles

The legislation administered by OEH imposes liability on a wide range of people who may have participated in or contributed to an act constituting an offence. This may mean that a number of people commit an offence arising out of one incident. However, it is not always appropriate to prosecute every person who may be liable for an offence.

In addition to the factors set out in 3.5 above, there are some further considerations that may be taken into account in determining the appropriate defendant/s. These are:

- (a) who is primarily responsible for the alleged offence, that is, who was primarily responsible for the acts or omissions giving rise to the alleged offence or the material circumstances leading to the alleged offence or who formed any relevant intention
- (b) in relation to the matters set out in (a) above, what was the role of the proposed defendant, and
- (c) the effectiveness of any court orders that might be made against the proposed defendant.

### 4.2 Corporate liability

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

### 4.3 Employees' liability

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

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

An employee who, in good faith, followed a specific management procedure designed to avoid a breach, would not normally be prosecuted for an offence occasioned by following that procedure.

### 4.4 Liability of directors and those concerned in the management of a corporation

OEH-administered legislation recognises that while corporations are legal entities, nevertheless, it is the directors and managers who represent the directing mind and will of the corporation and control its activities. The legislation clearly indicates that those who direct a



corporation's illegal activities will not be shielded from responsibility by the corporate legal structure. The basic test as to whether proceedings will be brought is, again, one of culpability.

In any decision to prosecute a person in their capacity as a director or a person concerned in the management of a corporation that committed an offence, the crucial issue is the person's actual control or ability to influence the conduct of the corporation in relation to its criminal conduct. It will be a question of fact in each case as to who is concerned in the management of that corporation and the prosecution will be required to prove that fact beyond reasonable doubt. What is important is not the scope of a management role in itself, nor the capacity to influence the corporation's operations in a broad sense. As a general policy, OEH will institute proceedings against a director or a person concerned in the management of a corporation only where there is evidence linking a director or manager with the corporation's illegal activity. That link need not necessarily be of a positive (intentional) character but could be of a negligent nature.

The matters set out above will be considered in addition to the factors set out in 3.5 in determining whether or not to commence proceedings against a director or manager.

## **4.5 Lenders' liability**

Although there are very few situations in which lending institutions could attract criminal liability under OEH administered legislation, there are instances where lenders may be technically liable for a breach because they fall into particular categories such as landholders, owners or occupiers.

The guiding principle for OEH is the culpability of the potential defendants in relation to the offence. More than technical legal liability will be necessary as a prerequisite to prosecution.

OEH acknowledges that its legislation is not intended to restrict in any way the legitimate commercial activities of lending institutions.

Hence, in the absence of any evidence of culpability, OEH will not institute proceedings against lenders who are legally liable.

By engaging in normal business practices, lending institutions may be concerned in the management of the borrower corporation. However, OEH will not institute proceedings on the basis of management capacity nor on the basis of actual management of the company in a general sense. The crucial factor for any potential defendant is the actual control or ability to influence the conduct of the corporation in relation to its criminal conduct.

## **4.6 Public authorities**

### **Background**

OEH recognises that the issue of deciding whether public authorities should be prosecuted in a specific instance depends upon whether prosecution is in the public interest. It acknowledges that there are two competing public interests in relation to the prosecution of public authorities. These are as follows:

- (a) The public has an interest in government authorities abiding by the law. The law should apply equally to the private and public sectors.
- (b) It is the taxpayer that bears the cost of any prosecution of public authorities. Since any fines imposed as a result of criminal proceedings go back to the government, it could be argued that public funds are not expended, simply recycled. However, the use of government legal resources, the briefing of private legal firms and the use of court time are not recoverable and such expenditure needs to be justified as being in the public interest.

OEH recognises that the ultimate aim of any prosecution action is to ensure compliance with its legislation. Public authorities are usually under the control and direction of a Minister who can direct compliance with the relevant legislation. However, experience indicates that sole reliance on that avenue does not make for the same rigid adherence as the requirements of the court process. Moreover, in the interests of general deterrence, there will be instances where it is important that compliance not only be achieved but be seen to be achieved, with independent scrutiny.

## Consultation

OEH is guided by the [Premier's Memorandum No. 97-26 \*Litigation Involving Government Authorities\*](#). OEH recognises that the consultative steps set out in the Memorandum may facilitate remedial action and may expedite any court hearing by better defining the facts in issue. Consultation can also focus on longer-term strategies and directions. Indeed, the consultative process, as an adjunct and not necessarily an alternative to prosecution, will not be restricted to public authorities but can be applied to the private sector as well.

It would be inappropriate to enter consultations with government departments solely to achieve a 'by consent' prosecution so the charges laid do not reflect the gravity of the alleged offence. However, it is in the public interest that court proceedings involving public authorities are concluded quickly. OEH will attempt, therefore, to define the facts in issue and, with the concurrence of the other authority, will prepare and tender to the court an agreed statement of facts.



## 5 Charges

### 5.1 General principle

Once a decision has been made to deal with an incident by way of prosecution, it is in the public interest for that prosecution to succeed. It is, therefore, OEH's responsibility to select charges it can prosecute successfully and which are consistent with the seriousness of the alleged criminal conduct. The charge or charges laid must reflect adequately the nature and extent of the conduct disclosed by the evidence with the aim of providing a basis for the court to impose an appropriate penalty. In line with this general principle, the following policy positions have been adopted.

### 5.2 Similar charges for the same offence

OEH is aware that it has a duty to refine its case to avoid laying duplicate or multiple charges for the same alleged breach. There will be occasions where the same act will be prohibited under two separate statutes and involve an offence under each. Laying of duplicate or multiple charges should be avoided unless it is considered appropriate in the circumstances to lay both a primary charge and a 'back-up' charge for the same alleged breach.

Where there is another prosecuting authority involved as well as OEH, OEH will liaise with the other authority to ensure the most appropriate charge/s are laid. Conversely, it would be preferable for other prosecuting bodies which know of OEH's actual or potential involvement in a case to initiate contact prior to commencing proceedings.

### 5.3 Continuing offences

The determining factor in whether to charge a continuing offence or separate offences is whether the wrongdoing or the course of conduct can be classified as a single criminal enterprise or a succession of criminal acts. If there is any doubt of continuity, then separate charges will be laid.

### 5.4 Charge-bargaining

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

A charge-bargaining proposal will not be entertained by OEH unless:

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

## 6 Penalty notices

### 6.1 Background

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

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

Penalty notices may be issued by designated officers under the relevant legislation. Those officers include officers from many organisations, such as local councils and police, as well as OEH. OEH has no direct control over how officers from other organisations carry out their duties. In the interest of fairness and consistency, it is recommended that all relevant officers implement the guidelines set out here in relation to penalty notices.

### 6.2 Operation

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

Penalty notices are designed primarily to deal with one-off breaches that can be remedied easily. They are not appropriate in situations of an ongoing nature where further inquiries are needed to ascertain the nature of the problem and develop an effective long-term solution.

It is generally inappropriate to issue contemporaneous or successive penalty notices for multiple statutory breaches. In such an instance, there is obviously a major, and probably continuing, compliance or enforcement problem, even though each breach in itself may be comparatively minor. Such a problem needs to be dealt with by a court so that the appropriate orders can be made and enforced.

There is no specific time-frame set out in the legislation within which penalty notices have to be issued. However, since the service of the penalty notice may be the first notification that an alleged offender has of the alleged breach, it must be received at a sufficiently proximate time to enable the alleged offender to recall the events so that an informed election can be made as to whether to defend the matter in court. As a matter of fairness and courtesy, it is desirable that penalty notices for straightforward matters be issued within 14 days of the alleged breach. For more complex matters, it is desirable that penalty notices be issued within 14 days of the decision maker being satisfied that an offence has been committed and that it is appropriate to issue a penalty notice. However, the period of time between the alleged breach and the issuing of a penalty notice should not be prolonged.

It would be inappropriate for another authority to issue a penalty notice in a situation where OEH was already involved in the matter. It may be that OEH has decided to deal with the problem in another manner. Where it is apparent that OEH is already involved in a matter, it would be appropriate for another authority, prior to taking action, to consult with OEH so that a coordinated and constructive approach can be adopted. Similarly, OEH recognises that where



a matter has been jointly investigated OEH needs to consult with the other authority before issuing a penalty notice.

The service of a penalty notice does not in itself institute criminal proceedings. It can, however, lead to the institution of criminal proceedings at the election of the alleged offender. All relevant authorised officers and relevant bodies should therefore be aware of the [Premier's Memorandum No. 97-26 \*Litigation Involving Government Authorities\*](#) in relation to the prosecution of public authorities.

An official caution may be issued as an alternative to a penalty notice where an OEH officer believes on reasonable grounds that a person has committed a penalty notice offence and it is appropriate to give an official caution in the circumstances, having regard to the factors set out in the Attorney General's [Caution Guidelines under the Fines Act 1996](#).

### 6.3 Summary

Penalty notices are appropriate where:

- (a) the breach is minor
- (b) the facts are apparently incontrovertible
- (c) the breach is a one-off situation that can be remedied easily, and
- (d) the issue of a penalty notice is likely to be a practical and viable deterrent.

It is not appropriate to issue penalty notices where:

- (a) the breach is ongoing and not within the alleged offender's capacity to remedy quickly
- (b) the penalty prescribed on the notice would be clearly inadequate for the severity of the offence
- (c) the impact of the breach on the environment or on our natural, cultural or built heritage cannot be assessed immediately
- (d) the evidence is controversial or insufficient such that if a court heard the matter, it would be unlikely to succeed
- (e) negotiations to find a resolution to the problem which is the subject of the breach are being conducted already with OEH
- (f) at least one of the motivations for issuing a penalty notice to public authorities is to avoid the consultative procedures set out in the [Premier's Memorandum No. 97-26 \*Litigation Involving Government Authorities\*](#), or
- (g) multiple breaches have occurred.

## **7 Selecting the appropriate court**

### **7.1 General principle**

Offences under OEH administered legislation are all summary offences, with no offence carrying more than a maximum of 2 years imprisonment. Prosecutions for these offences can be instituted either in the Land and Environment Court or the Local Court. Where OEH has carriage of the matter, it will consider the following factors in choosing the venue for the summary hearing:

- (a) unless the penalty is likely to exceed the jurisdictional limit for the Local Court or there are other special circumstances, proceedings will be heard by the Local Court closest to the location of the alleged offence
- (b) all offences which are serious enough to attract possible penalties in excess of the jurisdictional limit for the Local Court will be commenced in the Land and Environment Court
- (c) those matters which have or are expected to give rise to applications for orders that can only be made by the Land and Environment Court will be commenced in the Land and Environment Court, and
- (d) unless there are good reasons to the contrary, all charges arising out of the same incident will be instituted in the same jurisdiction (and preferably at the same time) so the court has the option to hear them together.

OEH is not the only authority with power to commence proceedings under legislation administered by OEH. It would be appropriate in the interests of efficiency and consistency for other prosecuting authorities to adopt the procedures set out in 7.1 unless there are compelling reasons to the contrary.



## **8 Disclosure, cooperation and compliance**

### **8.1 Background**

OEH recognises that early notification of an incident together with full and informed cooperation on the part of the alleged offender will often minimise harm arising out of the breach. It is in the public interest, therefore, to encourage such voluntary disclosure and cooperation. Together with other relevant matters, the factors of voluntary disclosure and cooperation will be considered by OEH in exercising its prosecutorial discretion.

### **8.2 Voluntary disclosure**

Consideration will be given as to whether the alleged offender made a voluntary, timely and complete disclosure of the breach. Specifically, consideration will be given to whether:

- (a) the alleged offender notified OEH promptly
- (b) the information assisted the control, abatement or mitigation of any harm or adverse effect arising out of the breach
- (c) the information substantially aided OEH's investigation of the incident
- (d) the information was available from other sources, and
- (e) the disclosure occurred prior to OEH or any other regulatory body obtaining knowledge of the non-compliance.

### **8.3 Cooperation**

The extent of the cooperation between OEH and the alleged offender from the time of the occurrence of the incident to the conclusion of the investigation may determine the timeliness and effectiveness of the response to the incident. An alleged offender's willingness to make available to OEH all relevant information (including the complete results of any internal or external investigation and the identity of all potential witnesses) is to be encouraged and, hence, is a factor to be considered.

## 9 Indemnification of witnesses

OEH does not have the power to indemnify a witness or to provide immunity against prosecution. It can, however, recommend such a course to the Attorney General.

It is important to note Guideline 17 of the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* in relation to immunity:

Generally an accomplice should be prosecuted (subject to these guidelines) whether or not he or she is to be called as a witness... There may be rare cases, however, where that course cannot be taken (for example, there may be insufficient admissible evidence to support charges against the accomplice).

...

A request for an indemnity or undertaking on behalf of a witness will only be made by the Director to the Attorney General after consideration of a number of factors, the most significant being:

- (i) whether or not the evidence that the witness can give is reasonably necessary to secure the conviction of the accused person
- (ii) whether or not that evidence is available from other sources, and
- (iii) the relative degrees of culpability of the witness and the accused person. (p 27.)

## 10 Sentencing and appeals against sentence

### 10.1 Costs

It is the policy of OEH that it will generally seek costs in successful prosecutions.

### 10.2 Compensation, restoration and other orders

The *EPA Guidelines for Seeking Environmental Court Orders* apply to prosecutions taken under legislation administered by OEH, where the legislation has equivalent provisions to those under Part 8.3 of the *Protection of the Environment Operations Act 1997*.

### 10.3 Appeals

OEH may appeal against sentences that have been imposed by the Local Court and the Land and Environment Court (*Crimes (Appeal and Review) Act 2001* and *Criminal Appeal Act 1912*). However, such appeals ought to be rare. In deciding whether to appeal a sentence, OEH will be guided by the principles set out in the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*. The key factors to be taken into account are:

- (a) appeals should only be brought to establish and maintain adequate standards of punishment for breaches of OEH administered legislation or to correct sentences that are so disproportionate to the seriousness of the crime as to lead to a loss of confidence in the administration of criminal justice, and
- (b) appellate courts will intervene only where it is clear that the sentencing court has made a material error of fact or law and has imposed a sentence that is manifestly inadequate.

In general, an appeal will only be instituted where it is considered likely to succeed. Any such appeal should be brought promptly.