

Prosecution Policy and Guidelines

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Functional Sub group Corporate Administration - Governance

Summary State the Department's policies, guidelines and circumstances in which a prosecution may be undertaken under health and related legislation.

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This Policy Directive may be varied, withdrawn or replaced at any time. Compliance with this directive is **mandatory** for NSW Health and is a condition of subsidy for public health organisations.

NSW Department of Health

PROSECUTION POLICY AND GUIDELINES

1. INTRODUCTION

- 1.1 This document describes in broad terms the prosecution policy of NSW Health and provides detailed guidelines for the implementation of the policy. This policy replaces all previous prosecution policies of NSW Health. It was informed by the Director of Public Prosecutions (NSW) Prosecution Policy, as amended, and the NSW Environment Protection Authority Prosecution Guidelines.
- 1.2 The Prosecution Policy and Guidelines will be reviewed regularly to ensure that public health legislation continues to be applied in an efficient manner, whilst keeping abreast of changes within the community that may raise issues falling outside current practices and guidelines.
- 1.3 The resources available for the prosecution of breaches of health legislation are necessarily finite, and should therefore be concentrated on those cases most worthy of prosecution. Resources should not be wasted pursuing cases which do not advance the objects of the relevant legislation.
- 1.4 Not all breaches of health legislation will lead to prosecution, and presently there are two alternative procedures by which breaches of health legislation can be dealt with. When a breach occurs, consideration should be given to the issue of a warning notice. However, in cases where the breach presents a serious risk to public health and safety or where the issue of a warning notice is inappropriate and would be counterproductive to the promotion of public health, the circumstances may warrant the matter going before a court. For a list of indicators of where warning notices may not be appropriate please see section 4 below.
- 1.5 Prosecution will only be considered when a prosecution is likely to promote the interests of public health, and where the prosecution is in the public interest. Whether the public interest requires a prosecution to be pursued will be a matter for the Director-General or delegate approving the prosecution to assess based on the provable facts and the whole of the surrounding circumstances.
- 1.6 Factors which can properly be taken into account in deciding whether the public interest demands a protectoral proceeding will necessarily vary from case to case. Factors which are relevant to determining whether the public interest requires a prosecution are set out in section 4 below.

2. PRIVACY

- 2.1 All information collected and retained for the purposes of regulatory work, including prosecutions, are to be retained, used and disclosed in

accordance with the Information Protection Principles set out in the Privacy and Personal Information Protection Act 1998 which apply to the collection, use, storage and disclosure of personal information. The Health Records and Information Privacy Act 2002 regulates the use and disclosure of personal health information, such as information about a person's health status or health care. Personal information collected during an investigation for the purposes of enforcing public health legislation, such as, for example, private residential addresses and telephone numbers, must not be disclosed to third parties outside Health except in limited circumstances and with the approval of the Director Legal or the Director's representative.

3. ROLE OF PROSECUTIONS

3.1 The principal role of any government agency through prosecutions is to assist the court to arrive at the truth in relation to an alleged offence, and to do justice between the needs of the community and the accused person according to law and the dictates of fairness. Health prosecutions must also further the aims of NSW Health, which is, in part to ensure and monitor compliance with health legislation.

4. THE DECISION TO PROSECUTE

4.1 The first factor to be considered in relation to any prosecution is whether the available evidence establishes a prima facie case. A prima facie case is one where there is admissible evidence available proving each and every element of the offence.

4.2 However, merely establishing a prima facie case is insufficient. There must be a reasonable prospect of the conviction being secured. In this respect, consideration should be given to:

- (i) the availability, competence and credibility of witnesses and the admissibility of such evidence; and
- (ii) any defences open to the defendant, including, where applicable, the defence of due diligence; and
- (iii) whether a prosecution is in the public interest; and
- (iv) whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest; and
- (v) any other factors which could affect the likelihood or otherwise of a conviction.

4.3 Further, in considering whether a matter has a reasonable prospect of conviction, an evaluation of how strong the evidence is likely to be when

presented in court is necessary, and consideration must be given to the credibility of the witness.

- 4.4 Factors, which alone, or in conjunction, arise for consideration in determining whether the public interest requires a prosecution include:
- (i) the harm or potential harm to the health, safety and protection of the public caused by the offence;
 - (ii) the seriousness or triviality of the alleged offence, and whether the offence is of a technical nature only;
 - (iii) whether any actual injury or damage has occurred to any person as a result of the alleged breach;
 - (iv) any mitigating or aggravating circumstances;
 - (v) any degree of culpability of the alleged offender in relation to the offence;
 - (vi) the availability of any alternatives to prosecution;
 - (vii) whether the offender has been dealt with previously by warning notice or other non-prosecutorial means;
 - (viii) whether the breach is a continuing offence;
 - (ix) the prevalence of the alleged offence and whether the needs of deterrence are specific in relation to the offender and/or general in relation to the community;
 - (x) the length of time since the alleged offence;
 - (xi) the length of time and expense of a court hearing;
 - (xii) the likely outcome in the event of a conviction having regard to the sentencing options available to the court;
 - (xiii) any precedent which may be set by not instituting proceedings;
 - (xiv) the youth, age, maturity, intelligence, physical health, mental health or special disability or infirmity of the alleged offender or a witness;
 - (xv) whether proceedings are to be instituted against others arising out of the same incident.

- 4.5 A decision of whether to prosecute or not must not be influenced by:

- (i) any elements of discrimination against a person in relation to age, race, nationality or political associations;
- (ii) personal empathy or antipathy towards the offender;
- (iii) political or other affiliations of those responsible for the prosecution decision;
- (iv) possible financial advantage or disadvantage to the offender; or
- (v) any other person or business or corporation; or
- (vi) the possible effect of decision on the personal or professional circumstances of the officers responsible for the prosecution.

5. YOUNG OFFENDERS

- 5.1 Special considerations may apply to the prosecution of minors, as the prosecution of a minor is generally regarded as a severe measure. Whilst each situation must be assessed on its merits, frequently there will be a stronger case for dealing with a minor who breaches public health legislation by some means other than prosecution. However, the seriousness of the alleged offence, harm to the public generally and the conduct, character and general circumstances of the minor concerned may require that prosecution be undertaken.
- 5.2 The public interest will not normally require the prosecution of a minor who is a first offender where the alleged offence is not a serious one.

6. ENFORCEMENT ACTION – WARNING NOTICES/PROSECUTION

- 6.1 The primary intent of public health legislation is to safeguard public health and safety and protect consumers. Warning notices can provide an effective and efficient way to deal with breaches of health legislation. They are a simple and expeditious means to achieve this intent without requiring the State to undertake the more lengthy and expensive path of prosecutions. Prosecution, however, also has an important role in ensuring general compliance throughout the community which cannot be achieved through the issue of warning notices alone.
- 6.2 A warning notice should only be served when it is apparent that an offence under health legislation has been committed and prosecution in the particular case is not indicated. A notice should be based on reliable evidence only and should only be served on an offender if there is sufficient evidence to make out a prima facie case against the offender.
- 6.3 Those establishments visited and found to breach after a number of complaints have been received from the public should not be issued with a warning notice. If a number of complaints have been received about an

establishment from the public the establishment must be visited in the next round of compliance monitoring and investigated for prosecution if found to breach the legislation.

6.4 Prosecution action rather than a warning notice will be considered in the following circumstances:

- (i) where the breach relates to a serious compromise of health standards and is of such a nature as to amount to a serious threat to public health and safety; or
- (ii) where the offender has already been subject to a prior warning notice issued by an officer of the NSW Health, Local Government or similar government authority for the same type of offence; or
- (iii) where the offender has already been subject to a number of warning notices for different offences over the previous five years; or
- (iv) where it is apparent that the offender was aware of the relevant legislation, but knowingly and recklessly disregarded the legislation; or
- (v) where the offender has a conviction for a breach of the same or similar nature within the last 5 years; or
- (vi) where the offence is for assaulting, obstructing, hindering an officer or offering a bribe, or
- (vii) where the offender demonstrates a knowledge of the legislation but has been indifferent or negligent in its application.¹

If any of the above circumstances exist prosecution may be appropriate, provided that the issues of public interest are satisfied. Public interest considerations are set out at section 4.4 above.

6.5 Warning notices should be sent to or delivered to the offender as soon as practical after detection and investigation of the breach. Warning notices should include:

- a. the exact nature of the alleged breach, including the relevant section and Act under which the breach occurred; and
- b. the time and date and place where the offence occurred; and

¹ For instance: If a salesperson in a retail outlet is found to have sold a tobacco product to a minor, and has admitted to the investigator that they were aware at the time of the sale that there is a prohibition on selling tobacco products to minors, then the salesperson is not entitled to the benefit of a warning, and the investigator must conduct an investigation with a view to prosecution.

- c. an explanation of the purpose of the Warning Notice noting that non-compliance in the future may result in prosecution.

6.6 It is inappropriate to issue warning notices for more than one simultaneous statutory breach. A person or company engaging in more than one offence at a time demonstrates a major compliance problem even though each breach in itself may be comparatively minor. Such a problem may need to be dealt with by a court. No more than one warning notice should be issued in relation to the same establishment within the period of 12 months unless a senior officer has approved the matter.²

6.7 A person or establishment who has received a warning notice should be revisited to check compliance within 12 months of the issue of the warning notice. In the instance where the initial breach was revealed through compliance monitoring, then similar compliance monitoring methods should be adopted in the second round, and if a second breach for the same or a similar offence is revealed, a brief of evidence must be compiled and submitted to Legal Branch in accordance with the policy outlined in section below.

6.8 It is also inappropriate to issue successive warning notices for a series of breaches for unrelated offences within a relatively short period of time. Breaches for a range of different offences identified through compliance monitoring over a relatively short period may demonstrate a major compliance problem even though each breach may be relatively minor.

7. SELECTING THE APPROPRIATE DEFENDANT

7.1 General considerations in selecting the appropriate defendant in a particular case are:

- (i) who is primarily responsible for the offence, that being who committed the act or who created the circumstances giving right to the alleged breach;
- (ii) what was the role of the alleged offender; and
- (iii) the likely effectiveness of court orders against the proposed defendant.

7.2 The common law and legislation confer liabilities on legal entities as well as individuals. In respect of determining how corporate liability may arise the informant should bear in mind that where an employee, agent or officer of a corporation in the course of their employment commits an offence, proceedings may be instituted against the corporation. Another relevant factor to be considered is the existence of an effectively implemented

² For instance: If a tobacco retailer fails to display regulation signage at the place where tobacco products are sold, and is also found to breach the Smoke-Free Environment Act 2000 by allowing patrons to smoke inside their shop, then it is inappropriate to issue a warning notice. In this instance the investigator must proceed to investigate for the purposes of prosecution.

compliance programme by the corporation, demonstrating due diligence on behalf of the corporation.

8. CONTENT OF REQUESTS FOR APPROVAL TO PROSECUTE

8.1 Requests for approval to prosecute should contain:

- (i) draft Court Attendance Notices for the offence;
- (ii) a floppy disk containing the Court Attendance Notices;
- (iii) statements and documents in admissible form which prove all the elements of the offence;
- (iv) records of interview;
- (v) a company search where appropriate;
- (vi) a fact sheet;
- (vii) photographs where appropriate;
- (viii) copies of warning notices sent previously;
- (ix) a separate sheet setting out any material relating to any potential defence which may be available to the defendant, and
- (x) the officer's observations and dealings with witnesses.

8.2 Prosecution is only to occur with the approval of the Director-General (or an officer authorised by the Director-General to approve such a prosecution) on the recommendation of the Director Legal (or a legal officer so authorised by the Director Legal). All requests for prosecution approval should be forwarded to the Director Legal after being endorsed by their relevant senior officers. Where doubt exists over sufficiency of evidence or possible defences, advice is to be sought from the Legal Branch. The Director Legal (or authorised legal officer) will assess the request and recommend whether a prosecution should be approved. In some cases further information may be required from the investigating officer before a recommendation can be made.

8.3 Court attendance notices are not to be issued in anticipation of approval being granted. Court attendance notices are only to be served after approval has been given.

9. PLEA NEGOTIATION

9.1 A plea of guilty is a fact that is taken into account in mitigation of sentence. There are obvious benefits also to the criminal justice system resulting from a plea of guilty. The earlier it is offered, the greater will be the benefit accruing to NSW Health, the accused and the court system.

9.2 Accepting a plea of guilty to fewer offences than those commenced, in full satisfaction of the charges laid requires the consent of the Director Legal (or authorised legal officer). The Director Legal (or authorised legal officer) will consider the following matters:

- (i) whether accepting a plea to a lesser number of offences reflects the essential criminality of the conduct; and
- (ii) the plea provides adequate scope for sentencing; and
- (iii) whether the evidence available to support the prosecution case is weak in any particular respect; and
- (iv) the saving of cost and time, against the likely outcome of the matter if it proceeded to hearing.

9.3 A plea to a lesser number of offences will not be considered where its acceptance would produce a distortion of the facts and create an artificial basis for the sentencing, or where the accused intimates that he or she is not guilty of any offence.

10. DISCONTINUATION OF COMMENCED PROCEEDINGS

10.1 Once a decision has been made to prosecute, discontinuation of proceedings is only to occur with the approval of the Director-General (or authorised legal officer) on the recommendation of the Director Legal (or authorised legal officer). Discontinuation may occur where a change in circumstances is such as to undermine the basis of the initial decision to prosecute, for example, proof of action, against the wrong defendant, unavailability of key witnesses, demonstration of an available defence.

10.2 A matter may be discontinued with the approval of the Director-General (or delegate) at any time, either as a result of an internal assessment of the case, or an application from any interested party.

10.3 Any application to discontinue should be made through or by the Director Legal (or authorised legal officer) and include a detailed account of the grounds on which the application is based.

10.4 On receipt of an application, the Director-General (or authorised legal officer) will review the case. A decision to discontinue will only be made where there is sufficient new evidence to undermine the original basis of the decision to prosecute, the key witnesses are unavailable or there is new evidence which demonstrates an available defence. All details of the relevant defences should be included in the application for discontinuation.

10.5 Reasons for not proceeding with the prosecution would not normally be given to the defendant.

11. FUNDING OF PROSECUTIONS

Undefended prosecutions in Local Courts.

11.1 The cost of prosecuting undefended Local Court prosecutions initiated by public health units are to be funded by the public health unit commencing the court action. The responsibility of court appearances is that of the

informant until the matter is either finalised or legal assistance for the hearing has been approved by the Director Legal.

Prosecutions requiring legal assistance.

- 11.2 Defended matters or other matters where legal assistance is required are to be referred to the Director Legal. Requests for legal assistance must include a brief of evidence (see section 5.1 above). Consideration of legal assistance will not be given unless this is provided.
- 11.3 The brief of evidence must be forwarded to the Director Legal within 14 days from the date on which the matter was set down for hearing. If the matter is set down for hearing within the 14-day period the brief must be forwarded immediately. If this is not possible Legal Branch must be contacted and informed of the difficulty and notified of the relevant hearing dates.
- 11.4 The engagement of external legal representation by the public health unit will be funded by the Public Health Division of the Department of Health only if the legal representation is approved by the Director Legal.
- 11.5 Funding for legal assistance includes witness's expenses, subpoenas, transcripts, and costs of travel and accommodation. These costs are to be met by the public health unit until the matter is finalised. If costs are awarded by the court in favour of NSW Health the prosecution fund will not be utilised. If costs are not awarded or the costs awarded do not cover all the expenses reimbursement will be made from the prosecution fund.
- 11.6 Once the matter has been forwarded to Legal Branch for assistance, the decision as to whom will provide that assistance is that of the Director Legal, consistent with Department policy on the engagement of external legal services.
- 11.7 Once a prosecution is initiated, all court appearance work will be conducted by a member of the relevant investigative branch, or, until either a plea of not guilty is entered into by the defendant or until such time as the matter is taken over by legal representatives engaged by the Director Legal.
- 11.8 On a plea of not guilty the investigative unit must refer the matter to the Director Legal at the earliest opportunity in accordance with paragraph 8.1 (ii). The Director Legal will determine the type and manner of legal assistance required. Any necessary funding for a prosecution will generally be the responsibility of the branch or unit with administrative responsibility for the legislation under which the prosecution action is taken, unless special funding arrangements have been approved by the Chief Financial Officer in consultation with Legal Branch.

11.9 Noting the potential for costs orders, no court adjournments may be sought, or consented to, without the prior consent of the Director Legal or a representative of the Director Legal.

SUMMARY OF PROSECUTION POLICIES

- A. Prosecution is only to occur with the approval of the Director-General (or an officer authorised by the Director-General to approve such a prosecution) on the recommendation of the Director Legal (or a legal officer so authorised by the Director Legal).
- B. Where doubt exists over sufficiency of evidence or possible defences, advice is to be sought from the Legal Branch.
- C. Prosecution will only be conducted if it is in the public interest to do so.
- D. Prosecution will only be conducted if the prosecution advances the aims of NSW Health.
- E. Prosecution will only be conducted if there is a prima facie case available against the offender.
- F. Prosecution will only be conducted if there is a reasonable prospect of conviction.
- G. Prosecution of a minor who is a first offender will not be conducted on a first offence and where the offence is not a serious one except in exceptional circumstances.
- H. A person or establishment who has received a warning notice for a breach of public health legislation is to be retested within 12 months of the issue of the warning notice.
- I. A person or establishment who has been convicted for a breach of public health legislation is to be retested within 12 months of the conviction.
- J. A person or establishment who has received a warning notice for a breach of public health legislation and is found to offend at any time after the warning letter is issued must be investigated for the purpose of prosecution.
- K. If a number of complaints are received about the same establishment from members of the public, the establishment should not be warned, but instead should be tested in the next round of testing and if found to breach the legislation and if sufficient evidence is available, prosecuted.
- L. Warning notices for successive offences are not to be issued to the same offender.
- M. If an offender indicates knowledge of the law but has nonetheless breached the legislation, an investigation with a view to recommending prosecution should be conducted.
- N. The cost of prosecuting undefended Local prosecutions initiated by public health units are to be funded by the public health unit commencing the court action.
- O. The responsibility of court appearances is that of the investigator until the matter is either finalised or legal assistance for the hearing has been approved by the Director Legal.
- P. Accepting a plea of guilty to fewer offences than those commenced, in full satisfaction of the charges laid requires the consent of the Director Legal (or authorised legal officer).

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- Q. No court adjournments may be sought, or consented to, without the prior consent of the Director Legal or a representative of the Director Legal.
- R. Once a decision has been made to prosecute, discontinuation of proceedings is only to occur with the approval of the Director-General (or authorised legal officer) on the recommendation of the Director Legal (or authorised legal officer).