

Prosecution Policy



Effective Date: 20/11/2013
Last Reviewed: 13/04/2022

IHL/2013/658
Version 3.00

1. Purpose

Queensland government departments undertake prosecutions, across a range of legislation, where alleged breaches of the law are detected and investigated. The prosecutions for the Department of Resources and the Department of Agriculture and Fisheries are prepared and conducted by lawyers at In-house Legal. In certain cases, external legal service providers are engaged where the case is complex or requires significant expertise, or where there is limited capacity in-house.

Commencing a prosecution against a person is a serious step and must not be taken lightly. The policy is intended to provide guidance to lawyers exercising the discretion to prosecute to achieve consistency, efficiency, and transparency in the administration of justice. It is not intended to be exhaustive nor inflexibly applied. Its application will depend on the circumstances of each case.

In the absence of a policy there could be a tendency to take all charges to court where sufficient evidence exists, even when the offence is trivial or technical. This is not in the public interest. The limited resources available for prosecution should be used to pursue, with appropriate vigour, cases worthy of prosecution, and not wasted pursuing inappropriate, trivial, or technical offences. Alternative compliance action must always be considered prior to commencing a prosecution.

2. Criteria used in the exercise of the discretion to prosecute

The decision to prosecute is requires two considerations:

1. Whether there is sufficient evidence.
2. If so, is it in the public interest for a prosecution to be commenced. A prosecution should be initiated or continued wherever it appears to be in the public interest. If it is not in the public interest, then it should not be pursued.

2.1 Is there sufficient evidence?

A prosecution should only proceed if there are reasonable prospects of a conviction being secured at trial. There must be admissible, substantial, and reliable evidence that an offence known to law has been committed by the alleged offender.

The following list of criteria (which is not exhaustive) should be considered when evaluating the evidence. The individual circumstances of each matter will dictate the weight apportioned to any particular factor.

1. The admissibility of the evidence, including any alleged confession.
2. Are any defences and or excuses available to the alleged offender either raised in the evidence, or likely to be raised at trial?
3. Are all potential witnesses available and compellable?
4. Does it appear that a witness is exaggerating, or that their memory is faulty, or that the witness is either hostile or friendly to the alleged offender, or may be otherwise unreliable?
5. Does the witness have a motive for telling less than the whole truth?
6. Are there matters which might properly be put to a witness by the defendant to attack his or her credibility?
7. What sort of impression is the witness likely to make? How is the witness likely to stand up to cross-examination? Does the witness have a special attribute have may impact negatively on their credibility? Does the witness require any special protection?
8. If there is conflict between the evidence of eyewitnesses that goes beyond what one might expect, and therefore materially weaken the case? Alternatively, if there is a lack of conflict between eyewitness evidence, are the accounts so similar as to arouse suspicion that a false story may have been concocted?
9. If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the alleged offender?

Witness conferences will assist in determining some of the factors identified above.

2.2 Is it in the public interest for the prosecution to proceed?

The factors to be considered when deciding whether it is in the public interest for a prosecution to be instituted or continued will vary from case to case. Generally, the more serious the offence the more likely it will be that the public interest will support that a prosecution be pursued. The following factors are some of the considerations which may be relevant. The relevance and weight of these factors will vary depending upon the circumstances of each case:

1. the seriousness or triviality of the alleged offence, including whether it is of a “technical” nature only
2. the availability and efficacy of any alternatives to prosecution
3. any mitigating or aggravating circumstances
4. the age, intelligence, physical health, mental health, cultural heritage, or any other special circumstances of the alleged offender
5. the alleged offender’s antecedents and background, for example, previous relevant compliance action that has been taken against them
6. the age or staleness of the alleged offence
7. the degree of culpability of the alleged offender in connection with the offence
8. the effect on public order
9. the obsolescence or obscurity of the law
10. whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute
11. the prevalence of the alleged offence including the need for personal and general deterrence
12. whether the consequences of any resulting conviction would be unduly harsh or oppressive
13. whether the alleged offence is of considerable public or environmental concern
14. any entitlement of the department or other person/body to compensation, reparation, or forfeiture if prosecution action is taken
15. the likely length and/or expense of a trial
16. the likely penalty imposed by the court if the person is found guilty having regard to the sentence options available to the court
17. whether the alleged offender co-operated in the investigation, including the investigation or prosecution of others
18. the necessity to maintain public confidence in the department and the courts
19. the potential financial or other benefit the alleged offender made from the illegal activity
20. the likelihood of detection of the offence.

3. Improper considerations

A decision whether to prosecute or not must clearly not be influenced by:

1. discrimination against the alleged offender or any other person involved
2. personal feelings concerning the alleged offender or their legal representative
3. possible political advantage or disadvantage to the government or any political group or party
4. the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

4. Human rights consideration

The *Human Rights Act 2019* (Qld) (HRA) requires public entities to act and make decisions in a way that is compatible with human rights. ‘Human rights’ means the rights stated in part 2, divisions 2 and 3 of the HRA, including but not limited to:

1. equality before the law and equal protection of the law without discrimination
2. property rights including that a person must not be arbitrarily deprived of their property
3. cultural rights, including for Aboriginal peoples and Torres Strait Islander peoples
4. right to a fair and public hearing
5. rights, in a criminal proceeding, to:
 - a. be presumed innocent until proven guilty
 - b. be informed promptly of the charge against them in a way they can understand
 - c. be tried without unreasonable delay
 - d. have the free assistance of an interpreter.

Consideration must be given to the requirements of the HRA at the commencement and throughout the prosecution, including if charges are to be discontinued.

Without limiting this general requirement, it includes giving regard to the over-representation of first nations persons in the criminal justice system as part of the assessment of public interest. While it will not be determinative, having regard to this factor may weigh in favour of alternative compliance action in borderline cases, particularly where there is an issue, falling short of establishing a defence, relating to the exercise or purported exercise of traditional or cultural rights or practices.

Lawyers should also bear the HRA in mind when reviewing briefs to ensure compliance with the HRA by investigators throughout the investigation. For example, if the person is a First Nations person, have appropriate safeguards at an interview been implemented? Similarly, if the person's first language is not English, have appropriate measures, such as the use of an interpreter, been taken to ensure the person understands their interaction with departmental officers during the investigation?

5. Prosecution of particular people

5.1 Peripheral defendants

Proceedings should only be brought and continued against those whose involvement warrants prosecution. In most cases, it will not be in the public interest to charge people who played a very minor or peripheral role. This must be assessed on a case-by-case basis having regard to all the facts and circumstances.

5.2 Informants

The use of informers as prosecution witnesses is a matter which requires careful and well-balanced judgement. In all cases where it is proposed to use an informant as a witness, the lawyer should ascertain whether the informant has been promised any reward for giving evidence or hopes to gain any benefit from testifying. In all cases there should be substantial corroborating evidence to support the evidence of an informant.

5.3 Juveniles

Prosecution of a juvenile should be regarded as a severe step. Ordinarily it will not be in the public interest to prosecute a juvenile unless the offending is of a very serious nature, or the behaviour is repeated. If it is intended to prosecute a juvenile, then the Director, Appeals and Prosecutions must be consulted prior to any complaint being laid.

5.4 Persons with diminished ability

Careful consideration should be given to the public interest in prosecuting persons who are affected by a mental illness, diminished intellectual ability or cognitive impairment, either at the time of committing the offence or at the time prosecution is contemplated. Rigorous analysis of whether any such condition is likely to afford a potential defendant with a defence, or render them unfit to stand trial, should be conducted early to avoid unnecessary distress and waste of public resources. Any medical evidence provided to the department should be considered promptly and further enquiries made where appropriate.

6. Negotiations

Negotiations have an appropriate role to play in the efficient administration of justice and should be encouraged and pursued at the earliest opportunity. Early pleas of guilty are in the public interest.

Negotiations may result in the alleged offender pleading guilty to fewer charges than those originally laid, with the remaining charges being discontinued, and the matter proceeding to sentence.

A plea of guilty following negotiations should only be accepted if it is in the public interest. The public interest is only satisfied if one or more of the following are satisfied:

1. the proposed reduction or amendment of the charges adequately reflects the defendant's criminality
2. the prosecution evidence is deficient in some way
3. the resolution is a favourable outcome compared to the expense of a trial and the likely penalty to be imposed.

Over-charging in any form to encourage or facilitate a plea of guilty is not permitted.

An offer to resolve the matter must not be accepted if the person maintains their innocence in respect of a charge they have offered to plead guilty to, or it requires the prosecution to distort the facts or the evidence.

A written submission in relation to the charges should be considered and responded to promptly.

It is important during negotiations that all conversations are recorded in a file note, and all emails and other correspondence are stored securely in case they need to be relied upon.

6.1 Consultation

In deciding whether to promote or accept a proposed resolution of the matter, the views of the investigating officer and relevant officers of the department must be carefully considered.

6.2 Discontinuing all or the majority of charges

If it is proposed that all or most proposed charges are not going to be proceeded with for any reason, the Director, Appeals and Prosecutions must be consulted prior to any final decision being made.

7. The conduct of prosecutions

A fundamental obligation of the prosecution is to assist in the timely and efficient administration of justice. Cases should therefore be efficiently prepared.

The prosecution material, being the brief of evidence on which the prosecution intends to rely and the disclosure material, should be disclosed as soon as possible, and where possible before the first court mention.

Delays in the case proceeding to final disposition should be avoided.

The HRA applies to the conduct of prosecutions and all staff must adhere to its principles.

7.1 Ongoing review

Once a Complaint is before the court, the file should continue to be assessed, particularly in relation to:

1. any change in the strength of the evidence
2. whether new information or evidence enlivens renewed consideration of the public interest criteria
3. any witness availability issues.

7.2 Communications with self-represented defendants

All staff must be vigilant to ensure there is absolute fairness to the defendant throughout the conduct of the case.

There must be full and early disclosure to a self-represented person.

In-house Legal lawyers must not give legal advice to a defendant and may only provide general information on procedural matters.

In-house Legal lawyers and other staff should not communicate with the defendant without having a witness present to take notes. Contemporaneous notes must be taken and saved to the file.

7.3 Disclosure

The duty of disclosure lies at the heart of a fair trial. Best practice and absolute fairness are paramount, and the statutory disclosure obligations in the *Criminal Code 1889* (Qld) and case law should be adhered to, even where the department is not strictly bound by them.

The prosecution must make full and early disclosure including disclosing any document whatsoever that either undermines the prosecution case or assists the case for the defendant.

Disclosure is an ongoing duty.

If a prosecutor becomes aware that a witness has made an inconsistent statement or a statement that may assist the defendant's case, the statement must be disclosed immediately. This includes statements made during witness conferences, in which case the notes of the conference must be immediately disclosed.

A witness' personal information should not be disclosed (for example, residential address, date of birth, or telephone number), unless relevant to the prosecution. In such cases, an assessment under the *Information Privacy Act 1999* about the disclosure must be undertaken and recorded on the file.

The prosecutor may decline to disclose documents or parts of documents where disclosure would be reasonably likely to:

1. cause a risk to the life or personal safety of a prosecution witness
2. prejudice an investigation
3. divulge investigation methodologies.

In these cases, the defendant should be advised of the circumstances in writing. If it is proposed to rely on any of these exceptions, the Director, Appeals and Prosecutions must be consulted first.

8. Duty of prosecutors

Lawyers are officers of the court and must comply with the duties this role imposes. A lawyer's primary duty is to the court.

Specific duties imposed on a lawyer acting as a prosecutor include that they:

1. must ensure that the prosecution case is presented properly and with fairness to the defendant
2. must never seek to persuade a judicial officer to a point of view by introducing prejudice or emotion
3. must not advance any argument that does not carry weight in his or her own mind
4. must not try to exclude or hide from the court any legal evidence that would be important to the interests of the defendant
5. must inform the court of authorities that are appropriate to the case, even where they are unfavourable to the prosecution.

A prosecutor may firmly and vigorously urge their position about a particular issue, and test and reject the view put forward on behalf of the defendant; however, this must be done temperately and with restraint.

9. Scope

This policy applies to all matters referred by the Department of Resources and the Department of Agriculture and Fisheries to In-house Legal to consider for prosecution, and all prosecutions commenced and/or conducted by In-house Legal on behalf of those departments.

This policy is not intended to be legally binding on the department and does not confine, restrain or limit the discretion of the department to take any action.

10. Review

This policy shall be reviewed from time to time as necessary.

11. Approval

Signed:

Mike Kaiser

Director-General

Department of Resources

Date: 20/04/2022

Signed:

Robert Gee

Director-General

Department of Agriculture and Fisheries

Date: 11/05/2022

12. Version history

Date	Version	Action	Description / comments
20 November 2013	1.0	Approved by the Deputy Directors-General, Business and Corporate Partnership	New document.
20 November 2018	1.0	Policy reviewed and retained	
20 November 2020	2.00	Update.	Rebranded in latest BCP format - no content change
13 April 2022	3.00	Approved by Directors-General	Major update to document.

13. Keywords

IHL/2013/658; prosecution; public interest; reasonable prospects; witness; court; evidence; compliance