

PROSECUTION POLICY



Tasmania
Explore the possibilities
Department of Justice

Please note

This information is for guidance only and is not to be taken as an expression of the law. It should be read in conjunction with the *Workplace Health and Safety Act 1995*, the *Workplace Health and Safety Regulations 1998* and any other relevant legislation. Copies of the legislation can be purchased from Print Applied Technology: call (03) 6233 3289 or freecall 1800 030 940. It is also available on the Internet at www.thelaw.tas.gov.au

This guide was produced by staff from WorkCover Tasmania and Workplace Standards Tasmania.

We welcome your feedback on this guide.
Send to: wstinfo@justice.tas.gov.au

Context ●●●●●

The Department of Justice contributes to a just and safe society by providing systems and services for the promotion and maintenance of rights and responsibilities and the resolution of disputes, for the benefit of the Tasmanian community.

Workplace Standards Tasmania, a division of the Department of Justice, has a strategic focus on improving standards of safety, health and fairness in workplaces, buildings and energy infrastructure in Tasmania.

While the challenges facing Workplace Standards Tasmania are numerous, a priority is to encourage industry to develop systematic solutions and a culture that empowers people with knowledge and provides a supportive environment where innovation is encouraged and rewarded.

Purpose ●●●●●

The purpose of this Policy is to provide guidelines for Workplace Standards Tasmania staff and to provide insight for the general public about prosecution of offences under legislation administered by Workplace Standards Tasmania. Workplace Standards Tasmania administers a number of Acts and their associated regulations, the main ones being:

- *Building Act 2000*
- *Dangerous Goods Legislation*
- *Electricity Industry Safety and Administration Act 1997*
- *Gas Act 2000*
- *Gas Pipelines Act 2000*
- *Industrial Relations Act 1984*
- *Long Service Leave Act 1976*
- *Occupational Licensing Act 2005*
- *Security-Sensitive Dangerous Substances Act 2005*
- *Workers Rehabilitation and Compensation Act 1988*
- *Workplace Health and Safety Act 1995.*

Background ●●●●●

Workplace Standards Tasmania's Prosecution Policy operates within the overall framework of its Enforcement Policy. These policies are stated so anyone can clearly understand when a prosecution is to be considered.

Policy ●●●●●

- (1) The aim of Workplace Standards Tasmania's Prosecution Policy is to ensure consistency, transparency and proportionality in matters recommended to the Office of the Director of Public Prosecution (DPP) for prosecution:
 - consistency: Workplace Standards Tasmania will endeavour to ensure that similar circumstances lead to similar outcomes
 - transparency: Workplace Standards Tasmania is committed to open and transparent dealings with obligation holders. By establishing and publishing our policies, obligation holders will have a better understanding of what is expected of them and what they may expect from Workplace Standards Tasmania
 - proportionality: enforcement options will be proportional to the seriousness of the offence. More serious offences will warrant more severe enforcement options. An organisation's previous record and previous interventions by Workplace Standards Tasmania may also influence the appropriate enforcement option employed.
- (2) In some circumstances, prosecution is considered the only appropriate response to the offender. It may also be used to deter others from contravening the legislation.
- (3) A decision to recommend prosecution is based on an assessment of the nature of the non-compliance and the alleged offender's performance. Before recommending prosecution action, Workplace Standards Tasmania will consider the DPP's Guidelines for the Exercise of the Discretion to Prosecute (see annex 1).

- (4) Although prosecution may be recommended for any offence against the legislation Workplace Standards Tasmania administers, prosecutions will generally be recommended if investigations disclose breaches involving any of the following:
- (a) Incidents resulting in death, serious injury or serious ill health.
 - (b) A significant risk to health and safety, including a risk of death or serious injury (a 'near miss') and a risk of serious ill health.
 - (c) A high degree of culpability.
 - (d) Non-compliance with notices and directions, failure to produce employment records or a failure to control risks despite previous warnings, information or advice from Workplace Standards Tasmania or any other source.
 - (e) A significant risk to workplace health or safety through the design, manufacture, importation and supply of any plant or structures.
 - (f) A significant risk to workplace health or safety through the manufacture, importation and/or supply of any substance.
 - (g) Non-payment of an infringement notice penalty.
 - (h) Hindering or obstructing an inspector or other person exercising their powers under the law.
 - (i) Discrimination against health and safety representatives or employees who have assisted inspectors or have made a health and safety complaint.
 - (j) Very significant damage to property or energy infrastructure.
 - (k) A breach of an award condition where an employer has previously been found guilty of a similar offence.
 - (l) A failure to keep records of employment.
 - (m) A failure to have workers' compensation insurance.
 - (n) Unlicensed gas or electrical work.
 - (o) Failure to hold a statutory licence, approval, registration, permit or certificate of competency.

- (5) Regard will also be given to the strategic deterrent value of prosecution – for example, if an alleged breach occurs in an industry targeted in national or local campaigns.
- (6) The implementation of this Policy is disposed generally on the previous performance of the alleged offender or their culpability given their state of knowledge. Further insight and guidance into the decision to recommend prosecution action is addressed by the question ‘Why Prosecute?’ (see annex 2).
- (7) Furthermore, prosecution will be recommended where it is demonstrable that the potential defendant has:
 - (a) been found guilty of a workplace standards related offence within the previous 5 years; or
 - (b) been previously made aware, by any means, of compliance shortcomings, either directly or indirectly, relevant to the cause of the current case; or
 - (c) performed acts or omissions that are reckless.
- (8) Workplace Standards Tasmania’s internal Compliance and Enforcement Committee is to consider all recommendations for prosecution and is to ensure the Workplace Standards Tasmania’s Enforcement and Prosecution Policies are applied consistently, transparently and proportionately.
- (9) Note: Other departments may take prosecution action under other legislation relating to the circumstance.

Further information ●●●●●

Further information about Workplace Standards Tasmania's *Enforcement Policy* may be obtained by:

- writing to The General Manager Workplace Standards Tasmania, PO Box 56, Rosny Park Tasmania, 7018
- calling the Workplace Standards Tasmania's Helpline on 1300 366 322 (within Tasmania) or 03 6233 7657 (outside Tasmania).



Roy Ormerod

General Manager

3 December 2008

Director of Public Prosecutions ●●●●●

Guidelines for the Exercise of the Discretion to Prosecute

The Director of Public Prosecutions has published Guidelines to provide an indication to the community whether or not a prosecution action should be undertaken. These may be summarised as follows:

- (1) The test applied by my Office and all other prosecuting agencies in Australia is one which requires the person signing the Complaint to be satisfied that there is a reasonable prospect of conviction on the available and admissible evidence.
- (2) The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, tend to undermine the confidence of the community in the justice system.
- (3) It follows that the objectives of fairness and consistency are of particular importance. However, fairness need not mean weakness and consistency need not mean rigidity. 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.
- (4) In deciding whether or not a matter should be prosecuted any views put forward by the investigating agencies are carefully taken into account. Ultimately, however, the decision is to be made having regard to the consideration referred to below.

- (5) The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution. A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by an identifiable person.
- (6) In deciding whether the evidence is sufficient to justify the institution or continuation of a prosecution the existence of a bare prima facie case is not enough. A prima facie case is a necessary but not sufficient condition for launching a prosecution. Given the existence of a prima facie case it must be understood that a prosecution should not proceed if there is no reasonable prospect of a conviction being secured before a Magistrate in the case of summary offences. This decision requires an evaluation of how strong the case is likely to be when presented in Court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the alleged offender and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course there can never be an assurance that a prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and the useless expenditure of public funds.
- (7) Having satisfied himself or herself that the evidence is sufficient to justify the institution or continuation of a prosecution, the prosecutor must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued. It is not the rule that all offences brought to the attention of the authorities must be prosecuted.

- (8) The factors which can properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. While many public interest factors militate against a decision to proceed with a prosecution, there are public interest factors which operate in favour of proceeding with a prosecution (for example, the seriousness of the offence, the need for deterrence). In this regard, generally speaking the more serious the offence the less likely it will be that the public interest will not require that a prosecution be pursued.
- (9) Factors which may 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 that it is of a 'technical' nature only
 - (b) any mitigating or aggravating circumstances
 - (c) the youth, age, intelligence, physical health, mental health or special infirmity of the alleged offender; a witness or victim
 - (d) the alleged offender's antecedents and background
 - (e) the staleness of the alleged offence
 - (f) the degree of culpability of the alleged offender in connection with the offence
 - (g) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute
 - (h) the availability and efficacy of any alternatives to prosecution
 - (i) the prevalence of the alleged offence and the need for deterrence, both personal and general
 - (j) whether the consequences of any resulting conviction would be unduly harsh and oppressive
 - (k) whether the alleged offence is of considerable public concern
 - (l) the attitude of the victim of the alleged offence to a prosecution

Annex 2

- (m) whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so, and
 - (n) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the Court.
- (10) The applicability of and weight to be given to these and other factors will depend on the particular circumstances of each case.
- (11) As a matter of practical reality the proper decision in many cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. Although there may be public interest factors present in a particular case, often the proper decision will be to proceed with a prosecution and for those factors to be put to the Court at sentence in mitigation. Nevertheless, where the offence is not so serious as plainly to require prosecution the prosecutor should always apply his or her mind to whether the public interest requires a prosecution to be pursued.

Source: www.crownlaw.tas.gov.au/dpp/prosecution_guidelines

WHY PROSECUTE?

DETERRENT

DETER WHO?

SPECIFIC OFFENDER

GENERAL DETERRENT

Programs, projects, incidents.

WHICH SPECIFIC OFFENDER AND FOR WHAT?

TYPE

OFFENCE

Recidivists
(Previous offender)

Same or
different
offence

Recalcitrant
(Been told but
not listening)

Same subject
matter or
ignorance of advice

Negligent/Reckless
(Blatantly
careless/reckless)

Case by case
decision

High profile
issue

High profile
event

Chronic
Issue

AIM

To bring people and/or organisations to account for incidents it can be demonstrated they had knowledge to prevent, or who ignored previous advice

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For more information contact:
Workplace Standards Tasmania

Hobart
30 Gordons Hill Road (PO Box 56)
Rosny Park Tas 7018

Launceston
Henty House, 1 Civic Square
Launceston Tas 7250

Burnie
Reece House, 46 Mount Street (PO Box 287)
Burnie Tas 7320

1 300 366 322 (inside Tasmania)
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