

# Policy Directive



Ministry of Health, NSW  
 73 Miller Street North Sydney NSW 2060  
 Locked Mail Bag 961 North Sydney NSW 2059  
 Telephone (02) 9391 9000 Fax (02) 9391 9101  
<http://www.health.nsw.gov.au/policies/>

## Prosecution Policy and Guidelines

**Document Number** PD2014\_021

**Publication date** 01-Jul-2014

**Functional Sub group** Population Health - Environmental

**Summary** The Ministry's policies, guidelines and circumstances in which a prosecution may be undertaken under health and related legislation.

**Replaces Doc. No.** Prosecution Policy and Guidelines [PD2007\_002]  
 Prosecution Policy and Guidelines [PD2005\_322]

**Author Branch** Legal and Regulatory Services

**Branch contact** Legal and Regulatory Services 02 9391 9534

**Applies to** Chief Executive Governed Statutory Health Corporations, Public Health Units

**Audience** Public Health Unit Directors, Environmental Health Officers, Pharmaceutical Investigators

**Distributed to** Public Health System, NSW Ambulance Service, Ministry of Health, Public Health Units

**Review date** 01-Jul-2019

**Policy Manual** Accounting - PHO

**File No.** H13/108318

**Status** Active

### Director-General

This Policy Directive may be varied, withdrawn or replaced at any time.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.

## PROSECUTION POLICY AND GUIDELINES

### PURPOSE

This document describes in broad terms the prosecution policy of the NSW Ministry of Health. This policy replaces the Ministry's *Prosecution Policy and Guidelines PD 2007\_002*. Its primary purpose is to provide guidance to officers who conduct regulatory work within NSW Health, on the mandatory requirements needed to process and request a prosecution. It aids in standardising the regulatory process under Health legislation state-wide. It is freely available to members of the public and provides transparency in the process and procedures of the Ministry of Health's approval of prosecutions.

### MANDATORY REQUIREMENTS

All prosecutions undertaken by the Ministry of Health or on behalf of the Ministry of Health under the *Public Health Act 2010*, the *Poisons and Therapeutic Goods Act 1966*, the *Smoke-free Environment Act 2000* and the *Public Health (Tobacco) Act 2008* (and the regulations made under those Acts) can only be initiated with the approval of the Secretary, the Chief Health Officer or the Director Legal and Regulatory Services and General Counsel of the Ministry of Health. Court attendance notices are only to be provided or issued by the Ministry of Health and are served by the Public Health Unit or Pharmaceutical Services Branch after approval to prosecute has been given.

### IMPLEMENTATION

This policy is relevant to Public Health Unit Directors, Environmental Health Officers, Tobacco Compliance Officers, the Chief Pharmacist and Pharmaceutical Advisers.

The Chief Pharmacist and Public Health Unit Directors are responsible for ensuring that:

- All staff are made aware of their obligations in relation to this Policy Directive
- Documented Procedures are in place to support the Policy Directive
- All documents required for the processing of a recommendation for prosecution must be submitted in a timely fashion well within the statutory limitation period for the relevant offence
- The Procedures adopted in submitting a recommendation for prosecution are consistent with the steps outlined in this Policy Directive.

## REVISION HISTORY

Version	Approved by	Amendment notes
PD2014_021	Secretary, NSW Health	Rescinds PD2007_002. Includes a section on fraud. Amends requirements for submitting briefs of evidence.
PD2007_002	Director General	Rescinds PD2005_322. Incorporates changes to procedures brought on by the repeal of Justices Act and the requirements set out in the amendments to the <i>Criminal Procedure Act 1986</i> .
PD2005_322	Director General	Sets out prosecution policy and guidelines.

## ATTACHMENTS

1. Prosecution Policy and Guidelines: Procedures.

## Prosecution Policy and Guidelines



---

**Issue date:** July-2014

PD2014\_021

## CONTENTS

<b>1</b>	<b>BACKGROUND</b> .....	<b>1</b>
1.1	Introduction .....	1
1.2	Privacy .....	1
1.3	Fraud and corruption .....	1
<b>2</b>	<b>PROSECUTIONS</b> .....	<b>1</b>
2.1	The rationale for prosecuting .....	1
2.2	The decision to prosecute .....	2
2.3	Young offenders .....	3
2.4	Warning notices verses prosecution .....	4
2.5	Selecting the appropriate defendant .....	5
2.6	Content of requests for approval to prosecute .....	6
2.7	Plea negotiation .....	6
2.8	Discontinuation of commenced proceedings .....	7
2.9	Funding of undefended prosecutions.....	7
2.10	Prosecutions requiring legal assistance.....	8
<b>3</b>	<b>LIST OF ATTACHMENTS</b> .....	<b>9</b>

## **1 BACKGROUND**

### **1.1 Introduction**

This document describes in broad terms the prosecution policy of the NSW Ministry of Health and replaces the Ministry's Prosecution Policy and Guidelines PD 2007\_002. The policy will be reviewed from time to time to ensure that public health legislation continues to be applied in an efficient manner, whilst keeping abreast of changes within the legislation, the common law as well as changes in the attitudes of the community that may raise issues falling outside current practices and guidelines. The prosecution policy and guidelines in this document are informed by the Director of Public Prosecutions (NSW) Prosecution Policy.

### **1.2 Privacy**

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. 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 Secretary NSW Health or the Director's representative.

### **1.3 Fraud and corruption**

The Ministry of Health requires an organisational culture that promotes ethical behaviour which does not tolerate any acts of fraud or corruption. It is also important that officers remember when conducting regulation work that they not only must act ethically and impartially, they must also be seen to be acting in an ethical manner. Apart from the legal consequences of fraud and corruption for the officer involved, real or perceived improper acts have the potential to damage the Ministry's public image and reputation and undermine the purpose of the Ministry's regulatory work. Officers should ensure that they have read and understood the Ministry's Fraud Control Strategy PD 2007\_070.

## **2 PROSECUTIONS**

### **2.1 The rationale for prosecuting**

The principal role of the Ministry of Health through prosecutions is to promote public health, 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.

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.

Not all breaches of health legislation will lead to prosecution, and some limited breaches of health legislation may be dealt with by way of penalty notice or caution. For guidance on the issue of penalty notices under health legislation refer to the Ministry's Penalty Notice and Caution Policy. 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 sections 2.2 and 2.4 below.

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 Secretary or delegate approving the prosecution to assess based on the provable facts and the whole of the surrounding circumstances. 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 2.2 below.

### 2.2 The decision to prosecute

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. 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
- (ii) Any defences open to the defendant, including, where applicable, the defence of due diligence
- (iii) Whether a prosecution is in the public interest
- (iv) Whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest
- (v) Any other factors which could affect the likelihood or otherwise of a conviction.

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 witnesses.

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
- (xiv) Whether proceedings are to be instituted against others arising out of the same incident.

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

- Any elements of discrimination against a person in relation to age, race, or nationality
- Personal empathy or antipathy towards the offender
- Possible financial advantage or disadvantage to the offender
- The possible effect of decision on the personal or professional circumstances of the officers responsible for the prosecution.

### 2.3 Young offenders

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. 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.

### 2.4 Warning notices verses prosecution

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.

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.

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 consideration of prosecution if found to breach the legislation.

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
- (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
- (iii) Where the offender has already been subject to a number of warning notices for different offences over the previous five years
- (iv) Where it is apparent that the offender was aware of the relevant legislation, but knowingly and recklessly disregarded the legislation
- (v) Where the offender has a conviction for a breach of the same or similar nature within the last five years
- (vi) Where the offence is for assaulting, obstructing, hindering an officer or offering a bribe
- (vii) Where the offender demonstrates a knowledge of the legislation but has been indifferent or negligent in its application.

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 2.2 above.

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
- b. The time and date and place where the offence occurred
- c. An explanation of the purpose of the Warning Notice noting that non-compliance in the future may result in prosecution
- d. A statement that if the person is found to breach the legislation in the future a prosecution would be considered
- e. The name and telephone number of a contact officer.

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.

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. 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 on their own may appear to be relatively minor.

### 2.5 Selecting the appropriate defendant

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
- (iii) The likely effectiveness of court orders against the proposed defendant.

The common law and public health 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 compliance programme by the corporation, demonstrating due diligence on behalf of the corporation.

### 2.6 Content of requests for approval to prosecute

Requests for approval to prosecute should contain:

- (i) Draft Court Attendance Notices for the offence
- (ii) Draft statements and documents in admissible form which prove every element of the offence
- (iv) Records of interview where appropriate
- (v) A company search where appropriate
- (vi) Copies of birth certificates or other government documents where appropriate
- (vii) Draft fact sheet
- (vi) Photographs where appropriate
- (viii) Copies of warning notices sent previously
- (ix) A separate sheet setting out any material relating to:
  - (i) Any potential defence which may be available to the defendant, and
  - (ii) The officer's observations and dealings with witnesses.

Requests recommending prosecution should be submitted in a timely fashion having regard to the limitation period for the relevant offence.

Prosecution is only to occur with the approval of the Secretary, the Chief Health Officer or the Director Legal and Regulatory Services and General Counsel of the Ministry of Health ('General Counsel'). All requests for prosecution approval should be forwarded to the Legal Branch via [LegalMail@doh.health.nsw.gov.au](mailto:LegalMail@doh.health.nsw.gov.au) after being endorsed by their Public Health Unit Directors or relevant senior officers. Where doubt exists over sufficiency of evidence or possible defences, advice is to be sought from the Legal Branch. When a request for prosecution is received by Legal Branch, a 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.

Court attendance notices are not to be issued in anticipation of approval being granted. Court attendance notices are only to be provided by the Ministry of Health and served by the Public Health Unit after approval to prosecute has been given.

### 2.7 Plea negotiation

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

Accepting a plea of guilty to fewer offences than those commenced, in full satisfaction of the charges laid requires the consent of the Secretary, the Chief Health Officer or the General Counsel of the Ministry of Health. In the event of a plea negotiation the following matters will be taken into consideration:

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

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.

### 2.8 Discontinuation of commenced proceedings

Once a decision has been made to prosecute, discontinuation of proceedings is only to occur with the approval of the Secretary, the Chief Health Officer or the General Counsel of the Ministry of Health. 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, or the demonstration of an available defence.

A matter may be discontinued with the approval of the Secretary, the Chief Health Officer or the General Counsel of the Ministry of Health at any time, either as a result of an internal assessment of the case, or an application from any interested party.

Any application to discontinue should be made through or by the General Counsel of the Ministry of Health and should include a detailed account of the grounds on which the application is based.

On receipt of an application, the case will be reviewed. 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.

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

### 2.9 Funding of undefended prosecutions

The cost of prosecuting undefended Local Court prosecutions initiated on the recommendation of a Public Health Unit, are to be funded by the Public Health Unit. The responsibility of court appearances is that of the informant or the officer in charge of the investigation until the matter is either finalised or legal assistance for the hearing has been approved by the General Counsel of the Ministry of Health.

---

## **2.10 Prosecutions requiring legal assistance**

Defended matters or other matters where legal assistance is required are to be referred to the General Counsel of the Ministry of Health. Requests for legal assistance must include a brief of evidence (see section 2.6 above). Consideration of legal assistance will not be given unless this is provided.

The engagement of external legal representation will be funded by Population Health, Ministry of Health only if the legal representation is approved by the General Counsel.

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.

Once the matter has been forwarded to Legal Branch for assistance, the decision as to whom will provide that assistance is that of the General Counsel for the Ministry of Health, consistent with Department policy on the engagement of external legal services.

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 Ministry.

On a plea of not guilty the investigative unit must refer the matter to Legal Branch at the earliest opportunity. General Counsel for the Ministry of Health (or their representative) 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.

Noting the potential for costs orders, no court adjournments may be sought, or consented to, without the prior consent of the General Counsel for the Ministry of Health or their representative.

### **3 LIST OF ATTACHMENTS**

1. Implementation Checklist

## Attachment 1: Implementation checklist

<b>LHD/Facility:</b>			
<b>Assessed by:</b>		<b>Date of Assessment:</b>	
<b>IMPLEMENTATION REQUIREMENTS</b>	<b>Not commenced</b>	<b>Partial compliance</b>	<b>Full compliance</b>
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1.	<u>Notes:</u>		
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2.	<u>Notes:</u>		
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.	<u>Notes:</u>		
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.	<u>Notes:</u>		
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.	<u>Notes:</u>		
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.	<u>Notes:</u>		