

# POLICY: DC-HC-004

## PROSECUTION

### PURPOSE

To ensure that the laws administered by the City are applied impartially, in a fair and consistent manner. The Policy aims to ensure decisions in relation to prosecutions are based on appropriate criteria which are accountable, transparent, open, fair and capable of being applied consistently across the broad range of circumstances to which the laws apply. The policy recognises the role of the “*public interest*” in determining whether or not a prosecution, or subsequent appeal, will be initiated or continued.

### DEFINITIONS

<b>Authorised person</b>	A person authorised by the local government under Section 9.10 of the Act to perform any of the functions of an authorised person in this Compliance Policy.
<b>Chief Executive Officer</b>	Is the Chief Executive Officer (CEO) of the City of Kalgoorlie-Boulder.
<b>City:</b>	The City of Kalgoorlie-Boulder or an employee of the City of Kalgoorlie-Boulder.
<b>Compliance</b>	Ensuring that the requirements of laws, regulations, industry codes and organisational standards are met.
<b>Defendant:</b>	The person against whom the report has been lodged or the accused person against whom criminal proceedings are brought.
<b>Standard of Proof:</b>	<p>The level of proof required proving a charge before a Court of Law.</p> <p>There are two distinct standards of proof, namely:-</p> <p>Criminal Standard of Proof. Also called “<b>Beyond Reasonable Doubt</b>”. The standard definition of beyond reasonable doubt is “<i>when any sane and prudent person has the same evidence placed before them, will reach the same conclusion</i>” [Brown v R (1913) HCA 70]. This is the standard of proof required for any criminal prosecution in</p>

any Court within Australia and the level of proof to be established by City should it seek a punitive penalty (monetary fine) through either the Local or Magistrates Court;

Civil Standard of Proof. Also called the “**Balance of Probabilities**”. The standard definition of balance of probabilities is “*if the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain*” [Briginshaw v Briginshaw (1938) HCA 34]. This is the standard of proof for any civil proceedings within any Court within Australia and is the level of proof to be established by City in any proceeding

## STATEMENT

A prosecution has an impact on the rights of the alleged offender, the interests of the victim and the community generally.

Through application of this Policy and Guidelines and Procedures, the City will avoid arbitrary decisions, and will ensure prosecutions are not conducted for improper purposes, capriciously or oppressively.

This Policy embraces the principles contained in the *Statement of Prosecution Policy and Guidelines* issued by the Director of Public Prosecutions and published in the *Western Australian Government Gazette* on 20 September 1999.

This Policy applies to all prosecutions for offences under the Acts, Regulations and Local Laws administered by the City, (referred to as "the Act" or "the Regulations" or "the Local Laws") and as the circumstances allow, to all appeals arising out of proceedings in respect of any such prosecutions.

## 1 INTRODUCTION

### 1.1 APPLICATION

This policy is to be applied:

- prior to any authority to prosecute being signed and at any subsequent time should additional information be provided that might influence the decision to prosecute prior to the matter being heard in court;
- when a decision is taken not to proceed with the recommendation of an "Authorised Person" to prosecute; and

- in all cases involving a serious endangerment to a person or the health and safety of a person is at risk.

## 1.2 RELATED DOCUMENTS

This policy should be read in conjunction with the City's Compliance Policy.

## 2 THE DECISION TO PROSECUTE

In applying the law impartially, in a fair and consistent manner, it is necessary to consider:

- the rights of the alleged offender;
- the interests of victims; and
- the interests of the community.

Ordinarily discretion on whether to prosecute will be exercised so as to recognise the courts' central role in the criminal justice system in determining guilt and imposing appropriate sanctions for criminal conduct.

Where an Authorised Person obtains sufficient evidence to establish a *prima facie* case for serious matters, and there is a reasonable prospect of a conviction, consideration will be given to taking prosecution action, instead of, or in addition to applying alternative enforcement actions, in circumstances including:

1. Where the issue of notices/orders/directives is considered insufficient for ensuring compliance with the Act or Regulations;
2. Where, in the opinion of an Authorised Person, an alleged breach of the Act, Regulations or Local Laws either has resulted, or could have resulted in serious injury, serious risk/damage or a serious health hazard;
3. Alleged failure to comply with a notice within a reasonable period of time;
4. Where a person flagrantly and/or deliberately breaches legislation;
5. Where an Authorised Person alleges a person has repeated the same serious offence; and
6. Wilful obstruction of an Authorised Person.
7. In cases falling under one or more of the above circumstances, a prosecution will only be initiated where:

- i) an authorised person obtains sufficient evidence to establish a *prima facie* case;  
and
- ii) it is judged to be in the "*public interest*", including there being a reasonable prospect of success.

The above considerations are detailed under sections 3, 4, and 5 below.

The decision to continue a prosecution is at least as important as the decision to charge and takes into account factors beyond those which influence an investigator. Those factors are set out in this document.

### **3 A PRIMA FACIE CASE**

Consideration should be given, as early as possible in the prosecution process, as to whether the evidence discloses a *prima facie* case.

The question whether there is a *prima facie* case is one of law. This involves consideration of:

- Whether the evidence could lead to the conclusion (at the required standard of proof), beyond reasonable doubt or balance of probabilities, that all the elements of the offence have been proved.

Where, in the opinion of the City's Chief Executive Officer, giving due consideration to appropriate advice, the available material does not support a *prima facie* case, the prosecution should not be instituted or proceed under any circumstances. A report shall be prepared, specifying the reasons for such action.

### **4 THE PUBLIC INTEREST**

If a *prima facie* case exists, the prosecution of an offence must also be in the public interest. This requires the balancing of a broad range of factors, as they relate to the particular case. The presence of a particular factor does not necessarily mean it would be against, or in, the public interest to proceed with a prosecution, and the same factor could equally weigh in favour of prosecution in one particular case, yet weigh against it in another. Ultimately it is all the relevant factors taken together which will determine, on balance, whether it is in the public interest to proceed.

As mentioned earlier in this policy, it is the role of the courts to determine guilt or innocence. While all prosecutions must be in the public interest, the test of public interest must be applied in a manner which does not remove the central role of the courts in the prosecution

process. As is the case with other issues relating to the public interest, it is a matter of balance and exercise of appropriate judgement. It is in the public interest that prosecutions be treated fairly and impartially.

A prosecution which is instituted for improper purposes, capriciously or oppressively is not in the public interest.

## **5 EVALUATION OF THE PUBLIC INTEREST**

### **5.1 Reasonable Prospects of Conviction**

It is not in the public interest to proceed with a prosecution which has no reasonable prospect of resulting in a conviction.

A prosecution should be discontinued if, based on the available material and appropriate advice, the City's Chief Executive Officer considers that there is no reasonable prospect of conviction, unless further prompt investigation will remedy any deficiency in the prosecution case.

The evaluation of prospects of conviction requires dispassionate and impartial judgment, based on the advice and experience of the Council's solicitors.

Such decisions may on occasions be difficult. However, this does not mean that only cases perceived as 'strong' should be prosecuted. Generally, the resolution of disputed questions of fact is for the court and not the Council. A case considered 'weak' by some may not seem so to others. Nevertheless, the Council has a responsibility, in the public interest, to exercise appropriate discretion and judgement in the assessment of the prospects of conviction when deciding to bring a matter to court. The assessment of the prospects of conviction is not to be understood as an usurpation of the role of the court but rather as an exercise of discretion in the public interest.

The evaluation of the prospects of conviction includes consideration of:

1. Whether any alleged confession was given voluntarily and whether there are grounds for reaching the view that a confession will not meet the various criteria for admission into evidence;
2. The likelihood of the exclusion from the trial of a confession or other important piece of evidence in the exercise of a judicial discretion. In the case of an alleged confession, regard should be given to whether a confession may be unreliable having regard to the intelligence of the accused, or linguistic or cultural factors;
3. The competence, reliability and availability of witnesses;

4. Matters known to the prosecution which may significantly lessen the likelihood of acceptance of the testimony of a witness. Regard should be given to the following:
  - i) Has the witness made prior inconsistent statements relevant to the matter?
  - ii) Is the witness friendly or hostile to the defence?
  - iii) Is the credibility of the witness affected by any physical or mental impairment;
5. The existence of an essential conflict in any important particular of the prosecution case among prosecution witnesses;
6. Where identity of the alleged offender is in issue, the cogency and reliability of the identification evidence;
7. Any lines of defence which have been indicated by or are otherwise plainly open to the defence.

Evaluation of the prospects of conviction will generally not have regard to:

1. Material not disclosed to the prosecution by the defence;
2. Notification of a defence which purports to rest upon unsubstantiated assertions of fact;
3. Whether assertions of facts upon which a defence or excuse are based are contentious, or rest on information which would not, in the opinion of the prosecutor, form the basis of credible cogent evidence.

## **5.2 OTHER RELEVANT PUBLIC INTEREST FACTORS**

### **5.2.1 Factors Which May Weigh Against Prosecution**

Despite the existence of a *prima facie* case and reasonable prospects of conviction, it may not be in the public interest to proceed if other factors, singly or in combination, render a prosecution inappropriate.

Presence of one or more of the following factors does not necessarily indicate that the prosecution should not proceed, but rather that the factor(s) should be balanced against other factors relating to the case. Factors which may, singly or in combination, render a prosecution inappropriate in the public interest include:

1. The trivial or technical nature of the alleged offence in the circumstance;

2. The youth, age, physical or mental health or special infirmity of the victim, alleged offender or a witness;
3. The alleged offender's antecedents (ie previous history);
4. The staleness of the alleged offence, including delay in the prosecution process which may be oppressive;
5. The degree of culpability of the alleged offender in connection with the offence;
6. The obsolescence or obscurity of the law;
7. Whether a prosecution would be perceived as counter-productive to the interests of justice;
8. The availability or efficacy of any alternatives to prosecution;
9. The lack of prevalence of the alleged offence and need for deterrence, either personal or general;
10. Whether the alleged offence is of minimal public concern;
11. The attitude of the victim of an alleged offence to prosecution;
12. The likely length and expense of a trial;
13. Whether the alleged offender has co-operated in the investigation and prosecution of others or has indicated an intention so to do;
14. The likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
15. The likely effect on public order and morale;
16. Whether a sentence has already been imposed on the offender which adequately reflects the criminality of the episode; and
17. Whether the alleged offender has already been sentenced for a series of other offences and the likelihood of the imposition of an additional penalty, having regard to the totality principle (ie where a person has been sentenced to a penalty to a level where "enough is enough"), is remote.

### **5.2.2 Factors Which May Weigh in Favour of a Prosecution Proceeding**

Factors which might require the prosecution to proceed in the public interest, and

which should be balanced against any factors weighing against, include:

1. The need to maintain the rule of law (ie the application of the law without the influence of arbitrary power; the equal accountability of all before the law; and the protection of the rights and freedoms of individuals through the courts);
2. The need to maintain public confidence in basic constitutional institutions, including Parliament and the courts;
3. The entitlement of any person to be awarded compensation if guilt is adjudged;
4. The release from obligation by a person to pay compensation, insurance or other similar payments in relation to the action of the defendant, if the defendant is found guilty of an offence;
5. The need for punishment and deterrence; and
6. The circumstances in which the alleged offence was committed.

### **5.2.3 Irrelevant Factors\_**

The following matters are not to be taken into consideration in evaluating the public interest:

1. The race, colour, ethnic origin, sex, religious beliefs, social position, marital status, sexual preference, political opinions or cultural views of the alleged offender;
2. The possible political consequences of the exercise or non-exercise of discretion;
3. The personal feelings concerning the alleged offender or victim; and
4. The possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

### **5.2.4 Juveniles**

Further special considerations apply to the prosecution of juveniles and decisions to continue a prosecution of a juvenile should have regard to:

1. The seriousness of the alleged offence;
2. The age and apparent maturity of the juvenile;

3. The capacity of the juvenile, if under 14, to know that at the time of doing an act, or making an omission, the juvenile knew that he or she ought not to do the act or make the omission;
4. The juvenile's antecedents;
5. The ability to mediate appropriately with the legal guardian(s); and
6. Any other special factor.

## **6 COMPLETION OF PROSECUTION CHECKLIST**

The prosecution checklist in Appendix Two must be completed before a prosecution can be initiated.

## **7 PROSECUTION APPEALS**

The purpose of prosecution appeals is to ensure that offence provisions are justly and correctly applied; and in the case of appeals against the penalty, to ensure that they are established and adequate, just and proportionate standards of punishment for offences.

Prosecution appeals have been held by the courts to raise considerations not present in an appeal by a defendant seeking a judgment of not guilty or a reduction in penalty. They have been described as cutting across time-honoured concepts of criminal administration and as putting the convicted person in jeopardy a second time.

Prosecution appeals must be considered against the background of many complex circumstances and legal principles. For any offence there is a range of sentencing options and a court must have regard, in choosing which option seems appropriate, to the principles laid down by Parliament and in other cases. For any offence there may be a number of different dispositions none of which are necessarily wrong. Therefore a prosecution appeal will not be initiated simply because the outcome is perceived as inadequate or inappropriate in a particular case.

The following factors are relevant in considering whether or not to lodge an appeal:

1. Whether a penalty is so disproportionate to the seriousness of the offence as to reflect error in sentencing principle by the courts;
2. Whether a penalty is so disproportionate to the seriousness of the crime as to shock the public conscience;

3. Whether a penalty is so out of line with other penalties imposed for the same or similar offences without reasonable cause for that disparity;
4. Whether the idiosyncratic views of individual magistrates relating to particular offences or types of offences require correction;
5. Whether disputed points of sentencing principle are giving, or are likely to give, rise to disparity of penalties imposed for offences of the same or similar type;
6. Whether existing penalties are already subject to wide and inexplicable variations and there is a need to reduce this disparity and variability in order to promote uniform standards of sentencing.

## **8 RECOVERY OF LEGAL COSTS**

City's policy for recovery of its costs is:

- The City will seek to recover its fair and reasonable costs in all matters where costs are recoverable, either by a charge on the land, consent or by order of the Court;
- The City will seek to recover the penalty imposed by the Court where such penalty is imposed; and
- The City will adopt the recommendations of its solicitors to accept a lesser amount than the full legal costs incurred by the City if, in the circumstances, the acceptance of such an offer will result in the City not incurring further and unnecessary legal costs.

## **9 RESPONSIBILITIES**

1. The primary responsibility for investigating and issuing complaints under the Act, Regulations and Local Laws reside with the Chief Executive Officer.
2. Only a person authorised by the Council may sign a complaint alleging a breach of the Act, Regulations or Local Laws by another person. The Council has delegated this authority to the Chief Executive Officer.
3. The authority to prosecute is, in the first instance, to be subject to legal advice from the Council's solicitors.
4. The Council has the ultimate responsibility and decision to determine and/or direct the Chief Executive Officer with regards to initiating or discontinuing legal action or an Appeal.

5. The CEO is to ensure that where a prosecution is to be instituted or not proceed with, a report shall be prepared specifying the reasons for such actions.

## RELEVANT DOCUMENTS