



NSW Department of
Community Services

Children's Services Directorate

Prosecution Policy and Guidelines

October 2008

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SECTION 1. INTRODUCTION

Purpose of the prosecutions policy and guidelines

- 1.1 The purpose of this document is to set out the prosecutions policy of the Department of Community Services (“DoCS”) in relation to the regulation of children’s services in NSW and to provide guidelines for implementation of the policy.
- 1.2 This document should be read in conjunction with other relevant policies developed by the Children’s Services Directorate, the Division in DoCS which is responsible for the licensing and regulation of children’s services and registration of out of school hours care services. These policies include the
 - *Strategic Compliance Monitoring and Enforcement Framework;*
 - *Compliance and Enforcement Policy;*
 - *Targeted Campaigns Policy; and*
 - *Complaints Investigation Policy.*
- 1.3 The key aim of these policies is to deter non compliance with children’s services legislation so as to ensure the health, welfare and well being of children attending children’s services and out of school hours care services in NSW.
- 1.4 Prosecution is a discretionary action. Initiating a prosecution is one of several enforcement options available to DoCS. Not all breaches of children’s services legislation should or will lead to a prosecution and other prosecution related options or administrative actions may be considered.
- 1.5 However the Department is committed to a policy of prosecuting whenever significant breaches of the children’s service legislation take place. Significant breaches include cases involving persistent frequent non-compliance where risks to the health, safety and/ or well-being of children are high, cases of ongoing wilful or negligent non compliance or where the non compliance has resulted in injury to the child.
- 1.6 The Department in commencing a prosecution aims to both punish the offender and achieve future compliance, and to deter future offenders. Prosecution in appropriate circumstances sends a message to the community that failure to comply with legislative responsibilities will be enforced through the courts.
- 1.7 These guidelines are not legally binding on the Department of Community Services or any other organisation. They reflect the current policies of the Department which are kept under review to reflect changes in legislation and practices of the courts and the Children’s Services Directorate.
- 1.8 This policy is informed by the *Prosecution Guidelines of the Office of the Director of Public Prosecutions (NSW).*

Legislation under which prosecution may occur

- 1.9 Prosecutions are commenced by DoCS for non-compliance with;
 - *Children and Young Persons (Care and Protection) Act 1998 (“the Act”)*

- *Children's Services Regulation 2004 ("the Regulation"); and*
- *Children and Young Persons (Care and Protection) Regulation 2000.*

1.10 Chapter 12 and Chapter 12A of the Act relate specifically to the licensing and regulation of children's services and the registration of out of school hours care services in NSW. Offences created by the Act and the Regulation are classified as criminal offences and are to be dealt with summarily in the Local Court or before the Supreme Court in its summary jurisdiction.

Limitation period for prosecution

1.11 Under section 258A (2) of the Act prosecutions for summary offences may be commenced no later than 2 years after the Director General became aware of the alleged offence.

SECTION 2. PROSECUTION GUIDELINES

Decision to prosecute

2.1 Two factors are to be considered in the exercise of the discretion to prosecute or not to prosecute. The first is whether the available evidence establishes a prima facie case and the second is whether it is in the public interest to prosecute in all the circumstances of the matter.

Prima facie case

2.2 A prima facie case is one where there is admissible evidence available to prove each and every element of the offence.

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

- (i.) the availability, the competence and credibility of witnesses and the admissibility of their evidence;
- (ii.) any defences open to the defendant;
- (iii.) whether or not any discretionary factors dictate that the matter should not proceed in the public interest.

Public interest considerations

2.4 The question of whether or not the public interest requires that a matter be prosecuted is resolved by taking into account a number of factors. The main criteria for consideration are similar to those adopted by the Office of the Director or Public Prosecutions and include:

A: Nature and circumstances of the alleged offence

- a) the seriousness, or conversely, the triviality of the alleged offence, or whether having regard to all the circumstances it is considered to be of both a 'technical' and minor nature only;
- b) the number of breaches identified and the period of time within which the breaches occurred;
- c) whether any actual injury or damage has occurred as a result of the alleged breach;
- d) the level and extent of the risk for the health, safety and well-being of children;
- e) the actual or potential consequence of the alleged offence;
- f) the length of time since the alleged offence occurred;
- g) the prevalence of the alleged offence and the need for deterrence, both specific and general;
- h) mitigating or aggravating circumstances or other relevant circumstances;
- i) any precedent that may be set by instituting or not instituting proceedings.

B: Characteristics of the alleged offender

- a) the relevant compliance history of the children's service;

- b) the degree of culpability of the alleged offender in relation to the alleged offence;
- c) whether the breach is a continuing or a second offence;
- d) the extent of cooperation during the investigation and willingness to implement programs to manage compliance;
- e) the degree to which the alleged offender acted upon any advice or information given by Departmental officers; and
- f) whether proceedings are to be instituted against others arising out of the same incident.

C. Level of public concern

Whether the nature of the alleged offence is of considerable public concern.

D. Not for improper purposes

The Department of Community Services adopts the principle that a prosecution must not be brought for improper purposes. A decision whether or not to prosecute will not be influenced by:

- a) any elements of discrimination against the person e.g. discrimination on the grounds of race, nationality, political associations;
- b) personal empathy or antipathy towards the alleged offender;
- c) political or other affiliations of those responsible for the prosecution decision;
- d) possible financial advantage or disadvantage to the offender or any other person or business or corporation;
- e) the possible effect of the decision on the officers responsible for the prosecution.

SECTION 3. PROSECUTION RELATED OPTIONS

3.1 After consideration of all the relevant prosecution criteria (i.e. sufficient evidence and public interest) a recommendation that prosecution action be taken against the alleged offender will result in one of the following:

- commencement of prosecution proceedings;
- acceptance of a written undertaking from the alleged offender;
- no further action.

Prosecution proceedings

3.2 Instituting prosecution proceedings will be considered an appropriate response where sufficient evidence exists to establish that a breach of the Act or the Regulations has occurred and where instituting prosecution action would be in the public interest.

3.3A decision to prosecute once approved by the Executive Director, Children's Services Directorate will be referred to the Legal Services Branch for review. Once the decision has been confirmed the Legal Services Branch will have carriage of the conduct of the prosecution.

Written Undertaking

3.4A written undertaking is an administrative response which may be accepted by the Department from a licensee or authorised supervisor in lieu of prosecution proceedings being instituted.

3.5A written undertaking may be accepted as an alternative to prosecution in circumstances where the licensee or authorised supervisor is likely to comply with the undertaking and where no previous enforcement action has been taken in relation to similar conduct.

3.6A written undertaking must state that the licensee or the authorised supervisor will rectify the breaches in the manner specified, and take other action agreed to in the undertaking.

3.7 Other agreed action may require that the licensee will take steps to comply with the relevant condition of licence prescribed in clause 25(3), (4) or (5) of the *Children's Services Regulation 2004* "... to the effect that the licensee will develop procedures to ensure that the authorised supervisor, and all other members of the staff of the service, comply with the provisions of this regulation which apply to them."

3.8 The Department does not have the power to require a person to enter into a written undertaking nor does it have the power to enforce the undertaking in a court of law.

3.9A written undertaking is an alternative to prosecution. Its purpose is to focus the licensee or the authorised supervisor on the tasks to be carried out to remedy the alleged breach and/or prevent a similar contravention in the future.

3.10 However if the terms of the written undertaking are not complied with within the given time frame or continuing offences have not been rectified the Department

may proceed to institute prosecution proceedings for the original alleged offences which led to the undertaking.

No Further Action

3.11 No further action will be taken, where

- there is insufficient admissible evidence of the breach; or
- it is not in the public interest to prosecute the breach or accept a written undertaking.

SECTION 4. REVOCATION OF LICENCE

- 4.1 The revocation, suspension or variation of a licence or the imposition of a further condition on a licence is an option that may be considered instead of or as well as the institution of prosecution action.
- 4.2 The decision to revoke a licence is made on the grounds set out in section 211 of the *Children and Young Persons (Care and Protection) Act 1998* or in clause 26(2) of the Regulation. In summary these grounds are that;
- the Director General is of the opinion that the continued operation of the children's service would constitute an unacceptable risk to the safety, welfare or well-being of any child or class of children attending the service; or
 - exceptional circumstances arise in which the Director General considers it contrary to the best interests of the children attending the children's service to continue; or
 - the Director General is of the opinion that any person involved in the control and management of a licensee that is not a natural person is no longer a suitable person to hold a licence; or
 - the authorised supervisor or the licensee has failed to comply with a provision of the Act or the Regulation that applies to that person.
- 4.3 The licence may be revoked at any time and revocation is not always dependant on the taking or completion of prosecution action.

SECTION 5. LIABILITY OF DIRECTORS

Offences by Corporations

5.1 **Section 258 Offences by corporations** of the *Children and Young Persons (Care and Protection) Act 1998* provides:

If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision unless the person satisfies the court that:

- a) *the corporation contravened the provision without the knowledge actual, imputed or constructive of the person, or*
- b) *the person was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or*
- c) *the person, being in such a position, used all due diligence to prevent the contravention by the corporation.*

5.2 Section 258 recognises that while corporations are legal entities, it is the directors and managers who represent the directing mind and will of the corporation and control its activities.

5.3 In any decision to prosecute under section 258 the crucial issue is the person's actual control or the ability to be able to influence the conduct of the corporation in its criminal conduct. This will be a question of fact in each case.

5.4 Action under this section can only be taken where there is evidence which directly links a Director or Manager with the corporation's illegal activity. That link need not necessarily be of a positive (intentional) character but could be of a negligent nature.

SECTION 6. CHARGES

- 6.1 Once a decision has been made to deal with the incident(s) of non compliance by way of prosecution, it is in the public interest for the prosecution to succeed. It is therefore a responsibility of DoCS to select charges it can prosecute successfully and which are consistent with the seriousness of the alleged criminal conduct.
- 6.2 The charge laid and any statement of facts must reflect the nature and the extent of the conduct disclosed by the evidence with the aim of providing a basis for the court to impose an appropriate penalty.
- 6.3 It is important that charges brought are carefully considered to avoid laying either duplicitous or multiple charges.

Charge Bargaining

- 6.4 "Charge bargaining" involves negotiations between the defence and the prosecution in relation to the charges that will proceed to a hearing. As a result of these negotiations, the defendant may opt to plead guilty to fewer than all the charges initially laid, or to a lesser charge or charges, in return for the prosecution offering no evidence on the remaining charges.
- 6.5 However if appropriate charges are laid initially there is little scope of charge bargaining and hence only limited circumstances where bargaining will be considered.
- 6.6 A charge bargaining proposal will not be entertained by DoCS unless
- a) the remaining charges reflect adequately the nature of the criminal conduct of the defendant; and
 - b) those charges provide the basis for an appropriate sentence in all the circumstances of the case; and
 - c) the investigating officer has been consulted.
- 6.7 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 sentencing or where the accused intimates that he or she is not guilty of any offence.

SECTION 7. MODE OF TRIAL

7.1 Proceedings for an offence against Chapter 12 and 12A of the Act or the regulations may be dealt with summarily before a Local Court or before the Supreme Court in its summary jurisdiction. (Section 259 of the Act)

7.2 In the majority of matters prosecutions will be initiated in the Downing Centre Local Court.

SECTION 8. CONTENT OF REQUESTS FOR APPROVAL TO PROSECUTE

8.1 Requests for approval to prosecute should be prepared in the form of a brief of evidence to be reviewed by the Director, Enforcement and Prosecutions and approved by the Executive Director, Children's Services Directorate.

8.2 The Brief should contain:

- (i.) Covering Sheet.
- (ii.) Contents sheet.
- (iii.) An Investigation Report documenting
 - a) details of the investigation, ie the officer's observations and dealings with witnesses, evidence collected, witnesses interviewed and breaches identified: and
 - b) a recommendation for prosecution or other prosecution-related action.
- (iv.) Witness statement from investigating officers (i.e. Children's Services Officer, Principal Investigators).
- (v.) Other statements and documents in admissible form which prove all the elements of the offence.
- (vi.) Record of interview with the licensee and/or authorised supervisor.
- (vii.) Witness statements from other relevant witnesses.
- (viii.) Exhibits which include:
 - a) an application for a children's service licence
 - b) the children's service licence
 - c) a company search (where appropriate)
 - d) the breach letter and/or other notices
 - e) entries in the official notebook (photocopies)
 - f) original records and/or photocopies
 - g) photographs and
 - h) any physical evidence.

8.3 The Director, Enforcement and Prosecutions should attach a separate sheet setting out any material or argument relating to any potential defence which may be available to the defendant.

SECTION 9. CONCLUSION

9.1 This Policy and Guidelines document does not attempt to cover all questions that can arise during the prosecution process for breaches of children's services legislation. It addresses those issues that DoCS considers are of immediate concern and in respect of which clarification is desirable.

9.2 It is anticipated that as the principles expressed in the *Compliance Monitoring and Enforcement Framework* are implemented and with the conduct of more frequent enforcement action takes place there will be other specific issues that will need to be addressed through the guidelines.

9.3 These will be set out from time to time in Supplementary Compliance, Enforcement and Prosecution Policies and Guidelines.