

## Prosecution

### Purpose

The National Heavy Vehicle Regulator (NHVR) initiates proceedings and prosecutes offences against the Heavy Vehicle National Law (HVNL) and specific state and territory road safety legislation in South Australia, Tasmania, Victoria, and the ACT.

This policy outlines the intent and guiding principles the NHVR applies in making decisions regarding the prosecution process, and the conduct of the prosecution process, for offences against the HVNL.

This policy:

- is a public document and is based on the principles of fairness, openness, consistency, accountability and efficiency the NHVR seeks to apply in prosecuting under the HVNL.
- is available to all interested members of the public, the legal profession and other law enforcement agencies.
- can be accessed on the NHVR's website: [www.nhvr.gov.au/](http://www.nhvr.gov.au/).

### Scope

Section 659 of the HVNL outlines the functions of the NHVR in relation to prosecution:

- Bringing and conducting proceedings in relation to contraventions or possible contraventions of provisions of the HVNL, including offences against the HVNL.
- Bringing and conducting, or conducting and defending, appeals from decisions in prosecutorial proceedings.

This policy:

- applies to the NHVR and any other agency that prosecutes on behalf of the NHVR
- addresses those issues the NHVR considers are of immediate concern and require further clarification
- will be reviewed regularly, with any changes made public.

This policy does not:

- apply to police forces prosecuting HVNL matters, although they are encouraged to follow the principles of this policy, or

- attempt to cover all questions that can arise in the prosecution process for breaches of the legislation administered by the NHVR.

### Policy statement

1. The NHVR's prosecutorial functions are prominent examples of the position of trust, responsibility, and public service the NHVR occupies in the Australian community. The NHVR is committed to discharging its prosecutorial functions fairly, in an open, reasonable, consistent, impartial, efficient, and accountable manner, and in the public interest.
2. Those general principles are applied from case-to-case, recognising that flexibility is required. Not all offences automatically result in prosecution. The public interest may suggest the exercise of discretion to discontinue a prosecution.
3. However, the NHVR is committed to prosecuting significant breaches of HVNL offences. Significant breaches generally include cases involving fatalities and/or serious injury or where potential risks to personal/community safety are high.
4. NHVR prosecutors seek to place all admissible evidence before the court. Each case must at all times be presented to the court fairly and justly. The community is entitled to expect that each case will also be prosecuted fearlessly, vigorously and skillfully.
5. Prosecution decisions will be made independently of those who were responsible for the investigation.

### Principles

The application of this policy will be consistent with the following principles.

### Deciding whether to prosecute

6. The resources available for prosecution are limited and should not be wasted pursuing inappropriate cases; the converse of which is that they are employed to pursue, with vigour, those cases worthy of prosecution.
7. The decision to prosecute is made based on the applicable law at the time.
8. When deciding whether the evidence is sufficient to justify the institution or continuation of a prosecution, the first step is to determine if there is a *prima facie* case.<sup>1</sup> Once it is established that there

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<sup>1</sup> On first appearance. A *prima facie case* is one which, on first appearance, contains sufficient evidence to prove the elements of the offence.

is a prima facie case, it is then necessary to consider the two-part test:

- a. Is there is a reasonable prospect of conviction?
- b. Is it in the public interest to proceed when considering any relevant discretionary factors?

### Reasonable prospect of conviction

9. The consideration of whether there is a reasonable prospect of a conviction requires an evaluation of how strong the case is likely to be when presented in court. The evaluation must consider such matters as the:
  - a. availability, competence and credibility of witnesses and their likely impression on the arbiter of fact;
  - b. admissibility of any admissions or other evidence.
10. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, an accused person and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction.<sup>2</sup> This requires an exercise of judgment which 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.<sup>3</sup>

### Public interest

11. The factors which can properly be taken into account in deciding whether public interest requires a prosecution will vary from case-to-case. Factors include:<sup>4</sup>
  - a. the seriousness of the alleged offence;
  - b. mitigating or aggravating circumstances impacting on the appropriateness or otherwise of the prosecution;
  - c. the age, intelligence, physical health, mental health or special vulnerability of an accused person, a witness or victim;
  - d. an accused person's antecedents and background;
  - e. the passage of time since the alleged offence when taken into account with the circumstances of the alleged offence and when the offence was discovered;

- f. the degree of culpability of an accused person in connection with the offence;
  - g. the availability and appropriateness of any alternatives to prosecution;
  - h. the prevalence of the alleged offence and the need for deterrence, both personal and general;
  - i. whether the alleged offence is of considerable public concern;
  - j. the attitude of the victim of the alleged offence to a prosecution;
  - k. the actual or potential harm, occasioned to an individual;
  - l. the likely length and expense of a trial;
  - m. whether an accused person is willing to co-operate in the investigation or prosecution of others, or the extent to which an accused person has done so;
  - n. the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
  - o. the need to give effect to regulatory or punitive imperatives.
12. The applicability of and weight to be given to these and other factors will depend on the particular circumstances of each case.<sup>5</sup>
  13. 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). Generally, the more serious an offence is, the more likely it is to proceed. The seriousness of the offence will influence the assessment of public interest.
  14. In most cases, a prosecution will proceed if there is sufficient evidence to justify that prosecution.
  15. Although there may be mitigating 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.<sup>6</sup>
  16. It is recognised that the resources available for prosecuting are finite and should not be expended pursuing inappropriate cases. Alternatives to prosecution, including diversionary procedures, should always be considered.<sup>7</sup>

<sup>2</sup> Refer paragraph 2.6, *Prosecution Policy of the Commonwealth*

<sup>3</sup> Ibid

<sup>4</sup> Refer paragraph 2.10, *Prosecution Policy of the Commonwealth*

<sup>5</sup> Ibid

<sup>6</sup> Refer paragraph 2.11, *Prosecution Policy of the Commonwealth*

<sup>7</sup> Refer paragraph 2.12, *Prosecution Policy of the Commonwealth*

## Determining whether or not to proceed to prosecution

17. A decision whether or not to proceed must not be influenced by:
- the race, religion, sex, national origin, social affiliation or political associations, activities or beliefs of the alleged offender or any other person involved (unless they have special significance to the commission of the particular offence or should otherwise be taken into account objectively);
  - personal feelings of the prosecutor concerning the offence, an accused person or a victim;
  - the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution or otherwise involved in its conduct; or
  - possible media or community reaction to the decision.<sup>8</sup>

## Proceeding with a breach of a primary duties offence

18. In cases involving a breach of a primary duty to ensure safety (as outlined in Chapter 1A of the HVNL) (primary duty offence) it must be determined if the breach is considered of sufficient seriousness to warrant imposing the much higher penalties applicable for primary duty offences. There is significant overlap between the primary duty offences and the other offences in the HVNL, and significant variance in penalty.
19. Relevant considerations to commencing a primary duties prosecution include:
- Has a death or serious injury occurred, or was there a real risk that one could occur?
  - Was the safety risk caused by serious or systematic non-compliance with the HVNL?
  - Was the safety risk created by business practices and/or company culture?
  - Is there a demonstrable preference for commercial benefit over safety?
  - What was the actual ability of any proposed defendant to influence and/or control the safety risk?
  - If a defendant company, what is the potential culpability of any natural persons involved in the company?

20. A safety risk arising from actual or potential damage to infrastructure or the environment presents unique challenges. When deciding whether to commence such a primary duty prosecution, criteria which should be considered include, but are not limited to, the following:
- Can the environmental or infrastructure damage be measured in an admissible way and linked to the defendant?
  - What is the seriousness of the environmental or infrastructure damage, both actual and potential?
  - Has damage been caused to the environment or infrastructure from a discrete event(s), or is it caused over an extended period of time?
  - Is there a more applicable regulatory or criminal legislation that the breach could be charged under (i.e., environmental protection legislation)?
21. The above criteria are not exhaustive, and any number of other relevant considerations should be taken into account. These considerations, along with others, should be considered as a whole.

## Priority in prosecuting offences

22. The NHVR *Prosecution Policy* requires that priority be given to the consideration and prosecution of primary duty offences and offences committed by executives of legal entities that owe such duties.
23. Priority is then given to the consideration and prosecution of prescriptive offences by operators, and then drivers including but not limited to:
- failure to comply with directions issued by the NHVR its officers and Police officers;
  - tampering or interfering with safety devices and devices to avoid compliance with legislative requirements;
  - fatigue related offences involving drivers who have exceeded allowable work hours or failed to rest for minimum rest times (critical);
  - failure to comply with mass and dimension requirements including limits on height, width, length and weight of heavy vehicles (severe);
  - provision of false or misleading information to the NHVR its officers and Police officers;
  - failure to comply with record keeping requirements relating to transport activities;

<sup>8</sup> Refer paragraph 2.13, *Prosecution Policy of the Commonwealth*

- g. failure to comply with regulatory requirements such as compliance with journey specific permits pertaining to routes used, warning signs displayed and exemptions to mass and dimension requirements;
- h. discrimination against or victimisation of employees.

## Selecting defendants

### General principles

- 24. Any party in the chain of responsibility (as defined in section 5 of the HVNL) can be identified as an appropriate defendant. This means that there may be a number of culpable parties arising from the same incident.
- 25. General principles to consider when identifying an appropriate defendant include the following:
  - a. Who is primarily responsible for the alleged offence? That is, who was primarily responsible for the acts or omissions giving rise to the alleged offence or the material circumstances leading to the alleged offence.
  - b. What was the culpability of the alleged offender?
  - c. What is the likely effectiveness of any court order that might be made against the alleged offender?

### Corporate and executive liability

- 26. The NHVR's policy is to prosecute duty holders, including corporations and their executives, for breaches of the HVNL, where there is a reasonable prospect of conviction and it is in the public interest.

### Public authorities

- 27. The legislation administered by the NHVR binds the Crown and government authorities. The law applies with equal force to both the private and public sectors.
- 28. The NHVR recognises that deciding whether to prosecute public authorities for breaches of the HVNL attracts specific public interest considerations. There are two competing public interests in relation to the prosecution of public authorities:
  - a. the public has an interest in government authorities abiding by the law;
  - b. it is the taxpayer that bears the cost of any penalties arising from the prosecution of public authorities. Such expenditure needs to be justified on the basis that it is in the public interest.

- 29. Public authorities are usually under the control and direction of a minister who can direct compliance with legislation. However, this position does not always achieve the required compliance.
- 30. In the interests of general deterrence, there will be instances where it is important that a failure to comply attracts an enforcement response, including prosecution.
- 31. In circumstances where a state or territory government is prosecuting offences under the HVNL, on behalf of the NHVR through a service level agreement (SLA) and there is an allegation against any department of that same government, the matter will be referred to the NHVR to adjudicate according to this policy, to ensure impartiality.

## Negotiation and withdrawal of charges

- 32. Requests for charge negotiation or the withdrawal of charges are to be made in writing to the Director of Prosecutions (the Director) to: [prosecutions@nhvr.gov.au](mailto:prosecutions@nhvr.gov.au).

### Charge negotiation

- 33. Charge negotiations between the parties are to be encouraged and may occur at any stage of the progress of a matter through the courts. Charge negotiations must be based on principle and reason, not on expedience alone. Written records of the charge negotiations must be kept in the interests of transparency and probity.
- 34. A prosecutor may agree to discontinue a charge (or charges) upon the commitment of an accused person to plead guilty to an alternative charge (or charges). A plea of guilty in those circumstances may be accepted if the public interest is satisfied after consideration of the following matters:
  - a. Does the alternative charge (or charges) adequately reflect the essential criminality of the conduct?
  - b. Does the plea provide adequate scope for sentencing?
  - c. Is the evidence available to support the prosecution case weak in any material respect?
  - d. Is the saving of cost and time substantial when weighed against the likely outcome of the matter if it proceeded to trial?
  - e. Will it save a witness, particularly a victim or other vulnerable witness, from the stress of testifying in a trial; and/or has a victim expressed a wish not to proceed with the original charge or charges?

35. The views of the investigator and the victim must be sought at the outset of formal discussions, and in any event before any formal position is communicated to the defence and must be recorded on file.
36. An alternative plea will not be considered where its acceptance would produce a distortion of the facts and create an artificial basis for sentencing, or where facts essential to establishing the criminality of the conduct would not be able to be relied upon, or where the accused person intimates that he or she is not guilty of any offence.
37. Any written offers or representations by the defence must be filed. In many cases there will not be any written record from the defence; but in any case of complexity or sensitivity, the defence should be asked to put in writing (or to adopt a prosecution document recording), without prejudice, the offer of a plea and the reasons why it is considered an appropriate disposition of the matter. In some cases, it may be appropriate to inform the defence that the prosecution will not consider an offer unless its terms are clearly set out in writing. The content and timing of such communications will be of significance to both parties given the weight to be accorded to early and appropriate pleas.

### Withdrawal of charges

38. A determination to discontinue court proceedings will be made by the Director of Prosecutions. The decision will take into account three key considerations:
  - a. having considered all the elements of the offence charged, there is no admissible evidence available to prove one or more of those elements or
  - b. having considered all the available evidence and the matters raised in the defendant's representations, there is no reasonable prospect that a court would find the offence proved beyond reasonable doubt or
  - c. having regard to discretionary factors it is not in the public interest to allow the proceedings to continue.

### Victims of crime

39. A victim of crime, including an offence under Ch1A, is a person who suffers harm as a direct result of an act committed, or apparently committed, by another person in the course of a criminal offence, and includes a member or nominated representative member of the victim's immediate family if the person dies or suffers serious injury. 'Harm' includes

physical or mental injury, emotional suffering, or economic loss.<sup>9</sup>

40. Victims, whether witnesses or not, should appropriately and at an early stage of proceedings have explained to them the prosecution process and their role in it. The Investigator or Prosecutor must make contact with the victim and provide ongoing information about the progress of the case.
41. Victims of crime (whether they have requested it or not) should be informed in a timely manner of:
  - a. charges laid or reasons for not laying charges
  - b. any decision to change, modify or not proceed with charges laid and any decision to accept a plea to a less serious charge
  - c. the date and place of hearing of any charge laid
  - d. the outcome of proceedings, including appeal proceedings, and sentence imposed.
42. The views of victims will be sought, considered and taken into account in making decisions about prosecutions; but those views will not alone be determinative.

### Enforceable undertakings

43. Chapter 10, Part 1A of the HVNL allows the NHVR to accept a written undertaking, known as an 'enforceable undertaking', by a person in proposed connection with a contravention or alleged contravention of the HVNL (except section 26F). The NHVR has a separate *Enforceable Undertakings Policy* which must be considered.

### Prosecution appeals against sentence

44. The prosecution right to appeal against a sentence should be exercised with appropriate restraint.
45. In deciding whether to appeal, there should be an assessment of whether there is a reasonable prospect that the appeal will be successful. Factors which may be considered include whether:
  - a. the sentence is manifestly inadequate
  - b. the sentence reveals an inconsistency in sentencing standards
  - c. the sentence proceeded based on a material error of law or fact requiring appellate correction
  - d. the sentence is substantially and unnecessarily inconsistent with other relevant sentences

<sup>9</sup> *Commonwealth DPP Victims of Crime Policy*



- e. an appeal would enable the appellate court to lay down some general principles for governance and guidance
  - f. an appeal will enable the appellate court to establish and maintain adequate standards of punishment
  - g. an appeal will ensure, so far as the subject matter permits, uniformity in sentencing
  - h. an appeal will enable an appellate court to correct an error of legal principle.
46. A prosecution appeal against a sentence should be instituted promptly, even where no time limit is imposed by the relevant legislation. Undue delay by the prosecution in the institution of an appeal may render oppressive the substitution of an increased sentence, and appellate courts have indicated on numerous occasions that in such cases they will not intervene although the prosecution's appeal is otherwise meritorious.

## Definitions

See the NHVR Governance Glossary for a list of terms related to this policy or processes, or the NHVR Glossary of common terms for terms used in the heavy vehicle industry.

## Related legislation and documents

- *Heavy Vehicle National Law Act 2012*
- *Commonwealth DPP Victims of Crime Policy*
- *Prosecution Policy of the Commonwealth*
- *NSW DPP Prosecution Policy*
- *Enforceable Undertakings Policy*
- *National Regulatory Strategy*