

Victorian Building Authority Prosecution Policy

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1. Overview

The Victorian Building Authority's Prosecution Policy (the Policy) describes the considerations that the Victorian Building Authority (VBA) will take into account when determining whether or not to commence a prosecution.

2. Audience

The Policy is intended for VBA staff, external stakeholders, other regulatory agencies and the public.

3. Context

The purpose of the Policy is to identify:

- the basis on which the VBA will decide whether to commence a prosecution;
- the factors the VBA will take into account when deciding who to prosecute; and
- the factors the VBA will take into account in deciding which charges (if any) to lay
- the factors the VBA will take into account before deciding whether to commence an appeal against a sentence imposed on an offender
- the roles and responsibilities of VBA employees in the investigation, preparation, review and authorisation of prosecutions.

The Policy, except insofar as it requires the rule of law to be observed, is not legally binding on the VBA.

4. The decision to prosecute

The decision whether or not to prosecute is a most important step in any regulatory process. Incorrect decisions when considering whether to prosecute will diminish community confidence and trust in the regulator and, as such, strong caution should be exercised in deciding whether to prosecute or not.

The initial consideration in the decision is whether the evidence is substantial to justify the initiation or continuation of a prosecution. A prosecution should not be instituted or continued unless there is admissible, sufficient and reliable evidence of an offence against the legislation administered by the VBA.

A prosecution may only proceed if there is a reasonable prospect of a conviction and a prosecution is required in the public interest.

4.1 Evaluating evidence

When evaluating evidence, regard should be given to the following:

- Are there grounds for believing evidence may be excluded or not be admissible (bearing in mind the laws of evidence)?
- If the case depends wholly or in part on admissions by an alleged offender, are there any grounds for believing that they may not be accepted by the court and relied upon?

- Does it appear that a witness' account or memory recall is unreliable or is likely to be viewed by the court as not credible?
- Does a witness have a motive or potential motive for not telling the whole truth?
- Are there matters which might properly be put to a witness which could reasonably be expected to significantly affect his or her standing as a witness of truth?
- What impression or view is reasonably likely to be formed by the court of the witness or of his or her evidence under cross examination or otherwise as to whether he or she is a witness of truth?
- If there is any conflict in the evidence of or between witnesses proposed to be called by the VBA such that it is reasonably likely the court will be unable to be satisfied (and be unable to form a view to the requisite standard) on points of difference between them?
 - If there is no apparent conflict between witnesses, is there anything which reasonably suggests that witnesses may be fabricating evidence?
- Are all the necessary witnesses available and competent or compellable if need be to give evidence? Are there any with travel arrangements or locations overseas which must be noted?
- Where two or more people are charged together, is there any reasonable prospect of the proceedings being severed? If so, is the admissible evidence sufficient to a reasonable degree to prove the case against each alleged offender should separate hearings be ordered? The realistic prospect of a favourable outcome for the prosecution may need to be evaluated both individually and collectively.

Having been satisfied there is evidence sufficient to warrant a prosecution which is likely to succeed, the VBA must then consider whether it is in the public interest to commence a prosecution.

4.2 Determining if it is in the public interest to prosecute

Once satisfied that there is a reasonable prospect of a conviction, the VBA must consider whether a prosecution is required in the public interest.

Factors which may arise for consideration either individually or collectively in determining whether it is in the public interest to pursue a prosecution include:

- the seriousness or otherwise of the alleged offence or whether it is of a 'technical' nature only
- any mitigating or aggravating circumstances including an admission of guilt or whether the alleged offence arises in circumstances where issues of public safety are involved
- the age, health and other relevant circumstances of the alleged offender, a victim or a witness
- the compliance history of the alleged offender and any prior conviction(s) of relevance
- the length of time taken to this point to decide whether to prosecute the alleged offence (as discussed in the Charter of Human Rights and Responsibilities, s 24)
- the degree of culpability of the alleged offender in connection with the offence;
- the obscurity of the proposed charge(s);
- whether the prosecution could be reasonably perceived to be as counterproductive, for example, by achieving no obvious or apparent public objective
- the availability and efficacy of any alternatives to prosecution, such as conciliation processes
- the prevalence of the alleged offence and the need for deterrence, both personal and general

- whether the consequences of any resulting conviction would be unduly harsh or oppressive
- whether the alleged offence is of public concern apart from being a breach of law
- any entitlement of the State, the victim or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken and succeeds
- the attitude of the complainant (if one) who may not wish for some serious reason not to give evidence
- the likely or possible length and expense of a court proceeding providing that mere length and mere expense of proceedings properly being brought generally are not reasons influential in deciding where the public interest lies
- whether the subject of the possible prosecution is willing to cooperate in the investigation or prosecution of others, and/or the extent to which the alleged offender has done so
- the likely sentencing outcome in the event of a finding of guilt having regard to the sentencing options available to the court
- any special circumstances that would prevent or could reasonably prevent a fair hearing being conducted
- whether a penalty has already been imposed on the person for the same offence(s) or for an offence or offences of the same or substantially the same character.

In determining whether to commence a prosecution pursuant to section 16B of the Act, the following additional considerations will apply:

- whether the alleged conduct has resulted in the death or serious injury of a person;
- whether the alleged conduct has exposed a number of persons to the risk of death or serious injury; and / or
- whether the alleged conduct has occurred in circumstances of a major demolition.

In an investigation and / or prosecution of an alleged indictable offence, the VBA will also take into account whether:

- the alleged conduct has or may have occurred with a view to obtaining a significant uplift in the value of land or a building; and / or
- the alleged conduct has or may have occurred with a view to obtaining a significant financial advantage

and will refer the matter to the Director of Public Prosecutions for consideration of potential asset confiscation proceedings.

5. VBA strategic objectives

Prior to determining whether to prosecute (or take any other form of enforcement action), the VBA will ensure that the strategy of the prosecution and steps involved are consistent with the observance of the rule of law, the strategic objectives of the VBA and the functions of the Act. These objectives assist in determining where and how the VBA will use its resources, and use of its resources will be considered when proper to do so in deciding whether a prosecution is warranted in some particular case.

6. Note on mitigation

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 in mitigation during sentencing. Nevertheless, where the offence is not so serious as plainly to require prosecution, the VBA may consider whether the public interest requires a prosecution to be pursued subject to due observance of the rule of law.

7. Factors that will not influence decisions to prosecute

A decision whether or not to prosecute will not be influenced by:

- race, religion, sex, national origin or political or other associations, activities or beliefs of the alleged offender or any other person involved
- personal feelings concerning the offence or towards the person subject to a possible prosecution or to the complainant
- possible advantage or disadvantage to the Government or any other person or group or party save for generally the public interest
- the possible effect of the decision on the personal professional or other circumstances of those responsible for the prosecution decision.

8. Similar charges for the same offence

The VBA will avoid laying duplicate or multiple charges for the same alleged breach. Laying of duplicate or multiple charges will be avoided unless it is considered appropriate in the circumstances to lay both a primary charge and a further charge for the same alleged breach and the bringing of each is warranted.

Where there is another prosecuting authority involved as well, the VBA will liaise with that other authority to ensure the most appropriate charge(s) is laid and that the rule of law is observed having regard to all the circumstances.

Conversely, it may be preferable for other prosecuting bodies (that are aware of the VBA's involvement in a matter) to initiate contact prior to commencing proceedings.

9. Declining to proceed after charges have been laid

Even though a person has been charged by the VBA, events may occur after charging that makes it inappropriate or inadvisable or not in the public interest for the prosecution to proceed. Alternatively, further facts may become available after the charging of a person by the VBA which have the effect of substantially weakening the prosecution case in which event it may be proper to re-assess the question whether the prosecution should still proceed.

The exercise of the power to discontinue a prosecution will be determined on the basis of the criteria governing the decision to prosecute set out above. The view(s) of the investigator and the complainant may be sought. Their view(s) may be taken into account but are not determinative of the ultimate decision whether a prosecution should be discontinued or not and a decision whether or not to discontinue a prosecution by the VBA shall be one to be made by the Director of Compliance, Enforcement and Legal Services, on the advice of the Legal Services Unit.

10. Plea negotiation

A plea of guilty is a factor to be taken into account in mitigation of sentence by the courts and not the VBA. There are obvious benefits also to the criminal justice system resulting from a plea of guilty. An admission of guilt may affect the decision of where the public interest lies.

The VBA endeavours to ascertain at the earliest possible point in the process whether a plea of guilty is likely to be entered in respect of any charge brought. The term 'plea negotiation' usually refers to negotiations between defence and prosecution in relation to the charges to be proceeded with. Such negotiations may result in the accused pleading guilty to one or to fewer than all the charges being brought, or pleading guilty to a lesser charge or charges. However, it may be noted that this does not guarantee that any lesser sentence may be imposed by the court.

11. Plea of guilty

No plea of guilty will be accepted by the VBA unless it reasonably reflects the nature of the conduct of the alleged offender and the seriousness or otherwise of such conduct and provides an adequate basis upon which the court can impose such sentence as may be appropriate. In exercising this discretion it must be borne in mind that in a particular case the public interest may be best served by acceptance of a lesser plea as opposed to any other course.

The major factors which may cause the VBA to accept an alleged offender's offer of a plea of guilty (which must be made freely without duress or persuasion) may include:

- saving witnesses, complainants and other members of the community involved in the process (especially persons who are elderly or infirm) from having to appear in court to give evidence
- whether a reduction in time and saving of expense to the community and to the VBA is likely to result, especially if there are to be multiple charges to be heard and determined otherwise
- whether the alleged offender has agreed to cooperate with police or other authorities or the VBA in giving information against any other alleged offender(s), if such information if given by way of evidence in court would be significant and persuasive and is reasonably able to be viewed as likely to result in a successful prosecution of any other alleged offender(s)
- deciding whether, upon an analysis of all the facts and circumstances, it is reasonably able to be concluded that it is not contrary to the public interest to do so
- considering the views of the complainant (if one) and the investigator, but such views shall not be conclusive in either instance.

At all stages of the process, the VBA will make adequate file notes, and in particular ensure that if a plea is negotiated, the basis of the plea (both as to factual matters and as to any sentencing submissions) is recorded in writing and is agreed upon by the VBA and the alleged offender(s) or the defence so that there is no basis for subsequent disputation as to the terms of the agreement in issue.

The VBA will provide self-represented accused(s) with any assistance able to be given consistent with the VBA being a prosecuting authority before the VBA will be prepared to accept any plea(s) of guilty from a self-represented accused. Such assistance will not include the provision of legal advice, but may include arranging interpreter services or providing information to the accused about how to access legal representation.

12. Derivation

This Policy have been prepared from the following documents:

- Director of Public Prosecutions Victoria – Director's Policy – The Prosecutorial Discretion

Note: The VBA aligns itself generally with the prosecutorial discretion policy of the Director of Public Prosecutions Victoria (DPPV) when determining whether to prosecute. The DPPV guidelines have been modified to meet the needs of the VBA.

- VBA Compliance and Enforcement Policy Position Statement
- NSW EPA Prosecution Guidelines (as updated)
- WorkSafe Victoria – General Prosecution Guidelines – (as updated)