

## Purpose

1. These prosecution guidelines (the Guidelines) outline the guiding principles applied by the Victorian Disability Worker Commissioner (the Commissioner) when deciding whether to prosecute offences against the *Disability Service Safeguards Act 2018* (DSS Act). They also explain how prosecutions are carried out.
2. The Disability Worker Registration Board of Victoria (the Board), the Victorian Disability Worker Commission (the Commission), and the Commissioner work together to regulate disability workers in Victoria. We aim to carry out our functions in a way which supports our objective to promote the quality, safety, responsiveness and sustainability of the disability workforce, and in a way that demonstrates our values.
3. The aim of these Guidelines is to:
  - a) provide consistency with the [Disability Worker Regulation Scheme Regulatory Approach](#) (Scheme Regulatory Approach), which takes precedent over these Guidelines
  - b) make sure we handle each criminal prosecution consistently
  - c) apply principles of fairness, openness, consistency, accountability and efficiency
  - d) be transparent with all stakeholders, by making the Guidelines available on the Commission's website: [www.vdwc.vic.gov.au](http://www.vdwc.vic.gov.au).

## Prosecution scope

4. The DSS Act allows the Commissioner to prosecute a person for:
  - a) breaches or possible breaches of the DSS Act
  - b) breaches or possible breaches of the *Disability Service Safeguards Regulations 2020* (the DSS Regulations).
5. The power to prosecute for an offence against the DSS Act is one way to respond to conduct by disability workers (or any other person) that may place people at serious risk of harm. The Guidelines do not stop the Board, Commission or Commissioner from seeking any other appropriate penalties or enforcement action.
6. The following persons may bring court proceedings for an offence against the DSS Act or the DSS Regulations:
  - a) the Commissioner
  - b) a person appointed to act as the Commissioner under section 29 of the DSS Act
  - c) a police officer
  - d) any person referred to in section 32A(1) of the DSS Act who is authorised by the Commission to bring a proceeding.
7. The Guidelines apply to all individuals listed above, except for police officers.

## Roles and responsibilities

8. The Commissioner will decide whether to prosecute.

9. The Director, Regulatory Operations will:
  - a) make a recommendation to the Commissioner on whether to prosecute, and
  - b) oversee the conduct of the prosecution.
10. Managers and other Commission staff will support the Commissioner and Director, Regulatory Operations to perform their roles in relation to a prosecution where necessary and appropriate.

## **Ethics, obligations and duties**

11. The Commission and Commissioner will follow the [Victorian Model Litigant Guidelines](#), which guide how the State should behave as a party to legal proceedings. Being a model litigant requires the Commission and Commissioner to act with complete propriety, fairly and in accordance with the highest professional standards.
12. All prosecutors and lawyers assisting with a prosecution must comply with their [legal professional obligations](#). This includes obligations under the *Legal Profession Uniform Law Application Act 2014*, the *Legal Profession Uniform General Rules 2015*, and the *Legal Profession Uniform Conduct (Barristers) Rules 2015*.

## **Offences under the DSS Act**

13. Offences are set out in Part 16 of the DSS Act and include a person:
  - a) making false claims about being a registered disability worker, the type of registration held, or being qualified for registration or endorsement under the DSS Act (sections 258 to 260)
  - b) providing a 'prescribed disability service' when they are not authorised to do so (section 261)
  - c) telling or encouraging a registered disability worker to do anything that is considered unprofessional conduct or professional misconduct (section 262)
  - d) breaching an interim prohibition order made under the DSS Act (section 263)
  - e) breaching a prohibition order made under the DSS Act (sections 264 and 265)
  - f) providing a disability service if they are prohibited from doing so in another State or Territory (section 266)
  - g) breaching restrictions on how disability services are advertised (section 267)
  - h) not obeying a notice to produce information or attend before an authorised officer or investigator (section 268)
  - i) not assisting while a search warrant is being carried out when required (section 269)
  - j) providing false or misleading information or documents (section 270)
  - k) obstructing authorised officers or investigators (section 271)
  - l) impersonating an authorised officer or investigator (section 272).

## **Prosecutorial discretion**

14. Prosecution agencies (such as the Commissioner) are generally not required to prosecute every offence, or suspected offence, that they are aware of. This is known as 'prosecutorial discretion'.
15. The Commissioner will consider a criminal prosecution in circumstances where:
  - a) it is reasonably likely that the conduct would be an offence against the DSS Act

- b) the conduct is serious and there is evidence of, or potential for, a high degree of harm to an individual or the public, particularly where the conduct is ongoing
- c) the conduct shows a blatant disregard for the law
- d) other circumstances exist, such as aggravating factors. Aggravating factors include pre-planning the offence, an abuse of trust or power (for example, where a disability worker commits an offence against a client), and vulnerability of the victim.
- e) the conduct is sector-wide, involves a new or emerging issue or has a significant impact on the reputation or integrity of the disability sector
- f) a criminal prosecution is likely to educate other workers, or deter other workers from offending
- g) other methods of ensuring compliance, provided in the Scheme Regulatory Approach, are not appropriate
- h) it is appropriate to impose a criminal sanction.

16. The Commissioner's decision whether or not to prosecute **must not** be influenced by:

- a) the race, religion, sex, national origin, political associations, activities or beliefs of the alleged offender or any other person involved
- b) personal opinions or feelings of a decision-maker about the offence, the offender or a victim
- c) possible negative media or community reaction to the decision, where the decision to prosecute is otherwise valid and in the public interest
- d) possible political advantage or disadvantage to Government or any political group or party
- e) any impacts (personal or professional) on them for making the decision to prosecute.

## Prosecutorial jurisdiction

17. The Commissioner has jurisdiction to prosecute summary offences under the DSS Act. These will proceed by way of summary proceedings in the Magistrates' Court of Victoria.

18. If a serious criminal offence may have been committed under a law that is **not** the DSS Act (for example an offence under the *Crimes Act 1958*), the Board, the Commission or the Commissioner may refer the matter to Victoria Police or another appropriate prosecuting agency to handle.

## Deciding whether to bring proceedings

19. The Commissioner will follow the Scheme Regulatory Approach when deciding whether to prosecute. Under the Scheme Regulatory Approach, the Board, Commission and Commissioner take a risk-based approach to regulating the disability workforce. This means that the harm, or risk of harm, to people with disability that the accused person presents is assessed, and a regulatory tool that best responds to that risk is then used. Prosecuting an individual is amongst the most serious regulatory tools available under the Scheme and is used in cases where the risk to people receiving disability services is highest.

20. The Commissioner's decision to prosecute will be made based on the law at the time the decision is made.

21. To decide whether there is enough evidence to commence or continue a prosecution, the Commissioner must assess whether there is a prima facie case. In other words, whether, based on the known facts of the case, it appears that the person has breached the DSS Act.

22. If the Commissioner decides that there is a prima facie case, they must consider the two-part test:

- a) Is there a reasonable possibility that the person could be convicted of the offence they would be charged with?

- b) Is it in the [public interest](#) to prosecute?

## Reasonable prospect of conviction

23. To assess whether there is a reasonable chance of the person being convicted, the Commissioner will assess how strong the case is likely to be when presented in court.
24. When deciding whether a prosecution has a reasonable chance of success, the Commissioner will consider:
- a) all the available evidence
  - b) whether the rules of evidence might exclude evidence from being presented to the court
  - c) whether the evidence may be false or untrue
  - d) how reliable the evidence is
  - e) whether the prosecution witnesses are available, able to give evidence, and can be required to give evidence by the court
  - f) whether the prosecution witnesses are credible and reliable
  - g) any relevant conflict between eye-witnesses
  - h) how the witnesses will handle the process of giving evidence in court
  - i) any possible defence
  - j) any other matter relevant to whether a magistrate would find the person guilty.

## Public interest

25. Where it is possible that the person could be convicted by the court, the Commissioner must then consider whether the prosecution is in the public interest. Specifically, whether the broader public would benefit from a prosecution going ahead. The factors that are relevant to a decision on whether a prosecution is in the public interest are listed below. A prosecution will only go ahead if there are more public interest factors **in favour** of a prosecution than **against**. The factors that the Commissioner will consider when deciding whether a prosecution is in the public interest will vary from case to case.
26. The Commissioner will take the below factors into account when deciding whether to commence a criminal prosecution.
- a) **Offence-related factors**, including:
    - (i) the seriousness of the offence
    - (ii) whether the offence is of serious concern to the public
    - (iii) how recently the offence happened.
  - b) **Offender-related factors**, including:
    - (i) the responsibility of the offender in relation to the offence
    - (ii) the offender's criminal record and background
    - (iii) the age, physical health, mental health or disability of the offender
    - (iv) whether the offender is willing to cooperate in the investigation or prosecution of others, or whether the offender has done so.
  - c) **Victim-related factors**, including:
    - (i) the attitude of the victim to a prosecution, and whether the victim is in favour of a prosecution going ahead
    - (ii) whether the victim would be entitled to compensation

(iii) the age, physical health, mental health or disability of the victim.

d) **Other factors**, including:

(i) the need to protect the community

(ii) the likely sentence the offender would receive if found guilty

(iii) how common the offence is and whether there is a need to deter others

(iv) the need to maintain public confidence in institutions such as the Parliament and the courts

(v) whether the consequences of any conviction would be unreasonably harsh on the offender

(vi) any special circumstances that would prevent a fair trial

(vii) the age, physical health, mental health or disability of any witnesses

(viii) whether there are any suitable alternatives to prosecuting the offender, for example issuing a prohibition order

(ix) how long and expensive a trial is likely to be

(x) whether a criminal sentence has already been imposed on the offender which adequately reflects the seriousness of the offending

(xi) any mitigating or aggravating circumstances.

27. The relevance and importance of these factors will depend on the specific facts of each case.

## Negotiation of charges

28. Negotiations between parties about the charges against the accused are encouraged and may occur at any stage of the progress of a matter through the courts.

29. A prosecutor may agree to discontinue a charge (or charges) if the accused commits to pleading guilty to an alternative charge (or charges). A guilty plea in those circumstances may be accepted if the Commissioner believes that it is in the public interest, having first considered:

a) whether the alternative charge or charges reflects the criminal nature of the conduct

b) the amount of time and cost saved when compared with the likely outcome of the matter if a trial went ahead

c) whether it will save a witness, particularly a victim or other vulnerable witness, from the stress of testifying in a trial

d) the wishes of the victim. For example, if a victim does not wish to assist with the prosecution or doesn't want the prosecution to go ahead.

30. The Commission will keep written records of charge negotiations for transparency.

## Resolution of prosecution

31. Resolution of matters, particularly early resolution, allow prosecutions to be more effective and efficient. The Commissioner will try to resolve prosecutions at all stages of the proceeding.

32. Plea offers should be made in writing. If a lawyer representing the accused makes a verbal offer, the Commission will respond in writing. If an accused is not represented by a lawyer, any plea offers from the accused must be written and responded to by the Commission in writing.

33. Resolution of a prosecution requires the Commissioner to agree with what is proposed. The Commissioner must consider whether the resolution would be in the public interest and consider:

- a) whether there is a reasonable chance of conviction on each charge
  - b) how strong the evidence is on each charge
  - c) any defence that the accused will put forward
  - d) the likelihood of the accused being acquitted of any charges
  - e) whether the charge or charges that the accused will plead guilty to:
    - (i) properly reflect that the accused committed criminal acts
    - (ii) allow for an appropriate sentence to be given to the accused
    - (iii) allow for other appropriate court orders, including orders about court and legal costs.
  - f) the views of the victim(s)
  - g) the need to reduce inconvenience and stress to witnesses, particularly those who may find it difficult to give evidence
  - h) any impacts in relation to any money or other benefits the accused gained through the crime that was committed.
34. The Commission will record any resolution in writing and provide a copy of the document to the accused or their lawyer before the resolution is entered at court. The document must include:
- a) the charges that the accused will plead guilty to
  - b) any facts that all parties agree on
  - c) any agreement about sentencing submissions
  - d) any agreement about court orders or costs
  - e) anything else that is relevant to the accused's decision to plead guilty.

## Victims of crime

35. A victim of crime is a person who is harmed directly because of a crime committed by another person. If the person harmed dies or is seriously injured, a member of their immediate family can also be considered a victim of crime. 'Harm' includes physical or mental injury, emotional suffering, or economic loss.
36. The Commission is committed to treating victims and persons affected by crime with courtesy, respect and dignity and to follow with the principles of the *Victim's Charter Act 2006* (Charter).
37. In communicating with victims, the Commission will consider:
- a) whether the victim wants to be contacted in relation to the prosecution
  - b) how the victim would like to be communicated with (e.g. phone, email, text, letter)
  - c) the victim's circumstances.
38. The Commission will provide information about the progress of the case, court process, the victim's role as a witness, support services, possible compensation and legal assistance.
39. The Commission will also advise victims:
- a) when and what charges are laid, along with any decision:
    - (i) to change the charges
    - (ii) not to go ahead with some or all of the charges or
    - (iii) to accept a plea of guilty by the accused to a less serious charge.

- b) how to find the date, time and location of court hearings
  - c) the outcome of any court hearings
  - d) if an appeal will be lodged
  - e) if an offender is charged with breaching their sentence.
40. If there isn't enough evidence to prove a charge in court and the withdrawal of all charges is considered, the victim's views will be considered.
41. If a victim does not believe that the Commission has followed the Charter principles when carrying out the prosecution, they may lodge a complaint with the Commission, and it will be handled in accordance with the Commission's complaints policy. If the victim is not satisfied with the Commission's handling of their complaint, they may have their complaint reviewed under the *Victims of Crime Commissioner Act 2015*.

## Publication of prosecution outcomes

42. Publishing the outcomes of prosecutions draws attention to the consequences of breaching the DSS Act. It is a valuable tool for both promoting education about the Scheme and deterring people from breaching the DSS Act.
43. The Commission will publish information about the nature and outcome of prosecutions, where it is:
- a) in the public interest
  - b) consistent with Commission policy
  - c) aligned with the objectives and guiding principles of the DSS Act
  - d) in accordance with the *Privacy and Data Protection Act 2014*.

## Prosecution appeals

44. After a prosecution has concluded, the Commissioner may consider whether there are any grounds for an appeal and whether an appeal would be in the public interest. The Commissioner may make a submission to the Director of Public Prosecutions (DPP) on whether an appeal ought to be lodged. The DPP can appeal an inadequate sentence or a point of law, but only if it is in the public interest (section 257 of the *Criminal Procedure Act 2009*).
45. Any appeal must meet [time limits](#) for filing an appeal.

## Prosecution costs

46. If the Commission's prosecution has been successful, it may seek a costs order in its favour for a fixed amount. Doing so helps the Commission to meet its statutory obligation to carry out functions under the DSS Act in a financially responsible manner (under section 284(2)) and is consistent with the Victorian Model Litigant Guidelines. The amount sought by the Commission may be less than the actual costs it has incurred throughout the prosecution. When considering the amount it should seek under a costs order, the Commission will have regard to previous costs orders and any advice from counsel.
47. Any funds payable to the Commission under a costs order will be deposited into the Disability Worker Regulation Fund.

## Sources

48. These Guidelines are informed by and consistent with the following instruments, guidelines and policies:

- a) *Disability Service Safeguards Act 2018*
- b) *Disability Service Safeguards Regulations 2020*
- c) *Privacy and Data Protection Act 2014*
- d) *Criminal Procedure Act 2009*
- e) *Crimes Act 1958*
- f) *Victim’s Charter Act 2006*
- g) *Victims of Crime Commissioner Act 2015*
- h) *Legal Profession Uniform Law Application Act 2014*
- i) *Legal Profession Uniform General Rules 2015*
- j) *Legal Profession Uniform Conduct (Barristers) Rules 2015*
- k) *Prosecution Policy of the Commonwealth (2021)*
- l) *Victorian Model Litigant Guidelines (2011)*
- m) *Victorian Director of Public Prosecutions Policy (2023)*
- n) *Consumer Affairs Victoria’s Guidelines for Criminal Prosecutions (2019)*
- o) *Disability Worker Regulation Scheme Regulatory Approach (2023)*

## Review and currency

These Guidelines will be reviewed within three years of the last approved date, or when there is a significant change in legislation or the intent of the Guidelines.

This is the responsibility of the General Counsel.

## Version history

Release notice			
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