



# Guidelines for commencing a prosecution under the *Local Government Act 2009*

## 1. Functions of the Independent Assessor

The functions of the Independent Assessor include –

- To investigate and deal with the conduct of councillors;
- To provide advice, training and information to councillors, local government employees and other persons about dealing with alleged or suspected inappropriate conduct, misconduct or corrupt conduct;
- To prosecute offences against the conduct provisions;
- To investigate other matters decided by the Minister; and
- Any other functions given to the Independent Assessor (“IA”) under *the Local Government Act 2009* (the Act).

## 2. Delegation of functions

The IA may delegate any of the assessor’s functions to an appropriately qualified staff member of the Office of the Independent Assessor (the OIA).

However, the IA may not delegate the assessor’s power to give a notice under section 150CK of the Act (Notice about confidentiality).

## 3. The decision to prosecute

The decision to prosecute is made by the IA or the person to whom the IA delegates the functions relating to the bringing of prosecutions under Chapter 5A, Part 2, Division 1 of the Act.

Any decision by the IA to prosecute an offence under the LGA should be made with the following two concepts in mind:

- Based on the evidence available, are there reasonable prospects of successfully obtaining a conviction?
- Is it in the public interest to prosecute the subject councillor?

### 3.1. Prospects of success

To determine the prospects of successfully obtaining a conviction, the IA (or delegate) should consider the following questions against the evidence obtained during their investigation:

- is there sufficient available evidence to prove each element of the alleged offence beyond reasonable doubt?
- is the relevant evidence admissible?
- are there any concerns with the credibility of the available witnesses?
- is any expert evidence required?
- what, if any, defences are open to the subject councillor?



## 3.2. Public interest considerations

The exercise of the prosecution function by the IA is guided by whether the exercise of that function will be in the public interest.

The IA (or delegate) may consider the following public interest considerations (this is a non-exhaustive list):

- the seriousness of the alleged offending.
- are there any mitigating or aggravating circumstances?
- the availability and effectiveness of any alternatives to prosecution.
- the subject councillor's history of compliance with their obligations under the Act, particularly the local government principles in section 4 of the Act.
- is the alleged breach a continuing or subsequent offence?
- how often, offences of this kind occur and whether there is a need for deterrence.
- the length of time since the alleged offence occurred, for example will the prosecution be within the statutory time limits of bringing a prosecution.
- the age and physical or mental health of the subject councillor.
- the length and expense of any court hearing.
- if the subject councillor is convicted, what are the possible penalties available.
- the need to maintain public confidence in the administration of justice by the OIA.
- can further proceedings be commenced against other persons as a result of the same incident.

## 4. Further considerations

### 4.1. Submissions on Penalty

The *Penalties and Sentences Act 1992* outlines the general factors that can be considered by a court at sentence. The following is a non-exhaustive list of factors which may be considered by the OIA in preparing sentencing submissions:

- The conduct of the subject councillor, including:
  - whether the offence was committed intentionally or not.
  - whether the subject councillor attempted to conceal their offending conduct, and how that was done – for example by collusion with other persons, intimidation of witnesses, destroying evidence.
  - any steps taken by the subject councillor to rectify or mitigate consequences of the offence and any contrition shown by the subject councillor.
  - the level of cooperation by the subject councillor with the OIA.
  - any prior convictions of the subject councillor relevant to the alleged offending.
  - any benefit or profit derived by the subject councillor due to the offence.
- The level of penalty sufficient to deter others from similar conduct, including any relevant suspension periods.
- The maximum penalty for the offences.
- Any relevant sentencing precedents or comparative cases.

### 4.2. Appeals against sentence

Although there is no specific restriction on whether the OIA may appeal against a sentence imposed by a court, when considering whether to appeal against a sentence, the OIA should have regard to the [Model Litigant Principles](#).

An appeal should only be instituted where the OIA consider that the appeal is likely to succeed.

