

Prosecution Policy

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1. Abbreviations and definitions

Abbreviations

EF Act	<i>Electoral Funding Act 2018 (NSW)</i>
EF Regulation	Electoral Funding Regulation 2018 (NSW)
Electoral Act	<i>Electoral Act 2017 (NSW)</i>
Electoral Regulation	Electoral Regulation 2018 (NSW)
LG Act	<i>Local Government Act 1993 (NSW)</i>
LG Regulation	Local Government (General) Regulation 2021
LOGO Act	<i>Lobbying of Government Officials Act 2011 (NSW)</i>
Office of the DPP	New South Wales Office of the Director of Public Prosecutions

Definitions

Inspector – means a person appointed by the NSW Electoral Commission under section 139 of the EF Act.

Lobbyist – means a third-party lobbyist or any other individual or body that lobbies Government officials (including an individual engaged to undertake lobbying for a third-party lobbyist) – see the defined term in the LOGO Act.

Lobbyists Register – means the Register of Third-Party Lobbyists established under Part 3 of the LOGO Act.

Lobbyists Watch List – means the Lobbyists Watch List established under Part 4 of the LOGO Act.

2. Introduction

- 2.1. The NSW Electoral Commission is responsible for promoting compliance by its stakeholders with the requirements of the legislation it administers.
- 2.2. The NSW Electoral Commission's stakeholders are individuals and entities involved in the electoral process in New South Wales, such as:
 - political parties, candidates, groups of candidates, elected members, third-party campaigners, associated entities, party agents and official agents
 - political donors
 - lobbyists and
 - electors.
- 2.3. The NSW Electoral Commission is responsible for the regulation of activities under the following legislation:
 - The *Electoral Funding Act 2018* (NSW) (EF Act) regulates election funding, expenditure and disclosure, and registration for elections
 - Supported by the Electoral Funding Regulation 2018 (EF Regulation)

- The *Electoral Act 2017* (NSW) (Electoral Act) regulates the conduct of State government elections in New South Wales
 - Supported by the Electoral Regulation 2018 (Electoral Regulation)
 - The *Local Government Act 1993* (NSW) (LG Act), but only in relation to the conduct of a local government elections
 - Supported by the Local Government (General) Regulation 2021 (LG Regulation).
 - The *Lobbying of Government Officials Act 2011* (NSW) (LOGO Act) regulates the lobbying of government officials in New South Wales
 - Supported by the Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014 (LOGO Regulation).
- 2.4. This policy is informed by the Prosecution Guidelines of the NSW Office of the Director of Public Prosecutions (Office of the DPP) and reflects the current policies of the NSW Electoral Commission.
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3. Purpose

- 3.1. The purpose of this policy is to provide a guide for the NSW Electoral Commission and staff when a decision is to be made by the NSW Electoral Commission about whether to prosecute.
 - 3.2. It aims to ensure decisions to prosecute are based on appropriate criteria which are transparent, impartial and consistently applied. In exercising its functions, the NSW Electoral Commission has an overriding legal obligation to operate in a manner that is not unfairly biased against or in favour of any particular parties, groups, candidates or other persons, bodies or organisations.¹
 - 3.3. Specifically, the policy aims to identify the bases upon which a decision to prosecute is made, and the alternatives to prosecution. This policy is not legally binding on the NSW Electoral Commission.
 - 3.4. This document is *not* a guideline within the meaning of section 152 of the EF Act.
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4. Scope

- 4.1. This policy may be considered prior to any consent being given by the NSW Electoral Commission to commence prosecution proceedings or in the period up to commencement of proceedings, should additional information come before the NSW Electoral Commission that might influence the decision to prosecute.
- 4.2. This policy may be used by the NSW Electoral Commission and staff, including contractors and third-party consultants, who are involved in the decision to prosecute and preparation of matters for prosecution under the legislation.

¹ *Electoral Act 2017* (NSW), s. 10(3).

5. Overview

- 5.1. The NSW Electoral Commission monitors compliance with the legislation for which it is responsible and enforces established breaches of that legislation. The findings of the NSW Electoral Commission's compliance monitoring activities inform the NSW Electoral Commission of potential breaches, which are then reviewed for possible investigation.
- 5.2. The NSW Electoral Commission is empowered to appoint inspectors to investigate alleged breaches of the legislation and to recommend an appropriate compliance or enforcement response. The prosecution of offences against electoral funding legislation by any person may only be commenced with the consent of the NSW Electoral Commission. The prosecution of other electoral and lobbying offences is a non-exclusive function of the NSW Electoral Commission. Prosecutions undertaken with the consent or other approval of the NSW Electoral Commission are commenced in the name of an individual officer who is a member of staff, in accordance with the requirements of the *Criminal Procedure Act 1986*, rather than in its corporate name. The prosecutor will ordinarily be the person occupying the position of Director, Compliance or such other officer as may be approved by the NSW Electoral Commission from time to time.
- 5.3. The investigation and prosecution of offences are distinct functions as outlined in further detail below.

Investigations by the NSW Electoral Commission

- 5.4. The NSW Electoral Commission's investigative function is undertaken by inspectors appointed by the NSW Electoral Commission under the EF Act. Their powers include:
 - requiring the production of documents relevant to an investigation
 - entering premises at which relevant records are or might be kept
 - questioning persons in connection with any perceived contravention of the EF Act, the Electoral Act, the LG Act, the LOGO Act and the regulations made under these Acts, and
 - in some instances, requiring persons to attend at a specified place and time for questioning.
- 5.5. For the purpose of enforcing compliance with the Electoral Act, the LG Act and the LOGO Act, the NSW Electoral Commission may exercise any investigative or other functions the NSW Electoral Commission has under the EF Act (see section 258 of the Electoral Act, section 325 of the LG Act and section 19 of the LOGO Act). For more information on the review and investigation of suspected breaches of the legislation, see the NSW Electoral Commission Compliance and Enforcement Policy.

Prosecutions by the NSW Electoral Commission

- 5.6. There are a range of possible outcomes following an investigation into a suspected breach. While the NSW Electoral Commission is empowered to commence prosecution proceedings for offences against the legislation it regulates, prosecution action is only one possible outcome to ensure compliance with the law.
- 5.7. This policy deals with the principles that apply in making a decision whether to prosecute. A summary of alternatives to prosecution is contained in part 9 of this policy. For more information on all compliance and enforcement options available to the NSW Electoral Commission and the criteria that will be considered in determining the appropriate response to a confirmed breach, refer to the NSW Electoral Commission Compliance and Enforcement Policy.
- 5.8. The General Counsel and the Legal Business Unit (Legal BU) may provide legal advice to assist in the assessment of a proposed prosecution as recommended by the Compliance Team. The decision to prosecute is ultimately one for the NSW Electoral Commission, although the NSW Electoral Commission is entitled to rely on its legal advisor's recommendation.

6. The decision to prosecute

- 6.1. The fundamental objectives of prosecution are to punish the offender, achieve future compliance and deter future offenders.
- 6.2. The decision to prosecute means criminal proceedings are commenced against a person. The potentially serious consequences of prosecution action, including criminal conviction and liability to significant penalties, requires careful consideration be given before the NSW Electoral Commission exercises its discretionary power to authorise a prosecution.
- 6.3. The following provides guidance on the principles to be applied when deciding whether a prosecution is the appropriate action for dealing with a breach of legislation.

Under what circumstances might the NSW Electoral Commission consider prosecution?

- 6.4. The general policy of the NSW Electoral Commission is that prosecution action will apply to serious offences. Accordingly, and subject to the other principles described in the paragraphs below, the following types of offences will be more likely to be prosecuted:
 - where the alleged offence is capable of having a significant impact on the transparency and integrity of the electoral and lobbying systems
 - where an alleged breach of the legislation involves material amounts of money
 - where an alleged offender engages in repeated non-compliance
 - where an alleged offender fails to comply with the terms of a compliance agreement (see part 9 below) and
 - in cases of apparent deliberate non-compliance, including acts of dishonesty.
- 6.5. It is important to note that this is not an exhaustive list. It is possible that cases not included above may be appropriate for prosecution. All prosecution decisions, and the reasons for them, are recorded.
- 6.6. In some instances it may be appropriate to commence prosecution action in addition to other compliance action (see the NSW Electoral Commission Compliance and Enforcement Policy for further information on the principles that apply in taking specified compliance or enforcement action).

Key principles

- 6.7. This policy adopts the Office of the DPP's principle that in all cases, the general public interest is the paramount criterion in the decision to prosecute. The question of whether a matter be prosecuted is determined by:
- whether the available admissible evidence is capable of establishing each element of the offence (the prima facie case test)
 - whether there is a reasonable prospect of conviction and if so
 - whether the matter should proceed in the public interest (the public interest factors).

Evidence of the offence

- 6.8. To commence a criminal prosecution, the NSW Electoral Commission must be satisfied that there is prima facie evidence that a person has committed an offence. This means that the available evidence must be capable of establishing each element of the offence to the standard of proof required of a prosecutor. In other words, the prosecution has to prove each element of the offence beyond reasonable doubt.

Reasonable prospects of conviction

- 6.9. Merely establishing a prima facie case is insufficient. There must also be a reasonable prospect of securing a conviction. Evaluating the prospects of conviction requires an exercise of judgement which will depend in part on the weight of the available evidence and the persuasive strength of the prosecution case. This includes consideration of:
- the competence, reliability and availability of any witnesses
 - any defences available to the defendant and
 - where the identity of the alleged offender is in issue, the cogency and reliability of the identification evidence.

Public Interest factors

- 6.10. Where there is a prima facie case and reasonable prospects of a conviction, the NSW Electoral Commission will consider whether, having regard to all the facts and circumstances of each case, it is in the public interest to commence prosecution action.
- 6.11. Factors which may arise for consideration in determining whether the public interest requires a prosecution include, but are not limited to, the following:
- the seriousness or, conversely, the triviality of the alleged offence or that it is of a "technical" nature only
 - the prevalence of the alleged offence in the community, whether it is of considerable public concern and the need to denounce and deter the offending behaviour, both personal (i.e., of the alleged offender) and general (i.e., of the community at large) or both
 - the obsolescence or obscurity of the law
 - the passage of time since the alleged offence, having regard to its seriousness and the reasons for the delay
 - whether the prosecution would be perceived as counter-productive; for example, by bringing the law into disrepute
 - any special circumstances that would prevent a fair trial from being conducted
 - the need to maintain public confidence in such basic institutions as the Parliament and the courts

- the availability and efficacy of any alternatives to prosecution (i.e., whether alternative enforcement action is sufficient for ensuring compliance with the legislation)
 - the likely length and expense of a trial if disproportionate to the seriousness of the alleged offence
 - whether any resulting conviction would necessarily be regarded as unreasonable or a miscarriage of justice
 - the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court
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 - the degree of culpability of the alleged offender in connection with the offence
 - any mitigating or aggravating circumstances of the alleged offence
 - the age, physical health, mental health, cognitive impairment or special disability or infirmity of the alleged offender or witness
 - the alleged offender's criminal history and background, including language ability and
 - whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so.
- 6.12. The applicability of and weight to be given to these and other factors will vary widely and depend on the particular circumstances of each case. It is likely that any particular case may have some factors in favour of prosecution and some against. It is also possible that one factor alone may outweigh a number of other factors which tend in the opposite direction.
- 6.13. Assessing the public interest is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number. The NSW Electoral Commission will consider the importance of each relevant public interest factor in the circumstances of each case and go on to make an overall assessment.

Irrelevant considerations

- 6.14. A decision whether to prosecute must not be influenced by:
- the race, religion, gender, gender identity, national origin or political associations, activities or beliefs of the alleged offender or any other person involved (unless the alleged offender's political associations, activities or beliefs are directly related to an offence)
 - the personal feelings of the prosecutor concerning the alleged offender, or a victim
 - political pressure or interference, or any possible political consequences of the decision
 - 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 (including social media) reaction to and reporting of the decision.

7. Time limits

- 7.1. Proceedings in respect of an offence against the legislation may be commenced within a time limit, depending on the legislation containing the offence:

- Under the EF Act – within 10 years after the offence was committed (Note: the limitation period for offences prior to 28 October 2014 is 3 years). The general limitation period of 10 years does not apply to proceedings for an offence against section 144 (Offence relating to scheme to circumvent political donation or expenditure prohibitions or restrictions)²
- Under the Electoral Act – within 3 years after the offence was committed³
- Under the LG Act (concerning electoral offences) - within 3 years after the offence is alleged to have been committed⁴
- Under the LOGO Act – within 6 months after the offence was committed.⁵

8. The appropriate court

8.1. Proceedings for an offence against the legislation may be taken before the Local Court or before the Supreme Court in its summary jurisdiction, depending on the legislation containing the offence:

- Under the EF Act – the Local Court, or the Supreme Court in its summary jurisdiction (Note: this does not apply to proceedings for an offence against section 144 of the EF Act which is to be dealt with summarily unless the prosecutor or the person charged elects to have the matter dealt with on indictment)⁶
- Under the Electoral Act – the Local Court, or the Supreme Court in its summary jurisdiction (Note: this does not apply to proceedings for an offence that is declared by the Electoral Act to be an indictable offence)
- Under the LG Act - summarily by the Local Court⁷
- Under the LOGO Act – the Local Court only.

Election to proceed on indictment

8.2. Where available, a decision to proceed on indictment should not be made unless:

- The accused person's criminality (taking into account the objective seriousness and their subjective considerations) could not be adequately addressed within the sentencing limits of the Local Court; and/or
- For some other reason, consistent with this policy, it is in the interests of justice that the matter not be dealt with in the Local Court (for example, if a comparable co-offender is to be dealt with on indictment).

Maximum penalties

8.3. The following table shows the maximum monetary (or other) penalty that the court may impose.

² *Electoral Funding Act 2018* (NSW), s. 147.

³ *Electoral Act 2017* (NSW), s. 254.

⁴ *Local Government Act 1993* (NSW), s. 693.

⁵ *Criminal Procedure Act 1986*, s. 179.

⁶ *Criminal Procedure Act 1986*, clause 18D of Table 1 of Schedule 1.

⁷ *Local Government Act 1993* (NSW) s. 691.

Legislation	Court	Maximum penalty
EF Act	Local Court	200 penalty units (\$22,000) ⁸
	District Court (for offences under 144 only)	Imprisonment for 10 years (maximum penalty under section 144)
	Supreme Court in its summary jurisdiction	Up to the maximum prescribed for an offence. (Note: the maximum penalty under the EF Act is 400 penalty units or \$44,000, and/or imprisonment for 2 years)
	Supreme Court	Imprisonment for 10 years (maximum penalty under section 144)
Electoral Act	Local Court	200 penalty units (\$22,000)
	District Court (for offences declared as indictable by the Act only)	Imprisonment for 5 years (maximum penalty under section 95)
	Supreme Court in its summary jurisdiction	Up to the maximum prescribed for an offence
	Supreme Court	Up to the maximum prescribed for an offence. (Note: the maximum penalty for an indictable offence under the Electoral Act is imprisonment for 5 years)
LOGO Act	Local Court	Up to the maximum prescribed for an offence. (Note: the maximum penalty for an offence under the LOGO Act is 500 penalty units or \$55,000 in the case of a corporation)
LG Act	Local Court	Up to the maximum prescribed for an offence.

- 8.4. The maximum penalty which can be imposed in each jurisdiction is an important factor in selecting the appropriate court in which to commence a prosecution for an offence against the legislation.
- 8.5. Proceedings for offences against the regulations will generally only be brought in the Local Court.
- 8.6. A Supreme Court prosecution is appropriate for serious offences under the legislation where a significant penalty is warranted to punish the offender and deter future breaches. For example, an offence committed dishonestly and involving significant sums of money may warrant a penalty higher than the maximum which can be imposed by a local court.

⁸ *Crimes (Sentencing Procedure) Act 1999*, s. 17: Unless the contrary intention appears, a reference in any Act or statutory rule to a number of penalty units (whether fractional or whole) is taken to be a reference to an amount of money equal to the amount obtained by multiplying \$110 by that number of penalty units.

9. Alternative compliance and enforcement actions

- 9.1. As previously indicated, prosecution action is only one approach the NSW Electoral Commission may take to ensure compliance with the law. There are a variety of compliance/enforcement actions available to the NSW Electoral Commission.
- 9.2. In determining whether prosecution action should be taken in any particular case and whether prosecution is in the public interest, the NSW Electoral Commission will consider whether any other compliance/enforcement actions are appropriate.
- 9.3. Following is a summary of the alternatives to prosecution available to the NSW Electoral Commission (please refer to the Compliance and Enforcement Procedures for more detail):
- no further action
 - a written warning or advice of breach (recorded against the person who committed the breach)
 - a written caution (recorded against the person)
 - penalty notice (see penalty notice offences listed in Schedule 1 of the EF Regulation and Schedule 1 of the Electoral Regulation)
 - recovery of monetary amount (applicable to unlawful political donations, indirect campaign contributions and loans)
 - compliance agreements (applicable to the EF Act)
 - Supreme Court injunction
 - removal from the Lobbyist Register (applicable to LOGO Act), and
 - being placed on a Lobbyists Watch List (applicable to LOGO Act).

10. Roles and responsibilities

- 10.1. The following table outlines the nature of the commitment expected from staff and the way that commitment should be implemented:

Who	Commitment	How
Members of the NSW Electoral Commission	To decide whether to commence prosecution proceedings.	<ul style="list-style-type: none">• Members may consider the principles in this policy prior to any consent being given to commence prosecution proceedings.
Executive Director Funding, Disclosure & Compliance and General Counsel Director, Compliance	To assist Members of the NSW Electoral Commission when making decisions whether to commence prosecution proceedings.	<ul style="list-style-type: none">• Approve briefs prepared by the Chief of Investigations for submission to Members of the NSW Electoral Commission.• Inform relevant staff including the Legal BU if approval has been obtained to commence prosecution proceedings.• In the case of the Director, Compliance be the named prosecutor in any proceedings agreed to by the NSW Electoral

Who	Commitment	How
		Commission and instruct the Crown Solicitor, where required.
Chief of Investigations	Assist the Executive Director, FDC&GC and Director, Compliance with respect to the above Commitment.	<ul style="list-style-type: none"> • To prepare comprehensive briefs for submission to Members of NSW Electoral Commission that may amongst other things set out the principles to be applied when deciding whether a prosecution is the appropriate action. • Ensure investigations are conducted in a manner that is not unfairly biased against or in favour of any particular parties, groups, candidates or other persons, bodies or organisations. • Ensure that any real or perceived conflicts of interests are avoided or effectively managed. • To advise the Director/Executive Director on available options.
Investigators	To conduct investigations in a manner that is not unfairly biased against or in favour of any particular parties, groups, candidates or other persons, bodies or organisations.	<ul style="list-style-type: none"> • To inform the Chief of Investigations of any information relevant to a particular matter that may influence the decision to prosecute. • Demonstrate high levels of personal conduct by amongst other things, undertaking investigations in a manner that is consistent with the NSW Electoral Commission's Compliance and Enforcement Policy and Procedures, the NSW Electoral Commission's Code of Ethics & Conduct for staff.
NSW Electoral Commission Staff	To maintain the confidentiality of details of any potential prosecution matter.	<ul style="list-style-type: none"> • Compiling with the NSW Electoral Commission's Code of Ethics & Conduct for staff.
Director, Legal	Provide legal advice and commence proceedings if required.	<ul style="list-style-type: none"> • Provide legal advice to assist in the assessment of a proposed prosecution as recommended by Compliance. • Commence proceedings and/or instruct the Crown Solicitor's Office when required.

11. Monitoring, evaluation and review

- 11.1. This Policy is to be reviewed by the date being 3 years from anniversary of approval unless reviewed earlier in response to post-implementation feedback or as necessary. The Legal BU will monitor and review this Policy and update when necessary.
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12. Associated documents

- Compliance and Enforcement Policy
 - Compliance and Enforcement Procedures
 - Compliance and Enforcement Publication Policy
 - Penalty Notice and Caution Procedures
 - NSW Electoral Commission's Code of Ethics & Conduct
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13. Relevant legislation

- *Electoral Act 2017 (NSW)*
 - Electoral Regulation 2018
 - *Electoral Funding Act 2018*
 - Electoral Funding Regulation 2018
 - *Lobbying of Government Officials Act 2011 (NSW)*
 - Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014
 - *Local Government Act 1993 (NSW)*
 - Local Government (General) Regulation 2021
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14. References

- Prosecution Guidelines, Office of the DPP, March 2021.
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15. Document control

Document management

Approved by NSW Electoral Commission:	Date approved:
	Date 14/06/2023
Executive Director Review:	
Rachel McCallum, Funding, Disclosure & Compliance and General Counsel	
Director Review:	
Monica Richmond, Legal BU	

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Revision record

Date	Version	Revision description
01 December 2014	V 1.0	Legislative change – Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014
29 June 2016	V1.1	Periodic review
12 December 2018	V1.2	Legislation change – Electoral Act 2017 and Electoral Funding Act 2018.
14 June 2023	V1.4	Updated policy template and references to the Office of the DPP's <i>Prosecution Guidelines</i> . References to named prosecutor and proceeding on indictment.