

# MPI Prosecution Procedures and Guidelines

Supporting document for the MPI Organisational  
Policy: Prosecutions and Infringements

Released under the Official Information Act 1982

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## Record of Reviews and Amendments

All amendments to this document must be approved by the Chief Legal Adviser and recorded in the table below.

Version number	Date Reviewed (R)/Amended (A)	Parts amended (Y/N & detail)	By	CLA approval obtained
1	R&A 16 March 2018	All - replaces replaces prior document <a href="#">MAF Organisational Guidelines Standards Prosecutions and...</a>	s 9(2)(a) [Redacted] [Redacted] [Redacted]	

Links to templates and guidance documents are included as hyperlinks where appropriate.

## **PART 1 INTRODUCTION**

### **1.1 Application of these guidelines**

These procedures and guidelines apply to all cases involving alleged offences which may be prosecuted by the Ministry for Primary Industries (“MPI”). Their purpose is to support the MPI Organisational Policy: Prosecutions and Infringements (“MPI Prosecution Policy”) by providing further detail in respect of the procedures and guidelines to be followed by MPI staff in making a decision whether or not to prosecute or to recommend appeals and by prosecutors in reviewing files and conducting prosecutions.

This document primarily applies to prosecutions. Infringements are included to a limited extent only, as they will be the subject of separate Procedures and Guidelines. These guidelines apply only to those infringement proceedings that will be placed before the District Court by filing a charging document and so require prosecution decision making at the outset, and those that require a file review by a prosecutor before initiation of a non-defended or defended infringement proceedings by filing a copy of an infringement notice with the Courts.

These Guidelines do not apply to frontline infringement issue.

### **1.2 Protecting independence**

Under the Solicitor-General’s Prosecution Guidelines (“SG Guidelines”) the independence of the prosecution decision maker must be maintained. Independence in that context refers to freedom from undue or improper pressure from any source, political or otherwise. The prosecution decision-maker must be independent from persons or agencies that are not properly part of the prosecution decision making process. The *MPI Prosecution Policy* sets out MPI’s requirements in ensuring independence is protected and seen to be protected.

If any matters arise outside of the MPI Prosecution Policy that may compromise or be seen to compromise that independence, they must be raised with the Chief Legal Adviser.

### **1.3 Reporting and recording conflicts of interest**

Integrity and impartiality are fundamental obligations expected of public servants. A conflict of interest is where a person’s interests or obligations conflict with or have the potential to conflict with the responsibilities of their job or position. It means that their independence, objectivity or impartiality could be called into question regardless of whether they actually derive a financial or other benefit from the conflict.<sup>1</sup>

If an actual, potential or perceived conflict of interest arises for any staff member involved in a prosecution or potential prosecution, the relevant regional Prosecution Team Leader, the Manager Prosecutions or the Chief Legal Adviser must be told immediately.

That person must record the disclosure, the conflict and its management in writing in accordance with the MPI Prosecution Policy. The Chief Legal Adviser has the final say where there is a disagreement about whether a conflict of interest exists or how to manage

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<sup>1</sup> For further information refer to the State Services Code of Conduct, and the MPI Organisational Guidelines "[Conflicts of Interest](#)".

it. Records concerning conflict reporting and management should be maintained on the relevant file held by the Legal Services Directorate.

## 1.4 Prosecution Guidance

All potential prosecutions must be managed, and all prosecutions conducted, in accordance with the SG Guidelines and the MPI Prosecution Policy, and any other relevant guidance issued. If there is any inconsistency between the SG Guidelines and these Procedures and Guidelines, the SG Guidelines shall prevail.

Prosecutors should also be familiar with and follow other relevant external and internal guidance. These include:

### General

- Cabinet Directions for the Conduct of Crown Legal Business
- Attorney-General's civil litigation values
- Prosecutors' Handbook
- Guidance on the Conduct of Crown Prosecutions Commenced by a Prosecuting Agency

### Charging

- Statutory Offences requiring the consent of the Attorney-General
- Guidelines for practitioners for filing criminal documents via email

### Conduct of prosecutions

- Solicitor-General's Guidance on Provision of Legal Services by Crown Organisations to each Other (yet to be published)
- Counsel classification guidance
- Competing interests – Criminal Disclosure Act and Privacy
- MPI Legal Peer Review Checklist
- "No surprises" Cabinet Circular (Oct 2016)

### Witnesses and victims

- Crown Law's "The Role of the Expert Witness"
- Code of Conduct for Expert Witnesses
- Victims of Crime - Guidance for Prosecutors
- Victims Code

### Appeals

- How to request an appeal – a guide for prosecuting agencies

### Media

- Media Protocol for Prosecutors
- MPI Organisational Policy – Media Response Policy
- In-Court Media Coverage Guidelines 2016

Links to these documents are provided throughout these Procedures and Guidelines where relevant.

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From time to time, the Chief Legal Adviser may also issue further guidance as to best practice to be followed.

### 1.5 Meaning of “Prosecutor”

The word “prosecutor” can refer to either the person or agency that lays criminal charges before the court, or the advocate who appears in support of those charges. In these Procedures and Guidelines “prosecutor” refers to the advocate. Generally a prosecutor will be a solicitor in MPI Legal Services, but a prosecutor may also be a lawyer from another department, an officer from another directorate in MPI who is conducting a minor appearance, or a Crown Solicitor instructed by MPI.

The word “prosecutor” can be used inconsistently, which you should remember when reading the external guidance referred to above.

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## **PART 2 PROSECUTION DECISION-MAKING PROCESS**

### **2.1 Prosecution Process – overview**

There are a number of steps in the prosecution process to ensure appropriate checks and balances are applied to each file. Individual directorates, particularly the Compliance Services Directorate, have detailed procedures that apply to this phase.

By way of overview, the file begins with an investigation and a recommendation from an investigating officer (officer in charge or OIC; see section 2.3.1). The OIC's line manager reviews the file, then the Prosecution Decision-maker considers whether prosecution may be appropriate.

If the Prosecution decision-maker believes prosecution may be appropriate in applying both the evidential and public interest tests, the file is referred to an MPI Prosecutor to review the evidence and assess whether the test for prosecution is met. (See section 2.3.2.) If the MPI Prosecutor is of the view the test is met, the file is referred back to the Prosecution Decision-maker for a final decision as to whether or not to prosecute.

Once charges have been filed, the conduct of the prosecution is the responsibility of the Prosecutor authorised to undertake that role, albeit that Prosecutor acts on instructions and in accordance with their professional obligations and at the direction of their manager, or otherwise under supervision. The Prosecutor is assisted by the OIC, who attends to disclosure and assists the Prosecutor in accordance with these Procedures and Guidelines. As to disclosure, see section 7.

A diagram of the prosecution process can be found here (link under development)

### **2.2 Authority to make prosecution decision**

The *MPI Prosecution Policy* describes who has authority to decide to prosecute, not to prosecute, or to warn. For the purposes of these Guidelines, these staff are prosecution decision makers.

It is expected that prosecution decisions will be made by Tier 4 Managers or authorised Tier 5 Managers<sup>2</sup> unless any one or more of the escalation criteria set out at section 3.1 of the *MPI Prosecution Policy* apply. In that case prosecution decisions must be made by the Director Compliance Services.

The Director Compliance Services is the decision-maker for proposed international fishing prosecutions under section 113ZE Fisheries Act 1996, which also require consent of the Attorney-General. (See section 5.3.1 below.)

A Prosecution Decision-maker must not have had any significant involvement in the preparation of the case file, or, in the case of infringements, prior involvement in the adjudication of an infringement now to be the subject of a prosecution decision.<sup>3</sup>

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<sup>2</sup> The requirements for authorising Tier 5 managers to make prosecution decisions are set out in their job descriptions.

<sup>3</sup> "Significant involvement" in the preparation of the case file means personal involvement in gathering evidence, discussing evidence with witnesses, alleged offenders, or other parties who may be perceived to have a vested



## 2.3 Making the decision whether to prosecute

No prosecution may be commenced or continued unless it meets the two part test set out in the SG Guidelines. In essence that test has two parts:

- evidential sufficiency: there is available and admissible evidence sufficient to provide a reasonable prospect of conviction; and
- public interest: whether the prosecution is in the public interest.

**Important: The decision must be based only on information contained in the case file.**

Every Prosecution Decision-maker must be satisfied that all relevant information has been obtained and that the file is prepared to a satisfactory standard as per the requirements in these Procedures and Guidelines.

The *SG Guidelines* provide guidance on the matters to be considered when deciding if the test for prosecution is met in a particular case file. These are set out below.

### 2.3.1 Recommendation by OIC to Decision-maker

Having completed an investigation into suspected offending, the OIC should complete their own summary report outlining their key findings, identifying any offences that appear to have been committed and setting out the evidence in support of the offences identified, including as to each element of the offence. The report should clearly set out the OIC's recommendation in respect of how any identified offending should be addressed. This will include one or more of the following responses:

- no action to be taken (such as when the evidential test is not met)
- education to be provided (for when an educative response is appropriate for offending that otherwise warrants prosecution, or when no offence has been disclosed but education is still an appropriate response)
- administrative or compliance action taken under relevant legislation breached (for example, withdrawal/suspension/revocation of licence or privilege, issuance of compliance notice, deemed value invoice issued etc). As to these, specific legal advice should be sought before acting or recommending such action
- warning issued (see 4.2 below)
- infringement notice issued (see 4.3 below, and Infringement Guidelines)
- pecuniary penalty pursued in High Court. MPI will develop guidelines for pecuniary penalty proceedings. Specific legal advice is also required
- consideration of post-conviction forfeiture action under the Criminal Proceeds (Recovery) Act 2009 or, civil action (which does not require conviction), if this has not already occurred
- prosecution

If the recommendation/s include issuing a warning, infringement notice or proceeding with a prosecution, the officer should clearly identify each offence, the evidence in support of each element of the offence, and the reason for their recommendation.

The report should also set out the alleged offender's past compliance and prosecution history, and any exonerating information, material relevant to any defence, and known information in

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interest in the decision; handling or collating of exhibits; and any other operational decisions relating to the case. It does not include the allocation of staff and resources to the case and the general management of staff.



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mitigation should be addressed in the report. A copy of the person's criminal history should be included in the file.

When submitted to the OIC's line manager, the file should be complete and ready for review. The format of the file should be in accordance with the standard file layout and contain a [File Index](#) and [File Cover Sheet](#).

In the event any relevant information is omitted from the file (for example, confidential informant identification) this should be noted in the report. The decision maker and the prosecutor should be entitled to assume the file provided to them is complete (including any exculpatory or known mitigating information) and that any relevant information not on the file is referred to in the officer's report.

NOTE: Where the purpose of this report (or any other) is to seek legal advice from a prosecutor, it should be clearly addressed to the prosecutor, with the decision maker copied in, and marked as "legally privileged – prepared for the purpose of obtaining legal advice/file review".

### 2.3.2 Legal Review by MPI Prosecutor

Prosecution Team Leaders are responsible for the allocation and reallocation of requests for file review across their teams, taking into account such factors as the significance of the prosecution, complexity, the place of the alleged offending, capacity and any relevant classification requirements.

While a decision maker may refer a file to their local prosecutor, it may be allocated to another prosecutor.

#### 2.3.2.1 Legal review

On receipt of a file for review, if the MPI Prosecutor considers a case file is deficient in any way, they must promptly notify the OIC (copied to the OIC's line manager), detailing the further information needed. Any deficiencies unable to be readily rectified by the OIC should be noted in the legal review and their impact advised.

If the file is considered by the MPI Prosecutor to be significantly deficient (and particularly where the OIC's files are frequently deficient), the Prosecutor should discuss this with the OIC's Team Manager.

Timeliness is an expectation at all stages of a prosecution, or potential prosecution, including timely review. Reviews should be completed within six weeks of receiving a complete file. Whilst that may not be possible in large or complex files, good communication with the OIC and with Prosecutions team management is expected.

In carrying out a legal review, the Prosecutor must comply with these Procedures and Guidelines, the *MPI Prosecution Policy* and the *SG Guidelines*. The MPI Prosecutor must also seek peer review by another prosecutor if required in accordance with the *MPI Legal Services Peer Review Checklist*. With the agreement of the Manager Prosecutions advice may be sought from Crown Solicitors, as noted in the *MPI Prosecution Policy*.

The MPI Prosecutor shall present their legal review as written advice (the Legal Review) in the form set out in the [File Review Template](#), the level of detail of which will depend on the particular offence(s). Generally the Legal Review should:

- set out the elements of the offence and any relevant statutory defences;
- assess whether the evidence meets the Test for Prosecution : namely



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- whether there is sufficient evidence which can be adduced in Court to provide a reasonable prospect of conviction; and
- whether prosecution is required in the public interest;
- include reference to any relevant statutory objectives and enforcement priorities;
- include any matters pertaining to cost relevant to the assessment of public interest (for example the likely cost of instructing the file to the Crown); and
- list the choice of charges; and
- advise on the significance of the potential prosecution.

### 2.3.2.2 Significant prosecutions

Potentially “significant prosecutions” for MPI or the wider Crown need to be identified as early as possible, and identification and classification as such may impact on conduct of the file review, allocation of peer review, allocation of counsel, reporting and oversight. In the first instance the identification of significant files is the responsibility of the prosecutor who receives the file for review. Matters to be considered include whether the case:

- raises legal issues that will likely have impacts beyond the particular prosecution;
- is large and/or technically complex;
- will involve significant internal/Crown/Court resources and costs;
- involves or touches on international fisheries prosecutions;
- involves a major commercial enterprise;
- involves or may require a well-resourced defence team, or
- have other features that may present significant risk or opportunity (such as a test case or to re-set sentencing levels for a particular offence).

Once a decision is made to prosecute, significant prosecutions should be marked as “significant” on the fortnightly prosecutions report. They should also be flagged for possible inclusion in the Litigation and Prosecution report to SLT.

### 2.3.3 Making and recording the decision whether to prosecute

The Prosecution Decision-maker must decide how the matter should proceed after considering both the OIC’s summary report, the MPI Prosecutor’s Legal Review, and any Crown Solicitor’s advice received. Part 3 describes the test for prosecution.

The Prosecution Decision-maker must record, and place on the case file, their decision (**whether that decision is to prosecute or not**) and sufficiently detailed reasons for that decision. The extent of the reasons needs to be considered given the significance of the potential prosecution. Reasons should include considerations such as the relevant statutory objectives, and what factors have been taken into account. Decisions may be reviewed from time to time and reasons must be sufficient to enable MPI’s decision making to be transparent and understood.

Templates for these decisions are under development (link pending)

Where a decision is made to issue a written warning instead of prosecuting, reasons for that decision must also be placed on the case file.



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Where a Prosecution Decision-maker wishes not to prosecute even if the MPI Prosecutor considers both the evidential and public interest tests are met, the matter should be referred to the Chief Legal Adviser and Director Compliance Services before a decision is made.

### 2.4 Prosecutor's responsibilities post decision-making

Once a decision is made to prosecute, the accountability for legal issues in connection with the prosecution file passes to the Prosecutor. Some of that accountability remains even if the conduct of the prosecution is allocated to the Crown or external counsel.

In particular, the Prosecutor:

- approves the wording of the charge(s);
- reviews the Summary of Facts prepared by the OIC to ensure that they present events suitably to form the basis of sentencing, if the charges are not defended;
- ensures the prosecution file is prepared to an appropriate standard;<sup>4</sup>
- updates the [File Cover Sheet](#) as the prosecution proceeds;
- monitors progress of any prosecution briefed to external Crown counsel and provides or facilitates support for external Crown counsel;
- ensures the competent and ethical conduct of the prosecution;
- prepares court documents to a high professional standard, and seeks peer review in accordance with the *MPI Legal Services Peer Review Checklist*;
- reports the result of each appearance as soon as possible, and at least on the same day; and
- completes a detailed [prosecution report](#) at the conclusion of the prosecution and arranges for the relevant MPI database(s) to be updated accordingly.

The MPI Prosecutor should keep their Team Leader (and the Manager Prosecutions and the Chief Legal Adviser if appropriate) apprised of any significant developments in the file. "Significant developments" include:

- developments that may affect the conduct of other prosecutions;
- matters posing significant risk (including reputational and financial risk) to the prosecution or MPI;
- indications of media interest;
- developments of which MPI may wish to alert the media;
- matters affecting resourcing of the prosecution;
- actual or potential conflicts of interest becoming apparent (such as the Prosecutor being required to give evidence).

Prosecutors should also look to identify and address other issues, such as legislative issues (via the Legislation Issues Register), risk reporting, or issues that raise training or operational needs.

Prosecutors should also be familiar with the *"No surprises" Cabinet Circular (Oct 2016)* which provides guidance to ensure Ministers are promptly informed of matters of significance relevant to their portfolios. Reporting to Ministers is by the Compliance Services Directorate.

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<sup>4</sup> The prosecution file is the case file plus other documents necessary for the prosecution, such as submissions.



## PART 3 TEST FOR PROSECUTION

As noted above, the Test for Prosecution has two limbs:

- the Evidential Test; and
- the Public Interest Test.

### 3.1 – Evidential Test

The *SG Guidelines*<sup>5</sup> describe the “evidential test” as follows:

“5.3 A reasonable prospect of conviction exists if, in relation to an identifiable person (whether natural or legal), there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence.

5.4 It is necessary that each element of this definition be fully examined when considering the evidential test in each particular case.

#### **Identifiable individual**

There will often be cases where it is clear that an offence has been committed but there is difficulty identifying who has committed it. A prosecution can only take place where the evidence sufficiently identifies that a particular person is responsible. Where no such person can be identified, and the case cannot be presented as joint liability there can be no prosecution.

#### **Credible evidence**

This means evidence which is capable of belief. It *may* be necessary to question a witness before coming to a decision as to whether the evidence of that witness could be accepted as credible. It may be that a witness is plainly at risk of being so discredited that no Court could safely rely on his/her evidence. In such a case it may be concluded that there is, having regard to all the evidence, no reasonable prospect of obtaining a conviction. If, however, it is judged that a Court in all the circumstances of the case could reasonably rely on the evidence of a witness, notwithstanding any particular difficulties, then such evidence is credible and should be taken into account.

Prosecutors may be required to make an assessment of the quality of the evidence. Where there are substantial concerns as to the creditability of essential evidence, criminal proceedings may not be appropriate as the evidential test may not be capable of being met.

Where there are credibility issues, prosecutors must look closely at the evidence when deciding if there is a reasonable prospect of conviction.

#### **Evidence which the prosecution can adduce**

Only evidence which is or reliably will be available, and legally admissible, can be taken into account in reaching a decision to prosecute. Prosecutors should seek to anticipate even without pre-trial matters being raised whether it is likely that evidence will be admitted or excluded by the Court. For example, is it foreseeable that the evidence will be excluded because of the way it was obtained? If so, prosecutors must consider whether there is sufficient other evidence for a reasonable prospect of conviction.

<sup>5</sup> Solicitor-General’s Prosecution Guidelines 1 July 2013



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### ***Could reasonably be expected to be satisfied***

What is required by the evidential test is that there is an objectively reasonable prospect of a conviction on the evidence. The apparent cogency and creditability of evidence is not a mathematical science, but rather a matter of judgement for the prosecutor. In forming his or her judgement the prosecutor shall endeavour to anticipate and evaluate likely defences.

### ***Beyond reasonable doubt***

The evidence available to the prosecutor must be capable of reaching the high standard of proof required by the criminal law.

### ***Commission of a criminal offence***

This requires that careful analysis is made of the law in order to identify what offence or offences may have been committed and to consider the evidence against each of the ingredients which establish the particular offence”

## 3.2 Public Interest Test

Even if the Evidential Test is met, not all offences for which there is sufficient evidence must be prosecuted. The Prosecution Decision-maker will exercise his or her discretion as to whether a prosecution is required in the public interest, following receipt of the Prosecutor's Legal Review.

The SG Guidelines describe the public interest test as follows:

“5.5 Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of conviction, the next consideration is whether the public interest requires a prosecution. It is not the rule that all offences for which there is sufficient evidence must be prosecuted. Prosecutors must exercise their discretion as to whether a prosecution is required in the public interest.

5.6 In a time honoured statement made in 1951 Sir Hartley Shawcross QC MP, the then United Kingdom Attorney-General, made the following statement to Parliament in relation to prosecutorial discretion: “It has never been the rule in this country ... that suspected criminal offences must automatically be the subject of prosecution.”

5.7 Broadly, the presumption is that the public interest requires prosecution where there has been a contravention of the criminal law. This presumption provides the starting point for consideration of each individual case. In some instances the serious nature of the case will make the presumption a very strong one. However, prosecution resources are not limitless. There will be circumstances in which, although the evidence is sufficient to provide a reasonable prospect of conviction, the offence is not serious and prosecution is not required in the public interest. Prosecutors for instance should positively consider the appropriateness of any diversionary option (particularly if the defendant is a youth).”

There is a multitude of factors that may be considered in determining whether prosecution is in the public interest. A non-exhaustive list of such factors is contained in the *SG Guidelines* and the *MPI Prosecution Policy*. Prosecutors and decision makers should also be alert to other factors that are relevant to the public interest.

Listed in full given their importance, the *SG Guidelines* list the following as illustrations of factors for or against prosecution:

“Public interest considerations for prosecution



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5.8.1 The predominant consideration is the seriousness of the offence. The gravity of the maximum sentence and the anticipated penalty is likely to be a strong factor in determining the seriousness of the offence;

5.8.2 Where the offence involved serious or significant violence;

5.8.3 Where there are grounds for believing that the offence is likely to be continued or repeated, for example, where there is a history of recurring conduct;

5.8.4 Where the defendant has relevant previous convictions, diversions or cautions;

5.8.5 Where the defendant is alleged to have committed an offence whilst on bail or subject to a sentence, or otherwise subject to a Court order;

5.8.6 Where the offence is prevalent;

5.8.7 Where the defendant was a ringleader or an organiser of the offence;

5.8.8 Where the offence was premeditated;

5.8.9 Where the offence was carried out by a group;

5.8.10 Where the offence was an incident of organised crime;

5.8.11 Where the victim of the offence, or their family, has been put in fear, or suffered personal attack, damage or disturbance. The more vulnerable the victim, the greater the aggravation;

5.8.12 Where the offender has created a serious risk of harm;

5.8.13 Where the offence has resulted in serious financial loss to an individual, corporation, trust person or society;

5.8.14 Where the defendant was in a position of authority or trust and the offence is an abuse of that position;

5.8.15 Where the offence was committed against a person serving the public, for example a doctor, nurse, member of the ambulance service, member of the fire service or a member of the police;

5.8.16 Where the defendant took advantage of a marked difference between the actual or developmental ages of the defendant and the victim;

5.8.17 Where the offence was motivated by hostility against a person because of their race, ethnicity, gender, sexual orientation, disability, religion, political beliefs, age, the office they hold, or similar factors;

5.8.18 Where there is any element of corruption.

Public interest considerations against prosecution

5.9.1 Where the Court is likely to impose a very small or nominal penalty;

5.9.2 Where the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by an error of judgement or a genuine mistake;

5.9.3 Where the offence is not on any test of a serious nature, and is unlikely to be repeated;

5.9.4 Where there has been a long passage of time between an offence taking place and the likely date of trial such as to give rise to undue delay or an abuse of process unless:

- the offence is serious; or





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- delay has been caused in part by the defendant; or
- the offence has only recently come to light; or
- the complexity of the offence has resulted in a lengthy investigation.

5.9.5 Where a prosecution is likely to have a detrimental effect on the physical or mental health of a victim or witness;

5.9.6 Where the defendant is elderly;

5.9.7 Where the defendant is a youth;

5.9.8 Where the defendant has no previous convictions;

5.9.9 Where the defendant was at the time of the offence or trial suffering from significant mental or physical ill-health;

5.9.10 Where the victim accepts that the defendant has rectified the loss or harm that was caused (although defendants should not be able to avoid prosecution simply because they pay compensation);

5.9.11 Where the recovery of the proceeds of crime can more effectively be pursued by civil action;

5.9.12 Where information may be made public that could disproportionately harm sources of information, international relations or national security;

5.9.13 Where any proper alternatives to prosecution are available (including disciplinary or other proceedings).

5.10 These considerations are not comprehensive or exhaustive. The public interest considerations which may properly be taken into account when deciding whether the public interest requires prosecution will vary from case to case. In regulatory prosecutions, for instance, relevant considerations will include an agency's statutory objectives and enforcement priorities.

5.11 Cost is also a relevant factor when making an overall assessment of the public interest. In each case where the evidential test has been met, the prosecutor will weigh the relevant public interest factors that are applicable. The prosecutor will then determine whether or not the public interest requires prosecution."

The *MPI Prosecution Policy* sets out the following:

"The prosecution decision-maker must also take into account:

- MPI's statutory objectives and enforcement priorities including National Compliance sector strategies, if appropriate;
- alternatives to prosecution such as directive options to achieve compliance or pecuniary penalties;
- any existing or likely prosecution or other proceedings involving the defendant(s) by another government agency, and the likely outcome;
- the relevant statutory timeframes and the period since the matter first came to Ministry attention;
- the resources available to the Ministry relative to the public interest in a prosecution proceeding;
- any guidelines issued by the Chief Legal Adviser;
- the obsolescence or obscurity of the law; and



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- whether the prosecution might be counter-productive, for example, by enabling a defendant to be seen as a martyr.

Factors that must not be taken into account include:

- colour, race, ethnicity, sex or marital status, religious, ethical or political beliefs;
- personal knowledge of the offender;
- political advantage or disadvantage to the prosecuting agency or people linked to it; and
- the possible effect on the personal or professional reputation or prospects of those responsible for decision making, the agency, or linked to it. “

The *SG Guidelines* make clear that, in regulatory prosecutions, an agency's statutory objectives and enforcement priorities will be relevant public interest considerations (see clause 5.10). In MPI's case, Compliance sector plans will be relevant.

Other factors will also be relevant from time to time, e.g. commercial motivation would be a factor favouring prosecution. Availability of other procedures such as a pecuniary penalty and whether the defendant is from outside New Zealand and unlikely to return may also affect the decision.

### 3.2.1 Cost and resourcing

Cost and resourcing is also a relevant public interest factor as noted in the *SG Guidelines*. If the MPI Prosecutor identifies that the case may involve significant time and or/resources, this should be noted and brought to the attention of the Prosecution Decision-maker in the Legal Review, and to Prosecutions team management.

It is important for the Prosecutor and the decision maker to give proper and realistic consideration to the costs and resourcing that may be involved in a significant prosecution that does not resolve pre-trial. This should not be confined to MPI costs and resourcing. This may need to include factoring in the costs of in-house legal support, Compliance resourcing, external counsel in some cases, witnesses and associated costs and resourcing for a sustained period. Those, Court costs and opportunity costs, may be easily underestimated.

### 3.2.2 Escalation to resolve disagreement

If there is a disagreement between the Prosecution Decision-maker and the MPI Prosecutor on whether or not the public interest requires prosecution, (or evidential sufficiency, or charging strategy) the Chief Legal Adviser and Director Compliance Services must be consulted. If there is still disagreement the decision lies with the Director Compliance Services after obtaining legal advice from the relevant Crown Solicitor. The Crown Solicitor's advice will be followed, unless there are exceptional reasons to depart from that advice and those reasons are fully documented. (Refer to the *MPI Prosecution Policy* p 6)

### 3.2.3 Ongoing assessment of the public interest

As with evidential sufficiency, the assessment of the public interest is an ongoing obligation and should be reassessed if there is a material change in the circumstances of the case or the defendant, such as where the defendant suffers from significant mental or physical ill health (see *MPI Prosecution Policy* at p 5). Note this advice on reassessment should be given by the Prosecutor whether or not it is sought. In the event that there is a disagreement as to whether the prosecution remains in the public interest, the matter should be escalated as above.



## **PART 4 – SOME ALTERNATIVES TO PROSECUTION**

In accordance with the *SG Guidelines*, prosecution is only one outcome in prosecution decision making. There is a range of other outcomes to respond to non-compliance.

### **4.1 Education and guidance**

Education and guidance may be appropriate in some cases. For example, education may be appropriate when no offence has been committed or there is insufficient evidence of offending to warn or prosecute, but it is likely that the person's conduct would have been different if they had understood legal requirements or best practice; and education may be appropriate if there has been a technical and unintended breach of the law that is not sufficiently serious to warrant a warning.

### **4.2 Written warnings**

A written warning is an official communication from MPI to an offender stating MPI considers they have committed an offence but in this case the public interest does not warrant prosecution (or issuing an infringement notice where that is an option).

A warning must only be issued to a person (including a body corporate) where there is sufficient evidence in respect of which MPI could prove the offence against that person to the criminal standard of beyond reasonable doubt. A warning must not be issued where there is a mere suspicion of offending without sufficient evidence by which to prove the offence. A warning must also never be issued where there has been undesirable conduct that nevertheless does not amount to a criminal offence.

A warning is an informal alternative to a prosecution where the public interest in a prosecution is not met. The public interest test must be considered.

It is imperative that warnings are grounded in consistency, transparency and integrity.

A warning must be approved and issued by a Prosecution Decision-maker and provided in writing to the offender using the appropriate template letter. (Template to be included) MPI does not issue "verbal warnings". The Prosecution Decision-maker must consider any sector specific MPI policy or guidance relating to the decision whether to issue a warning. The warning must be recorded in the relevant MPI compliance system with a brief reason for the decision to warn.

Particular care must be given in the case of offending that may involve breaches of other legislation, to avoid the Ministry issuing a written warning where another agency may intend to prosecute arising from the same incident. (See Part 5 below on "charging strategy")

Care must also be taken in cases where there may be multiple parties in an operation, to ensure consistency and calibration in decision making. Issuing a warning to one offender may indicate, for example, that a co-offender should receive a discharge without conviction.

Care should also be taken where an offence may involve a victim and reparation may be in issue or there may be other related advantages that may flow from a conviction. The Independent Police Complaints Authority has recommended that victims should be consulted about the possibility of a pre-charge warning in cases where a prosecution may result in an order for reparation. Where the factors weighing for or against prosecution are relatively



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evenly balanced, the victim's views will carry some weight. Where the victim has suffered financial loss through or by means of the offence and is seeking reparation, a warning should not be given unless the victim agrees to that course of action or enforceable and realistic arrangements for the payment of reparation are made. (See section 8.3 below about victims). Specific advice must be sought concerning cases that raise these factors.

### 4.3 Infringement proceedings by charging document

In some cases, MPI may decide to proceed with an infringement commenced by way of a charging document as an alternative to a prosecution. This type of proceeding is a category 1 prosecution under the Criminal Procedure Act 2011, but cannot result in a conviction. (So, for example, section 252(7) Fisheries Act 1996 relating to community-based sentences does not apply to infringement proceedings.) The same procedure is followed as for other prosecutions.

Further guidance on infringements and processes will be developed in separate Infringement Procedures and Guidelines. Other sector specific guidance is also relevant in terms of when to infringe, or prefer charging.

### 4.4 Diversion, restitution, donations and the like

While offers of reparation or to make amends are relevant, money cannot be seen to "stifle" an otherwise appropriate prosecution.

MPI does not currently have a diversion programme, nor an enforceable undertakings regime under the legislation it administers.

MPI does not enter into arrangements such as donations in lieu of prosecution, or negotiate restitution on behalf of victims. **MPI must never receive funds or services as part of resolution of a prosecution without a court order.**

In cases in which these or like considerations arise, specific advice should be sought. MPI's general position is that outcomes should be determined under the supervision of the Court. See also para 6.5 "Plea discussions and arrangements".



## **PART 5 – CHARGING STRATEGY – CHOICE OF CHARGE(S) AND DEFENDANT(S)**

If the recommendation is to prosecute, the Legal Review must include advice on the charges considered to be most appropriate.

No charging document shall be filed unless:

- there is agreement between the Prosecution Decision-maker and the Prosecutor on the persons to be charged and the charges to be filed; or
- in any case where the Prosecution Decision-maker and the Prosecutor are unable to agree, the matter has been referred for resolution between the Chief Legal Adviser and the Director Compliance Services and a decision is made.

For guidance on the filing of charging documents electronically, refer to the Ministry of Justice's *Guidelines to practitioners for filing criminal documents via email*.

### **5.1 General guidance on choice of charges**

A key factor to be considered in terms of charging strategy is the intended outcome. For example, the intended outcome may be both specific and general deterrence that is, improving behaviour both in terms of the individual defendant or defendants and others in that sector or the general public.

Guidance on choosing the appropriate charges and defendants can be found in the following:

- Section 17 of the Criminal Procedure Act 2011, which states requirements for the content of charges.
- The *MPI Prosecution Policy* (p 7) sets out the matters which must be taken into account when making decisions on charges, including as to corporate entities and officers. If a particularly complex or serious case is likely to result in a Crown prosecution, the Crown Solicitor should be consulted.
- *MPI charging standards* such as those for animal welfare, which provide guidance on the level of charge appropriate for use in cases of ill-treatment
- The *Prosecutor's Handbook* summarises the different offence categories and discusses jurisdiction. It also provides guidance on the choice and content of charges (*Commencement Stage chapter*).
- The *SG Guidelines* provide broad guidance about choosing charges and choice of defendants at pp 11-12. Critically, the number and nature of charges filed should adequately and truly reflect the criminality of the defendant's alleged conduct. The number or seriousness should not be inflated to increase the likelihood of a plea resolution. (*SG Guidelines* at 8.2).
- Charges may be representative where the criteria set out at s 20 of the Criminal Procedure Act 2011 are met, and MPI's policy is that these should be considered for repeated or ongoing conduct.
- The *SG Guidelines* at 8.6 require that in both cases, "the prosecutor should take into account the cost of prosecuting multiple charges and defendants in proportion to the seriousness of the offending and any likely sentence. Such decisions should be made as early in the prosecution as possible".

In addition:



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- The charging strategy needs to bear in mind whether any orders or consequent exercise of statutory powers are necessary or desirable subsequent to any conviction.
- Charges against multiple defendants should only be filed where that is necessary to fully present the facts, or the person charged has played a more than minor role.
- The charging strategy should consider the different offence categories under the Criminal Procedure Act 2011, the consequences of those, and any benefits in common categorisation.
- The number and level of charges selected should reflect the nature and seriousness of the offending, enable the evidence to be presented in a clear and cohesive way and should give the court sufficient powers of sentence.
- The charging strategy should consider the cost of the prosecution, the impact on MPI's resources, and the impact on the Court's resources: could fewer or different charges achieve the same outcome but have less impact on resources.
- In the case of corporate offending, any charging should reflect the purpose of the relevant legislation, and the relative culpability of that corporate entity and or its officers and employees. For example, in cases of commercial offending, consideration needs to be given to who is charged, and the timing of that charging, so that the role others may have in offending (such as owners, or corporates) is not overlooked in charging.

Where any charge is to be filed, the wording of the charge must first be approved by the Prosecutor.

### 5.1.1 Charges under legislation MPI administers or has enforcement functions under

The decision maker may bring charges under the legislation that MPI administers or other legislation under which it has an enforcement role, including the Trade in Endangered Species Act and Hazardous Substances and New Organisms Act.<sup>6</sup> When deciding which Act to file a charge under, the decision maker will consider the nature of the alleged conduct and the charge that would most appropriately mark that conduct.

### 5.1.2 Charges under legislation for which MPI is not responsible and has no enforcement functions

No MPI employee may file a charging document or conduct a prosecution in respect of any offence against legislation for which MPI is not responsible (for example, the Crimes Act 1961) or under which MPI has no enforcement function *unless*:

- the prior written approval of the Prosecutions Manager or Chief Legal Adviser has been obtained; and
- approval has been given by the Director Compliance Services.

No approval is needed for charges that include reference to ss 66 (parties to offences) or 72 (attempts) Crimes Act 1961.

As a matter of courtesy, where MPI intends to file charges under legislation it does not administer but under which it has enforcement functions, the OIC should advise the relevant

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<sup>6</sup> For example, the Ministry for the Environment administers the Hazardous Substances and New Organisms Act 1996 (HSNO) but MPI has HSNO warranted officers who may exercise enforcement powers in respect of New Organisms. Likewise, the Department of Conservation administers the Trade in Endangered Species Act 1989 but an Inspector appointed under the Biosecurity Act 1993 is deemed to be an Endangered Species Officer.



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government department or agency of the charges at an early stage, preferably prior to filing the charging document.

### 5.2 Co-ordinated enforcement and prosecution decision-making

In some cases, another agency may be taking or intending to take prosecutions or other proceedings that involve the offender(s). The *MPI Prosecution Policy* sets out the relevant considerations and responsibilities for co-ordinated enforcement/prosecution (see p 7).

This point needs active consideration, as the fact of another prosecution, proceeding, or sentence may well reduce the public interest in MPI commencing or continuing with a prosecution in some cases. Or, it may be appropriate for the other agency to prosecute an additional charge under MPI's legislation. MPI's policy states:

Government agencies should respond to criminal behaviour in a coordinated way. When determining whether to prosecute, the decision-maker should consider any existing or likely prosecution or other proceedings involving the defendant by another government agency, and the likely outcome.

In the case of a decision not to prosecute on public interest grounds, where there is non-compliance with legislation administered by another agency, MPI shall consider referring that matter to that other agency for decision to ensure a coordinated government response, prior to any formal warning being issued.

It is the responsibility of the Prosecutions Team Leader to consult with the Police or other agency responsible for enforcing the legislation concerned before a decision to prosecute is made and to provide reasonable notification as to progress and outcome of any prosecution commenced.

### 5.3 Statutory consents to prosecutions

#### 5.3.1 Charges for which the consent of the Attorney-General or Solicitor General is required

Charges for offences which may touch on matters of security or involve foreign relations or international treaty obligations require the prior consent of the Attorney-General. In practice this function tends to be undertaken by the Solicitor-General. The offences are set out in the 2013 document [Statutory Offences requiring the consent of the Attorney-General](#). Within the scope of MPI's legislation, this relates only to the charges set out below:

- 113ZE Fisheries Act 1996 - to prosecute for offences against:
  - section 113A Fisheries Act 1996 (Illegal fishing or transportation in a fisheries jurisdiction of a foreign country)
  - section 113E Fisheries Act 1996 (Unlawful use of a foreign vessel on high seas by New Zealand nationals)

The Director Compliance Services is the decision-maker in respect of any such charges. Before making a decision, the Director Compliance Services shall refer the case file to the Manager Prosecutions, who must also consult the Chief Legal Adviser, Ministry of Foreign Affairs and Trade, and the Deputy Solicitor-General (Criminal) in the Crown Law Office, before advising the Director Compliance Services.

### **5.3.2 Solicitor-General Consent - Filing of charging document for category 1, 2 or 3 offences out of time**

The consent of the Solicitor-General is required for filing charging documents out of time for certain category 1, 2 or 3 offences as provided for in section 25 Criminal Procedure Act 2011.

No MPI employee may seek such a consent unless:

- the prior written approval of the Prosecutions Manager or Chief Legal Adviser has been obtained; and
- approval has been given by the Director Compliance Services.

The process for obtaining consent to prosecute from the Attorney-General or the Solicitor-General is set out in the Prosecutors Handbook at 2.3, and 11.2 of the SG's Guidelines. Prosecutors seeking consent must provide Crown Law Office with the information and documents required, including draft charging documents. If consent is granted, Crown Law will provide a memorandum setting out the consent which is to be filed with the charging document.

Released under the Official Information Act 1982





## **PART 6 CONDUCT OF THE PROSECUTION**

This Part should be read in conjunction with section 9 of the MPI Prosecution Policy.

The *Prosecutors' Handbook* is a useful source which sets out the different stages of a prosecution, from when a prosecution is initiated through to appeals.

**Note: Guidance for infringements will be located in a separate document *Infringements Guidelines*.**

### **6.1 Who will conduct the prosecution?**

Once the decision to prosecute is made, the decision as to who will conduct the case will be made within the Legal Services Directorate. Decisions will also need to be made from time to time about individual appearances, or at certain stages of the prosecution.

The relevant Prosecutions Team Leader, in consultation with the Manager Prosecutions or the Chief Legal Adviser as appropriate, may instruct external Crown counsel, including Crown Solicitors, for any prosecution. There may also be other options including other Departmental lawyers, or non-Legal MPI staff, as set out below. With the agreement of the Chief Legal Adviser, the relevant Team Leader may withdraw instructions to external Crown counsel.

#### **6.1.1 MPI Prosecutors**

MPI prosecutors may carry out non-Crown prosecutions.

Prosecution Team Leaders are responsible for allocation or re-allocation of prosecutions across their teams. When making allocation decisions Team Leaders will consider and comply with the Public Prosecutions Unit framework for classification of counsel. In the absence of any other allocation decision, the MPI Prosecutor who completed the Legal Review will initially be responsible for conduct of the prosecution.

#### **6.1.2 MPI staff outside Legal Services may conduct minor appearances**

If agreed by the Chief Legal Adviser, Director Compliance Services and Director Border Clearance Services, a MPI prosecutor may instruct an appropriately trained staff member outside of the Legal Services Directorate to conduct a minor appearance.<sup>7</sup> Those staff members have the same responsibilities as an MPI prosecutor in relation to the appearance.

#### **6.1.3 Crown Solicitors**

Crown Solicitors may be instructed in the circumstances set out at section 9.1 of the *MPI Prosecution Policy*. The Solicitor-General may also direct that a prosecution be conducted by a Crown Solicitor as a Crown Prosecution as set out in the *SG Guidelines* (section 13).

If the Crown Solicitor is instructed, they should generally be the Crown Solicitor who holds the warrant for the area in which the matter will be prosecuted. In some cases, however, it may be appropriate to engage the Crown Solicitor from another area (for example, where that office has particular specialist expertise in the relevant area of law, or a conflict exists). The agreement of the Deputy Solicitor-General (Criminal) is required. Further guidance can be

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<sup>7</sup> The legal authority is section 10(1) of the Criminal Procedure Act 2011, which allows other officers or employees of a prosecuting department to appear and conduct the proceeding on behalf of the informant.

found in the document [Guidance on the Conduct of Crown Prosecutions Commenced by a Prosecuting Agency](#).<sup>8</sup>

It is good practice to engage the Crown Solicitor early, for example in establishing major investigations that are likely to become Crown Prosecutions.

### **6.1.3.1 Crown prosecutions<sup>9</sup>**

The Crown Prosecutions Regulations 2013 (the Regulations) provide that certain prosecutions must be conducted by the Crown Solicitor. These are:

- a) a proceeding for a category 4 offence;<sup>10</sup>
- b) a proceeding for an offence listed in the Schedule to the Regulations;<sup>11</sup>
- c) a proceeding for an offence not listed in the Schedule, if the defendant elects to be tried by a jury;
- d) a proceeding that is transferred to the High Court if none of paragraphs (a) to (c) apply; or
- e) any other proceeding, if the Solicitor-General directs that, having regard to the particular features of the proceeding, it is appropriate that it be conducted as a Crown prosecution.

The Crown Solicitor makes all decisions relating to the prosecution once the Crown has assumed responsibility. Those decisions are to be made in consultation with MPI through the instructing MPI Prosecutor.

An MPI Prosecutor should maintain good contact with the Crown Solicitor conducting the prosecution and may assist or junior on the matter as appropriate. Unless otherwise agreed, the MPI prosecutor will be responsible for reporting on progress on the prosecution and the outcome of all hearings.

#### **Costs**

Crown Prosecutions are funded by the Crown from the point at which the Crown Solicitor assumes responsibility for the file (as set out in regulation 5 of the Regulations).<sup>12</sup>

### **6.1.3.2 Departmental (non-Crown) prosecutions**

Prosecutions which are not Crown Prosecutions may be prosecuted by an MPI Prosecutor or instructed to the Crown Solicitor or (rarely) other external counsel.

Circumstances in which it may be appropriate to instruct a non-Crown prosecution to the Crown Solicitor include:

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<sup>8</sup> This document outlines the general roles and responsibilities of prosecuting agencies and Crown Solicitors in the conduct of Crown prosecutions commenced by the prosecuting agency.

<sup>9</sup> See the *Prosecutors' Handbook – Crown Prosecutions chapter* for more information on Crown prosecutions.

<sup>10</sup> No offences which MPI may prosecute are category 4 offences

<sup>11</sup> None of the offences in the Schedule are offences for which MPI prosecutes

<sup>12</sup> Generally, this will be at the point the proceeding is adjourned following the defendant's first appearance:



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- where there is an actual or potential conflict of interest involving the Prosecutor, an MPI witness or otherwise such that the greater independence afforded by the Crown Solicitor (or other external counsel) is prudent;
- where there are insufficient resources within MPI to conduct the prosecution (for example, if a hearing will take a number of weeks);
- where the matter requires expertise the Crown Solicitor (or other external counsel) is better placed to provide;
- where to do so will be more cost effective (such as for brief appearances in locations where there is not an MPI prosecutor);
- where no MPI prosecutor is (practicably) available to appear.<sup>13</sup>

An MPI prosecutor should maintain good contact with the Crown Solicitor or external counsel conducting the prosecution and may assist or junior on the matter as appropriate.

### Costs

If a non-Crown prosecution is instructed to the Crown Solicitor or other external counsel, MPI is responsible for all costs associated with the conduct of the prosecution. The instructing MPI prosecutor should seek an estimate of cost, except for short one-off appearances.

The instructing prosecutor should endeavour to ensure invoices are received in a timely manner and provided without delay to the Prosecutions Manager.

### 6.1.4 Departmental lawyers

Some appearances on MPI prosecutions can now be conducted by other Departmental prosecutors.<sup>14</sup> A decision as to whether or not another Departmental prosecutor should be instructed is to be made by Team Leaders, in consultation with the OIC.

Situations where this may be appropriate include:

- where workflows need to be managed; part of secondment arrangements;
- where expertise in speciality areas of law is sought.

Other relevant factors include the nature, complexity and importance of the appearance, and costs. At this stage appearances by prosecutors from other departments will likely be appropriate only for procedural list appearances (including sentencing following a guilty plea on first call).

An MPI prosecutor shall brief the Departmental prosecutor as to the file.

If engaging another Departmental prosecutor is being considered, refer to the *Solicitor-General's Guidance on Provision of Legal Services by Crown Organisations to Each Other* for assistance, and any memorandum of understanding between MPI and that department.

Likewise, with the approval of their Team Leader, MPI prosecutors may be instructed by other government departments. The prosecutor appearing must be adequately briefed on the prosecution and must comply with all applicable professional obligations, including responsibilities under any MOU with the other department.

<sup>13</sup> For example, where travel time/costs would be uneconomic compared to instructing the matter externally

<sup>14</sup> For further detail see Rule 15.2, Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 and the SG's Guidance on Provision of Legal Services (yet to be published).



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### 6.1.5 External (non-Crown) lawyers

In rare cases it may be necessary to instruct external counsel who is not a member of the Crown Solicitor network to provide advice or conduct a prosecution on behalf of MPI. This is likely to be a rare occurrence and would generally only occur where there is a requirement for specific expertise and on the recommendation, or with the concurrence of, the Crown Solicitor or the Crown Law Office.

## 6.2 Significant Cases

Prosecutors should identify in file reviews and on the fortnightly prosecution report cases which may present significant risk or opportunity to MPI or to the wider Crown. These shall include cases that:

- raise legal issues that will likely have impacts beyond the particular prosecution;
- are large and/or technically complex;
- will involve significant internal/Crown/Court resources and costs;
- involve or touch on international fisheries prosecutions;
- involve a major commercial enterprise;
- involve or require a well-resourced defence team, or
- have other features that may present significant risk or opportunity (such as a test case or to re-set sentencing levels for a particular offence).

Note the “risk reporting” framework also identifies other factors, such as sustained media interest, legal risk, novelty, sensitive relationships and resourcing.

In such cases the Manager Prosecutions, in consultation with the Chief Legal Adviser, shall ensure an appropriate level of legal representation including, if necessary, the use of external Crown counsel supported by a competent MPI legal and operational team.

Such cases also require ongoing oversight, reporting and case management.

In accordance with clause 3.5 of the *SG Guidelines*, the Chief Legal Adviser will keep the Solicitor General or Deputy Solicitor General informed of appropriate matters, including matters of general public or legal importance, or matters which give rise to substantial or new forms of legal risk.

## 6.3 Hearings on marae

Criminal proceedings may be conducted on marae in some circumstances, including emergencies or to hold specialist courts.

Outside of those situations, the District Court may transfer criminal proceedings to a marae (or any other place) pursuant to s4A of the District Courts Act 1947. That empowers the Court to transfer proceedings to “any other convenient place”.

Such applications in MPI’s context have been very rare to date. The test is one of convenience. Crown Law’s advice on a previous occasion (*Te Pania*) was that the prosecution should generally take a neutral stance on applications in which it is a respondent, with the key issue – convenience and logistics - a matter for the Court to determine. The prosecutor should notify their Team Leader promptly of any application so MPI’s stance can be decided.



## 6.4 Ongoing review of charges

After filing charges, Prosecutors are responsible for periodically reviewing them to determine whether they should continue to be prosecuted under both the evidential and public interest tests, or whether any charges should be amended, added, or withdrawn. Refer to the *SG Guidelines* (clause 9) for assistance.

A review by the Prosecutor should occur:

- prior to a matter proceeding to trial; and
- whenever a prosecutor becomes aware of a material change in circumstances relevant to the prosecution.

## 6.5 Plea discussions and arrangements

The *SG Guidelines* recognise that principled plea discussions and arrangements have a significant value for the administration of the criminal justice system. These discussions may be initiated by the prosecutor or defence counsel.

In undertaking plea discussions and arrangements, prosecutors must adhere to the principles set out in the *SG's Prosecution Guidelines* (clause 18).

Particular care must be taken in cases where there are offers of payment whether by way of redemption fees, reparation or payments of other descriptions. Specific written advice should be provided in these circumstances and the prosecutor should consult their Team Leader. **MPI must never receive funds or services as part of resolution of a prosecution without a court order.**

Special care is also required in cases that involve a victim. The *SG Guidelines* require that a victim or complainant is informed of any plea discussions and given sufficient opportunity to make his or her position as to any proposed plea arrangement known to the prosecutor, albeit their view is not determinative.

Clause 18.4 of the *SG Guidelines* sets out recording requirements. Any plea arrangement should be properly recorded in a form capable of being placed before the Court. MPI will be bound by any such arrangement unless it has been materially misled. MPI prosecutors must ensure that such discussions are scrupulously accurate and fair.

The overarching consideration is the interests of justice. While plea discussions may be contemplated in cases where the charges filed are clearly supported by the evidence, the *SG Guidelines* note two relevant considerations:

- whether the charges agreed to adequately reflect the essential criminality of the conduct; and
- whether the charges agreed to provide sufficient scope for sentencing to reflect that criminality.

Decisions to offer or agree to a plea arrangement that meets these two criteria in the interests of justice must first be approved by the Manager Prosecutions or relevant Team Leader. The final decision to offer or agree to the arrangement, if approved, will be made by the Prosecution Decision-maker. Those parts of the MPI Prosecution Policy and these Guidelines that concern independence also apply at this stage.

This applies to prosecutions being conducted by MPI or by external counsel, including Crown Solicitors where they are prosecuting non-Crown prosecutions on behalf of MPI. It



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does not apply to Crown prosecutions where, in accordance with clause 28.9 of the *SG Guidelines* and the document *Guidance on the Conduct of Crown Prosecutions Commenced by a Prosecuting Agency*, once the Crown assumes responsibility for a prosecution, all decisions in relation to the conduct of the prosecution, are a matter for the Crown Solicitor to decide.

### 6.6 Withdrawal of charges

This section must be read with the preceding section on plea discussions and arrangements.

A Prosecutor may withdraw a charge before trial with the leave of the Court. Because withdrawal does not prevent a prosecutor later filing a charge in relation to the same matter, in very rare cases this may be most appropriate to allow the prosecution a second chance to cure evidential deficiencies. More commonly, it may be appropriate in order to:

- remove duplicate charges;
- remove charges as part of a plea negotiation;
- remove included charges where the prosecutor wishes to proceed on the most serious charge only.

Withdrawal of a charge must have the approval of the Prosecution Decision-maker.

Other than in a Crown prosecution, decisions to withdraw or agree to a plea arrangement including withdrawal of charges must ideally first be approved by the Manager Prosecutions or relevant Prosecutions Team Leader. Given the practicalities of the Court environment and the likely availability of others, prosecutors should seek approval prior to Court when withdrawal may become an issue.

The final decision will be made by the Prosecution Decision-maker. Those parts of the MPI Prosecution Policy and these Guidelines that concern independence also apply at this stage, and reasons for the decision to withdraw the charges must be recorded

### 6.7 Dismissal of charges

The Court may dismiss a charge at any time before or during a trial, but prior to the defendant being found guilty or entering a plea of guilty. This may occur when:

- a) the prosecutor has not offered evidence at trial; or
- b) in relation to a charge for which the trial procedure is the Judge-alone procedure, the Court is satisfied that there is no case to answer; or
- c) in relation to a charge to be tried, or being tried, by a jury, the Judge is satisfied that, as a matter of law, a properly directed jury could not reasonably convict the defendant.

A dismissal is deemed to be an acquittal and therefore precludes subsequent proceedings. Given the significance of this course of action, any decision to seek or consent to a dismissal will be made by the Prosecution Decision-maker, but only if:

- a) the Test for Prosecution is no longer met; and
- b) the decision has first been approved by the Chief Legal Adviser or Manager Prosecutions.

Dismissal may incur costs.



## 6.8 Records and Reporting

Accurate and timely recording and reporting is an important obligation for prosecutors. It cannot be assumed that a transcript of evidence/submissions or the Judge's decision will be available in time to guide actions that follow sentencing or conviction, such as media releases or considering whether or not to appeal. Thus the importance of the prosecutor taking good notes during the hearing.

Prosecutors should take as full a note as possible of any judicial decisions (including reasons). Prosecutors should also take as full a note as possible of submissions for the defendant that depart from any written submissions, including concessions, as well as any evidence on disputed facts.

Prosecutors shall report back on outcomes that same day to their team leader and OIC, as well as Communications (if appropriate). The OIC is responsible for further circulation within Compliance Services. This report back is not intended to be onerous, except in significant cases a brief update will suffice in most cases, pending the completion of a fuller prosecution report.

The Prosecutor shall, within five working days of the completion of a prosecution, provide a full prosecution report on the result. The prosecution report shall be in the [Ministry standard format](#) and the result will also be entered into the Prosecutions Activity Report".

In the case of prosecutions briefed to external Crown or other counsel, the instructing MPI Prosecutor is responsible for advising counsel of MPI's reporting requirements. External counsel should supply the result to the instructing MPI Prosecutor. The instructing MPI Prosecutor shall provide the result to the OIC, the Prosecution Decision-maker and the Prosecutions Team Leader.

The MPI Prosecutor is responsible for the updating of the Compliance databases.

Where any oral decision has precedent value or contains a contentious ruling relating to the determination of a point of law that may be subject to appeal, the Prosecutor should request the Court to have the decision transcribed (or ask external counsel to request it).

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## PART 7 CRIMINAL DISCLOSURE

### 7.1 Criminal Disclosure Act 2008

The Criminal Disclosure Act 2008 (CDA) codifies how disclosure is to occur for all criminal proceedings. Note this also includes infringements in circumstances where a defendant has requested a hearing pursuant to s 21(6) of the Summary Proceedings Act 1957.

As the SG Guidelines reiterate, “(p)roper disclosure is central to preventing wrongful convictions”. Proper and timely disclosure is also essential to ensure the fair and efficient progress of a prosecution, and failure to comply may lead to delays, adverse comment, costs or mistrials.

Disclosure ensures that a defendant is able to review all relevant information relating to the prosecution, with the exception of information that is able to be withheld. The grounds for withholding information are primarily contained in s 16 CDA. “Relevance” is broadly defined and means information or an exhibit as the case may be that “tends to support or rebut, or has a material bearing on” the case against the defendant.

Under the CDA, “**prosecutor**” means the person who is for the time being in charge of the file or files relating to a criminal proceeding; and includes—

- (a) any other employee of the person or agency by whom the prosecutor is employed who has responsibilities for any matter directly connected with the proceedings; and
- (b) any counsel representing the person who filed the charging document in the proceedings; and
- (c) in the case of a private prosecution, the person who filed the charging document and any counsel representing that person

The “prosecutor” under the CDA is responsible for disclosure and ensuring that it occurs within statutory timeframes.

It is important to note that the SG Guidelines state as follows: “(t)he Crown Prosecutor should not be considered the “prosecutor” for the purposes of the Act. In any other prosecution (whether conducted by a Crown prosecutor or not) the prosecutor as well as the officer or employee designated by the relevant government agency as the person responsible for the file is relevantly a “prosecutor” in terms of the Act.” (16.1)

Due to the wide definition of “prosecutor” in the CDA, roles and responsibilities are set out below.

Enabling disclosure is an enforcement agencies responsibility. The *SG Guidelines* at 16.4 require that enforcement agencies shall “ensure that the prosecutor has access to all relevant information relating to the charges in the possession of that agency”. Given this Ministry’s breadth of operations, it is important to recognise that relevant information may initially be held in other systems, operated outside of the Operations Branch.

It is also important to identify, locate and disclose information witnesses may have (such as exhibits or personal notes), that they do not immediately produce at the investigation stage, but they may wish to refer to at trial or is otherwise subject to disclosure obligations. This needs to be explored at first instance by the OIC to ensure witnesses understand their obligations, and that any additional disclosure is identified early.





## 7.2 Roles and responsibilities

Within MPI, primary responsibility for preparing disclosure and securing relevant information lies with the OIC of the file. A dedicated OIC Disclosure may be appointed for larger files. Their role includes ensuring that there is a list of the material disclosed and a copy of all disclosed documents. The *Guidelines* require that agencies are able to verify this, and when disclosure has been made (16.3).

The Prosecutor for the file (or the instructing MPI Prosecutor where external Crown counsel is instructed) is responsible for reviewing disclosure (including what is withheld) and advising as required. It is the responsibility of the Prosecutor to ensure MPI complies with all disclosure obligations. The OIC is to provide all necessary assistance.

The SG Guidelines at 16.2 note as follows:

Disclosure obligations will not be carried into effect merely by seeking assurances from the person in charge of the file that the trial file contains all necessary disclosure material and that any other material disclosed represents full disclosure.

Final decisions on withholding or disclosing information in non-straightforward cases should be made jointly between the Prosecutor, the OIC and the Prosecution Decision-maker. The Prosecutor's Team Leader and/or Manager Prosecutions should be consulted in the following instances:

- there is a dispute between the OIC, the Prosecutor and/or the Prosecution Decision-maker;
- where the information to be withheld or disclosed could be regarded as controversial, or have serious ramifications outside the prosecution in question; and/or
- where the information is of a novel form.

## 7.3 Disclosure File Index and filing copies of disclosed materials

A Disclosure File Index should be created for every Prosecution file, and kept up to date by the OIC. A hard copy of the Disclosure File Index should be placed on the case file.

For larger or more complex files, a live disclosure index should be created at the earliest practicable stage and updated as the matter progresses.

Any documents to be withheld must be listed in the Disclosure File Index along with the reasons for the non-disclosure. See section 4.7.7 below in relation to decisions not to disclose relevant information.

It is good practice to also keep an exact copy of the disclosure that was sent out. This may not be possible where large amounts of paper are involved, but it is important to keep an exact copy of any partially disclosed documents that were sent out.

## 7.4 Specific disclosure steps

See the Prosecutor's Handbook – Administration Stage chapter for further information on meeting disclosure obligations.



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### 7.4.1 Standard form letters and disclosure file indices

At each point when disclosure is required, the OIC should send a copy of the materials to be disclosed to the defendant, with the relevant standard form letter as noted below. A copy of the letter should be saved in the relevant document management system.<sup>15</sup>

Standard form letters and Disclosure File Indices should be used wherever possible:

- Disclosure File Index
- [standard initial disclosure letter](#)
- [standard letter for further initial disclosure](#)
- [standard letter for full disclosure](#)
- standard letter for ongoing further disclosure
- standard letter for additional particular disclosure

### 7.4.2 Initial disclosure

Initial disclosure should be effected when the summons is served, but in any event must be done within 21 days from the service of the summons.

The OIC is responsible for preparing and sending the initial disclosure, following the Prosecutor's review.

Infringement notices do not require disclosure unless they end up going to court for hearing.

The initial disclosure required to be provided includes:

- caption sheet (with penalties for the offence included);
- summary of facts;
- a copy of the defendant's criminal history and offences under the relevant legislation (e.g. prior fisheries offending or biosecurity offending) if one has been obtained;
- a [standard initial disclosure letter](#) giving advice as to the defendant's entitlement to further information.

### 7.4.3 Further initial disclosure

Defendants may request further information at an early stage in the prosecution process. The defendant or counsel acting for the defendant should request this information in writing, but an oral request should be accepted.

The types of information that defendants may request is set out in the CDA. It is possible to withhold some of this information should grounds exist.

The CDA requires further initial disclosure to be provided as soon as reasonably practicable and at least 7 days before the next substantive hearing date. In practice, MPI should aim to respond to further initial disclosure requests within 14 days of receiving a request, although longer periods are permissible for larger requests. The OIC should consult the Prosecutor if more than 14 days may be required.

All further disclosure should be checked by a Prosecutor before it is sent out and be accompanied by a [standard letter for further initial disclosure](#) and updated Disclosure File Index.

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<sup>15</sup> Currently for example, FOCUS for fisheries matters, Information Leader for food-related matters (food, APA, wine) and Animal Welfare.



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### 7.4.4 Full disclosure

Full disclosure must be supplied as soon as reasonably practicable after a not guilty plea is entered (this is implicit where trial by jury is elected).

The defendant does not need to request full disclosure. The Prosecutor will advise the OIC if full disclosure is required.

Full disclosure includes **any relevant information**. Relevance is defined by s8 of the Act as follows: “**relevant**, in relation to information or an exhibit, means information or an exhibit, as the case may be, that tends to support or rebut, or has a material bearing on, the case against the defendant”

If any relevant information is withheld, a list must be given to the defendant specifying the documents/exhibits being withheld and the reasons for the withholding.

The full disclosure must be checked by the Prosecutor before it is sent out and should be accompanied by a [standard letter for full disclosure](#) and updated Disclosure File Index.

### 7.4.5 On-going further disclosure

Disclosure is a continuing obligation.

When relevant information comes into the possession or control of the OIC or Prosecutor after full disclosure has occurred, it must be disclosed to the defendant (unless there is a reason for withholding, in which case an updated Disclosure File Index should be sent detailing the document/exhibit and reason for withholding).

This obligation continues until the period for lodging any appeal has expired. The OIC should consult with the Prosecutor if potentially relevant information comes to light during this time.

Any further disclosure must be checked by the Prosecutor before it is sent out.

Further, another important aspect is that reasons for withholding information may change. Section 16(3) of the CDA requires that the prosecutor must disclose such information if the criminal proceedings are not yet complete “if the prosecutor becomes aware that there has ceased to be any justification for withholding all or part of any information that has been withheld under this Act”.

For example, the status of a person may change throughout an investigation and prosecution, and that change may impact on the continued justification of any initial decision to withhold information.

### 7.4.6 Additional particular disclosure

Occasionally, a defendant or their counsel may request a specific particular piece of information that was not included in full disclosure. The requests should be handled in the same way as full disclosure, with reasons given for any information not provided.

The additional particular disclosure must be checked by the Prosecutor before it is sent out.

## 7.5 Service of disclosure

Documents can be hand-delivered to the defendant or their counsel by any MPI employee, or posted. Electronic copies should be made available if requested. Prosecutors may also hand-deliver disclosure at court to the defendant or counsel. In the case of electronic disclosure, particular care is required to ensure a new, unused storage device is used, and that any redactions made are fully protected.



## 7.6 Decision not to disclose relevant information

All relevant information must be disclosed unless it falls within a specified exception in ss 15, 16, 17, or 18 of the CDA. The OIC must act on the advice of the Prosecutor when considering whether to disclose information. Special care must be taken not to disclose any information that may lead to the identification of the place where an informant or witness lives.

If information is not to be disclosed, the document/exhibit must still be listed in the Disclosure File Index with the level of disclosure (full, partial or not disclosed), and reasons for non-disclosure identified (mentioning the specific section of the CDA). This is then sent to the defendant, who may challenge the decision in court if they wish. If that happens, a Judge will make the final decision.

Documents that should **never** be disclosed without the agreement of both the Prosecution Decision-maker and Manager Prosecutions include

- operations orders;
- information relating to operational plans for surveillance, covert operations or other information that discloses a similar type of content;
- ministerial briefings or similar documents;
- internal emails or communications relating to the prosecution; and
- legally privileged information.

The following should only be disclosed pursuant to order of the Court:

- informant names (for non-witnesses), the real names of undercover officers, or details that could lead to their identification;
- witness or informant residential addresses or any information that may lead to the identification of the place where the witness or informant lives (such as postal address, residential address, email address, fax number, or phone number) (s 17 CDA).

## 7.7 Further guidance on disclosure

The SG Guidelines provide further guidance in relation to disclosure obligations (clause 16), including guidance on:

- evidence that is not disclosed until trial (paragraph 16.6);
- information which the prosecutor does not intend to produce in evidence (paragraph 16.7);
- previous convictions of proposed witnesses (paragraphs 16.8 and 16.9);
- disclosure of any inducement or immunity given to a witness (paragraph 16.10);
- identity of informers (paragraphs 16.11 and 16.12);
- obligations or requests under Official Information Act 1982/Privacy Act 1993 (paragraphs 16.13 to 16.15). See also the document *Competing interests – Criminal Disclosure Act and Privacy* which provides practical guidance for prosecutors, as well discussing a case which looked at balancing the competing interests in the two Acts;
- 'third party' disclosure (paragraphs 16.16 and 16.17); and
- contempt applications (paragraph 16.18).



## PART 8 WITNESSES AND VICTIMS

### 8.1 Roles and responsibilities

The OIC will be the primary point of contact for witnesses and ensure that witnesses are kept informed and treated with courtesy throughout the prosecution process.

The OIC shall also be responsible for ensuring the witness' manager is notified of a request to give evidence (if the witness is an MPI staff member) and that the witness is informed of any applicable allowances.

Responsibility for preparing and serving the witness summons, and organising payment of witness expenses, lies with the OIC. See the *MPI Prosecution Policy* for more on witnesses (section 7).

### 8.2 Code of Conduct for Expert Witnesses

All expert witnesses to give evidence in MPI prosecutions must be provided with a copy of the *Code of Conduct for Expert Witnesses*, including any MPI employees who act as expert witnesses in any prosecution. Those employees must comply with the required standards of conduct applicable to expert witnesses, including the Code of Conduct for Expert Witnesses.

The Prosecutor must ensure a witness understands their obligations as an expert witness. It is good practice for the OIC to ensure written acknowledgement is obtained from the expert witness confirming they have been provided with the Code and agree to adhere to it. The document *The Role of the Expert Witness* prepared by Crown Law provides assistance.

### 8.3 Victims

It is rare that an MPI prosecution will involve identifiable "victims" as defined by the Victims' Rights Act 2002. However, prosecutors should always be alert to the possibility of there being a "victim" in any prosecution.

The definition of 'victim' in the Victims' Rights Act 2002 is set out in s 4 and is extensive.

Examples of cases that might include "victims" include:

- a person injured by consuming food or drink
- an officer who has been threatened or assaulted
- the owner of land, or a forest, whose property is stolen
- the owner of a farm whose stock are ill-treated by a third party and require veterinary treatment.

MPI will ensure that victims of crime are treated at all times with courtesy and compassion and with respect for their dignity and privacy.

The Victims' Rights Act requires that victims are informed as to proceedings, including investigation progress, and the laying of charges, including "reasons for not laying charges", and all changes (see s 12). The OIC will be responsible for keeping a victim informed.

The Prosecutor shall prepare any victim impact statements.

MPI will comply with the Crown Law protocol [Victims of Crime – Guidance for Prosecutors](#), the [Victims Code](#) and the Victims' Rights Act 2002.

See the *SG Guidelines* for further guidance in relation to victims (section 29).



## 8.4 Others disadvantaged by an offence

The Victims' Rights Act also enables the prosecutor to treat someone else outside of this definition as a "victim" where they were disadvantaged by an offence – see s20.

This is an important provision which enables such a person to provide a victim impact statement as part of the sentencing process, and triggers sections 17 to 19, and 21 to 27 of the Victims' Rights Act. The prosecutor may do so if the statutory criteria are met, and it is considered appropriate to do so. The sections may be applied to a person:

- a. who was disadvantaged by an offence; and
- b. from whom information on the effects of the offence has been, or could be, ascertained by or on behalf of the prosecutor, and
- c. who is not a victim of the offence, a person accused of the offence, or the offender".

It is important that these decisions are made consistently and transparently across prosecutions.

Prosecutors should actively consider whether s20 is available. This provision has been used to provide impact statements from iwi and affected industry in appropriate cases. Note this provision does not extend to the restorative justice process.

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## **PART 9 SENTENCING**

### **9.1 Prosecutors, sentencing, and associated orders post-conviction**

The *SG Guidelines* set out expectations as to how Prosecutors should approach sentencing or sentence indications. Refer to 21 of the *SG Guidelines*.

This includes:

- drawing the attention of the Court to proven or accepted facts
- assisting the Court by providing any applicable principles including guideline judgments
- all proven aggravating factors including the convicted person's criminal record (if any)
- the impact on any victims of the offending, and
- the Prosecutors view as to the appropriate sentence range or tariff.

Prosecutors should take into account any relevant Compliance sector strategies, policies and our statutory objectives in considering and adopting the sentencing approach, including as to disqualifications. In significant or novel prosecutions, sentencing approach and submissions should be subject to senior peer review. Except in the most routine cases, it is expected that sentencing approach will have been discussed with the OIC.

Prosecutors should have a clear idea of the reasonable range within which the sentence might fall, both so as to fulfil their obligations as above, but also so a potentially manifestly inadequate decision can be readily identified and prompt decisions can be made as to whether or not to seek to appeal.

Sentencing submissions must be fair, but must also set out clearly what starting point MPI considers appropriate, what mitigating and aggravating factors the court should consider, and what ultimate penalty MPI considers should be imposed. The submissions should also assist the court with a clear statement of MPI's position on other orders that the court might make, e.g. disqualification from being in charge of animals.

Prosecutors must be familiar with the Sentencing Act 2011, and other relevant requirements such as Part 5A of the Criminal Procedure Rules 2012, and other legislation as appropriate from time to time (such as those that govern forfeiture or disqualification).

Note: Guidance on seizure and forfeiture will be located in a separate Policy at a later stage.

### **9.2 Restorative justice**

Restorative justice is an important component of the sentencing process in appropriate cases,

Under s24A of the Sentencing Act 2011, where there is a "victim" to offending the Court must adjourn proceedings to enable enquiries to be made as to whether a restorative justice process is appropriate. Proceedings may also be adjourned under s 25 for such a process to take place. Prosecutors can be expected to be the contact at the outset, and need to be prepared to address that question.



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Many MPI prosecutions will not obviously trigger this process, given the current applicable definition of a “victim”. Some District Court Judges have interpreted the definition of “victim” widely and have ordered a restorative justice conference. In such cases, MPI will generally comply with the court’s direction instead of considering an appeal against it, but the prosecutor should consult their Prosecutions Team Leader about the appropriate course in each case.

While s 20 of the Victims’ Rights Act 2012 gives the prosecution the option to present statements by others disadvantaged by an offence, there is currently no equivalent in the restorative justice context. The current Crown Law “Victims of Crime – Guidance for Prosecutors” require prosecutors to be aware of the statutory requirements and to be able to assist victims who wish to participate in such processes to access them. However the prime contact should be the officer in charge.

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## **PART 10 APPEALS**

### **10.1 Appeals by the defendant**

Any MPI Prosecutor who conducted or instructed on a prosecution and receives notice of an appeal filed by a defendant shall immediately inform their Team Leader and the Manager Prosecutions.

The prosecutor should advise the OIC and the Communications team. Any media responses need to reflect the fact of an appeal, and that the matter remains before the Court.

For further guidance, refer to the *Prosecutor's Handbook - Appeals Stage chapter*.

### **10.2 Appeal by the Crown**

No appeal shall be commenced on behalf of MPI, whether by a MPI Prosecutor or by external Crown counsel, unless authorisation has been given in accordance with the *MPI Prosecution Policy* (section 10.2) if appropriate, and the prior written consent of the Solicitor General has been obtained.

### **10.3 Guidelines for obtaining consent to appeal from Solicitor-General**

MPI must obtain the consent of the Solicitor-General to appeal any decision (refer section 26 of the *SG Guidelines* and the *Cabinet Directions on the Conduct of Crown Legal Business 2012*). See also the *Prosecutors' Handbook – Appeals Stage chapter* for further guidance and “*How to request an appeal: a guide for prosecuting agencies*”.

There are two stages to this process. Given the short timeframes for filing appeals, it is imperative that requests are made as soon as possible, and are sent to the right place with the right information as soon as possible. In practice, this requires us to make a request to Crown Law Office within about five working days of the decision, so this prospect needs to be raised as soon as possible post decision, ideally within the first 48 hours. This puts a premium on the quality of the prosecutor's notes from the hearing, as transcripts will usually be unavailable. Speed, rather than accuracy, is more important at this stage given the statutory time frames for appeal and Crown Law's requirements.

First, the Director Compliance Services, Prosecution Decision-maker, the Prosecutor or a legal manager, may initiate a request for approval to appeal. When a request is made, the Prosecutor is responsible for forwarding urgently to the Manager Prosecutions the following material:<sup>16</sup>

- the decision to be appealed (or, in the case of an oral decision that has not been transcribed: the Prosecutor's full notes of the decision, to be followed by a typed transcript of the notes as soon as possible).
- a statement of the proposed ground(s) of appeal and details of the alleged errors in the judgment.
- any written submissions for MPI or the defendant.

<sup>16</sup> Note that the appeal period for lodging a sentence appeal from the District Court is 20 working days (s 248 CPA); and the Solicitor-General's consent must have been obtained within that time.



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- an outline of the importance to MPI of conducting an appeal and any risks in doing so.

The decision on whether to request the Solicitor-General's consent to appeal will be made by the Manager Prosecutions or the Chief Legal Adviser in consultation with appropriate Legal and Compliance Services staff, including the Director Compliance Services.

Secondly, where the decision is that an appeal is appropriate, the Manager Prosecutions will prepare the request and email it for approval to the Solicitor General, with the assistance of the Prosecutor who appeared on the prosecution.<sup>17</sup> The material to be sent to the Solicitor-General is set out in the *Prosecutors' Handbook – Appeals Stage chapter* at page 8, and in the supplementary guidance "How to request an appeal: A guide for prosecuting agencies".

### 10.4 Conduct of appeal

The Team Leader or Manager Prosecutions will instruct external counsel to conduct the appeal, and to file the notice of appeal if MPI is the appellant. Generally, counsel instructed will be the Crown Solicitor responsible for the area where the prosecution occurred.

A prosecution Team Leader will allocate responsibility for supporting external counsel to an MPI prosecutor, who should maintain good contact with counsel conducting the appeal and should assist or junior on the matter as appropriate. The MPI prosecutor is responsible for all of the usual MPI reporting throughout and at the conclusion of the appeal, including risk reporting. Appeals should generally be identified as "significant" on the fortnightly prosecutions report.

The supporting MPI Prosecutor should try to maximise MPI's timely input into the appeal process, which requires expectation setting at the outset. The supporting MPI Prosecutor should request counsel on the appeal to provide:

- a copy of the submissions for the opposing party as soon as possible after they are received; and
- a draft of the submissions for MPI sufficiently in advance of the time for filing submissions to allow any comments to be considered (preferably at least three days).

The supporting MPI Prosecutor is responsible for coordinating such MPI feedback on the submissions and the conduct of the appeal as required. The supporting MPI prosecutor will generally prepare a first draft of MPI's submissions for counsel.

### 10.5 Reporting of the appeal judgment

On receipt or delivery of the appeal judgment, counsel appearing on the appeal shall immediately forward a copy or note of any oral judgment to the MPI Prosecutor assisting (where it is external counsel appearing).

The MPI Prosecutor supporting must then update and provide a copy to the Manager Prosecutions, the OIC, the Prosecution Decision-maker and otherwise as appropriate, including the Communications team. The OIC will circulate the decision within Compliance Services.

<sup>17</sup> Email [criminal@crownlaw.govt.nz](mailto:criminal@crownlaw.govt.nz).

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The MPI Prosecutor will complete a report on the case in the [Ministry standard format](#) and enter it into the relevant MPI Compliance system within five days. The Prosecutor should also provide a copy to the Team Leader and to the Manager Prosecutions.

On rare occasions it may be that a further appeal may be contemplated. Public communications need to respect that prospect. In the event that a further appeal needs to be contemplated, it will be for the Crown Solicitor conducting the first appeal to request leave for any further appeal. The Crown Solicitor will also need to seek the consent of the Solicitor-General for the second appeal.

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## **PART 11 COSTS**

### **11.1 Costs against defence counsel**

Section 364 of the Criminal Procedure Act 2011 was introduced to ensure that both prosecutors and defence counsel abide by the requirements imposed by the Criminal Procedure Act 2011 and Criminal Disclosure Act 2008. Failures to do so, when significant and without reasonable excuse, can be punished by a costs order. This power is separate from the Costs in Criminal Cases Act regime.

Prosecutors should actively consider such applications against defence counsel in cases where there has been a significant failure, for example where substantial witness expenses such as airfares are needlessly incurred. Prosecutors should seek approval from their Team Leader before making such an application.

### **11.2 Costs of prosecution and associated expenses**

The Costs in Criminal Cases Act 1967 enables the Court to order just and reasonable costs towards the prosecution. There is authority (*Contour Roofing*, District Court) that this does not include “in house” counsel costs in the departmental context, given the limit to “barristers and solicitors” in the associated regulations.

As a consequence a number of major prosecuting agencies do not seek in-house legal costs. The current guidance from Crown Law Office is to that effect.

All prosecutors should carefully consider the jurisdiction for seeking costs and associated expenses in appropriate cases, as this may well vary depending on who the prosecution has been conducted by throughout. Further, different types of costs associated with a prosecution may still be sought depending on the charging legislation (for example s 173 of the Animal Welfare Act 1999 or s 270 of the Food Act 2014, both examples of provisions enabling orders to pay expenses), relating to vets and the testing/storing of food respectively. In addition, other costs such as vet costs, testing or forensic analysis costs, or expert report costs may be recoverable under the Costs in Criminal Cases Act 1967.

### **11.3 Costs against the prosecution**

Costs may be awarded against prosecuting agencies in certain circumstances under the Costs in Criminal Cases Act. This includes not only a case where a defendant is acquitted, but also where charges are dismissed and withdrawn.

In the usual course of events costs will be ordered against the Ministry of Justice but there is an ability for the Court to award costs directly against the prosecuting agency in the event of negligence or bad faith.

In the event a costs application is received, the fact of the application needs to be raised with the Manager Prosecutions, identified as “significant” for the purposes of reporting, and the application must be given full and proper attention. Counsel need to be prepared to defend the decision to prosecute, or to continue to prosecute and to address the matters identified as relevant to the courts consideration in section 5(2) of the Costs in Criminal Cases Act, namely:

- (a) Whether the prosecution acted in good faith in bringing and continuing the proceedings;



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- (b) Whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence;
- (c) Whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty;
- (d) Whether generally the investigation into the offence was conducted in a reasonable and proper manner;
- (e) Whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point;
- (f) Whether the information was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty;
- (g) Whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence.

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## **PART 12 MEDIA**

### **12.1 Media statements**

Public statements of any form concerning alleged offending, an investigation or prosecution must be made with particular care and in compliance with relevant guidelines.

In the prosecution context, the general expectation is that Compliance Services will be responsible for any public statements and prosecutors will not make any public comment (refer to section 11 of the *MPI Prosecution Policy*).

For example, prosecutors are not to provide information in response to 'in court' approaches by media attending any stage of a court proceeding, for comment or supply of information/material that is not already in the public arena. This includes but is not limited to distribution of the Summary of Facts.

In commenting in the media or using other channels, MPI must ensure not to make statements suggesting predetermination of the outcome of any investigation or tending to prejudice the right of a defendant (or defendants yet to have their cases resolved) to a fair trial.

If any public comment is to be made (whether by Compliance Services or prosecutors), the *Media Protocol for Prosecutors* should always be followed. See also the *SG Guidelines* section 30). Refer also to the *MPI Organisational Policy – Media Response Policy*.

Where a case is of significant public interest, the Director Compliance Services or the relevant Crown Solicitor may issue a statement giving broad reasons why a particular prosecution decision was made. The Director Compliance Services may also proactively announce that MPI has initiated an investigation or has laid charges. An example is an [announcement of a decision to prosecute over fishing-related albatross deaths](#).

Where media interest can be reasonably anticipated, the Prosecutor should ensure with the OIC that the Communications team is aware of the matter, and that any strategy is pre-agreed with Compliance Services and Communications, Engagement and Channels (contact Helene Ambler).

### **12.2 Media applications**

The Ministry of Justice has prepared guidelines for media in courts (see *In-Court Media Coverage Guidelines 2016*).

The guidelines set out principles that apply to the media, including filming exhibits, photography and recording evidence. The guidelines also set out how media applications are to be made, including that an application (except one relating to a first appearance in a criminal matter) should be lodged at least 10 working days before the trial is due to start (or if lodged within five working days, must include an explanation for the delay and why the application should still be granted).

If an application is filed, MPI can submit, in writing, whether the application is not opposed or whether it is opposed and why. In practice, MPI will usually take a neutral stance on media applications so long as suitable protection for witnesses will be provided.

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The Judge can either determine the application on the papers or set a hearing date. The matters the Judge may have regard to are set out in the *In-Court Media Coverage Guidelines 2016*.

Those Guidelines also provide for witness protection in some circumstances, whether as of right, or at the Judge's discretion. The latter will apply to "official witnesses", such as MPI employees or expert witnesses.

While these applications may be rare in MPI's context, when they do arise, prosecutors should be alert to the Media Guidelines, and in particular, to the guiding principles (including the desirability of open justice), and to the protections that may be available to witnesses.

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