

CROWN LAW

SOLICITOR-GENERAL'S GUIDELINES
FOR USE OF INMATE ADMISSIONS

As at 6 August 2021



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1. PURPOSE

- 1.1 These Guidelines have been written for prosecutors, but other participants in the justice system may find them useful.
- 1.2 The purpose of these Guidelines is to provide guidance to prosecutors in respect of prosecutions where there is evidence proposed to be used that is derived from an inmate admission or statement concerning another person's alleged offending (inmate admissions evidence).
- 1.3 These Guidelines should be read together with the *Solicitor-General's Prosecution Guidelines 2013 (Prosecution Guidelines)*, along with any other guidelines issued by the Solicitor-General specific to prosecutions. If there is any inconsistency between these Guidelines and the *Prosecution Guidelines*, these Guidelines should be preferred.

2. COMPLIANCE

- 2.1 It is expected all public prosecutions, whether conducted by Crown prosecutors, government agencies or (instructed) counsel, should approach inmate admissions evidence in accordance with these Guidelines.
- 2.2 In addition, all law practitioners conducting a private prosecution must continue to adhere to the Law Society's general rules of professional conduct. The Solicitor-General expects that such prosecutors should also consider and apply all relevant principles in these Guidelines.

3. INMATE ADMISSIONS EVIDENCE

Introduction

- 3.1 There is a risk of unreliability in respect of admissions evidence from prison inmates. Such evidence has been linked to determinations of miscarriage of justice and cases of wrongful conviction in a number of overseas jurisdictions and in New Zealand. The Supreme Court has also observed the need for guidance for prosecutors on the use of inmate admissions evidence (see *W* (SC38/2019) *v* *R*¹).
- 3.2 Some inmate witnesses have demonstrated remarkable ingenuity in obtaining what appears to be compelling information in order to support false evidence. At the same time, defendants can and do make incriminating statements to fellow inmates, and inmates can, like other witnesses, provide valuable and reliable evidence. Inmate witnesses' circumstances and motivations vary considerably.
- 3.3 The general scheme of the Evidence Act 2006 is that concerns about the reliability of evidence can be met by section 8 (which requires a case-by-case assessment of various factors (discussed in *W*)), the testing that occurs in the trial process itself, and the availability of a warning direction to the jury under section 122 concerning potential unreliability. Due to the particular risks associated with inmate admissions evidence, it is appropriate that the Crown takes an especially careful approach to the decision to call it.

¹ *W* (SC38/2019) *v* *R* [2020] NZSC 93, [2020] 1 NZLR 382.

Application

- 3.4 These Guidelines apply only where an inmate (who is not a co-defendant, accomplice, undercover operative or confidential informant) has provided evidence of incriminating statements made to them by a defendant that:
- 3.4.1 were made while they were imprisoned together; and
 - 3.4.2 relate to offences occurring outside the prison or custodial institution.

Overall public interest assessment – guiding principles

- 3.5 Prosecutors must carefully review proposed inmate admissions evidence to ensure it is in the public interest to call it on behalf of the Crown, having regard to the known dangers associated with such evidence.
- 3.6 Prosecutors should only adduce inmate admissions evidence if they are satisfied it is more likely than not reliable.
- 3.7 The assessment whether to call the evidence must include consideration of factors that might reasonably affect the reliability of the evidence, while also respecting the role of the fact finder at the trial.
- 3.8 Inmate admissions evidence is likely to be appropriate only in serious cases.
- 3.9 It is unlikely to be in the public interest to prosecute based only on the uncorroborated evidence of an inmate admissions witness.

Procedure

- 3.10 In every case, the decision whether or not to call an inmate admissions witness should be made by the Crown Solicitor.
- 3.11 The decision to call inmate admissions evidence requires an appropriate degree of inquiry into the reliability of the evidence, including whether the types of information and factors outlined below are engaged. In order for the Crown Solicitor to satisfy herself or himself of the reliability of the inmate admissions evidence, the New Zealand Police and/or relevant government agency may be required to undertake additional investigatory or preparatory work to seek material that goes beyond what is usually available on an investigation file. Whether and to what extent further material is required is a judgment call for the Crown Solicitor. For instance, there is no requirement to seek information from non-parties where there is no indication they hold relevant material.
- 3.12 There is no obligation to investigate the proposed inmate admissions evidence further, if, based on the material initially provided by the government agency investigator, the Crown Solicitor decides it will not be necessary to call an inmate admissions witness.
- 3.13 In terms of the information made available, the Crown Solicitor should ensure it includes details (to the extent available) regarding the inmate admissions witness's previous convictions; current sentences imposed and length of term remaining; how many times they have offered/disclosed/given evidence of this type; how their evidence has been treated and the reason for this treatment; significance (if any) of any such evidence used to the matter(s) then at issue; and any benefit or other preference received by them.

- 3.14 In situations where further or other information comes to light that affects the original view of the inmate admissions evidence (particularly as to its reliability), the Crown Solicitor should reassess their original decision regarding whether or not to call that witness.
- 3.15 Information obtained that relates to the reliability of the inmate admissions evidence is disclosable, subject to applicable sections of relevant legislation, including section 16 of the Criminal Disclosure Act 2008.
- 3.16 Where the decision is made to call inmate admissions evidence the Crown Solicitor should record their decision and the reasons for it (including any reassessment).

Factors to consider

- 3.17 The following non-exhaustive factors should be taken into account where applicable:

3.17.1 *Motive*

- Whether the information was solicited from, or volunteered by, the witness.
- Any offers or promises made to the witness.
- Other inducements (such as sentence reduction, withdrawal of charges, plea arrangement, bail, changes to conditions of imprisonment, safety measures).
- Any prior interactions between the witness and investigating officers.
- The nature of the witness's interview in which the inmate admission was recounted (for example, audio/visual recording, written statement) (acknowledging that where possible, disclosures of such evidence should be recorded).
- Any requests made by the witness that may relate to their willingness to give evidence or the circumstances of their disclosure of an admission (whether or not agreed to).
- The witness's explanation for coming forward.
- Other motivations (for instance, grudge, gang allegiance).
- Whether any ulterior motive or inducement is likely to be still operative at the time of giving evidence.
- Any threats against, or safety concerns of or for, the witness.

3.17.2 *Circumstances of alleged interactions*

- The plausibility of the witness's account of the alleged interaction with the inmate.
- Any records related to the alleged interaction, and the contemporaneity of these.
- Whether the alleged interaction is supported by Department of Corrections records or other inmates.
- Any delay before coming forward and the reasons for it.

3.17.3 ***Confirmatory evidence***

- The level of detail and specificity of the evidence.
- Consistency of the evidence with known facts and with other statements made by the witness.
- Whether the witness's evidence led to the discovery of other evidence.
- Whether the witness's evidence contained information not in the public domain.

3.17.4 ***Opportunity to concoct***

- The witness's potential access to alternative sources of information. (For example: media reports/articles/editorials; disclosure documents; other witnesses/co-defendants/gang members; Police).
- The timing of the disclosure of the witness's evidence relative to media reports/articles/editorials.

3.17.5 ***Character and state of the witness***

- Conviction history, especially as to fraud, dishonesty, perjury and perverting the course of justice.
- Material from New Zealand Police databases, such as the National Intelligence Application (NIA).
- Whether the witness has given inmate admissions evidence in the past (including consulting any inmate witness register and other records maintained by New Zealand Police and other New Zealand government agencies in this regard).
- Where the witness has given inmate admissions evidence in the past, details should be obtained (to the extent available), and assessed for reliability – noting that any transcript or recording of the witness's evidence will likely be required.
- Any other issues or matters that may go to reliability, including court ordered assessment and treatment (by way of example).