

# Assessment of the Ministry for Primary Industries Prosecution Function



**Te Tari Ture  
o te Karauna**  
Crown Law

*Proactively released*

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Reviewer: Ian Murray, Barrister  
Date review finalised: June 2022

## INTRODUCTION

1. This assessment of the prosecution function within the Ministry for Primary Industries (MPI) was commissioned by the Public Prosecutions Unit within the Crown Law Office (PPU). A cross-section of interested parties were spoken to during the assessment process and this report summarises the findings of that process.
2. Our overall conclusion is that prosecutions by MPI are carried out well; there are clear guidelines as to how prosecution decisions are to be made; and, on the whole, principled prosecuting decisions are made consistently with the Solicitor-General's prosecution guidelines.

## SUMMARY OF RECOMMENDATIONS

3. We have reached the following conclusions:
  - 3.1 In our view, MPI prosecutes well. It has good procedures and systems in place. Managers are engaged with their teams, manage workloads, and provide satisfactory oversight and supervision. Prosecutions were conducted to a high standard whether handled by internal prosecutors or briefed out to external counsel.
  - 3.2 We were satisfied with the level of compliance with the Solicitor-General's Prosecution Guidelines and MPI's own internal prosecution policy and guidelines. We consider that prosecution decisions made by MPI follow a robust process and are well considered.
  - 3.3 While there have been some mostly historical difficulties with the quality of some investigations conducted by MPI, we accept that MPI are putting considerable effort into training and upskilling investigators. MPI appears committed to continuing this process.
  - 3.4 The geographical spread of the MPI prosecution teams could raise issues of independence, supervision and oversight as well as collegiality. There are other possible challenges to the independence of MPI prosecutors, principally that prosecutors are co-located with compliance staff; and that the Compliance Services and Legal Services directorates are both in the same branch, Compliance and Governance, and report to the same Deputy Director-General. We consider MPI to be adequately managing the issues this presents.
  - 3.5 MPI mostly manages disclosure issues satisfactorily, although an issue did arise in a major high-profile case in 2017 that had the potential to derail that prosecution. We concluded that lessons were learnt from what happened and also from other high-profile cases from other prosecuting agencies where disclosure difficulties arose.

- 3.6 There are some complex issues related to ancillary orders that are available with prosecutions under legislation overseen by MPI. MPI appear alive to the potential difficulties raised by these issues and committed to improving consistency as to how and when these orders are sought.
4. We make the following recommendations:
- 4.1 MPI should be alive to the potential adverse effects from operating the regional prosecutor's model and ensure that new staff are given adequate training on the importance of prosecutorial independence.
- 4.2 The Ministry should ensure there is ongoing monitoring of systems used for disclosure so that the systems remain fit for purpose, in particular with major prosecutions. With large scale cases, they will need to ensure disclosure procedures are adopted so that significant problems do not manifest.
- 4.3 There should be periodic reviews of their prosecution policies and guidelines to ensure they remain current. This was last done in 2016 and a further review is currently underway.
- 4.4 MPI should continue to carefully consider issues raised by ancillary orders (such as seizure and bonding back; forfeiture and redemption fees; and banning or prohibition). These orders raise complex issues which need careful management.

## BACKGROUND

5. In 2012 the PPU was set up within Crown Law to oversee public prosecutions. This was in part due to a Cabinet direction arising from the 2011 *Review of Public Prosecution Services*.<sup>1</sup> The purpose of the PPU is to assist the Solicitor-General in superintending the quality and conduct of public prosecutions across government.
6. Current oversight mechanisms utilised by the Solicitor-General include the Public Prosecutions Reporting Framework, launched in 2013, and prosecution function assessment, launched in 2018. As with several other prosecuting agencies, MPI has participated in the Public Prosecutions Reporting Framework since 2015, submitting both monthly data reports to the PPU and completing an annual questionnaire.
7. The objectives of this assessment are to:
- 7.1 improve Crown Law's understanding of the process for making decisions to prosecute within the MPI;
- 7.2 improve Crown Law's understanding of the way in which these prosecutions are conducted and reported;

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<sup>1</sup> John Spencer *Review of Public Prosecution Services* (Crown Law Office, September 2011).

- 7.3 identify areas for improving prosecution processes;
  - 7.4 ensure the rule of law is reflected in prosecution decisions and processes; and
  - 7.5 identify whether there are ways in which the Solicitor-General could offer support or guidance to MPI.
8. In undertaking this assessment, the following process was followed:
- 8.1 An initial information gathering process was conducted, designed to collate existing policies, procedures, legislation and guidelines, bolstered by scoping interviews with relevant parties.
  - 8.2 Following that, a range of people involved in MPI prosecutions were interviewed. Those interviewed included both internal and external parties in order to test our understanding of prosecution systems and gain valuable insight into how these prosecutions are conducted. The interviews were conducted in confidence and transcripts were not made. Interviewees were not directly quoted, and this report consolidates the views of the participants. A full list of contributors is provided in the Appendix. We wish to thank all participants for their time and assistance.
  - 8.3 Following completion of the interviews, the gathered information was assessed to identify common findings, including whether processes or policies could be improved (and if so, how), and whether the Solicitor-General could provide additional guidance or support to MPI.
  - 8.4 A draft report including recommendations was circulated to MPI for comment and its feedback incorporated.
  - 8.5 The report was finalised and sent to MPI and other key stakeholders.

## THE ORGANISATIONAL STRUCTURE OF MPI

9. MPI is a large government department. It oversees significant parts of our primary industries,<sup>2</sup> reporting to five Ministers across a range of portfolios.<sup>3</sup> The description of the organisational structure in MPI's 2019/2020 Annual Report is "MPI's structure consists of five business units and four functional areas to organise our people and manage resources effectively as we carry out our work programme."<sup>4</sup>

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<sup>2</sup> Biosecurity, Agricultural Compounds and Veterinary Medicines, Fisheries, Food Safety, Forestry, Climate Change and Animal Welfare.

<sup>3</sup> Minister of Agriculture, Minister for Biosecurity, Minister for Rural Communities (all held by Minister O'Connor), Minister of Forestry (Minister Nash), Minister of Oceans and Fisheries (Minister Parker), Associate Minister of Agriculture (Animal Welfare) (Minister Whaitiri) and Minister for Food Safety (Minister Whaitiri).

<sup>4</sup> Ministry for Primary Industries Manatū Ahu Matua Annual Report 2019/20 at page 4.

10. The Compliance Services directorate, which is primarily responsible for commencing MPI's prosecutions, falls within the Compliance and Governance branch. More serious and complex investigations are handled by the Compliance Investigations group within the Compliance Services directorate. This group has specialist investigators trained for this type of investigation. These investigators carry out investigations across the entire range of the subject matter of MPI prosecutions. The Director, Compliance Services is a Tier 3 Director sitting just below Deputy Director-General level.<sup>5</sup>
11. MPI has a significant enforcement footprint. It is difficult to put a precise number on the scale of investigations carried out by MPI. Before the Covid-19 pandemic, the majority of investigations were relatively minor and resulted in the issuing of infringement notices (mostly for biosecurity breaches at the border). While these "investigations" have dramatically reduced during the pandemic, it is anticipated that these will rebound to some degree once international travel resumes in 2022. Annual reporting by MPI since 2014 has estimated the numbers of investigations could have been in the range of 11,000 to 16,000 per year, including the issue of infringement notices at the border and similar "investigations".
12. MPI prosecutors are located within the Legal Services directorate, which now, following an organisational restructure, falls within the same branch as the Compliance Services directorate. MPI's internal prosecutors handle the majority of MPI prosecutions, with the residual 8 to 15 per cent of cases instructed to Crown Solicitors.<sup>6</sup> At present, MPI employs 15.2 full time equivalent (FTE) internal prosecutors.<sup>7</sup> Approximately 200 to 300 prosecutions are carried out every year.
13. In terms of hierarchy, MPI's Chief Legal Adviser/Director Legal Services (Chief Legal Adviser)<sup>8</sup> is responsible for the prosecution team and is a Tier 3 director. He sits immediately below the Deputy Director-General, Compliance and Governance.<sup>9</sup> The next leadership level below the Chief Legal Adviser is the Manager Prosecutions and Support.<sup>10</sup>
14. The prosecution team operates under a regional model which, at present, has prosecutors based in 10 MPI regional offices throughout New Zealand providing legal and prosecution advice to all 16 regions. The frontline prosecutors are then divided into two teams, each led by a team leader: one leading the northern team; the other the central and southern team.

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<sup>5</sup> Gary Orr is the current Director Compliance Services.

<sup>6</sup> Taken from MPI's response to the PPU's Annual Questionnaire for Prosecuting Agencies between 2014 to 2018.

<sup>7</sup> This figure includes the two prosecution team leaders, who conduct prosecutions, but does not include the Manager Prosecutions and Support or a Principal Legal Adviser who also spends a portion of her time on prosecution-related issues.

<sup>8</sup> Peter McCarthy is the current Chief Legal Adviser.

<sup>9</sup> Andrew McConnell is the Deputy Director-General, Compliance and Governance.

<sup>10</sup> Rebecca Easterbrook is the Manager Prosecutions and Support.

15. At present, the northern legal team has prosecutors in Whangarei, Auckland, Hamilton and Tauranga, with the team leader based in Hamilton.<sup>11</sup> The central and southern legal team has prosecutors in Napier, Petone, Nelson, Christchurch and Dunedin, with the team leader based in Dunedin.<sup>12</sup> Housed within offices in those regions are staff from various MPI business units and operational areas. Also, staff from Te Uru Rakau, Policy and Trade, Compliance and Governance, Biosecurity New Zealand, New Zealand Food Safety and Fisheries New Zealand are all co-located in the same office. The staff from these business groups work independently but enjoy the collegiality of working in the same office.
16. Despite cohabitating with the Compliance teams, the prosecutors operate independently. This operating model is intended to provide members of the Compliance teams easy access to lawyers who are experts in MPI's legislation. It also means there are prosecutors close to most of the courts, avoiding the need for prosecutors to travel to satellite courts from one central location or instruct the local Crown Solicitor with the additional expense and inconvenience.
17. Prosecutors play an important function in risk management and quality control. As well as providing advice and representation on prosecution files, prosecutors also offer a range of non-file related advice. This includes providing legislation-related advice, delivering training to compliance officers, giving advice in relation to issues such as search powers, assisting non-prosecutor lawyers with advice on enforcement provisions as legislation is drafted, helping develop prosecution information management systems, carrying out analysis of prosecution outcomes, and assisting with compliance enforcement strategies.
18. Work is shared within each regional team and across the wider team by utilising the whole cohort of prosecutors to ensure that work is evenly spread. Because of the geographical separation of the teams, by necessity, much of the communication is conducted by email or online.

## **MPI PROSECUTION DECISION MAKING PROCESSES**

19. In addition to the Solicitor-General's Prosecution Guidelines, MPI has implemented internal guidelines that address how prosecutors should manage the prosecution process. The MPI Prosecution Policy set out high level guidance on a number of aspects of the prosecution process and the Prosecution Procedures and Guidelines, sets out more detailed guidance on the prosecution decision process in a similar way to the Solicitor-General's Prosecution Guidelines. The Prosecution Procedures and Guidelines also provides for how disclosure should be carried out.

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<sup>11</sup> Currently Kevin Herlihy.

<sup>12</sup> Currently Lisa Brown.

20. The types of investigation conducted by MPI fall broadly into three categories depending largely on the seriousness of the conduct: infringement offences, simple investigations, and complex investigations.
21. Historically infringement offences comprise the majority of investigations carried out by MPI. Most of these originate from frontline biosecurity staff who issue infringement offences at the border for low level breaches of the biosecurity rules. These are ordinarily cursory investigations and do not follow the usual process for making prosecution decisions. MPI prosecutors will only become involved in these cases if the infringement notice is defended.
22. In contrast, MPI prosecutors support decisions on simple and complex investigations. While there is some variance between the different compliance teams, criminal investigations follow broadly the same process.<sup>13</sup>
23. Where an offence is suspected, the case is referred to the relevant compliance group for investigation.<sup>14</sup> Generally, more serious, or complex cases will be investigated by specialist investigators within the dedicated Compliance Investigations group, while less serious or complicated cases are investigated by frontline staff.<sup>15</sup>
24. Next, a frontline officer or investigator is placed in charge of the case and will carry out the necessary enquiries. Once the investigation is complete, they prepare an investigation report and refer the file to their manager. The compliance or investigations manager can decide to take various alternatives to prosecution options.
25. Like all regulators, MPI has a range of regulatory responses available dictated at least to some degree by the statutory objectives and the branches' enforcement priorities. Investigation outcomes may vary under different statutory regimes, but include:
  - a) Taking no action (such as when the evidential test is not met).
  - b) Providing education (in circumstances when no offence has been disclosed but education is still an appropriate response).
  - c) Taking administrative or compliance action under the relevant legislation breached (for example, withdrawal/suspension/revocation of licence or

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<sup>13</sup> MPI prosecutors generally have less involvement with decisions on recreational fishing investigations, where the charges will generally allege taking more than three times the allowed daily bag limit and/or taking undersized fish. In those cases, the prosecutor will approve the proposed charges before the prosecution is commenced but will not provide a written file review.

<sup>14</sup> Unless it is dealt with by education, warning, or the issuing of an infringement offence.

<sup>15</sup> "Frontline staff" refers to MPI's compliance officers outside Compliance Investigations. The Compliance Services directorate includes a Fisheries Compliance group; an Animal Welfare Compliance group (which also addresses offending against the National Animal Identification and Tracing Act 2012); and a Compliance Investigations group to handle more complex investigations. The Compliance Investigations group also undertakes any investigations under biosecurity or forestry legislation that may result in a prosecution. Food Compliance is in the Compliance and Response directorate in MPI's branch called New Zealand Food Safety. Food Compliance investigates simple offending and refers more complex investigations to Compliance Investigations.

privilege, issuance of compliance notice, deemed value invoice issued). Specific legal advice is sought before acting or recommending such action, and any action of this kind apart from a compliance notice/direction by an inspector is taken by appropriately delegated staff outside the compliance function.

- d) Issuing a warning (when a prosecution is not in the public interest but there is sufficient evidence of offending).
  - e) Issuing an infringement notice.
  - f) Pursuing a pecuniary penalty in the High Court (not available under all Acts MPI administers). MPI is planning to develop guidelines for pecuniary penalty proceedings and specific legal advice is required before this can be pursued.
  - g) Considering forfeiture action under the Criminal Proceeds (Recovery) Act 2009 or civil action (which does not require conviction).
  - h) Prosecuting the offender.<sup>16</sup>
26. If the case does not proceed to prosecution, this is noted on the file before it is closed.
27. Where prosecution is recommended, the compliance or investigations manager refers it to the prosecution team and the file is forwarded to a regional prosecutor or a prosecution team leader for review. The prosecutor then considers the evidence to assess whether the two stages of the test for prosecution are met: first, whether there is evidential sufficiency to provide reasonable prospects of conviction; and secondly, whether it is in the public interest to commence the prosecution.<sup>17</sup> The prosecutor can also recommend that further enquiries be made, or additional evidence obtained, before the prosecution is commenced. This is recorded on the file.
28. Once the prosecution review is completed, the prosecutor provides their advice to the designated decision maker. There is an expectation that this legal review will be completed within a six-week timeframe.<sup>18</sup>
29. The prosecution decision is ordinarily made by a Tier 5 Manager (Regional Manager) within the particular compliance or investigation group where the prosecution originated. That decision is guided by the opinion of the prosecutor, but ultimately the decision is made independently by the manager. If the prosecutor and the manager agree (as occurs in the vast majority of cases), then the case proceeds.

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<sup>16</sup> MPI presently does not operate a diversion scheme in the same way as other public prosecuting agencies.

<sup>17</sup> Prosecution decisions are governed by MPI's internal prosecution policy and guidelines as well as the Solicitor-General's Prosecution Guidelines.

<sup>18</sup> At present the pressure on the prosecutions team of court fixtures, other file reviews and providing other advice means that this timeframe may be exceeded. MPI is managing these pressures as much as possible by briefing Crown Solicitors' offices to undertake some file reviews and prosecutions that would generally be done in-house but is finding the capacity of the Crown Solicitor network is also stretched so file reviews may take some time.

30. If the manager disagrees with the prosecutor's advice, then the decision is escalated. The prosecution decision-making process allows level 4 managers (Compliance managers reporting to the Director, Compliance Services, and the Prosecutions & Support Manager in Legal Services) to discuss these disputed decisions.<sup>19</sup> The decision remains one for the Compliance manager to make but if there is still disagreement, the Director of Compliance Services and Chief Legal Adviser will make the decision. This is also the case with potentially sensitive prosecutions. If the Director Compliance Services and Chief Legal Adviser do not agree, then the case is referred to the local Crown Solicitor and the final decision lies with the Director of Compliance Services after considering the legal advice from the relevant Crown Solicitor. As a matter of policy, the Crown Solicitor's advice will be followed unless there are exceptional reasons to depart from that advice. To comply with policy, the decision and reasons for it need to be recorded in writing for purposes of transparency.
31. If the case proceeds to prosecution, the file will be allocated to a prosecutor to take forward. This may not necessarily be the prosecutor who provided the legal advice for the prosecution decision maker.

## ANALYSIS

32. This assessment interviewed a wide range of people who provide a range of different perspectives on all aspects of MPI prosecutions. An impressionistic approach has therefore been taken and the views of the interviewees have been distilled into a series of themes that are included in the report.
33. The consensus of the interviewees was that MPI carries out its prosecutions competently and professionally. MPI's in-house prosecutors are considered skilled prosecutors who routinely prosecute well and make good quality, strategic decisions in often difficult cases. MPI prosecutors have a reputation for being fair and pragmatic.
34. Our view is that the current processes used by MPI are thorough and work efficiently. Management staff are provided with high quality data to enable them to monitor individual staff's workloads and how quickly and efficiently work is being carried out. Processes like these are necessary when a prosecution team operates on a regional model like MPI does.
35. MPI also has good systems in place to monitor performance measures and to ensure compliance with internal and external timeframes. In our opinion, both prosecution team leaders were engaged with their team and had good oversight of how the teams were performing and how the work was being carried out.
36. This assessment highlighted the wide range of work undertaken by MPI prosecutors and the significant gulf in seriousness and complexity. The work ranges from lower-level cases such as defended infringement offences and biosecurity breaches at the border through to complex, long-running trials. This breadth of the prosecution work

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<sup>19</sup> The prosecution decision-makers include equivalent positions in Food Compliance and Response.

can give rise to pressures in the MPI prosecution team and difficulties in properly allocating resources. For example, large prosecutions are highly resource-intensive and complex, putting stress on the prosecution team. Such substantial cases can have a detrimental effect on the overall operation of the team. While such cases can be difficult to predict and manage, MPI appears to have developed systems to identify and designate significant prosecutions, and then to manage any subsequent resourcing issues (often by briefing the prosecution out to the local Crown Solicitor).

37. Related to this is the relatively high proportion of senior prosecutors employed by MPI. Ordinarily, prosecuting agencies have a range of staff at different levels of seniority to be able to assign work to staff members at the appropriate level for the difficulty and complexity of the work.
38. However, in our view, there are good reasons for MPI's prosecution teams to be weighted towards the senior level. The type of work carried out by MPI prosecutors, the diverse subject matter of the different legislation they are expected to be familiar with and the geographical spread of the prosecutors means that not all prosecutors have direct supervision by a more senior colleague in the same office. Against that backdrop, it makes sense for a larger number of prosecutors to be relatively senior as this best allows them to handle the difficult and challenging work they must undertake.
39. The application of various prosecution guidelines to lower-level breaches also arose as an issue in the assessment process. For example, in the fisheries area, the lowest level breach of amateur fisheries regulations can be dealt with by infringement notices. However, when the offending reaches a certain threshold of seriousness,<sup>20</sup> the person is prosecuted in Court. At present, a more streamlined prosecution decision-making process applies to this low-level offending. For example, a written prosecution review is not provided prior to the prosecution decision being made for offending alleging excess and/or undersize catch although prosecutors still review the charges prior to filing.<sup>21</sup> And they remain available for advice should an investigator or decision-maker have questions about a specific file. However, we consider that it still may be beneficial for a prosecutor to consider these prosecution files and any legal consequence that could potentially flow from the prosecution decision, even for relatively low-level offending. MPI are best placed to work out how to achieve that.
40. On the whole, we were impressed by how the MPI prosecutions team operated and the quality of the work that it undertook. There were some topics that interviewees mentioned during the assessment which we considered warranted further consideration. These further matters for discussion are:

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<sup>20</sup> In circumstances when the amount taken is over three times the daily catch limit.

<sup>21</sup> In these cases, the file provided to the prosecutor is prepared according to the file standard contained in MPI's Prosecution File Flowchart and would contain notebook entries and job sheets in the first instance, rather than witness statements, because these cases usually involve internal compliance staff being eyewitnesses. Before the case goes to Court the summary of facts will be on file along with charging documents, summonses plus evidence of service, interviews, photographs and relevant documentary exhibits, disclosure index and any unused material.

- (a) compliance with the Solicitor-General's Prosecution Guidelines and MPI's own internal prosecution policy and guidelines;
- (b) threats to independence and maintaining supervision and oversight;
- (c) how MPI manages disclosure; and
- (d) ancillary orders under legislation overseen by MPI.

41. Each matter is now considered in turn.

#### **PROCESS FOR MAKING PROSECUTION DECISIONS**

42. Like all prosecuting agencies, MPI's prosecution decisions are governed by the Solicitor-General's Prosecution Guidelines.<sup>22</sup> Complementing those guidelines are internal policies and guidelines which provide detailed rules about, amongst other things, how prosecution decisions should be made within MPI.
43. As discussed above, the process begins when an MPI compliance team commences an investigation led by an investigator or officer. Once the investigator or officer has completed the investigation, the file is given to their manager who if happy to proceed will then seek a prosecution review from the prosecutor.<sup>23</sup> The prosecutor considers the two-step test in the Solicitor-General's Prosecution Guidelines and makes a recommendation back to the same manager who will ultimately make the decision whether to commence prosecution.<sup>24</sup>
44. Having spoken to both prosecutors and prosecution decision makers, we are satisfied that the prosecution process is well understood by staff involved and is consistently applied. The process appears to be robustly carried out and both prosecutors and decision makers take their duties seriously. We are of the view that the process in which prosecution decisions are made by MPI is good and high-quality decisions are made. We received no negative feedback about this aspect of the process either internally or externally. It appeared to us that the prosecution decision process within the MPI prosecution framework is working well.
45. We are of the view that prosecutors are providing valuable peer-review and quality control oversight of prosecutions and ensure that MPI and wider Crown legal risks are well monitored and managed.
46. In our view, the prosecution policy provides appropriate guidance to prosecution decision makers and sets out orthodox processes for those involved in the process to follow. We also consider that these current guidelines provide better and more clear-cut guidance about how a prosecution is to be commenced and who should ultimately

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<sup>22</sup> Crown Law Office *Solicitor-General's Prosecution Guidelines* (1 July 2013).

<sup>23</sup> With the exception of straightforward recreational fishing investigations, as noted above.

<sup>24</sup> See discussion at [19] to [31] above.

make that decision, than the ones previously used by MPI. The current guidelines are well designed to provide a clear and certain process for commencing prosecutions.

47. As already noted, the MPI prosecution team is spread out over the entire country co-located in regional offices with staff from compliance teams. This type of arrangement can bring challenges and can require careful management. First, to ensure that prosecutors remain independent from the clients they are advising, especially as they are within the same branch of the organisation and fall under the same Deputy Director-General. Second, to ensure that geographical separation does not compromise the ability of the prosecution team to effectively do its business. For these reasons we concluded that it was important to carefully consider the impact of this arrangement.

### ***Oversight and Collegiality***

48. MPI essentially has two options for managing its prosecution team. Either establishing a team or teams that cover large parts of the country from a central location or establishing a regional set up where lawyers are spread around the regions that, in turn, cover smaller areas of territory.
49. There are advantages and disadvantages with both options. Centralisation makes supervision and oversight easier and enhances collegiality within the prosecutions team. However, lawyers must travel to cover the wider spread of courts or alternatively instruct local Crown Solicitors more often. There can also be a disconnect with the clients that need to be advised. In contrast, regionalisation enhances client relations and makes servicing courts easier, but makes supervision and oversight harder and can affect collegiality.
50. MPI has established a regional set up. A number of the offices have only one or two solicitors. As a result, it is important that those solicitors have relatively unfettered access to the wider team. We did not get the sense that maintaining collegiality and proper oversight was a significant problem for MPI. Our clear impression was that the regional team structure, which involved a wide geographical spread, operated well.
51. It appeared to us that the teams, while geographically spread out, maintained good collegiality, and had effective mechanisms for sharing work. It appeared that the team leaders had good awareness of workflow and maintained a good oversight of what was happening within their teams and who was doing what work.
52. Prior to the Covid-19 pandemic, there were opportunities on at least a twice-yearly basis for prosecutors to meet up face-to-face. In between those meetings, other forms of communication were used to maintain connections. Since Covid-19 Legal Services have been unable to convene face to face meetings for the whole directorate, however about six-monthly they have convened directorate meetings for the entire legal team – over skype for those outside Wellington with the Wellington-based teams meeting in-person. They have also conducted fortnightly Prosecution Practice Group meetings for the prosecutors, and brief virtual “stand up” meetings twice weekly throughout the pandemic lockdown and beyond to ensure the entire directorate

remains connected. The Chief Legal Adviser also sends out weekly emails about who's doing what and prosecution results to help keep the legal team informed.

53. Team leaders attend regular meetings with the senior management in Wellington over audio visual links (weekly with the Legal Leadership Team, and six-weekly with the Compliance Services Leadership Team). The impression we had was that this was an effective way to ensure consistency, both between the teams and throughout the whole of the prosecution team.
54. As part of this assessment, MPI provided us with a large volume of internal documentation showing the processes used to monitor and assess how the prosecution team is operating both on a team and an individual level, as well as how their work is being carried out.<sup>25</sup> MPI keep an issues register so that anyone can identify an issue of general importance and highlight it for the entire team (with a view to agreeing legal positions and processes to address the issue and/or seeking legislative amendment when possible). A comprehensive schedule is kept with all current prosecutions listed and significant information about each case recorded, including next hearing dates. Prosecutions with certain features are designated "significant prosecutions" and highlighted in the schedule, for awareness of managers in Legal Services and Compliance Services, to alert staff who deal with media issues, and to identify matters for a regular discussion with the Deputy Director-General Compliance and Governance on progress on significant investigations and prosecutions or investigations that have the potential to impact upon New Zealand's image in foreign markets. "Significant prosecutions" are matters that:
  - 54.1 raise legal issues that will likely have impacts beyond the particular prosecution;
  - 54.2 are large and/or technically complex;
  - 54.3 will involve significant internal/Crown/court resources and costs;
  - 54.4 involve or touch on international fisheries prosecutions;
  - 54.5 involve a major commercial enterprise;
  - 54.6 involve or require a well-resourced defence team; and/or
  - 54.7 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).

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<sup>25</sup> A good example of this is a file with an interactive flowsheet following the life of the prosecution with links to key documents and guidance for both prosecutors and compliance staff at each stage of the criminal prosecution process. It is a very valuable resource and provides high quality assistance to staff involved in the prosecution decision process allowing them to make better informed decisions.

55. We consider that the processes adopted by MPI for oversight of prosecutors and its casework provide an excellent platform for keeping track of the work being done by MPI prosecutors.

### ***Maintaining independence***

56. The Solicitor-General's Prosecution Guidelines highlight the importance of prosecutorial independence.<sup>26</sup>

4.1 The universally central tenet of a prosecution system under the rule of law in a democratic society is the independence of the prosecutor from persons or agencies that are not properly part of the prosecution decision-making process.

4.2 In practice in New Zealand, the independence of the prosecutor refers to freedom from undue or improper pressure from any source, political or otherwise. All government agencies should ensure the necessary processes are in place to protect the independence of the initial prosecution decision.

57. Many of the prosecutors are based in MPI offices alongside the clients they assist. While we acknowledge that this arrangement of co-location could infringe on the independence of a prosecutor's advice to the decision maker, we are satisfied that there are adequate safeguards to ensure that the prosecutors, while working with compliance staff, nevertheless maintain their independence<sup>27</sup>. Importantly, the arrangement is designed to maintain the independence of the prosecutors so that they can continue to provide independent prosecution advice to investigators and decision makers. Further, co-location is an effective way for prosecutors to develop and maintain connection with the compliance staff — compliance staff can get informal legal advice easily which benefits the wider organisation.<sup>28</sup>

58. During the review, there was a restructuring of MPI's organisational structure. The Legal Services directorate was originally within a separate branch to the Compliance teams, but during the restructure Compliance Services was moved into the same branch. As a result, Legal Services and Compliance Services now share the same Deputy Director-General. The original separation was valuable for maintaining independence. While we did not find any evidence that the change was causing problems, it does create the potential for the independence of the prosecutors to be eroded. Ultimately, we concluded that the risk to independence was low. It is significant that Deputy Director-General, Compliance and Governance is not a prosecution decision maker so that the risk of interference and any undermining of the prosecutor's independence is significantly reduced.

59. Further we are satisfied that, despite MPI's prosecutors being co-located with the compliance teams that they service, the independence of their role and that of the

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<sup>26</sup> Solicitor-General's Prosecution Guidelines at paras 4.1 and 4.2.

<sup>27</sup> The factors that help maintain independence include peer reviews of important decisions, sharing of work amongst the prosecutors so that local prosecutors do not always deal with local cases and the level of supervision over prosecutions from management.

<sup>28</sup> A practical issue for MPI's prosecutors is the level of demand for their advice. They endeavour to reduce the number of ad hoc requests for advice by participating in training of compliance officers and by holding an online fortnightly seminar/Q&A session (attended by about 100 compliance officers each time).

prosecution decision maker has been maintained along with the positive benefit of compliance teams having easy access to high quality legal staff.

## DISCLOSURE

60. As has been highlighted by recent high-profile cases, meeting disclosure expectations remains a major risk for prosecuting agencies.<sup>29</sup> As a result, the way MPI manages issues relating to disclosure was a topic that we considered closely in this assessment.
61. MPI's Prosecution Procedures and Guidelines set out the process for managing disclosure. It provides that "primary responsibility for preparing disclosure and securing relevant information lies with the officer in charge of the file" but "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." Further, "it is the responsibility of the Prosecutor to ensure MPI complies with all disclosure obligations. The OIC is to provide all necessary assistance" and "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". There is also an escalation policy if agreement cannot be reached.<sup>30</sup>
62. On the whole, we consider that MPI satisfactorily manages disclosure issues. Prosecutors, managers, and investigators knew their respective roles and by and large the proper process appeared to be followed and working well.
63. We became aware that one prosecution had a significant disclosure issue that arose during the course of a lengthy judge-alone trial.<sup>31</sup> This was similar to what occurred in the *Bublitz* proceeding where documents had not been dealt with in accordance with what had been agreed between the parties. As a result, the prosecution was almost derailed when the defendant applied (unsuccessfully) to have the case aborted.
64. In the end, the issue was resolved satisfactorily so that the prosecution continued to the point where a plea arrangement was made, the defendants entered guilty pleas and were sentenced. But the disclosure difficulties were a salient reminder of the danger of disclosure in complicated cases where the prosecuting agency has inadequate systems to ensure disclosure is properly carried out.
65. Ultimately, we saw this issue as arising in an unusual and out of the ordinary case with a substantial volume of documentation. In those circumstances mistakes were made but it appeared to us that lessons had been learnt from the difficulties with disclosure so that the issue is unlikely to manifest itself in the future. That said, MPI needs to ensure that major prosecution disclosure is handled thoroughly and completely so

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<sup>29</sup> See for example, *R v Lyttle* [2018] NZHC 2689 and *Bublitz v R* [2019] NZSC 139.

<sup>30</sup> MPI Prosecution Procedures and Guidelines at 7.2.

<sup>31</sup> *Ministry for Primary Industries v Hawkes Bay Seafoods Ltd* [2019] NZDC 2599.

that future prosecutions are not imperilled. Care needs to be exercised so that this issue does not reoccur.

## **ANCILLARY ORDERS – FORFEITURE AND PROHIBITION**

66. Conviction for offences under legislation overseen by MPI can bring about significant ancillary orders. These include forfeiture of items of property and prohibition from carrying out the activity that led to prosecution.
67. In respect of forfeiture, conviction on some fisheries offending brings about mandatory forfeiture of specified items used in the commission of the offence.<sup>32</sup> The more serious the type of offending, the wider-ranging the scope of potential assets that are forfeited. Forfeiture is not ordered by the Court but rather is an automatic consequence of conviction.
68. Repeat fisheries offenders can also suffer a fishing prohibition so that they are prevented from being able to fish for a certain period of time. These punishments are designed to provide a stern deterrent against major fishery offending. Likewise, with some animal welfare offending, banning orders are available to prevent certain offenders from being able to continue to have control of animals if they have offended against certain animal welfare legislation.
69. While not unique, these are an unusual aspect of the offences MPI prosecutes. There is a tension between proportionate forfeiture which properly deters offenders from certain types of behaviour and imposing a disproportionate and unfair punishment. Both of these perspectives were expressed by different interviewees during the assessment in relation to the forfeiture and prohibition regimes. How the individual participants perceived the forfeiture provisions may come down to a matter of perspective (and those expressing concern were defence counsel). Also, in the context of this review it must be borne in mind that forfeiture or prohibition was either an automatic consequence of the legislation or in other cases was imposed by the Court on application. In the latter situation, while the outcome is influenced by the prosecutor's discretion to make the application in the first place, the decision is that of the Court. However, notwithstanding it is the Court's decision, we paid some attention to this issue because of the disparate points of view expressed and the role MPI has in seeking prohibition or managing seizure and forfeiture.
70. Some complex issues arise from forfeiture. First, property is seized by the Crown at the point when the offending is detected rather than after guilt is determined. The impact of this seizure is perhaps most acute when the property seized is valuable fishing equipment like fishing boats. The effect of such seizure can be to render, at that stage, an innocent defendant incapable of carrying on their fishing activities and so preventing them from maintaining their livelihood. To resolve the potential unfairness of this issue, MPI can bond the seized items of property back to the defendant until the case is determined. However, the risk for the Crown is heightened,

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<sup>32</sup> See Fisheries Act 1996, ss 255–256.

because, at the time the forfeited boat is bonded back to the defendant, that boat is the property of the Crown and is potentially being returned to a person to carry out further unlawful fishing activities. From what we could see MPI is doing its best to manage this risk, but the risk associated with these bond-back arrangements needs to be borne in mind and closely monitored.

71. Further, following conviction the items of property are forfeited to the Crown. However, the Court can order that the property is returned to the offender after a redemption fee is paid. A redemption fee is a sum of money, often a percentage of the value of the item, that is paid to the Crown to get the property back. Prior to the *Hawkes Bay Seafoods* case, redemption fees appeared to be largely dealt with on a case-by-case basis and there was no discernible consistent approach to the amount of the redemption fee. However, in the *Hawkes Bay Seafoods* case, MPI tried to institute a more structured and transparent approach so that there would be more certainty as to the level of the redemption fee.<sup>33</sup> There is room for more work to be done in this area, but MPI is clearly aware of the issues and is working constructively to try and bring consistency to a difficult area.
72. In regard to banning or prohibition, these orders are available for serious animal welfare offenders or recidivist fisheries offenders. Again, there is tension between preventing harm to animals or fisheries resources and removing the livelihood of the offenders who, in many cases, are life-long farmers or fishers. Prohibition is mandatory with certain repeat fisheries offending whereas it is a discretionary order in relation to animal welfare offenders. We discussed this issue with several people within MPI and got the impression that MPI tries to take a reasonable and careful approach when seeking banning orders and does not take lightly the option of seeking such an order. We understood it only does so when MPI officials have real concerns for the animals' on-going welfare.
73. While there was some criticism by defence counsel of the use of banning orders, we ultimately find that it is for the Court to decide whether any order should be made. We did not see any evidence that MPI were acting improperly in seeking those orders.

## CONCLUSION

74. We were impressed by the coherent and well-structured way in which the MPI prosecution system operates and the people who are involved in MPI's prosecutions. We have made some recommendations to assist in improving the system but on the whole conclude that MPI's prosecutions are working well.

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<sup>33</sup> This information is not presently publicly available but is contained in the developing body of case law. MPI is looking at providing some guidance in this area in the future.

## APPENDIX: LIST OF INTERVIEW PARTICIPANTS

This Appendix sets out a list of the people spoken to during this assessment.

Peter McCarthy — Chief Legal Adviser/Director Legal Services, MPI

Stephanie Rowe — (former) Director, Compliance Services, MPI

Gina de Graaff— Principal Legal Adviser, MPI

Rebecca Easterbrook — Manager Prosecutions & Support, MPI

Gary Orr — Director, Compliance Services, MPI

Gray Harrison — National Manager, Animal Welfare & NAIT Compliance, MPI

Lisa Brown — Team Leader (Central and Southern), Prosecutions, MPI

Kevin Herlihy— Team Leader (Northern), Prosecutions, MPI

Grant Fletcher — (former) Senior Solicitor, Prosecutions, MPI

Leo Stothart — Senior Solicitor, Prosecutions, MPI

Grant Burston — Wellington Crown Solicitor, Luke Cunningham Clere

Stephanie Bishop — Partner, Luke Cunningham Clere (Wellington Crown Solicitor Office)

William Jennings — (former) Senior Solicitor, Prosecutions, MPI

Karyn van Wijngaarden — Partner, Ocean Law

Christopher Lange — Barrister (formerly of Raymond Donnelly, Christchurch Crown Solicitor Office)

Dustin Luo — (former) Senior Solicitor, Prosecutions, MPI

Amelia Jones — Senior Solicitor, Prosecutions, MPI

Brendon Mikkelsen — Regional Manager, Animal Welfare & NAIT Compliance, MPI

Adam Plumstead — Regional Manager, Fisheries Compliance, MPI

Karyn South — Partner, Raymond Donnelly (Christchurch Crown Solicitor Office)

Morgan Dunn — Senior Solicitor, Prosecutions, MPI

Jackson Webber —Partner, O'Donoghue Webber (Tasman Crown Solicitor Office)

Julie Wotton — Senior Solicitor, Prosecutions, MPI

Amelia Jones — Senior Solicitor, Prosecutions, MPI

John Higgins — Senior Solicitor, Prosecutions, MPI

Tom Sutcliffe — Barrister