The Solicitor-General's Prosecution Guidelines

Te Aratohu Aru a te Rōia Mātāmua o te Karauna

as at 1 January 2025

Te Tari Ture o te Karauna
Crown Law

Introductory words from the Law Officers

Ngā kupu whakataki a Ngā Rōia Mātamua o Te Karauna

Foreword from the Attorney-General

New Zealand's prosecution system is founded on the fundamental values of transparency and equality before the law, and the legitimate public interest in prosecuting criminal offending.

New Zealand is different from other jurisdictions because we do not have a centralised agency that conducts prosecutions or makes prosecution decisions. Numerous prosecuting agencies and Crown Solicitors – private lawyers appointed by the Governor-General – conduct prosecutions and make such decisions.

This means close oversight of prosecution decisions in New Zealand is particularly important. The *Solicitor-General's Prosecution Guidelines* are a key part of this oversight. They provide guidance on how prosecutions should reflect core prosecution principles and promote consistent decision-making. The Solicitor-General's longstanding responsibility for general oversight over public prosecutions, and to issue and maintain prosecution guidelines, was codified in the Criminal Procedure Act 2011.

The guidelines set general expectations for prosecutors and identify the internal guidance that prosecuting agencies should have in place. As the guidelines say, they are not rules that provide an instruction manual to prosecutors on how every prosecution decision must be made or what the outcome should be. This reflects the diverse range of cases in which public prosecutors make decisions that general guidance cannot provide for or anticipate.

These guidelines support agencies to have better prosecuting processes, and therefore, make better decisions. I am especially pleased these guidelines provide more and enhanced guidance about how the interests of victims are relevant to prosecution decisions. The guidelines also include practical actions that prosecutors can take to improve the experience for victims, particularly where they have suffered from trauma.

Hon Judith Collins KC
Attorney-General

Introduction from the Solicitor-General

The Solicitor-General has issued Prosecution Guidelines since 1992. Since then, the guidelines have supported prosecutors to make decisions which are fair, detached and objective, while taking into account all the relevant circumstances of each case.

The law requires a range of factors to be considered when making different types of prosecution decisions, including matters such as the decision to prosecute; decisions about bail and sentencing; and decisions about the involvement of victims.[1] These guidelines assist prosecutors by identifying the factors which may be relevant to different types of decisions. This promotes equality before the law by ensuring that all relevant factors are taken into account in every case.

It is essential that the guidelines are reviewed from time to time to ensure they remain fit for purpose. It is important to see whether the guidelines can be improved to better support prosecution decision-making.

The latest review reflects the modern context in which prosecutions are conducted. There are now many more agencies who bring prosecutions than there were when the guidelines were first published.[2] Some prosecuting agencies did not find the previous guidelines to be relevant to the offending they prosecute because the guidelines were largely focused on serious offending prosecuted by the Police. Another part of the context was that Māori are among those groups that are disproportionately represented in the criminal justice system, as both defendants and victims. Victims' groups and advocates also considered the guidelines could better reflect victims' interests and experiences in prosecution decisions.

The goals of the review were:

- To ensure the guidelines reflect current law and practice.
- To improve the usability of the guidelines for all prosecutors.
- To support prosecuting agencies to design processes that facilitate unbiased decisions.

We sought a diverse range of views when we undertook this review. We heard from prosecutors and defence lawyers; the wider legal profession; the New Zealand Police and other enforcement agencies; and a wide group of experts in the criminal justice system, including those who support victims and defendants. This process was designed to identify all the factors relevant to prosecutorial decision-making.

The revised guidelines are presented as a suite of individual guidelines on specific topics, with the Principal Guideline as the foundational document. The revised guidelines:

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[1] Both in statute and at common law. See for example the Bail Act 2000, the Sentencing Act 2002, the Victims' Rights Act 2002 and the Supreme Court's decision in *Berkland v R* [2022] 1 NLZR 509.

[2] At the time of publication there are more than 40 different prosecuting agencies.

- Have been comprehensively reviewed and updated to reflect current law and practice, including the creation of guidelines on new topics.
- Apply to different kinds of offending, ranging from serious crime to minor regulatory offending, so it is easier for prosecutors from all enforcement agencies to use them. The guidelines are written in plain language, including commentary to assist with interpretation. For the first time, the guidelines are fully digital. All these measures make the guidelines more usable and easier to update in future.
- Include guidance on processes which facilitate unbiased decision-making.

Because the guidelines will be applied to a wide range of offending, not all of the guidance will be relevant to every agency. The intention is to support agencies to develop their own specific policies within the parameters set by the guidelines.

The 2024 edition of the guidelines is the result of the most comprehensive review we have conducted since 1992. The guidelines replace previous guidelines issued by the Solicitor-General. They will be reviewed and updated from time to time, and new guidelines may be added.

Una Jagose KC
Solicitor-General

Principal Guideline

Aratohu Mātāmua

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

Status of the guidelines

Te mana o te aratohu

1. These guidelines set general expectations, not rules. They should not be seen as an instruction manual for prosecutors, and prosecutors will have to make decisions in the course of their roles that are not covered here. The guidelines do not purport to lay down any rule and do not create any procedural or substantive rights that can be enforced in a legal proceeding.

2. It is expected that all public prosecutors, whether in-house prosecutors, Crown Solicitors or external counsel, will make decisions consistent with the general principles in the guidelines during the prosecution process. Most decisions require prosecutors to choose from a range of available and reasonable options based on a variety of factors to which prosecutors may appropriately give different weight in different cases. The guidelines do not provide a formula which can be applied to individual cases so as to dictate a particular result.

3. The guidelines do not limit prosecutors' discretion and prosecutors are expected to exercise their judgement. Departure from the guidelines may be appropriate to do justice in the unique circumstances of an individual case.

4. This guideline (the Principal guideline | te Aratohu mātāmua), and the various individual guidelines on specific topics, are issued as part of the Solicitor-General's oversight role as codified in s 185 of the Criminal Procedure Act 2011. They are not directions under s 188 of that Act unless expressly stated.

5. The word "must" is only used to reflect an obligation under statute or other instrument (such as the Cabinet Directions for the Conduct of Crown Legal Business). Otherwise, the words "should" or "may" are used to indicate the strength of the expectation.

6. The guidelines are to be read subject to any more detailed advice or s 188 directions the Solicitor-General may provide to prosecutors from time to time on specific topics (which may be privileged). For the avoidance of doubt, the guidelines are also subject to any judicial directions or practice notes.

7. The guidelines do not strictly apply to prosecutions in the Youth Court (unless or until a prosecution is transferred to either the District or High Courts) or to prosecutions brought by the Director of Military Prosecutions. Prosecutors in the Youth Court and Courts Martial should follow the guidelines, with any necessary modifications, where appropriate and practicable.

Prosecution principles

Ngā mātāpono arumanga

8. The guidelines are designed to promote a consistent approach to decision-making in accordance with the following principles. The principles are expressed at a high level below, with additional guidance on how they might be practically applied in individual subject-specific guidelines.

    8.1 Prosecutors should always act in a manner that is fundamentally fair and objective, in accordance with their role as officers of the court to uphold the rule of law. Prosecutorial decisions should not be influenced by sympathy or prejudice. Public prosecuting agencies should have processes in place that facilitate unbiased decisions in accordance with the guidelines.

    8.2 Prosecutors act independently. This means they should make decisions free from political influence, or improper pressure from any other source, including media and public sentiment, and independently of the investigation process. This includes avoiding any actual, perceived or potential conflicts of interest when making prosecutorial decisions. All public prosecuting agencies should have systems in place to protect the independence of prosecution decisions.

    8.3 Public prosecutors perform a public service. They should give effect to the law while also trying to ensure that prosecution decisions reflect the interests of justice in the particular case and serve the good of society.

    8.4 The prosecutor's role is to help ensure a fair trial so far as possible, not to strive for a conviction. A successful prosecution is one in which an outcome is achieved after a fair and transparent process before an impartial court. However, prosecutors act in an adversarial system and, while they should present the case fairly and justly, they should pursue it fearlessly and skilfully.

    8.5 It has never been the case that all offences must be prosecuted. While prosecution will ordinarily be the only appropriate response to criminal offending of at least moderate seriousness, it should be used only where it is a proportionate response to the circumstances of the case.

    8.6 Doing justice to all according to law is key; and law takes account of the specifics of the case at hand. Public prosecutors should therefore take into account and bring the court's attention to all relevant circumstances they are aware of.

    8.7 Prosecutors should treat all participants in the process with dignity and respect. In particular, prosecutors should be aware of, and responsive to, the needs of victims in accordance with the guidelines and the Victims' Rights Act. In serious cases, victims should be consulted in respect of important decisions in the prosecution process, where that is practicable and appropriate.

9. While the guidelines recommend prosecutors take into account a wide range of information in making prosecution decisions, that is limited to information the prosecutor is personally aware of at the time of making the decision. Prosecutors are not expected to make further enquiries about matters such as a person's personal

background and circumstances. Prosecutors should review a decision if they receive relevant new information material to that decision (if the decision is still operative).

10. Prosecutors are expected to comply with all applicable codes of conduct or professional rules that apply to them.

Commentary

Some prosecuting agencies may have their own code of conduct. Two examples of codes that are likely to apply to many prosecutors are:

- any minimum standards of integrity and conduct set by the Public Service Commissioner applying to the public service and/or Crown agents; and
- the Rules of Conduct and Client Care applying to lawyers and particularly the specific rules applying to prosecutors.

Role of the Solicitor-General

Te tūnga o te Rōia Mātāmua o te Karauna

11. The Solicitor-General has always had the responsibility of maintaining general oversight of public prosecutions, namely those prosecutions which are commenced by a government department (including New Zealand Police) or a Crown entity. Since 2013 this has been recognised in statute.[1]

12. To meet this responsibility, the Solicitor-General issues and maintains the guidelines, and provides general advice and guidance to prosecuting agencies and Crown prosecutors as required. The Solicitor-General is not involved in individual prosecutions unless advice is sought, or the Crown Law Office becomes involved (for example, if there is an appeal or a request for the exercise of a Law Officer function). Even where advice is sought from the Solicitor-General, the responsibility for making any prosecution decision remains with the prosecutor, unless a specific direction is given.

13. Crown prosecutors conduct Crown prosecutions[2] on behalf of the Solicitor-General. In respect of non-Crown prosecutions, under the Cabinet Directions for the Conduct of Crown Legal Business, the Solicitor-General has oversight of the arrangements for the provision of legal services in prosecutions commenced by Police or a government department[3] (whether conducted by in-house counsel, Crown Solicitors, or other instructed counsel). The Solicitor-General may direct how those services are provided.

14. The Solicitor-General has the power to stay any prosecution.[4] Implicit in that power is the power to direct the way in which a prosecution is conducted so that it does not need to be stayed.

15. All public prosecutors, including Crown prosecutors, are expected to inform the Solicitor-General of any matter of general public or legal importance arising in respect of a prosecution they are conducting, or which gives rise to substantial or new legal risk.

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1 Criminal Procedure Act 2011, s 185.

2 As defined in the Crown Prosecution Regulations 2013.

3 As defined in the Cabinet Directions.

4 Criminal Procedure Act, s 176. The power is given to the Attorney-General but can be exercised by the Solicitor-General: Constitution Act 1986, s 9A.

Making prosecution decisions

Te taenga atu ki ngā whakatau aru

16. The commencement of a prosecution is a serious step which has significant implications for all the participants, as well as other public sector agencies. A prosecution should only be commenced if the matter warrants the intervention of the criminal law. If there is another way of dealing with a particular case that is likely to be effective, and is appropriate in the circumstances, it should be used. Unless it is clearly the necessary response, because the offending is at least moderately serious, prosecution should generally be considered only after other options have been identified and rejected.

17. For the avoidance of doubt, public safety is a key consideration when deciding which response is appropriate. Prosecuting agencies should always assess the risk of further harm to the victim (if any), their whānau and the wider public when considering whether alternatives to prosecution should be used. If there is a risk of physical harm, it will be rare that prosecution should not be pursued (provided of course that the Test for Prosecution is met).

    Commentary
    For example, in a case of assault involving serious injury, prosecution will ordinarily be the only appropriate response. In such cases, prosecutors do not need to undertake a detailed consideration of other options.

Prosecution policies | Ngā kaupapa here mō te aru

18. Each prosecuting agency must have a publicly available prosecution policy, which is an integral part of their decision-making process. In particular, prosecution policies should set out all the enforcement options available (different agencies will have different enforcement options) and the circumstances in which each will be used.

19. Prosecution policies should set out a clear decision-making process in which the prosecuting agency's available enforcement tools are considered in a logical way. Policies should also set out the circumstances in which alternatives to prosecution should be considered.

20. The guideline on Prosecution policies | Ngā kaupapa here mō te aru provides detailed guidance for prosecuting agencies as to the matters those policies should cover.

The Test for Prosecution | Te whakamātautau mō te arumanga

21. If a prosecuting agency decides, having applied its prosecution policy as set out above, that prosecution should be considered, it should apply the Test for Prosecution.

22. There are two stages to the test:

    22.1 The first stage is the Evidential Test: Is there enough evidence to prove the proposed charge beyond reasonable doubt?

    22.2 The second stage is the Public Interest Test: Does the public interest require a prosecution to be brought?

23. Prosecutors should only commence a prosecution if both tests are met, and they should apply the tests separately for each charge they wish to bring. Prosecutors should never commence a prosecution if there is not enough evidence to prove a charge, no matter how strong the public interest in prosecution may be. Conversely, even where there is overwhelming evidence to prove the charge, prosecutors should not bring a prosecution unless, in their assessment, the public interest requires it.

24. The tests should generally be applied in the above sequence, with the evidential test considered first. However, if the prosecutor is of the clear view that a prosecution is *not* required in the public interest, a decision can be made on that basis without the need to comprehensively evaluate evidential sufficiency.

25. Detailed guidance about both parts of the Test for Prosecution is contained in the guideline on Decisions to prosecute | Te whakatau ki te aru.

Making unbiased decisions | Te whakatau rītaha-kore

26. Prosecutors should make decisions that are fair, detached and objective, while taking into account all of the circumstances of each case. This requires prosecutors to be aware of the biases that can affect prosecutorial decision-making, and to put processes in place to mitigate them.

27. The guideline on Making unbiased decisions | Te whakatau rītaha-kore contains detailed guidance on this topic.

Tikanga

28. The Supreme Court has confirmed that tikanga has been and will continue to be recognised in the development of the common law of New Zealand | Aotearoa.

29. Given the evolving context of tikanga and New Zealand law, and that it is not for the Solicitor-General to determine what tikanga is or is not in any given context, only high-level guidance is offered here. The place of tikanga within the common law has been affirmed, so may be relevant to decision-making. Prosecutors will be engaging with and making decisions relating to Māori suspects, victims and whānau in the course of their work. Prosecutors should therefore develop a basic understanding of tikanga as it operates within te ao Māori, such as through taking advantage of cultural education opportunities offered at work. Prosecutors should keep themselves updated regarding leading tikanga jurisprudence and developments of tikanga in the law.

30. Prosecutors should also build the relationships needed to seek guidance on issues of tikanga. This may include consulting experts | pūkenga in tikanga, including mana whenua. This may be particularly relevant in certain types of prosecutions, such as prosecutions concerning fisheries, where expert knowledge regarding local cultural harvesting practices may be relevant.

Te reo Māori

31. Te Ture mō te Reo Māori | The Māori Language Act 2016 recognises te reo Māori as a taonga and imposes obligations on the Crown to “actively protect and promote” te reo Māori.[5] It also gives people the right to speak te reo Māori in court if they choose.[6] Prosecutors are encouraged to use te reo Māori respectfully, both in documents and in court (such as when announcing an appearance). In particular, prosecutors should correctly pronounce te reo Māori names and words. When speaking te reo Māori in court, prosecutors should translate what they say into English or arrange for an interpreter, in accordance with the applicable rules of court.[7]

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5 Te Ture mō te Reo Māori | Māori Language Act 2016, s 4.
6 Te Ture mō te Reo Māori | Māori Language Act 2016, s 7.
7 Criminal Procedure Rules, r 1.9.

New Zealand Bill of Rights Act 1990

Te Ture mō ngā Mana ā Tangata i Aotearoa 1990

32. Prosecutors conducting public prosecutions are subject to the New Zealand Bill of Rights Act 1990 (NZBORA). This reflects the prosecutor's role in prosecuting offences on behalf of the state. Prosecutors should make decisions consistently with their particular obligations under the NZBORA (while recognising that others—especially those exercising judicial power—have distinct obligations under the NZBORA).

33. Prosecutors should keep abreast of developing NZBORA jurisprudence, and how it might inform both their role and the role of the court, and should be prepared to bring this to the court's attention if necessary. Some subject-specific guidelines identify particular NZBORA rights that are engaged during different parts of the prosecution process (for example, during disclosure and jury selection) and provide more detailed and practical guidance about the application of particular rights to particular prosecutorial decisions.

Monitoring the application of the guidelines

Te aroturuki i te whakaūnga o te aratohu

34. All prosecuting agencies and Crown Solicitors are required to record and provide data to the Solicitor-General, upon request, to enable the Solicitor-General to exercise their oversight role under s 185 of the Criminal Procedure Act.

35. The Solicitor-General may issue directions about what data is to be recorded and provided (whether at a case-specific or aggregate level).

36. Among other things, data may be sought to confirm:

    36.1 prosecution decisions are made consistently with the guidelines;

    36.2 obligations to victims are being met; and

    36.3 consent is being sought from the Solicitor-General where required.

Glossary

Kuputaka

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

This glossary defines certain terms that are used throughout the guidelines. It is subject to the definitions in the glossary of individual guidelines, where applicable.

Amicus / Amicus curiae

A lawyer appointed to assist the Court. Amicus may be appointed to represent the *defendant's* interests as well as, or instead of, defence counsel. In cases where the *defendant* does not have a lawyer and is not allowed to cross-examine certain witnesses personally, amicus will be appointed to cross-examine on their behalf.

Attorney-General

The senior *Law Officer* for the Crown. The Attorney-General is a Government Minister who provides advice to Cabinet on legal issues and has ministerial responsibilities for the *Crown Law Office*. The Attorney-General has several statutory functions in relation to prosecutions, such as giving consent for certain prosecutions to be commenced. In practice those functions are almost always carried out by the *Solicitor-General*.

Charging document(s)

The document(s) filed in court by the *prosecuting agency* which sets out the charge against the *defendant*.

Child witness

Defined in the Evidence Act 2006 as a witness who was under the age of 18 when the proceeding was commenced, including complainants but not defendants.

Complainant

See: *Victim*

Communication assistance

Defined in the Evidence Act as meaning oral or written interpretation of a language, written assistance, technological assistance, and any other assistance that enables or facilitates communication with a person who for any reason (for example, insufficient proficiency in the English language, age, or a disability) requires assistance to understand court proceedings or give evidence.

Court victim advisors

Employees of the Ministry of Justice who are appointed to provide support, information and advice to *victims* through the court process. In some courts there are specialist court victim advisors such as sexual violence victim advisors. Some prosecuting agencies may also employ staff to support victims in the cases they prosecute but they are not court victim advisors.

Crown entity

An organisation defined in s 7 of the Crown Entities Act 2004.

Crown Law

The Crown Law Office (usually known simply as "Crown Law") is a *government department*. The *Solicitor-General* is its Chief Executive and the *Attorney-General* its responsible Minister.

Crown prosecution

A *public prosecution* which meets certain criteria set out in the Crown Prosecution Regulations 2013. If a matter is, or becomes, a Crown prosecution the local *Crown Solicitor* will assume responsibility for it on behalf of the *Solicitor-General* and it will be conducted independently of the original *prosecuting agency*.

Crown Prosecutor / Crown Solicitor

A Crown Solicitor is a lawyer in private practice who holds a warrant of appointment from the Governor-General to prosecute within a particular geographic area. A Crown Solicitor will employ other *prosecutors* to assist them in their role, and they may undertake any task on behalf of the Crown Solicitor except where a guideline specifies that something must be done by the Crown Solicitor personally. Any *prosecutor* conducting a *Crown prosecution* on behalf of the *Solicitor-General*, including prosecutors on the Serious Fraud Office Prosecution Panel, is a Crown prosecutor. Where the guidelines refer to the "local" Crown Solicitor, it is a reference to the Crown Solicitor in whose warrant area the charges have been, or would be, filed. In respect of prosecutions commenced by the Serious Fraud Office, a reference to the Crown Solicitor means the Director of the Serious Fraud Office.

Defendant

A person who is being prosecuted in court. The person may also be described as a suspect or offender depending on the context. In general, the term suspect is used to refer to the person under investigation prior to charges being filed. From that point on they are referred to as the defendant. The term offender is used when neither of those terms is apt, and means "alleged offender" if guilt has not yet been established.

Disabled person

A person with long-term physical, mental, intellectual or sensory impairment(s) which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others. Disability has a corresponding meaning. See also *Mental health issue* and *Mental and intellectual impairment*.

Evidential Test

See the guideline on Decisions to prosecute | Te whakatau ki te aru.

Fact-finder

The person or group who will decide the facts of the case in court, and determine whether the *defendant* is guilty or not. It may be a jury or a judge sitting alone.

Government department

An organisation listed in Part 1 of the Second Schedule to the Public Service Act 2020.

Independent victim advocate

A person who is supporting a *victim* and advocating on their behalf, who is not appointed by a government agency.

Informant

A person who provides information to an enforcement agency, sometimes on a confidential or anonymous basis.

Investigator

A person who investigates possible criminal offending. There is usually a lead investigator in charge of an individual file, who may be referred to as the "*officer in charge*", particularly in Police prosecutions. Investigators may make prosecution decisions where it is not practical or expedient for a *prosecutor* to do so. Investigators may not be in a position to take into account all the factors set out in the guidelines, but those decisions will be reviewed by a *prosecutor*, who will be better placed to do so, at a later date.

Law Officer

There are two Law Officers: the *Attorney-General* is the senior Law Officer and the Minister responsible for the *Crown Law Office*. The *Solicitor-General* is the junior Law Officer and the Chief Executive of the *Crown Law Office*.

Marginalised communities

Marginalised communities comprise people who share one or more particular characteristics (such as ethnicity, religion, national origin, gender identity, sexual orientation, age, disability, language, and/or immigration status), who may have been denied the full opportunity to participate in aspects of everyday life, or who have been historically under-served or otherwise discriminated against, and as a result have been adversely affected by persistent inequality. Members of marginalised communities may have experienced unconscious bias, discrimination, and mistreatment. These experiences may affect how marginalised communities engage and interact with the criminal justice system.

Mental health issue

This refers to a mental health condition, that may be short-term or long-term, that impacts a person's thoughts, perceptions, mood and behaviour. See also *Disabled person* and *Mental or intellectual impairment*.

Mental or intellectual impairment

These are distinct types of impairment but are used in these guidelines to refer to impairments which limit a person's ability to undertake normal daily activities. See also *Disabled person* and *Mental health issue*.

Non-Crown prosecution

A *public prosecution* which does not meet the criteria for becoming a *Crown prosecution* under the Crown Prosecution Regulations 2013. Non-Crown prosecutions may be conducted

by *prosecutors* employed or instructed by the *prosecution agency* which commenced the prosecution. That may include *Crown Solicitors* and their staff, but the matter does not become a *Crown prosecution* simply because the *prosecuting agency* has instructed them. The *prosecuting agency* is the decision-maker at every stage of a non-Crown prosecution.

Offender

See: *Defendant*

Officer in charge

The lead *investigator* in charge of the file within a *prosecuting agency*.

Plea arrangement

An agreement between a *defendant* and a *prosecutor* that the *defendant* will plead guilty to one or more charges in exchange for one or more charges being withdrawn, amalgamated or reduced.

Prosecutor

Any person who makes a prosecution decision or conducts a prosecution, including representing the *prosecuting agency* in court. A public prosecutor is the prosecutor in a *public prosecution*, unless it has become a *Crown prosecution* in which case it will be conducted by a *Crown prosecutor*. The guidelines use the term public prosecutor and prosecutor interchangeably but only apply to public prosecutors. *Investigators* may make prosecution decisions where it is not practical or expedient for a prosecutor to do so. *Investigators* may not be in a position to take into account all the factors set out in the guidelines, but those decisions will be reviewed by a prosecutor, who will be better placed to do so, at a later date.

Prosecuting agency

The entity which has commenced the prosecution. If the prosecuting agency is a *government department* or a *Crown entity* the prosecution is a *public prosecution*. Other public bodies (such as local authorities and other statutory bodies or boards) which bring prosecutions are properly described as prosecuting agencies, but those prosecutions are not *public prosecutions,* and those agencies are not subject to the guidelines.

Public prosecution

A prosecution commenced by the Police, a *government department* or a *Crown entity*. A public prosecution may become a *Crown prosecution* if it meets the criteria in the Crown Prosecution Regulations 2013. Prosecutions commenced by other public bodies (such as local authorities and other statutory bodies or boards) are not public prosecutions, but they are not private prosecutions either. These non-public, non-private prosecutions may become Crown prosecutions if they meet the criteria in the Crown Prosecution Regulations.

Private prosecution

A prosecution brought by a private individual or organisation. They cannot become *Crown prosecutions*.

Public Interest Test
See the guideline on Decisions to prosecute | Te whakatau ki te aru.

Senior manager
The person within a *prosecuting agency* who is nominated in the agency's prosecution policy as having the authority to approve certain important decisions.

Solicitor-General
The junior *Law Officer* for the Crown and Chief Executive of the *Crown Law Office*. The Solicitor-General has statutory oversight of all *public prosecutions*, and is directly responsible for all *Crown prosecutions* conducted by *Crown Solicitors* on their behalf. The Solicitor-General has statutory functions and may perform the functions of the Attorney-General (such as granting consent for certain prosecutions). The Solicitor-General's functions in the criminal jurisdiction may be delegated to a Deputy Solicitor-General.

Stay of proceedings
A written direction from the *Attorney-General*, under s 176 of the Criminal Procedure Act 2011, that no further steps can be taken in a prosecution.

Summary of facts (SOF)
A document prepared by the *prosecuting agency* which sets out the factual basis for the charges filed against the *defendant*. Sometimes called a "Caption Summary" or simply "SOF".

Support person
Any person who is supporting a *victim*, whether in court or more generally, including *court victim advisors* and *independent victim advocates*. A victim may nominate someone they know as a support person, or they may choose to engage with publicly funded support services (such as those contracted to the Ministry of Social Development to provide Court Support Services in sexual violence cases). A *prosecuting agency* may also employ staff to support victims. A victim may choose to nominate a support person in writing who will receive information on their behalf (instead of the victim themselves). In this guideline, references to victims includes reference to support people who have been so nominated.

Suspect
See: *Defendant*

Under-served populations
Under-served populations are populations who face barriers in the criminal justice system for a variety of reasons. Reasons include geographic location, religion, sexual orientation, gender identity, ethnicity, or other particular needs (such as language barriers, disability, immigration status or age). In some cases, victims of specific crimes, while not being inherently more vulnerable, may be under served because the system has not been designed for them. For example, adult male victims of family or sexual violence may have difficulty finding specialised support because most specialised services are designed for women and children.

Victim

This term has the same meaning as in the Victims' Rights Act. Broadly, it means a person who has suffered harm[1] as a result of an offence. In the case of a child or young person, or a victim who is deceased or otherwise unable to participate in the prosecution, it includes their parents, guardians, and other whānau (unless they are alleged to have harmed the victim themselves). The terms *complainant* and survivor are not used in these guidelines because many victims do not support their use, but they may be used in other contexts to refer to a victim; with the exception that *complainant* is used in the guideline on Prosecuting sexual violence | Te aru i te taitōkai in order to distinguish between victims who are the subject of charges and victims who are giving propensity evidence only. For some types of offending there is no defined victim, such as regulatory offending which impacts on the general public or a particular sector. A *prosecuting agency* may choose to engage with specified groups of people as if they were victims, but are not required to do so. Similarly, a *prosecutor* may choose to take into account the impact of offending on local iwi or hapu although they do not meet the definition of victim.

Victim Notification Register (VNR)

A register maintained by Ara Poutama Aotearoa | the Department of Corrections. Certain *victims* are entitled to be placed on the register. *Victims* who are on the register will be notified if the *defendant* leaves custody.

Witness

A person who gives evidence in a proceeding, whether in person, in writing or by pre-recorded video.

Young person

In these guidelines, unless otherwise specified, the term "young person" has its ordinary meaning and is not restricted to those under the age of 18. Depending on the circumstances it may include young adults.

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[1] The statutory definition requires either physical injury or property loss/damage.

Prosecution policies

Ngā kaupapa here mō te aru

As at 1 January 2025

All guidelines should be read alongside the Principal guideline | te Aratohu mātāmua

Introduction | Ngā kupu whakataki

1. Prosecution is a serious step with significant consequences for a defendant, any victim(s) and their whānau. It also involves using court resources and potentially the resources of other agencies, as well as the prosecuting agency. For these reasons, it should not be the default option for all offences and other enforcement options should be carefully considered where available. If there is another way of dealing with a particular case that is likely to be effective, and is appropriate in the circumstances, it should be used.

2. All public prosecuting agencies have been required by Cabinet, since 1 July 2013, to have a publicly available prosecution policy which sets out, among other things, the process for making prosecution decisions and the circumstances in which alternative methods of resolving a matter may be used.[1] This ensures that prosecutions, which are a significant step, are only brought in appropriate cases.

3. This guideline sets out the matters which should be covered in a prosecution policy in order to meet Cabinet's requirements.

4. Prosecuting agencies may choose to seek advice from Crown Law as to the consistency of their prosecution policy with these guidelines but that is not required.

Guideline | Te aratohu

5. A prosecution policy must, at least:[2]

   5.1 identify the objectives of the agency's prosecution activity;

   5.2 determine the circumstances in which a prosecution is appropriate rather than some less punitive action; and

   5.3 ensure that prosecution decisions are cost-effective and in the public interest.

6. Prosecution policies should clearly set out the individual agency's enforcement objectives and priorities to give context to the rest of the policy. In order to comply with Cabinet's direction, they should clearly identify the purpose for which prosecutions are brought as opposed to other types of enforcement action.

7. To do this effectively, a prosecuting agency's prosecution policy should set out all the different types of enforcement action which are available to it, and the sorts of circumstances in which they would be used. In addition to prosecution, enforcement actions will include, at a minimum:

   7.1 Taking no action.

   7.2 Taking an educative approach: providing the person under investigation with information to ensure they are aware of their obligations and the consequences of non-compliance.

[1] CAB Min (12) 26/6.
[2] These are the requirements set by Cabinet.

7.3 Issuing a warning (whether formal or informal).

8. Some prosecuting agencies will have a suite of other enforcement tools available, such as infringement notice regimes, restorative justice practices (including local community or iwi-led initiatives) and civil enforcement or forfeiture proceedings. However, there is no expectation that any agency will have such tools available to them, and many do not. It is for each prosecuting agency to determine what alternative tools they will develop and use, and in what circumstances, in order to fulfil their statutory functions and meet their enforcement objectives within the available resources.

Commentary

Some prosecuting agencies also operate diversion schemes, which provide opportunities for defendants who have already been charged to be dealt with outside of the court process. Diversion operates within the court process, after charges have been filed. Agencies who implement diversion schemes should do so in accordance with the guideline on Diversion | Te autaki.

9. The main risks with the use of alternatives to prosecution are:

9.1 A person may be incentivised to submit to the alternative process, in order to avoid the risks inherent in prosecution, when they have not in fact committed an offence.

9.2 Agencies may proceed with alternative action in circumstances where, if alternatives were not available, no action would be taken at all because the offending was not sufficiently serious. This is sometimes called “net-widening”.

10. Prosecuting agencies should have practices in place to guard against these risks, in accordance with this guideline. Prosecutors should only consider the use of an alternative to prosecution if they have already determined that it would be insufficient to take no action at all. In particular, prosecution policies should clearly set out the criteria for the use of each enforcement tool, based on a clear understanding of the tool’s purpose. Prosecution agencies may find it useful to consider the guideline on Making unbiased decisions | Te whakatau rītaha-kore when considering criteria and processes for each tool, to support equitable access to those tools. The purposes of each tool should align with the prosecuting agency’s statutory functions and enforcement priorities, as well as the purposes of the legislation containing the offences being prosecuted.

11. The following eligibility criteria should be considered, where applicable, for each tool other than prosecution (the Test for Prosecution is set out in the guideline on Decisions to prosecute | Te whakatau ki te aru):

11.1 An evidential sufficiency threshold. That threshold need not be the same standard which is required before a prosecution can be commenced: a prosecuting agency may elect to adopt the threshold in the Evidential Test, a lesser standard (such as having reasonable grounds to believe an offence has

been committed), or a higher standard (such as requiring an admission of guilt).

Commentary
The appropriate standard will depend on the nature of the tool in question – for example, some methods of disposition will only be effective where there is an admission of guilt (such as restorative justice practices). For others, such as an informal warning that does not have further repercussions for the person, a lower threshold may be appropriate.

11.2 A description of the types of offending which are suitable for that particular tool (for example, by reference to the seriousness of the offending).

11.3 Reference to the victim(s) of the offending (if any) and an assessment as to whether that particular tool supports victims' needs (as to which, see the guideline on Victims | Ngā pārurenga for further information).

11.4 Reference to any particular circumstances of the suspect which may either qualify or disqualify them for the use of that tool. For example, some tools may have a disproportionate impact for an individual offender due to their personal characteristics (such as young people or those with disabilities).

11.5 A requirement to assess how effectively the tool:

11.5.1 addresses the suspect's conduct;

11.5.2 restores the parties;

11.5.3 holds the suspect accountable; and

11.5.4 meets the prosecuting agency's enforcement objectives.

11.6 Any other criteria the prosecuting agency considers necessary to ensure a particular tool is used only in appropriate cases, and within the available resources.

12. Prosecution policies should also identify who the decision-maker is at each step.

13. Prosecution policies should set out a clear decision-making process in which the available enforcement tools are considered in a logical way, and the tools which are less severe than prosecution are considered first. Agencies may require prosecutors to consider alternatives to prosecution sequentially, from least severe to most, before applying the Test for Prosecution. If a particular enforcement tool is not appropriate in a particular case (either because the criteria for entry are not met or the offending is simply too serious to be dealt with in that way) the next least severe option is considered, and so on. This allows agencies to satisfy themselves that prosecution is the most appropriate method of resolving the matter.

14. There are circumstances in which agencies may determine it is not appropriate to consider alternatives to prosecution. For instance, prosecution should generally be considered for offending of at least moderate seriousness. Prosecuting agencies should always assess the risk of further harm to the victim (if any), their whānau and the wider public when considering whether alternatives to prosecution should be used.

15. Other circumstances where prosecuting agencies may decide alternative action does not need to be considered include:

    15.1 The need to access other remedies which are contingent on convictions being entered. These circumstances should be identified in an agency's prosecution policy.

    15.2 Cases where the conduct has been persistent or repeated, particularly where alternative action has previously been used in respect of an individual (whether that was successful or not).

    15.3 The prosecuting agency's operating environment is such that prosecution of particular conduct is an enforcement priority.

16. Prosecution policies may also incorporate other policies that are required by the guidelines. For example, prosecuting agencies should have policies in place to deal with complaints or requests to review prosecution decisions; and other policies recommended by these guidelines (such as the guideline on Making unbiased decisions | Te whakatau rītaha-kore). Those policies may form part of an overall prosecution policy, or they may be separate.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Decisions to prosecute | Te whakatau ki te aru
Making unbiased decisions | Te whakatau rītaha-kore
Diversion | Te autaki
Warnings | Ngā whakatūpato
Avoiding unlawful bargains | Te kaupare i te tauhokanga takahi ture

Te Tari Ture o te Karauna
Crown Law

Decisions to prosecute

Te whakatau ki te aru

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

Introduction | Ngā kupu whakataki

1. If a prosecuting agency has decided, in accordance with its prosecution policy, that prosecution should be considered, it should apply the Test for Prosecution.

2. There are two stages to the test:

   2.1 The first stage is the Evidential Test: Is there enough evidence to prove the proposed charge beyond reasonable doubt?

   2.2 The second stage is the Public Interest Test: Does the public interest require a prosecution to be brought?

3. Prosecutors should only commence a prosecution if both tests are met, and they should apply the tests separately for each charge they wish to bring. Prosecutors should never commence a prosecution if there is not enough evidence to prove a charge, no matter how strong the public interest in prosecution may be. Conversely, even where there is overwhelming evidence to prove the charge, prosecutors should not bring a prosecution unless the public interest requires it.

4. The tests should generally be applied in the above sequence, with the Evidential Test considered first. However, if the prosecutor is of the clear view that a prosecution is not required in the public interest, a decision can be made on that basis without the need to comprehensively evaluate evidential sufficiency.

Roles | Ngā tūnga

5. This guideline refers to the "prosecutor" as the decision-maker. In practice, the initial prosecution decision in many agencies is likely to be made by an investigator where it is not practical or expedient for a prosecutor to do so. Investigators may not be in a position to take into account all the factors set out in the guidelines, but their decisions should be reviewed by a prosecutor, who will be better placed to do so, at a later date.

6. The prosecutor's role is to make decisions based on the evidence and information available to them. While this guideline recommends prosecutors take into account a wide range of information in making prosecution decisions, that is limited to information the prosecutor is personally aware of at the time of making the decision. Prosecutors are not expected to make further enquiries about matters such as a suspect's personal background and circumstances. Prosecutors should review the decision to prosecute when they receive material new information.

Guideline | Te aratohu

Evidential Test

7. The prosecutor should be satisfied there is sufficient evidence to prove the charge beyond reasonable doubt.

8. Where there is an obvious defence that is likely to be raised (such as self-defence) the prosecutor should also consider whether it is, or may be, satisfied on the evidence. While in general the question of defences should be left to the court, the Evidential Test will not be made out if an anticipated or clearly available defence cannot be rebutted to the requisite standard on the evidence.

9. In assessing whether the Evidential Test is met, the prosecutor should consider all the available evidence, including exculpatory evidence. However, there are some types of evidence that should either be excluded from consideration or should be treated with care, to ensure that the evidence founding the prosecution is **available**, **admissible**, **credible**, and **reliable**.

Availability

10. Only evidence which is actually available to the prosecutor to adduce in court should be considered.

    Commentary
    For example, if a key witness is known to be overseas, the prosecutor should be satisfied that their evidence is able to be secured. The prosecutor might, for example, know the witness is willing to voluntarily return to New Zealand to give evidence or their evidence can be obtained in some other way (such as by video link).

11. It is not necessary for all the evidence to be in admissible form at this stage.

    Commentary
    For example, where documentary evidence is to be admitted as a business record the prosecutor need only be satisfied that there will be a witness available to produce it, it is not necessary to have obtained a formal statement from that person. Results of scientific testing may also be taken into account before a formal report or statement has been prepared.

Admissibility

12. Only evidence which is reasonably expected to be admissible should be considered. This may include evidence which is prima facie inadmissible, such as hearsay, if the prosecutor reasonably believes a court will admit it. But it should not include evidence which is plainly inadmissible or where the argument for admissibility is weak.

    Commentary
    For example, a prosecutor may reasonably believe the court will admit a hearsay statement where the maker of the statement is deceased, or there is some other rule under which the evidence could be admitted such as the co-conspirator's rule. Similarly, a prosecutor may reasonably believe that, even where there appears to have been some irregularity that means the evidence has been obtained improperly or unfairly, the court is unlikely to exclude it under s 30 of the Evidence Act 2006.

Credibility

13. In general, credibility findings should be reserved for the court. However, only evidence that is capable of belief should be considered. The prosecutor should consider each piece of evidence against the other available evidence to determine whether it is capable of belief. If a piece of evidence is clearly contradicted by the weight of other evidence, or there is some other factor suggesting the evidence is not credible, it should be discounted. Prosecutors should ensure that any reasonable further enquiries which might assist a court in making credibility assessments have been carried out.

    Commentary
    Prosecutors may conclude a witness's evidence is not credible, and should not be taken into account, where the weight of other evidence (or some other factor) establishes that account is false or inaccurate. But a prosecutor should not exclude evidence from consideration simply because there is contradictory evidence (such as an account in a suspect's Police interview) or because the witness's credibility is likely to be challenged in court. There may be a reasonable explanation for contradictory evidence, particularly where an offence is committed in private and there are no eyewitnesses or other corroborating evidence (for instance, in family or sexual violence offending). Provided the victim's account is capable of belief, it is for the court, not the investigator or prosecutor, to assess the credibility of the evidence before them.

Reliability

14. Prosecutors should be satisfied the evidence is reliable.

15. Prosecutors should take particular care with a defendant's statements that will be relied on as admissions. The prosecutor should be satisfied such statements have been obtained properly and fairly, and that they are reliable, before taking them into account. Where a defendant has allegedly made an admission to a witness other than an investigator or some other person acting in an official capacity, the prosecutor should consider the possibility that the witness is either mistaken or has a motivation to falsely attribute an admission to the defendant. Where the admissions were not contemporaneously recorded, the prosecutor should consider the possibility there may have been some error in recall. Where alleged admissions have been made in a custodial environment, the prosecutor should analyse the statements in accordance with the guideline on Inmate admissions | Ngā whāki ā-mauhere.

Applying the test to the evidence

16. When assessing availability, admissibility, credibility and reliability, the prosecutor should consider asking the investigator to make further enquiries about a piece of evidence if there is any doubt about whether it should be relied upon.

17. For the avoidance of doubt, evidence which has been excluded from consideration for the purposes of the Evidential Test may still be used at trial to supplement the prosecution case. There may be pieces of evidence where there is a question about credibility which is properly left to the fact-finder to determine, but the prosecutor decides to exclude that evidence from consideration when applying the Evidential Test. It is important that the Evidential Test is made out based on evidence the prosecutor is confident is available, admissible, credible and reliable before a prosecution can be commenced.

18. The evaluation of the admissible evidence, and the assessment as to whether it is sufficient to prove the charge beyond reasonable doubt, is a matter of judgement rather than science. Prosecutors should anticipate likely defences and critically analyse the evidence on that basis. They should consider how a court might view particular pieces of evidence, based on their experience, and consider the significance of that. But they should not attempt to predict the outcome of a trial. In particular, prosecutors should not allow the prospect of illegitimate reasoning by the fact-finder to factor into their assessment of evidential sufficiency. This is particularly likely to be an issue in cases involving sexual violence or family violence, where a victim may be perceived to have behaved in a counter-intuitive way.

Public Interest Test

19. The prosecutor should be satisfied the public interest requires a prosecution to be brought.

The "public interest" is not the same as the "interests of justice"

20. The terms "public interest" and "interests of justice" are commonly used in the criminal jurisdiction. At times they may appear to be interchangeable, but in the guidelines they are distinct concepts.

21. The guidelines use the term "interests of justice" where the focus is on what will do justice in an individual case, and it is not necessary for the prosecutor to look beyond the circumstances of the particular case.

22. By contrast, the "public interest" imports broader notions of justice and fairness and will take into account factors beyond the case at hand, which ensure a fair and credible justice system. There is a strong public interest in holding offenders to account. Upholding the rights of those who are accused of offences is also in the public interest.

    Commentary

    For example, there is a strong public interest in upholding plea arrangements. But it may be in the interests of justice to rescind a plea arrangement in a specific case where new evidence has come to light. As another example, in the aftermath of a natural disaster the public interest may not support the bringing of prosecutions which would ordinarily be in the interests of justice, because the courts are not able to operate at full capacity.

Applying the Public Interest Test

23. It has never been the rule that all offences must be prosecuted. Even if the Evidential Test is satisfied, it is a matter of prosecutorial judgement whether to bring a prosecution. Each prosecuting agency will exercise its judgement in accordance with its own enforcement objectives and priorities, while taking its available resources and the likely costs of a prosecution into account.

24. The ultimate question is whether the public interest requires a prosecution as a response to the offending. The guidelines require that question to be considered at two points:

    24.1 The first is in the application of the agency's prosecution policy as set out in the guideline on Prosecution policies | Ngā kaupapa here mō te aru: if the prosecuting agency considers some alternative method of responding to the offending is available and appropriate; can effectively respond to the offending; and meet the needs of victims, their whānau and the broader community, then prosecution does not need to be considered.

    24.2 The second is after the prosecutor has determined the Evidential Test has been met: prosecution should not be the default response. For example, the suspect may deny the offending (which may disqualify many of the alternative methods of dealing with the matter), in a case where the offending is at the lower end of the scale in terms of seriousness and does not require a prosecution.

25. When considering the likely costs of a prosecution, prosecuting agencies should bear in mind that when they commence a prosecution, they do not incur costs only for the parties (the prosecuting agency and the defendant). Prosecutions require time and resources to be spent by the courts and other agencies, as well as other affected persons (for example, victims and their whānau). In considering whether the public interest requires a prosecution, prosecutors should consider the fact that, if a prosecution is brought, there will be costs to the system as a whole, not just their agency. This is separate, and additional, to considering the impacts of the offending itself on the participants (which is a component of the Public Interest Test as outlined below).

26. Prosecuting agencies are only expected to anticipate the ordinary costs of a prosecution. There may be cases where a well-resourced defendant takes steps in the prosecution process which cause delays or otherwise inflate the costs of the prosecution. It may be reasonable for an agency to persist with a high-cost prosecution when that is in the public interest, even if the offending is not particularly serious. This is particularly relevant for regulatory prosecutions.

Factors to be considered

27. The list of factors set out below is not intended to be exhaustive. A particular case, or a particular type of offending, may have features which are uncommon but are relevant to the public interest. The guidelines attempt to highlight the public interest factors which are most commonly applicable but, particularly in the regulatory context, prosecuting agencies may consider other factors to be relevant. Those factors should be set out in the agency's prosecution policy with an explanation of how they may weigh in favour of, or against, a prosecution. The guideline on Making unbiased decisions | Te whakatau rītaha-kore may also assist in making these assessments.

28. In general, prosecutors should consider four broad questions when assessing whether the public interest requires prosecution:

    28.1 How do the features of the **offending** weigh for or against prosecution?

    28.2 How do the personal characteristics and circumstances of the **suspect** weigh for or against prosecution?

    28.3 How do the interests of the **victim(s)** (if there are any) weigh for or against prosecution?

    28.4 Are there any **alternative methods** of resolving the matter short of prosecution which are available and appropriate in the circumstances?

The offending

29. How do the features of the offending weigh for or against prosecution? This will likely require an assessment of:

    29.1 the seriousness of the offending;

    29.2 the individual suspect's involvement and level of culpability;

    29.3 whether there is a particular need to deter that type of offending;

    29.4 whether the likely sentence that would be imposed on conviction would only be minor; and

    29.5 whether there are any national security concerns.

30. Different types of offending will naturally require consideration of different factors. As set out above, a prosecuting agency which focuses on a particular type of regulatory offending, for example, may produce its own list of factors to be considered which should be set out in its prosecution policy.

31. Any assessment of the seriousness of the offence will necessarily be context specific. The extent of harm to any victim or communities is an important consideration. Offending which does not involve actual harm to the public or an individual may nevertheless be considered a serious example of its kind.

32. That is particularly relevant in the regulatory context, for example where there has been a breach of provisions designed to protect the integrity of New Zealand's primary industries, critical infrastructure, financial markets, environment and so on, as opposed to provisions which target public safety more directly.

Commentary

There may be objective indicators as to the seriousness of the offence, such as the prescribed maximum penalty. However, prosecutors should be careful not to assume offending is particularly serious simply because the offence charged carries a high maximum penalty: a case-specific assessment is required. Conversely, offending which is not subject to a high maximum penalty may still be considered serious. In some cases, prosecutors may choose to consult with interested parties to assist in their assessment. For example, in fisheries prosecutions, tikanga considerations may be relevant. In such a case it may be valuable to seek the views of interested whānau, hapū and/or iwi.

33. It is not possible to list all the factors which may be relevant to an assessment of seriousness. Prosecuting agencies, particularly those dealing with only a narrow scope of conduct, should identify in their prosecution policies the way in which seriousness will be assessed and the factors which may be relevant. Without limiting the matters which may be relevant to an assessment of seriousness, any matter identified as an aggravating factor in the Sentencing Act 2002 will be relevant as well as those listed above.

34. Offences dealing with breaches of statutory or court-ordered conditions (such as sentence or release conditions) require careful consideration in some situations, such as where the offender is grappling with mental health or addiction challenges which may mean that they have genuine difficulty complying with such conditions. Prosecutors should be aware that prosecuting every breach of such conditions, where an offender's culpability is lowered because of a reduced ability to comply, may simply lead to the offender accumulating multiple convictions for breach offences. This may actively inhibit their rehabilitation and reintegration, and consequently increase the risk of further offending.

35. Where an offender appears to have breached the conditions of their sentence or release, prosecutors should first consider which of the following is the most appropriate approach in the circumstances of the case:

    35.1 An educative approach, which involves ensuring the offender is aware of their obligations and warning them of the possible consequences of a breach.

    35.2 An administrative approach, for example seeking a review or cancellation of the sentence, resulting in a re-sentencing (in the case of a breach of sentence conditions), or recall to prison (in the case of a breach of release conditions).

35.3 Prosecution, which may be appropriate where it is apparent the breaches in question have been repeated and deliberate. Prosecution may also be appropriate where the breaches undermine efforts to protect a person's safety, such as breaches of non-association conditions. In other cases, if an educative or administrative approach is to be taken, the offender should not generally be prosecuted for the breach as well.

The suspect

36. How do the personal characteristics and circumstances of the suspect weigh for or against prosecution? This will likely require an assessment of the following factors:

36.1 The suspect's age (prosecution may have a disproportionate impact on both the young and the elderly). Age will likely also be relevant to the risk of reoffending.

36.2 Whether the suspect has any disability or is experiencing any significant mental health issues, which may have had a causative role in the offending, that the prosecutor is aware of.

36.3 The suspect's prior criminal history (or lack of), including prior enforcement action short of prosecution if the prosecutor is aware of it.

36.4 The risk posed by the suspect to the safety of the public, or any individual person.

36.5 Whether there are features of the suspect's background known to the prosecutor which may shed light on a suspect's culpability or have played a role in their offending.[1] As with all public interest factors, this is not a determinative factor on its own and is likely to be most relevant in cases involving less serious offending or where the decision to prosecute is finely balanced. It will often be the case that prosecution remains appropriate and such matters are best taken into account in the sentencing exercise.

36.6 Whether the suspect has already been subject to some consequence for their conduct, such as:

36.6.1 loss or harm arising from the offending itself (the suspect may have been harmed themselves or have unintentionally harmed someone close to them);

36.6.2 post-conduct loss or harm, whether related to the offending or not (the suspect's present personal circumstances may be quite different from those prevailing at the time of the offending); or

36.6.3 legal consequences, such as employment consequences or action taken by another agency.

36.7 Any other aggravating features, such as being subject to a sentence, or bail or release conditions, at the time of the offending. It may also be relevant that the suspect was subject to some non-judicial proceedings or order (such as

[1] *Berkland v R* [2022] 1 NZLR 509. For example, relevant factors may relate to poverty, a lack of education opportunities, addiction or displacement from whānau or community support. In addition, offenders may have previously been victims of crime (whether reported or not) and that may be a relevant factor in their own offending.

disciplinary proceedings), particularly in the context of regulatory offending.

36.8 Any other mitigating features, such as:

36.8.1 expressions of remorse;

36.8.2 participation in restorative practices, whether formal (such as restorative justice conferences), or informal (such as initiatives led by local communities, iwi or hapū);

36.8.3 the provision of assistance to the authorities; or

36.8.4 efforts to repair damage or restore losses.

37. Prosecutors are only required to take into account a suspect's personal characteristics where there are reasonable grounds to believe they are applicable and relevant. Prosecutors will use their judgement to determine whether and how to take such matters into account, based on the information available to them.

Commentary
For example, it will not always be appropriate to take an assertion that a suspect has a mental or intellectual impairment at face value, particularly where there has been no formal diagnosis. Another example might be where there has been an expression of remorse which does not appear to be genuine.

38. Particular care should be taken with certain classes of offender:

38.1 Young people and first offenders. Entry into the criminal justice system has been proven to have long-term negative impacts for a defendant, even if they are not convicted. The fact a person has been charged (and may be subject to bail conditions) can make it more difficult to retain employment and housing. Where the offending is not serious, those who do not have any prior convictions (and therefore may be disproportionately impacted by a decision to bring a prosecution) should be dealt with in an alternative manner if possible.

38.2 People with a mental or intellectual impairment. A prosecutor may be aware (for example, from prior dealings with the person) that a suspect has a mental or intellectual impairment (whether due to injury or some other cause such as Fetal Alcohol Syndrome Disorder) or is experiencing significant mental health issues. Those circumstances can be relevant to the prosecution decision in two ways. First, if there is a causal link between those matters and the offending, the suspect may be less culpable. Second, the suspect may not be able to fully participate in a criminal proceeding. That may require prosecutors to consider whether an alternative intervention or response (such as action under the Mental Health (Compulsory Assessment and Treatment) Act 1992) would be more appropriate. Or, if there is to be a prosecution, the prosecutor may need to suggest the court order reports to be prepared under the Criminal Procedure (Mentally Impaired Persons) Act 2003. There will be cases in which prosecution is appropriate despite these issues, for example where the offending is serious or there are public safety concerns. In such cases the defendant's circumstances can be taken into account at sentencing.

39. Prosecutors will usually be unaware of the full extent of a defendant's personal circumstances at the time they make the initial prosecution decision. Prosecution decisions should be reviewed whenever significant new information about the defendant comes to light.

40. Different considerations arise where the offender is a corporate entity rather than a natural person. Prosecuting agencies who regularly investigate the conduct of corporate entities should set out in their prosecution policies the factors to take into account in determining whether a prosecution is appropriate, tailored to the type of conduct in question.

Commentary
For example, while in general the courts are reluctant to impose significant monetary penalties on a natural person who does not have the means to pay, the same is not true of corporate defendants where the threat of significant financial penalties, even to the point of liquidation, is an effective deterrent.

The victim

41. How do the interests of the victim(s) (if there are any) weigh for or against prosecution? This will likely require an assessment of:

    41.1 any ongoing safety issues for the victim, their whānau and the community;

    41.2 the impact of a prosecution, or decision not to prosecute, on the victim's physical and mental health;

    41.3 the impact of a prosecution, or decision not to prosecute, on the victim's whānau and, where relevant, their hapū and iwi;

    41.4 how the victim's ability to obtain reparation will be affected; and

    41.5 whether the victim will be eligible for registration on the Victim Notification Register.

42. It should never be assumed that a victim would wish to avoid being involved in a trial. Some will feel that way. Others see their choice to be involved in a prosecution, despite its challenges, as an important step to hold the defendant accountable.

43. Prosecutors may seek the views of a victim before making a decision to prosecute or not, particularly in family violence or sexual violence cases where the victim's evidence is central to the prosecution and the decision will have significant implications for them. However, it should always be made clear that the decision is for the prosecutor to make; the victim's views will not be determinative. If a prosecutor asks a victim whether they support a prosecution being commenced, they should first inform them:

    43.1 whether they will be required to give evidence;

    43.2 how long a prosecution may take; and

    43.3 of the likelihood of a custodial sentence if the defendant is found guilty (but emphasising this will be a matter for the court to determine).

Commentary

People unfamiliar with the criminal justice system may have unrealistic expectations as to both process and outcome. It is important to ensure victims understand the process before being asked if they support a prosecution. In some cases, prosecutors may also share their assessment of the likelihood of conviction: while there may be sufficient evidence to prove the charge beyond reasonable doubt, the prosecutor may nevertheless consider, based on their judgement and experience, that acquittal is more likely. That, too, *may* influence a victim's views, but that should not be assumed – for some victims the process of holding an offender accountable is more important than the outcome, and of course the prosecutor's prediction may prove to be incorrect. Prosecutors should ask themselves *why* they think a prosecution may not result in a finding of guilt if they consider there is sufficient evidence; if it is because they think the fact-finder will be influenced by irrelevant matters or engage in illegitimate reasoning, they should take steps to mitigate those risks.

44. Where a victim does not support a prosecution and/or does not wish to give evidence, prosecutors should carefully consider why the victim holds that view. The ultimate question is what the public interest requires; there will be cases in which, for reasons of public safety, a prosecution is required despite the victim being unsupportive. Prosecutors should be sensitive to victims' needs in such situations and take steps to allay their concerns.

Commentary

Prosecutors should be aware that the reason a victim does not support a prosecution may in fact reinforce the need for a prosecution, for example, where they are fearful of the defendant. In such cases prosecutors should explain the possibility of applying to the court for an order permitting the victim to give evidence in an alternative way.

45. Further, a victim's views about a prosecution may change over time. Prosecutors should be aware of this and be prepared to seek a victim's views at multiple times and review the prosecution decision if necessary.

Alternatives to prosecution

46. Are there any alternative methods of resolving the matter short of prosecution which are available and appropriate in the circumstances? This question will in many instances have been considered prior to applying the Test for Prosecution, in accordance with the prosecuting agency's prosecution policy as set out in the guideline on Prosecution policies | Ngā kaupapa here mō te aru. However, prosecutors should return to it at this stage when more information will likely be available as circumstances may have changed with the passage of time.

The continuing obligation to review the prosecution decision

47. Once a prosecution is commenced, prosecutors should keep the decision to prosecute under review throughout the life of a case to ensure that it remains appropriate to continue with it and that the charges are correct. In particular, prosecutors should revisit the Test for Prosecution in either of the following scenarios:

    47.1 Where further information or evidence comes to light which either contradicts some of the evidence to be relied upon or otherwise weakens the prosecution

case.

47.2 Where further material information is received, or there is a material change in circumstances, relevant to the factors considered as part of the Public Interest Test.

Commentary
It is a matter of judgement for the prosecutor to decide when to review the decision to prosecute. If a defendant invites the prosecutor to review the decision, whether on the basis of new information or otherwise, it is for the prosecutor to determine whether there has been a material change warranting reconsideration.

48. A prosecution should be discontinued as soon as practicable if the prosecutor considers the Test for Prosecution is no longer met.

49. There will also be cases where the prosecutor considers that, as a result of further evidence becoming available, a charge should be amended (either to a more or less serious charge) or additional charges filed. The court's leave may be required. It is appropriate to take those steps, provided there is no unfairness to a defendant; it would not be fair, for example, to significantly amend charges shortly before a trial is to commence. However, such a step may be necessary in the public interest, in which case the prosecutor should not oppose an application to adjourn the trial so that the defendant can prepare to meet the new charges.

The choice of charges

50. In most cases, the evidence will support charges for more than one offence. The prosecutor will need to decide which charge (or charges) is most appropriate in the circumstances. That should generally be done prior to consideration of the Test for Prosecution, because:

50.1 the prosecutor will need to know what offence is to be charged in order to determine whether the Evidential Test is met; and

50.2 the prosecutor will also need to know what the appropriate charges would be, at least in a general way, in order to gauge the seriousness of the offending, which is relevant to the Public Interest Test.

51. However, prosecutors may determine that a different charge (whether more or less serious than first thought) should be preferred, once the factors in the Public Interest Test have been considered. In such cases it will usually be prudent to reconsider the Evidential Test to ensure that all elements of the charge to be filed can be proven beyond reasonable doubt.

52. Prosecutors do not have to select, or continue with, the most serious charge available on the evidence. Nor must they select the least serious charge which is technically available on the evidence. Prosecutors should proceed with charges that:

52.1 accurately and adequately reflect the seriousness and extent of the offending; and

52.2 provide the court with an appropriate basis for sentencing in light of the facts

and elements of the offence.

Commentary

For example, most offending involving interpersonal violence will involve the defendant unlawfully detaining the victim. But that does not mean that a charge of kidnapping should necessarily be filed. Such a charge should be reserved for cases in which there is a period of deliberate detention as a separate act. In respect of the violence itself, there are often several different charges available. Any charge more serious than assault could technically be charged as assault. It is for the prosecutor to assess which charge best captures the criminality of the offending. Another common example is where there have been multiple assaults in a single episode of violence: it is not generally necessary or appropriate to file a charge for every individual punch or kick. However, separate charges should be preferred if there is a clear delineation between multiple violent acts, such that a fact-finder might reasonably reach different verdicts for each.

53. Prosecutors should never inflate the number or seriousness of charges to encourage a defendant to plead guilty to a lesser charge, or to fewer charges. The Test for Prosecution should be applied to each individual charge the prosecutor wishes to file.

54. Prosecuting agencies and Crown Solicitors should have processes in place for the peer review of charging decisions by a suitably senior prosecutor.

Plea arrangements

55. A plea arrangement is an agreement between the prosecutor and the defendant that the defendant will plead guilty if the prosecutor agrees to do one or more of the following:

    55.1 Reduce a charge to a lesser offence.

    55.2 Withdraw or offer no evidence on other charges.

    55.3 Not file, withdraw or offer no evidence on charge(s) against another person or persons.

    55.4 Amalgamate multiple charges to a single representative charge.

    55.5 Amend content in the summary of facts that will be put before the court.

56. A plea arrangement may also involve a prosecutor agreeing to not file, offer no evidence on, or withdraw charges in exchange for a suspect giving evidence in a trial against other defendants involved in the same set of facts. The existence of such an arrangement should be disclosed to those other defendants.

57. A plea arrangement should **not** include the prosecutor agreeing to support a particular sentence, because the decision as to sentence is exclusively for the court. A prosecutor may give a defendant advance notice of their likely position on sentence, but that should form no part of the plea arrangement.

58. Plea arrangements have several benefits:

    58.1 They provide victims and their whānau with the certainty of an outcome without the need for a trial.

58.2 They will generally result in an outcome being reached much more quickly than if a trial were required. This is a benefit for both the victim(s) (if any) and the defendant.

58.3 There are significant savings in resources if the time and cost of a trial are not required.

Commentary
Those benefits go beyond the individual case: the court time that would have been used for that trial can be used for another trial instead, providing a quicker outcome for the participants in that case as well.

58.4 Victims and other witnesses who may have found the experience of giving evidence traumatic will not be required to do so.

59. Plea discussions, whether or not they result in a plea arrangement, are a legitimate way of efficiently and effectively progressing a prosecution when done in a principled way. They may be initiated by either the prosecutor or the defendant, at any time during the prosecution.

60. Prosecutors should engage in plea discussions with defence counsel. They should not generally engage directly with a defendant, whether they are represented by counsel or are representing themselves (see the guideline on Self-represented defendants | Te kaiwawao ka whakakanohi i a ia anō for more guidance in that situation).

61. Prosecutors may enter into a plea arrangement if it is in the interests of justice. This requires that the charges to which the defendant will plead guilty:

61.1 are clearly supported by the evidence;

61.2 adequately reflect the essential criminality of the conduct; and

61.3 provide an adequate basis for an appropriate sentence.

62. Prosecutors should not enter into a plea arrangement where the plea arrangement would produce a distortion of facts or create an artificial basis for sentencing.

63. If a prosecutor is considering entering into a plea arrangement in a case involving a victim of a specified offence, they should make all reasonable efforts to seek the victim's views on the proposed plea arrangement before it is finally agreed. However, the decision is ultimately one for the prosecutor.

64. Prosecutors should be as consistent as possible in plea discussions with all defendants. Defendants who are comparably situated should be provided with a comparable opportunity to engage in plea discussions and be treated similarly in the discussions.

Commentary
This paragraph applies more broadly than to cases involving multiple defendants. While it is obviously important that multiple defendants in the same case are treated consistently, prosecutors should also be aware that some defendants may not be treated consistently with others in comparable situations as a result of unconscious bias or other factors.

65. Prosecutors should honour plea arrangements. A prosecutor may only depart from an agreed plea arrangement if the interests of justice require it. Either the Crown Solicitor (in a Crown prosecution), or a senior manager within the prosecuting agency (in a non-Crown prosecution) should personally approve the repudiation of a plea arrangement.

Commentary
It will not be sufficient that the prosecutor simply changes their mind. Repudiation of a plea arrangement will generally only be appropriate if the prosecutor becomes aware that the facts of the case are significantly different from those that were understood at the time of entering into it, whether because they have been misled or further information has come to light.

66. If a prosecutor is considering entering into a plea arrangement that involves the defendant pleading guilty to a charge that is significantly less serious than that disclosed by the evidence, removing reference to a material aggravating factor from the summary of facts, or withdrawing charges altogether, the prosecutor should discuss the matter with a senior prosecutor within their agency or firm.

67. If a prosecutor is considering entering into a plea arrangement in a case in which reparation will be sought at sentencing, the prosecutor should review the guideline on Avoiding unlawful bargains | Te kaupare i te tauhokanga takahi ture.

Plea arrangements in cases involving sexual violation

68. Crown Solicitors must personally approve the withdrawal or reduction of a charge of sexual violation, in accordance with the guideline on Prosecuting sexual violence | Te aru i te taitōkai. Crown Solicitors are required to comply with the direction that personal approval be given, in accordance with s 188 of the Criminal Procedure Act 2011.

Plea arrangements in murder cases

69. Crown Solicitors must seek the Solicitor-General's approval for plea arrangements in relation to murder charges, in accordance with the guideline on Plea arrangements in murder cases | Ngā whakaritenga tauākī i ngā kēhi kōhuru. Crown Solicitors are required to comply with the direction that personal approval be given, in accordance with s 188 of the Criminal Procedure Act.

The summary of facts

70. Plea arrangements will often involve discussions about the factual basis for sentencing. Prosecutors should not agree to present a summary of facts that misleads the court. For instance, prosecutors should not:

    70.1 Withhold admissible facts that would be relevant and material to sentencing.

    70.2 Withhold information about the injury or damage suffered by a victim.

    70.3 Include facts that would cause the court to reject a guilty plea (such as facts suggesting the offending may have been accidental when the particular offence requires proof of intention).

Decisions to take no action

71. Decisions not to prosecute must be explained to victims.[2] In serious cases, such as cases involving sexual violation or a death, that should be done in person, if practicable. The guideline on Prosecuting sexual violence | Te aru i te taitōkai provides further guidance for those cases.

72. People should be able to rely on decisions taken by prosecutors. Usually, if a prosecutor tells a suspect or defendant that no action is to be taken, that should be the end of the matter. However, there may be circumstances in which action may need to be taken after an initial decision to take no action, such as:

    72.1 Rare cases where a review of the original decision shows that it should not be allowed to stand.

    72.2 Cases where there is a subsequent and material change in the evidence available.

73. In either situation, the overriding consideration remains whether it is in the public interest to reverse the original decision.

74. There is no statutory right to seek a review of a decision not to prosecute. But victims or interested members of the public may nevertheless seek a review and, in some cases, a prosecuting agency may agree to engage in such a process.

75. All prosecuting agencies should have a policy for dealing with a request to review a decision to take no action in a particular case. Such policies should give effect to principles of natural justice and ensure independence of the review from the original decision.

76. The guideline on Prosecuting sexual violence | Te aru i te taitōkai stipulates the procedure to be followed in cases where a decision is made to take no action where there is an allegation of sexual violation.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Prosecution policies | Ngā kaupapa here mō te aru
Making unbiased decisions | Te whakatau rītaha-kore
Victims | Ngā pārurenga
Prosecuting sexual violence | Te aru i te taitōkai
Plea arrangements in murder cases | Ngā whakaritenga tauākī i ngā kēhi kōhuru
Avoiding unlawful bargains | Te kaupare i te tauhokanga takahi ture
Statutory consents to prosecutions | Ngā whakaaetanga ā-ture ki ngā arumanga
Inmate admissions | Ngā whāki ā-mauhere
Immunities | Te kahu ārai

[2] Victims' Rights Act 2002, s 12(1)(b).

Making unbiased decisions

Te whakatau rītaha kore

As at 1 January 2025

The Solicitor-General’s Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

All guidelines should be read alongside the Principal guideline | te Aratohu mātāmua

Introduction | Ngā kupu whakataki

1. Prosecutorial decisions should be made with a view to fairness and equitable criminal justice outcomes for all. Prosecutors should be aware of biases that affect prosecutorial decision-making and put processes in place to mitigate adverse effects. In this guideline, "equitable outcomes" means the absence, in prosecution decisions, of avoidable or remediable differences in treatment or approach that have or may have an unfair effect on particular groups of people, however these groups are defined.

2. Cognitive bias is a systematic thought process that involves simplifying and filtering information; and includes assumptions, stereotypes, personal preferences, and mental shortcuts. Biases can help us make decisions efficiently, rather than reasoning from first principles in every case. Bias can be either conscious (explicit) or unconscious (implicit). Unconscious biases are harder to identify.

3. Bias can contribute to unfair decision-making, erroneous judgements and inappropriate organisational practices. Biases can therefore undermine the administration of justice by entrenching or exacerbating social and systemic prejudice, discrimination and privilege. Bias can impact all population groups but the overrepresentation of Māori in the criminal justice system as both victims and defendants suggests Māori may be more likely to be harmed by adverse biases.

Scope | Te korahi

4. This guideline supports prosecutors to follow fair processes and achieve equitable outcomes in their decision-making.

Guideline | Te aratohu

5. Prosecuting agencies should have processes and policies to mitigate against conscious and unconscious bias in prosecutorial decision-making. These processes and policies may help prosecuting agencies to meet their obligations under the New Zealand Bill of Rights Act 1990, including those relating to freedom from discrimination.[1]

6. These processes and policies may form part of the public prosecution policies that prosecuting agencies are required to maintain or be contained in a separate policy document. If they are contained in a separate policy document, prosecuting agencies should consider making that document publicly available.

[1] New Zealand Bill of Rights Act 1990, s 19.

7. The following are examples of some processes and policies that prosecuting agencies may consider:

7.1 Prosecuting agencies could give guidance to prosecutors about:

7.1.1 relevant background and systemic factors;

7.1.2 how to identify whether these factors are present and how they relate to the offending; and

7.1.3 how the prosecutor should take these factors into account in prosecution decisions.

7.2 Developing internal organisational decision-making processes and best practice. This could include:

7.2.1 Requiring blind peer review of some files. This could involve a peer reviewer reviewing a decision to prosecute with identifying particulars redacted. This may reduce the risk of unconscious bias related to particulars (such as ethnicity, gender, disability, age or other prohibited grounds of discrimination[2]) influencing decisions. Sometimes, seemingly neutral factors (such as a person's address) may act as proxies for other factors and should also be considered for redaction.

7.2.2 Requiring written documentation of certain decisions to support considered, logical and transparent decision-making.

7.2.3 Identifying cases that might benefit from a "devil's advocate" approach, or review by someone with a different perspective.

7.3 Unconscious bias training. We are not conscious of many of our biases and how they influence our decision-making. Prosecuting agencies could provide unconscious bias training for prosecutors to help increase awareness and provide mitigation techniques.

7.4 Forums for prosecutors to safely discuss bias. Prosecuting agencies could facilitate an organisational culture of self-reflection and open dialogue to support prosecutors to identify and discuss problematic bias in prosecution or other decision-making. This can build institutional knowledge by providing opportunity for prosecutors to share strategies for challenging or mitigating biases and highlight organisational policies and processes that are working well.

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2 Human Rights Act 1993, s 21.

7.5 Developing measures and maintaining data. Systematically collecting and analysing data on prosecution decisions and outcomes could help prosecuting agencies identify areas for further research into whether conscious or unconscious bias may be undermining fair processes and equitable outcomes in prosecutorial decision-making. It could also help assess the effectiveness of bias-related policies and procedures.

7.6 Recruitment, retention, promotion and other organisational policies that improve and support diversity. This may include policies that enable diverse voices to be heard and valued. A more diverse workforce can improve prosecuting agencies' understanding and identification of the biases present in decision-making.

Commentary

For this to be effective, responsibility for understanding, identifying and addressing biases rests with all prosecutors working in the prosecuting agency, not only those from a particular background or minority group.

8. Prosecution decisions should be made independently from the investigator to minimise the impact of inappropriate conscious and unconscious bias in driving inequitable prosecution outcomes. This is set out in the guideline on The relationship between prosecutors and investigators | Te hononga i waenga i te kaiaru me te kaitūhura.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Decisions to prosecute | Te whakatau ki te aru
Prosecution policies | Ngā kaupapa here mō te aru
Sentencing | Te whiu
Bail | Peira
Diversion | Te autaki
Warnings | Ngā whakatūpato
Avoiding unlawful bargains | Te kaupare i te tauhokanga takahi ture
Appeals | Ngā pīra

Victims

Ngā pārurenga

As at 1 January 2025

All guidelines should be read alongside the Principal guideline | te Aratohu mātāmua

Summary | Te whakarāpopototanga

1. Different victims have different needs relating to their rights to be kept informed about the progress of proceedings and to be consulted on certain decisions. The appropriate level of support for each victim should be determined through consultation with the victim. Prosecutors should treat the victim with respect, courtesy and compassion, and respect the victim's dignity and privacy. It is important for prosecutors to act in a manner that demonstrates that, while the victim's views are important, they are not determinative.

Introduction | Ngā kupu whakataki

2. Victims occupy a special and unique place in the prosecution process. Depending on the type of case, they may be required to play a significant role in the prosecution (such as being a crucial witness for the prosecution) or they may not be required to participate at all if they do not wish to do so. Different victims will have different needs depending on the nature of the case and their own circumstances. In all cases, prosecutors should give effect to the victim's rights to be kept informed about the progress of the proceeding and, in certain cases, to have the opportunity to provide their views in respect of certain decisions. Prosecutors should be mindful of the effect of the offending on the victim and seek to minimise the possibility of further harm wherever possible.

Scope | Te korahi

3. This guideline is designed to assist prosecutors, and prosecuting agencies, to support victims throughout the life of a prosecution, as well as meeting their own obligations under the Victims' Rights Act 2002.

4. The Victims' Rights Act sets minimum standards for providing information to all those who meet the definition of "victim" in that Act. Section 29 of the Act imposes additional obligations in respect of victims of specified offences. These guidelines recommend additional ways in which prosecuting agencies, investigators and prosecutors can support victims, which go beyond the requirements of the Act and represent best practice. Some of the recommendations apply to all victims; some apply only to victims of specified offences; and others apply only in serious cases (as defined below). It is a matter for prosecuting agencies to determine whether and how they will support victims beyond the requirements of the Act.

5. Subject to those qualifications, this guideline applies to prosecutions for all types of offending. Additional guidance for sexual violence offending is provided in the guideline on Prosecuting sexual violence | Te aru i te taitōkai.

Roles | Ngā tūnga

6. When conducting a prosecution, the prosecutor acts on behalf of their agency, or the State (as applicable), and does not act for a victim in the same way as other lawyers act for their clients. Prosecutors should nonetheless always be mindful of the consequences for the victim and their whānau, and take their views into account where required by the Victims' Rights Act or recommended by these guidelines, in relation to any significant prosecution decision.

7. The prosecutor, the investigator and the court victim advisor all have different roles to play with respect to victims. Those roles may be further refined depending on a particular victim's needs and wishes. Prosecutors should establish clear lines of communication between all three parties so that responsibilities for the provision of information are clear and victims receive the information they should while not being "over contacted".

8. Similarly, prosecutors should liaise with court victim advisors to determine who will provide the victim's views to the court. In general, it will be the prosecutor's role to provide the victim's views to the court unless agreed otherwise.

Glossary | Kuputaka

9. A *serious case* will be defined differently within each prosecuting agency. In this guideline it includes, without limiting the nature of other cases which might properly be described as serious, any case which involves a death, or very serious violence (such as would justify a charge under s 188 of the Crimes Act, or a charge of sexual violation). It is a narrower class of cases than those defined as specified offences in s 29 of the Victims' Rights Act. A *specified offence* is an offence specified in s 29 of the Victims' Rights Act.

Guideline | Te aratohu

Principles

10. Section 7 of the Victims' Rights Act provides that the overarching principles for prosecutors to follow when dealing with victims are:[1]

    10.1 To treat victims with respect, courtesy and compassion.

    10.2 To respect victims' dignity and privacy.

11. To give effect to these principles, prosecutors should, at a minimum, be cognisant of the mandatory statutory requirements in the Victims' Rights Act to inform victims about matters concerning them and significant events throughout the prosecution. In some cases, prosecutors are required to seek victims' views on certain matters and convey those views to the court.[2]

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[1] Victims' Rights Act 2002, s 7.

[2] Victims' Rights Act, ss 28-30. See also relevant provisions in the Bail Act 2000 and the Criminal Procedure Act 2011 regarding bail and name suppression respectively.

12. Different victims have different needs. Some need more support than this guideline recommends; others need less. Some are opposed to the prosecution and do not wish to engage at all. Prosecutors should consult with victims, the investigator and other relevant people (for example the court victim advisor or independent victim advocate, if applicable) to determine the appropriate level of support in each case. Prosecutors should also be aware of the NGOs operating in their region to provide support to victims.

13. This guideline will need to be applied flexibly to meet the needs of individual cases. In particular, in Crown prosecutions, the Crown Solicitor determines how a matter should be prosecuted, in the particular circumstances of the case. The conduct of a proceeding in court is a matter for the presiding judge.

The decision to prosecute

14. Prosecutors should seek victim's views when making the decision to prosecute or not, particularly where a specified offence is alleged. However, the prosecutor should not give the impression that the victim's views will be determinative; while a victim's views are important, the decision always remains with the prosecutor. There will be cases where, for example for reasons of public safety, it is important to bring a prosecution over a victim's objection. Conversely, if the Test for Prosecution is not met, a prosecution cannot be commenced, irrespective of a victim's views.

15. Prosecutors should ensure victims are advised of prosecution decisions, preferably before they are made public. If the decision is not to prosecute, the victim should be told why. There will be exceptions, such as where the reasons are sensitive or private to the defendant or another party. Prosecutors should provide as much information as is appropriate, and explain why they cannot provide the full reasons, if that is the case.

16. In serious cases, prosecution decisions should be explained to the victim in person where practicable, particularly if the decision is not consistent with the victim's views. Victims should be given the option of having a suitable support person (who is not a witness) present at such meetings.

Providing information to, and consulting with, victims

17. Information and consultation are important, not only to the court's decision-making, but also to the victim's experience of, and preparedness to continue to engage with, the prosecution. Better information and consultation will help reduce stress for a victim, support their wellbeing and thereby improve the quality of their evidence in court if they are required to give evidence.

18. There are mandatory statutory obligations to provide victims with information about the prosecution. Under the Victims' Rights Act, that information may be provided by the investigator, the prosecutor (usually via the investigator) or court staff (such as a court victim advisor). The prosecutor or investigator will almost always be best placed to provide information to the victim; court staff will not have the same contextual understanding of the prosecution. The investigator will also have had the most prior contact with the victim, as the prosecutor and court staff do not become involved until charges are filed, which in most cases will be some time after a complaint is made to the prosecuting agency.

19. Engagement with a victim should be informed by the victim's own wishes. Some victims will want more information about the prosecution than others. Some may have a preference for receiving information from the investigator rather than court staff, or vice versa. Victims are also entitled to nominate, in writing, a support person to receive information on their behalf.[3] Consultation with the victim at an early stage, as to the level of engagement they wish to have, is essential.

20. Subject to the victim's wishes, the investigator should be the person who has presumptive responsibility for providing victims with information about the prosecution, unless some other course has been agreed with the prosecutor and court victim advisor. References in this guideline to the prosecutor providing information should therefore be taken to include the investigator. The prosecutor remains responsible for providing information to the investigator (for example about what has happened in court) so that information is provided to the victim quickly and accurately.

21. In relation to victims of specified offences, prosecutors should, from an early stage, be aware of the following:

    21.1 Who, if anyone, a victim wishes to have as their support person and the role that person will play in the provision of information (both to and from the victim), pre-trial meetings (if applicable) and court hearings.

    21.2 Whether there are any safety needs the prosecutor needs to know about, particularly where they may impact on the frequency and/or method of communication with the victim.

    21.3 Whether there are any religious or cultural protocols that should be observed, whether in hui | meetings with the prosecutor or at court, and whether other people may need to be involved to facilitate those processes (such as kaumatua to say karakia at court).

    21.4 Whether the victim has any particular accessibility needs, whether generally or specifically for court, or any other needs which may need to be accommodated. The need for translation or other communication assistance should be advised to the court as soon as possible.

Information required to be provided by statute

22. Section 12 of the Victims' Rights Act provides that the following information **must** be provided to victims:

    22.1 Decisions on charging and all changes thereto.

    22.2 The victim's role as a witness.

    22.3 The possibility of the court suppressing the victim's name and the steps the victim may take in respect of suppression of their own name.

[3] Victims' Rights Act 2002, s 14. In these guidelines, references to the victim include any support person nominated under this process.

22.4 The date and venue of:

22.4.1 the first appearance;

22.4.2 any preliminary hearing;[4]

22.4.3 any trial;

22.4.4 any sentencing hearing; and

22.4.5 any appeal hearing (whether the appeal is against conviction, sentence or both).[5]

22.5 Any referral of the conviction or sentence by the Criminal Cases Review Commission under s 17 of the Criminal Cases Review Commission Act 2019.

22.6 The outcome of the prosecution, including:

22.6.1 any guilty plea or finding of guilt, and the sentence imposed;

22.6.2 any finding that the defendant is unfit to stand trial;

22.6.3 any finding that the charge was not proved;

22.6.4 any acquittal or deemed acquittal (eg a discharge under s 147 of the Criminal Procedure Act 2011); and

22.6.5 any pardon.

Additional obligations in respect of bail and name suppression

23. The Victims' Rights Act also provides that victims of specified offences must be advised of, and their views sought in relation to, the following:[6]

23.1 Any application by the defendant for permanent name suppression.[7]

23.2 Any application by the defendant for bail (including EM bail).[8]

24. Where practicable, in serious cases, victims should also be advised of applications for interim name suppression and applications for variation of bail conditions (particularly those which may mean the victim is more likely to see the defendant somewhere or at some time they do not expect, such as variations to residential or curfew conditions). As with applications for bail and permanent name suppression, prosecutors should ascertain the victim's views and convey them to the court, unless that is not practicable.

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[4] While still technically a statutory requirement, this is redundant given that preliminary hearings are no longer a feature of the criminal process.

[5] These are the only types of appeals mentioned in the statute, but victims should also be advised of other appeals, such as significant pre-trial appeals.

[6] Provided they have asked to be kept advised of such matters under s 32B of the Victims' Rights Act.

[7] Victims' Rights Act, s 16B.

[8] Victims' Rights Act, s 30.

Commentary

An example where this may not be practicable is where the prosecutor is confronted with an application in court, without prior notice, and an adjournment has been refused or is not appropriate.[9]

A prosecuting agency may choose to advise victims of other offences of, and seek their views on, bail and name suppression, but they are not required to do so.

25. Any decisions about bail or name suppression should be communicated to victims of specified offences as soon as possible.[10]

26. If the defendant is remanded in custody at any point (whether bail was sought or not) the investigator should be notified as soon as possible, as this will trigger the operation of the Victim Notification Register (VNR).

Other information to be provided

27. In serious cases, prosecutors should consider notifying victims of the following matters, and explain the outcomes or implications to them (as well as consulting with them where appropriate):

    27.1 Procedures for determining fitness to stand trial or insanity, under the Criminal Procedure (Mentally Impaired Persons) Act 2003, if triggered.

    27.2 Notifications and/or applications by the prosecutor for the victim to give evidence in a particular way (whether the ordinary way or an alternative way), under the Evidence Act 2006.

    27.3 Applications by the prosecutor for the victim to have communication assistance when giving evidence, under s 80 of the Evidence Act.

    27.4 Significant pre-trial applications filed by the defendant that may affect them, such as:[11]

        27.4.1 Applications for stay or dismissal of the charges, under s 147 of the Criminal Procedure Act.

        27.4.2 Applications for severance under s 138(4) of the Criminal Procedure Act.

        27.4.3 Applications to transfer the trial to a different court, under s 157 of the Criminal Procedure Act.

        27.4.4 Applications to offer evidence about the victim's veracity or propensity, under ss 37 or 40 of the Evidence Act.

        27.4.5 Applications for non-party disclosure of personal information about them, under ss 24-29 of the Criminal Disclosure Act 2008.

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[9] Victims' Rights Act, ss 28-30; Bail Act 2000, s 8; and Criminal Procedure Act 2011, s 200.

[10] Assuming the victim has asked to be kept advised of such matters under s 32B of the Victims' Rights Act.

[11] Prosecutors will need to determine whether and when to advise victims about pre-trial applications and decisions. Much will depend on the merits of the application and the circumstances of the victim. However, prosecutors should at least consider providing this information, and have a good reason for deciding not to do so.

27.5 Applications by the defendant for communication assistance, and/or to give evidence in an alternative way.

27.6 A proposed plea arrangement that the prosecutor is considering offering or accepting.[12]

27.7 Any sentence indication hearing sought by the defendant.

27.8 Where the defendant has been convicted, or acquitted on account of insanity, the victim's right to provide a victim impact statement to the court.

27.9 Where the defendant has been convicted and there is associated family violence offending, the possibility of a protection order being made at sentencing.[13]

27.10 The possibility of appeals, whether in respect of pre-trial matters, conviction or sentence. The consequences of an appeal being filed should also be clearly explained (for example, where a pre-trial appeal means the trial may be delayed). Where relevant, the prosecutor may also consider advising the victim of the possibility of an application to the Criminal Cases Review Commission once appeal rights have been exhausted.

28. If a mistrial is declared or (in the case of jury trials) no verdict is reached, prosecutors should consult with the victim before deciding whether to proceed with a further trial, to explain what has happened and seek their views about a retrial. If a further trial is required, prosecutors should consider pre-trial matters afresh.

Commentary
For example, the way in which a victim gave evidence may no longer be suitable because of the passage of time or some other factor. Prosecutors should consult with the victim about such matters at an early stage.

29. In serious cases, prosecutors should ensure the victim has been referred to both Court Services for Victims (court victim advisors) and Victim Support. Court victim advisors can assist by explaining the court process, ascertaining and communicating the views of the victim and showing the victim the courtroom. They can also organise an appropriate support person for a victim with special needs to be in the courtroom if required and organise other special arrangements for the trial. Victim Support can assist victims and their whānau to access their entitlements to financial assistance, for example to attend the trial. There may be other services available depending on the type of case and its location; prosecutors should be familiar with the supports available in their area.

How information should be provided

30. Prosecutors should provide information in a timely way and in a manner the victim can understand.

31. Prosecutors should bear in mind that trauma may affect a victim's ability to process information about proceedings, particularly when that information concerns unknown or new terms or processes. In some cases, prosecutors may need to repeat

[12] It is not necessary to advise a victim of every proposal made by a defendant where the prosecutor has no intention of agreeing to it.
[13] Sentencing Act 2002, s 123B.

information on multiple occasions, or provide information even where the prosecutor knows someone else (such as the investigator) has already provided it.

32. Prosecutors should avoid making promises to victims and provide realistic time estimates. In any case where there is a change of circumstances that affects advice or information that has been given to a victim, prosecutors should ensure any change in the advice or information is explained promptly.

33. When ascertaining the victim's views before the court makes a decision (for example, about bail or name suppression), the prosecutor should make clear to the victim that their views will not be determinative, and that the court will need to consider a range of factors when coming to its decision.

34. When providing information to the court, prosecutors should be mindful of the statutory prohibition on disclosing the victim's contact details (including their residential address, email address or telephone numbers).[14] Prosecutors should also exercise caution when disclosing personal information about other witnesses.

35. When there are very large numbers of victims (as may be the case, for example, with certain types of dishonesty and property offending) it may not be practicable to identify or contact each victim individually. Prosecutors may consider alternative ways of meeting their obligations to provide information about proceedings.

Commentary

For example, information may be provided on a website or via an email address. In these cases, victims should be made aware of how they can access information.

36. Some victims may view court proceedings and prosecutors with suspicion; they may have felt disrespected, or experienced bias or prejudice, in the past. Prosecutors should be aware of such concerns and address them appropriately.

37. Prosecutors should be sensitive to matters that are important to the victims and their whānau in an individual case.

Commentary

For example, in serious cases, where prosecutors are aware of any significant dates (such as the birthday of a deceased victim, or other dates of cultural or religious significance to the victim or their whānau), they should avoid communicating information which could be distressing on those dates. Prosecutors should also take such dates into account in the setting of trial and sentencing dates, where practicable.

Meeting victims prior to trial

38. It will not be practicable for prosecutors to meet with victims in every case, particularly if they are not required to attend court. However, in serious cases, prosecutors should consider offering to meet with victims at an early stage (prior to callover in jury trial cases), irrespective of whether they are required to give evidence.

39. It is important that such meetings are not rushed, and take place in a respectful manner. Prosecutors should avoid meetings being scheduled shortly before they have to attend court or leave to meet other commitments. They should think carefully

[14] Victims' Rights Act, s 16. See also Evidence Act 2006, ss 87-88.

about the venue for a meeting.

Commentary
For example, the Crown or prosecutors' room at a courthouse may not be appropriate if there are likely to be interruptions as other prosecutors come and go.

40. Where a meeting is to take place, the prosecutor should make sure they know how to correctly pronounce the name of the victim, and any other people attending, as well as their pronouns. They should also make enquiries to find out whether there are any religious or cultural protocols which should be observed at the meeting, and whether the victim has any accessibility issues that need to be met.

41. The victim should be given the option of having a support person present. If a communication assistant has been appointed, the prosecutor should consider whether they should also attend (where practicable). The prosecutor should also consider whether an interpreter is required.

42. In addition to the matters set out above, and answering any questions the victim may have, prosecutors may wish to discuss the following with the victim, where relevant:

    42.1 The role of a prosecutor and, in particular, that they are not the victim's lawyer. This should be done sensitively; some victims may be surprised the State provides the defendant with a lawyer but not the victim. Prosecutors may need to reassure the victim that they will take account of the victim's views when making important decisions even though they do not act as the victim's lawyer.

    42.2 The prosecutor has to prove the case; defendants cannot be compelled to give evidence. Whether the defendant gives or calls evidence will be their decision to make and there should be no expectation they will do so.

    42.3 The media will be entitled to be present and report on any aspect of the proceeding, subject to any suppression orders.

    42.4 The level of engagement the victim wishes to have with the prosecution. Some victims wish to know about every court date and every development; others prefer to put the matter out of their minds until they are required to come to court or otherwise be involved. Victims should also have the opportunity to express a preference as to who provides information to them as between the investigator (on behalf of the prosecutor) or the court victim advisor.

    42.5 The position with respect to bail and name suppression and what that means. If the defendant is remanded in custody, the prosecutor should explain they may apply for bail at any time. The prosecutor should tell the victim what to do if they become of aware of a breach of bail (for example if they are contacted by the defendant), or if they are concerned by any other matters (such as unwanted contact from supporters of the defendant).

    42.6 The way in which the case will be determined and how the victim will be advised of the result. This will depend in part on whether the defendant has elected trial by jury.

42.7 If the defendant has not elected jury trial, the victim should be advised that the judge may reserve their decision so that the outcome is not known at the end of the trial. Prosecutors should have a procedure in place to receive and communicate judge-alone verdicts so that there are no delays (for example, if the prosecutor is on leave or in trial when the decision is emailed to them). In some cases, it may be appropriate to seek an embargo on the decision to allow victims to be notified before the verdict is public.

42.8 If there is to be a jury trial:

42.8.1 the need to alert the investigator, or the prosecutor, immediately if the victim or witness realises they know a juror personally; and

42.8.2 the victim will need to be able to attend court at very short notice if they wish to be present when the verdicts are taken. Otherwise, the prosecutor should put a plan in place to advise the victim of the verdict as quickly as possible, in a manner they are comfortable with.

42.9 The possible outcomes of the trial and the consequences of those outcomes. In particular, it can be distressing for a victim to see an offender released after being found guilty, if they have been granted bail pending sentencing. Expectations about a remand in custody following a guilty verdict should be carefully managed. Equally, the prosecutor should explain that a not guilty verdict will see the defendant's immediate release even if there has been a previous remand in custody.

43. Prosecutors should identify any specific needs such as translation or accessibility issues if the witness is intending to attend court. It may also be appropriate to ascertain whether there are any cultural processes the victim would like to observe, such as saying karakia at court.

44. If a victim or their whānau is intending to watch a trial, they should be warned about any aspects which might be particularly distressing (such as medical evidence or the presentation of graphic photographs) so they can decide whether to attend those parts of the trial.

Special considerations when meeting with victims who are to be witnesses

45. Pre-trial meetings have value for both victims and prosecutors. Most victims will not have given evidence in court before and may feel anxious about doing so. Meeting the prosecutor ahead of time and establishing a rapport supports the victim to give the best evidence they can. It is also an opportunity to identify any issues, such as accessibility issues, that have not yet been identified.

46. The investigator should always be present at any meeting between a prosecutor and a victim who is to be a witness. There should be no evidential discussions during meetings with witnesses. Meetings should be confined to the matters set out below as well as any other non-evidential matters raised by either the prosecutor or the witness. The attending investigator should create a record of who was present and the nature of the meeting (for example, "meeting with prosecutor"), which should be disclosed, but there is no need to keep a full record of the discussion.

47. There will be occasions when evidential matters are raised by either the prosecutor or the witness. These discussions should take place separately.[15] The attending investigator should keep a full record of any evidential discussions, which may need to be disclosed to the defence.

48. Prosecutors should explain to the victim that the prosecutor cannot rehearse their evidence with them, and the reasons for that. However, prosecutors may prepare witnesses for court. Preparation must not extend to coaching but should include:

    48.1 Confirming that, when giving evidence, the most important thing is to tell the truth.

    48.2 Reassuring them that all that is otherwise expected is that they be themselves.

    48.3 Explaining what to expect in evidence in chief, cross-examination and re-examination and judicial questions (and what those terms mean). The witness should listen carefully to all questions, irrespective of who is asking them, and if they do not understand or need clarification, ask for the question to be repeated or rephrased.

    48.4 In some cases it may be appropriate to tell the witness they may be challenged on some specific topics (without suggesting possible answers, which would stray into coaching). For example, it may be appropriate to tell the witness if they are likely to be accused of lying, or questioned about sensitive issues or previous criminal convictions. Similarly, it may be appropriate to warn the witness that they may be confronted with sensitive material such as photographs or text messages.

    48.5 Showing the witness exhibits about which they might be asked questions, particularly where it is potentially confusing (such as spreadsheets of phone data, or floor plans), so they can orient themselves to the material ahead of time. This may save time at trial and assist the witness to feel more confident when giving evidence.

    48.6 Advising that cross-examination is not a personal attack, but a professional task that is part of defence counsel's duty to their client. In particular, witnesses should be warned that they may not always understand the relevance of a question, or wish to answer, but that they must do their best to do so. If having difficulty, they may pause before answering (at which point the prosecutor may object to an improper question), ask for a break or ask for clarification.

49. Where relevant, prosecutors should explore the possibility of the victim giving evidence in an alternative way.

Particularly vulnerable victims

50. Some victims are particularly vulnerable for reasons which may or may not be immediately apparent to the prosecutor. Prosecutors should be mindful that some victims may have more difficulty participating in the criminal justice system than others, and attempt to mitigate that as far as practicable. It is important to identify

[15] For convenience, such a meeting could directly follow an initial or pre-trial meeting.

barriers that might limit their capacity or willingness to participate and to consider ways to overcome them.

51. Without limiting the reasons why a victim may be particularly vulnerable, the following populations are likely to fall into that category:

 51.1 Children.

 51.2 Victims of family or sexual violence. Prosecutors should be aware of the guideline on Prosecuting sexual violence | Te aru i te taitōkai and consider applying it, where relevant and appropriate, in family violence cases. In particular, prosecutors should consider the ways in which victims should give evidence and either give notice, or make applications, to the court as soon as possible.[16]

 51.3 Members of communities that may be under-served by the criminal justice system or otherwise marginalised are more vulnerable to becoming victims of crime and may feel unprotected by, and mistrustful of, that system. People are more likely to have been impacted by these factors if they have had previous interactions with the criminal justice system as a victim or defendant, or have been subject to abuses in care. Populations which may be under-served by the criminal justice system or otherwise marginalised include:

  51.3.1 The elderly, who are more likely to live with physical or cognitive limitations which may affect their ability to participate effectively.

  51.3.2 Disabled people.

  51.3.3 Minority populations, particularly those with limited or no proficiency in English (the effect of which is likely to be exacerbated in stressful or unfamiliar settings).

  51.3.4 People who are vulnerable by virtue of particular circumstances such as homelessness, incarceration or immigration status.

  51.3.5 Members of LGBTQI+ (or "Rainbow") communities.

52. Some victims will fall into more than one of the above communities.

Victims who have experienced trauma[17]

53. Victims may experience physical, emotional, psychological, and/or pecuniary harm as a result of an offence. Multiple types of harm may result from the same crime. Emotional harm can be caused by a variety of crimes, including those that do not involve violence.

54. Prosecutors should use their best efforts to follow a trauma-informed approach, and recognise that victims may have experienced multiple forms of trauma. This includes trauma from the crime itself, trauma from their injuries or losses, trauma from their

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[16] Family violence complainants are entitled to give their evidence in chief by way of video records in certain circumstances: Evidence Act 2006, s 106A. Where those criteria are not met, the prosecutor should consider making an application to the court for them to do so.

[17] In this context, the word trauma has its technical meaning whereby a person has been so impacted by an experience that they experience some or all of the following: hypervigilance, psychological and physical avoidance, and, in response to internal or external triggers, a re-experiencing of the past event.

involvement in the criminal justice process and other forms of pre-existing trauma that may affect their experience in the criminal justice process.

Commentary
A trauma-informed approach involves understanding the vulnerabilities and experiences of trauma survivors, including the prevalence and physical, social, and emotional impact of trauma. A trauma-informed approach recognises signs of trauma in victims and witnesses and responds by integrating knowledge about trauma into the prosecutor's practice. Trauma-informed approaches seek to empower the victim's feelings of safety, choice and control.

Emotional harm may result in a range of physiological and psychological reactions, from temporary impairment in the ability to cope and function to acute stress reactions and post-traumatic stress disorder. Visual imagery related to the event and the emotional and physical reactions associated with reliving the experience may remain with a victim for many years. Victims who have experienced violence, threats of violence, intimidation, exploitation or harassment over an extended period may also suffer from complex trauma, which can entail severe emotional injury. In appropriate cases, prosecutors should endeavour to identify how trauma might impact a victim's ability to give evidence and take steps to mitigate the risks of further harm as far as possible (such as seeking orders for the victim to give evidence in a different way or asking the court to take more frequent breaks than usual while the victim is giving evidence).

55. Without limiting how prosecutors may implement a trauma-informed approach, prosecutors may consider the following:

    55.1 Asking a victim how they would like the prosecutor to refer to the offender (use of the person's name may be triggering). The prosecutor may need to explain that other participants (such as defence counsel) are not required to meet such preferences.

    55.2 Asking a victim whether there are any particular words or phrases which the prosecutor should avoid in discussions with the victim, or anything else the prosecutor should or should not do, to reduce the difficulty of communicating and participating for the victim as much as possible.

    55.3 Ensuring that, in meetings, there is sufficient space to allow for a victim to sit apart from others and there are no obstructions between them and the exit.

    55.4 If relevant, preparing a victim for the use of exhibits (such as photographs) so they are not confronted with them for the first time at trial.

    55.5 Taking additional steps to avoid any possible contact between victims and defendants. For example, arranging for a victim to arrive earlier or later than a bailed defendant to avoid them going through court security at the same time.

56. Prosecutors are often very busy and working on multiple cases at any one time. However, victims who have experienced trauma may interpret normal signs of being busy as suggesting the victim does not matter, such as when a prosecutor forgets details of the case or makes errors such as mixing up people's names. Prosecutors

should try to avoid those sorts of errors and apologise if they do occur.

Commentary
When arranging a meeting with a victim, prosecutors should ensure they have sufficient time to prepare for it immediately beforehand. This will enable them to refamiliarise themselves with the file and ensure the details are fresh in their minds. It is inevitable that mistakes will occasionally be made; when that happens it may be appropriate to reassure the victim that their case is important.

Changes to charges and plea arrangements

57. Significant amendments to charges, including a reduction in charge, or amalgamation of multiple charges, whether for the purposes of a plea arrangement or not, are likely to be of great importance to victims and their whānau. The choice of charges is exclusively a decision for the prosecutor to make in accordance with the guideline on Decisions to prosecute | Te whakatau ki te aru. However, in serious cases, prosecutors should make all reasonable efforts to discuss any significant amendments to charges with victims beforehand to explain the reasons for, and implications of, the change and seek their input, unless that is impracticable. Prosecutors should consider seeking adjournments for this purpose in appropriate cases.

58. Prosecutors should be aware that victims have an interest in seeing those who have harmed them held accountable for their actions and may be concerned about the withdrawal or amalgamation of individual charges. Removing individual charges can be disempowering for victims who may perceive that the prosecutor, or the justice system generally, is being dismissive of the harm they have suffered from those individual charges, even if they are unlikely to impact the final sentence.

The summary of facts

59. The summary of facts is an important document. If a guilty plea is entered, the summary will form the factual basis for sentencing. As with plea arrangements, in serious cases the victim’s views should be considered when determining whether the prosecutor will agree to significant amendments to the summary of facts. The summary of facts should represent a comprehensive summary of the circumstances giving rise to the offending that the prosecutor can prove beyond a reasonable doubt. A summary of facts which bears little resemblance to the victim’s account of the offending risks undermining their confidence in the process. There will be cases where the victim disputes aspects of the summary, but the prosecutor is not in a position to prove the victim’s account beyond reasonable doubt (or the disputes are not sufficiently material to warrant a disputed facts hearing). This should be clearly explained to the victim before the summary is read out in court or otherwise made public.

60. Prosecutors should tell victims that the content of the summary of facts could be made public at any time: if a defendant pleads guilty, the prosecutor must provide the summary to the court and it becomes a matter of public record that can be accessed and published by the media unless the court makes an order prohibiting publication.

61. There will be cases where some of the information in a summary of facts cannot be disclosed to victims prior to a guilty plea being entered (for example, where they are to be a witness at trial). In other cases, parents or caregivers may request certain details to be withheld from young or vulnerable victims. In such cases the investigator and prosecutor should work together so that victims are not surprised by information published in the media or discussed in court at a sentencing hearing.

Sentencing

62. Sentencing is a particularly important event for victims and their whānau. In serious cases, prosecutors should consider meeting with victims beforehand to discuss the process and the options for their attendance at, and involvement in, the sentencing hearing, particularly if they have not had to attend court previously in the proceeding (for example, where there has been a guilty plea).

63. If a prosecution is proceeding to sentencing or disposition following a trial, guilty plea, or acquittal on account of insanity, prosecutors should do all of the following (or ask the investigator to do so):

    63.1 Explain the victim's right to provide a victim impact statement to the court. In order for the victim to make an informed choice, they will need to understand the nature and purpose of the victim impact statement, and who will see it, as well as what type of material should not be included (such as overly inflammatory material, references to unrelated matters or offending other than that before the court, and comments addressed to the defendant directly).

    63.2 Where inappropriate material appears in a victim impact statement, prosecutors should either redact the material or acknowledge in their submissions to the court that it should not be taken into account. Any redactions should be discussed with, and explained to, the victim prior to the sentencing hearing. Prosecutors should agree with the victim on a deadline for providing a draft victim impact statement so these discussions can occur and avoid last minute redactions.

    63.3 Consult the victim as to whether any parts of their victim impact statement should be withheld from the defendant,[18] or whether other directions about disclosure should be sought.[19]

    63.4 If the victim wishes to provide a victim impact statement, ask the victim whether they wish to read it in court (or have someone read it on their behalf) and, if so, how they wish to present it.[20] Prosecutors should explain that the judge will ultimately decide. The prosecutor should also explain the sentencing hearing will be public (and may, therefore, be reported in the media).

    63.5 Where s 24A of the Sentencing Act applies, explain that someone will be in contact with the victim to discuss the possibility of restorative justice. Where s 24A does not apply (for example, where no guilty plea was entered), the prosecutor may wish to explain what restorative justice is and ascertain the

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[18] Victims' Rights Act, s 25.
[19] Victims' Rights Act, s 27.
[20] Victims' Rights Act, ss 22 and 22A set out the way in which a victim impact statement may be presented.

victim's willingness to participate.

63.6 Where the case involves family violence offending, consider applying for a protection order as part of the sentence. This will require consultation with the victim as an order may only be made if the intended protected person does not object.[21]

64. The prosecutor (or investigator) should also do the following in serious cases:

64.1 If it becomes apparent that the sentencing hearing may be adjourned (for example, because required reports have not been prepared in time), proactively alert the court and have the matter formally adjourned. Victims should be notified as soon as possible if a matter is likely to be adjourned so they have time to change practical arrangements, such as taking time off work or school.

64.2 Prior to the sentencing hearing, advise victims about the sentencing process. Victims should be made aware they may attend in person even if they do not want to present their victim impact statement personally, and should be advised that the hearing will be open to the public. Anyone in the public gallery will hear the victim impact statement if it is read out. It should be clearly explained that the facts of the offending will be outlined by the judge in some detail so the victim is prepared for that.

64.3 Advise victims of the full range of sentencing options available to the court, and the submissions the prosecutor will make as to the appropriate sentence. If the defendant is seeking a discharge without conviction the victim should be made aware of that.

64.4 If the sentencing hearing is in a list court, and the victim is planning to attend, consider asking for it to be heard at a fixed time (or first or last in the day) to minimise waiting time for the victim.

64.5 If the victim and/or their whānau is attending the sentencing hearing, alert the court so that the judge is aware.

64.6 After sentencing, explain the sentence imposed and any practical implications. Some victims may wish to have a copy of the sentencing notes; prosecutors should facilitate that request where practicable (or explain that sentencing notes are not always transcribed).

Post-trial appeals

65. If a convicted defendant files an appeal, the prosecutor should ensure the victim is informed of the nature of the appeal (whether against conviction, sentence or both) and the process for dealing with it. In the case of appeals from Crown prosecutions (which includes all jury trials), that process will be facilitated by Crown Law together with the investigator and/or court victim advisor. However, in serious cases prosecutors may consider informing the victims themselves as well, such as where the victim is particularly vulnerable and will benefit from receiving this advice from the prosecutor personally, given the prosecutor will be best placed to explain the grounds

[21] Sentencing Act, s 123B.

of appeal.

66. It is rare for appeals to be determined at the hearing. Prosecutors should explain the process for being advised about a reserved decision. In serious cases it may be appropriate to ask the appeal court to embargo a reserved decision for a short period of time, so the prosecutor can notify victims before the decision is made public.

67. If a retrial is ordered on a successful appeal, prosecutors should consult with the victim about matters relevant to a retrial from the victim's perspective.

Dealing with complaints and requests for reviews of prosecutorial decisions

68. Prosecutors should ensure the victim is aware of the Victims' Code and should themselves be familiar with it. The Code outlines victims' rights, details the services available to victims and sets out the complaints process for a victim to follow in the event they consider their rights have not been met.

69. Section 49 of the Victims' Rights Act confirms victims' right to complain if they have not been afforded their rights under the Act. All prosecuting agencies should set out, either in their prosecution policy or some other publicly available document, their process for dealing with complaints from victims. Such policies should incorporate natural justice processes.

70. Victims do not have a statutory right to a review of a prosecution decision but a victim may nevertheless seek such a review. Each prosecuting agency should determine for itself whether and when it will engage in a review process. This should be set out in the agency's prosecution policy or some other publicly available document. Any review process should ensure the independence of the review from the original decision. The guideline on Prosecuting sexual violence | Te aru i te taitōkai stipulates the procedure to be followed in cases where a decision is made to take no action where there is an allegation of sexual violation.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Decisions to prosecute | Te whakatau ki te aru
Prosecuting sexual violence | Te aru i te taitōkai
Case management | Te whakahaere kēhi
Bail | Peira
Sentencing | Te whiu
Media | Te pāpāho
Retrials | Te whakahaere anō i te whakamātau
Appeals | Ngā pīra
Non-party disclosure | Te tūhura i hunga kē
Diversion | Te autaki
Stays of proceeding | Te whakamoe kōtitanga

Appeals

Ngā pīra

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

All guidelines should be read alongside the Principal guideline | te Aratohu mātāmua

Summary | Te whakarāpopototanga

1. Prosecutors should come to appeals with an open mind. If there is a responsible basis for defending a decision, the prosecutor should do so.
2. The Solicitor-General's consent is required for a prosecution appeal. The ultimate question for the Solicitor General will be whether the proposed appeal is in the public interest. The factors relevant to that question will depend on the decision the prosecutor seeks to appeal.
3. The appendices to this guideline contain process guidance for prosecuting agencies and Crown Solicitors when requesting consent for an appeal.

Introduction | Ngā kupu whakataki

4. Defendants have a right of appeal against various judicial decisions in criminal proceedings, as well as against their conviction and/or sentence. The prosecutor has a more limited right of appeal against certain decisions.

Scope | Te korahi

5. This guideline sets out the Solicitor-General's expectations of prosecutors when responding to criminal appeals. It also provides substantive and procedural guidance for bringing criminal appeals.
6. This guideline does not cover other challenges to decisions where there is no jurisdiction to appeal or an appeal is otherwise not appropriate. If a prosecuting agency continues to have significant concerns about the impact of such a decision, prosecuting agencies may wish to contact Crown Law to discuss the possibility of an application for judicial review or use of the Solicitor-General's reference procedure.[1]

Glossary | Kuputaka

7. In this guideline:
   - 7.1 A *decision* is a decision of a court, tribunal or jury, including a verdict, which is either under appeal or sought to be appealed.
   - 7.2 The *prosecutor* is the lawyer acting on the appeal for the prosecuting agency (in respect of appeals against decisions made in non-Crown prosecutions) or the Solicitor-General (in respect of appeals in Crown prosecutions).
   - 7.3 A *defence appeal* is an appeal brought by the defendant.
   - 7.4 A *prosecution appeal* is an appeal brought by the prosecutor.
   - 7.5 A *specified offence* is an offence specified in s 29 of the Victims' Rights Act 2002.

[1] Criminal Procedure Act 2011, s 313.

Guideline | Te aratohu

Representation

8. In a non-Crown prosecution, if the prosecuting agency is the New Zealand Police or a government department:

    8.1 In both prosecution and defence appeals to the District Court, the prosecuting agency may choose to conduct the appeal itself or to instruct the local Crown Solicitor at the agency's cost.

    8.2 Defence appeals, and appeals brought by Police, to the High Court are conducted by the local Crown Solicitor, and funded by Crown Law from the Crown Solicitor's annual fee.

    8.3 Prosecution appeals to the High Court, other than those brought by Police, are conducted by the local Crown Solicitor, on instructions from the prosecuting agency and at the agency's cost.[2]

9. If the prosecuting agency in a non-Crown prosecution is not Police or a government department, the prosecuting agency is responsible for arranging and funding representation for the appeal.

10. All defence and prosecution appeals against decisions made in Crown prosecutions are conducted and funded by Crown Law.

Defence appeals

11. The starting point is the decision under appeal. The appeal prosecutor (whether or not they were the trial prosecutor) should assess each decision with an open mind. If there is a responsible basis for defending a decision, the prosecutor should usually put that case before the court in the public interest. In some cases, it will be necessary to acknowledge or articulate arguments against the decision, while still defending the result. The fact an appeal is subsequently allowed does not necessarily mean it should not have been opposed. The court benefits from hearing competing arguments when making decisions.

Victims and trial prosecutors

12. Prosecutors should be mindful of the rights and interests of victims and their whānau. They should also bear in mind that trial prosecutors will be interested in the progress of appeals and may be able to provide relevant information. Nevertheless, prosecutors should exercise independent judgement when conducting appeals.

Concessions

13. Prosecutors should review decisions as early as possible to assess the merits of the appeal. They should test the issue: what can properly be said in answer to it? How significant is the issue in the context of the appeal as a whole?

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2 The applicable fees are set out in the Terms of Office for Crown Solicitors.

14. Whether to allow an appeal is a matter for the appeal court's independent judgement, applying the applicable statutory criteria. Concessions, like other submissions, do not and cannot bind a court when determining an appeal. While prosecutors should endeavour to advance all available arguments in support of the challenged decision, there will be occasions where a prosecutor does not consider it possible to responsibly defend a legal or factual conclusion reached by the court below, or the challenged decision itself. It is appropriate for the prosecutor to acknowledge that when the situation arises. Prosecutors should only make such concessions after careful consideration and a comprehensive analysis of the case, and after:

    14.1 consulting with the prosecuting agency and trial prosecutor on the proposed concession, unless there is a good reason not to do so; and

    14.2 notifying any victim(s) of a specified offence, preferably before the proposed concession is communicated to the court, if the concession is significant in the context of an appeal against conviction or sentence.

15. Prosecutors should consult Crown Law about a proposed concession (whether on the appeal itself or a legal or factual issue in the appeal) if it may have precedential value or is high-profile and likely to attract media attention.

Appeal points not raised by the appellant

16. It is not the prosecutor's responsibility to identify every possible point on a defence appeal. However, if the appellant has failed to raise an argument that plainly requires the court's attention, the prosecutor should address the point (and rebut it, if appropriate) both as a matter of fairness and to guard against a further appeal on that ground.

Procedural applications

17. Defence appeals regularly raise procedural issues, such as applications for extensions of time and to admit fresh evidence. Prosecutors should respond to such applications on their merits and not oppose applications by default.

Prosecution appeals

Solicitor General's consent

18. Section 246 of the Criminal Procedure Act 2011 requires that the Solicitor-General give consent before any prosecutor[3] can bring an appeal against sentence.

19. The Cabinet Directions for the Conduct of Crown Legal Business require that the Solicitor-General's consent is obtained before Police or a government department may bring any criminal appeal. This guideline extends that requirement to all public prosecutors.

20. The process for seeking consent is set out in Appendix 1 (for non-Crown prosecutions) and Appendix 2 (for Crown prosecutions).

[3] Including private prosecutors.

21. Despite the above, the Solicitor-General has authorised:

21.1 Crown Solicitors to give consent for appeals to the High Court against decisions concerning bail and name suppression, given the need for urgent decisions in such cases; and

21.2 Police to bring appeals, other than sentence appeals,[4] to the District Court against decisions of Community Magistrates or Justices of the Peace. The decision to bring an appeal should be approved by the National Legal Counsel of the Police Prosecution Service.

Appeals against pre-trial rulings

22. If a prosecutor wishes to appeal against a pre-trial decision, they should begin the process of seeking consent from the Solicitor-General as a matter of priority to minimise the potential for delay to the prosecution. If the trial date is imminent, the prosecutor should not seek consent unless they will seek an adjournment of the trial to enable the appeal to be heard. Prosecutors should consider the impact of an adjournment, particularly on any victims and their whānau, before deciding to pursue an appeal.

23. The factors that will be relevant to whether a pre-trial decision should be appealed will depend on the nature of the pre-trial ruling. In deciding whether to pursue an appeal against a pre-trial ruling, prosecutors should consider the following:

23.1 Whether and how an appeal is in the public interest.

23.2 The likelihood of the appeal being successful.

23.3 The impact of the decision on the prosecution's case.

Commentary
Where the decision will significantly impact the presentation of the prosecution case, this tends to favour an appeal. For instance, the Solicitor-General is more likely to consent to an appeal against a decision excluding significant prosecution evidence, rather than evidence that is incidental or simply supports other admissible evidence.

23.4 The impact the appeal is likely to have on the trial date and whether there are any reasons why the trial should not be adjourned.

Commentary
Factors that may weigh against a prosecution appeal include where a victim is opposed to the trial being postponed, or a prosecution witness would not be available if the trial is postponed.

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[4] Section 246 of the Criminal Procedure Act 2011 requires the Solicitor-General to give consent for any sentence appeal brought by a prosecutor.

Appeals against sentence

24. Sentencing is a discretionary exercise. That means an appeal will only succeed where the sentence is manifestly inadequate, or where it is wrong in principle. The high threshold for a prosecution appeal is reflected in the statutory requirement for the Solicitor-General's consent to be obtained before an appeal can be filed. The Solicitor-General will only give consent where this threshold is clearly met and the public interest requires an appeal.

    Commentary
    There will usually be multiple outcomes that are within the proper range for the sentencing judge in a particular case. It can be a difficult judgement call whether a sentence warrants consideration by a higher court.

25. A prosecution appeal against sentence may be appropriate where:

    25.1 There are reasonable prospects of persuading the appeal court that the sentence is manifestly inadequate.

    25.2 The sentence appears to have been based on an error of principle or law. The error must be clearly identifiable, and it must either:

    25.2.1 apply beyond the facts of the instant case; or

    25.2.2 have resulted in a sentence which is unfair having regard to sentences imposed on co-offenders or is manifestly inadequate having regard to similar cases.

    Commentary
    An error of principle may occur where the sentencing judge incorrectly applies, or fails to apply, established sentencing methodology to arrive at the sentence, for example, by not applying a guideline judgment. Even so, the end sentence must generally also be manifestly inadequate to justify an appeal.

    25.3 It is desirable to improve consistency of sentences imposed for offences of the same or similar type.

    Commentary
    The Solicitor-General may consent to a prosecution appeal against sentence to establish or modify a guideline judgment, or to clarify the law and achieve greater consistency of approach.

    25.4 There is some other distinct public interest consideration that justifies a prosecution appeal.

26. Prosecutors should be aware that any successful appeal against sentence will only increase the sentence to the lower end of the available range. Courts are also reluctant to substitute a custodial sentence where the original sentence was non-custodial. Appeals against non-custodial sentences should therefore only be considered where imprisonment was the only available sentence.

Appeals on questions of law

27. Prosecution appeals on a question of law should meet the following criteria:

    27.1 the ruling is concerned with a point of law, rather than whether the evidence was sufficient in the case;

    27.2 the question of law was a point that clearly arose in the proceeding and relates to an issue that was a significant factor in the decision; and

    27.3 the answer to the question of law will likely have an impact on the outcome of the proceeding or will have significance for other cases.

28. Consent to appeal will only be given if an appeal is in the public interest.

29. Factors that are relevant to assessing the public interest include:

    29.1 Whether resolving the question of law will be relevant to other cases, or is limited to the instant case;

    29.2 The seriousness of the offending and circumstances of the defendant; and

    29.3 Whether there are conflicting judicial decisions on the question and it is desirable to have it authoritatively decided.

Appeals against bail decisions

30. A prosecutor should only appeal a bail decision if they reasonably believe:

    30.1 it is in the public interest to appeal; and

    30.2 it is likely that the appeal will be successful.

31. In terms of the public interest, public safety is the key factor for prosecutors to consider when assessing the risk of reoffending under the Bail Act 2000. This involves assessing the nature of potential offending and particularly whether it involves potential physical or sexual violence to any person, such as risk to the safety of the victim(s) and/or their whānau, or the public at large. An appeal will not be appropriate if this risk is theoretical or generalised, rather than tied to a specific risk factor posed by the individual defendant.

32. Prosecutors should seek the views of the investigator and any victims of specified offences when considering whether to appeal against the granting of bail, or against decisions about bail conditions.

Appeals against name suppression

33. A prosecutor should only appeal a name suppression decision if they reasonably believe:

    33.1 it is in the public interest to appeal; and

    33.2 it is likely that the appeal will be successful.

34. Prosecutors should seek the views of any victims of specified offences when considering whether to appeal against name suppression.

After the appeal is determined

35. Prosecutors should promptly notify the prosecuting agency of the outcome of an appeal, so that they can notify the victim(s), if any, and consider whether further action is necessary. This is particularly important if the appeal court has ordered a retrial. In that situation it is helpful for prosecutors to provide the prosecuting agency with their views as to whether a retrial should proceed, in light of the reasoning in the judgment.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Decisions to prosecute | Te whakatau ki te aru
Sentencing | Te whiu
Bail | Peira
Making unbiased decisions | Te whakatau rītaha-kore
Victims | Ngā pārurenga

Appendix 1: How to request an appeal from a decision made in a non-Crown prosecution

1. All appeals by prosecuting agencies require the consent of the Solicitor-General. This appendix sets out the process for prosecuting agencies to follow when seeking consent to an appeal in a non-Crown prosecution. In Crown prosecutions the Crown Solicitor should submit the request for consent (outlined in Appendix 2).

2. In practice, the authority to consent to an appeal is exercised by the Deputy Solicitor-General (Criminal). The Criminal Team at Crown Law receives and analyses all requests for the Deputy Solicitor-General. The timeframes for filing appeals are generally short, so it is important that requests are sent as soon as possible; are sent to the right place; and contain the necessary information.

3. The procedures are different depending on the type of appeal sought. Prosecuting agencies will need to know:

   3.1 the kind of appeal sought (for example, pre-trial appeal, sentence appeal, or appeal on a question of law);

   3.2 the date of the decision sought to be appealed (even if reasons have not yet been given), which will determine the applicable timeframe; and

   3.3 the court to which any appeal will lie.

Where to send the request

4. All appeal requests should be sent electronically to criminal@crownlaw.govt.nz.

5. The exception is requests to appeal District Court decisions concerning bail and name suppression to the High Court. These requests should be sent to the local Crown Solicitor in whose warrant area the decision sought to be appealed was made.

When to send the request

6. Send the request as soon as possible. Appeals must usually be filed within 20 working days from the date the decision was made, not the date the written decision was sent to the parties or the date on which reasons were given. Prosecutors should ask the court in which the decision was made to transcribe and provide the written decision as soon as possible so that an appeal can be considered.

7. Crown Law expects that requests will be sent within seven working days of the decision.

The process

8. The following steps generally take place before an appeal is filed:

   8.1 The prosecuting agency makes the decision to request an appeal (in accordance with whatever internal processes the agency may have in place).

   8.2 The matter is referred to the Criminal Team at Crown Law.

   8.3 Counsel in the Criminal Team is allocated, reviews the file, and prepares a detailed opinion as to the merits of an appeal.

   8.4 A second opinion is prepared by another more senior member of the Criminal Team.

   8.5 Both opinions are provided to the Deputy Solicitor-General for their review and final decision.

   8.6 The outcome is communicated to the prosecuting agency.

   8.7 If consent has been given, appeal documentation is prepared for filing. Crown Law will only do this for appeals from Crown prosecutions and appeals to the Court of Appeal or Supreme Court. For other appeals, the prosecuting agency will need time to instruct the relevant Crown Solicitor (or other prosecutor if not required to instruct Crown Solicitors) to prepare this documentation and file it in the correct court. For an appeal against sentence Crown Law will provide a signed Notice of Consent. The Criminal Procedure Act requires the Notice to be filed together with the Notice of Appeal.[5]

9. It is critical that prosecuting agencies do not wait until a judge's written decision is issued before requesting consent to an appeal, unless the reasons are expected to be released within a week of the decision.

10. Prosecuting agencies should have internal processes to ensure appeal requests are approved by a senior manager before being referred to Crown Law.

What information to include with your request

Cover letter

11. The cover letter should set out:

    11.1 The type of appeal sought.

    11.2 The date and place of the decision.

    11.3 The day on which the appeal period will expire.

    11.4 The statutory provision under which an appeal would be brought.

[5] Criminal Procedure Act 2011, s 248(3).

11.5 If applicable, the trial date (if not yet heard) and/or the date of the next court appearance (for example, callover date).

12. The letter should set out why the prosecuting agency thinks an appeal is warranted. It is not necessary to include a lengthy recitation of the facts or submissions made at first instance.

13. If the proposed appeal is on a question of law, the letter should set out the proposed question(s).

14. If the written reasons for the decision are not yet available, do not wait to receive them unless they are expected to be provided within a week of the decision. Instead, the letter should include as much information as possible about the decision from the prosecutor who appeared. If the request is for an appeal against sentence, and the sentencing notes are not yet available, Crown Law will need to know:

14.1 The starting point adopted by the judge.

14.2 The precise details of any increases or discounts from the starting point for the aggravating and mitigating features of the offending and the offender.

14.3 The details of any other adjustments to the sentence (such as for totality).

14.4 Whether the offender pleaded guilty, and any discount afforded for the guilty plea.

14.5 Whether the offender spent time in custody or on restrictive bail conditions (such as EM bail or a 24 hour curfew) prior to sentencing.

14.6 Any other orders that were made, such as orders for reparation, forfeiture etc.

14.7 The final sentence that was imposed.

Enclosures

15. The following documents should be attached to the cover letter:

15.1 The decision the prosecuting agency wishes to appeal against (if available).

15.2 Copies of the charges and summary of facts.

15.3 Any written submissions filed by both parties at first instance.

16. Any other relevant material (for example, defendant’s criminal history, victim impact statements and pre-sentence reports for proposed sentence appeals; copy of the disputed evidence for proposed pre-trial appeals).

Appendix 2: How to request an appeal from a decision made in a Crown prosecution

1. All appeals require the consent of the Solicitor-General. This appendix sets out the process for Crown Solicitors to follow when seeking consent to an appeal in a Crown prosecution. In non-Crown prosecutions, the prosecuting agency will submit the request for consent (outlined in Appendix 1), although they may seek a Crown Solicitor's assistance in doing so.

2. In practice, the authority to consent to an appeal is exercised by the Deputy Solicitor-General (Criminal). The Criminal Team at Crown Law receives and analyses all requests for the Deputy Solicitor-General. The timeframes for filing appeals are generally short so it is important that requests are sent as soon as possible; are sent to the right place; and contain the necessary information.

3. The Criminal Team at Crown Law is responsible for all appeals from Crown prosecutions, except for appeals to the High Court concerning bail or name suppression. The procedures are different depending on the type of appeal sought. Crown Solicitors will need to know:

   3.1 the kind of appeal sought (for example, pre-trial appeal, sentence appeal or appeal on a question of law);

   3.2 the date of the decision sought to be appealed, which will determine the applicable timeframe; and

   3.3 the court to which any appeal will lie.

Where to send the request

4. All appeal requests should be sent electronically to criminal@crownlaw.govt.nz.

5. Crown Solicitors do not need to send requests to appeal a District Court decision on bail or name suppression to the High Court. Requests for appeals to the Court of Appeal in respect of bail or name suppression should be submitted in accordance with this guideline.

When to send the request

6. Send in the request as soon as possible. Appeals must usually be filed within 20 working days from the date the decision was made, not the date the written decision was sent to the parties or the date on which reasons were given.

7. Crown Law expects that requests will be sent within seven working days of the decision.

The process

8. The following steps generally take place before an appeal is filed:

   8.1 The Crown Solicitor, or partner in the Crown Solicitor firm, makes the decision to request an appeal.

   8.2 The matter is referred to the Criminal Team at Crown Law.

   8.3 Counsel in the Criminal Team is allocated, reviews the file and prepares a detailed opinion as to the merits of an appeal.

   8.4 A second opinion is prepared by another more senior member of the Criminal Team.

   8.5 Both opinions are provided to the Deputy Solicitor-General for their review and final decision.

   8.6 The outcome is communicated to the Crown Solicitor.

   8.7 Appeal documentation is prepared for filing, if the decision is that an appeal should be filed.

9. It is critical that Crown Solicitors do not wait until the judge's written decision is issued before requesting an appeal, unless the reasons are expected to be provided within a week of the decision. The Crown Solicitor (or a partner in the firm) should personally review the matter and approve the seeking of consent.

What information to include with your request

Cover letter

10. The cover letter should set out:

    10.1 The type of appeal sought.

    10.2 The date and place of the decision.

    10.3 The last day for filing an appeal.

    10.4 The statutory provision under which an appeal would be brought.

    10.5 If applicable, the trial date (if not yet heard) and/or the date of the next court appearance (for example, callover date).

11. The letter should set out why the Crown Solicitor thinks an appeal is warranted. It is not necessary to include a lengthy recitation of the facts or submissions made at first instance.

12. If the proposed appeal is on a question of law, the letter should set out the proposed question(s).

13. If the written reasons for the decision are not yet available, do not wait to receive them unless they are expected to be provided within a week of the decision. Instead, the letter should include as much information as possible about the decision from the prosecutor who appeared. If the request is for an appeal against sentence, and the sentencing notes are not yet available, Crown Law will need to know:

13.1 The starting point adopted by the judge.

13.2 The precise details of any increases or discounts from the starting point for the aggravating and mitigating features of the offending and the offender.

13.3 The details of any other adjustments to the sentence (such as for totality).

13.4 Whether the offender pleaded guilty, and the discount afforded for any guilty plea.

13.5 Whether the offender spent time in custody or on restrictive bail conditions (such as EM bail or a 24-hour curfew) prior to sentencing.

13.6 Any other orders that were made such as orders for reparation, forfeiture etc.

13.7 The final sentence that was imposed.

Enclosures

14. The following documents should be attached to your cover letter:

14.1 The decision the Crown Solicitor wishes to appeal against (if available).

14.2 Copies of the charges and summary of facts.

14.3 Any written submissions filed by both parties at first instance.

15. Any other relevant material (for example, defendant’s criminal history, victim impact statements and pre-sentence reports for proposed sentence appeals; copy of the disputed evidence for proposed pre-trial appeals).

Procedure where appeal is filed

16. If the Deputy Solicitor-General decides to bring an appeal, the appeal will be filed and the Criminal Team at Crown Law will be responsible for it. The Crown Solicitor will need to send the complete file, and the Police file, to Crown Law to enable counsel to prepare for the appeal.

Avoiding unlawful bargains

Te kaupare i te tauhokanga takahi ture

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

Introduction | Ngā kupu whakataki

1. Prosecuting agencies may enter into plea arrangements or operate diversion schemes that include the defendant making reparation payments to the victim, or other payments of money. Prosecutors and prosecuting agencies should be careful that these arrangements are not unlawful.

Scope | Te korahi

2. This guideline relates to reparation and other payments made by defendants that are connected to plea arrangements or diversion. It does not cover any court-ordered payments.

Guideline | Te aratohu

Policies and procedures relating to reparation payments

3. Reparation payments are relevant to the work of many prosecuting agencies. Such agencies are expected to have clearly documented policies and processes for considering reparation payments. This should include:

   3.1 the method for receiving and administering reparation payments;

   3.2 a mechanism to ensure the defendant is advised of, and provided, the opportunity to obtain legal advice before agreeing to such payments; and

   3.3 the consequences for a defendant if they fail to make the agreed reparation payment once proceedings are discontinued.

Is a plea arrangement or diversion appropriate?

4. Prosecuting agencies should continue to apply the Public Interest Test when considering whether the payment by the defendant of reparation or another payment is appropriate in a particular case. A prosecutor should only agree to diversion or a plea on a lesser charge when satisfied that the public interest is met. The defendant's willingness to make amends by paying reparation is only one of the factors considered in the public interest assessment.

5. A plea arrangement or diversion is likely to be unlawful where the reparation payment is the primary or pivotal reason for amending the charge or offering diversion. In general, it will be more appropriate for a prosecutor to agree to a plea arrangement or diversion where the alleged offending is of low to moderate seriousness.

Obtaining victims views

6. Prosecutors should make reasonable efforts to seek the victim's views when they are considering whether a reparation payment would be appropriate. This ensures the victim's circumstances are considered (in order to calculate the full extent of loss, damage or expenses) and allows prosecutors to manage the victim's expectations about what is reasonable in the circumstances given the defendant's financial means. However, the decision about whether a plea arrangement or diversion is appropriate is ultimately one for the prosecutor.

Types of payments

7. Typical types of payments include reparation payments to victims that cover the reasonable expenses a victim has incurred as a result of the offending and other payments, such as donations to charity.

8. Prosecuting agencies should avoid any appearance of a private bargain with defendants. Prosecuting agencies should be cautious before including payment of fines, costs or other fees in diversion or plea arrangements.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Decisions to prosecute | Te whakatau ki te aru
Diversion | Te autaki
Making unbiased decisions | Te whakatau rītaha-kore
Prosecution policies | Ngā kaupapa here mō te aru

Bail

Peira

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

Introduction | Ngā kupu whakataki

1. The Bail Act 2000 sets out a detailed legislative regime for bail. In addition, s 24(b) of the New Zealand Bill of Rights Act 1990 provides that those who are charged with criminal offences shall be released on reasonable terms and conditions unless there is just cause for continued detention.

Roles | Ngā tūnga

2. It is the court's responsibility to decide whether to grant bail. However, prosecutors have a role in seeking conditions and supporting or opposing an application for bail. In doing so, prosecutors should make decisions based on the evidence and information available to them. While this guideline recommends that prosecutors take into account a wide range of information in making prosecution submissions, that is limited to information the prosecutor is personally aware of at the time. Prosecutors are not expected to make further enquiries about matters relating to the suitability of an address for bail. Ultimately, whether bail is granted, and upon what conditions, will be a matter for the court.

3. Victims can have an important role in providing investigators and prosecutors with information that is relevant to bail decisions. Some victims also have rights to be informed, and have their views sought, in respect of particular decisions relating to bail. These rights are set out in the guideline on Victims | Ngā pārurenga and prosecutors should be familiar with them.

Scope | Te korahi

4. This guideline covers court ordered bail. It does not cover Police bail.

5. It also does not cover prosecutor decisions to appeal bail. Guidance for appeals is set out in the guideline on Appeals | Ngā Pīra.

Guideline | Te aratohu

6. Prosecutors involved in bail decisions are expected to be familiar with the Bail Act and any judicial practice notes relating to bail. Decisions on whether to oppose bail and what conditions to seek must always be based on the grounds in the Bail Act. These decisions should be tailored to the specific risks the defendant poses and should not be routinely sought without reference to these specific risks.

7. Prosecutors should make decisions on what position to take on bail based on credible and relevant information.

Victims' and investigators' views

8. Victims and their whānau have an interest in whether a defendant is granted bail and upon what conditions. They may also have information that is relevant to:

   8.1 the prosecutor's decision about whether to oppose bail;

   8.2 the proposed bail address;

8.3 the prosecutor's decision about whether to seek conditions and what conditions to seek (including information about any geographic conditions that might be appropriate); and

8.4 the prosecutor's assessment about relevant Bail Act risks, such as the risk the defendant will offend while on bail or interfere with witnesses.

Commentary
Victims may have information that goes beyond what is contained in an agency's information management systems (such as the New Zealand Police's National Intelligence Application or NIA). For example, victims may have views about appropriate geographic conditions other than proximity to their residential address.

9. Prosecutors should take into account the views of victims of specified offences[1] and investigators in developing a prosecution position on bail. However, the prosecution's position on a bail application is ultimately an independent decision made by the prosecutor.

10. Prosecutors should consult with the investigator in charge of the file about Bail Act risks. In particular, investigators may have useful information about public safety concerns, especially for victims, their whānau and witnesses.

11. Prosecutors should be aware that victims' views can change over time and should seek to provide information to the court that is up-to-date and accurate.

When to oppose bail

12. Decisions to oppose bail must be based on there being just cause for continued detention, taking into account the risks and factors set out in the Bail Act.[2]

13. In assessing the risk of offending on bail as set out in s 8(1)(a)(iii) of the Bail Act, the prosecutor should predominantly consider the risk to public safety, particularly the safety of victims and their whānau. This involves assessing the nature of potential offending.

Commentary
Where the risk relates to offending that is likely to involve sexual or physical violence against any person, this public safety risk will likely weigh heavily in the prosecutor's decision on whether to oppose bail. In contrast, if the risk of offending relates only to minor offending which would not warrant a custodial remand, a prosecutor may decide not to oppose bail.

14. Prosecutors should only oppose bail where the risks outlined in the Bail Act[3] cannot be adequately mitigated by conditions on release. For instance, where the defendant does not have a suitable bail address, prosecutors should consider whether the risks can be sufficiently mitigated by the proposed conditions (as outlined in the section on conditions below) rather than opposing bail.

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[1] Victims' Rights Act 2002, s 29.
[2] Bail Act 2000, s 8.
[3] Bail Act 2000, s 8(1)(a).

15. Prosecutors should be aware that their prosecution positions on bail could inadvertently reflect biases. Some considerations can be neutral on their face but can be applied in a way that disproportionately impacts some people. Prosecutors should be mindful of this and make sure their evaluation of risks is tailored to the circumstances of each defendant rather than using blanket rules.

Commentary
There are multiple factors that are relevant to assessing whether a proposed address is "suitable". This is a highly subjective evaluation and may therefore be affected by bias. To reduce that risk, the following should not automatically be considered unsuitable but instead carefully assessed against the risks in the Bail Act:

- Addresses where multiple generations live, or that have residents who come and go. This may be more traditional in certain cultures, such as Māori, Pasifika and Asian cultures.
- Addresses with elderly inhabitants. In some instances, there may be evidence that family elders, such as kaumātua and kuia, can exert a positive influence on defendants by taking on some collective responsibility for the defendant's bail conditions. This could be a factor that supports bail.

Family violence offences

16. The Bail Act contains restrictions on bail for defendants who have previously been convicted of a specified offence as defined under the Bail Act.[4] In addition to these restrictions, prosecutors should consider ss 8(3A), (3C) and (4) of the Bail Act, which set out mandatory considerations in family violence cases.

Reverse onus provisions

17. The Bail Act contains some reverse onus provisions where the defendant must satisfy a judge that they should be granted bail or allowed to go at large.[5] Prosecutors may decide not to oppose bail even where the reverse onus applies. If doing so, they should explain to the judge why the prosecution is not opposing bail (for instance, because the defendant is a primary caregiver and the risk of offending while on bail is low and can be mitigated by conditions) to assist the judge in making their decision.

When to request bail conditions

18. Prosecutors must only seek conditions that are reasonably necessary on one of the grounds set out in the Bail Act.[6]

19. Prosecutors should not automatically propose certain conditions as standard practice. Every proposed condition should respond to specific identifiable risks posed by the defendant in the particular case.

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[4] Bail Act 2000, s 10. Note this is distinct from "specified offences" under the Victims' Rights Act 2002 (although there are overlaps).
[5] See, for instance, Bail Act 2000, ss 12 and 17A.
[6] Bail Act 2000, s 30(4).

20. Defendants who are experiencing significant mental health issues, have a disability, or are otherwise disadvantaged may not have access to accommodation, resources, networks or support systems that commonly exist for other members of the community. Prosecutors should only seek conditions that are necessary to manage the defendant's risk.

21. Conditions should be the least restrictive means capable of achieving the intended purpose. What is "least" restrictive may depend on the defendant's specific circumstances. It may be appropriate to seek more restrictive conditions if there have been breaches of less restrictive bail conditions.

    Commentary
    As an example, curfew conditions can be onerous for defendants as curfew checks may be conducted late at night. If the reason for seeking a curfew is to manage the risk of flight, prosecutors may consider whether a reporting condition would adequately manage that risk in a less restrictive manner.

22. Prosecutors should only seek conditions with which a defendant can realistically comply. Prosecutors should also carefully consider the possibility of unintended consequences of proposed conditions. Whether compliance is realistic should be assessed against the defendant's individual circumstances.

    Commentary
    Bail conditions that a defendant cannot realistically comply with may result in the defendant simply accruing breaches of bail conditions. Prosecutors should consider matters that may make it difficult for a defendant to comply with a proposed bail condition, such as whether to propose a condition not to consume alcohol where a defendant has an alcohol addiction. Similarly, a condition that is drafted broadly to prevent a defendant from entering any "licensed" premises, rather than any "on-licence" premises, could prevent the defendant from going to a supermarket.

Bail variations

23. The guidance above also applies to applications to vary bail conditions.

24. Prosecutors should promptly respond to applications to vary bail conditions. If a defendant seeks to vary their bail conditions without notice, the prosecutor should consider whether to seek an adjournment in order to assess the proposed variations against Bail Act risks and, in serious cases, seek the views of any victims.

Defendants with particular characteristics

Young people

25. Different bail regimes will apply to children and young people under the age of 18 depending on whether they are appearing before the Youth Court or the adult courts. Prosecutors should take particular care before opposing bail for offending by children and those under 18 years old. Opposing bail for children and young people under 18 years old is likely to be inappropriate unless the offending is serious or the defendant is high-risk.[7] Generally, prosecutors should seek to mitigate risks posed by such persons by seeking conditions rather than opposing bail.

Defendants experiencing significant mental health issues

26. Prosecutors should recognise the unique circumstances and vulnerability of defendants who are experiencing significant mental health issues. A prosecutor should make submissions on bail that take account of these circumstances and consider whether their position on bail could reinforce mental health supports. For instance:

    26.1 If a defendant voluntarily decides to undertake a mental health programme (such as attending an addiction clinic), prosecutors should consider how this affects their assessment of Bail Act risks. This is particularly the case where the programme is residential.

    26.2 If there is a compulsory treatment order for the defendant under the Mental Health (Compulsory Assessment and Treatment) Act 1992 and bail is not opposed, prosecutors should consider whether the order adequately addresses Bail Act risks, or seek bail conditions that are consistent with, and support, the order.

27. In some instances, a defendant's significant mental health issues may warrant opposing bail because they increase a relevant Bail Act risk, such as offending on bail.

28. Prosecutors should be aware of the Criminal Procedure (Mentally Impaired Persons) Act 2003 and how it intersects with bail decisions.[8]

Bail pending sentencing

29. Section 13 of the Bail Act applies pending sentencing. Where a guilty plea has been intimated, prosecutors should be aware of the effect of s 11 of the Bail Act and draw it to the attention of the court prior to guilty pleas being entered for an offence specified in that provision.

30. Prosecutors should also refer to guidance in the guideline on Sentencing | Te whiu when considering whether to oppose or consent to an adjournment to enable the defendant to complete a rehabilitation programme or course of action.

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[7] In addition to relevant provisions in the Oranga Tamariki Act 1989, see also s 15 of the Bail Act 2000 and s 175 of the Criminal Procedure Act 2011.

[8] See, for example, Criminal Procedure (Mentally Impaired Persons) Act 2003, ss 18, 22, 23, 35, 38.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Victims | Ngā pārurenga
Sentencing | Te whiu
Making unbiased decisions | Te whakatau rītaha-kore
Appeals | Ngā pīra

Case management

Te whakahaere kēhi

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

Introduction | Ngā kupu whakataki

1. Prosecutors should proactively manage cases after charges have been filed to ensure they can be heard and dealt with as expeditiously as possible.

Scope | Te korahi

2. This guideline does not cover all aspects of the court process. For example, there are specific guidelines about disclosure, bail and sentencing. There is also a separate guideline about cases in which the defendant is self-represented.

Guideline | Te aratohu

General

3. At all stages of a prosecution, the prosecutor has a duty to assist the court. While occasionally that may involve the prosecutor acting as a contradictor at the court's request, prosecutors should not adopt a default position of opposing any application made by a defendant. Each application should be assessed on its merits and should only be opposed if the prosecutor considers the applicable legal test is not met.

4. Prosecutors should only make submissions, whether in support of their own application or in opposition to a defence application, which are supported by the available evidence and the applicable law.

5. The duty to assist the court extends to assisting to ensure the timely and efficient administration of justice. That means, for example, that prosecutors should ensure matters are prepared for trial as quickly as possible and identify any issues which require judicial intervention at an early stage.

6. Prosecutors should be aware that costs awards may be made in the event of a failure to comply with a procedural obligation (such as disclosure obligations or the procedural requirements in the Criminal Procedure Act 2011 and associated Rules). Such awards can be made against the prosecutor personally if they are responsible for the failure. For the avoidance of doubt, prosecutors are not indemnified by the Solicitor-General or by Crown Law in respect of any costs award made against them, whether under the Criminal Procedure Act or the Costs in Criminal Cases Act 1967.

Prior to the Case Review Hearing

7. Prosecutors should use their best efforts to engage in case management discussions with defence counsel for the purpose of completing the Case Management Memorandum (CMM).

8. Where a CMM has not been filed, prosecutors should not file one unilaterally. However, in some cases it may be useful to provide the court with a separate memorandum outlining the matters which require judicial intervention from the prosecution's perspective, and advising the court of the efforts made to engage with defence counsel.

9. Any agreement reached between a prosecutor and defence counsel in the course of case management discussions is generally binding on future prosecutors working on the file, unless there has been a material change in circumstances. Once an agreement has been communicated to the court, it should be departed from only in exceptional circumstances. This must be approved by the Crown Solicitor personally (in Crown prosecutions) or the applicable senior manager (in non-Crown prosecutions).

   Commentary
   An example of an exceptional circumstance is where significant new information has come to light since the agreement was reached.

Prior to trial

10. Prosecutors should carefully consider whether and what pre-trial applications are necessary. Crown Solicitors and prosecuting agencies are expected to have effective quality control mechanisms to ensure all such applications are justified, properly supported by relevant law and evidence, and are filed in a timely manner.

11. Prosecutors do not need to file a pre-trial application for an order that evidence they propose to adduce is admissible unless they consider there is an arguable objection to the admissibility of that evidence. An unparticularised objection to the evidence does not warrant the filing of an application.

12. Where there are clear grounds for objecting to the evidence, the prosecutor should consider filing an application for admissibility orders even if the defendant has not objected to the evidence. Doing so may avoid an application having to be filed close to trial (because an objection is notified late) or admissibility of the evidence becoming an issue during the trial or in a post-trial appeal.

13. Trials should generally take place in the court in which the charges were initially filed (or the nearest jury trial court, if the defendant elects a jury trial). Prosecutors should only apply for a matter to be transferred to a different court in exceptional circumstances.

Proceeding to trial in the absence of the defendant

14. Prosecutors should not ask the court to proceed with a trial in the absence of the defendant for a Category 2, 3 or 4 offence unless it is apparent that the defendant has deliberately chosen not to attend their trial. Even where that is clear, prosecutors should carefully consider whether proceeding in the defendant's absence is in the interests of justice, by reference to the factors in s 121 of the Criminal Procedure Act. Proceeding without the defendant will only be in the interests of justice if a fair trial is still possible.

    Commentary
    Examples of cases in which it may be appropriate for the prosecutor to seek to proceed in the absence of the defendant for category 2, 3 or 4 offences include:

    - proceedings that involve particularly traumatic offending such as sexual or violent offending, where it is likely to be especially distressing for victims and their whānau if the trial is delayed;

- proceedings that involve multiple co-defendants who have attended and want the trial to proceed; and/or
- proceedings where the defendant's counsel has been briefed and is able to represent their interests.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Decisions to prosecute | Te whakatau ki te aru
The relationship between prosecutors and investigators | Te hononga i waenga i te kaiaru me te kaitūhura
Self-represented defendants | Te kaiwawao ka whakakanohi i a ia anō

Disclosure

Te tūhura

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

Introduction | Ngā kupu whakataki

1. Defendants in criminal prosecutions are entitled to disclosure; this is an aspect of the right to a fair trial under s 25(a) of the New Zealand Bill of Rights Act 1990. The Criminal Disclosure Act 2008 (CDA) determines what must be disclosed.

Glossary | Kuputaka

2. In this guideline:

   2.1 A *prosecuting agency* is the agency prosecuting the defendant (on its own behalf or on behalf of the Crown) and that holds the file or files relating to the prosecution.

   2.2 The *person managing disclosure* is the person designated by the prosecuting agency as being responsible for managing disclosure on its behalf under the CDA.[1] Usually, this will be an investigator (such as the officer in charge), rather than the person who appears in court.

   2.3 The *prosecutor* is the person representing the prosecuting agency in the criminal proceeding.

Scope | Te korahi

3. This guideline covers disclosure obligations in criminal proceedings, and applies to all prosecutors and prosecuting agencies. It explains who has obligations under the CDA, and sets out the key principles that apply. It also notes the potential for information requests under the Official Information Act 1982 (OIA) and Privacy Act 2020.

4. Non-party disclosure is addressed in a separate guideline.

Guideline | Te aratohu

5. All prosecutors and persons managing disclosure are expected to be familiar with the CDA, any judicial practice notes relating to disclosure and any legally privileged advice regarding disclosure from Crown Law. Prosecuting agencies and Crown Solicitors should have policies, forms and/or checklists in place to support best practice that fulfils obligations under the CDA and the expectations in this guideline.

Principles guiding disclosure

6. Disclosure is a core aspect of criminal prosecutions. It is not a tick-box exercise, and should be engaged in thoughtfully to protect fair trial rights. Disclosure turns on the concept of "relevance" which needs to be assessed on the facts of each individual case.

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[1] The Criminal Disclosure Act 2008 (**CDA**) refers to this person as the "prosecutor" (see definition of "prosecutor" in s 6 of the CDA). For consistency with the rest of the guidelines and to aid understanding, this guideline instead uses the term "prosecutor" in the sense that it is most commonly understood; the person who appears in court to conduct the prosecution.

7. It is a cooperative exercise, requiring proactive engagement and communication by the prosecutor and the person managing disclosure.

Disclosure obligations: who does what?

Prosecuting agency

8. The prosecuting agency is ultimately responsible for ensuring disclosure obligations are met.

Person managing disclosure

9. The person managing disclosure (on the prosecuting agency's behalf) should:

   9.1 provide all relevant material to the prosecutor;

   9.2 keep records of what has been disclosed and what withheld, when and how that was communicated to the defendant, and why relevant information was withheld; and

   9.3 seek advice from the prosecutor before disclosing sensitive information – for example, information that may be privileged or disclose the identity of an informant.

Prosecutors

10. Prosecutors have complementary obligations to the prosecuting agency and the person managing disclosure. Any lawyer conducting a prosecution has a duty to the court to protect the fairness of the trial, and a professional duty to comply with obligations concerning disclosure.[2]

11. This does not mean prosecutors should independently review every disclosure decision made. Rather, prosecutors should take reasonable steps to ensure that disclosure has occurred, for example by:

    11.1 proactively satisfying themselves that the prosecuting agency (including the person managing disclosure) is aware of its disclosure obligations under the CDA, and has met them;

    11.2 offering advice on whether contentious or sensitive material should be disclosed; and

    11.3 passing on to the person managing disclosure any requests for disclosure and any information the prosecutor receives directly that may need to be disclosed.

When must disclosure occur?

12. Disclosure should always be provided to the defendant as soon as practicable.

[2] Lawyers and Conveyancers Act (Conduct and Client Care) Rules 2008, r 13.12(a).

13. Initial disclosure[3] should ideally be provided at or before the defendant's first appearance and must be provided within 15 working days of the commencement of the proceeding.[4] Disclosure before the defendant's first appearance assists the defendant to enter a plea.

14. After a not guilty plea, full disclosure[5] must be provided as soon as reasonably practicable. Full disclosure has two parts:

    14.1 First, all relevant information must be provided to the defendant unless there is a basis to withhold it (see "what must be disclosed" below).

    14.2 Second, the person managing disclosure is also required to disclose whether any relevant information has been withheld, and the reason for that (see "what can be withheld" below).

When does the ongoing disclosure obligation end?

15. Disclosure obligations continue until the proceeding has ended. They apply even on appeal, although a more limited pool of information will be "relevant" by this stage having regard to the grounds and issues on the appeal.

16. Full disclosure is therefore not a one-off event, but an ongoing process. When new and relevant information comes to light, the person managing disclosure is required either to disclose it, or to explain to the defendant that it has been withheld. If changed circumstances mean information that was previously assessed as irrelevant has become relevant, or there are no longer grounds for withholding the information, the person managing disclosure must disclose it.

Disclosure just before trial or during trial

17. Disclosure just before or during trial is especially likely to impact fair trial rights. It also creates risks for the prosecution – evidence may be excluded; the trial may be adjourned or a mistrial declared, impacting witnesses, victims, their whānau and the defendant; costs may be ordered against the prosecution; or in extreme cases, the defendant may apply for the charges to be stayed.

18. The person managing disclosure should therefore ensure that defendants have received disclosure as soon as practicable after the defendant has pleaded not guilty, so that the defendant has sufficient time to prepare their defence well in advance of the trial.

What must be disclosed?

19. Relevant information must be disclosed if the CDA does not provide a reason to withhold it. Information is "relevant" if it "tends to support or rebut, or has a material bearing on, the case against the defendant."[6] The person managing disclosure should discuss with the prosecutor if it is unclear whether particular information is "relevant". A good working rule for these discussions is: "If in doubt, disclose".

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[3] As defined in s 12(1) of the CDA.
[4] CDA, s 12(4). This section also elaborates on different dates in the circumstances specified in that subsection.
[5] As defined in s 13(2) of the CDA.
[6] CDA, s 8.

20. There are no categories of information that are inherently non-disclosable.

21. Some kinds of information should always be proactively considered for disclosure. The High Court Practice Note[7] provides a helpful checklist of potentially relevant information. For example:

    21.1 Do prosecution witnesses have any convictions that affect their credibility?

    21.2 Have any prosecution witnesses received a sentencing discount, or other incentive, for their willingness to give evidence?

    21.3 Are there individuals that the prosecution will not call as witnesses, but who can say something relevant? If so, the defendant should be given the individual's name, address (if disclosure is authorised under s 17 of the CDA), and any witness statement the individual has given.

22. Sometimes information may need to be disclosed even if there are grounds to withhold it. Under the CDA, a defendant can ask the court to order disclosure if the public interest in disclosing the information outweighs the interests protected by withholding it.

What can be withheld?

23. Relevant information can only be withheld on one of the grounds in the CDA. For example, there will be good reason for withholding disclosure where the identity of an informant is at stake. The person managing disclosure should also withhold information that is legally privileged. The person managing disclosure should have early discussions with the prosecutor about what should be disclosed if the information is contentious or difficult, such as information about informants.

24. The person managing disclosure must create a schedule that records the existence of any withheld information and the reason it has been withheld.

25. The person managing disclosure should be aware that a change in circumstances may impact the decision to withhold information.

Requests under the Privacy Act 2020 or Official Information Act 1982

26. Sometimes individuals will request information connected to a criminal prosecution under the Privacy Act or OIA. If the request comes from a defendant, it may be refused if the defendant could have asked for the same information under the CDA.[8]

27. The OIA applies to public prosecuting agencies, but not to Crown Solicitors – although Crown Solicitors may choose to help prosecuting agencies respond to an OIA request.

28. The Privacy Act applies to both prosecuting agencies and Crown Solicitors.

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[7] 2023 Practice Note: Criminal Disclosure in High Court Trials, HCPN 2023/1.

[8] Official Information Act 1982, s 18(da)(i), Privacy Act 2020, s 53(g)(i).

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Non-party disclosure | Te tūhura i hunga kē
Decisions to prosecute | Te whakatau ki te aru
Inmate admissions | Ngā whāki ā-mauhere
Witness anonymity orders | Ngā whakatau whakaū i te matatapu o te kaiwhāki
Immunities | Te kahu ārai
The relationship between prosecutors and investigators | Te hononga i waenga i te kaiaru me te kaitūhura

Diversion

Te autaki

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

Introduction | Ngā kupu whakataki

1. Diversion is a way of resolving a prosecution, which has already been commenced, with no further formal consequences for the defendant. Diversion is usually only available for low-level offending. The defendant must fulfil conditions specified by the prosecutor, such as undertaking an activity which satisfies the public interest in dealing with the offending (for example, offering an apology together with some act of public service such as undertaking volunteer work or making a donation to a charity). After the conditions have been fulfilled, the charges are dismissed, which means the offence does not form part of the defendant's criminal record.

Scope | Te korahi

2. This guideline provides guidance to prosecuting agencies as to what to consider if they decide to develop a non-statutory diversion scheme. It will also assist prosecutors in determining which cases might be appropriate for diversion and the process that should be followed.

3. This guideline only covers schemes that operate once charges have been filed. It does not cover schemes that operate before charges are filed in court: these pre-charge schemes are enforcement tools that should be outlined in prosecuting agencies' prosecution policies in accordance with the Principal guideline | te Aratohu mātāmua.

Roles | Ngā tūnga

4. The prosecutor is responsible for identifying whether a case may be suitable for diversion. They may do this whether or not it has been requested by the defendant.

5. Once the prosecutor advises the court diversion has been completed, the court must dismiss the charge.[1]

Guideline | Te aratohu

6. The purposes of diversion schemes may vary between prosecuting agencies, but they typically include the following:

   6.1 To address behaviour that has resulted in charges being filed.

   6.2 To balance the needs of victims and their whānau, the defendant and their communities.

   6.3 To give defendants an opportunity to avoid conviction.

   6.4 To reduce re-offending.

[1] Criminal Procedure Act 2011, s 148.

7. The main danger in the operation of diversion schemes is “prosecution creep” – that is, a prosecutor charges a person for the purpose of putting them through a diversion programme, without fully considering whether the Test for Prosecution is met. In some cases that means a person will be prosecuted (and diverted) when, if the Test for Prosecution was properly applied, the person would not be prosecuted at all.

8. Prosecuting agencies which operate diversion schemes should have clear policies and practices in place to guard against the risk of prosecution creep. They should have a clear understanding of the purpose of their diversion scheme, which will inform both the eligibility criteria and the types of conditions that a defendant may be required to meet in order to participate. The purposes of diversion should align with the prosecuting agency’s statutory functions and enforcement priorities, as well as the purposes of the legislation containing the offences being prosecuted.

When should diversion be considered?

9. This guideline covers diversion schemes that operate *after* it is determined that the Test for Prosecution is met and charges have been filed. The possibility of diversion is therefore not a matter that the prosecutor considers when applying the Test for Prosecution.

   Commentary
   Prosecutors should not commence prosecutions with the immediate intention of referring the case for diversion. If it is obvious before charges are filed that prosecution and a formal court process is not an appropriate response, then the Test for Prosecution is not met. Prosecutors should instead be using an alternative enforcement tool, as specified in their prosecution policies, that operates pre-charge.

10. Diversion should not be considered if a prosecutor considers, post-charge, that there is not enough evidence to prove the charges beyond reasonable doubt. If there is not enough evidence to prove the charges, the prosecutor should seek leave to withdraw the charges. Diversion is not appropriate where a prosecution cannot succeed.

   Commentary
   The Test for Prosecution is an ongoing assessment and a prosecutor may decide, after charges are filed, that the Evidential Test is no longer met. That might be because the original decision was flawed, but it is more likely that further information or evidence has come to light which suggests a different outcome (for example, because it contradicts the evidence that was available when the charges were filed). In those circumstances the prosecutor should bring the prosecution to an end, even if the defendant has said they are willing to comply with a diversion programme, and it would be beneficial for the victims for the defendant to do so (for example, because they would receive an apology and some reparation for the loss they have suffered). That is because a prosecution should not proceed any further if the Evidential Test is not met.

11. Diversion may be appropriate for cases in which charges have been filed, but it becomes clear that the public interest in dealing with the offending can be met by way of diversion.

    Commentary
    Sometimes a prosecution is commenced but the prosecutor subsequently decides that the Public Interest Test no longer requires prosecution, but rather can be met by way of diversion. That will generally be because further information or evidence has come to light which suggests a different outcome is properly available (for example, the defendant has acknowledged their guilt and offered to apologise to the victim). In such a case it may be appropriate to offer diversion to the defendant. That will mean they avoid a conviction even though there is still sufficient evidence to prove the charge beyond reasonable doubt. As set out above, if the Evidential Test is no longer met, the charge(s) should simply be withdrawn.

What is the process if diversion is offered?

12. An offer should be made to the defendant, preferably in writing, which sets out the terms for diversion. The offer should do all of the following:

    12.1 Clearly state that the defendant is free to accept or reject the offer of diversion.

    12.2 Set out the conditions of diversion (the things the defendant must do). Examples of suitable conditions may include, without limitation, that the defendant will:

        12.2.1 Undertake education relevant to the offending.

        12.2.2 Make amends or a reparation payment to the victim(s) or a donation to a charity. Any payment or donation should be in accordance with the guideline on Avoiding unlawful bargains | Te kaupare i te tauhokanga takahi ture.

        12.2.3 Complete a prescribed number of community service hours.

        12.2.4 Limit contact with certain people and places.

        12.2.5 Undertake rehabilitative programmes (where, for instance, alcohol, drugs, addiction or violence have been contributing factors).

    12.3 Stipulate a timeframe within with the conditions of diversion must be met.

    12.4 Confirm that if the defendant complies with all of the conditions of diversion within the stipulated timeframe, the prosecution will notify the court which must then dismiss the charge(s).

    12.5 Set out the consequences of a failure to comply with the conditions of diversion (for example, the offer will be revoked and the prosecution will continue).

What should be covered in a prosecuting agency's diversion policy?

13. Prosecuting agencies which offer diversion should have a publicly available diversion policy which sets out the criteria for eligibility for diversion and the process which will be followed. That policy should be consistent with this guideline.

14. A diversion policy should do all of the following:

14.1 Set out the criteria for eligibility. In general, the criteria should include a requirement that the defendant has admitted their responsibility for the offending. The criteria should also stipulate which types of offending prosecuted by that prosecuting agency will be suitable for diversion and which will not. There may also be criteria specific to the defendant (for example, whether they have previously offended – although the mere fact of having prior criminal history should not automatically disqualify a defendant, for example where the prior offending is unrelated or historical).

14.2 Ensure that suspects are not advised of the possibility of diversion during an investigation in such a way that applies, or could be interpreted as applying, pressure to acknowledge guilt to avoid the possibility of a conviction. If a suspect who is aware of the existence of the scheme raises it with the investigator, the investigator should advise that it is not part of the consideration at that stage of the case.

14.3 Ensure that, if applicable, the interests of victims and their whānau are addressed and taken into account. In particular, the policy should be clear about whether and how the victim's views are relevant to the diversion decision, as well as the ways in which a defendant's activity under a diversion programme could meet victims' needs. A victim's opposition to diversion should not automatically preclude diversion being offered, but it will usually be a factor taken into account. Victims should be advised immediately when a diversion decision has been made and kept updated regarding the outcome of diversion.

14.4 Identify who will determine whether diversion should be offered in a particular case. Ideally the decision-maker should be someone other than the investigator in charge of the particular file.

14.5 Set out expectations for the recording of a decision to offer diversion or not and the extent of the reasons to be provided.

14.6 Incorporate mechanisms for regular internal oversight and review of decisions about diversion, to ensure consistency of approach to its use by the prosecuting agency.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Decisions to prosecute | Te whakatau ki te aru
Avoiding unlawful bargains | Te kaupare i te tauhokanga takahi ture
Prosecution policies | Ngā kaupapa here mō te aru
Making unbiased decisions | Te whakatau rītaha-kore
Victims | Ngā pārurenga

Immunities in cartel cases

Te kahu ārai ngā hara ā rāngai kamupene

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

All guidelines should be read alongside the Principal guideline | te Aratohu mātāmua

Introduction | Ngā kupu whakataki

1. Immunity from criminal prosecution, along with civil leniency, incentivises cartel participants to provide prosecuting agencies with information the agencies could otherwise not obtain. It is an essential tool in the detection and elimination of cartels.

Scope | Te korahi

2. This guideline sets out the circumstances in which the Solicitor-General may grant immunity from criminal prosecution for cartel offending, as well as the process by which the Commerce Commission may recommend a grant of immunity for such offending. It does not cover civil leniency, which is addressed in the Commission's Cartel Leniency and Immunity Policy.[1]

3. This guideline does not restrict the ability to seek immunity from prosecution in the ordinary way, as set out in the guideline on Immunities | Te kahu ārai.

Glossary | Kuputaka

4. In this guideline:

    4.1. *Cartel conduct* is conduct that breaches (or appears to breach) the prohibition on cartel provisions (s 30 of the Commerce Act 1986) and a *cartel offence* is an offence for intentionally breaching that prohibition (s 82B of the Commerce Act).

    4.2. An *applicant* is a natural person or corporate entity who has applied to the Commerce Commission for civil leniency, and/or immunity from criminal prosecution.

    4.3. *Leniency* means an undertaking from the Commerce Commission that, subject to the fulfilment of ongoing obligations and conditions, the Commission will not take civil enforcement action against an applicant for their involvement in specified cartel conduct.

    4.4. *Immunity* means an undertaking from the Solicitor-General that, subject to the fulfilment of ongoing obligations and conditions, the Solicitor-General will stay any prosecution against an applicant for specified cartel conduct.

    4.5. A *recipient* is a natural person or corporate entity who has received a grant of immunity from the Solicitor-General.

    4.6. *Derived leniency* and *derived immunity* are leniency and immunity afforded to a current or former director, officer or employee of a corporate entity that has been granted leniency and/or immunity. Like leniency and immunity, derived leniency and derived immunity are subject to the fulfilment of ongoing obligations and conditions.

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[1] Available on the Commerce Commission's website at www.comcom.govt.nz.

Roles | Ngā tūnga

5. The Commerce Commission is an independent Crown entity. It is responsible for investigating under, and enforcing, the Commerce Act, including the prohibitions relating to cartel conduct. The Commission may grant (or decline to grant) leniency under its Cartel Leniency and Immunity Policy.[2] It may recommend that the Solicitor-General grant immunity, but it has no role in deciding applications for immunity.

6. The Solicitor-General decides applications for immunity. The Solicitor-General acts independently when considering the Commission's recommendations.

Guideline | Te aratohu

The test

7. The ultimate question for the Solicitor-General is whether it is in the interests of justice to secure the applicant's evidence at the expense of the opportunity to prosecute. The Solicitor-General will apply the criteria in the guideline on Immunities | Te kahu ārai, modified and supplemented by the following considerations, which reflect the special features of cartel offending:

    7.1. The importance of the Commerce Commission's "first in" policy, which gives priority to the first cartel participant willing to cooperate, regardless of that participant's culpability relative to other participants.

    7.2. The difficulty of assessing the criminality and seriousness of the potential cartel conduct if it is disclosed early in, or at the beginning of, an investigation.

    Commentary
    In cartel cases, there may be little or no evidence besides the applicant's account at the point the Solicitor-General is asked to consider immunity from prosecution.

    7.3. The fact that a grant of civil leniency by the Commission is not an "inducement" for the purposes of the criteria in the guideline on Immunities | Te kahu ārai.

    7.4. The fact that, if the Commission was not previously aware of the cartel conduct, an applicant's evidence will generally strengthen the prosecution case in a "significant" way that was not otherwise reasonably available.

8. The Solicitor-General will also have regard to the prescribed conditions in the Commission's Cartel Leniency and Immunity Policy, namely:

    8.1. The applicant must be the first party to qualify for immunity, either:

        8.1.1. in relation to cartel conduct of which the Commission is not aware; or

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2 Available on the Commerce Commission's website at www.comcom.govt.nz.

8.1.2. in relation to cartel conduct of which the Commission is aware but has insufficient evidence to issue civil proceedings, and the applicant can provide valuable evidence that could not be reasonably obtained elsewhere.

8.2. The applicant:

8.2.1. is or was a participant in the cartel conduct;

8.2.2. admits that they participated in, or are participating in, cartel conduct;

8.2.3. has either ceased their involvement in the cartel conduct, or has confirmed to the Commission that they will cease their involvement;

8.2.4. has not coerced others to participate in the cartel conduct; and

8.2.5. agrees to provide full and continuing cooperation to the Commission in its investigation of cartel conduct and any subsequent proceedings (including prosecution).

8.3. If the applicant is a corporate entity, it must also make admissions that it is liable for the cartel conduct, including due to the actions of its directors, officers, contractors, agents or employees.

Civil leniency not relevant

9. A decision by the Commerce Commission to grant the applicant civil leniency is not relevant to the question whether it is in the interests of justice for the Solicitor-General also to grant immunity from criminal prosecution.

The process

Legal advice

10. The Solicitor-General expects that every applicant will receive legal advice before making an application.

The recommendation

11. When the Commerce Commission recommends that the Solicitor-General grant immunity from prosecution, it will send a formal opinion on the merits of the proposed immunity to criminal@crownlaw.govt.nz. The opinion should be from a cartel panel prosecutor (if one has been instructed), or an appropriate senior legal staff member at the Commission (where no cartel panel prosecutor has been instructed). The opinion should include, or annex, an indication of the evidence that would be provided under the grant of immunity (which need not be in the form of briefs of evidence).

The decision and its consequences

12. The Solicitor-General will promptly communicate immunity decisions to the Commerce Commission, in accordance with any timeframe agreed with the Commission. The Commission will promptly provide decisions to applicants.

If the application is declined

13. If the Solicitor-General declines to grant immunity, any information obtained from the applicant in connection with it cannot be used against that person in a prosecution.

If the application is granted

14. If the Solicitor-General grants immunity, they will provide a written undertaking (through the Commerce Commission) that, subject to the fulfilment of ongoing obligations and conditions, they will stay any prosecution commenced against the applicant for the cartel offence for which immunity was sought.

15. The standard conditions and ongoing obligations for immunity include that the applicant continues to meet the requirements in their leniency agreement with the Commission and the Commission's Cartel Leniency and Immunity Policy. This includes fully cooperating with the Commission investigation and any prosecution. For individuals, this also means:

    15.1. they will appear as a witness for the prosecution as and when requested in any proceedings against other cartel participants; and

    15.2. they will give evidence truthfully, disclosing all relevant facts within their knowledge, and will not refuse to answer any questions to avoid self-incrimination in respect of cartel conduct covered by the immunity from prosecution.

Immunity and cooperation on alternative bases

16. Cartel participants who wish to formally cooperate with the Commerce Commission in circumstances where they cannot receive immunity under this guideline may still be eligible for immunity under the guideline on Immunities | Te kahu ārai.

17. The Commission's Cartel Leniency and Immunity Policy provides further information about cooperation with the Commission.

Derived immunity

18. If the Solicitor-General grants immunity to a corporate applicant, they will also usually grant derived immunity to all of the applicant's present and former directors, officers and employees who ask for immunity if they:

    18.1. admit their involvement in the conduct of the corporation in respect of the cartel; and

    18.2. undertake to provide full disclosure and cooperation.

19. Corporate applicants should identify the persons, or classes of persons, for whom derived immunity is sought.

20. The Solicitor-General expects that anyone who may benefit from derived immunity will receive legal advice in advance of a grant of derived immunity. Recipients of derived immunity may need legal advice independent from the applicant. Where there is a reasonable prospect of derived immunity, the relevant individuals should be offered the opportunity to seek independent legal advice, including in relation to leniency. The costs of obtaining the legal advice will be met by the applicant.

21. Where the Commerce Commission recommends to the Solicitor-General that a corporate applicant should be granted immunity from prosecution, the Commission should also recommend whether derived immunity should be granted to the persons who meet the criteria above. This recommendation should set out all relevant information in relation to the proposed grants of derived immunity.

22. The Solicitor-General will independently decide whether to grant derived immunity. When the Solicitor-General decides to grant derived immunity, they will provide a written undertaking to that effect.

Revocation

23. The Solicitor-General may revoke a grant of immunity at any time if:

    23.1. the Commerce Commission makes a recommendation to revoke immunity and the Solicitor-General, exercising their independent judgement, agrees with that recommendation; or

    23.2. the Solicitor-General becomes aware of information that suggests immunity should not have been granted (whether or not the Commission knew about the information at the time it made its recommendation); or

    23.3. the Solicitor-General is satisfied, after having consulted with the Commission, that:

        23.3.1. the recipient of the immunity has provided information to the Commission or relevant prosecuting agency that is false or misleading in a relevant matter; or

        23.3.2. the recipient of the immunity has not fulfilled the conditions of the immunity.

24. The Solicitor-General will notify the recipient and the Commission in writing of their intention to revoke the grant of immunity. They will give the recipient a reasonable opportunity to respond before revoking immunity.

25. If immunity is revoked, any information provided to the Solicitor-General or the Commission may be used against the recipient in a prosecution.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Immunities | Te kahu ārai
Disclosure | Te tūhura

Immunities

Te kahu ārai

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

All guidelines should be read alongside the Principal guideline | te Aratohu mātāmua

Introduction | Ngā kupu whakataki

1. People who commit serious offences will almost always be prosecuted when the Test for Prosecution is met. In exceptional cases, however, the Solicitor-General may grant an accomplice immunity from prosecution in exchange for evidence against a more culpable co-offender. Immunities are rarely granted. They are reserved for the most serious cases.

Scope | Te korahi

2. This guideline sets out the circumstances in which the Solicitor-General may grant immunity from prosecution or permit a prosecuting agency to advertise the possibility of immunity together with a reward for information that assists in solving a case or bringing a prosecution. It sets out the process for prosecutors to seek a grant of immunity. It does not address immunities in cartel cases, which are covered by a separate guideline.

Roles | Ngā tūnga

3. Prosecutors may ask the Solicitor-General to grant an accomplice immunity from prosecution. The Solicitor-General may provide a written undertaking providing an accomplice with immunity from prosecution in exchange for giving evidence.

Guideline | Te aratohu

4. Sometimes a prosecution will need the evidence of an accomplice, either to respond to a weakness in the case, or to prove the true nature and extent of a defendant's offending. Unless the accomplice has already been dealt with (usually charged and sentenced or acquitted), they will have the right to avoid self-incrimination by declining to give evidence. Prosecutors may wish to consider, in such cases, whether to ask the Solicitor-General to grant the accomplice immunity from prosecution in exchange for giving evidence for the prosecution.

5. An immunity is a written undertaking from the Solicitor-General to stay any charge against an accomplice for specified offences. It protects the accomplice from both public and private prosecutions. The only purpose of the undertaking is to make available evidence that would otherwise be unavailable.

The test

6. In general, the Solicitor-General will only consider granting an immunity if:

    6.1. the accomplice's proposed evidence is:

        6.1.1. necessary to respond to a significant weakness in the prosecution case; or

6.1.2. essential to prove the true nature and extent of a defendant's offending (and such proof is not otherwise available); and

6.2. the accomplice has themselves committed a criminal offence but is less culpable than the defendant(s). Generally, they will present a lower risk to public safety.

Commentary

The weakness in the prosecution case, sought to be addressed by the grant of immunity, may be such that there is insufficient evidence to charge the principal(s), or that while there is sufficient evidence to charge, the prosecution case will be significantly strengthened by the evidence to be given under immunity. The stronger the prosecution case without the accomplice's proposed evidence, the less likely it is that immunity will be granted.

7. The ultimate question is whether it is in the interests of justice to secure the accomplice's evidence against the defendant(s) instead of prosecuting the accomplice. The Solicitor-General will almost invariably need to be satisfied of (at least) the following matters before coming to that conclusion:

7.1. the offending the accomplice can give evidence about is serious;

7.2. there are no other reasonably available ways of addressing the weakness in the prosecution case, or proving the true nature and extent of the offending (without relying upon the evidence to be given under immunity);

7.3. the evidence to be given under immunity is admissible, relevant and significantly strengthens the prosecution case, or proves the true nature and extent of the offending;

7.4. the accomplice, while having committed some identifiable offence(s) for which they could be charged, is less culpable, and less of a risk to public safety, than the person to be tried;

7.5. the evidence to be given under immunity appears reliable and, preferably, is supported by other admissible evidence;

7.6. no inducement, other than the possibility of an immunity, has been suggested to the accomplice (other than a reward where the Solicitor-General approved the advertisement of the possibility of immunity together with a reward); and

7.7. there is sufficient admissible evidence to charge the accomplice with the offence(s) he or she is believed to have committed.

Commentary

In considering the credibility/reliability of the evidence to be given under immunity, prosecutors should consider whether the accomplice has a motivation to lie, in addition to the inducement of immunity or reward outlined in paragraph 7.6 above. Factors outlined in the guideline on Inmate admissions | Ngā whāki ā-mauhere may

be relevant to this assessment. Such factors should be identified in the request to the Solicitor-General.

Additional considerations

8. Prosecutors should advise the Solicitor-General of any other matters that may reasonably have a bearing on whether immunity is in the interests of justice. Those matters may include, for example, the character, criminal record and credibility of the accomplice and whether, if the accomplice were to be prosecuted and then testify, there is a real basis for believing that his or her personal safety would be at risk while serving any term of imprisonment.

Offers of reward

9. Occasionally New Zealand Police wish to advertise the possibility of immunity together with a reward notice. Police should seek the Solicitor-General's prior approval for the terms of such an advertisement, as immunity will not normally be granted where there has been any inducement offered to the witness and only the Solicitor-General can offer immunity.

Process | Te tukanga

Initial consultation between the investigator and prosecutor

10. Investigators should consult promptly with the local Crown Solicitor after identifying that an accomplice may be required as a witness rather than a defendant. The investigator and the Crown Solicitor should discuss whether, and how, the possibility of immunity from prosecution should be explored. It is important to keep accurate records about how possible immunity is raised with the witness. The investigator and Crown Solicitor should also discuss whether it would be appropriate to proceed with the investigation on the basis that the accomplice will be available as a witness.

11. In Crown prosecutions, the Crown Solicitor should personally decide whether to request the Solicitor-General to grant immunity to an accomplice. Because immunities are reserved for the most serious cases, they should only be sought in exceptional circumstances in connection with non-Crown prosecutions. In such a case the prosecuting agency should seek advice from the local Crown Solicitor as to whether immunity should be sought.

The request for immunity

12. The Crown Solicitor should send a formal opinion on the merits of any proposed immunity to criminal@crownlaw.govt.nz. The opinion should annex the accomplice's statements and provide sufficient detail for the Solicitor-General to be satisfied of the matters in paragraphs 7.1-7.7 above, and include information about how possible immunity was raised with the witness.

13. In all cases, the Solicitor-General's expectation is that the Crown Solicitor will have personally approved any request for immunity that is sent to Crown Law.

Briefing the accomplice

14. The accomplice who is to testify under immunity should provide a brief of the evidence they will give. They should be advised to seek independent legal advice, the reasonable cost of which may, if necessary, be met by the prosecuting agency. The accomplice should be advised that if immunity is declined, the brief of evidence and any other information obtained from the accomplice in connection with a promise to request immunity cannot be used against that person by the prosecution. The brief of evidence will be subject to the ordinary rules of disclosure concerning other defendants. The accomplice should also be advised that, if granted, immunity may be revoked on the grounds set out below.

Disclosure

15. Responsibilities for disclosure are set out in the guideline on Disclosure | Te tūhura. Evidence from a witness who has been given immunity from prosecution will almost certainly be contentious and there may be personal safety implications. If the prosecution is a Crown prosecution, such evidence, including disclosure requirements, should be discussed between the Crown prosecutor and the person managing disclosure at an early stage, including what information provided to support the request for immunity should be disclosed.

Revocation

16. The Solicitor-General approaches the grant of immunity on the assumption it is final in terms of the individual's legal jeopardy. However, the Solicitor-General may revoke a grant of immunity at any time if:

    16.1. the Solicitor-General becomes aware of information which suggests immunity should not have been granted; or

    16.2. the Solicitor-General is satisfied that:

        16.2.1. the recipient of the immunity has provided information to the Solicitor-General or relevant prosecuting agency that is false or misleading in a material respect; or

        16.2.2. the recipient of the immunity has not fulfilled the conditions of the immunity.

17. The Solicitor-General will notify the recipient in writing of the intention to revoke the grant of immunity and the reason for that, and give them a reasonable opportunity to respond before doing so.

18. If immunity is revoked, any information provided to the Solicitor-General in connection with the application for immunity may be used against the recipient in a prosecution.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Inmate admissions | Ngā whāki ā-mauhere
Disclosure | Te tūhura
Immunities in cartel cases | Te kahu ārai ngā hara ā-rāngai kamupene
Decisions to prosecute | Te whakatau ki te aru

Inmate admissions

Ngā whāki ā-mauhere

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

All guidelines should be read alongside the Principal guideline | te Aratohu mātāmua

Summary | Te whakarāpopototanga

1. Evidence of admissions obtained from someone in custody with a defendant can be unreliable. The law recognises, however, that subject to certain safeguards, such evidence can reliably be put before a jury. The decision to call inmate admissions evidence is significant. It requires the prosecutor to be satisfied that the evidence is reliable. Relevant matters in assessing reliability include the proposed witness's motive; circumstances of the interaction between the defendant and the proposed witness; evidence that confirms the proposed witness's account; whether there may have been an opportunity for the proposed witness to concoct the evidence; the character of the proposed witness; and whether they have offered such evidence in the past.

2. Inmate admissions evidence should be accompanied by appropriate directions to the jury explaining the risks of such evidence. The reasons for the decision to call inmate admissions evidence should be recorded in writing.

Introduction | Ngā kupu whakataki

3. Inmate admissions evidence can be unreliable. Such evidence has been linked to miscarriages of justice and wrongful convictions in overseas jurisdictions and in New Zealand. Some inmate witnesses have demonstrated remarkable ingenuity in obtaining what appears to be compelling information to support false evidence.

4. At the same time, defendants can and do make incriminating statements while in custody that can, in the right circumstances, constitute valuable and reliable evidence. People in custody can be honest and reliable witnesses, but careful scrutiny of their evidence is always required. This guideline provides guidance to prosecutors about processes to follow, and relevant considerations, when deciding whether or not to call inmate admissions evidence. It also identifies matters the prosecutor should consider seeking judicial directions about, if such evidence is to be called at a jury trial.

Scope | Te korahi

5. These guidelines apply where a proposed witness has provided information about admissions allegedly made by a defendant while they were in custody with the proposed witness.

6. It does not cover incriminating comments made by defendants to those who can be expected to have direct knowledge of the offending independent of the defendant's admissions, such as co-defendants, accomplices, undercover operatives and some confidential informants.

Glossary | Kuputaka

7. In this guideline:

    7.1 *Proposed witness* means a witness that the prosecution proposes to call to give inmate admissions evidence, who would not be expected to have knowledge of the offending beyond the admissions allegedly made to them.

7.2 *Inmate admissions evidence* means evidence of incriminating statements by a defendant to a proposed witness that:

7.2.1 were made while they were in custody together; and

7.2.2 relate to offences occurring outside the prison or place of custody.

Guidelines | Te aratohu

8. The general scheme of the Evidence Act 2006 is that concerns about the reliability of evidence can be met by s 8 (which requires a case-by-case assessment of probative value against prejudicial effect); the testing that occurs in the trial process itself; and the availability of a warning to a jury that evidence could be unreliable.[1]

9. However, given the risks associated with inmate admissions evidence, prosecutors should take great care when deciding whether to call it. The considerations and processes outlined below are intended to respect the role of the fact-finder at trial while mitigating the risks of unreliable inmate admissions evidence.

Overall public interest assessment – guiding principles

10. Prosecutors should carefully review proposed inmate admissions evidence to determine whether it is in the interests of justice to call it, having regard to the known dangers associated with such evidence.

11. Prosecutors should only call inmate admissions evidence if they are satisfied it is more likely than not to be reliable. This assessment should involve consideration of the factors outlined at paragraphs 14-18 below.

12. Prosecutors should generally only call inmate admissions evidence in serious cases.

Factors prosecutors should consider when assessing reliability

13. The following are non-exhaustive factors that prosecutors should consider in assessing the reliability of inmate admissions evidence.

Motive

14. Prosecutors should take a broad view of possible motivations for a proposed witness to lie about admissions made by a defendant. Factors relevant to motive include the following:

14.1 Whether the information was solicited from, or volunteered by, the proposed witness.

14.2 Any offers or promises made to the proposed witness.

14.3 Other inducements for the proposed witness (such as support for a sentence reduction, withdrawal of charges, a plea arrangement, bail, changes to conditions of imprisonment or safety measures).

14.4 Any prior interactions between the proposed witness and investigating officers.

[1] Evidence Act 2006, s 122.

14.5 The circumstances in which the proposed witness came to be speaking to the authorities, and whether and how their statement has been recorded (for example, audio/visual recording, written statement).

14.6 Whether the proposed witness has made any requests to authorities that may relate to their willingness to give evidence (whether or not the request was agreed to).

14.7 The proposed witness's explanation for coming forward.

14.8 Other motivations the proposed witness may have (for example, a grudge against the defendant or other gang allegiance).

14.9 Whether any ulterior motive or inducement is likely still to apply when the proposed witness may give evidence.

14.10 Any threats against, or safety concerns of or for, the proposed witness.

Circumstances of alleged interactions

15. Factors relevant to the circumstances of the proposed witness's alleged interactions with the defendant include the following:

15.1 The plausibility of the proposed witness's account of the alleged interaction with the inmate.

15.2 Any records related to the alleged interaction, and whether they were contemporaneous.

15.3 Whether the alleged interaction is supported by records of the Department of Corrections | Ara Poutama Aotearoa or by other inmates.

15.4 Any delay in the proposed witness coming forward with the evidence and the reasons given for that delay.

Confirmatory evidence

16. Factors that may confirm a proposed witness's evidence include the following:

16.1 The level of detail and specificity of the evidence.

16.2 Consistency of the evidence with known facts and with other statements made by the proposed witness.

16.3 Whether the proposed witness's evidence led to the discovery of other evidence.

16.4 Whether the proposed witness's evidence contains information that is not in the public domain.

Opportunity to concoct

17. Prosecutors should consider whether the proposed witness's evidence could be constructed based on facts and information gained from sources other than the defendant. Relevant factors include:

    17.1 the proposed witness's potential access to alternative sources of information (such as media reports, articles and editorials; disclosure documents; other people (such as witnesses, co-defendants, family or criminal associates); and information from the New Zealand Police); and

    17.2 the timing of the proposed witness's evidence relative to media reports, articles or editorials.

Character and circumstances of the proposed witness

18. Factors relevant to the character and circumstances of the proposed witness include:

    18.1 The proposed witness's conviction history (especially any offences of fraud, dishonesty, perjury or perverting the course of justice).

    18.2 Whether the proposed witness has any other record of dishonesty.

    18.3 Material from Police databases (such as the National Intelligence Application (NIA)) about the proposed witness.

    18.4 Whether the proposed witness has given inmate admissions evidence in the past. Prosecutors should consult any inmate witness register or any other records maintained by Police and other government agencies. If the witness has given inmate admissions evidence in the past, prosecutors should seek details as to the reliability of this past evidence. This will likely require consideration of any transcript or recording of the proposed witness's past evidence.

    18.5 Any other issues or matters that may go to reliability.

    Commentary
    This could include, for example any court-ordered assessment and/or treatment or that the proposed witness has previously provided information as a confidential informant and whether that information was considered reliable.

Information prosecutors should consider when assessing reliability

19. Prosecutors should ensure they are provided with the following (to the extent it is available) so they have sufficient information to assess the reliability of the inmate admissions evidence:

    19.1 the proposed witness's previous convictions;

    19.2 the sentence(s) the proposed witness is currently serving and the length of term remaining;

19.3 the number of times (if any) that the proposed witness has previously offered, disclosed or given evidence of this type, and if they have previously offered, disclosed or given such evidence:

19.3.1 how their evidence was treated and the reason for that treatment;

19.3.2 the significance (if any) of their evidence to the matter(s) then at issue; and

19.3.3 any benefit or other preference offered to, or received by, the proposed witness in connection with giving this evidence.

20. The prosecutor should consider whether they require additional material to assess the reliability of the inmate admissions evidence. This may require the prosecutor to ask the investigator to undertake additional investigation or preparatory work. Whether and to what extent further material is required is a judgement call for the prosecutor.

21. The prosecutor is not obliged to seek further information about inmate admissions evidence if, based on the material initially provided by the investigator, the prosecutor decides not to call the evidence.

22. If information comes to light that affects the prosecutor's original view of the inmate admissions evidence (particularly its reliability), the prosecutor should review their decision about whether or not to call the evidence.

Directions to juries

23. Where inmate admissions evidence is given in a jury trial, the prosecutor should ensure the jury is given appropriate directions about it.[2] The exact form of direction will be a matter for the judge, and should be tailored to the circumstances of the case, but prosecutors could suggest the following should be included:

23.1 The reasons why such evidence should be treated with care (because of the risk of incentivised evidence leading to a miscarriage of justice).

23.2 The possible incentives for a witness to give such evidence. Even where there has been no inducement by the authorities, the witness may have been influenced by the possibility of future benefits.

23.3 The possibility that the evidence may have been motivated by animosity.

23.4 The possibility that the witness obtained the information from third parties, including media sources, other prisoners or from interactions with Police, rather than from the defendant.

23.5 The possibility that the statement is not an admission but a demonstration of bravado by the defendant, or simply a recounting of the evidence against them (without necessarily accepting its truth).

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2 This may include a direction under s 122(2)(d) of the Evidence Act 2006.

23.6 The usual cautions about disputed evidence that is not independently verified.

24. Where the judge does not address these matters in their summing up to the jury, and the prosecutor considers the judge should have done so in the circumstances of the case, the prosecutor should alert the judge to the omission immediately after the jury has left the courtroom, and invite the judge to bring the jury back so that suitable directions may be given.

Disclosure

25. Responsibilities for disclosure are set out in the guideline on Disclosure | Te tūhura. Inmate admissions evidence will almost certainly be contentious and may give rise to procedural difficulties. If the prosecution is a Crown prosecution, such evidence should be discussed between the Crown prosecutor and person managing disclosure at an early stage, including what information should be disclosed.

26. Information about the reliability of inmate admissions evidence may engage the reasons for withholding information under the Criminal Disclosure Act 2008. This type of information should be disclosed unless it is in the public interest to withhold it (for example, for safety reasons). If the information is to be withheld, the fact of its existence (but not the content) should be disclosed so that the defendant can consider whether to seek an order for disclosure.

Process | Te tukanga

27. In Crown prosecutions, a decision to call inmate admissions evidence should be approved by the Crown Solicitor personally.

28. In non-Crown prosecutions, the decision should be approved by a senior manager in the prosecuting agency. If approval is given, the agency should consider instructing the local Crown Solicitor, who will have expertise in assessing and leading such evidence, to conduct the prosecution.

29. Any decision to call inmate admissions evidence, and the reasons for that decision, should be recorded in writing.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Decisions to prosecute | Te whakatau ki te aru
Disclosure | Te tūhura

Jury selection

Te whiriwhiri i te hunga whakawā

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

Introduction | Ngā kupu whakataki

1. The Juries Act 1981 identifies persons who are disqualified from or ineligible to serve on a jury.[1] Outside of these disqualification and ineligibility provisions, prosecutors should use selection processes to obtain a fair and impartial jury that is representative of the community. This recognises juries' important role in maintaining public confidence in the criminal justice system.

Scope | Te korahi

2. This guideline applies to all jury trials. It outlines high-level principles, including when and how a prosecutor should challenge a potential juror for cause or without cause.

Glossary | Kuputaka

3. In this guideline:

   3.1 A *challenge for cause* is the ability for a party to challenge a potential juror on specified grounds under s 25 of the Juries Act.

   3.2 A *challenge without cause* is the ability for a party to challenge a potential juror under s 24 of the Juries Act.

Guideline | Te aratohu

4. Prosecutors who conduct jury trials are expected to be familiar with the Juries Act.

When should a prosecutor challenge for cause?

5. The Juries Act allows parties to challenge a juror for cause on defined grounds. The Act does not limit the number of challenges for cause.

6. A prosecutor should only challenge for cause if they reasonably believe that one or more grounds for a challenge for cause is met.

When should a prosecutor challenge without cause?

7. Prosecutors' challenges without cause should focus on potential jurors whose inclusion could undermine the integrity of the jury. This may be on the same grounds as a challenge for cause, but where the conditions for such a challenge are not met. Examples include:

   7.1 The potential juror is known or related to a participant in the trial, such as the complainant, counsel, the defendant or any of the witnesses.

   7.2 There is a reasonable basis for believing the potential juror may be biased.

   Commentary
   An example might be that the potential juror has made a remark that is biased against one of the parties.

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[1] Juries Act 1981, ss 6-8.

7.3 The potential juror has demonstrated that they may not wish to participate in the proceedings.

Commentary
An example might be where the potential juror has made hostile remarks about the court process.

7.4 The potential juror has acted in some way, or there is some other indication, that they will be unable to perform the role.

Commentary
An example might be where the potential juror has shown they are not able to understand instructions.

8. A prosecutor should never challenge without cause based on any of the prohibited grounds of discrimination in the Human Rights Act 1993.[2]

Jury vetting

9. Sometimes, prosecutors may seek information from the New Zealand Police about individuals on the jury panel list.

10. This can be information about previous criminal convictions or other information such as the fact that a potential juror has been a victim of an offence. This information helps prosecutors decide whether to challenge potential jurors.

11. The Supreme Court has confirmed that obtaining previous conviction histories for jury vetting purposes is lawful. The Court did not have to directly consider the status of information that is wider than just previous criminal convictions such as material from Police databases such as the National Intelligence Application (NIA). However, the Court observed that it is not immediately apparent why such information should be treated any differently from information about previous convictions.

When do prosecutors need to disclose information obtained from jury vetting?

12. A prosecutor should disclose information about previous convictions or other information about potential jurors to the defence if it gives rise to a real risk that the juror might be prejudiced against the defendant or in favour of the Crown. Disclosure of information that does not meet this test is not required.

13. This test strikes the balance between fair trial considerations and the privacy interests of jurors and potential jurors. It requires a prosecutor to assess whether there is a real risk of prejudice such that the previous conviction history or other information should be disclosed despite the sensitive and private nature of the information. Prosecutors should consider a range of factors, including the number and nature of the previous convictions, how recently the offending or alleged conduct occurred, and the type of offending being considered in the current prosecution.

Commentary
An example where criminal histories might be disclosed are a potential juror's previous drug dealing convictions in a trial involving drug offending. Examples of situations

[2] Human Rights Act 1993, s 21.

where other information might be disclosed are a potential juror's status as a victim of violence in an assault trial; or gang associations in a trial with gang member defendants.

14. The privacy and security of jurors should be protected to the greatest extent that is consistent with fairness to the defence.

15. Jury vetting does not apply to persons whose criminal convictions are covered by the Criminal Records (Clean Slate) Act 2004.

16. No disclosure is necessary if the prosecutor does not undertake a jury vetting process.

Blind vetting

17. Prosecutors should not use the process of "blind vetting", in which Police strike out the names of potential jurors on a jury panel after considering criminal convictions and material from databases such as NIA. Blind vetting is not appropriate because the prosecutor is not provided with any information as to why the names have been struck out and so is unable to determine whether the test for disclosure has been met.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Disclosure | Te tūhura

Te Tari Ture o te Karauna
Crown Law

Media

Te pāpāho

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

Introduction | Ngā kupu whakataki

1. Open justice is in the public interest. It promotes public scrutiny of, and confidence in, the justice system. Accurate media reporting is a critical component of open justice, as few people have direct access to the courts. Prosecutors can foster open justice by providing accurate information and by correcting inaccurate reporting. In doing so, prosecutors must protect fair trial rights, respect legal restrictions on publication, be respectful of current court processes, and comply with their professional obligations.

2. This guideline sets out prosecutors' roles and responsibilities when making public statements. It applies to Crown prosecutors and New Zealand Police; other prosecuting agencies should take it into account when developing their own media policies.

Scope | Te korahi

3. This guideline sets out considerations for prosecutors when providing information and responding to requests from media.

Guideline | Te aratohu

4. Prosecutors may provide factual information about the nature and progress of proceedings, as long as the information is not suppressed or otherwise non-disclosable. Moreover, a clear explanation of how the criminal justice system works can enhance public confidence in the system by fostering accurate reporting.

5. The defendant's right to a fair trial will, however, always take precedence over media interests and freedom of expression. Prosecutors should not make public statements that prejudice that right. Prosecutors serve the public interest in open justice when they provide the facts.

6. Prosecutors should respect victims' privacy and be sensitive to their rights and needs. Personal information should never be disclosed without express consent. If a victim is considering speaking to the media, the prosecutor may wish to advise them of the potential consequences of making a public statement on the prosecution. Victims should be kept informed about proceedings in accordance with the Victims' Rights Act 2002 in a timely way, so they are not surprised by media reporting.

Crown Solicitors should have media policies

7. Crown Solicitors are expected to have media policies. These should set out, at a minimum, the employees who may speak to the media (and in what circumstances), along with a process for dealing with media requests that are urgent or relate to sensitive and high-profile cases.

8. Subject to these guidelines and the applicable Crown Solicitor policy, prosecutors may respond to media enquiries about cases for which they are responsible.

Crown Solicitors may explain prosecution decisions

9. A Crown Solicitor may, in a case of significant public interest, issue a statement giving broad reasons for a decision to prosecute, or a decision not to prosecute. They may also make a statement in relation to a decision that has brought a prosecution to an end (for example a stay of proceedings, or a decision to dismiss a charge under s 147 of the Criminal Procedure Act 2011). The Crown Solicitor may wish to consult the Deputy Solicitor-General (Criminal) before making any such statement.

Prosecutors may provide information

10. In general, prosecutors may provide information about the charges, the defendant, and the progress of proceedings. However, prosecutors should always consider whether there are any special reasons in a particular case that make it inappropriate to put the information in the public domain.

11. The prosecutor may generally provide the following information:

    11.1 The fact and location of the arrest and the general nature of the criminal charges.

    11.2 Once the defendant has appeared in court, the name, age and residence (town, city, or region only) of the defendant, unless any of those details are suppressed or their publication is prohibited for other reasons.

    11.3 The date and location of the next court appearance.

    11.4 Guidance on the nature of the hearing (first appearance, case review hearing, pre-trial callover, pre-trial application, appeal etc).

    11.5 The names of the prosecutor and the lawyer who appeared for the defendant at the hearing.

    11.6 Information about the outcome of the hearing (for example, the prosecution was discontinued, a charge was amended, the trial was adjourned, and so on).

12. In general, prosecutors should not publicise the fact that advice has been sought from internal legal counsel, a Crown Solicitor's office, or Crown Law. There will be rare cases in which it is appropriate for a prosecutor to inform the public, for example, that a charging decision in a high-profile case is being peer reviewed by a Crown Solicitor or by Crown Law. The prosecutor should consult the Deputy Solicitor-General (Criminal) before making any such statement. Prosecutors should never disclose legal advice to the media, the public, or any third party without an express waiver of privilege from the Attorney-General (to obtain a waiver, prosecutors should contact Crown Law's Criminal Team).

13. It is permissible to advise the media that a matter has been referred to the Solicitor-General or a Crown Solicitor for consideration of a possible appeal by the prosecution.

14. Crown Law may decide to issue a public statement in respect of a decision to bring, or not bring, an appeal. While the prosecuting agency will be consulted as to the content of any statement, the Solicitor-General will determine what, if anything, should be disclosed to the public.

Prosecutors may explain, but not offer opinions

15. Prosecutors may explain aspects of a case for the purpose of facilitating accurate, complete and fair reporting. Those matters include the law and procedure relevant to the prosecution or the wider proceeding, the prosecutor's submissions, and the effect of any judicial decision.

16. Prosecutors should not make any public statement expressing an opinion about a case (especially about the defendant's guilt or innocence), the progress of the trial or any hearing, or any judicial decision (including any sentencing decision).

Prosecutors may not disclose certain information

17. Prosecutors should not make any public comment or statement about the following:

    17.1 The defendant's previous convictions, unless they have been ruled admissible and referred to in open court.

    17.2 Personal information about witnesses and victims, including addresses and telephone numbers, unless there is express consent from the person concerned or the information is already in the public domain (for example, because evidence has been given about it in open court and it is material to the proceeding).

    17.3 Matters raised in chambers or in other hearings that are closed to the public, including information provided during bail hearings.

    17.4 Advice given to, or discussions held with, colleagues, foreign officials, or members of a prosecuting agency, whether or not such advice or discussions are privileged.

    17.5 Any other information prosecutors legally must not disclose, including but not limited to:

        17.5.1 personal details and evidence suppressed by statute or court order;

        17.5.2 privileged information, including information connected with plea discussions;

        17.5.3 information about a sentence indication, or a request for a sentence indication; and

        17.5.4 national security information subject to non-disclosure obligations.

Prosecutors may correct inaccuracies

18. Prosecutors may become aware that inaccurate information about a proceeding has been published. Prosecutors should consider whether to offer factual explanations of the relevant law or procedure to correct errors and encourage accurate reporting.

Prosecutors may not comment on potential charges against identified individuals

19. The media may seek to confirm that a named person is under investigation or that charge(s) are being considered, or will be filed, against that person. As a general rule, prosecutors should not comment on those matters.

20. Prosecutors should be extremely cautious in making any comment prior to charges being filed. Any statement should be at a very general level, related to process, and should not provide any specific information about charges (if any) being considered or any identifiable individual being investigated.

    Commentary

    By way of example, prosecutors may indicate that an investigation into an event or incident is ongoing and state that it is not appropriate to comment further at this stage.

Prosecutors should be familiar with the civil and criminal regimes relating to public statements, and access to court documents

Contempt of court

21. Prosecutors should be familiar with the law of contempt and ways in which publication contempts can be committed. If a prosecutor becomes aware of information in the public domain that may amount to an offence or contempt, they should consider drawing the information to the attention of the court, Police (if the conduct involves possible breach of a statutory suppression provision), or the Solicitor-General. If the impact of public coverage of a trial is formally raised in court, prosecutors should consider advising the Solicitor-General.

22. Prosecutors should be mindful that actions short of an offence under the Contempt of Court Act 2019 or contempt may raise grounds for appeal post-trial, adjournment of the trial, or a stay of the prosecution.

Defamation

23. Prosecutors should be familiar with the law relating to defamation. Prosecutors should be mindful that defamatory remarks to media outside of court may result in personal liability for such remarks, as well as putting the prosecution at risk (for example, a defamatory statement that jeopardises the fairness of the trial may result in the court staying the prosecution).

Official Information Act

24. Media may request information about a criminal proceeding under the Official Information Act 1982 (OIA). Government prosecutors in public prosecuting agencies should be familiar with the OIA and any legally privileged advice from Crown Law about responding to OIA requests that relate to criminal proceedings.

Rules of court

25. Prosecutors should be familiar with the role of the judiciary in making decisions about the release of information held by the courts, including any rules of court and media guidelines.

Requests for court documents

26. The timing of a media request is important. If a proceeding is ongoing, or a particular document has not been dealt with in open court, it will generally not be appropriate, and may be discourteous to the court's control of its own proceedings, for the prosecution to provide court documents to the media. The situation may be different once a proceeding, or relevant part of a proceeding, is complete.

27. The media commonly request copies of submissions or summaries of fact. Prosecutors should be particularly cautious about media requests for summaries of fact as these remain allegations unless and until they are accepted. They should not be provided to media before the prosecution has presented its sentencing submissions in open court. They should not be made available when an objection has been raised and is unresolved, or when an objection is reasonably anticipated.

28. When dealing with a media request for submissions, prosecutors should consider the nature of the proceeding and the content of the submissions. In general, if submissions have been filed and used in open court, they may be released to the media unless there are orders preventing release, or such orders are reasonably anticipated. Sometimes, it may also be appropriate to provide copies of submissions to media at the start of a hearing, so that media can more readily follow the legal argument. If a prosecutor has any doubt about this course, it is safer to check with the court.

29. In some cases, prosecutors may instead refer media to the applicable rules of court and suggest they request documents under that process.

Requests for further orders

30. Prosecutors should consider whether the existence of information on the internet requires the making of any orders, including suppression orders under the Criminal Procedure Act or take-down orders under that Act or the Contempt of Court Act.

Crown prosecutors, media, and Police

31. If Police instruct a Crown prosecutor prior to the Solicitor-General assuming responsibility for a prosecution, the Crown prosecutor should assist Police to deal with the media in a way that protects fair trial rights.

32. The Crown prosecutor is likely to be held responsible for any public comments by the prosecution or Police from the time the Solicitor-General assumes responsibility for a Crown prosecution. Police and the Crown prosecutor should therefore consult each other about any media queries and decide who should respond. Police and the Crown prosecutor should manage these situations on a case-by-case basis, guided by the nature of the inquiry and the type of information sought.

33. Police should act in accordance with this guideline and the "Dealing with the Media" chapter of the Police Manual. In relation to prosecutions, this includes:

    33.1 Avoiding making comment on an investigation or operation during pre arrest interactions with the media that could later be construed as being prejudicial to the case when it goes to court.

    33.2 Not commenting on matters (other than procedural matters) that are still in the court process. This includes post conviction, pre sentencing and post sentencing until any appeals have been completed. Where matters are in the hands of Crown Solicitors, Police should consult with the Crown Solicitor (if possible) before comments are made.

    33.3 Avoiding any comment that could be construed as criticism of a judicial decision.

Comments on justice issues generally

34. Occasionally prosecutors may be asked to comment to the media or in a public forum on matters relating to the criminal justice system generally. Prosecutors should take care before making any comment. Prosecutors should always make clear they are providing their own views, rather than speaking for the Government, Crown Law, or the Crown.

35. In situations that are likely to attract significant public attention, such as a television interview, prosecutors should consider consulting with the Solicitor-General before agreeing to participate.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Victims | Ngā pārurenga
Decisions to prosecute | Te whakatau ki te aru
Sentencing | Te whiu
The relationship between prosecutors and investigators | Te hononga i waenga i te kaiaru me te kaitūhura
Appeals | Ngā pīra

Non-party disclosure

Te tūhura i hunga kē

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

Introduction | Ngā kupu whakataki

1. Defendants in criminal prosecutions are entitled to disclosure; this is an aspect of the right to a fair trial under s 25(a) of the New Zealand Bill of Rights Act 1990. The Criminal Disclosure Act 2008 (CDA) determines what must be disclosed. This includes information held by non-parties to the proceedings.

Glossary | Kuputaka

2. In this guideline:

   2.1 A *prosecuting agency* is the agency prosecuting the defendant (on its own behalf or on behalf of the Crown) and holds the file or files relating to the prosecution.

   2.2 The *person managing disclosure* is the person designated by the prosecuting agency as being responsible for managing disclosure on its behalf under the CDA.[1] Usually, this will be an investigator (such as the officer in charge), rather than the person who appears in court.

   2.3 The *prosecutor* is the person representing the prosecuting agency in the criminal proceeding.

   2.4 A *non-party* is a person or organisation that is not the prosecuting agency or prosecutor.

Scope | Te korahi

3. This guideline provides guidance for prosecutors relating to non-party disclosure in criminal proceedings. Guidance for government departments, where they are the non-party from whom disclosure is sought, is not covered by this guideline, and is set out in legally privileged advice from Crown Law.

4. This guideline does not apply to disclosure between the prosecution and defence. This is addressed in the guideline on Disclosure | Te tūhura.

Guideline | Te aratohu

5. All prosecutors involved in non-party disclosure and persons managing disclosure are expected to be familiar with the CDA, any judicial practice notes relating to disclosure, and any legally privileged advice regarding disclosure from Crown Law.

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[1] The CDA refers to this person as the "prosecutor". For consistency with the rest of the guidelines and to aid understanding, this guideline instead uses the term "prosecutor" in the sense that it is most commonly understood; the person who appears in court to conduct the prosecution.

6. Sometimes, a defendant may ask a prosecutor to disclose information that is not part of the investigation file or otherwise held by the prosecutor or the prosecuting agency. If this information is held by a person or organisation that is not a party to the criminal proceedings, prosecutors should generally advise the defendant that they should seek this information from the non-party, and if they decline to release it the defendant may follow the non-party disclosure process in the CDA.

   Commentary
   Even government departments are non-parties in the context of prosecutions brought by the Crown,[2] as recognised by the courts[3] and provided in the Privacy Act 2020 which restricts the sharing of information between government agencies.

7. There are limited situations where the person managing disclosure should seek the information from the non-party to disclose it. This may include information that is relevant and ought reasonably to be part of the investigation file. In that situation the investigator may decide to seek the information as part of their investigation. If the non-party is unwilling to provide such information the prosecuting agency may decide to use its ordinary enforcement powers, such as obtaining a search warrant or production order, to compel the non-party to provide it.

8. Any information the prosecuting agency obtains is subject to the normal disclosure rules.

9. Most requests should be channelled through the CDA's non-party disclosure mechanism (unless the person managing disclosure has decided to seek the information as part of the investigation). These include requests for:

   9.1 Information that is inherently private or sensitive.

      Commentary
      Examples include requests for psychiatric, medical or counselling notes about an individual, or commercially sensitive information. This ensures that the person or organisation that actually holds the information – and is therefore best placed to advise the court about privacy interests and other public interest considerations – assists the court to determine whether it should be disclosed.

   9.2 Information that does not immediately appear relevant.

      Commentary
      This could be where a request for information is not sufficiently particularised and appears to be a fishing expedition. The non-party disclosure mechanism allows the relevance of the information to be assessed by a court.

[2] Whether the prosecution is a Crown or non-Crown prosecution.
[3] *[XG] v R* [2021] NZCA 4 at [9]. See also *Opetaia v R* [2020] NZCA 552.

Role of the prosecutor in non-party disclosure applications

10. The prosecutor and non-party have distinct roles in respect of a non-party disclosure application (at both the s 24 stage and at any hearing held under s 27):

    10.1 The prosecutor focuses on the relevance of the information to the prosecution and other legal issues such as the potential impact on fair trial rights.

    10.2 The non-party focuses on public interest or privacy interests relevant to the disclosure of the particular information. The non-party may also provide information as to the nature and content of the information, which may assist the court to assess its relevance.

    Commentary
    Where the prosecutor has sufficient knowledge, it may be appropriate for them to address privacy or other statutory interests in non-disclosure (for instance, if the non-party is a private citizen or is unrepresented). However, this should be done cautiously, as the non-party that owns or has custody of the information is generally in a better and more informed position to assist the court to determine whether the information should be disclosed.

11. These distinct roles mean the non-party should be separately represented (if they seek legal representation).

    Commentary
    The prosecutor should not act for a non-party in a criminal proceeding they are prosecuting. In relation to Crown prosecutions, no one from the prosecuting Crown Solicitor firm should act for the non-party in a non-party application associated with that prosecution. However, a Crown prosecutor may act for a non-party in a prosecution in a different warrant area; or in a non-Crown prosecution, if they have not been instructed to conduct the prosecution. If the non-party is a government department, they must instruct Crown Law to act for them, subject to any authorisation from the Solicitor-General.

Process | Te tukanga

12. The non-party provisions of the CDA do not apply to information held by a prosecutor or prosecuting agency, but disclosure obligations do. Prosecutors and the prosecuting agency should therefore never directly receive the non-party information from the non-party, unless a court has ordered its disclosure or permitted the prosecutor to view the information under s 27(3) of the CDA, or the non-party has consented to release the information.

13. A prosecutor who receives a non-party application under s 24 of the CDA should ensure that:

    13.1 The non-party is promptly notified. The prosecutor (or the person managing disclosure) should find out from the non-party whether they hold the information, how much there is, and how long it would take to collate it. The prosecutor should convey this information to the court if the court is not seeking

submissions from the non-party.

Commentary
The defence should make "reasonable efforts" to obtain the information from the person or agency it thinks holds the information *before* making a non-party application. However, this does not always occur in practice. Even where defence counsel *has* previously sought the information, for example by making a request under the Official Information Act 1982, that does not notify the non-party of the s 24 application. The CDA requires the court to serve the application on the non-party only after the application for a hearing is granted under s 25. This means the non-party may not know the process has been commenced. Contacting the non-party early means the prosecutor can obtain information that may assist the court in its determination. It also puts the non-party on notice, so they have more time to prepare if the court does order a hearing. Prosecutors should not assume the non-party is aware of the application. For example, the fact defence counsel has previously requested the information from the non-party (for example, by way of a request under the Official Information Act 1982) does not mean the non-party has been notified of the s 24 application.

13.2 The person to whom the information relates is promptly notified. If this person has views about the application, the prosecutor should inform the court. If a hearing is ordered, the court is required to serve the person with the application but this is often overlooked and, in any event, the person should be notified earlier and their views provided to the court in the s 24 process.

Commentary
Sometimes, a person other than the prosecutor may be best placed to make this notification (such as the non-party). The prosecutor and non-party should agree who will make contact, so this is only done once.

14. Prosecutors should notify the non-party immediately if the court orders a hearing.

Commentary
A non-party will need time to collate information, make redactions to protect the privacy of other individuals, or remove irrelevant information ahead of the hearing. Immediate notification allows them to start doing this ahead of the court serving them with the application, which the CDA only requires to be done five working days before the s 27 hearing.

15. Prosecutors do not need to notify the non-party if it is obvious that they already know there will be a hearing (for example, where they have been actively involved in the non-party process).

Contempt applications

16. Section 29(6) of the CDA sets out a specific situation where a prosecutor may make a contempt application relating to a non-party disclosure hearing. Any contempt application should be referred to the Solicitor-General by writing to criminal@crownlaw.govt.nz setting out the reasons why a contempt application should be made.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Disclosure | Te tūhura

The relationship between prosecutors and investigators | Te hononga i waenga i te kaiaru me te kaitūhura

Plea arrangements in murder cases

Ngā whakaritenga tauākī i ngā kēhi kōhuru

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

Introduction | Ngā kupu whakataki

1. This guideline supplements the section on plea arrangements in the guideline on Decisions to prosecute | Te whakatau ki te aru, but applies specifically to proposals to reduce a charge of murder to manslaughter on the basis the defendant will plead guilty to the reduced charge. Such arrangements require the Solicitor-General's approval.

Scope | Te korahi

2. This guideline applies where the Crown Solicitor is considering reducing a charge of murder to manslaughter in exchange for a guilty plea.

3. Not all proposals concerning possible manslaughter charges need to be referred to the Solicitor-General. If a defendant indicates they will plead guilty to manslaughter, but the Crown Solicitor does **not** consider manslaughter is appropriate, there is no need to refer the defence proposal to the Solicitor-General; the Crown Solicitor may simply reject it.

4. Where there has been no offer to plead guilty, but the Crown Solicitor considers, applying the Test for Prosecution, a murder charge is no longer appropriate (for example where further evidence has been obtained) and manslaughter should be substituted, the Crown Solicitor does not need the Solicitor-General's approval.

Roles | Ngā tūnga

The Crown Solicitor

5. The Crown Solicitor's role is to:

   5.1 Make the charging decision when the matter becomes a Crown prosecution and keep the charge under review.

   5.2 Form their own view as to whether murder or manslaughter or some other charge is the most appropriate charge consistent with the guideline on Decisions to prosecute | Te whakatau ki te aru.

   5.3 Seek the Solicitor-General's approval to substitute a charge of manslaughter, where required.

The Solicitor-General

6. The Solicitor-General's role is to review and approve requests to change murder charges to manslaughter. In practical terms, the Solicitor-General:

   6.1 Ensures there has not been under-charging to secure a plea.

   6.2 Ensures that plea discussions are not taking place where murder was not the appropriate charge in the first place.

6.3 Strengthens public confidence in the criminal process through independent review of the proposed charge and by testing the Crown's approach in the most serious cases, including cases where there will often be strong incentives for both parties to avoid a trial.

Guideline | Te aratohu

7. In accordance with the guideline on Decisions to prosecute | Te whakatau ki te aru, the Crown Solicitor should keep a murder charge under review to ensure it continues to be justified in accordance with the Test for Prosecution.

8. The exercise of prosecutorial discretion lies with the Crown Solicitor, who has the detailed knowledge of the evidence and is responsible for the conduct of the prosecution. In the exercise of that discretion the Crown Solicitor should consider whether, on the available evidence and having regard to the public interest, the entry of a guilty plea to manslaughter would sufficiently capture the defendant's culpability.

9. It is not uncommon for the assessment of the Test for Prosecution to change throughout the life of a murder prosecution so that manslaughter is later assessed as being the correct charge. That may be the result of new evidence (particularly expert evidence), or subtle shifts in the existing evidence as assessments of likely witness performance and the articulation of the defence case evolve. If, as a result of such changes, manslaughter appears to be the more appropriate charge, the Crown Solicitor may amend the charge and proceed in respect of manslaughter only (manslaughter always being available in the alternative where a murder charge has been filed).

10. The more difficult cases are those in which it is finely balanced whether murder or manslaughter is the more appropriate charge on the evidence. In such cases it may be appropriate to accept a defence proposal to resolve the matter by way of a guilty plea to manslaughter. This will usually be because of particular public interest factors that sway the balance (such as the victim's whānau interests in achieving certainty of outcome without a trial; and/or matters personal to the defendant such as youth, mental health or reduced moral culpability), or because of significant procedural challenges (for example where the prosecutor anticipates key witnesses will be uncooperative or fail to come up to brief).

11. Otherwise, in cases where there is sufficient evidence to prove murder beyond reasonable doubt, even though there is some risk of a guilty verdict in respect of manslaughter, it will generally be best to leave the issue of the correct verdict to the jury to decide. This is particularly so if the defendant's culpability is high, such as where they have been involved in deliberate and extreme violence. The fact a jury might return a verdict of guilty on the lesser charge is not, in itself, a reason to accept a guilty plea to manslaughter.

The Solicitor-General's approach to considering requests

12. The Solicitor-General will consider a request by reviewing whether the Crown Solicitor's prosecutorial discretion is being exercised properly: that is, that the Crown Solicitor is taking into account relevant considerations, not taking into account irrelevant ones and is exercising the discretion for a proper purpose. If the Crown Solicitor considers a plea to manslaughter is most appropriate in the circumstances, the Solicitor-General will not demur from that assessment as long as the reasoning is transparent, principled and sound. The Solicitor-General's role is to approve the plea arrangement, not to impose their own view.

13. The most common reasons that the Solicitor-General refuses requests to approve plea arrangements in murder cases are because the proposed factual basis for the plea (and therefore sentencing) does not adequately reflect the defendant's culpability or is inconsistent with manslaughter (for example, where the defendant acted with murderous intent (murder), or with unreasonable force in self-defence); or where the distinction between murder and manslaughter turns on factual disputes which are best left to a jury. In cases with those features Crown Solicitors should consider carefully whether to seek approval for the proposed plea arrangement and consult Crown Law if in doubt.

Process | Te tukanga

14. It is important that requests are sent to the right place, and contain the necessary information, in sufficient time for them to be considered prior to trial.

15. The Crown Solicitor, or a partner in the Crown Solicitor firm, must personally endorse and convey a request to the Solicitor-General to approve a plea arrangement in a murder case.

16. On rare occasions, the Crown Solicitor may receive a plea proposal and seek Crown Law's endorsement or input even if they are **not** recommending manslaughter. It is important that Crown Solicitors are clear about that when contacting Crown Law, either in the request or in a separate communication.

17. All requests should be sent electronically to criminal@crownlaw.govt.nz. Requests sent to individual staff members may not be considered.

Timing

18. The time required to consider a request depends on how complex the matter is. Complexity arises from the particular mix of law involved, the quality of the available evidence and the public interest factors. These are different in every case.

19. Prosecutors should assume it will take up to four weeks to receive a response to the request. If the timing of the referral is wholly within the Crown Solicitor's control, at least six weeks should be allowed.

20. There will be cases where an offer to plead guilty to manslaughter arises suddenly; sometimes just before or even during trial. Urgent requests can be accommodated; it is best to contact one of the Criminal Team Managers immediately after the proposal has been received to discuss the way forward.

Information to be provided

21. The request should include the following:

    21.1 The trial date (if there is one) and any other key dates such as the next callover.

    21.2 A clear and succinct summary of the Crown's case in respect of the existing murder charge. If there are particular witness statements or expert reports that are relevant to the proposed reduction in charge these should be included in full. There is no need to send the totality of the evidence intended to be called at trial.

    21.3 A statement as to the basis on which the Crown Solicitor considers a manslaughter charge would be appropriate.

    21.4 Confirmation that the defendant has confirmed they will actually plead guilty to manslaughter (hypothetical requests will not be considered).

    21.5 A draft summary of facts for manslaughter which has been agreed with the defendant. This is very important: the Solicitor-General will only consider plea arrangements if it is known what the factual basis for the guilty plea (and therefore sentencing) would be. This may be set out in a letter from defence counsel if there is one, although an agreed summary is preferable.

    21.6 If there are co-offenders, a summary of their position (in particular, whether they are likely to seek a similar agreement, whether there is any distinction between them in terms of culpability, and so on).

    21.7 A summary of the position of Police and the victim's whānau as to whether they support the request. If the whānau has not yet been contacted about the possibility of a manslaughter charge, that should be made clear.

The decision

22. The outcome will be communicated to the Crown Solicitor as soon as possible once the Solicitor-General has made a decision. It will then be for the Crown Solicitor to communicate the decision to defence counsel and the court.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Decisions to prosecute | Te whakatau ki te aru

Te Tari Ture
o te Karauna
Crown Law

Prosecuting sexual violence

Te aru i te taitōkai

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

Summary | Te whakarāpopototanga

1. There are special considerations which apply when prosecuting sexual violence offending. Prosecutors should: communicate and explain prosecutorial decisions to victims; ensure the victim's evidence is collected and presented in the way that minimises harm to them; and explain to the victim the procedures surrounding the suppression of the victim's own name. It is particularly important for a prosecutor to build a relationship with a victim who is to be a witness at trial, so they feel comfortable giving evidence.

Introduction | Ngā kupu whakataki

2. Prosecuting sexual violence offending raises challenging issues for the criminal justice system and its practitioners. Victims of sexual violence are often particularly vulnerable and particular care is needed to enable their participation in the justice system.

Scope | Te korahi

3. This guideline supplements the guideline on Victims | Ngā pārurenga and should be read together with it. This guideline provides additional guidance in respect of sexual violence cases specifically.

4. This guideline applies to all sexual cases, as defined below, whether they are Crown prosecutions or non-Crown prosecutions.

5. The conduct of investigations is beyond the scope of this guideline. The application of the Test for Prosecution is set out in the guideline on Decisions to prosecute | Te whakatau ki te aru.

Glossary | Kuputaka

6. In this guideline, the following definitions are used (instead of those in the main Glossary, where applicable):

   6.1 *Witness* encompasses both complainants and other vulnerable witnesses, such as witnesses who are giving propensity evidence in sexual cases or witnesses who are vulnerable by reason of their age, disability, experience or other factor. Where necessary, more specific terms such as "complainant", "victim", "child witness" or "propensity witness" are used as defined below. Where a witness is a child, or is unable to make decisions for themselves, references to information being provided to, or views sought from, the witness include their parent or caregiver.

   6.2 *Complainant* means a person whose allegations are the subject of a charge of sexual offending against one or more defendants.

6.3 *Independent Sexual Violence Advocate* means a person who works with or for a specialist sexual violence support service, or a sexual harm crisis support service, to support complainants and victims of sexual violence, and includes providers contracted to the Ministry of Social Development to provide Court Support Services.

6.4 *Propensity witness* means a witness for the prosecution who is to give or is giving evidence as defined in s 40(1) of the Evidence Act 2006 related to their personal experience of a sexual nature about or with any one or more defendants.

6.5 *Sexual case* has the same meaning as in the Evidence Act. At the time of publishing these guidelines it means a criminal proceeding in which a person is charged with, or is waiting to be sentenced or otherwise dealt with for:

6.5.1 an offence against any of the provisions of ss 128 to 142A or s 144A of the Crimes Act 1961; or

6.5.2 any other offence against a person of a sexual nature.

6.6 *Trial* means both judge-alone trials and jury trials, unless otherwise stated.

6.7 *Victim* means a complainant in respect of whose allegation(s) there has been a plea or verdict of guilty against a defendant in a criminal proceeding.

6.8 *Victim Advisor* means the court victim advisor and includes a specialised sexual violence victim advisor.

Guideline | Te aratohu

Decisions not to prosecute

Decisions made by New Zealand Police

7. Police will generally make the decision to prosecute or not in a sexual case in the first instance, in accordance with the Test for Prosecution in the guideline on Decisions to prosecute | Te whakatau ki te aru.

8. If Police decides not to prosecute where there is a complaint of sexual violation, they should:

8.1 Advise the complainant of the decision, and why it was made, in person unless that is not practicable (for example, where the complainant is overseas). Complainants should be given the option of having a suitable support person (who is not a witness) present at such meetings.

8.2 Advise the complainant they may seek a review of the decision not to prosecute, and how long they have to request one (this will differ according to the circumstances of the particular case).

Decisions made by the Crown Solicitor

9. If Police commences a prosecution and the matter subsequently becomes a Crown prosecution, the Crown Solicitor's office will make a fresh prosecution decision, in accordance with the guideline on The relationship between prosecutors and investigators | Te hononga i waenga i te kaiaru me te kaitūhura.

10. In cases involving an allegation of sexual violation:

    10.1 The Crown Solicitor, or a partner in the Crown Solicitor's firm, should personally make or approve a decision not to prosecute.

    10.2 A decision not to prosecute, and the reasons for it, should be explained to the complainant, in person unless that is not practicable (for example, where the complainant is overseas). Complainants should be given the option of having a suitable support person (who is not a witness) present at such meetings. The complainant must be advised they may seek a review of the decision not to prosecute, and how long they have to request one (this will differ according to the circumstances of the particular case).

    10.3 While technically the Crown may seek leave to withdraw charges on a without prejudice basis, complainants should be advised that withdrawing charges will be the end of the matter unless further evidence comes to light.

Process where a complainant seeks a review

11. Police (where the decision to be reviewed was made by Police) or the Crown Solicitor (where the decision to be reviewed was made by the Crown Solicitor) determine how a review will be conducted. Reviews should be conducted by someone who was not involved in the original decision. Reviews of Police decisions should be conducted by a person of a more senior rank or classification than the original decision maker. In Crown prosecutions, reviews should be conducted by a prosecutor holding at least a senior classification from Crown Law. In a small Crown Solicitor office where there are insufficient senior prosecutors, or in a difficult or complex case, the matter may be referred to Crown Law. Crown Law may review the matter or refer it to another Crown Solicitor.

12. Complainants should be advised about the process and likely timeframe for the review. In Crown prosecutions the timeframes will be short as there will be charges before the court.

13. If the original decision maker and the reviewer cannot agree about whether a prosecution should be commenced or continued, the matter should be referred to Crown Law for a decision or direction.

14. The requirement to offer a review only applies to decisions not to prosecute or to bring a prosecution to an end. This includes bringing a prosecution to an end for an individual complainant in a case with multiple complainants.

    Commentary

    Police and Crown Solicitors are not required to review decisions to amend or reduce charges if a complainant requests it, although they may choose to.

Specialisation of prosecutors

Crown prosecutions

15. The majority of sexual cases will become Crown prosecutions, either because the charges include offences listed in the Schedule to the Crown Prosecution Regulations 2013 or because there has been an election of jury trial. Crown prosecutors, who comprise only a small proportion of all public prosecutors, have particular skills and expertise in prosecuting sexual violence offending.

16. The choice of prosecutor is for the Crown Solicitor. Trials that include charges of sexual violation should ordinarily involve a prosecutor holding at least a senior classification from Crown Law. That prosecutor may be lead or sole counsel, or support an experienced intermediate prosecutor who is leading the trial. In some cases, the Crown Solicitor may assess that a trial may be appropriately conducted by a sufficiently experienced intermediate prosecutor as sole counsel.

Non-Crown prosecutions

17. Some sexual cases will not automatically involve Crown Solicitors because they do not become Crown Prosecutions (for example where the most serious offence is indecent assault and the defendant has not elected a jury trial). However, the Solicitor-General's expectation is that Police will consider instructing Crown Solicitors to conduct these cases if they are proceeding to trial, especially where the case is difficult or complex.

18. In particular, it is expected Police will consider instructing Crown Solicitors in cases which involve either:

    18.1 a witness under the age of 18; or

    18.2 a witness who is vulnerable by reason of their age or disability, or who requires communication assistance.

19. Police should also consider instructing Crown Solicitors in cases including, but not limited to:

    19.1 Cases which are historical in nature (which may involve stay applications).

    19.2 Cases involving multiple complainants.

    19.3 Cases involving propensity evidence.

    19.4 Cases involving complex or novel expert evidence.

    19.5 Cases in which applications are made under:

        19.5.1 Sections 44 and 44AA of the Evidence Act (to offer evidence about a complainant's sexual experience or sexual disposition, or where there is a dispute as to whether evidence is of sexual reputation).

        19.5.2 Section 106F of the Evidence Act (where Police has stipulated that a complainant or propensity witness is to have all of their evidence pre-recorded prior to trial and the defendant has applied for a direction that no pre-recording hearing is held).

19.5.3 Section 106H of the Evidence Act (where a witness has had all of their evidence pre-recorded and the defendant has applied for a direction that the witness be recalled for further cross-examination).

19.5.4 Section 27 of the Criminal Disclosure Act 2008 (for non-party disclosure).

20. A prosecutor conducting a sexual case for the Police Prosecution Service should have sufficient relevant experience and training.

Plea arrangements in sexual violation cases

21. Prosecutors may enter into plea discussions, and reach plea arrangements, as with any other type of offending, in accordance with the guideline on Decisions to prosecute | Te whakatau ki te aru.

22. However, prosecutors should exercise particular care when considering reducing a charge of sexual violation to indecent assault where the evidence supports the more serious charge. Such a reduction is likely to be significant for the victim and impact the sentencing options available. While there may be exceptional cases warranting resolution of the case by way of a guilty plea to indecent assault, such decisions should only be made after consultation with Police and the victim, and ideally with their support. The decision to charge indecent assault should be approved by the Crown Solicitor personally.

Providing information to, and consulting with, complainants

23. In addition to the matters set out in the guideline on Victims | Ngā pārurenga, the following applies in sexual cases:

23.1 Where there is a significant amendment to the charge(s), or a reduction in charge, this should be clearly explained to the complainant, preferably in person.

23.2 If a pre-recording hearing is to take place, the views of the complainant or witness whose evidence is being pre-recorded should be sought as to the presence of the media at that hearing.[1]

23.3 Prosecutors must make all reasonable efforts to advise of the following:

23.3.1 The ways in which complainants and propensity witnesses may give evidence at, or before, trial.[2]

23.3.2 If the defendant is convicted, or is acquitted on account of insanity, the different ways in which a victim impact statement may be presented to the court.[3]

[1] Evidence (Video Records and Very Young Children's Evidence) Regulations 2023, reg 58.
[2] Victims' Rights Act, s 28B.
[3] Victims' Rights Act, s 28BA.

23.3.3 Complainants' names (and other identifying particulars) will be automatically suppressed. Adult complainants should be advised of the ability to apply to have automatic suppression of their own names lifted, and propensity witnesses should be advised that the court may make an order prohibiting the publication of identifying information about them, if sought.

23.4 Prosecutors should consider notifying complainants of the following applications if they are filed by the defendant:[4]

23.4.1 Applications to cross-examine the complainant about their prior sexual experience or sexual disposition under s 44 of the Evidence Act, or where there is a dispute as to whether the prohibition on evidence about sexual reputation in s 44AA is engaged.

23.4.2 Applications for the complainant to give evidence in a different way from that which has been notified by the prosecutor, under s 106F of the Evidence Act.

23.4.3 Applications for further cross-examination of a complainant or propensity witness where cross-examination has already taken place prior to trial and been recorded, under s 106H of the Evidence Act.

24. When providing information to the court, prosecutors must be mindful of the statutory prohibition on disclosing the complainant's occupation.[5]

25. If a victim wishes to read their victim impact statement at a sentencing hearing, the prosecutor should consider whether to seek an order closing the court.[6]

Meeting complainants prior to trial

26. In this section references to a "trial" include a hearing at which the complainant's or a propensity witness's evidence (including cross-examination) is to be pre-recorded and later played at trial as a video record.

27. In Crown prosecutions, there should ideally be two meetings with the complainant prior to trial (outlined in more detail below):

27.1 An initial meeting to explain the role of the prosecutor and various procedural matters.

27.2 A pre-trial meeting to establish a rapport with the complainant and discuss the trial process in more detail.

28. Propensity witnesses should also be offered the opportunity to attend a (separate) pre-trial meeting with the prosecutor.

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[4] Prosecutors will need to determine whether and when to advise complainants about pre-trial applications and decisions. Much will depend on the merits of the application and the circumstances of the complainant. However, prosecutors should at least *consider* providing this information, and have a good reason for deciding not to do so.

[5] Evidence Act 2006, s 88.

[6] Criminal Procedure Act, s 199AA; and Victims' Rights Act, s 28D.

29. In non-Crown prosecutions, the Police prosecutor should consider meeting with the complainant prior to trial to discuss the matters below. If they are unable to do so, the officer in charge may address them with the victim.

The initial meeting

30. In non-Crown prosecutions and Crown prosecutions where the Crown Solicitor has assumed responsibility at the second appearance, the initial meeting should take place before, or shortly after, the Case Review Hearing. In other Crown prosecutions the meeting should take place after the Crown has assumed responsibility (usually after the Case Review Hearing) but prior to callover, if practicable. Ideally, this meeting will involve the trial prosecutor if one has already been assigned, which may depend on whether a trial date has been allocated.

31. Prosecutors should explain the following to complainants in the initial meeting:

    31.1 If the prosecutor conducting the meeting may not be the trial prosecutor, they should make this clear, while reassuring the complainant that the trial prosecutor will meet with them nearer the time of trial.

    31.2 The current mode of trial (whether jury trial or trial by a judge sitting alone). It may be appropriate in some cases to explain that the mode of trial may change.

    31.3 The likely timeframe for setting a trial date and duration of the trial. If the relevant court has a system of backup fixtures, this should be explained.

    31.4 The fact the court will be closed while the complainant gives evidence, and what that means.

    31.5 That a judge may not approve a complainant's proposed support person if they do not consider they are suitable.[7] The prosecutor should explain that the support person will see and hear everything in the courtroom while the complainant is giving evidence so the complainant should think carefully about who they wish to fulfil that role.

    Commentary
    For example, a complainant may reconsider whether they wish to have a partner or family member as their support person given that person will become aware of all the details of the case, including evidence which may be put to them in cross-examination.

    31.6 The complainant may remain in the courtroom after giving evidence to watch the trial from the public gallery. However, there are generally no special measures adopted (for example, there will be no screen) and they may find watching the trial distressing.

32. The prosecutor should answer any questions the complainant may have, although not about evidential matters (the reasons for this should be clearly explained).

33. The initial meeting also provides an opportunity for the prosecutor to discuss three important matters with the complainant:

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[7] Evidence Act, s 79.

33.1 The ways in which the complainant is entitled to, or may, give evidence. The prosecutor should explain the different options (which will depend on the individual circumstances of the case, such as whether a video recorded interview was conducted) and give the complainant the opportunity to express any preferences (whether then or at a later point). If a video recorded interview may be played at trial, this should be clearly explained to the complainant, including when that will occur and who will be present.

33.2 The possibility of the complainant's evidence, including cross-examination, being pre-recorded prior to trial. The prosecutor should explain the process and give the complainant the opportunity to express any preferences (whether then or at a later point). Prosecutors should tell the complainant that, if their evidence is pre-recorded, they can still be recalled to give further evidence at trial. Prosecutors should also explain that while the complainant's preferences are important and will be taken into account, the decision about pre-recording will be made by the prosecutor and can be overridden by the judge.

33.3 The level of engagement the complainant wishes to have in the prosecution. Some complainants wish to know about every court date and every development; others prefer to put the matter out of their minds until they are required to come to court or otherwise be involved. Prosecutors should ask complainants if they prefer the officer in charge (on behalf of the prosecutor) or the victim advisor to provide information to them.

34. Finally, the prosecutor should also assess whether a report from a communication assistant may be beneficial.

The pre-trial meeting

35. The pre-trial meeting should take place at least a week prior to trial, unless that is not practicable (for example, where the complainant is overseas or elsewhere in New Zealand).[8]

36. Prosecutors should explain the following to complainants and/or propensity witnesses at the pre-trial meeting:

36.1 Any matters that should have been, but were not, explained at the initial meeting. Some matters may need to be revisited or confirmed (for example, if orders have been made, any changes such as a late election of jury trial, or where the complainant was considering options such as the identity of their support person or whether they would like any religious or cultural protocols observed at court). In some cases, particularly if it has been a long time since the initial meeting, it would be prudent to touch briefly on all the matters discussed at the initial meeting.

[8] Note, however, that Police is responsible for the costs of transporting a complainant for the purpose of a pre-trial meeting with a Crown prosecutor. Cost therefore should not be a barrier if the complainant wishes to meet with the trial prosecutor prior to trial.

36.2 How any alternative ways of giving evidence or other measures (such as additional breaks or communication assistance) will work. In particular, if a video recorded interview is to be played it should be explained when that will occur and who will be present. It should also be explained that any evidence given orally in court will be video recorded, and the purpose for which that video record may be used.[9]

36.3 If the defendant is going to be self-represented at trial, complainants and propensity witnesses should be advised about the restrictions on cross-examination[10] and the procedure which will be adopted.

Courtroom education

37. Complainants and other witnesses should be provided with courtroom education prior to trial. The prosecutor may decide to do this personally (together with the officer in charge) or decide it should be undertaken by a victim advisor. If a communication assistant is being used, they should also attend the courtroom visit if practicable.

Meeting the trial judge

38. Regional practices vary but some judges may ask to meet the complainant prior to trial, particularly if they are a child or young person. These meetings can reduce later stress for the complainant, as they will be confronted with fewer people they do not know when they attend the trial. Such meetings should be attended by the prosecutor and defence counsel, as well as a support person. While it may be appropriate for others to attend (such as the victim advisor or officer in charge), the number of people attending should be limited so as not to overwhelm the complainant. For the same reason, consideration should be given to the venue for the meeting; CCTV rooms are typically very small and can easily feel crowded.

Preparation for trial

Avoiding delay

39. Delays can cause serious stress for complainants and other witnesses in sexual cases. Avoiding delay may improve the quality of a witness's evidence and participation and helps achieve finality for complainants, which may assist their recovery.

40. It is critical that sexual cases are reviewed at an early stage[11] by a sufficiently experienced prosecutor to identify:

40.1 The particular vulnerabilities of witnesses, which will guide decisions as to how the complainant should give evidence or whether communication assistance is required (both discussed further below). This will also be informed by the initial meeting with the complainant as recommended by this guideline.

40.2 The need for any other pre-trial applications (discussed further below).

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[9] Evidence Act, s 106J.

[10] Evidence Act, s 95.

[11] In a Police case this exercise should be completed prior to the Case Review Hearing. In a Crown case it will obviously be influenced by the time at which the Crown Solicitor has assumed responsibility, which in non-schedule jury trial matters will be much later in the proceeding than in schedule matters. In all jury cases the Crown should ensure, as far as practicable, that all pre-trial applications are identified and filed before the first callover, as required by the Criminal Procedure Act 2011.

40.3 The need for any pre-trial enquiries by Police or other arrangements such as editing video recorded interviews. Prosecutors should allow sufficient time for Police to complete such enquiries and disclose the results without jeopardising the trial fixture.

40.4 Whether expert evidence is required, for example counter-intuitive evidence. Identifying a suitable expert, seeking approval from the Ministry of Justice to instruct them, and preparing their brief (which should be disclosed well before trial) may take weeks. Where practicable, prosecutors should brief expert witnesses in person.

40.5 Any need for the trial to be prioritised or fast-tracked (and consequent need to fast-track disclosure if not already complete).

41. The above matters should be identified as early as possible because of the potential impact on the trial timeframe. A late decision, for example, that communication assistance is required can result in trials being adjourned due to the shortage of communication assistants. Similarly, late pre-trial applications, for example to adduce propensity evidence, can jeopardise trial dates, particularly if a decision is appealed.

42. Prosecutors should take the following steps to expedite the trial, which should be highlighted in the Case Management Memorandum (for judge-alone trials) or Trial Callover Memorandum (for jury trials):

42.1 Ensure that disclosure is completed as soon as practicable.

42.2 Notify the court of pre-trial applications as early as possible, including those anticipated to be filed by the defendant.

42.3 Proactively seek early fixture dates for any pre-trial applications (prosecutors should presume that the decision on the application will be reserved, and there may be an appeal that needs to be determined prior to trial).

42.4 Ensure the court is made aware of anything that may make the trial unsuitable as a backup fixture, or that means it warrants greater priority over other cases.

43. Once a trial date is set, any adjournment is particularly difficult for complainants, especially if it occurs close to the trial date. Complainants will likely have mentally prepared for the trial as well as taken practical steps such as arranging to take time off work or school. Changes may be difficult, particularly if the complainant does not wish other people to know the reason for their absence. Unless it is clear that the trial should be adjourned, prosecutors should generally resist applications for adjournments, particularly if child witnesses or vulnerable adults are involved. Prosecutors should advise witnesses as soon as possible after they become aware an adjournment may be required, to minimise the impacts, and be proactive about getting a formal court decision so they can provide certainty to complainants.

Dealing with video records

44. Video records of Police interviews of witnesses contain extremely sensitive information. Prosecutors must be familiar with their obligations under the Evidence (Video Records and Very Young Children's Evidence) Regulations 2023 which require, among other things, the following:

    44.1 Video records must be kept secure. This requires keeping the means of accessing records (usernames and passwords) secure, and ensuring unauthorised people are not able to view them.[12] There must be an access log to track who has viewed video records.

    44.2 Copies of, or access to, video records must not be provided to the defence unless the court has ordered disclosure.[13] In Crown prosecutions, Police will facilitate any access. The transcript must be disclosed as soon as practicable.

    44.3 Prosecutors may give access to experts (to both video records and transcripts) without judicial approval. They must advise the expert of their obligations under reg 34 (to keep the records and means of access secure and destroy them once they are no longer needed).[14]

    44.4 Video records must either be returned to Police, or the means of access destroyed, at the end of the proceeding.[15] All reasonable steps must be taken to destroy transcripts but the regulations recognise that may not be possible (for example, it would not be reasonable to delete an entire back up of a server because there is a copy of a transcript on it).[16]

Ways of giving evidence

45. Sections 106C to 106J of the Evidence Act govern the giving of evidence by complainants and propensity witnesses in sexual cases, regardless of their age. Such witnesses are entitled to give their evidence, including cross-examination and re-examination, in an alternative way.[17]

46. These witnesses may give their evidence in different ways for different parts of their evidence, and multiple ways may be used in the same proceeding (for example, evidence in chief by Police video recorded interview, and cross-examination and re-examination by a video record created at a pre-recording hearing). Such witnesses may give evidence in alternative ways such as by using CCTV or a screen at a pre-recording hearing.

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[12] Evidence (Video Records and Very Young Children's Evidence) Regulations 2023, reg 42 (in respect of video records) and reg 45 (in respect of transcripts).

[13] Evidence Act, s 106(4B).

[14] Evidence (Video Records and Very Young Children's Evidence) Regulations, reg 25.

[15] Evidence (Video Records and Very Young Children's Evidence) Regulations, reg 44.

[16] Evidence (Video Records and Very Young Children's Evidence) Regulations, reg 45.

[17] Evidence Act, s 106D(1).

47. Adult witnesses may give evidence in the ordinary way.[18] If a child witness wishes to give evidence in the ordinary way, an application must be made to a judge.[19] Applications must be filed no later than when the Case Management Memorandum (for judge-alone trials) or Trial Callover Memorandum (for jury trials) is filed. The judge may direct that a child complainant or witness can give part or all of their evidence in the ordinary way if satisfied that the child fully appreciates the effect on them of doing so.[20]

48. Prosecutors must file a written notice with the court no later than when the Case Management Memorandum (for judge-alone trials) or Trial Callover Memorandum (for jury trials) is filed, stipulating the ways in which the witness will give evidence.[21] A notice is not required if the witness is a child and the prosecutor has filed an application for them to give evidence in the ordinary way under s 106E of the Evidence Act. If the notice filed by the prosecutor stipulates that the witness is to give their cross-examination evidence by way of a video record made prior to trial, the notice must be filed as early as practicable, but no later than the Case Management Memorandum or Trial Callover Memorandum, as applicable.

49. There is no need to file any evidence, such as an expert report, or supporting information with the notice. However, evidence may be required if the defendant files an application seeking that the witness give evidence in a different way from that stipulated in the notice, under s 106F of the Evidence Act. That issue can be considered in the event such an application is filed.

50. If circumstances change after a notice has been filed so that it is no longer possible or desirable for the witness to give evidence in the way stipulated in the notice, an amended notice should be filed as soon as practicable.[22]

Evidence in chief

51. As set out above, adult witnesses must be consulted and asked how they wish to give evidence. As a general rule, where an adult complainant or propensity witness has participated in a video recorded interview, prosecutors should at least consider using it as the basis of their evidence in chief. The advantages of doing so are as follows:

    51.1 It is generally less stressful and traumatic for the witness than having to recount their evidence verbally in the courtroom.

    51.2 It minimises the risk of inadmissible evidence being inadvertently given, or admissible evidence being omitted.

    51.3 The fact-finder will hear the "best evidence" of the witness, in the sense that the video recorded interview will have been conducted nearer to the time of the offending.

18 Evidence Act, s 106D(3)(a).
19 Evidence Act, s 106E.
20 Evidence Act, s 106E(3)(a).
21 Evidence Act, s 106D(3).
22 Evidence Act, s 106D(6).

52. However, there may be good reasons for departing from that general rule, including (but not limited to):

   52.1 The interview contains inadmissible material and the editing process would render it incomprehensible.

   52.2 The interview is too long to be played at trial and editing would be ineffective.

   52.3 The witness has a clear and strong preference for giving evidence orally in court, despite the advantages of the video recorded interview being used having been explained to them. It may be relevant to the witness that, if a video recorded interview is played, they will first answer questions in court in the context of cross-examination from defence counsel, which can be unsettling. Children should ordinarily give their evidence in chief by way of their video recorded interview.

53. Cost and the need for extra hearing or trial time are irrelevant to any decision as to how evidence should be given. The focus must be on the best interests of the witness.

Cross-examination and re-examination

54. Complainants and propensity witnesses are entitled to give the remainder of their evidence by way of a video record made prior to trial. In practice this requires a pre-recording hearing.[23] Prosecutors should discuss the benefits and risks of pre-recording with the witness and ascertain their preferences. Some cases will be better suited to pre-recording than others.

   Commentary
   For example, pre-recording of a witness's complete evidence may not be suitable in cases with multiple complainants unless all the complainants' evidence is to be pre-recorded.

55. Pre-recording has benefits for complainants, defendants and the system generally. These include the following:

   55.1 Pre-recording supports complainants and propensity witnesses to give the best evidence they can as:

      55.1.1 The jury will not be present. The presence of fewer people (particularly strangers) is generally less stressful for witnesses giving evidence of a sensitive nature. Even where witnesses would be giving evidence by CCTV, it can be more stressful for them knowing that a jury is watching.

      55.1.2 There is greater flexibility to take breaks as frequently and for as long as needed (within the limits of court sitting times) which may alleviate a witness's stress. Practically, a jury is not kept waiting and the breaks can be edited from the recording, reducing the time needed for trial.

      55.1.3 The witness can be questioned in a more natural way. When a jury is present, counsel may ask questions in an artificial way to avoid

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[23] The definition of "cross-examination evidence" includes supplementary evidence in chief, cross-examination and re-examination: Evidence Act, s 106D(7).

inadvertently eliciting inadmissible evidence such as hearsay or information prejudicial to the defendant. Where evidence is pre-recorded, inadmissible evidence can be dealt with by simply asking the witness to answer the question again without referring to the inadmissible portion (and editing the first answer from the recording). This is particularly relevant for children who may have difficulty understanding what they can and cannot say, and require questions to be asked as simply as possible.

55.2 It minimises the risk of mistrial as any inadmissible evidence can be edited from the video record that is played at trial. This is fairer to the defendant than a judge directing a jury to disregard inadmissible evidence after they have heard it. Reducing the risk of a mistrial also reduces the risk that a complainant will be subjected to the additional stress and delay occasioned by a retrial.

55.3 The defendant may change their plea after hearing the complainant's evidence because they better understand the case against them (similar to changes of plea after the close of the Crown case at trial). This would avoid the need for a full trial. The certainty of a guilty plea (if entered) benefits the complainant compared to the uncertain outcome of a trial.

55.4 Pre-recording *may* reduce delays for a complainant in giving their evidence, if pre-recording takes place well before the trial. Pre-recording does not require the use of a courtroom with jury trial facilities and is therefore easier to schedule. However, a long delay between a pre-recording and the trial carries risks, as set out below.

56. The potential risks of pre-recording are:

56.1 Pre-recording may increase the delay to trial due to the need for at least one additional hearing (to take the witness's evidence). This is more likely where the defendant seeks orders preventing pre-recording from taking place, requiring a further hearing, with the possibility of appeals. Even if a defendant does not object to pre-recording, there may be disputes about admissibility which require a further pre-trial hearing.

56.2 There is an inherent risk, which cannot be completely eliminated, that the witness will be recalled to give further evidence at trial. Giving evidence on multiple occasions is likely to increase stress for the witness. Applications for recall, and appeals against the decisions on those applications, may also delay the trial. This can be stressful for the witness even if they are not ultimately recalled. The longer the delay between the pre-recording and trial proper, the greater the risk that something will happen that triggers an application by the defendant to recall the witness.

56.3 The uncertainty about the trial outcome can heighten anxiety for victims and their whānau, especially if there is a long delay between giving evidence and learning the outcome.

56.4 A witness whose evidence has been pre-recorded must not discuss the case, or their evidence, with any other witnesses in the trial. That may not be practical if people close to the witness are also trial witnesses (such as their parents or caregivers), particularly where there is a long delay between the pre-recording hearing and trial. It may be distressing for a victim, particularly a child, to be told they cannot talk about the case with those close to them (such as the people they trusted with their initial disclosure). Further, if there are multiple complainants, taking their evidence at different times may risk the suggestion that there has been collusion between hearings. In order to mitigate these difficulties and avoid any suggestion there has been an opportunity for collusion, it may be prudent to pre-record the evidence of other witnesses as well.

57. A notice which stipulates that a witness is to give all of their evidence by a video record (necessitating a pre-recording hearing) must also stipulate the ways in which the witness will give evidence at that hearing (for example by the use of CCTV or screens). As set out above, adult witnesses must be consulted about these matters; it should not be assumed that they would prefer not to be in the courtroom or, if in the courtroom, that they would prefer not to see the defendant. It can generally be presumed that child witnesses should give evidence via CCTV but they should have the opportunity to express a view after visiting the courtroom.

Communication assistance

58. Communication difficulties are frequently underestimated. For younger witnesses in particular, communication abilities will vary – some children can cope with adult language at about 12 years of age, while some 17-year-olds may not have an adult vocabulary. Impairments that can impact severely on communication, such as Fetal Alcohol Syndrome and Autism Spectrum Disorder, are often not readily perceptible, especially as some people strive to conceal their impairments.

59. Prosecutors should identify communication difficulties early because of the need to obtain expert reports and arrange communication assistance through the court registry (there is a shortage of suitably experienced communication assistants in New Zealand). Where it is possible such assistance may be required, prosecutors should:

59.1 On receipt of the file, ask the officer in charge to investigate for vulnerabilities (including consulting family, teachers and medical professionals).

59.2 Review any video recorded interview as early as possible.

59.3 Ask writers of reports as to ways of giving evidence to comment on the witness's communication capacity and needs.

60. If any concerns arise from those steps, prosecutors should seek a report from an expert communication assistant. Prosecutors should consider ordering such a report in respect of witnesses under 12 years of age, and any witness with a known mental or intellectual impairment.

61. Communication assistants are not expert witnesses, but neutral professionals appointed by the court (similar to interpreters). Communication assistants recommend to the court how to adapt questioning and wider trial practice to a witness's needs, including in individual consultations with counsel. In a minority of cases, they may attend the trial to monitor questioning (for miscommunication and associated issues with the witness's coping or concentration span) or by actively translating.

62. Prior to trial, prosecutors should advise the trial judge that a communication assistant has been engaged and seek directions for the process at trial (for example, where they will sit, their role at trial, how they will communicate issues to the court, whether counsel should provide questions to them in advance among other practicalities). Ideally, the communication assistant should attend the callover or hearing at which these issues will be discussed.

63. Where practicable, prosecutors should consider meeting the communication assistant prior to trial to discuss how best to examine the witness. Defence counsel should also be afforded that opportunity. In some cases, it may be appropriate to give the communication assistant the questions counsel intend to ask in writing. These pre-trial discussions will reduce the need for the assistant to interrupt when the witness is being asked questions at trial.

Other pre-trial applications

64. Prosecutors should consider whether any pre-trial applications might be required when doing an initial review of the file:

    64.1 Prosecutors should review the evidence to identify possible disputes and proactively file applications under s 101 of the Criminal Procedure Act if applicable (for example, filing an application in relation to propensity evidence unless defence counsel have confirmed they do not object to its admission). Prosecutors should review transcripts of the complainant's and defendant's video recorded interviews carefully and discuss proposed edits with defence counsel at an early stage to avoid late objections.

    64.2 Prosecutors should be alive to the possibility of evidence being led in breach of ss 44, 87 or 88 of the Evidence Act, which collectively prohibit evidence being given about the complainant's sexual experience, sexual disposition, address and occupation. If the complainant refers to any of these matters in their video interview, the prosecutor should either arrange for editing of the video recorded interview or file an application to adduce the evidence.

65. Where possible, prosecutors should discuss potential defence applications with defence counsel to ensure they are filed promptly. The most common examples in sexual cases are:

    65.1 Applications for severance under s 138(4) of the Criminal Procedure Act.

    65.2 Applications to cross-examine the complainant under s 44 of the Evidence Act.

    65.3 Applications for a non-party disclosure hearing under s 24 of the Criminal Disclosure Act.

65.4 Applications for disclosure of video records under s 106(4B) of the Evidence Act. Prosecutors should be proactive about ensuring that defence counsel have made arrangements to view video recorded interviews well before trial.

Other measures

66. Prosecutors should consider other measures which can improve the trial experience for witnesses in sexual cases. Some will require a formal application while others can simply be discussed with the trial judge (preferably well prior to trial, for example at the pre-trial callover).

67. The availability of these measures will vary but they may include:

 67.1 Allowing witnesses to view their video recorded interview before they appear, rather than at the same time as the judge or jury (to allow time to process the evidence and to minimise time at court).

 67.2 Calling complainants and propensity witnesses, particularly children, only at the beginning of a sitting day. This may mean shorter sitting days (especially on the first day) or other evidence can be scheduled for afternoons between those witnesses.

 67.3 Taking frequent breaks, either scheduled in advance or as requested by the prosecutor or the complainant (or their support person or victim advisor) including short in-court "mini" breaks.[24]

 67.4 Where a complainant or propensity witness has asked for it, allowing time for tikanga or cultural processes (such as karakia) prior to and/or at the conclusion of giving evidence.

Conducting a pre-recording hearing

68. A pre-recording hearing should not take place until after the disclosure process is complete and all relevant pre-trial applications have been heard and determined.

69. To that end, the prosecutor should:

 69.1 Proactively liaise with Police to ensure disclosure is completed expeditiously. Disclosing material after a pre-recording hearing risks the defendant filing an application to recall the witness for further cross-examination in respect of the newly disclosed material.

 69.2 Ensure a pre-recording hearing is not set down until after any relevant pre-trial applications have been heard and determined, as these may impact the evidence to be given. Obvious examples are applications for the witness to give evidence in a different way under s 106F of the Evidence Act, applications under ss 44 or 44AA of the Evidence Act, or applications for non-party disclosure under s 27 of the Criminal Disclosure Act. If none has been filed, it may be prudent for the prosecutor to seek formal confirmation from the defendant that no such applications will be filed, such as at callover or by way of memoranda filed in court, before a pre-recording hearing is set down. This will help minimise the risk

[24] Where everyone remains in place in court but the witness has a few minutes' privacy in the CCTV room (only the judge's camera remains on).

of a witness being recalled for further cross-examination.

70. Similarly, requests for sentence indications and applications to dismiss charges under s 147 of the Criminal Procedure Act should be dealt with prior to pre-recording hearings, as the outcomes could mean the witness does not need to give evidence at all.

71. Prosecutors should approach the pre-recording hearing in the same way as a trial as this evidence will usually be the most important part of the case. Prosecutors should assume they will have no further opportunity to ask questions of the witness. The prosecutor will need to be familiar with all aspects of the evidence in order to lead all necessary supplementary evidence in chief, object to questions asked in cross-examination, and conduct any necessary re-examination. Photograph and exhibit booklets will need to be prepared if it is intended to refer the witness to them.

Conducting the trial

72. In this section the references to a "trial" include, as applicable, a hearing at which the complainant's evidence, or that of a propensity witness, including cross-examination is to be pre-recorded and later played at trial as a video record.

73. In evidence in chief and re-examination, prosecutors must be careful to ask questions which are comprehensible to the witness, free of undue suggestion or coercion, and allow the witness a reasonable opportunity to give their evidence completely and accurately. The prosecutor should closely adhere to recommendations in any communication assistance report as to suitable and unsuitable questions.

74. When a witness is being cross-examined by defence counsel, prosecutors should intervene if a question, or the way in which it is asked, is "improper, unfair, misleading, needlessly repetitive, or expressed in language too complicated for the witness to understand".[25] This includes questions asked in an intimidating, hectoring or aggressively dismissive manner, or that are designed to humiliate the witness. If a communication assistance report is available, prosecutors should object to any question which does not conform with its recommendations.

75. Prosecutors should seek a break if it appears a witness is becoming too tired or distressed to concentrate. Some witnesses may decline the offer of a break even when they need one (for example, if they think the judge would prefer to carry on or to avoid being seen as disrupting the trial).

76. In cases involving particularly vulnerable witnesses (for example, those requiring communication assistance, very young children, witnesses with mental or intellectual impairment or those experiencing significant mental health issues), it may be prudent to agree certain matters with the judge and defence counsel prior to trial. This might include the types of questions that may not be asked, the nature of the involvement of the communication assistant (if applicable) and the frequency and length of breaks.

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[25] Evidence Act, s 85.

77. Prosecutors should highlight technology that will be used shortly before the trial date (for example at the pre-trial callover) to ensure it is available. While the court is responsible for ensuring the requisite technology is available, the prosecutor should assist by ensuring the court knows what is required and has the opportunity to test it. Prosecutors may choose to help with testing to assist the smooth running of the trial.

78. Prior to the judge's summing up, prosecutors should consider whether s 126A of the Evidence Act is engaged and, if so, suggest the judge give any directions considered necessary or desirable to address relevant misconceptions relating to sexual cases.

After trial

79. Ideally, prosecutors should debrief witnesses after they have finished giving evidence and answer any questions they may have. Often that will not be possible (for example, because another witness is to be called immediately and the complainant is not remaining at court). In those circumstances, the officer in charge should meet with the witness and prosecutors should offer to answer any questions at a later time.

80. If practicable, the prosecutor or the officer in charge should advise the complainant of the verdict, either in person or by telephone. Alternatively, if the complainant has already learned of the verdict, the prosecutor or officer in charge should offer to answer any questions they may have. Prosecutors should be mindful of the possibility of an appeal and/or retrial and ensure discussions are recorded by the officer in charge if evidential matters are discussed (beyond simply a repetition of what was said at trial).

81. If a mistrial is declared or (in the case of jury trials) no verdict is reached, prosecutors should consult with the complainant before deciding whether to proceed with a further trial. If a further trial is required, prosecutors should consider pre-trial matters afresh. For example, the way in which a witness gave evidence may no longer be suitable because of the passage of time or some other factor. Prosecutors should consult with the witness about such matters at an early stage.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Victims | Ngā pārurenga
Decisions to prosecute | Te whakatau ki te aru
Sentencing | Te whiu
Case management | Te whakahaere kēhi
Retrials | Te whakahaere anō i te whakamātau
Appeals | Ngā pīra

Te Tari Ture o te Karauna
Crown Law

Retrials

Te whakahaere ano i te whakamatau

As at 1 January 2025

The Solicitor-General’s Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

All guidelines should be read alongside the Principal guideline | te Aratohu mātāmua

Introduction | Ngā kupu whakataki

1. A retrial is the default response when a trial ends before a verdict is reached, or when an appeal court quashes a conviction and orders a retrial. In rare cases, a retrial may also be ordered when an acquittal is tainted, when compelling new evidence implicates a person acquitted of a specified serious offence or when the prosecution brings a successful appeal on a question of law.

2. Even when a court directs a retrial, the prosecutor should consider whether to proceed with the prosecution, and whether to proceed in the same way as at the earlier trial. The ultimate question after an unfinished trial is whether a retrial is required in the public interest.

Scope | Te korahi

3. This guideline provides prosecutors with:

    3.1. a framework for deciding whether a retrial is required in the public interest when a trial ends without a verdict;

    3.2. guidance regarding the retrial of acquitted persons;

    3.3. guidance for conducting retrials; and

    3.4. the procedure following a decision not to proceed with a retrial.

Roles | Ngā tūnga

4. The court (whether the trial court or an appeal court) will make the initial determination as to whether a retrial should be ordered following a mistrial, hung jury or successful appeal against conviction.

5. Once the court has confirmed a retrial may proceed, it is for the prosecutor to determine whether to proceed with the prosecution in the usual way.

6. If the prosecutor wishes to seek a retrial by way of:

    6.1. an appeal on a question of law;

    6.2. an application under s 151 of the Criminal Procedure Act 2011 on the basis the acquittal was tainted; or

    6.3. an application under s 154 of the Criminal Procedure Act on the basis new and compelling information has come to light;

    they must refer the matter to the Solicitor-General, whose consent is required for an appeal or an application under s 151. Only the Solicitor-General may bring an application under s 154.

Glossary | Kuputaka

7. In this guideline:

   7.1. A *hung jury* is a jury that was discharged because it was unable to reach a verdict.

   7.2. A *mistrial* occurs when a trial ends before the fact-finder (the judge or the jury) has delivered a verdict.

   7.3. A *retrial* is a second or subsequent trial of a defendant.

   7.4. A *specified serious offence* is an offence within the definition in s 152(1) of the Criminal Procedure Act.

Guideline | Te aratohu

8. The starting point is the Test for Prosecution. If it is not met, the prosecution should not proceed any further. It follows there will be no retrial. If the test is met, the prosecutor should also consider the matters set out below.

Mistrials and hung juries

Second trials

9. A retrial will generally be in the public interest following a mistrial or a first hung jury. Nevertheless, the prosecutor should consider:

   9.1. the views of the victim, their whānau and the prosecuting agency;

   9.2. the desirability of ending the proceeding with a verdict;

   9.3. the reason the earlier trial did not conclude (including whether the jurors were discharged because of an unforeseen event);

   9.4. whether another jury would be in a better or worse position to reach a verdict;

   9.5. the cost of another trial to the community and to the defendant;

   9.6. the strength of the prosecution case;

   9.7. the seriousness of the offence; and

   9.8. any other factor having a bearing on the public interest in another trial.

Third or further trials

10. The factors outlined at paragraphs 9.1-9.8 above are also relevant to consideration of a further trial, for example following two or more hung juries; however, a further trial will only be in the public interest in exceptional circumstances. The Solicitor-General will normally stay a prosecution at that point, unless satisfied that:

    10.1. some event, not relating to the strength of the prosecution's case, brought about one or both disagreements;

    10.2. new and persuasive evidence would be available on a third trial; or

10.3. there is some other exceptional circumstance meaning the public interest requires a third trial.

11. Prosecutors should refer the matter to the Solicitor-General as soon as possible after a second hung jury, so that the Solicitor-General may make a timely decision about whether to stay the prosecution. The prosecutor should be prepared to assist the Solicitor-General with the matters referred to in paragraphs 9.1-9.8.

Convictions quashed on appeal

12. Prosecutors should be mindful of the practical and legal consequences of the appellate process. Has the passage of time affected the availability of evidence or witnesses? Has the appeal decision reduced the scope of the admissible evidence?

13. If the Test for Prosecution is met, the prosecutor should also consider:

    13.1. the views of the victim, their whānau and the prosecuting agency;

    13.2. the seriousness of the offence;

    13.3. the extent of any custodial remand or sentence served by the defendant;

    13.4. the cost of another trial to the community and to the defendant; and

    13.5. any other factor having a bearing on the public interest in another trial.

Conducting retrials

14. If a retrial is to take place, the prosecutor should carefully assess whether the conduct of the trial should be adjusted.

Retrials following successful appeals against conviction

15. The prosecutor should carefully consider the reasons for the appeal court's decision. Does the decision require, or imply, that the retrial be conducted in a different manner from the first trial? Should the prosecutor make any additional pretrial applications (for example, where the appeal court has questioned, but not ruled on, the admissibility of certain evidence)?

16. If there was any suggestion of prosecutorial misconduct at the first trial, it may be prudent for a different prosecutor to conduct the retrial.

Retrials following hung juries

17. The prosecutor should evaluate the evidence and determine whether any of it should no longer be led. This is particularly important where there were multiple charges at the first trial, but only some of those charges are proceeding to a retrial (because the jury was only hung on those charges and the defendant was either convicted or acquitted on other charges).

18. Similarly, it may be necessary to ask the investigator to make further enquiries as a result of matters raised at the first trial. Any such further enquiries should be conducted promptly, and the results disclosed to the defendant as soon as practicable. Prosecutors may decide to advise the defendant that such enquiries are under way, so they are not surprised by the disclosure of additional material.

Retrials following mistrials

19. Where a retrial is necessary because of a mistrial, the prosecutor should consider whether the reasons for ordering the mistrial should affect the conduct of the retrial. For example, if a witness gave inadmissible evidence, they may need to be briefed prior to the retrial to ensure that does not happen again. In extreme cases, where it appears a witness may have caused a mistrial deliberately, consideration may need to be given to pre-recording their evidence, or not calling them at all.

Procedure where a prosecutor determines a retrial should not proceed

20. If the prosecutor considers the Test for Prosecution is no longer met, they may either seek leave to withdraw the charges or invite the court to dismiss them.

21. In circumstances where the Test for Prosecution is met, but there have been two or more trials and there are no exceptional circumstances warranting a further trial, the prosecutor should refer the matter to criminal@crownlaw.govt.nz and recommend the Solicitor-General issue a stay of proceedings.

Procedure where a prosecutor wishes to seek a retrial in respect of a tainted acquittal or new and compelling evidence

22. When a prosecutor wishes to refer a matter to Crown Law with a request that the Solicitor-General either bring, or consent to, an application under ss 151 or 154 of the Criminal Procedure Act, they should include the following information in the referral:

    22.1. Details of the original charges and the circumstances of the prior acquittal.

    22.2. Full details of the circumstances said to warrant a retrial (the relevant administration of justice offence, or the new and compelling evidence, as applicable).

    22.3. If the referral is made by a prosecuting agency, they should first obtain an opinion from the local Crown Solicitor as to the whether the grounds for the application are made out, and provide this to Crown Law.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Decisions to prosecute | Te whakatau ki te aru
Stays of proceedings | Te whakamoe kōtitanga
Victims | Ngā pārurenga
Prosecuting sexual violence | Te aru i te taitōkai

Self-represented defendants

Te kaiwawao ka whakakanohi i a ia anō

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

All guidelines should be read alongside the Principal guideline | te Aratohu mātāmua

Introduction | Ngā kupu whakataki

1. Some defendants choose to represent themselves in criminal proceedings, rather than being represented by a lawyer. Prosecutors need to take particular care when prosecuting self-represented defendants so that the trial remains fair and self-represented defendants are not unfairly pressured.

Scope | Te korahi

2. This guideline sets out prosecutor responsibilities that apply specifically where a defendant is self-represented. The Principal guideline | Te Aratohu mātāmua and other guidelines continue to apply.

Guideline | Te aratohu

3. Prosecutors should take particular care in relation to self-represented defendants. Prosecutors should document all direct contact with self-represented defendants and consider whether any communication should be conducted through the court. Prosecutors should take care not to communicate with the court without the self-represented defendant being present or copied into written communications, unless the communication is of a purely administrative nature that would not involve opposing counsel in any event.

   Commentary
   Examples of purely administrative communications are seeking clarification on the timing of a hearing, or confirmation that the court has received documents.

4. Prosecutors should not provide legal advice to a self-represented defendant. If necessary, prosecutors should make clear to the defendant that they do not represent them and cannot provide them with legal advice, other than to advise them to retain a lawyer.

5. Prosecutors should try to avoid overly technical or legal language that a self-represented defendant may have difficulty understanding.

6. Prosecutors should be aware of their duty to assist the court and to put before the court all information they hold that is admissible and relevant to issues before the court. This includes any information the prosecutor considers the court should be made aware of for the purpose of ensuring the defendant’s trial is fair (for example, information relevant to whether the court should consider appointing counsel to assist the court or examine the defendant’s fitness to stand trial).

   Commentary
   This is consistent with the prosecutor’s role as an officer of the court and an advocate within an adversarial system. Prosecutors do not have to seek out information that may be useful to the defence.

7. If there is a trial with a self-represented defendant:

    7.1 The prosecutor should inform prosecution witnesses that the defendant is representing themselves.

    7.2 The prosecutor should inform the court if a self-represented defendant is restricted from personally cross-examining a complainant or a witness under s 95 of the Evidence Act 2006. Counsel to assist the court will need to be appointed.

    7.3 If a prosecutor intends to lead evidence that is arguably inadmissible, they should raise this with the trial judge before the evidence is called, to explain why they consider the evidence is admissible.

    7.4 If a prosecutor does not intend to lead evidence that is arguably relevant and admissible, they should make the trial judge aware of this evidence and set out why they do not intend to lead it. The prosecutor may have to address whether the failure to adduce the evidence may make the prosecution unfair.

Plea discussions

8. Prosecutors should not initiate any plea discussions with a self-represented defendant. If the defendant seeks to initiate plea discussions with the prosecutor, the prosecutor should:

    8.1 say that the issue of appropriate charges should be discussed in front of the judge at the next opportunity (such as a case review hearing);

    8.2 ensure there are contemporaneous records of any oral communication; and

    8.3 notify the court (care should be taken not to disclose the content of the discussion in breach of the privilege in s 57 of the Evidence Act).

    Commentary
    To avoid breaching privilege, prosecutors may inform the court that a self-represented defendant has sought to initiate plea discussions, but not disclose anything further that was said.

Sentencing

9. If a defendant faces charges that are punishable by imprisonment, prosecutors should be aware of, and draw the court's attention to, s 30 of the Sentencing Act 2002, before a plea is entered.

10. Prosecutors should inform the court of any known mitigating factors at sentencing.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Decisions to prosecute | Te whakatau ki te aru
Sentencing | Te whiu
Case management | Te whakahaere kēhi

Sentencing

Te whiu

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

Introduction | Ngā kupu whakataki

1. The Sentencing Act 2002 sets out a detailed legislative regime relating to sentencing.

Roles | Ngā tūnga

2. It is the court's role to sentence defendants.

3. Defence lawyers (or the defendant themselves if they are self-represented) make submissions on sentence, including informing the court about mitigating factors such as relevant personal information about the defendant.

4. The prosecutor's role is to assist the court to determine an appropriate sentence according to law, based on the evidence and information available to them. While this guideline recommends prosecutors take into account a wide range of information in making submissions, that is limited to information the prosecutor is personally aware of. Prosecutors are not required to make further enquiries about matters such as a defendant's personal background and circumstances.

5. Victims and their whānau have a strong interest in the sentencing process. Victims have a right to provide information to the sentencing court about the impact the offending has had on them. They also have rights in relation to the sentencing hearing and the right to be informed of the sentence imposed. These rights are set out in the guideline on Victims | Ngā pārurenga and prosecutors should be familiar with them.

Scope | Te korahi

6. This guideline sets out the role of the prosecutor in relation to sentencing. It does not cover prosecution appeals against sentence. Guidance for appeals is set out in the guideline on Appeals | Ngā pīra.

Guideline | Te aratohu

7. Prosecutors involved in sentencing are expected to be familiar with the Sentencing Act, the Criminal Procedure Rules 2012 and any practice notes relating to sentencing issued by any court.

The prosecutor's submissions

8. Prosecutors should place all proven or agreed facts before the court for sentencing.

9. The Criminal Procedure Rules set out information that must be included in sentencing memoranda in certain situations.[1] The information prosecutors should consider providing the court for sentencing is set out below, as well as more detailed guidance on some of the matters set out in the Criminal Procedure Rules. Where relevant, the prosecutor should assist the court by:

   9.1. Referring the court to relevant authorities, including guideline judgments.

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[1] Criminal Procedure Rules 2012, r 5A.5.

9.2. Drawing the court’s attention to any statutory presumptions for sentence and the prosecution’s assessment of factors relevant to whether or not the presumption is displaced.

9.3. Setting out any relevant mitigating factors personal to the defendant that the prosecutor is aware of.

9.4. Setting out relevant aggravating factors.

Commentary
Prosecutors’ submissions on aggravating factors should be thoughtful, nuanced and reflect the full context. For instance, while previous convictions are an aggravating factor,[2] prosecutors should place less weight on this if significant time has elapsed between the previous conviction and the current offending, or where the previous conviction is for a completely different or minor offence.

9.5. Providing information on the impact of the offending on any victims and their whānau. Where relevant, prosecutors should alert the court to factors that indicate the defendant poses a risk to a victim, their whānau or the community and the types of sentences that would adequately mitigate this risk.

Commentary
Such information is not confined to content in victim impact statements. For instance, where a victim impact statement has not been provided, it may assist the court to know whether a victim has engaged with the prosecution process, or any views a victim has expressed about the defendant, the offending or the prosecution. This information may be available in another form, such as the victim’s formal statement or evidence at trial. Such information may also inform the court of a victim’s interest in certain sentencing outcomes such as reparation.

9.6. Providing the prosecution’s position on the available sentencing range for the final sentence, including whether a sentence of imprisonment is appropriate. In doing so, prosecutors should not press for a specific term of imprisonment.

9.7. Highlighting cases where a discharge without conviction, or a sentence with a rehabilitative focus, might be available, whether or not this has been sought by the defendant.

Commentary
A sentence with a rehabilitative focus may, for instance, be a sentence of community work and supervision with a training or education component, or a sentence of home detention with conditions that allow completion of a residential drug rehabilitation programme.

2 Sentencing Act 2002, s 9(1)(j).

9.8. Alerting the court to any other mandatory or discretionary consequences of conviction applicable to the offending.

Commentary
This could include registration on the Child Sex Offenders Register; the making of a Firearms Prohibition Order; the making of a Protection Order; or orders under the Land Transport Act 1998, Misuse of Drugs Act 1975 or Arms Act 1983.

Defendant's background factors

10. There may be information about a defendant's background that can shed light on a defendant's culpability or play a role in their offending. The judicial discretion in sentencing a defendant has long required consideration of relevant aspects of their background. This is now codified in the Sentencing Act.[3] These factors may relate to poverty; a lack of education opportunities; addiction; or displacement from whānau or community support. In particular, prosecutors should be aware that victims and defendants are not mutually exclusive groups. Some defendants have previously been victims of crime (whether reported or not) and that may be a relevant factor in their own offending.

11. Where prosecutors are aware of relevant information about a defendant's background, they should acknowledge this in their sentencing submissions. The defendant's background may be particularly relevant where the potential sentence is at the margin between imprisonment and a non-custodial sentence. This approach is about tailoring the prosecutor's submissions to the defendant's individual circumstances and culpability so that sentencing is individualised for the defendant and the offending while taking into account the public interest.

Commentary
Prosecutors may be aware of information about past offending connected to the defendant that is relevant to sentencing. This includes information that may be in past sentencing notes or reports that provide details of any previous offending by the defendant. It may also include information about past offending *against* a defendant that provides useful context about the defendant's background (such as suffering abuse in care as a child). Prosecutors may, for instance, be able to confirm or elaborate on statements in sentencing memoranda or sentencing reports that the defendant has been a victim of previous offending. Prosecutors should consider drawing the court's attention to this information where appropriate and relevant.

12. The weight prosecutors should place on a defendant's background in their sentencing submissions will always depend on the specific facts relevant to the defendant and the offending. A defendant's disadvantaged background will have greater weight when it has a greater causative link to the offending.

13. Prosecutors should be aware that vulnerable and disadvantaged defendants, including defendants with disabilities or experiencing significant mental health issues, may not have the financial means or access to support systems that commonly exist for other members of the community. This can mean that sentencing options that are at the

[3] Sentencing Act 2002, ss 8 and 9. See also *Berkland v R* [2022] 1 NZLR 509.

lower end of the sentencing hierarchy, such as fines and reparation payments, are not viable for such defendants.[4]

Defendants with dependent children

14. Prosecutors should be aware that the defendant's personal circumstances include the impact imprisonment would have on that defendant's dependent children.[5] The weight to be placed on this factor will depend on the type of offending and the circumstances of the child or children.

Discharges without conviction

15. Prosecutors should be aware that some defendants may not be able to point to specific consequences of a conviction because of background factors such as those referred to in this guideline. They should take this into account when forming an overall position on whether the consequences of a conviction would be out of all proportion to the gravity of the offence.[6]

    Commentary
    Young defendants and other defendants affected by the background factors in this guideline are more likely to have difficulty setting out specific consequences of conviction precisely because of their circumstances. For instance, they may be less likely to be able to show that a conviction would stop them from pursuing or continuing to work in a specific profession they are currently studying towards or employed in. But the general impact of a conviction (for example on travel or employment) may still be relevant to a prosecutor's assessment of the consequences of a conviction.

Adjournments under s 25 of the Sentencing Act 2002

16. Section 25 of the Sentencing Act enables a court to adjourn proceedings in specified circumstances prior to sentencing. The adjournment may be to allow the defendant to complete a rehabilitation programme or course of action, or a restorative justice process, among other things.

17. The defendant's conduct during the adjournment period informs the court's sentencing process.[7]

18. Prosecutors should generally not oppose an adjournment to allow a defendant to attend or complete a rehabilitation programme or course of action if:

    18.1. there is independent evidence that suggests the offending was caused by the factor(s) the proposed programme or course of action is designed to target;

    18.2. the defendant's performance on bail indicates they are likely to comply with bail conditions and engage in the proposed programme or course of action; and

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4 Sentencing Act 2002, s 10A.
5 Sentencing Act 2002, ss 8(h) and (i).
6 Sentencing Act 2002, s 107.
7 Sentencing Act 2002, s 25(1)(e).

18.3. there is a genuine plan in place indicating that the defendant is ready and willing to complete the proposed programme or course of action and that it is likely to be effective.

Commentary
In most instances, this will include confirmation that the defendant has committed to the programme, such as written confirmation of enrolment. By contrast, if a defendant has requested an adjournment for this purpose on multiple occasions but failed to complete it without any reasonable excuse, that may suggest a defendant is not ready and willing to complete a relevant programme or course of action.

19. Prosecutors should also consider the impact of the delay on any victim (and their whānau) and may seek their views on the adjournment.

20. An adjournment will usually require the defendant to be on bail to be able to complete the programme or course of action. Prosecutors should apply general bail considerations, including the guideline on Bail | Peira, when considering whether to oppose or support an adjournment.

Sentence indications

21. Prosecutors should make submissions for sentence indications in the same way as they would for sentencing hearings. Prosecutors should be familiar with the provisions in the Criminal Procedure Act 2011 and Criminal Procedure Rules relating to sentence indications, as well as any relevant practice notes issued by any courts.

Statutory presumptions

22. Some offences have statutory presumptions for a particular type of sentence. Some presumptions are set out in the Sentencing Act while others are incorporated into a specific offence provision.

23. Prosecutors should identify any statutory presumption for the court but are not required to develop a clear position on whether or not it is displaced. However, if prosecutors make submissions favouring a sentence range for the final sentence that involves displacing a statutory presumption, they should outline for the court why they consider the presumption is displaced. Prosecutors should carefully consider the statutory elements required to displace the presumption. Statutory provisions that use language such as "exceptional circumstances" and "manifest injustice" provide guidance about the threshold required to displace the presumption.

24. Prosecutors should consider the mitigating and aggravating factors set out in the Sentencing Act when evaluating whether a statutory presumption is displaced for the purpose of developing sentencing submissions.

Commentary
It is not possible to set out comprehensive guidance on the displacement of all statutory presumptions given the different statutory language used. By way of example only, persistent and repetitive offending against multiple victims is a factor likely to weigh heavily against displacement of the statutory presumption that

defendants convicted of sexual violation will be sentenced to imprisonment.[8] Another example is where youth and mental or intellectual impairments are likely to weigh heavily against the imposition of a severe sentence, even if a presumption applies.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Victims | Ngā pārurenga
Prosecuting sexual violence | Te aru i te taitōkai
Making unbiased decisions | Te whakatau rītaha-kore
Bail | Peira
Appeals | Ngā pīra
Self-represented defendants | Te kaiwawao ka whakakanohi i a ia anō

[8] Crimes Act 1961, s 128B(3)(b).

Te Tari Ture
o te Karauna
Crown Law

Statutory consents to prosecutions

Ngā whakaaetanga ā ture ki ngā arumanga

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

Introduction | Ngā kupu whakataki

1. Some offences can only be prosecuted with the consent of the Attorney-General. In practice, the Solicitor-General, who has the powers and duties of the Attorney-General, generally provides this consent.

Scope | Te korahi

2. This guideline sets out the matters prosecutors should consider, and the process to follow, when seeking consent from the Solicitor-General to prosecute an offence for which a statutory consent is required. It does not address the process for seeking the consent of the High Court to file a charge where that is required.

Guideline | Te aratohu

Offences requiring the Attorney-General's consent

3. The Attorney-General's consent is required before filing charges under a number of Acts and regulations. It is common for consent to be required when there is an international or national security element to the offence or the offending; when bribery or corruption is alleged; or when the offending engages protected rights under the New Zealand Bill of Rights Act 1990 (for example, the offence of inciting racial disharmony, and some offences involving objectionable and restricted publications). In some cases, the relevant statute permits New Zealand Police to arrest a person prior to obtaining consent.

4. Prosecutors should satisfy themselves that consent is not required before filing any charge.

5. Prosecutors should consider *why* consent is required in relation to a particular offence, and satisfy themselves that prosecution is appropriate, before referring the matter to Crown Law for consent. The request for consent should address that issue specifically.

   Commentary
   If, for example, consent is required because the offence engages protected rights, prosecutors should not seek consent unless they are satisfied that prosecution is a proportionate response.

Solicitor-General's consent required to file charges out of time

6. Charges in respect of some offences must be filed within five years of the date on which the offence was committed, unless the prior consent of the Solicitor-General is obtained to file a charging document after that date.[1] Prosecutors should consider whether it is appropriate to extend the time for filing a charging document, in all the circumstances of the case. The considerations may be different in a case where an extension of time will determine whether any prosecution is brought at all, as opposed to where there will be a prosecution on other charges in any event. The request should address these issues and explain why charges should be brought despite the expiry of the limitation period.

Process | Te tukanga

7. Requests for consent should be sent to criminal@crownlaw.govt.nz. Requests should annex a draft copy of the charging document(s), along with material to allow the Solicitor-General to be satisfied there is sufficient admissible evidence to support the charge and that the public interest favours charging the alleged offence in the circumstances. The Solicitor-General requires an accurate and thorough analysis of the evidence available to establish each element of the charge for which consent is sought. In most cases a summary will suffice but in some cases the prosecuting agency should provide copies of the evidence itself.

8. If the Solicitor-General consents to the prosecution, prosecutors should file the notice of consent together with the charging document(s).

9. If a prosecutor realises they have filed a charge requiring consent without having first obtained that consent, they should immediately contact criminal@crownlaw.govt.nz. In general, the charge will be a nullity and will have to be re-filed (if consent is subsequently sought and given, and subject to any limitation periods).

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Decisions to prosecute | Te whakatau ki te aru

[1] Criminal Procedure Act 2011, s 25.

Stays of proceedings

Te whakamoe kōtitanga

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

All guidelines should be read alongside the Principal guideline | te Aratohu mātāmua

Introduction | Ngā kupu whakataki

1. The Attorney-General may direct that a criminal proceeding be stayed. This long-standing prerogative power is reflected in s 176 of the Criminal Procedure Act 2011. The effect of a stay is that no further steps can be taken in the criminal proceeding (unless the Attorney-General lifts the stay, which is exceedingly rare).

Scope | Te korahi

2. This guideline provides prosecutors with a framework for deciding when to request a stay from the Attorney-General.[1] It also provides a high-level guide to the process for staying a prosecution, and for requesting that the Attorney-General lift a stay.

Roles | Ngā tūnga

3. In principle anyone can request a stay of proceedings: prosecutors, defendants, other interested parties (such as victims, or defendants' whānau) and members of the public. In most cases it is the prosecutor who seeks a stay.

4. In practice, the Solicitor-General, who has the powers and duties of the Attorney-General, exercises the power to stay proceedings.

Glossary | Kuputaka

5. In this guideline:

    5.1. A *hung jury* is a jury that was discharged because it was unable to reach a verdict.

    5.2. A *retrial* is a second or subsequent trial of a defendant.

Te aratohu | Guideline

6. The Solicitor-General's overriding consideration when deciding whether to direct a stay under s 176 of the Criminal Procedure Act will be the public interest. The full range of factors that might be relevant to a decision to prosecute may also be relevant to a stay decision.

7. In practice, the Solicitor-General will generally direct a stay in four situations:

    7.1. where the jury has been unable to agree on a verdict after two or more trials;

    7.2. where continuation of the prosecution would be oppressive or unjust (including because the prosecution was wrongly commenced, or because the circumstances have changed and the Test for Prosecution is no longer met);

    7.3. where stale or outstanding charges should be cleared; and

    7.4. where the defendant has died.

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[1] A court may also order that proceedings be stayed; this guideline is not relevant to those types of stays.

Hung juries

8. The Solicitor-General will normally stay a prosecution after two hung juries, unless:

   8.1. they are satisfied that some event, not related to the strength of the prosecution case, brought about one or both of the disagreements;

   8.2. new and persuasive evidence would be available on a third trial; or

   8.3. there is some other exceptional circumstance meaning the public interest requires a third trial.

9. Prosecutors should refer the prosecution to criminal@crownlaw.govt.nz as soon as possible after a second hung jury.

Prosecutions that should be brought to an end

10. Prosecutors should monitor the continued appropriateness of prosecutions. Prosecutors may form the opinion that:

    10.1. the prosecution was wrongly commenced;

    10.2. the circumstances have changed so that the Test for Prosecution is no longer met; or

    10.3. for some other reason, continuation of the prosecution would be oppressive or unjust, or otherwise not in the public interest.

11. A more appropriate response will often be to withdraw charges or invite the court to dismiss charges. However, there may be situations where this is not an appropriate or available course. In those situations, prosecutors should draw the prosecution to the Solicitor-General's attention for consideration of a stay of proceedings.

Stale charges

12. The Solicitor-General will generally direct a stay to clear outstanding, unresolved or stale charges. This may be the case where an offender has been convicted on serious charges but the jury has disagreed on other less serious charges, or when a convicted person is serving a substantial sentence and continuing with further charges would serve no worthwhile purpose.

The defendant has died

13. A prosecutor has two options for bringing a prosecution to an end following a defendant's death:

    13.1. The prosecutor may seek the court's leave to withdraw all outstanding charges. This option will be most appropriate in cases where there is no victim and the offending is at the lower end of the scale.

    13.2. The prosecutor may seek a stay from the Solicitor-General. A notice that the Solicitor-General has stayed proceedings completes the court record and provides finality. It accurately reflects the reason the prosecution cannot continue and it preserves the prosecution's position.

Lifting a stay

14. A stay will only be lifted in exceptional circumstances. If prosecutors consider a stay should be lifted, they should write to criminal@crownlaw.govt.nz outlining the reasons why this should occur.

Process | Te tukanga

15. Requests for stays should be sent to criminal@crownlaw.govt.nz together with the charging document, summary of facts, death certificate or other official record of death (if relevant) and a description as to why the person considers the stay should be issued.

16. Victims should be advised when, and why, a stay is to be sought, unless that is not practicable.[2] Other than where the defendant has died, the victim's views as to whether a stay should be issued should be sought and conveyed to the Solicitor-General as part of the request.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Decisions to prosecute | Te whakatau ki te aru
Retrials | Te whakahaere anō i te whakamātau
Victims | Ngā pārurenga

[2] If it is not practicable to advise a victim before a stay is sought, they must be advised subsequently of the outcome of the proceeding: Victims' Rights Act 2002, s 12.

The relationship between prosecutors and investigators

Te hononga i waenga i te kaiaru me te kaitūhura

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

Introduction | Ngā kupu whakataki

1. Prosecutors and investigators have numerous different responsibilities throughout an investigation and any resulting prosecution. Some of these responsibilities differ depending on whether the matter is, or could become, a Crown prosecution.

Scope | Te korahi

2. This guideline covers the relationship between prosecutors and investigators in Crown and non-Crown prosecutions, including the provision of legal advice prior to the filing of charges.

Glossary | Kuputaka

3. In this guideline:

   3.1 A *Schedule offence* is an offence that is listed in the Schedule to the Crown Prosecution Regulations 2013.

   3.2 The *Serious Fraud Prosecutors' Panel* is a panel of counsel appointed by the Solicitor-General, in consultation with the Director of the Serious Fraud Office (SFO), to prosecute serious or complex fraud. When performing this function, they are also Crown prosecutors, but are often not employed by a Crown Solicitor.

Guideline | Te aratohu

General

4. All prosecutors involved in Crown and non-Crown prosecutions are expected to be familiar with legislation, regulations and other instruments that are relevant to the conduct of the types of prosecutions they are involved in.

5. The Solicitor-General and a prosecuting agency may enter into a Memorandum of Understanding or other agreement about the conduct of Crown prosecutions and/or non-Crown prosecutions. This guideline is subject to any Memorandum of Understanding that is in place between a particular prosecuting agency and the Solicitor-General.

6. A suspect's conduct may fall within the remit of multiple prosecuting agencies and be subject to both civil and criminal sanctions. Prosecutors and/or investigators (as applicable) should consider the conduct being investigated and identify as early as possible whether any other prosecuting agency may have an interest in prosecuting the conduct.

7. If more than one prosecuting agency is considering a prosecution or seeking civil or criminal sanctions, agencies should coordinate to determine what proceeding or proceedings best meet the public interest. Where two or more prosecuting agencies have signed a Memorandum of Understanding or other agreement, agencies are expected to act in accordance with that agreement.

8. It is important these matters are considered early in the investigation, and well prior to filing charges, as there is no ability for a different agency to take over responsibility for a prosecution once it has been commenced. The discontinuance of a prosecution by one agency, and commencement by another in its place, may give rise to an abuse of process argument.

Relationship between prosecutors and investigators

9. Investigations and prosecutions are distinct functions, although both may be undertaken within the same agency. Investigators and prosecutors (either within or external to the prosecuting agency) need to work collaboratively to effectively investigate and prosecute offences.

10. Prosecutors are expected to cooperate and consult with investigators on key decisions, including determining whether to continue a prosecution against a defendant or when reviewing the charges filed. However, while prosecutors should take into account investigators' views, prosecutors should ultimately make prosecution decisions independently from investigators.

Seeking advice from Crown Solicitors

11. New Zealand Police and government departments may seek legal advice from Crown Solicitors during investigations and prosecutions. Crown Solicitors may also offer advice when conducting a non-Crown prosecution on their behalf. Police and government departments are generally expected to follow advice from Crown Solicitors. This is a limited modification of the solicitor-client relationship. Crown entities and other prosecuting agencies may instruct any lawyer (including Crown Solicitors) to provide them with legal advice, and the ordinary solicitor-client relationship will exist.

Crown prosecutions

12. The Solicitor-General has direct responsibility for the conduct of Crown prosecutions. Crown prosecutors conduct Crown prosecutions on behalf of the Solicitor-General.

13. The Crown Prosecution Regulations set out the qualifying criteria for Crown prosecutions, and when the Solicitor-General assumes responsibility for a Crown prosecution.[1] In practice, a Crown Solicitor, Serious Fraud Prosecutors' Panel member or other instructed counsel will assume responsibility for the prosecution on the Solicitor-General's behalf.

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[1] Crown Prosecution Regulations 2013, regs 4 and 5.

14. More detailed guidance about responsibilities in Crown prosecutions is contained in the Appendix.

Conduct of Crown prosecution[2] before the Solicitor-General assumes responsibility

15. As soon as practicable, a prosecuting agency will notify the Crown Solicitor that:

    15.1 a charging document for a category 4 offence or a Schedule offence is to be filed or has been filed; or

    15.2 leave is to be sought to amend an existing charge to substitute an offence for a category 4 offence or a Schedule offence, where there was not already a category 4 offence or Schedule offence in the proceeding; or

    15.3 for any other reason, a prosecution for an offence is to become, or has become, a Crown prosecution (for example, because the defendant has elected jury trial or the proceeding has been transferred to the High Court).

16. The prosecuting agency should notify the local Crown Solicitor (meaning the Crown Solicitor whose warrant covers the geographic area in which the charges have been, or will be, filed), irrespective of where the offence was committed or whether another Crown Solicitor has previously been involved.

17. If there is any doubt about whether a matter is a Crown prosecution or not, and it cannot be resolved after discussion between the prosecuting agency and the Crown Solicitor, the matter should be referred to the Solicitor-General to determine the issue.

18. The general rule is that the prosecuting agency should appear in a Crown prosecution until Crown responsibility for it is assumed.[3] However, the agency should not take any steps during that period that might fetter the Crown Solicitor's discretion in the subsequent conduct of the trial or sentencing.

    Commentary
    This does not prevent the prosecuting agency from making decisions about the charges prior to the Crown assuming responsibility, particularly where that will resolve the prosecution. But care should be taken in cases where the Crown Solicitor will assume responsibility in any event, and conduct the sentencing (for example, where the charges are still for offences listed in the Schedule to the Crown Prosecution Regulations).

19. In particular, unless directed by the Crown Solicitor, the prosecuting agency should not give any indications or undertakings, nor reach any agreements, with the defendant or their lawyer as to:

    19.1 the evidence that will or will not be led at trial;

    19.2 whether the Crown will seek for certain charges/defendants to be tried together or separately;

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2 Other than a prosecution commenced by the Serious Fraud Office.
3 See the Cabinet Directions for the Conduct of Crown Legal Business.

19.3 whether the Crown will oppose any pre-trial applications indicated by the defence; and

19.4 the approach the Crown will take to sentence in the event the defendant is convicted.

20. Prosecuting agencies should consult the Crown Solicitor before reaching agreements with defendants or their lawyers about the content of a summary of facts where a guilty plea is to be entered, if the agreement will result in a material change to the factual basis for sentencing.

21. Prosecuting agencies should instruct Crown Solicitors to appear, at the agency's cost, on the following matters in a Crown prosecution for a Schedule offence, if the matter is to be dealt with before the Crown assumes responsibility for the prosecution:

21.1 a sentence indication hearing (and any subsequent hearings before the defendant enters a plea);

21.2 a hearing under the Criminal Procedure (Mentally Impaired) Persons Act 2003 into the defendant's fitness to stand trial and any subsequent hearings such as an enquiry into the defendant's involvement and/or disposition for the offence following a finding of unfitness; and

21.3 a hearing to determine whether the only reasonable verdict is that the act is proven but the defendant is not criminally responsible on account of insanity.

22. Prosecuting agencies should also instruct the Crown Solicitor in respect of any substantive pre-trial hearing in a non-Schedule matter that is to be heard before the Crown assumes responsibility for the prosecution but will not be dispositive, such as pretrial hearings about the admissibility of evidence. In general, such hearings should not take place until after the Crown has assumed responsibility for the matter, in accordance with the scheme of the Criminal Procedure Act 2011. This paragraph does not apply to hearings about bail, name suppression or disclosure.

23. Prosecuting agencies that are government departments must instruct Crown Solicitors to appear on their behalf if an appearance is required in the High Court, as required by the Cabinet Directions for the Conduct of Crown Legal Business.

Conduct of Crown prosecution[4] after the Solicitor-General assumes responsibility

24. The prosecuting agency should provide the file to the Crown Solicitor as soon as practicable once the matter has become a Crown prosecution. Crown Solicitors should review the file and liaise with investigators and the prosecuting agency in a timely manner to promptly identify any additional investigative enquiries that may be necessary.

[4] Other than a prosecution commenced by the Serious Fraud Office.

25. Once the Solicitor-General assumes responsibility for a Crown prosecution, the Crown prosecutor is solely responsible for making prosecution decisions and makes these independently from the investigator, the original prosecutor and the original prosecuting agency. This includes decisions about the evidence to be adduced, the conduct of the prosecution and the nature and scope of any continuing investigation that is likely to result in evidence or information relevant to the trial.

26. The Crown prosecutor is also expected to independently review the charges that have been filed consistent with the guideline on Decisions to prosecute | Te whakatau ki te aru. However, Crown prosecutors should consult closely with the investigator or officer in charge of the case and take into account their views when making prosecution decisions. Crown prosecutors should explain the basis of any significant decision to the investigator or officer in charge.

27. If an investigator disagrees with a key prosecution decision a Crown prosecutor has made, and that disagreement is not able to be resolved after discussion between the investigator and the prosecutor, the investigator should discuss the matter with their manager. In situations of serious disagreement, a senior manager at the prosecuting agency may request that the Crown Solicitor review the decision. In rare cases, the prosecuting agency or the Crown Solicitor may refer the matter to Crown Law for advice.

28. The role of the investigator and original prosecuting agency is to assist the Crown prosecutor to prepare for, and conduct, the trial. In broad terms, investigators (or other staff within the original prosecuting agency) are expected to:

    28.1 open, conduct, direct and control the investigation through all phases, including trial;

    28.2 identify the need for, and, where relevant, undertake evidential or procedural steps such as formal procedures for identification and hearsay notices;

    28.3 manage and control all arrangements with prosecution witnesses, including by seeking, where relevant, advice or assistance from the Crown Solicitor in respect of witness immunity, anonymity or protection, and having regard to the reasonable needs of the victims of crime;

    28.4 in preparation for and during trial, to carry out additional investigative steps as are reasonably required by the Crown Solicitor to enable the effective presentation of the case and the discharge of the Crown Solicitor's duties; and

    28.5 ensure the file is fully briefed prior to trial.

Direction by Solicitor-General that a prosecution be conducted as a Crown prosecution

29. The Solicitor-General may direct that a proceeding that would otherwise be a non-Crown prosecution be conducted as a Crown prosecution.[5] The Solicitor-General will only issue such a direction in rare cases where they consider they need to have direct oversight of a prosecution because it raises issues that require the advocacy or independence of the Crown.

30. Without limiting the circumstances in which that advocacy or independence may be required, examples may include:

    30.1 The prosecution raises complex or novel legal principles.

    30.2 The prosecution involves matters which are of particular general or public importance.

    30.3 A prosecution for the offence is rare or novel.

    30.4 The prosecution involves highly sensitive and/or confidential Crown or government information and/or raises issues of national security.

31. The Solicitor-General may make such a direction of their own motion or at the request of a prosecuting agency.

Serious Fraud Prosecutors' Panel

32. The Serious Fraud Prosecutors' Panel consists of Crown prosecutors who conduct prosecutions for serious or complex fraud commenced by the SFO.[6] As Crown prosecutors, panel members are expected to act in accordance with all applicable guidelines issued by the Solicitor-General.

33. The prosecution of serious or complex fraud is taken on behalf of the Director of the SFO until the Solicitor-General assumes responsibility for the prosecution. Once the Solicitor-General has assumed responsibility, the Solicitor-General may give binding directions to an instructed panel member. Such directions will be given in consultation with the Director of the SFO.

Non-Crown prosecutions

34. The Solicitor-General has general oversight of non-Crown prosecutions.

35. Prosecuting agencies have responsibility for the conduct of non-Crown prosecutions. Prosecuting agencies may use in-house counsel or instruct the local Crown Solicitor to conduct non-Crown prosecutions. Prosecuting agencies other than Police and government departments may instruct other external counsel to act on their behalf. Counsel conducting non-Crown prosecutions are expected to comply with all guidelines issued by the Solicitor-General.

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[5] Crown Prosecution Regulations 2013, reg 4.

[6] Serious Fraud Office Act 1990, s 48.

36. A Crown prosecutor in a non-Crown prosecution acts on instructions from the prosecuting agency, which remains the ultimate decision-maker, save that as set out above, Police and government departments are expected to follow legal advice from Crown Solicitors.

Commentary

In practice this means that the decision to prosecute or not remains with the prosecuting agency, even where a Crown Solicitor has given advice about whether or not a prosecution should be commenced. Such advice will rarely completely exclude the possibility of either course of action, so that it informs rather than dictates the prosecuting agency's decision. However, where a Crown Solicitor has advised that a prosecution *cannot* be brought (for example, where a limitation period applies or there is an evidential gap that cannot be overcome), Police and government departments are expected to follow that advice. Similarly, Police and government departments are expected to accept advice from Crown Solicitors about other matters (for example, opinions as to the admissibility of evidence).

Payment of costs orders

37. Costs orders may be made under the Costs in Criminal Cases Act 1967 and the Criminal Procedure Act. The Ministry of Justice will pay costs ordered against a public prosecuting agency under the Costs in Criminal Cases Act unless the court orders otherwise.[7] There is no equivalent provision for costs awards made under the Criminal Procedure Act. Those costs awards are paid by the party or person against whom the order is made.

38. Crown Law does not indemnify prosecuting agencies, their staff, Crown Solicitors or Crown prosecutors for costs ordered directly against them, whether under the Costs in Criminal Cases Act or the Criminal Procedure Act.

39. Where an award will not be paid by the Ministry of Justice, the prosecuting agency should generally expect to pay costs awards made in non-Crown prosecutions unless they have been made primarily because of the conduct or approach of an instructed prosecutor (in which case the prosecutor is liable). The prosecuting agency and the instructed prosecutor may agree on a different approach depending on the reasons for the order being made and/or the particular case. In Crown prosecutions, the prosecuting agency is generally not responsible for the payment of costs ordered against the Crown, other than where it has been made in relation to a procedural failing for which the agency was responsible.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Decisions to prosecute | Te whakatau ki te aru
Case management | Te whakahaere kēhi
Sentencing | Te whiu
Disclosure | Te tūhura
Non-party disclosure | Te tūhura i hunga kē
Victims | Ngā pārurenga

[7] Costs in Criminal Cases Act 1967, s 7.

Appendix 1: Conduct of crown prosecutions[8]

Introduction

1. This document outlines the general roles and responsibilities of prosecuting agencies and Crown Solicitors in the conduct of Crown prosecutions commenced by a prosecuting agency. This guideline is subject to any Memoranda of Understanding between the Solicitor-General and the Commissioner of Police, the Chief of Defence Force or the chief executive of any government department.[9]

2. Any difficulty that arises in the application of this guidance should be discussed between the prosecuting agency and relevant Crown Solicitor in the first instance, and otherwise referred to the Deputy Solicitor-General (Criminal).

Notification of Crown prosecution to the Crown Solicitor

3. The prosecuting agency should provide early notification to the Crown Solicitor of a pending Crown prosecution. Where applicable and as soon as it is received, the prosecuting agency should also forward to the Crown Solicitor the notice provided by the Registrar upon adjournment for case review or trial callover of future dates for key events.[10]

4. In accordance with the principle of early notification, the prosecuting agency should consult the Crown Solicitor on:

   4.1 Any views the prosecuting agency is to provide in a case management memorandum or otherwise about whether a protocol offence should be tried in a District Court or the High Court.

   4.2 Any application that the prosecuting agency proposes to make under s 70 of the Criminal Procedure Act to transfer a category 2 or 3 offence to the High Court.

5. An order for a High Court trial which results from either the protocol or application process will mean that the prosecution will be a Crown prosecution.[11] The Crown will assume responsibility for the prosecution when it is transferred to the High Court.[12]

Providing the Crown prosecution file to the Crown Solicitor

6. Unless otherwise agreed with the Crown Solicitor, the prosecuting agency should provide the prosecution file to the Crown Solicitor no later than five working days after the Crown has assumed responsibility for a prosecution. Both the prosecuting agency and Crown Solicitor should nominate a contact person for queries about the file.

7. The Crown Solicitor will advise the prosecuting agency as soon as practicable whether any remedial action on the file is required.

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8 Other than those commenced by the Serious Fraud Office.

9 See, for example, the Memorandum of Understanding between the Solicitor-General and the Commissioner of Police and the Protocol between the Solicitor-General and Commissioner of Inland Revenue.

10 See Criminal Procedure Rules 2012, r 4.7 (information about case review) and r 5.7 (information about trial callover).

11 Crown Prosecution Regulations, reg 4.

12 Crown Prosecution Regulations, reg 5.

8. Timely provision of the file is particularly important in those cases where the Crown assumes responsibility for a prosecution upon adjournment for trial callover. The Crown has only three weeks from that point to review the file and to review and file the formal statements. The file in those cases should include the formal statements that the prosecuting agency proposes are filed.

Specific roles and responsibilities of the prosecuting agency and Crown Solicitor in the conduct of a prosecution

Formal statements and exhibits

9. Formal statements and exhibits are filed under the Criminal Procedure Act after the Crown has assumed responsibility for the prosecution. The roles and responsibilities for formal statements and exhibits will usually be as follows:

   9.1 The prosecuting agency will prepare the formal statements that it proposes be filed under s 85 of the Criminal Procedure Act.[13] These should usually be provided to the Crown Solicitor no later than five working days after the proceeding has been adjourned for trial callover. The Crown Solicitor will advise the prosecuting agency as soon as practicable whether changes to the statements, additional statements, or statements in a different form are required.

   9.2 The Crown Solicitor will determine which formal statements and exhibits should be filed (and in what form) and whether a summary of any formal statement is required under s 82(4) of the Criminal Procedure Act. The Crown Solicitor will prepare the summary.

   9.3 The Crown Solicitor will file (and serve) the formal statements and the prosecuting agency will file (and serve) the exhibits. The formal statements and exhibits need not be filed at the same time, although there should be liaison (including with the court) about when they will be filed. Some courts will only accept formal statements and exhibits for filing on particular days.

   9.4 The Crown Solicitor and prosecuting agency should notify each other when the formal statements and exhibits respectively have been filed.

Summonsing witnesses for trial

10. In Crown prosecutions, the process for summonsing witnesses for trial will usually be as follows:

    10.1 The prosecuting agency will prepare a (draft) witness list and provide the list to the Crown. The witness list may sometimes be on the file that is initially provided to the Crown when it assumes responsibility for a prosecution, or it may be provided later.

[13] This includes the preparation of a transcript of a video interview that is to be filed as or with a formal statement.

10.2 The prosecutor should provide the witness list to the court (ordinarily as part of the case review process in judge-alone trials or when the formal statements or prosecutor's trial callover memorandum are filed in jury trials). The court will prepare witness summonses based on that information.

10.3 The prosecuting agency will serve the summonses and confirm service with the Crown prosecutor.

Witness expenses

11. Fees, allowances and expenses of Crown witnesses at trial are met by the Ministry of Justice.[14] The prosecuting agency should meet the travel and other costs of a witness for the purpose of any necessary pre-trial meeting with the Crown Solicitor.

Conduct of prosecutions that are no longer Crown prosecutions

12. In some cases, there will be a change in circumstances so that a prosecution no longer qualifies as a Crown prosecution (for example, because the court has given a defendant leave to withdraw his or her election of jury trial after the matter has been adjourned for trial callover). In such cases the Crown Solicitor will continue to conduct the prosecution at the cost of the Crown Law Office.

[14] Witnesses and Interpreters Fees, Allowances and Expenses Regulations 2023.

Warnings

Ngā Whakatūpato

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

All guidelines should be read alongside the Principal guideline | te Aratohu mātāmua

Introduction | Ngā kupu whakataki

1. Prosecuting agencies may issue formal warnings instead of commencing a prosecution. Warnings may appropriately resolve law enforcement concerns without burdening the courts, particularly when the conduct is less serious. The purpose of this guideline is to provide guidance to agencies on how to use formal warnings appropriately, consistently, and in accordance with the principles of natural justice.

Scope | Te korahi

2. This guideline applies to formal warnings that are:

   2.1. given to a person (either natural or legal);

   2.2. recorded on the person's file;

   2.3. made in response to behaviour that a prosecuting agency believes could amount to criminal conduct; and

   2.4. capable of having ongoing or future negative consequences for the person.

3. This guideline provides guidance on the proper form of warnings and the proper process for issuing them. It sets out matters that should be included in prosecuting agencies' policies on warnings, and in warnings themselves. It provides high-level guidance on assessing whether a warning may be appropriate. This guideline does not prescribe a specific process for every prosecuting agency, as operational and law enforcement contexts vary. Agencies should develop their own policies and processes. They should be consistent with this guideline, the principles of natural justice, and the Privacy Act 2020.

4. This guideline only applies to formal written warnings as described in paragraph 2. Prosecuting agencies may, however, choose to adopt some or all of these principles in other contexts (for example, informal verbal warnings where the warning is not recorded on the person's file or warnings given in place of issuing an infringement notice or pursuing an infringement offence).

5. The guideline is premised on the basis that warnings will be considered instead of prosecution, as one of the available enforcement tools set out in each prosecuting agency's prosecution policy, prior to charges being filed.

Glossary | Kuputaka

6. In this guideline, a *warning* is a formal written warning of the type described in paragraph 2.

Guideline | Te aratohu

Suitability

7. Not all behaviour that could amount to criminal conduct requires a prosecution response. In some cases, a prosecuting agency may warn a person for conduct it considers may be criminal. Each case is assessed on its merits.

Range of conduct

8. Formal warnings may be used in response to a wide range of conduct. It is unlikely that a formal warning will adequately respond to conduct which, if proved, would amount to serious offending, but this guideline sets no threshold or limit for the use of warnings. Whether a formal warning is appropriate will depend on a holistic assessment of all the circumstances, including where warnings sit within an agency's available enforcement tools in its prosecution policy.

Purposes

9. Prosecuting agencies may issue formal warnings for different purposes, for example:

   9.1. to show the agency takes the matter seriously;

   9.2. to impress on the person that the agency considers the conduct is criminal, and could have been prosecuted;

   9.3. to give the person an opportunity to address the underlying drivers of the conduct or make amends for it; and/or

   9.4. to deter the person and the public from engaging in similar conduct in the future.

10. Prosecuting agencies should be clear about the intended purpose(s) of a proposed formal warning. They should consider whether the warning is likely to achieve its intended purpose(s).

Needs and interests

11. Prosecuting agencies should also consider:

    11.1. the needs and interests of the person, their whānau, and their community;

    11.2. the needs and interests of any victim, their whānau, and their community; and

    11.3. the interests of the general public.

12. When the conduct is a breach of regulatory obligations or standards, the prosecuting agency should assess the interests of the general public considering its statutory objectives and enforcement priorities, and its published enforcement criteria and prosecution policies (including any formal warnings policy).

13. Ultimately, the agency should assess whether a formal warning would be appropriate in the circumstances.

Process

The evidence

14. Prosecuting agencies should generally be satisfied there is sufficient evidence to prosecute before issuing a warning. The operational context of some agencies may, however, mean that warnings can be issued on a more limited body of evidence. In such cases, agencies should clearly identify the evidential threshold(s) for issuing warnings. Agencies should explain in their warnings policy why the adopted evidential threshold (if lower than sufficient evidence to prosecute) is appropriate.

    Commentary
    Some prosecuting agencies may consider it appropriate to issue a formal warning at an early stage of an investigation.

Admission and consent

15. The requirements of natural justice will vary depending on the conduct and the consequences of a warning for the person concerned. It will always be necessary to put the allegations to the person for comment before deciding to issue a warning. Natural justice may also require:

    15.1. the person's consent to receiving the warning and having the matter resolved in that way; and/or

    15.2. an admission of the conduct in respect of which the person is to be warned.

    Commentary
    No person should be placed under any pressure to admit the alleged conduct. In some circumstances, prosecuting agencies may wish to ensure that the person has been advised, and given the opportunity, to obtain legal advice before making any admission and/or consenting to receive the proposed warning.

The warning

16. The content of the formal warning should reflect the potential for ongoing consequences arising from it. Warnings should set out, at a minimum:

    16.1. an accurate summary of the key facts underpinning the warning;

    16.2. the reason(s) for issuing the warning;

    16.3. the consequences of the warning, including:

        16.3.1. where the warning will be held, and for how long;

        16.3.2. how the warning may be used (for example, with whom it may be shared, and if it will be published);

        16.3.3. how the warning may be used if the person engages in similar behaviour in the future;

16.3.4. the person's rights in relation to the warning, including rights under the Privacy Act or in the prosecuting agency's privacy policy (for example, the right to have the warning reviewed within a certain period); and

16.4. the person's response to the proposed warning (if relevant), including whether they admit the alleged facts or dispute them, and whether they consent to the matter being dealt with by a warning.

Limits

17. Warnings should respect the limits of the prosecuting agency's role as investigator and/or prosecutor. Agencies should be careful to avoid creating an impression they have an adjudicative or judicial role. Accordingly, warnings should not assert or imply that an offence has been committed, or that an offence is proven. The warning may set out that, in the agency's view, the conduct or behaviour concerned may amount to a specific offence and that, if it is repeated, a prosecution may be considered.

18. Warnings should not imply that a charge would have been filed if a warning had not been issued, unless that is in fact the case.

Explaining the proposed warning

19. Prosecuting agencies should explain the matters in paragraph 16 to the person in a way the person can understand, before issuing a warning.

Reconsideration

20. In rare cases, special reasons may justify reconsideration of the decision to warn. Those reasons include that:

20.1. a review of the original decision shows the warning should not be allowed to stand; and

20.2. new evidence means the original decision to issue a formal warning was not appropriate.

Commentary
When a formal warning is issued early in an investigation, the prosecuting agency should consider whether to explain to the person that the agency may revisit the warning if further evidence comes to light suggesting the offending was more serious.

Policies

21. Each prosecuting agency that issues formal warnings should have a formal warnings policy, either separate to, or part of, its prosecution policy.

Core policy provisions and processes

22. Each prosecuting agency's formal warning policy should:

22.1. be publicly available (if not incorporated in the agency's publicly available prosecution policy);

22.2. describe the situations in which the agency may consider issuing warnings (this may include reference to the types or seriousness of conduct eligible for warnings, and whether warnings may be issued to a person only once, or more than once);

22.3. set out the matters that are to form part of warnings, including the matters listed in paragraph 16;

22.4. identify the evidential threshold(s) below which warnings will not be considered (and, if the threshold is lower than sufficient evidence to prosecute, explain why this is appropriate);

22.5. describe the process for issuing warnings, which should include a process for engaging with the person under investigation to give effect to natural justice; and

22.6. set out the process the agency will follow for reconsidering warnings, which should include:

22.6.1. a statement that reconsiderations will only occur in rare situations, consistent with the reasons set out in this guideline; and

22.6.2. a requirement that the agency should seek internal legal advice, or the advice of a Crown Solicitor, as part of any reconsideration process.

Further policy provisions

23. To make warning policies and processes more robust, prosecuting agencies should consider including the following:

23.1. The purpose or purposes for which the agency uses warnings.

23.2. The agency's supervision and assurance processes to ensure warnings are appropriately issued, and the agency is taking a consistent approach concerning the use of warnings.

23.3. A process to engage with any harmed person.

23.4. A process for reviewing warnings, at the request of the warned person, within a set period after a warning has been issued. This may be an internal review or complaints process within the agency; any such process should be suitably independent from the official(s) who made the decision to warn.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Decisions to prosecute | Te whakatau ki te aru
Prosecution policies | Ngā kaupapa here mō te aru
Making unbiased decisions | Te whakatau rītaha-kore

Witness anonymity orders

Ngā whakatau whakaū i te matatapu o te kaiwhāki

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

All guidelines should be read alongside the Principal guideline | te Aratohu mātāmua

Introduction | Ngā kupu whakataki

1. A defendant's ability to confront and challenge prosecution witnesses is an important component of the right to a fair trial. An application for a witness anonymity order is, therefore, a significant step in a prosecution. The Solicitor-General must approve the making of any such application before it is filed in court.

Scope | Te korahi

2. This guideline sets out the material prosecutors should provide the Solicitor-General when asking for approval to make an application for a witness anonymity order. It also sets out the things the Solicitor-General will take into account when considering a request for approval.

Roles | Ngā tūnga

3. The Solicitor-General approves the making of applications for witness anonymity orders. If approval is granted, it is for the prosecutor to make the application to the court.

Glossary | Kuputaka

4. In this guideline, a *witness anonymity order* is a pre-trial witness anonymity order made under s 110 of the Evidence Act 2006, or a witness anonymity order made under s 112 of the Evidence Act.

Guideline | Te aratohu

5. Prosecutors must obtain the Solicitor-General's approval before applying for a witness anonymity order. Prosecutors must comply with this direction to seek the Solicitor-General's approval for such orders, in accordance with s 188 of the Criminal Procedure Act 2011.

6. In Crown prosecutions, a decision to seek approval to make a witness anonymity application should be made by the Crown Solicitor personally. In non-Crown prosecutions, the prosecuting agency should seek advice from the local Crown Solicitor as to whether a witness anonymity order is warranted and whether the applicable statutory test is met.

Statement, opinion, and report to the Solicitor-General

7. Prosecutors should provide the following information when seeking approval to make an application for a witness anonymity order:

   7.1. material from the person in relation to whom the order is sought, either in statement or affidavit form, explaining that person's perception of the likely danger to them, or the risk of serious damage to property;

   7.2. a report from the investigator as to the likelihood of danger, or serious damage to property;

7.3. any information that is relevant to the reliability of the proposed evidence from the person in relation to whom the order is sought, including factors set out in the guideline on Inmate admissions | Ngā whāki ā-mauhere (if applicable); and

7.4. an opinion from a Crown Solicitor as to whether the applicable statutory test is met.

Importance of candour

8. The Solicitor-General relies on prosecutors and investigators to refer to any relevant matters, including matters that could undermine or qualify the case for an order. The Solicitor-General expects that investigators will have carefully examined and probed the material provided in support of the proposed application (and the evidential basis for it) before seeking approval for an application.

Process | Te tukanga

9. Responsibilities for disclosure are set out in the guideline on Disclosure | Te tūhura. Evidence from a witness who is subject to a witness anonymity order will almost always be contentious and have personal safety implications. If the prosecution is a Crown prosecution, such evidence should be discussed between the Crown prosecutor and the person managing disclosure at an early stage, including what information supplied to support the application should be disclosed.

10. If a prosecutor is seeking approval to apply for a witness anonymity order, they should write to criminal@crownlaw.govt.nz setting out the reasons for seeking the order and including the information set out in paragraph 7.1-7.4 above.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Inmate admissions | Ngā whāki ā-mauhere
Disclosure | Te tūhura