



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

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 which 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 pāturenga