



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

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 prosecutions² 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 department³ (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.

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 whakataua 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

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.