



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

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## Retrials

# Te whakahaere ano i te whakamatau

*As at 1 January 2025*

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## **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](mailto: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 whakataū ki te aru  
Stays of proceedings | Te whakamoe kōtitanga  
Victims | Ngā pāruenga  
Prosecuting sexual violence | Te aru i te taitōkai