



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

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## **The relationship between prosecutors and investigators**

### **Te hononga i waenga i te kaiaru me te kaitūhura**

*As at 1 January 2025*

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

## 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.<sup>1</sup> 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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<sup>1</sup> 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<sup>2</sup> 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.<sup>3</sup> 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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<sup>2</sup> Other than a prosecution commenced by the Serious Fraud Office.

<sup>3</sup> 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<sup>4</sup> 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.

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<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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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<sup>5</sup> Crown Prosecution Regulations 2013, reg 4.

<sup>6</sup> 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.<sup>7</sup> 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 pāturenga

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<sup>7</sup> Costs in Criminal Cases Act 1967, s 7.



## Appendix 1: Conduct of crown prosecutions<sup>8</sup>

### 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.<sup>9</sup>
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.<sup>10</sup>
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.<sup>11</sup> The Crown will assume responsibility for the prosecution when it is transferred to the High Court.<sup>12</sup>

### 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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<sup>8</sup> Other than those commenced by the Serious Fraud Office.

<sup>9</sup> 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.

<sup>10</sup> See Criminal Procedure Rules 2012, r 4.7 (information about case review) and r 5.7 (information about trial callover).

<sup>11</sup> Crown Prosecution Regulations, reg 4.

<sup>12</sup> 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.<sup>13</sup> 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.

### ***Summoning witnesses for trial***

10. In Crown prosecutions, the process for summoning 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.

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<sup>13</sup> 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.<sup>14</sup> 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.

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<sup>14</sup> Witnesses and Interpreters Fees, Allowances and Expenses Regulations 2023.