

Prosecution Policy

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Policy owner	Legal Services, Strategy and Governance
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Policy overview

1. This policy sets out the Department of Internal Affairs' (**Department**) policy on prosecutions. It applies to any prosecution action being considered or undertaken by the Department, including prosecutions under the following enactments:¹
 - (a) Gambling Act 2003;
 - (b) Crimes Act 1961;
 - (c) Films, Videos, and Publications Classification Act 1993;
 - (d) Anti-Money Laundering and Countering Financing of Terrorism Act 2009;
 - (e) Private Security Personnel and Private Investigators Act 2010;
 - (f) Passports Act 1992;
 - (g) Births, Deaths, Marriages, and Relationships Registration Act 1995;
 - (h) Citizenship Act 1977;
 - (i) Charities Act 2005;
 - (j) Marriage Act 1955; and
 - (k) Civil Union Act 2004.

Applies to

2. This policy applies to all Department staff and counsel acting on behalf of the Department in dealing with prosecutions or potential prosecutions brought by the Department (including prosecutions brought by duly appointed enforcement officers employed by the Department). In particular, it applies to (but is not limited to) the following units:
 - (a) Legal Services (Strategy and Governance);

¹ This policy, where applicable, will also be used to guide the Department's decisions in relation to civil enforcement action taken under the Unsolicited Electronic Messages Act 2007, which is subject to a different standard of proof than a criminal prosecution.

- (b) Regulatory Services (Policy, Regulatory and Ethnic Affairs); and
 - (c) Identity Investigations, Charities Services Investigations and Grant Audit and Review (Service Delivery and Operations).
3. This policy does not apply to infringement notices. It also does not apply to prosecutions that are handled by other government agencies (such as the New Zealand Police or the Serious Fraud Office) on referral from the Department.

Proposal/purpose

4. This policy sets out the procedures and expectations for Departmental staff and counsel when dealing with potential prosecutions. It sets out the process to be followed in assessing a file for prosecution, and how the prosecution decision is to be made. It then sets out how prosecutions are to be conducted.
5. This policy is intended to comply with the Cabinet direction of 25 July 2012 that government agencies with prosecution functions have in place policies that identify the objectives of the agency's prosecution activity, determine the circumstances in which a prosecution is appropriate rather than some less punitive action, and ensures that prosecution decisions are cost-effective and in the public interest.

Detailed explanation of policy

Objectives of the Department's prosecution activity

6. The Department enforces a large number of enactments, and as such the objectives of particular prosecutions may vary depending on the purpose of those enactments.
7. There are some general objectives in undertaking prosecution activity that apply across all the Department's prosecutions. These general objectives should be read in conjunction with specific objectives relating to prosecutions under specific enactments.
8. These objectives must be taken into account when considering taking prosecution action.
9. The general objectives that apply across all prosecutions taken by the Department are:
- (a) To ensure that appropriate and proportionate enforcement action is taken in response to breaches of the law;
 - (b) To ensure, where appropriate, there are adequate deterrents against offending;
 - (c) To ensure the use of appropriate charges under appropriate legislation;
 - (d) To promote fair trial processes;
 - (e) To act rationally, impartially, fairly and in accordance with the Solicitor-General's Prosecution Guidelines; and
 - (f) To underpin the Department's compliance objectives.
10. Some specific objectives that apply to particular prosecution action taken by the Department include:
- (a) In relation to prosecutions brought under the Films, Videos, and Publications Classification Act 1993:

- (i) Protection of the community, particularly children;
 - (ii) Deterrence against trading and possessing of objectionable publications that promote or support the exploitation of children or young persons for sexual purposes;
 - (iii) Rehabilitation of offenders where appropriate;
 - (iv) Ensuring objectionable publications are not made available to the public, and that restricted publications are only made available in accordance with their classification; and
- (b) In relation to prosecutions brought under the Gambling Act 2003, and the Crimes Act 1961 (in relation to crimes of dishonesty related to gambling):
- (i) Prevention and minimisation of harm caused by gambling, including problem gambling;
 - (ii) Limitation of the opportunity for crime or dishonesty associated with gambling;
 - (iii) Ensuring the integrity and fairness of games; and
 - (iv) Ensuring that money from gambling benefits the community; and
- (c) In relation to prosecutions under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009:
- (i) To detect and defer money laundering and the financing of terrorism;
 - (ii) To contribute to public confidence in the financial system; and
- (d) In relation to prosecutions under the Passports Act 1992:
- (i) To ensure the integrity of information on the passport information database;
 - (ii) To deter fraudulent activity in relation to New Zealand passports and travel documents; and
- (e) In relation to prosecutions under the Births, Deaths, Marriages and Relationships Registration Act 1995:
- (i) To ensure the integrity of the official record of information relating to births, deaths, marriages, civil unions, name changes, adoptions, and sexual assignments and reassignments in New Zealand;
 - (ii) To deter fraudulent activity in relation to New Zealand birth, death, marriage, civil union and name change certificates and other identity documents; and
- (f) In relation to prosecutions under the Citizenship Act 1977:
- (i) To ensure the integrity of the citizenship by grant and citizenship by descent processes in New Zealand; and
 - (ii) To deter fraudulent activity in relation to New Zealand citizenship documents; and
- (g) In relation to prosecutions under the Charities Act 2005:

- (i) To promote public trust and confidence in the charitable sector;
 - (ii) To encourage and promote the effective use of charitable resources; and
- (h) In relation to civil enforcement action under the Unsolicited Electronic Messages Act 2007:
- (i) To promote a safer and more secure environment for the use of information and communications technologies in New Zealand;
 - (ii) To reduce impediments to the uptake and effective use of information and communications technologies by businesses and the wider community in New Zealand;
 - (iii) To reduce the costs to businesses and the wider community that arise from unsolicited commercial electronic messages; and
 - (iv) To deter people from using information and communications technologies inappropriately.

Process for assessment of a file for prosecution

Referral and assessment of prosecution file

11. The unit at the Department with responsibility for enforcement of a particular enactment is responsible for detection and investigation of offences relating to that enactment.
12. For a file to be considered for prosecution, the investigator in charge of the file must have a reasonable suspicion that offending has occurred. If the investigator is uncertain as to whether offending has occurred, advice must be sought from Legal Services.
13. All files being considered for prosecution must be referred to Legal Services for assessment against the Solicitor-General's Prosecution Guidelines. The file should be submitted to Legal Services in accordance with the investigating unit's internal processes (such as Advisory Group referral or manager sign-off).
14. Files submitted to Legal Services must contain all evidence (whether favourable or unfavourable) in relation to the file, as well as a report and/or draft Caption Sheet and Summary of Facts outlining the proposed charges. Alternative charging options may be suggested by the officer-in-charge.
15. A Solicitor or Team Leader in Legal Services will then review the file for evidential sufficiency and public interest considerations (see below). This review must be peer-reviewed by another Solicitor or Team Leader.

Evidential sufficiency

16. When assessing evidential sufficiency, Solicitors must apply the test in the Solicitor-General's Prosecution Guidelines, namely that the evidence that can be adduced in Court is sufficient to provide a reasonable prospect of conviction.

Public interest

17. If there is sufficient evidence for a prosecution, then it must be considered whether a prosecution is required in the public interest.

18. Consideration of public interest will include any relevant factors in the Solicitor-General's Prosecution Guidelines, including cost-effectiveness.

Prosecution decision making and disputes

19. Pursuant to paragraph 4.2 of the Solicitor-General's Prosecution Guidelines, prosecution decisions must be made independently.
20. All prosecutions must be initiated by referral to Legal Services and assessment of the file by Legal Services as outlined above.
21. Once the file has been assessed, the decision to prosecute or not prosecute in a particular case is to be made by the investigating unit. A decision to prosecute must not be contrary to Legal Services' assessment of the file.
22. If the test in the Solicitor-General's Prosecution Guidelines is not met, a decision of "no prosecution" must be taken.
23. Decisions must be made independently and be free from any undue or improper pressure (such as political pressure). A prosecution decision in respect of a case should not be made by the investigator in charge of that case. If a person making a prosecution decision is concerned about undue or improper pressure, the Chief Legal Advisor should be consulted.
24. If in Legal Services' assessment, the prosecution does not meet the evidential standard for prosecution, the investigating unit may choose to gather further evidence and refer the case back to Legal Services for re-consideration.
25. In the case of any dispute between Legal Services and the investigating unit as to evidential sufficiency, public interest, or the particular charges to be filed in respect of the file, the Solicitor and the appropriate person from the investigating unit will attempt to resolve the dispute through discussion.
26. If the dispute is not able to be resolved, the final decision will be made by the Chief Legal Advisor, following an independent review of the file. The Chief Legal Advisor may seek external advice from Crown Law or a Crown Solicitor in making this assessment.
27. If a decision is made to prosecute, the Solicitor and the appropriate person in the investigating unit will discuss the proposed charges and come to an agreement about appropriate charges.

Selection of charges

28. If a decision to prosecute is made, then appropriate charges must be selected. This will be done by Legal Services in consultation with the investigating unit.
29. The selection of charges must follow the guidance in the Solicitor-General's Prosecution Guidelines, particularly:
 - (a) The number and nature of charges should reflect the totality of the offending; and
 - (b) Neither the number nor seriousness of charges should be decided by having regard to the impact of that decision on the likelihood of an offer by the defendant to plead guilty to lesser charges.

30. In the case where two different charges under different legislation could apply to the same offence (for example a choice between proceeding under the Gambling Act 2003 or the Crimes Act 1961), consideration should be given to which charge is more suitable in the context of the particular offending (including its nature and seriousness).

Additional requirements for particular types of prosecutions

31. For files from Charities Services, before a prosecution decision is finalised, the file must be certified by a Crown Solicitor as having reasonable grounds for prosecution, in accordance with section 74(2) of the Charities Act 2005. Legal Services will refer the file to the appropriate Crown Solicitor.
32. For files in respect of offences against sections 123 to 129, 131 or 131A of the Films, Videos, and Publications Classification Act 1993, consent of the Attorney General to prosecute is currently required to be obtained prior to charges being filed pursuant to section 144 of that Act. Legal Services will refer the file to Crown Law prior to charges being filed.²
33. For files in respect of offences against the Births, Deaths, Marriages, and Relationships Registration Act 1995, the prior consent of the Registrar-General must be obtained for a prosecution to be initiated.

Conduct of prosecutions

34. All Department of Internal Affairs prosecutions must be conducted by properly qualified legal counsel. Prosecutions may be done by in-house solicitors (for non-Crown prosecutions) or by Crown Solicitors under instruction from Legal Services.
35. Legal Services will conduct the prosecution in consultation with the investigating unit, and will keep the investigating unit informed of progress. The responsibility for instructing Crown Solicitors (including providing instructions throughout the course of a prosecution) remains with Legal Services.
36. All prosecutors appearing for the Department of Internal Affairs must comply with the requirements of the Solicitor-General's Prosecution Guidelines and the relevant rules in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, particularly rule 13.12 which states:

13.12 A prosecuting lawyer must act fairly and impartially at all times and in doing this must—

- (a) comply with all obligations concerning disclosure to the defence of evidence material to the prosecution and the defence; and
- (b) present the prosecution case fully and fairly and with professional detachment; and
- (c) avoid unduly emotive language and inflaming bias or prejudice against an accused person; and
- (d) act in accordance with any ethical obligations that apply specifically to prosecutors acting for the Crown.

² A current Bill before Parliament seeks to repeal section 144. If this provision is repealed, then this paragraph will no longer apply.

Related policies, procedures, standards, guidelines, legislation, and/or websites

37. This policy should be read together with the Solicitor-General's Prosecution Guidelines, available online at crownlaw.govt.nz, and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, available online at legislation.govt.nz.
38. This policy is consistent with, and should be read together with the Regulatory Services Compliance Statement *Minimising Harm, Maximising Benefit – the Department of Internal Affairs' Approach to Compliance and Enforcement 2012* (available at www.dia.govt.nz).
39. This policy will be reviewed by 31 January 2014 and annually thereafter. It will be made available publically on the Department's website.