HAWKE'S BAY
REGIONAL COUNCIL

Hawke's Bay Regional Council Enforcement Policy

February 2018
ISBN 978-0-947499-15-0 HBRC Publication No. 4974

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Compliance

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ISBN 978-0-947499-15-0

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rārangi upoko

INTRODUCTION
tīmatanga kōrero

Local government in New Zealand is responsible for ensuring compliance with a variety of laws and regulations that are aimed at achieving positive community and environmental outcomes.

For Hawke's Bay Regional Council [HBRC] there are a number of obligations relating to implementation of the Resource Management Act [RMA]. The purpose[1] of the RMA is to 'promote sustainable management of our natural and physical resources'.

Hawke's Bay Regional Council needs to meet their obligations to the RMA and community while working within the corporate values[2], and towards the vision[3] and mission of the wider organisation.

These obligations are met by a dedicated group of Environmental officers known as the Resource Use Team who are bound by principles and guidelines particular to that role.

Much of the regulatory business for the Resource Use Team revolves around the monitoring of resource consents issued by HBRC to those in the community seeking to use, or impact on, natural and physical resources. When consents are issued, there are obligations for the Council in respect of monitoring compliance with the respective resource consent conditions.

Many activities within Hawke's Bay are 'permitted' by the Hawke's Bay Regional Resource Management Plan or Coastal Plan. As with consented activities, there is an obligation to monitor compliance with permitted activity rules.

The Resource Use Team also manages an incident response service whereby members of the public can contact the Council on a 24/7 basis if they believe there has been a breach of environmental regulations.

On occasion when a breach has been confirmed there is a requirement to take enforcement action against liable parties using tools available under the RMA. This role can be highly contentious and the subject of much public and judicial scrutiny, the function has to be carried out correctly.

The purpose of this policy is to provide clear guidance to the Hawke's Bay Regional Council as to how our RMA Enforcement obligations are carried out.

[1] Section 5, Resource Management Act 1991
[2] Partnership and collaboration, accountability, transparency, excellence
[3] A healthy environment, a vibrant community and a prosperous economy

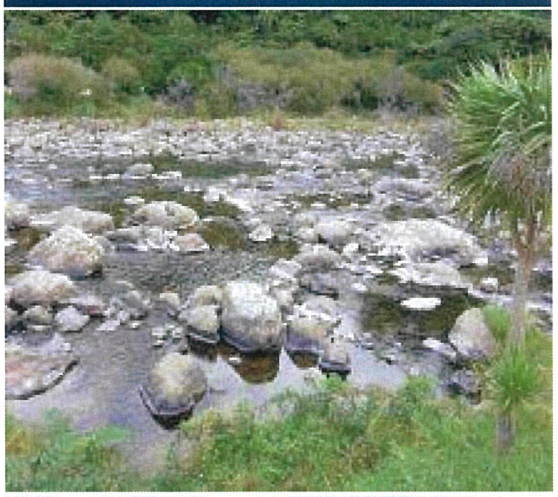
DEFINING THE SCOPE OF THIS POLICY

Hawke's Bay Regional Council has a 'spectrum' approach to encouraging positive behaviour change and ensuing the highest levels of compliance possible.

Hawke's Bay Regional Council's approach to ensuring compliance with the RMA includes the following:

- **Recognition and reward** for those who lead best practice and are seen as exemplar, going above and beyond mere regulation.
- **Education** for those people who are unaware of rules or need reminding of their obligations, and the reasons for those obligations.
- **Supporting industries** to develop best practise and be engaged to encourage compliance, or better, within their peers and own industry,
- **Enforcement** for those people who breach regulation. The RMA provides a number of enforcement tools that can be applied to people who have committed breaches. One of those enforcement tools is prosecution.

THIS POLICY COVERS THE COUNCIL'S ENFORCEMENT ACTIVITIES



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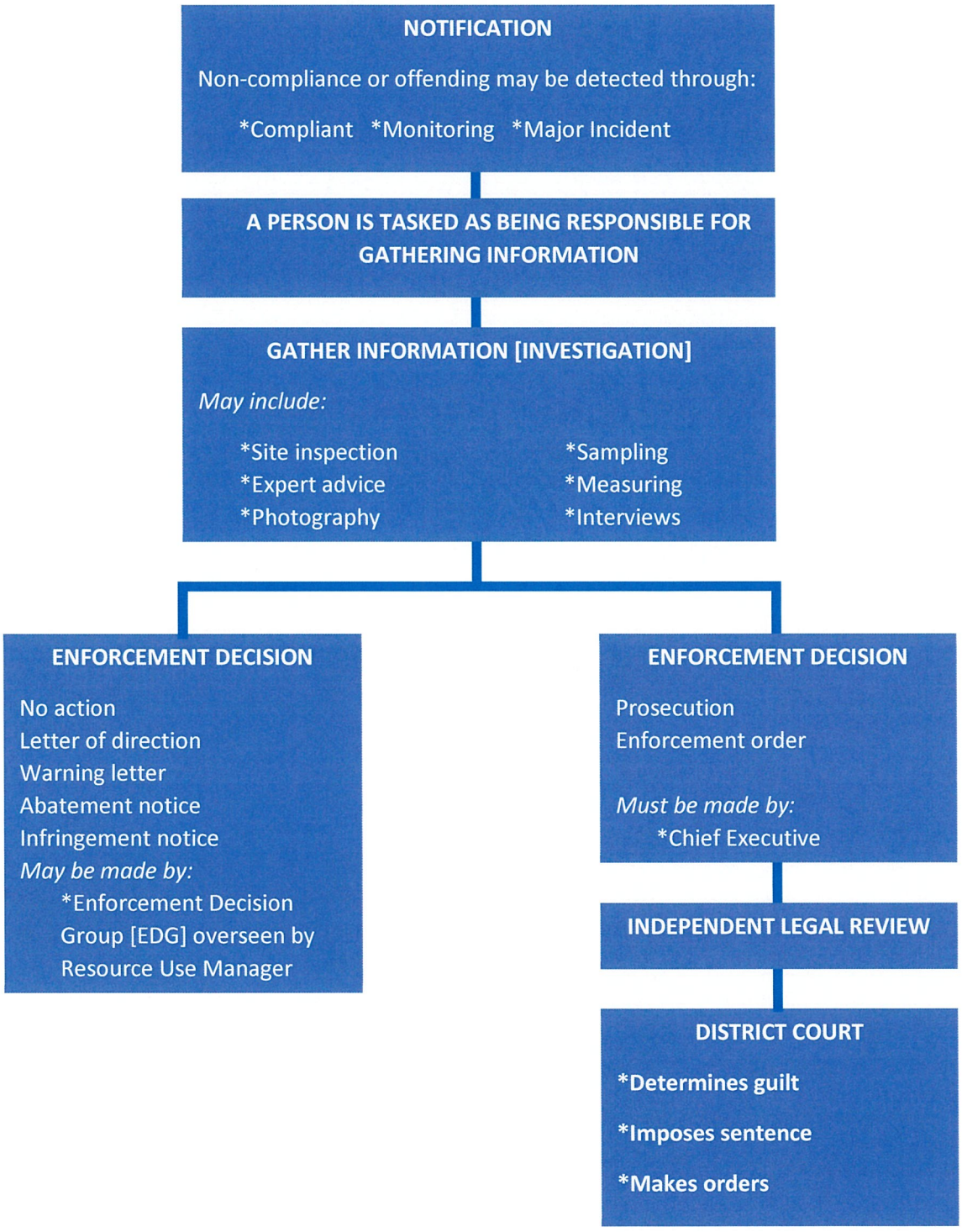

PRINCIPLES AND GUIDELINES

The regulatory enforcement role in New Zealand has clearly established guidelines and principles. Hawke's Bay Regional Council will apply and adhere to these principles[4] when carrying out enforcement activities.

TRANSPARENCY

We will provide clear information and explanation to the community and those being regulated, about the standards and requirements for compliance. We will ensure that the community has access to information about the change to environmental impacts of industry as well as actions taken by us to address environmental issues and non-compliance.

CONSISTENCY OF PROCESS

Our actions will be consistent with the legislation and within our powers. Compliance and enforcement outcomes will be consistent and predictable for similar circumstances. We will ensure that our staff have the necessary skills and are appropriately trained, and that there are effective systems and policies in place to support them.

FAIR, REASONABLE AND PROPORTIONAL APPROACH

We will apply regulatory interventions and actions appropriate for the situation. We will use our discretion justifiably and ensure our decisions are appropriate to the circumstances, and that our interventions and actions will be proportionate to the seriousness of the non-compliance and the risks posed to people and the environment.

EVIDENCE-BASED, INFORMED

We will use an evidence based approach to our decision making. Our decisions will be informed by a range of sources, including sound science, the regulated parties, information received from other regulators, members of the community, industry and interest groups.

COLLABORATIVE

We will work with, and where possible, share information with other regulators and stakeholders to ensure the best compliance outcomes for our region. We will engage with the community, those we regulate, and government to explain and promote environmental requirements, and achieve better community and environmental outcomes.

LAWFUL, ETHICAL AND ACCOUNTABLE

We will conduct ourselves lawfully and impartially in accordance with these principles, relevant policies and guidance. We will document and take responsibility for our regulatory decisions and actions. We will measure and report on our regulatory performance.

TARGETED

We will focus on the most important issues and problems to achieve the best environmental outcomes. We will target our intervention at poor performers and illegal activities that pose the greatest risk to the environment. We will apply the right tool for the right problem at the right time.

RESPONSIVE AND EFFECTIVE

We will consider all alleged non-compliance to determine the necessary interventions and action to minimise impacts on the environment and community and maximise deterrence. We will respond in an effective and timely manner and in accordance with legislative and organisational obligations.

[4] Principles taken directly from the Strategic Compliance Framework authored by the Regional Council Compliance and Enforcement Special Interest Group [CESIG].

CONFLICTS OF INTEREST

Hawke's Bay Regional Council will carry out all of its enforcement functions in accordance with the Conflict of interest Policy [5]

The purpose of this policy is to:

- Create a framework for decision making that avoids actual or perceived conflict of interest
- Minimise the risks where a conflict of interest exists
- Ensure staff are free from any personal, commercial, financial, political or other pressures that might affect their actual or perceived ability to make independent decisions

This policy provides guidance for staff as to where conflict of interest may arise [and therefore how to avoid a conflict of interest] and a mechanism for ensuring that any actual or potential conflict of interest is disclosed and managed appropriately.

[5] SP028 – Staff Policy – Conflict of Interest

GATHERING THE INFORMATION [INVESTIGATION] *te kohinga o te whakaaro [he whakatewhatewha]*

If a breach, or potential breach, of the RMA occurs then information must be gathered about how and why the breach occurred. This information gathering, or investigation, should be welcomed by all parties as its purpose is to establish the truth of what has occurred and enable informed decisions to be made.

The depth and scope of the investigation will be dependent on the seriousness of the incident.

Investigation activities may include:

- Visiting private property to collect information or potential evidence such as samples, photographs, drone footage, measurements or ecological assessments.
- Talking to people about what they know about the incident. People interviewed may be witnesses to an incident or potentially liable parties. These conversations will be recorded in writing or by electronic means.
- For serious matters, interviews will be conducted in line with the requirements of The Evidence Act to ensure fairness[6]

When visiting private property it is vital to respect the rights of the lawful owner or occupier. Council staff must ensure that all entry to private property is done lawfully.

The Chief Executive of the Hawke's Bay Regional Council has the authority to issue staff with warrants of authority[7]. A warranted enforcement officer has the ability to enter private property for the purpose of assessing compliance with environmental regulation.

However, if the officer has reasonable grounds to believe that a breach of the RMA has been carried out on the property, then that warrant is no longer a valid legal access. The High Court[8] has given very clear direction as to when an officer can rely upon their warrant of authority.

Staff must attend specific training [9] and be familiar with all of their statutory obligations before carrying out any enforcement functions.

[6] Section 28(4), Evidence Act 2006
[7] Section 38, RMA
[8] Venning Judgement – Auckland HC – CIV 2003-404-000018
[9] HBRC warranted staff will gather information in keeping with best practise detailed in Basic Investigative Skills for Local Government ISBN 978-0-9922583-0-6 ad attend the Basic Investigative Skills for local government course.

ENFORCEMENT DECISION MAKING ngā ara whakatau

Enforcement of the RMA can be complex. The Act provides potentially large penalties for those who breach however does not offer any guidance as to determining what is serious and what is less so.

For example, a single section of the Act can prohibit activities as diverse as emitting objectionable odour, discharging contaminants into a stream or burying toxic waste inland. Clearly, these have vastly different environmental and community effects.

The Courts have provided helpful guidelines[10] as to what factors are appropriate to consider in RMA cases to determine the seriousness of a breach. It is widely accepted across the regional sector that these are the appropriate factors to consider in enforcement decision making:

Factors to consider when considering enforcement action:

- What were, or are, the actual adverse effects on the environment?
- What were, or are, the potential adverse effects on the environment?
- What is the value or sensitivity of the receiving environment or area affected?
- What is the toxicity of the discharge?
- Was the breach as a result of deliberate, negligent or careless action?
- What degree of due care was taken and how foreseeable was the incident?
- What efforts have been made to remedy or mitigate the adverse effects?
- What has been the effectiveness of those efforts?
- Was there any profit or benefit gained by the alleged offender/s?
- Is this a repeat non-compliance or has there been previous enforcement action taken against the alleged offender/s?
- Was there a failure to act on prior instructions, advice or notice?
- Is there a degree of specific deterrence required in relation to the alleged offender/s?
- Is there a need for a wider general deterrence required in respect of this activity or industry?

It is further considered appropriate to consider the following:

- Was the receiving environment of particular significance to Iwi?
- How does the unlawful activity align with the principles and purposes of the RMA?
- If being considered for prosecution, how does the intended prosecution align with the Solicitor-General's Prosecution Guidelines? **[These guidelines are attached at Appendix A.]**

Not every factor will be relevant every time. On occasion one single factor may be sufficiently aggravating, or mitigating, that it may influence the ultimate decision. It is inappropriate to take a matrix or numerical approach to weighing and balancing these factors. Each case is unique and the individual circumstances need to be considered on each occasion to achieve a fair and reasonable outcome. The discretion to take enforcement action, or not, sits solely with those delegated to make decisions in the regulatory agency.[11]

[10] Machinery Movers Limited v Auckland [1994] 1 NZLR 492 & Selwyn Mews Ltd v Auckland City Council HC Auckland CRI-2003-404-159

[11] New Zealand Law Commission http://www.nzlii.org/nz/other/nzlc/report/R66/R66-5_.html

WHO CAN MAKE THE DECISION?

Taking any kind of enforcement action can have a profound impact on the subject of the action and cannot be taken lightly. Decisions on enforcement action must be based on reliable and correctly obtained information.

For low level breaches, the Manager Resource Use is designated to authorise the issuing of warning letters, formal warnings, infringement notices and abatement notices.

The final decision results from an enforcement decision group [EDG] process. The attending Environmental Officer prepares the EDG documentation and provides a recommendation. The officer then presents the EDG to the Manager Resource Use and a minimum of 1 team leader. There is no limit to the number of officers involved in the EDG meeting and the number may be extended to allow for subject matter experts to attend if required.

Should the EDG determine and recommend a higher level of enforcement, such as a prosecution or an application for an Enforcement Order, they make a recommendation to the Group Manager. Should the Group Manager agree, the recommendation is referred to the Chief Executive who is the only person authorised to make a decision to prosecute. The decision to prosecute is made subject to an independent legal review.

Taking into account the very unique circumstances that can be present in individual cases, and regardless of who makes the decision, it is vital to strive for consistency in decision making.

Independence of the decision is paramount.
"In practice in New Zealand the independence of the prosecutor refers to freedom from undue or improper pressure from any source, political or otherwise"[12]

[12] Solicitor General's Prosecution Guidelines, 1 July 2013, Article 4.2

INDEPENDENT LEGAL REVIEW

The independent legal review considers the matter I its entirety. The review applies two tests: the evidential test and the public interest test. These tests are separately considered and must both be satisfied before a prosecution is initiated.

THE EVIDENTIAL TEST

The evidential test for prosecution requires a legal assessment of whether:

- The evidence relates to an identifiable person [whether natural or legal]
- The evidence is credible
- The Council can produce the evidence before the Court and it is likely it will be admitted by the Court
- The evidence can reasonably be expected to satisfy an impartial jury [or Judge], beyond a reasonable doubt, that the individual has committed a criminal offence; the individual has given any explanations and, if so, whether the Court is likely to find the explanations credible in light of the evidence as a whole
- There is any other evidence the Council should seek out which may support or detract from the case

Once it has been established that there is sufficient evidence to provide a reasonable prospect of conviction, the test for prosecution requires a consideration of whether the public interest requires a criminal prosecution.

THE PUBLIC INTEREST TEST

The second part of the test is important for ensuring that the discretion to prosecute is exercised in accordance with the rule of law and any relevant statutory requirements.

WHO SHOULD CONDUCT THIS REVIEW?

As a local authority Hawke's Bay Regional Council is free to choose its legal representatives in enforcement matters. In the main, a local experienced barrister is used for this purpose. On occasions we will seek legal advice from other practitioners usually a law firm in the Crown Solicitor network with extensive RMA Enforcement expertise.

ENFORCEMENT OPTIONS
ngā ara whakatikatika

The 'compliance pyramid: [13] is a widely used model for achieving positive behavioral change. At the bottom of the pyramid are those who are willing to comply – at the top are those that resist compliance. The pyramid is designed to create downward pressure – that is, to move non-compliant individuals or organisations down the pyramid to full compliance and to where lower level and less costly interventions can be utilised.

The most severe response is reserved for the most serious breach

[13] Adapted from Ian Ayres & John Braithwaite [1992], Responsive Regulation: Transcending the deregulation debate, Oxford University Press, New York.

The RMA and case law provide the formal enforcement tools that are available to deal with breaches of the RMA. It is important to ensure these tools are applied consistently across the myriad of activities and resource use across the region.

Enforcement tools can be categorised into two main functions. **Directive** actions are about looking forward and giving direction to right the wrong. **Punitive** actions are about looking back and holding people accountable for what they have done.

These actions are described in more detail in the following diagrams.

DIRECTIVE ACTIONS

ACTION	DESRIPTION OF ACTION	POTENTIAL IMPACTS ON THE LIABLE PARTY	WHEN MIGHT THIS ACTION BE APPROPRIATE?
Letter of direction	To prevent further breaches or to remedy or mitigate the effects of non-compliance, Council can give a written direction for a party to take or cease a particular action	Such a direction is not legally enforceable	Letter of directions should be reserved for dealing with cooperative parties, who are motivated to follow the direction, and where the breach is of a minor nature, consistent with a breach that would perhaps also receive a formal warning
Abatement notice	An abatement notice is a formal, written directive. It is drafted and served by Council instructing an individual or company to cease an activity, prohibit them from commencing an activity or requiring them to do something. The form, content and scope of an abatement notice are prescribed in statute	A direction given through an abatement notice is legally enforceable To breach an abatement notice is to commit an offence against the RMA and make parties open to punitive actions	An abatement notice may be appropriate any time that there is a risk of further breaches of environmental regulation or remediation or mitigation is required as a result of non-compliance
Enforcement order	Like an abatement notice, an enforcement order can direct a party to take particular action. However, an application for an enforcement order must be made to the Environment Court or during the course of a RMA prosecution	A direction given through an enforcement order is legally enforceable To breach an enforcement order is to commit an offence against the RMA and make liable parties open to punitive actions	An application for an enforcement order may be appropriate any time there is a risk of further breaches of environmental regulation, or remediation or mitigation is required as a result of non-compliance

It is important to note that for every directive action there should be a corresponding punitive action.

PUNITIVE ACTIONS

ACTION	DESRIPTION OF ACTION	POTENTIAL IMPACTS ON THE LIABLE PARTY	WHEN MIGHT THIS ACTION BE APPROPRIATE?
	A formal warning is documented by way of a letter to a culpable party informing them that an offence against the RMA has been committed, and that they are liable	No further action will be taken in respect of that breach. However, the warning forms part of a history of non-compliance and will be considered if there are future incidents of non-compliance	A formal warning may be given when: • An administrative, minor or technical breach has occurred; and • The environmental effect, or potential environmental effect, is minor or trivial in nature; and • The subject does not have a history of non-compliance; and • The matter is one which can be quickly and simply put right; or • A written warning would be appropriate in the circumstances
	An infringement notice is a written notice which requires the payment of a fine. The amount of the fine is set in law. Depending on the breach the fine will be between $300 and $1,000	No further action will be taken in respect of that breach. However, if the infringement notice forms part of the history of non-compliance and will be considered if there are future incidents of non-compliance	An infringement notice may be issued when: • There is prima facie [on the face of it] evidence of a legislative breach; and • A one-off or isolated legislative breach has occurred which is of minor impact and which can be remedied easily; and • Where an infringement notice is considered to be a sufficient deterrent
	A prosecution is a process taken through the criminal courts to establish guilt or innocence and, if appropriate, the Court will impose sanctions RMA matters are heard by a District Court Judge who is also warranted as an Environment Judge All criminal evidential rules and standards must be me in an RMA prosecution Most RMA offences carry a penalty of up to 2 years imprisonment, or $300,000 fine for a natural person or fine up to $600,000 for a company	A successful prosecution will generally result in a conviction and a penalty imposed A prosecution forms part of the history of non-compliance and will be considered if there are future incidents of non-compliance	A prosecution may be considered appropriate when the factors listed in this policy indicate that the matter is sufficiently serious to warrant the intervention of the criminal law

APPENDIX A
āpitihanga A

SOLICITOR-GENERAL'S PROSECUTION GUIDELINES [2013]

Hawke's Bay Regional Council will adhere to the standards of good criminal prosecution practise expressed in the *Solicitor General's Prosecution Guidelines [2013]*[14]. The Council's criminal prosecutions are conducted by external lawyers, on the Council's behalf, and the *Solicitor General's Prosecution Guidelines [2013]* and the *Media Protocol for Prosecutors* [Crown Law, 2013][15] while not binding on local authorities, represent best practice.

[14] http://www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/prosecution-guidelines-2013.pdf

[15] http://www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/media-protocol-2013.pdf

CROWN LAW

SOLICITOR-GENERAL'S PROSECUTION GUIDELINES

As at 1 July 2013

Te Tari Ture o te Karauna
Crown Law

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ATTORNEY-GENERAL'S INTRODUCTION

1. Under our constitutional arrangements, the Attorney-General is responsible through Parliament to the citizens of New Zealand for prosecutions carried out by or on behalf of the Crown. In practice, however, the prosecution process is superintended by the Solicitor-General, who, pursuant to s 9A of the Constitution Act 1986, shares all the relevant powers vested in the office of the Attorney-General. These arrangements have renewed force with the codification of the Solicitor-General's responsibility for public prosecutions in s 185 of the Criminal Procedure Act 2011.

2. Unlike most similar jurisdictions, New Zealand has no centralised decision-making agency in relation to prosecution decisions. In respect of Crown prosecutions, prosecutions are mainly conducted by Crown Solicitors – private practitioners appointed to prosecute under a warrant issued by the Governor-General. Other prosecutions are conducted by the New Zealand Police and numerous other enforcement agencies that are responsible for enforcing a particular regulatory area. Notably, the 2011 *Review of Public Prosecution Services* did not recommend any fundamental change to these arrangements.

3. The absence of a central decision-making process underscores the importance of comprehensive guidelines, and the acceptance of core prosecution values. The *Review of Public Prosecution Services* also reiterated the important role the Solicitor-General's Prosecution Guidelines play in setting core and unifying standards for the conduct of public prosecutions. The revised Guidelines reinforce the expectations that the Solicitor-General and I have of all prosecutors who prosecute on behalf of the State.

4. New Zealand is fortunate to be served by a public prosecution service that is professional, open, fair and responsible. These standards will continue through the day-to-day adherence to the values reflected in these Guidelines.

Hon Christopher Finlayson QC
Attorney-General

SOLICITOR-GENERAL'S INTRODUCTION

1. New Zealand's public prosecution system is in the midst of significant change. The Criminal Procedure Act 2011 changes the way criminal cases proceed through the courts and imposes new obligations on all parties to conduct cases in a different way. Fiscal restraints have forced Crown Solicitors and prosecuting agencies to consider how to maintain fundamental prosecutorial standards with more limited resources.

2. Notwithstanding this significant change, the essentials of good prosecution practice remain the same. This is reflected in these revised Guidelines which, in large part, continue to reflect the core principles established by the 2010 Guidelines. The revisions that have been made are largely those that are required to address the findings of the 2011 *Review of Public Prosecution Services* and to provide new guidance in light of the changes made by the Criminal Procedure Act 2011.

3. Revisions to reflect the *Review of Public Prosecution Services* include those that aim to reinforce the Solicitor-General's oversight of all public prosecutions. That oversight role is codified for the first time in the Criminal Procedure Act. A key way in which oversight is discharged is through these Guidelines, which apply more explicitly to government agencies than past versions. Other revisions to reflect the Criminal Procedure Act include guidance on the approach prosecutors should take to the Act's case management process, including charge discussions, and revised guidance on appeals.

4. As noted by the Attorney-General in his introduction, the promulgation of these Guidelines is an important unifying force in light of the diversity of New Zealand's prosecution arrangements. I am confident that adherence to these Guidelines by prosecutors will maintain a high quality public prosecution service which has the confidence of the public, the judiciary and the legal profession now and into the future.

Michael Heron QC
Solicitor-General

DEFINITIONS

Attorney-General:	The senior Law Officer of the Crown appointed under warrant by the Governor-General.
Solicitor-General:	The junior Law Officer of the Crown appointed under warrant by the Governor-General pursuant to the Royal Prerogative.
Law Officers:	The Attorney-General and the Solicitor-General.
Crown Solicitors:	Those who hold the warrant of Crown Solicitor for the following regions: • Auckland; • Christchurch; • Dunedin; • Gisborne; • Hamilton; • Invercargill; • Napier; • New Plymouth; • Palmerston North; • Rotorua; • Tasman; • Tauranga; • Timaru; • Wanganui; • Wellington; • Whangarei.
Crown prosecutor:	A Crown Solicitor or a lawyer representing a Crown Solicitor; or any other lawyer employed or instructed by the Solicitor-General to conduct a Crown prosecution.
Crown prosecution:	A prosecution of a kind specified in the Crown Prosecution Regulations 2013, and which must be conducted by the Solicitor-General or a Crown prosecutor.
Public prosecution:	A prosecution for an offence that is commenced by or on behalf of the Crown, including a prosecution commenced by a Crown entity as defined in the Crown Entities Act 2004.
Government agencies:	All departments listed in Schedule 1, State Sector Act 1988 and Crown entities as defined in the Crown Entities Act 2004 who have the ability to commence and conduct prosecutions, and the New Zealand Police.
New Zealand Police:	Includes all employees of the New Zealand Police, regardless of whether they are constables as defined in the Policing Act 2008.
Enforcement agencies:	Includes government agencies.

1. PURPOSE AND PRINCIPLES OF THE GUIDELINES

1.1 The purpose of these Guidelines is to ensure that the principles and practices as to prosecutions in New Zealand are underpinned by core prosecution values. These values aim to achieve consistency and common standards in key decisions and trial practices. If these values are adhered to, New Zealand will continue to have prosecution processes that are open and fair to the defendant, witnesses and the victims of crime, and reflect the proper interests of society.

1.2 Compliance with these Guidelines is expected in respect of public prosecutions and Crown prosecutions. However, the Guidelines are intended to assist all those persons whose function it is to enforce the criminal law by instituting and conducting a criminal prosecution. Specifically these Guidelines are intended to assist in determining:

1.2.1 Whether criminal proceedings should be commenced;

1.2.2 What charges should be filed;

1.2.3 Whether, if commenced, criminal proceedings should be continued or discontinued.

And to:

1.2.4 Provide guidance for the conduct of criminal prosecutions; and,

1.2.5 Establish standards of conduct and practice that the Law Officers expect from those whose duties include conducting prosecutions.

1.3 The Guidelines reinforce the expectation of the Law Officers and the Courts that a prosecutor will act in a manner that is fundamentally fair, detached and objective. The prosecutor should act to foster a rational trial process, not one based on emotion or prejudice.

2. COMPLIANCE WITH THE GUIDELINES

2.1 All public prosecutions and Crown prosecutions, whether conducted by Crown prosecutors, government agencies or instructed counsel, should be conducted in accordance with these Guidelines.

2.2 Adherence to the Guidelines is also a condition of the warrant held by each Crown Solicitor.

2.3 The Guidelines are not an instruction manual for prosecutors, nor do they cover every decision that must be made by prosecutors and enforcement agencies. They do not purport to lay down any rule of law. They instead reflect the aspirations and practices of prosecutors who adhere to the United Nations Guidelines on the Role of the Prosecutor (1990) and the International Association of Prosecutors Standards (1999).

Private prosecutions

2.4 Private prosecutions are recognised in and regulated by the Criminal Procedure Act 2011 and related legislation such as the Criminal Disclosure Act 2008.

2.5 The Solicitor-General has only a limited role or authority in relation to private prosecutions, for example when the power to stay a prosecution is exercised or there is a statutory requirement that a prosecutor obtains the Solicitor-General's consent. However, the Solicitor-General expects law practitioners conducting a private prosecution to adhere to the Law Society's general rules of professional conduct and to all relevant principles in these Guidelines.

3. THE SUPERVISION OF PROSECUTIONS

3.1 Section 185 of the Criminal Procedure Act 2011 codifies the Solicitor-General's long-standing responsibility to maintain general oversight of the conduct of public prosecutions. The discharge of this duty includes the issuing and maintenance of these Guidelines, and the provision of general advice and guidance to government agencies as required.

3.2 In respect of prosecutions by government departments to which the *Cabinet Directions for the Conduct of Crown Legal Business 2012* apply, the Solicitor-General retains oversight of legal services provided by Crown Solicitors, departmental lawyers or other instructed counsel and may direct the manner in which those services are provided.

3.3 The Solicitor-General's supervision of Crown prosecutions is more direct. The Solicitor-General must assume responsibility for and conduct every Crown prosecution from the time or stage prescribed in the Crown Prosecution Regulations 2013. A Crown prosecution must be conducted by a Crown prosecutor (ordinarily a Crown Solicitor or counsel employed in the Crown Solicitor's practice) in accordance with any directions given by the Solicitor-General (either generally or in the particular case).

3.4 In relation to most practical matters, the relationship between the Solicitor-General and a Crown Solicitor is based on the *Terms of Office* as well as practice and convention. While a Crown Solicitor is subject to any directions given by the Solicitor-General in respect of a Crown prosecution, it is the expectation of the Law Officers that opinions of the Solicitor-General in relation to all matters within the province of a Crown Solicitor will be respected and complied with and, in the case of Crown prosecutions, without resort to formal directions.

3.5 As a matter of practice, government agencies conducting prosecutions and Crown prosecutors (ordinarily a Crown Solicitor) are expected to inform the Solicitor-General or Deputy Solicitor-General (Criminal) of any matter which ought to be communicated to those offices. Without limiting the expectation, this will cover any matter of general public or legal importance or which gives rise to substantial or new forms of legal risk.

3.6 Section 176 of the Criminal Procedure Act 2011 recognises the common law right of the Attorney-General to intervene in the prosecution process and to stay a prosecution. The Solicitor-General may also exercise that power in accordance with s 9A of the Constitution Act 1986. Implicit in the Law Officers' ability to stay a prosecution is an ability to direct the manner in which a prosecution is to be conducted in order to avoid the need for the prosecution to be stayed.

4. THE INDEPENDENCE OF THE DECISION-MAKER

4.1 The universally central tenet of a prosecution system under the rule of law in a democratic society is the independence of the prosecutor from persons or agencies that are not properly part of the prosecution decision-making process.

4.2 In practice in New Zealand, the independence of the prosecutor refers to freedom from undue or improper pressure from any source, political or otherwise. All government agencies should ensure the necessary processes are in place to protect the independence of the initial prosecution decision.

5. THE DECISION TO PROSECUTE

The Test for Prosecution

5.1 Prosecutions ought to be initiated or continued only where the prosecutor is satisfied that the Test for Prosecution is met. The Test for Prosecution is met if:

5.1.1 The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and

5.1.2 Prosecution is required in the public interest – the Public Interest Test.

5.2 Each aspect of the test must be separately considered and satisfied before a decision to prosecute can be taken. The Evidential Test must be satisfied before the Public Interest Test is considered. The prosecutor must analyse and evaluate all of the evidence and information in a thorough and critical manner.

The Evidential Test

5.3 A reasonable prospect of conviction exists if, in relation to an identifiable person (whether natural or legal), there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence.

5.4 It is necessary that each element of this definition be fully examined when considering the evidential test in each particular case.

Element	Description
Identifiable individual	There will often be cases where it is clear that an offence has been committed but there is difficulty identifying who has committed it. A prosecution can only take place where the evidence sufficiently identifies that a particular person is responsible. Where no such person can be identified, and the case cannot be presented as joint liability there can be no prosecution.

Element	Description
Credible evidence	This means evidence which is capable of belief. It *may* be necessary to question a witness before coming to a decision as to whether the evidence of that witness could be accepted as credible. It may be that a witness is plainly at risk of being so discredited that no Court could safely rely on his/her evidence. In such a case it may be concluded that there is, having regard to all the evidence, no reasonable prospect of obtaining a conviction. If, however, it is judged that a Court in all the circumstances of the case could reasonably rely on the evidence of a witness, notwithstanding any particular difficulties, then such evidence is credible and should be taken into account. Prosecutors may be required to make an assessment of the quality of the evidence. Where there are substantial concerns as to the creditability of essential evidence, criminal proceedings may not be appropriate as the evidential test may not be capable of being met. Where there are credibility issues, prosecutors must look closely at the evidence when deciding if there is a reasonable prospect of conviction.
Evidence which the prosecution can adduce	Only evidence which is or reliably will be available, and legally admissible, can be taken into account in reaching a decision to prosecute. Prosecutors should seek to anticipate even without pre-trial matters being raised whether it is likely that evidence will be admitted or excluded by the Court. For example, is it foreseeable that the evidence will be excluded because of the way it was obtained? If so, prosecutors must consider whether there is sufficient other evidence for a reasonable prospect of conviction.
Could reasonably be expected to be satisfied	What is required by the evidential test is that there is an objectively reasonable prospect of a conviction on the evidence. The apparent cogency and creditability of evidence is not a mathematical science, but rather a matter of judgment for the prosecutor. In forming his or her judgment the prosecutor shall endeavour to anticipate and evaluate likely defences.
Beyond reasonable doubt	The evidence available to the prosecutor must be capable of reaching the high standard of proof required by the criminal law.

Element	Description
Commission of a criminal offence	This requires that careful analysis is made of the law in order to identify what offence or offences may have been committed and to consider the evidence against each of the ingredients which establish the particular offence.

The Public Interest Test

5.5 Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of conviction, the next consideration is whether the public interest requires a prosecution. It is not the rule that all offences for which there is sufficient evidence must be prosecuted. Prosecutors must exercise their discretion as to whether a prosecution is required in the public interest.

5.6 In a time honoured statement made in 1951 Sir Hartley Shawcross QC MP, the then United Kingdom Attorney-General, made the following statement to Parliament in relation to prosecutorial discretion:

> "It has never been the rule in this country ... that suspected criminal offences must automatically be the subject of prosecution."

5.7 Broadly, the presumption is that the public interest requires prosecution where there has been a contravention of the criminal law. This presumption provides the starting point for consideration of each individual case. In some instances the serious nature of the case will make the presumption a very strong one. However, prosecution resources are not limitless. There will be circumstances in which, although the evidence is sufficient to provide a reasonable prospect of conviction, the offence is not serious and prosecution is not required in the public interest. Prosecutors for instance should positively consider the appropriateness of any diversionary option (particularly if the defendant is a youth).

5.8 The following section lists some public interest considerations for prosecution which may be relevant and require consideration by a prosecutor when determining where the public interest lies in any particular case. The following list is illustrative only.

Public interest considerations for prosecution

5.8.1 The predominant consideration is the seriousness of the offence. The gravity of the maximum sentence and the anticipated penalty is likely to be a strong factor in determining the seriousness of the offence;

5.8.2 Where the offence involved serious or significant violence;

5.8.3 Where there are grounds for believing that the offence is likely to be continued or repeated, for example, where there is a history of recurring conduct;

5.8.4 Where the defendant has relevant previous convictions, diversions or cautions;

5.8.5 Where the defendant is alleged to have committed an offence whilst on bail or subject to a sentence, or otherwise subject to a Court order;

5.8.6 Where the offence is prevalent;

5.8.7 Where the defendant was a ringleader or an organiser of the offence;

5.8.8 Where the offence was premeditated;

5.8.9 Where the offence was carried out by a group;

5.8.10 Where the offence was an incident of organised crime;

5.8.11 Where the victim of the offence, or their family, has been put in fear, or suffered personal attack, damage or disturbance. The more vulnerable the victim, the greater the aggravation;

5.8.12 Where the offender has created a serious risk of harm;

5.8.13 Where the offence has resulted in serious financial loss to an individual, corporation, trust person or society;

5.8.14 Where the defendant was in a position of authority or trust and the offence is an abuse of that position;

5.8.15 Where the offence was committed against a person serving the public, for example a doctor, nurse, member of the ambulance service, member of the fire service or a member of the police;

5.8.16 Where the defendant took advantage of a marked difference between the actual or developmental ages of the defendant and the victim;

5.8.17 Where the offence was motivated by hostility against a person because of their race, ethnicity, gender, sexual orientation, disability, religion, political beliefs, age, the office they hold, or similar factors;

5.8.18 Where there is any element of corruption.

5.9 The following section lists some public interest considerations against prosecution which may be relevant and require consideration by a prosecutor when determining where the public interest lies in any particular case. The following list is illustrative only.

Public interest considerations against prosecution

5.9.1 Where the Court is likely to impose a very small or nominal penalty;

5.9.2 Where the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by an error of judgement or a genuine mistake;

5.9.3 Where the offence is not on any test of a serious nature, and is unlikely to be repeated;

5.9.4 Where there has been a long passage of time between an offence taking place and the likely date of trial such as to give rise to undue delay or an abuse of process unless:

- the offence is serious; or
- delay has been caused in part by the defendant; or
- the offence has only recently come to light; or
- the complexity of the offence has resulted in a lengthy investigation.

5.9.5 Where a prosecution is likely to have a detrimental effect on the physical or mental health of a victim or witness;

5.9.6 Where the defendant is elderly;

5.9.7 Where the defendant is a youth;

5.9.8 Where the defendant has no previous convictions;

5.9.9 Where the defendant was at the time of the offence or trial suffering from significant mental or physical ill-health;

5.9.10 Where the victim accepts that the defendant has rectified the loss or harm that was caused (although defendants should not be able to avoid prosecution simply because they pay compensation);

5.9.11 Where the recovery of the proceeds of crime can more effectively be pursued by civil action;

5.9.12 Where information may be made public that could disproportionately harm sources of information, international relations or national security;

5.9.13 Where any proper alternatives to prosecution are available (including disciplinary or other proceedings).

5.10 These considerations are not comprehensive or exhaustive. The public interest considerations which may properly be taken into account when deciding whether the public interest requires prosecution will vary from case to case. In regulatory prosecutions, for instance, relevant considerations will include an agency's statutory objectives and enforcement priorities.

5.11 Cost is also a relevant factor when making an overall assessment of the public interest. In each case where the evidential test has been met, the prosecutor will weigh the relevant public interest factors that are applicable. The prosecutor will then determine whether or not the public interest requires prosecution.

No prosecution

5.12 If the prosecutor decides that there is insufficient evidence or that it is not in the public interest to prosecute, a decision of "no prosecution" will be taken.

5.13 A decision of "no prosecution" does not preclude any further consideration of a case by the prosecutor, if new and additional evidence becomes available, or a review of the original decision is required. It is anticipated that such a step will be rare.

6. REASONS FOR DECISIONS

6.1 Subject to considerations contained in the "Media Protocol for Prosecutors" (referred to at Guideline 30), in any case of significant public interest, the Crown Solicitor or a senior manager of the relevant government agency may if he or she sees fit, issue a statement giving broad reasons why a decision to prosecute or not to prosecute was made.

6.2 This step may also be taken by a Crown Solicitor in relation to a stay of proceedings or application to dismiss a charge under s 147 of the Criminal Procedure Act 2011 or a decision to offer no evidence.

6.3 The Solicitor-General should be consulted before any statements are issued by a Crown Solicitor.

7. REOPENING A PROSECUTION DECISION

7.1 People should be able to rely on decisions taken by prosecutors. Normally, if a prosecutor tells a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped, that is the end of the matter and the case will not start again.

7.2 Occasionally there are special reasons where a prosecutor will restart the prosecution where that course is available under the applicable law, particularly if the case is serious.

7.3 These reasons include:

7.3.1 Rare cases where a reassessment of the original decision shows that it was wrong and should not be allowed to stand;

7.3.2 Cases which are stopped so that more evidence which is likely to become available in the near future can be collected and prepared. In these cases, the prosecutor will tell the defendant that the prosecution may well start again; and

7.3.3 Cases which are stopped because of a lack of evidence but where more significant evidence is discovered later.

8. THE CHOICE OF CHARGES

8.1 The nature and number of the charges filed should adequately reflect the criminality of the defendant's conduct as disclosed by the facts to be alleged at trial. The charges may be representative where the criteria under s 20 of the Criminal Procedure Act 2011 are made out.

8.2 The number or seriousness of charges should not be inflated to increase the likelihood of an offer by the defendant to plead guilty to lesser charges.

Trying defendants or charges together

8.3 Filing unnecessary additional charges or joining defendants who have played a minor role to major alleged offenders in large multi-defendant trials is not in the public interest.

8.4 The prosecutor should ensure that the number of charges, whether or not arising from the same or related criminal acts, is truly necessary to properly reflect the criminality of the defendant's alleged conduct.

8.5 The same principle should be applied to decisions about the number of people to be prosecuted in relation to any given event. Charges against multiple defendants should be filed only where that is necessary to put the full picture before the fact-finder, or the person charged has played more than a minor role in the offending.

8.6 In decisions both as to the number of charges or number of defendants, the prosecutor should take into account the cost of prosecuting multiple charges and defendants in proportion to the seriousness of the offending and any likely sentence. Such decisions should be made as early in the prosecution as possible.

9. REVIEW OF CHARGES

9.1 Wherever necessary and practicable, the charges to be filed should be reviewed by a senior prosecutor.

9.2 Once charges have been filed, and before trial, the prosecutor should review the charges to determine whether those are the charges that should be prosecuted or whether:

9.2.1 Any of the charges should be amended to bring them into conformity with the evidence available;

9.2.2 Other charges should be added; and

9.2.3 Any charges should be withdrawn (because, for example, they are no longer considered necessary in the public interest, or are not adequately supported by the evidence).

9.3 When the Solicitor-General or Crown prosecutor assumes responsibility for a Crown prosecution, he or she should undertake an independent review of the charges. There is a limited opportunity to amend or withdraw existing charges in Crown prosecutions without obtaining the leave of the Court, or to add new charges without filing a charging document. It is for the Solicitor-General or the Crown prosecutor to decide what of the original charges should remain, be amended or withdrawn, and what additional charges are required. The charges should be founded on the available evidence, and should reasonably reflect the criminality disclosed on the evidence.

10. COORDINATION OF PROSECUTION DECISIONS

10.1 Government agencies should respond to criminal behaviour in a coordinated way. When determining whether to commence a prosecution, the prosecutor should consider any existing or likely prosecution of the defendant (or other proceedings against the defendant) by another government agency. If a prosecution is proposed to be commenced under a specific regulatory statute, consultation with the agency administering that statute is appropriate.

11. STATUTORY CONSENTS TO PROSECUTIONS

11.1 There are numerous offences that can only be prosecuted with the consent of the Attorney-General. In practice this function is almost always undertaken by the Solicitor-General. Often, where offences may touch on matters of security or involve foreign relations or international treaty obligations, consent is required to ensure that the circumstances of the prosecution accord with the statutory purpose of the Act. The offence of bribery in relation to a Member of Parliament requires the consent of a High Court judge.

11.2 The process for recording consent is set out in s 24 of the Criminal Procedure Act 2011. Prosecutors seeking the Attorney-General's consent should provide a draft copy of the charging documents and sufficient material to allow the Solicitor-General to properly consider the evidence and relevant circumstances of the alleged offence.

12. IMMUNITIES FROM PROSECUTION

12.1 On occasions the prosecution case will depend upon the evidence of an accomplice or participant in an offence in order to proceed against a defendant considered to be more culpable or a greater risk to public safety.

12.2 Unless that potential witness has already been charged and sentenced he or she may be justified in declining to give evidence on the grounds of self-incrimination.

12.3 In such a case it will be necessary for the prosecutor to consider giving the witness immunity from prosecution. Immunity takes the form of a written undertaking from the Solicitor-General to exercise the power to stay if the witness is prosecuted for nominated offences. It thus protects the witness from both public and private prosecutions.

12.4 The only person able to give such an undertaking is the Solicitor-General.

12.5 The only purpose in giving immunity is to enable the prosecutor to use otherwise unavailable evidence.

12.6 Immunities are to be used sparingly and only in cases where it is demonstrably clear that without the evidence given under immunity the prosecution case is unlikely to succeed, or there is a risk it will be significantly weakened.

12.7 Before agreeing to give immunity, the Solicitor-General will almost invariably need to be satisfied of at least the following matters:

12.7.1 That the offence in respect of which the evidence is to be given is serious;

12.7.2 That there are no other reasonably available avenues of gaining sufficient evidence to bring a successful prosecution other than relying upon the evidence to be given under immunity;

12.7.3 That the evidence to be given under immunity is admissible, relevant and significantly strengthens the prosecution case;

12.7.4 That the witness, while having committed some identifiable offence, is not an equal or greater risk to the public safety than the person to be tried;

12.7.5 That the evidence to be given under immunity is apparently credible and, preferably, supported by other admissible material;

12.7.6 That no inducement, other than the possibility of an immunity, has been suggested to the witness; and

12.7.7 That admissible evidence exists, sufficient to charge the witness with the offences he or she is believed to have committed.

12.8 The formal opinion of the senior prosecutor (almost invariably the Crown Solicitor) regarding the merits of the immunity will be required.

12.9 The witness who is to testify under immunity should provide a brief of the evidence he or she is to give. That person should be advised that they should seek independent legal advice, the reasonable cost of which will be met by the prosecution. The witness should be advised that should the application for immunity be declined the brief of evidence and any other information obtained from that person in connection with a promise to apply for immunity cannot be used against that person by the prosecution. The brief of evidence will be subject to the ordinary rules of disclosure.

13. DIRECTION BY THE SOLICITOR-GENERAL THAT A PROSECUTION SHOULD BE CONDUCTED AS A CROWN PROSECUTION

13.1 Under regulation 4 of the Crown Prosecution Regulations 2013, the Solicitor-General may direct that, having regard to the particular features of the proceeding, the proceeding should be conducted as a Crown prosecution.

13.2 A direction will only be issued in the rare case where the Solicitor-General's direct oversight of a prosecution is required. Features of a prosecution that may indicate a direction under regulation 4 is appropriate include where:

13.2.1 The prosecution is for an offence that is so serious that it should be prosecuted by the Crown in the public interest;

13.2.2 The prosecution is of an alleged offender whose criminal history is so serious that the offence should be prosecuted by the Crown in the public interest;

13.2.3 The prosecution raises complex or novel legal principles;

13.2.4 The prosecution raises issues that require the advocacy or independence of the Crown;

13.2.5 The prosecution involves matters which are of particular general or public importance;

13.2.6 A prosecution for the offence is rare or novel;

13.2.7 The nature of the evidence and/or the characteristics of witnesses require specialist prosecution skills; or

13.2.8 The prosecution involves highly sensitive and/or confidential Crown/government information and/or raises issues of national security.

13.3 Consideration of whether a direction is appropriate may be at the instigation of the prosecuting agency or the Solicitor-General.

14. WITNESS ANONYMITY ORDERS

14.1 All applications for witness anonymity orders by an enforcement agency must have the prior approval of the Solicitor-General.

14.2 When the application is made the Solicitor-General should be provided with material from the person in relation to whom the order is sought; either in statement or affidavit form, explaining that person's perception of the likely danger to them or the risk of serious damage to property. That statement should be accompanied by a report from the Police as to the likelihood of danger, or serious damage to property and with an opinion from or through a Crown Solicitor as to the application of ss 110(4)(a) or 112(4) of the Evidence Act 2006.

15. BAIL

15.1 Generally, matters relating to bail are codified in the Bail Act 2000. In addition s 24(b) of the New Zealand Bill of Rights Act 1990 provides that those who are charged with criminal offences shall be released on reasonable terms and conditions unless there is just cause for continued detention.

15.2 The core principles in relation to whether to remand the defendant in custody or order release on bail are found in s 8 of the Bail Act 2000.

15.3 Prosecutors opposing bail should base their opposition only on factors relevant to bail and on the basis of credible, cogent and relevant information.

15.4 Where, by virtue of s 8(2)(b) of the Bail Act 2000 the issue of bail involves the strength of the prosecution case, prosecutors should pay special attention to s 20(2) of that Act.

15.5 In accordance with s 30 of the Victims' Rights Act 2002, prosecutors should make all reasonable efforts to ensure any views of the victim are put before the Court where an application for bail is made by a defendant charged with a specified offence under s 29.

15.6 Prosecutors should take account of the *Bail Practice Note (Bail Act 2000)* of 7 February 2002 issued by the Chief District Court Judge which details the Court's expectations of prosecutors.

15.7 Crown prosecutors appear on bail matters in two different capacities. If the prosecution is not a Crown prosecution, they may appear on instructions from the agency that commenced the proceeding. If the prosecution is a Crown prosecution, the Crown prosecutor appears as the prosecutor.

15.8 In both capacities the Crown prosecutor should seek and be cognisant of the views of the agency that commenced the proceeding as to any bail risks presented by the defendant, however, the ultimate decision as to what will be said to the Court about eligibility for bail is the responsibility of the Crown prosecutor. This is not incompatible with the role of that agency whose legitimate views as to bail are to be placed before the Court.

16. DISCLOSURE

Disclosure obligations

16.1 Proper disclosure is central to preventing wrongful convictions. Under the Criminal Disclosure Act 2008 a "prosecutor" is the person in charge of the file or files relating to a criminal prosecution. Where the proceeding is a Crown prosecution, a Crown prosecutor will have custody of the trial file but the person in charge of the files is the person designated by the enforcement agency as the officer or employee responsible for the file. The Crown prosecutor should not be considered the "prosecutor" for the purposes of the Act. In any other prosecution (whether conducted by a Crown prosecutor or not) the prosecutor as well as the officer or employee designated by the relevant government agency as the person responsible for the file is relevantly a "prosecutor" in terms of the Act.

16.2 The Criminal Disclosure Act 2008 prescribes a comprehensive regime for disclosure by prosecutors to a defendant. Disclosure obligations will not be carried into effect merely by seeking assurances from the person in charge of the file that the trial file contains all necessary disclosure material and that any other material disclosed represents complete disclosure. In a Crown prosecution, a Crown prosecutor should ensure that the person in control of the relevant files is aware of and has complied with the obligations imposed by the Criminal Disclosure Act 2008.

16.3 Enforcement agencies should be in a position to verify what documents have been disclosed and when by appropriate record keeping.

16.4 For the purpose of disclosure, enforcement agencies shall ensure that the prosecutor has access to all relevant information relating to the charges in the possession of that agency.

16.5 Enforcement agencies and prosecutors should use their best endeavours to make initial disclosure by the time of the defendant's first appearance to facilitate entry of a plea by the second appearance. As long as initial disclosure has been made, the Court has a discretion to require a plea under s 39(1) of the Criminal Procedure Act 2011.

Evidence that is not disclosed until trial

16.6 Section 113 of the Criminal Procedure Act 2011 provides that the trial may be adjourned or the jury discharged if the defendant is likely to be prejudiced by the production of a prosecution witness without sufficient notice. Therefore the prosecutor should provide adequate notice of an intention to call any additional witness and provide the defence and the Court with a brief of the evidence that witness will give. In jury trials, this practice should be followed even though the prosecutor is not limited at trial to the evidence filed in formal statements or adduced under an oral evidence order.

Information which the prosecutor does not intend to produce in evidence

16.7 Prosecutors are reminded to make available to the defence the names, and if authorised under s 17 of the Criminal Disclosure Act 2008, the addresses of all those who have been interviewed who are able to give evidence on a relevant subject but whom the prosecution does not intend to call, irrespective of the prosecutor's view of credibility. It is for the prosecutor to decide whether the evidence meets the test of "relevance" provided in s 8 of the Criminal Disclosure Act 2008.

Previous convictions of proposed witnesses

16.8 Section 13(3)(d) of the Criminal Disclosure Act 2008 requires the prosecution to disclose any convictions of a prosecution witness that are known to the prosecutor and that may affect the credibility of that witness.

16.9 An enforcement agency entitled to access criminal record databases should do so as a matter of course. If the enforcement agency is in doubt about whether a conviction should be disclosed, counsel's advice should be taken. Any list of convictions is part of full disclosure and as such should be supplied as soon as is reasonably practicable after a defendant has pleaded not guilty in accordance with s 13(1) of the Criminal Disclosure Act 2008. If the prosecuting agency intends to withhold details of convictions, the defendant should be notified in sufficient time to enable rulings to be sought from the Court.

Disclosure of any inducement or immunity given to a witness

16.10 The defendant should always be advised of the terms of any immunity from prosecution given to any witness. Likewise the existence of any other factor which might operate as an inducement to a witness to give evidence should be disclosed to the defendant. This includes the fact that the witness has been paid for providing information (*R v Chignell* [1991] 2 NZLR 257).

Identity of informer

16.11 There will be good reason for restricting disclosure where the identity of an informer is at stake. The general principle is that the identity of an informer may not be disclosed unless the Judge is of the opinion that the disclosure of the name of the informer, or of the nature of the information, is necessary or desirable in order to establish the innocence of the defendant.

16.12 A statutory restriction on disclosure of the true identity of undercover police officers is contained in s 108 of the Evidence Act 2006.

Obligations or requests under Official Information Act 1982/Privacy Act 1993

16.13 Government agencies are subject to the Official Information Act 1982, but Crown Solicitors are not. Official information should be made available unless there is good reason for withholding it. Under s 18(da) of the Act, a request for official information from a defendant or a person acting on behalf of the defendant may be refused if the defendant could seek the information under the Criminal Disclosure Act 2008.

16.14 While as a matter of practical convenience Crown Solicitors may facilitate responses to requests for official information, they are not as a matter of law obliged to do so. The responsibility to provide this information rests on government agencies, and requests made of a Crown Solicitor should be referred to them. The Crown Solicitor should be advised of all information supplied to other parties.

16.15 Government agencies and Crown Solicitors are subject to the Privacy Act 1993. Personal information (i.e. that particular category of official information held about an identifiable person) is the subject of an explicit right of access, upon request, by that person unless it comes within some limited exceptions. Under s 29(1)(ia) of the Act, an agency may refuse to disclose information to a defendant or a defendant's agent if the defendant could seek the information under the Criminal Disclosure Act 2008.

"Third party" disclosure

16.16 The Criminal Disclosure Act 2008 makes provision for a defendant to seek orders that a person other than the prosecutor disclose information likely to assist the defence. Section 26(1)(b) of the Act requires notice of the application to be served on the prosecutor and that person may be heard at a hearing under s 27.

16.17 At any hearing the prosecutor, while mindful of the right to a fair trial, may make submissions that assist the Court on the question of the relevance or admissibility of the evidence sought and, particularly where a third party is unrepresented, remind the Court of any statutory or other interests of the third party in non-disclosure.

Contempt applications

16.18 In relation to a s 27 non-party disclosure hearing, any contempt application under s 29(6) of the Criminal Disclosure Act 2008 should be referred to the Deputy Solicitor-General (Criminal).

17. CASE MANAGEMENT

17.1 The case management provisions of the Criminal Procedure Act 2011 aim to reduce the time taken for cases to be resolved; better focus the next court appearance after the defendant enters a plea; and increase the proportion of cases in which pleas are entered or charges are withdrawn as a result of out-of-court discussions.

17.2 The obligation on a prosecutor is to engage in case management discussions and to jointly complete a case management memorandum. Prosecutors should use their best endeavours to engage defence counsel in discussions and assist with the completion of the memorandum and should document their efforts in this respect. There are costs sanctions for failure to comply with these and other obligations under the Criminal Procedure Act 2011.

17.3 In accordance with usual practice before the Act's commencement, prosecutors should be prepared to conduct case management discussions on a without prejudice basis having regard to the purposes of the case management procedure in s 55(1)(a) of the Act.

17.4 Any agreement reached by the prosecutor as part of the case management discussions and recorded in the case management memorandum should bind any other prosecutor (for example, a different prosecutor who attends the case review hearing). Departure from an agreement reached as part of case management discussions should only occur in exceptional cases, and should be authorised by the Crown Solicitor or senior manager within the relevant government agency. Examples of exceptional circumstances may include where significant new evidence has come to light since the agreement was reached or where the prosecutor was unaware of information so that it should negate the agreement in the interests of justice.

17.5 In cases where defence counsel will not discuss case management or jointly complete the memorandum, the prosecutor should not file a unilateral case management memorandum. Prosecutors should, however, be prepared to discuss case management at the review hearing that will be held in the absence of a case management memorandum and be in a position to draw upon their record of the efforts taken to engage in the case management process.

18. PLEA DISCUSSIONS AND ARRANGEMENTS

18.1 Principled plea discussions and arrangements have a significant value for the administration of the criminal justice system, including:

18.1.1 Relieving victims or complainants of the burden of the trial process;

18.1.2 Releasing the saved costs in Court and judicial time, prosecution costs, and legal aid resources to be better deployed in other areas of need;

18.1.3 Providing a structured environment in which the defendant may accept any appropriate responsibility for his or her offending that may be reflected in any sentence imposed.

18.2 Subject to the requirements of these Guidelines, the Solicitor-General views it as appropriate for a prosecutor to engage with defence counsel in a process concerning disposition of charges by plea. In the majority of cases, plea discussions are likely to occur as part of the preparation of a joint case management memorandum following the entry of a not guilty plea.

18.3 Any discussions should be between the prosecutor and defence counsel, and not directly with the defendant. In any case where the defendant has waived their right to a lawyer, any question of appropriate charges should be dealt with at the case review hearing.

18.4 Any plea arrangement should be properly recorded in a form capable of being placed before a Court. The prosecutor may not depart from the terms of an arrangement unless he or she has been materially misled by any information (from any source) as to the facts relied on in the plea discussions and the Crown Solicitor or senior manager within the relevant government agency agrees that it is appropriate in the circumstances to repudiate the arrangement in whole or in part.

18.5 Where it is practical and appropriate, the victim or complainant should be informed of any plea discussions and given sufficient opportunity to make his or her position as to any proposed plea arrangement known to the prosecutor. It is expected that prosecutors will establish or continue effective processes to manage victims' expectations, consistent with the principle that while victims' rights are an integral part of the criminal justice system, ultimately the prosecutor should make decisions based on the broader public interest and interests of justice.

18.6 Plea arrangements may be contemplated in cases where the charges filed are "clearly supported" by the evidence. The overarching consideration is the interests of justice. However, the following considerations are relevant:

18.6.1 Whether the charges agreed to adequately reflect the essential criminality of the conduct; and

18.6.2 Whether the charges agreed to provide sufficient scope for sentencing to reflect that criminality.

18.7 In the context of plea discussions, it is not acceptable for prosecutors to:

18.7.1 Proceed with unnecessary additional charges or a more serious charge with a view to securing a negotiated plea;

18.7.2 Agree to a plea of guilty to an offence not disclosed by the evidence; or

18.7.3 Agree to a plea of guilty on the premise that the prosecutor will support a specific sentence.

18.8 Plea discussions will often encompass discussions about the factual basis of sentencing. Any document in the nature of a summary of facts should contain a full account of the charges filed on the basis of those facts that could have been proved by admissible evidence if the matter went to trial. It should not omit any material fact for the purposes of any plea arrangement with the defendant, and in particular should not outline facts to the court which are misleading or, when measured against the essential elements of the offence to which the defendant has pleaded guilty, would cause the court to reject the plea in favour of a plea of not guilty. Facts that should not be omitted include the extent of the injury or damage suffered by a victim.

18.9 The Solicitor-General must approve all plea arrangements in relation to murder charges.

19. THE PROSECUTOR AND TRIAL FAIRNESS

19.1 The overarching duty of a prosecutor is to act in a manner that is fundamentally fair. Prosecutors should perform their obligations in a detached and objective manner, impartially and without delay.

19.2 Legal practitioners acting in a prosecutorial capacity should do so in accordance with their ethical obligations as officers of the Court and conduct themselves according to the rules of professional conduct.

19.3 Prosecutors should always protect the right to a fair trial. Subject to that requirement, prosecutors may act as strong advocates within the adversarial process and may prosecute their case forcefully in a firm and vigorous manner. However, prosecutors should not strive for a conviction. They should present their case dispassionately and avoid inflammatory language.

19.4 Prosecutors should ensure that they comply with the disclosure obligations contained in the Criminal Disclosure Act 2008.

19.5 Prosecutors should be cognisant of the needs of victims and ensure that, in accordance with the law and the requirements of a fair trial, victims and witnesses are treated with care and respect.

19.6 Prosecutors should be prepared to assist the trial Judge on matters of fact or law in relation to any matter in the summing up, whether or not the matter relates to the prosecutor's case.

20. ASSISTANCE TO THE COURT

20.1 Obtaining a conviction is a consequence but not the purpose of a prosecution.

20.2 Without compromising professional obligations and public responsibilities prosecutors should, where appropriate, assist the Court in the fair, prompt and cost efficient disposal of criminal matters.

20.3 In particular, but without limiting the general obligation, prosecutors should be astute to ensure that:

20.3.1 The number of witnesses called at trial is necessary;

20.3.2 Courts are provided with information and submissions of a standard upon which the Court can rely;

20.3.3 In the case of an unrepresented defendant where there is no amicus the Court is informed of any matter appearing to show that the defendant is unable reasonably to conduct his or her case; and

20.3.4 The summing up is free from errors of fact or law irrespective of whether the particular point was more properly one for the defendant's trial counsel to make.

21. PROSECUTORS AND SENTENCING

21.1 The prosecutor should be prepared to draw the attention of the Court to the proven or accepted facts of the case and any binding or relevant sentencing principles.

21.2 While the prosecutor should not press for a particular term of imprisonment or any other sentence, where it is considered necessary or appropriate, he or she should assist the sentencing court by providing:

21.2.1 Any applicable principles from the Courts including guideline judgments;

21.2.2 All proven aggravating factors including the convicted person's criminal record;

21.2.3 The impact on any victims of the offending; and

21.2.4 The prosecutor's view as to the appropriate sentence range or tariff.

21.3 A similar approach should be taken to any submissions from the prosecutor for the purposes of a sentence indication.

21.4 The Court may give a sentence indication if it is satisfied that the information available to it is sufficient for that purpose. Prosecutors are obliged to comply with a request from the court for additional information as may be made in accordance with s 61(3) of the Criminal Procedure Act 2011 or r 4.9 of the Criminal Procedure Rules 2012. A sentence indication which forms the basis of a defendant's guilty plea will ordinarily be binding on the sentencing Judge.

22. PRE-TRIAL APPLICATIONS

22.1 The need for, and nature of, pre-trial applications are, and will remain, a matter of judgement for the prosecutor. It is anticipated that in all such cases the Crown Solicitor and senior officers and employees of government agencies will ensure, through

effective quality control mechanisms, that all applications are justified in the circumstances at the time, are properly supported by the relevant law and evidence, and are filed in a timely fashion.

22.2 In relation to applications as to the admissibility of evidence under s 78 or s 101 of the Criminal Procedure Act 2011, the prosecutor is not obliged to file an application if he or she is satisfied that there is no arguable objection to the admissibility of the identified evidence.

23. JURY SELECTION

23.1 The Supreme Court judgment in *R v Gordon-Smith (No 2)* [2009] 1 NZLR 725 confirmed the lawfulness of the practice known as "jury vetting", whereby Crown prosecutors receive from the Police information about previous criminal convictions of those whose names appear on the jury panel, to assist in determining whether or not to challenge those people from becoming jurors.

23.2 The practice of jury vetting does not apply to persons whose criminal convictions are covered by the Criminal Records (Clean Slate) Act 2004.

23.3 In *Gordon-Smith* the Supreme Court held that a Crown prosecutor should disclose to a defendant any previous convictions of a potential juror known to the Crown, if the previous convictions give rise to a real risk that the juror might be prejudiced against the defendant or in favour of the Crown. Disclosure is otherwise not required.

24. PROCEEDING IN THE DEFENDANT'S ABSENCE

24.1 Prosecutors should be aware of the ability of the Courts under the Criminal Procedure Act 2011 to proceed in the absence of the defendant before and after plea.

24.2 It is inappropriate for a defendant to be able to frustrate the course of justice by absconding. In some cases, absconding may lead to complainants withdrawing otherwise meritorious complaints. There is also the inconvenience that is otherwise caused to victims, witnesses and jurors; the risk that witnesses' memories will fade thereby reducing the reliability and credibility of the evidence they eventually give; the difficulties caused for any co-defendants who may wish the case to proceed against them in a timely manner; and the inability for victims, particularly in serious cases, to move on from the offence.

24.3 Examples of cases where prosecutors may seek to proceed in absence for category 2, 3 or 4 offences are:

24.3.1 Where the offending is particularly traumatic such as sexual or violent offending and the prospect of giving evidence is especially distressing; or

24.3.2 Where there are multiple co-defendants who have attended for trial and wish to have the charges heard.

24.4 Notwithstanding the examples provided at paragraph 24.3 the prosecutor will need to be able to identify clear public interest factors that render it demonstrably in the interests of justice to proceed in absence.

25. RETRIALS AND STAY OF PROCEEDINGS

25.1 The common law right of the Attorney-General to intervene in the prosecution process and to stay any prosecution from proceeding further is recognised in s 176 of the Criminal Procedure Act 2011.

25.2 In New Zealand the power to stay has been sparingly exercised. That conservative approach is likely to continue.

25.3 Generally speaking the power of entering a stay will be exercised in three types of situation:

25.3.1 Where a jury has been unable to agree after two trials. After a second disagreement the Crown Solicitor must refer the matter to the Solicitor-General for consideration of a stay. A stay will normally be directed unless the Solicitor-General is satisfied that some event, not relating to the strength of the Crown's case, brought about one or both of the disagreements, or that new and persuasive evidence would be available on a third trial, or that there is some other exceptional circumstance making a third trial desirable in the interests of justice.

25.3.2 If the Solicitor-General is satisfied that the prosecution was commenced wrongly, or that circumstances have so altered since it was commenced as to make its continuation oppressive or otherwise unjust.

25.3.3 To clear outstanding or stale charges or otherwise to conclude unresolved charges; for example, where an offender has been convicted on serious charges but a jury has disagreed on other less serious charges, or a convicted person is serving a substantial sentence and continuing with further charges would serve no worthwhile purpose.

25.4 The possible circumstances which may justify a stay under paragraphs 25.3.2 and 25.3.3 above are variable. In general terms, however, the same considerations will apply as are involved in the original decision to prosecute, always with the overriding concern that a prosecution not be continued when its continuance would be oppressive or otherwise not in the interests of justice.

26. APPEALS

Consent to appeal or bring judicial review proceedings

26.1 Pursuant to the *Cabinet Directions on the Conduct of Crown Legal Business 2012* a government department must obtain the Solicitor-General's consent to appeal any decision of a Court or to commence judicial review proceedings. Pursuant to these Guidelines that direction is extended to any appeal by a public prosecutor or a Crown prosecutor.

26.2 Prosecutors should provide the Crown Law Office with the information and documents that are required for the Solicitor-General to decide whether consent should be given, as identified in the Crown Law Office *Prosecutors' Handbook*.

Appeals against pre-trial rulings

26.3 Leave of the appeal court is required to file an appeal against a pre-trial ruling. Although there is a 20 working day time limit to file a leave application in relation to a

pre-trial appeal, prosecutors should take steps to progress any application as a matter of priority. Often a critical factor in relation to these appeals will be the trial date and any reason why the trial may not be adjourned.

Appeals against sentence

26.4 The prosecutor has a right of appeal against sentence.

26.5 Section 246 of the Criminal Procedure Act 2011 requires that any appeal by a prosecutor against sentence, including an appeal by a private prosecutor, is only brought by or with the consent of the Solicitor-General.

26.6 Consent will not be given unless the sentence imposed is considered, in all of the circumstances, manifestly inadequate or contrary to principle.

26.7 In considering whether an appeal against sentence should be brought, prosecutors should take into account that:

26.7.1 A sentence will be increased on a prosecutor's appeal only where it is manifestly inadequate or contrary to principle;

26.7.2 Any increase will take the sentence imposed only to the lower end of the correct available range;

26.7.3 Despite paragraph 26.7.2 above, an appeal may be justified where the appeal involves an important matter of principle, or the appeal is to be taken to establish or modify a sentencing guideline judgment.

26.8 Where the appeal is to be taken on the grounds of error of principle it will be necessary to:

26.8.1 Identify the principle; and

26.8.2 Demonstrate either:

- that the principle is one of application beyond the facts of the particular case, or
- that the sentence has brought about an unfairness having regard to sentences imposed on co-offenders, or in similar cases where the offenders are serving a term of imprisonment.

Appeals on questions of law

26.9 Prosecutors may appeal on a question of law arising in a ruling by the trial court. Leave of the appeal court is required. The ruling must be made in proceedings that relate to or follow the determination of the charge or during the determination of the charge.

26.10 There must be a question of law that:

26.10.1 Was a significant factor in the disposition of the case; and

26.10.2 Has sufficient public interest to engage the appeal court.

26.11 An appeal on a question of law will only be appropriate if the ruling in question:

26.11.1 Is sufficiently clear and precise to be capable of being challenged; and

26.11.2 Is concerned with a point of law, rather than the sufficiency of the evidence in the case.

26.12 The ability to appeal on a question of law arising in a determination of the charge (except a question that arises in a jury verdict) is not intended to provide an ability to appeal based on the merits of the case.

26.13 If the appeal court in consequence of an appeal on a question of law orders a new trial Guideline 5 (above) will continue to be relevant.

Judicial review

26.14 A judicial review of a Court's decision in a criminal prosecution may only be brought by or with the consent of the Solicitor-General.

26.15 Judicial review is not a review of the merits of a decision, but rather a review of the process by which the decision is made. The grounds on which a decision may be reviewed are limited. The scope of statutory rights of appeal in criminal cases means that there are few circumstances in which a judicial review of a decision in a criminal prosecution should be brought.

26.16 Prosecutors are referred to the guidance in these Guidelines as to when an appeal against a decision or ruling should be taken. That guidance also applies to a judicial review of that decision.

27. SOLICITOR-GENERAL'S REFERENCE PROCEDURE

27.1 The Solicitor-General may refer a question of law that arises out of a trial to the Court of Appeal. A question of law that arises out of a first appeal against conviction or sentence to the High Court or Court of Appeal may also be referred to the Court of Appeal or the Supreme Court.

27.2 A Reference will only be appropriate if the ruling in question:

27.2.1 Is sufficiently clear and precise to be capable of being challenged;

27.2.2 Is concerned with a point of law, rather than the sufficiency of the evidence in the case; and

27.2.3 Raises a point of practical importance which is likely to be followed in other cases.

27.3 The Reference procedure is not to be used:

27.3.1 To determine theoretical questions of law; or

27.3.2 To refer a ruling which is clearly in ignorance of or inconsistent with clear existing authority.

27.4 A material consideration may be whether the ruling has been reported and is likely to be followed in other cases.

28. RELATIONSHIP BETWEEN CROWN PROSECUTORS AND ENFORCEMENT AGENCIES

The Police or other investigator

28.1 Crown prosecutors appear in the criminal courts in two distinct capacities, namely on instructions from the person or government agency who commenced the proceeding or, in respect of Crown prosecutions, as the Crown's representative.

28.2 When acting on instructions, the Crown prosecutor is instructed in that capacity as an agent or officer of the Crown and should still act in accordance with the applicable guidelines. While Crown prosecutors are expected to consult closely with and take into account the views of the investigator or officer in charge of the case on all significant matters, it is also the Law Officers' expectation that government agencies who commence proceedings will follow the advice of the Crown prosecutor as to the nature of the charges and conduct of the prosecution.

28.3 The relationship between the Crown prosecutor and the agency who commenced the proceeding should also be conducted in accordance with any Memorandum of Understanding or similar agreement between the Solicitor-General and the chief executive of that agency.

Recipients of advice

28.4 Due to the increasing complexity of the criminal law and considerations arising from the New Zealand Bill of Rights Act 1990, many criminal or regulatory investigations will require specialised legal advice from the earliest stages.

28.5 In this regard, Crown Solicitors are expected to have and maintain sufficient capacity to give advice as and when necessary, and to develop and maintain appropriate relationships with the locally based government agencies to ensure effective legal advice is sought and given.

28.6 In giving investigative advice, the solicitor-client relationship is modified to the extent that the investigators to whom the advice is directed are expected to act in accordance with that advice.

Serious Fraud Prosecutors' Panel

28.7 Members of the Serious Fraud Prosecutors' Panel are appointed by the Solicitor-General after consultation with the Director in accordance with s 48 of the Serious Fraud Office Act 1990. Proceedings in relation to the prosecution of serious or complex fraud are taken on behalf of the Director and subject to the Director's instruction until the Solicitor-General assumes responsibility for the prosecution in accordance with the Crown Prosecution Regulations 2013. Once the Solicitor-General has assumed responsibility for the prosecution, the Solicitor-General may give binding directions to an instructed panel member. Such directions will be given in consultation with the Director.

28.8 Panel members should consult the Director throughout the course of a prosecution and have regard to the Serious Fraud Office's broader objectives in relation to serious or complex fraud. Both before and after the point at which the Solicitor-General assumes responsibility for the prosecution, panel members must otherwise act in accordance with these Guidelines.

Crown prosecutions

28.9 Once the Crown has assumed responsibility for a prosecution, all decisions in relation to disclosure, the charges filed, the evidence to be adduced, the conduct of the prosecution and the nature and scope of any continuing investigation (where it is probable that will result in evidence or information relevant to the trial) are matters solely for the Crown prosecutor to decide.

28.10 In the discharge of this responsibility, Crown prosecutors are expected to consult closely with and take into account the views of the investigator or officer in charge of the case and to explain the basis of any significant decision.

29. VICTIMS

29.1 Victims of crime in the criminal justice system are to be:

29.1.1 Treated with courtesy and compassion; and with

29.1.2 Respect for their dignity and privacy.

29.2 The key means of observing these principles is through the provision of information to ensure that victims understand the process and know what is happening at each stage. So far as is possible, the victim should have explained to them the court processes and procedures, and should be kept informed of what is happening during the course of the proceedings.

29.3 Prosecutors should seek to protect the victim's interests as best they can whilst fulfilling their duty to the Court and in the conduct of the prosecution on behalf of the Crown.

29.4 Crown prosecutors are referred to the protocol "Victims of Crime – Guidance for Prosecutors" (issued with these Guidelines) for greater detail as to the role and duties of prosecutors in respect of victims. Prosecutors in government agencies should be aware of and take into account the guidance provided in that protocol.

30. MEDIA

30.1 When communicating with the public through the media, prosecutors are to ensure that they:

30.1.1 Do not make remarks that may prejudice fair trial interests or the perceived objectivity of the judge;

30.1.2 Support the administration of justice and the integrity of the criminal justice system;

30.1.3 Respect the principle of open justice;

30.1.4 Recognise the public interest in receiving accurate information about the criminal justice system and criminal prosecutions; and

30.1.5 Treat victims of crime with courtesy and compassion, and respect their dignity and privacy.

30.2 Crown prosecutors are referred to the protocol "Media Protocol for Prosecutors" (issued with these Guidelines) for greater detail as to the role and duties of prosecutors in respect of the media. Prosecutors in government agencies should be aware of and take into account the guidance provided in that protocol.

APPENDIX B
āpitihanga B

MEDIA PROTOCOL FOR PROSECUTORS [2013]

CROWN LAW

MEDIA PROTOCOL FOR PROSECUTORS

As at 1 July 2013

Te Tari Ture o te Karauna
Crown Law

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PURPOSE

1. The purpose of this protocol is to assist prosecutors to take a common approach to public statements regarding cases pending or before the Courts. The protocol is for guidance only.

2. The protocol sets out the roles and duties of prosecutors in dealing with the media and is intended for the use of Crown Law and Crown Solicitors. The term "prosecutor" is used throughout.

3. Prosecutors in government agencies should be aware of and take into account the guidance provided in this protocol.

4. Each Crown Solicitor should have a media policy covering matters to do with communications with the media, including who may speak to the media and processes for dealing with a media situation of urgency and priority. Subject to this protocol and to their organisation's media policy, prosecutors may respond, at their discretion, to media enquiries about cases for which they are responsible.

PRINCIPLES

5. When communicating with the public through the media, prosecutors are guided by five principles. These are:

   5.1 Not making remarks that may prejudice fair trial interests or the perceived objectivity of the judge;

   5.2 Supporting the administration of justice and the integrity of the criminal justice system;

   5.3 Respecting the principle of open justice;

   5.4 Recognising the public interest in receiving accurate information about the criminal justice system and criminal prosecutions; and

   5.5 Treating victims of crime with courtesy and compassion, and respecting their dignity and privacy.

6. It is of primary importance that public statements do not prejudice a defendant's right to a fair trial. The public interest in a fair trial is fundamental and can override other important principles such as open justice and freedom of expression. It is also necessary to bear in mind that while the law of contempt may apply in some circumstances, actions short of contempt can result in a trial being adjourned or stayed or may give rise to grounds for an appeal.

7. Prosecutors must be mindful of their obligations and duties as officers of the Court and their role in the administration of justice. They should be careful not to express personal opinions inconsistent with those obligations.

8. Open justice is regarded as a fundamental tenet of our justice system and is particularly important in criminal proceedings. The media plays a key role in upholding open

justice. Public scrutiny is beneficial to the administration of justice and the community has a right to accurate information, subject to lawful restrictions and the defendant's right to a fair trial.

9. Assisting the public to understand the operation of the criminal justice system encourages public confidence that cases are being dealt with in accordance with the law. There will be occasions when prosecutors can assist public understanding by succinct and clear explanations of law or procedure.

10. At all times prosecutors must be sensitive to the rights and needs of victims of crime. Victims' addresses or contact details should never be disclosed without consent. If members of the media wish to contact a victim, it may be appropriate to advise the victim of the inquiry so that he or she may decide whether to contact the inquirer directly. Prosecutors may wish to discuss with victims the advisability of responding to media requests for interviews.

11. The Victims' Rights Act 2002 also requires that victims are kept informed of the progress of proceedings, ensuring that they are not taken unaware by information published in the media.

OTHER MATTERS LIKELY TO AFFECT INTERACTION WITH MEDIA

12. In addition to these guidelines there is a range of relevant rules and provisions which may affect the release of information to the public. Nothing in these guidelines affects:

    12.1 The law relating to contempt of court;

    12.2 Any suppression orders;

    12.3 Any statutory provisions which regulate the disclosure or publication of information (for example, s 63 of the Criminal Procedure Act 2011, which makes it an offence to knowingly publish any information about a request for a sentence indication or a sentence indication that has been given, before the defendant has been sentenced or the charge has been dismissed);

    12.4 Legal professional privilege; and

    12.5 The law relating to defamation.

13. Prosecutors should also be aware of:

    13.1 The role of the judiciary in making decisions about the release of information held by the courts, including any rules of Court and media guidelines; and

    13.2 Any relevant professional rules (for example, Rules 13 and 13.12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008).

GUIDANCE

14. The paragraphs below set out some guidance about what information or statements may be publicly made available. These are matters of judgement and discretion and prosecutors should always have regard to the overarching principles and other rules referred to above.

COMMENT PRIOR TO CHARGE

15. Comment by prosecutors prior to charges being filed will rarely be appropriate. Any comment should be limited to providing an explanation of the general issues raised and should not address the particular case or its circumstances.

COMMENT DURING PROCEEDINGS

16. Once charges have been filed the obligation to avoid prejudice to a fair trial becomes acute. At this stage (including bail hearings) it is usually appropriate to provide information about the charges, the defendant and the progress of proceedings. In particular, the prosecutor may state:

    16.1 The fact and location of the arrest and the general nature of the criminal charges;

    16.2 Once the defendant has appeared in Court, the name, age and residence (town or city or region only) of the defendant (subject always to name suppression or other rules);

    16.3 Date and location of next Court appearance;

    16.4 Guidance on the type of hearing – first or second appearance, plea, case review hearing, trial callover etc;

    16.5 Names of the prosecutor and the defendant's lawyer who have appeared in Court;

    16.6 Information about what has happened procedurally with the case e.g. whether the prosecution has been discontinued, charges reduced etc;

    16.7 If relevant, confirmation that advice has been sought from Crown Law/the Crown Solicitor.

17. In general, the following information should not be provided or comment should not be made:

    17.1 Any previous convictions of the defendant, whether directly or indirectly, unless these have been ruled admissible and referred to in open Court. For example, public comment that the defendant was on bail at the time of the offence would constitute contempt of court: *Solicitor-General v Wellington Newspapers Ltd* [1995] 1 NZLR 45. Referring to the fact a defendant is facing trial on other unrelated charges may also constitute a contempt: *Solicitor-General v APN New Zealand Ltd* [2012] NZAR 7;

17.2 Personal information, address or telephone number of witnesses, victims and in some instances, defendants, unless there is express consent;

17.3 Information concerning Chambers/*in camera* hearings including information provided during bail hearings;

17.4 Personal opinions in relation to a particular case, especially about the outcome of a hearing, an individual's guilt or innocence, or a sentencing outcome;

17.5 Comment on any judicial decision other than to summarise or explain the effect of the decision.

18. Requests for information that has been produced as an exhibit during criminal proceedings should be referred to the Court for consideration under Part 6 of the Criminal Procedure Rules 2012 (SR 2012/415).

19. Occasionally, requests are received from the media for copies of the summaries of fact prepared by the Crown and provided to the court. Summaries of fact should not be made available to the media before the prosecution presents its submissions in open Court. Where there is a contest over the accuracy of the summary it should not be made available in that form until the contest has been resolved.

20. Other information or documents which have been filed and used in open court, such as submissions, may be released to the media unless there are orders preventing such release or where the prosecutor intends to seek such orders.

COMMENT AFTER PROCEEDINGS

21. As discussed above, prosecutors may provide reasonable assistance to explain the law, procedure or the Crown's submissions on sentence to ensure accurate reporting but should avoid expressing any personal opinion about the outcome of a case.

22. Prosecutors should not comment on the likelihood of a Crown appeal but may advise that a matter has been referred to the Solicitor-General for a decision on whether an appeal should be filed.

23. Prosecutors are reminded that when they make comments to the media outside the Court, qualified privilege will be difficult to establish and they are potentially exposed to personal liability in defamation.

RESPONDING TO INACCURATE INFORMATION

24. From time to time prosecutors may be aware that inaccurate information about the proceedings has been published. Subject to the principles outlined above and any suppression orders, it may be appropriate to offer factual explanations of the relevant law or procedure to correct errors and ensure accurate reporting.

INFORMATION ON THE INTERNET

25. The widespread availability of information on the internet poses challenges for prosecutors. Information released to any person may be rapidly and widely available.

26. The enduring nature of information in that medium means that prosecutors may need to take steps more frequently and at an earlier stage of the proceedings to seek suppression orders. In addition, historical information on the internet may raise issues of contempt in the face of current proceedings, even though it did not raise such concerns when posted. One example is information concerning prior convictions.

27. Where a prosecutor becomes aware of the existence on the internet of information which may amount to contempt the prosecutor should consider drawing this to the attention of the Court and the Solicitor-General.

RELATIONSHIP BETWEEN CROWN PROSECUTORS AND POLICE

28. New Zealand Police frequently seek advice from Crown Law or Crown prosecutors prior to the Crown assuming responsibility for the prosecution. Where that is the case, prosecutors should assist Police to observe the law of contempt and deal with the media in a way which protects fair trial rights.

29. When the Solicitor-General assumes responsibility for a Crown prosecution and until sentencing is completed, a prosecution is in the hands of the Crown Solicitor. The prosecutor is likely to be held responsible for any media comments by the prosecution or Police. Any media queries should therefore be considered in consultation with the prosecutor and decisions made about whether the prosecutor or the Police (Officer in Charge) should respond. These situations will need to be managed on a case by case basis depending on the nature of the query and the kind of information which is sought.

30. New Zealand Police employees are required to act in accordance with this protocol. They are also required to observe the general guidelines for communicating with the media set out in the Police Manual. In relation to prosecutions, these include:

    (a) Officers in charge of investigations and operations are required to avoid making comment on an investigation/operation during pre-arrest interactions with the media that could later be construed as being prejudicial to the case when it goes to Court.

    (b) Officers in charge of investigations and operations are required not to comment on matters (other than procedural matters) that are still in the Court process. This includes post conviction, pre and post sentencing and until any appeals have been completed. Where matters are in the hands of Crown Solicitors, officers in charge and operations should consult with the Crown Solicitor (if possible) before comments are made.

    (c) Officers are reminded to avoid any comment that could be construed as criticism of judicial decisions.

CRIMINAL CONTEMPT OF COURT

31. In New Zealand the Solicitor-General, by convention, is primarily responsible for prosecution at common law for criminal contempt of court. In practice it is usual for the Solicitor-General to make the decision and personally prosecute the resulting

proceedings. When carrying out this function the focus is on conduct that is corrosive of the criminal justice system as a whole.

32. When a question concerning the effect of media coverage on a trial is formally raised with the Court, prosecutors are asked to advise the Solicitor-General. The Solicitor-General will be interested to ensure that the immediate public interest in the prosecution and in any future prosecution for contempt is adequately managed.