

Prosecution Procedure and Guidelines

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**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HĪKINA WHAKATUTUKI

Te Kāwanatanga o Aotearoa
New Zealand Government

1 Purpose

- 1.1 The purpose of this document is to set out the procedures and guidelines to be followed by MBIE staff in making a decision to prosecute or to request appeals. It also establishes standards to be met by prosecutors in any MBIE prosecution.
- 1.2 These Procedures and Guidelines must be read in conjunction with the [Prosecution Policy](#).

2 Scope

- 2.1 These Procedures and Guidelines apply to:
- a. all MBIE staff authorised (whether as a statutory decision maker or acting under delegation) to make a decision to prosecute, or to take other actions in scope of the [Prosecution Policy](#)
 - b. all MBIE staff involved in the preparation for, and conduct of, prosecutions brought by MBIE (whether under legislation administered by MBIE or other laws eg. the Crimes Act 1961) and related court proceedings
 - c. all prosecutors acting for MBIE and
 - d. witnesses giving evidence in respect of their role as an MBIE employee or contractor, within any criminal proceedings.
- 2.2 These Procedures and Guidelines do not apply to staff involved in civil enforcement of MBIE legislation (eg. before occupational licensing boards or the Employment Relations Authority). However, they may still provide useful guidance to such staff, particularly in relation to proceedings in the Employment Court under [Part 9A of the Employment Relations Act 2000](#) for a pecuniary penalty.

3 Definitions

| Term | Definition |
|----------------------|--|
| Investigation | <p>In the context of this document, means investigation of potential criminal conduct.</p> <p>The term does not include a routine audit, inspection or complaint review unless after initial assessment (including relevant initial enquires), the investigator determines to undertake further investigation that could lead to a criminal prosecution.</p> |
| Investigator | <p>Any employee (including those warranted under MBIE legislation) whose functions include investigation of suspected criminal offending.</p> |

4 Independence

- 4.1 The [Solicitor-General's Prosecution Guidelines](#) state at 4.1 that:

“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 The [Prosecution Policy](#) provides that MBIE will ensure that prosecution decisions are taken independently. The processes and guidelines in this document are intended to protect the independence of the MBIE prosecution decision maker.
- 4.3 Any matters that arise outside of the [Prosecution Policy](#) and these procedure and guidelines that may compromise or be seen as compromising independence must be raised with the Chief Legal Officer.
- 4.4 MBIE business units may develop enforcement strategies setting out business unit priorities and guiding deployment of investigations resources. Prosecution decision makers should be aware of these strategies and take them into consideration, but prosecution decisions must be made independently by the responsible decision maker with the benefit of expert legal advice.
- 4.5 Where a regulatory framework splits regulatory roles between MBIE and an external body,¹ it is appropriate to consult the external body on an enforcement strategy, but not on individual prosecution decisions.
- 4.6 Internal and external comment and discussion on prosecution matters (including reporting to SLT, Ministers or comment to the media) should recognise this independence both before and during prosecutions. Formal reports to Ministers and/or SLT should generally occur only once charges have been laid or withdrawn, in accordance with the “no surprises” obligations of officials in respect of matters that are likely to be controversial or the subject of public debate.²
- 4.7 Public comment on investigations and prosecutions must follow section 11 of this document (media comment).

5 Conflict of Interest

- 5.1 All staff involved in prosecutions or potential prosecutions must act lawfully, fairly, promptly, and free of any actual, potential or perceived conflict of interest. This applies when making decisions or contributing in any way to any MBIE prosecution or other litigation arising out of or related to prosecution action that may reasonably be contemplated.
- 5.2 Any conflict of interest by an MBIE staff member (whether actual, potential or perceived) must be disclosed immediately to the relevant manager in accordance with the [Declarations of Interest Policy](#), [Prosecution Policy](#) and appropriate legal advice sought from the prosecutor or the Manager Legal Services – Litigation. In the case of disagreement as to the existence of a conflict of interest or the way in which it should be managed, the Chief Legal Officer’s decision will be final.
- 5.3 It is the responsibility of the business unit manager to:
- record, in accordance with the [Declarations of Interest Procedure](#), the nature of the conflict, the date of disclosure, its impact on the prosecution if any and any advice given as to its management;
 - assess whether it creates a risk (other than ordinary litigation risk) that needs to be included in a risk register; and

¹ eg. the licensed builders regime, which contains complementary roles for the Registrar of Licensed Building Practitioners, the Building Practitioners Board, and the chief executive of MBIE, in whose name prosecutions of non-licensed builders are taken.

² Cabinet manual para 3.16 (a) states “In their relationship with Ministers, officials should be guided by a “no surprises” principle. They should inform Ministers promptly of matters of significance within their portfolio responsibilities, particularly where these matters may be controversial or may become the subject of public debate.”

- c. decide whether it creates a new or substantial risk that needs to be reported to the Solicitor-General under the [Solicitor-General's Prosecution Guidelines](#).³

- 5.4 Where a person has disclosed a conflict of interest, that person must usually cease further involvement in the prosecution process.
- 5.5 The independence of a prosecutor is not compromised merely by the fact that they have provided advice at the investigative stage, unless they are likely to be a witness.

6 Prosecution decision making

6.1 Threshold for prosecution

No prosecution may be commenced unless it meets the two part test set out in the [Solicitor-General's Prosecution Guidelines](#):

- a. Evidential sufficiency: there is available and admissible evidence sufficient to provide a reasonable prospect of conviction; and
- b. Public interest: Prosecution is required in the public interest.⁴

A prosecution decision in accordance with the [Prosecution Policy](#) and these procedures and guidelines must be made in every case where a breach of any Act, regulation, or other legislative instrument (which is enforceable by an offence provision) has been investigated, there is evidence to suggest a prima facie case, and there may be public interest in proceeding to a prosecution.

For some relatively minor or technical breaches of the law it is acknowledged that there may be no obvious public interest in a prosecution and that individual business unit's enforcement strategies may provide for the use of other enforcement tools to achieve compliance. A formal prosecution decision in accordance with the [Prosecution Policy](#) is not required in this case, however the decision (and the relevant enforcement tool used) should still be recorded by the business unit.

6.2 Investigator's role

When MBIE investigators investigate a suspected breach of any Act, Regulation or other instrument that may meet the requirements for prosecution, it is the responsibility of the investigator to prepare the file for referral to a prosecutor for review before the formal prosecution decision is made or confirmed by the relevant prosecution decision maker.

The file should include copies of the evidence available (including evidence that may support an available defence), and clearly identify any issues that may go toward weight (including credibility) or admissibility. The file should also include all relevant information as to matters going to the public interest assessment.

6.3 Legal review

Legal review must be carried out by a prosecutor.

This review is an integral independent check within the process. It is significant, not only in respect of reviewing the technical aspects of individual cases, but also in ensuring the efficient, effective and timely management of cases generally.

Review is a continuing process, and all prosecutors are required to take account of any change in circumstances in any prosecution. Accordingly, there needs to be a close and effective liaison

³ SG Guidelines para 3.5.

⁴ Assessment of the public interest is an on-going obligation. It should be reassessed whenever there is any material change in the circumstances of the case (including any relevant developments in the law) or the defendant (such as ill health).

between prosecutors and the relevant investigator(s) to reach the right decisions in managing prosecutions, particularly when deciding to change or withdraw charges.

6.4 **Evidential Test**

It is the responsibility of the prosecutor reviewing the file to determine whether there is evidential sufficiency for the proposed charges selected or alternatives having regard to the evidence available.

To meet the evidential test, a prosecutor must be satisfied that the proposed evidence is sufficient to provide a reasonable prospect of conviction. A reasonable prospect of conviction will exist if, in relation to an identifiable person, there is credible evidence which could be given before a Court and upon which an impartial Judge or jury could reasonably be expected to be satisfied beyond a reasonable doubt that the person has committed a criminal offence.

If this first limb of the test is not met, then no charge may be laid, no matter how important or serious the matter may be.

6.5 **The Public Interest Test**

If the evidential test is met, the next consideration is whether the public interest requires the prosecution to proceed. It is not the case that all offences for which there is sufficient evidence must be prosecuted. The prosecution decision maker must exercise the discretion as to whether a prosecution is required in the public interest.

There are a multitude of factors that may be considered in determining whether prosecution is in the public interest. A non-exhaustive list of such factors is contained in the [Solicitor-General's Prosecution Guidelines](#).

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 in his or her view the public interest requires prosecution.

6.6 **Written advice following review of file by prosecutor**

The prosecutor may give advice on any legal issue raised by the file and will provide written advice on the outcome of the file review.

If the prosecutor is not satisfied that the test for prosecution has been met, they will provide written advice to the prosecution decision maker that a decision of 'no prosecution' should be made. This advice should at a minimum include:

- a. an outline of the facts of the case
- b. the elements of the offence and any relevant statutory defences
- c. the evidence considered by the prosecutor
- d. any possible issues of admissibility that have been identified, and
- e. the advice that there is either insufficient evidence to establish that there is a reasonable prospect of success in a prosecution and/or concern that the public interest test has not been met (with accompanying reasons).

If the prosecutor is satisfied that the test for prosecution has been met, they will document and confirm this for the prosecution decision maker.

6.7 **Prosecution decision makers**

Prosecution decisions must be made by prosecution decision makers in accordance with MBIE's delegations framework and these procedures and guidelines.

In the case of all prosecution delegations:

- a. the authorisation must be recorded in writing
- b. the delegate must comply with the [Prosecution Policy](#) and these procedures and guidelines.

It is expected that delegations for prosecution decisions will sit at tier 4 or 5 level⁵ unless one or more of the following escalation criteria apply:

- a. the legislation, or the particular provision breached, is new or untested
- b. there are potential issues with the exercise of search and seizure powers (whether under a search warrant or exercising a statutory power)
- c. there are human rights issues
- d. there are (or may be) allegations made that MBIE has acted negligently or unlawfully, or
- e. any other reason exists that may indicate special sensitivity.

A prosecution decision maker must:

- a. not have had any significant involvement in the preparation of the case file
- b. be satisfied that all relevant information has been obtained and that the file is prepared to a satisfactory standard
- c. have considered, and applied, the current version of the [Prosecution-Guidelines](#).

6.8 The Decision

If a prosecutor determines that the evidential test has not been met then, subject to review or escalation, a decision of 'no prosecution' must be made. A decision of 'no prosecution' does not preclude any further consideration of a case by the prosecutor, if new or additional information becomes available.

If the prosecutor advises that the evidential test and the public interest test appear to be met the prosecution may proceed if the prosecution decision maker is comfortable in relation to evidential sufficiency and considers it is in the public interest to do so.

In determining whether to proceed with the prosecution, the prosecution decision maker must, in conjunction with the public interest assessment under the [Prosecution-Guidelines](#) take into account as appropriate:

- a. MBIE's and the business unit's statutory objectives and enforcement priorities including sector strategies, if any
- b. alternatives to prosecution which may achieve compliance
- c. any existing or likely prosecution or other proceedings involving the defendant(s) by another business group, or government agency, and the likely outcome
- d. the relevant statutory timeframes and the period since the matter first came to MBIE's attention
- e. the obsolescence or obscurity of the law.

Factors that *must not* be taken into account include:

- a. colour, race, ethnicity, sex or marital status, religious, ethical or political beliefs
- b. political advantage or disadvantage to the prosecuting agency or people linked to it, and
- c. the possible effect on the personal or professional reputation or prospects of MBIE or its staff
- d. any proposal for payment of money, including compensation

⁵ Or tier 6 operational managers in large branches.

- e. the existence of a diversion policy.⁶

If the prosecution decision maker and the prosecutor do not agree on evidential sufficiency, the prosecution decision maker may seek a review through contacting the Legal Manager, Litigation or relevant Crown Solicitor's office. If the prosecution decision maker and the prosecutor do not agree whether or not it is in the public interest to take or continue a prosecution, the decision maker must consult the Manager Legal Services –Litigation and if disagreement remains, the matter should be referred to the General Manager of the branch in which the business unit sits (if the General Manager is not the prosecution decision maker) and the Chief Legal Officer in accordance with the [Legal Services Policy](#).⁷

If the Chief Legal Officer and the General Manager cannot agree on the public interest, a decision to commence or continue the prosecution may only be made by the General Manager or relevant Deputy Secretary after obtaining legal advice from the Crown Law Office or the relevant Crown Solicitor.

The decision must be based only on information contained in the case file.

6.9 Coordinated Enforcement and Prosecution Decision-Making

It is not uncommon that more than one MBIE business unit, or more than one government agency may investigate a particular matter, in circumstances where prosecution or other enforcement activity by any of those business units or agencies could result.

Wherever possible, MBIE business units must work collaboratively with each other or other agencies to ensure that investigations are carried out in the most expedient and robust manner. For example, in some cases it may be possible for business units or agencies to share information, such as witness statements, to ensure that witnesses are not subjected to multiple interviews by different people. Care will always be required however to ensure that the sharing of information does not compromise the investigation(s).

When determining whether to prosecute, the prosecution decision maker should consider any existing or likely prosecution or other proceedings involving the defendant by another MBIE business unit, or other government agency, and the likely outcome. In the case of a decision not to prosecute on public interest grounds, where there is non-compliance with legislation administered by another agency, the decision maker should consider referring that matter to that other agency for decision to ensure a coordinated government response, prior to any formal response being issued.

It is the responsibility of the investigator and the relevant business unit manager to consult with the Police or other agency responsible for enforcing the legislation concerned before a decision to prosecute is made, and to provide reasonable notification as to progress and outcome of any prosecution commenced. Those consultations will ensure that good information is available in relation to the public interest in prosecuting the person and may, at MBIE's discretion, impact on its decision to bring a charge(s), or the timing of any charges being brought (e.g. to await a prosecution decision in respect of more serious offending).

⁶ It is acknowledged that in some cases a prosecution decision maker may make a prosecution decision, conditional on review by a prosecutor. This is acceptable under these procedures and guidelines provided the decision maker carries out the substance of their role under this document.

⁷ Para 6.6, Legal Services Policy.

7 Finalisation of charges

- 7.1 Once the decision to prosecute is finalised, the accountability for legal issues in connection with the prosecution file passes to the prosecutor. In particular, the prosecutor:
- determines the wording of the charge(s) and
 - ensures the prosecution file is prepared to an appropriate standard.
- 7.2 MBIE may bring charges under the legislation that it administers or other legislation, including (most commonly) the Crimes Act 1961. When deciding which legislation to lay a charge under, the prosecutor will have particular regard to the nature of the alleged conduct and the charge that would most appropriately mark that conduct.
- 7.3 It is the responsibility of the prosecutor, in consultation with the investigator or prosecution decision maker to determine what charges are appropriate. When making decisions on charges, the following matters must be taken into account:
- the selection of charges must take into account the totality of the offending. Representative charges should be considered for repeated or ongoing conduct where the criteria under s20 of the Criminal Procedure Act 2011 are made out and
 - if the offending relates to acts or omissions attributed to a company or other corporate entity, the charges should reflect:
 - the purpose of the relevant legislation and any express provision as to party liability; and
 - the relative culpability of that corporate entity and/or its officers and employees.
- 7.4 If the most obvious charge on the facts of the case is a specific charge that is not available because a limitation period has expired, it is only in exceptional cases that it will be appropriate to select a more general charge with a higher penalty.
- 7.5 The relevant Crown Solicitor should be consulted in particularly complex or serious cases likely to result in Crown Prosecutions, or where certification by a Crown Solicitor is required under an Act. Some offences, due to their seriousness, require the consent of the Attorney-General before a charge can be laid. Where these charges are contemplated early advice should be sought from the prosecutor who will arrange to seek the required consent from Crown Law.
- 7.6 The [Prosecution-Guidelines](#) provide broad guidance about choosing charges. Considerations include:
- the number of charges must reflect the alleged conduct and the public interest in having appropriate convictions entered against the defendant
 - neither the number nor seriousness of charges should be decided by having regard to the impact of that decision on the likelihood of an offer by the defendant to plead guilty to lesser charges.

8 Infringements

- 8.1 Infringement offences are generally able to be proceeded with by infringement notices or through the filing of a charging document⁸. Each infringement must therefore be able to be proven to the criminal standard.
- 8.2 Even where an infringement offence cannot be proceeded with by way of a charging document, if a person issued with an infringement notice disputes the offence and/or formally requests a hearing,

⁸ Filing a charging document would ordinarily require leave of a District Court Judge or a Registrar (Summary Proceedings Act 1957, s 21(1)(a)). However, the specific legislation may have a provision which provides for filing without leave.

then the test for prosecution must be satisfied and the relevant procedures in this document must be complied with before MBIE files a notice of hearing in Court.

- 8.3 An infringement notice may be revoked by a person authorised by the General Manager of the branch in which the business unit sits.

9 Records, Disclosure and Reporting

- 9.1 All significant prosecution advice and all prosecution decisions (including ‘no prosecution’ decisions) must be recorded in writing.
- 9.2 It is the responsibility of the prosecution decision-maker to record their decision and the reasons for it. Those reasons must be accurate and timely.
- 9.3 It is the responsibility of the prosecutor to maintain a record of any prosecution commenced and to report to the client investigator and the relevant prosecution decision maker.

9.4 Disclosure

Disclosure in prosecutions is governed by the Criminal Disclosure Act 2008 (**CDA**). Under the CDA, a “prosecutor” is the person for the time being in charge of the file or files relating to a criminal prosecution. It therefore includes both the relevant investigator (or person in charge of the file) and the lawyer acting.

Under the CDA, the prosecutor must disclose certain information to the defendant (initial disclosure) within 15 working days of the commencement of proceedings. If requested by the defendant in writing, the prosecutor must provide additional information from the investigation file, as soon as is reasonably practicable. A list of the information that a defendant can request at this time is set out in section 12(2) of the CDA.

The remaining information (full disclosure) must be disclosed as soon as is reasonably practicable after a defendant has pleaded not guilty.

In MBIE responsibility for preparing disclosure falls on the investigator or person in charge of the file. The prosecutor for the file is responsible for checking full disclosure and advising as required.

Disclosure ensures that a defendant is able to review all relevant information relating to the prosecution, with the exception of information that is able to be withheld.

The grounds for withholding information are contained in s 16 CDA. It is the responsibility of the prosecutor to ensure that MBIE complies with all disclosure obligations, including those set out in the CDA, and to ensure that there is a record of what has been disclosed, to whom and when and, in the case of non-disclosure, the reasons for that decision. The relevant investigator or person in charge of the file is expected to provide all necessary assistance to ensure that the prosecutor is able to discharge his or her responsibility. Final decisions on withholding or disclosing information in non-straightforward cases should be made jointly between the prosecutor, and the person in charge of the file (if necessary with the input of the relevant manager/s).

It is the responsibility of the person in charge of the file to ensure those within business units who need to be kept informed are notified of progress.

9.5 Victims

In cases involving a “victim” or “victims” for the purposes of the [Victim Rights Act 2002](#):

- a. it is the responsibility of the investigator or other person in charge of the file to keep victims informed of progress of the investigations and prosecutions in accordance with s 12 of that Act, and
- b. it is the responsibility of the prosecutor, in conjunction with the person in charge of the file to prepare victim impact statements.

Prosecutors should also act consistently with the [Victims of Crime Guidance for Prosecutors](#), and the [Victims Code](#), both of which explain prosecution responsibilities in further detail.⁹

9.6 Witnesses

Any MBIE employee who is requested by a prosecutor or investigator to give evidence in support of a MBIE prosecution must attend Court and assist upon request.

If the employee has any concerns regarding their safety, they should notify their manager and the prosecutor immediately. That way all parties can consider whether any steps may need to be taken to protect the witness (for example, giving their evidence in an alternative way e.g. by CCTV).

An MBIE employee must give evidence in a prosecution that is not brought by MBIE if summonsed. It is the responsibility of that employee to inform their manager that they have been summonsed and to inform them of any potential risks arising out of the nature of the evidence that they may be required to give. Employees and managers are encouraged to seek advice from a prosecutor if they are concerned about the evidence required or the potential risks.

MBIE employees called to give expert evidence in a prosecution must comply with the [Code of Conduct for Expert Witnesses](#). For MBIE prosecutions, it is the responsibility of the prosecutor to ensure that the witness understands their obligations as an expert witness.

10 New information in the prosecution context

- 10.1 Investigators and other staff must provide any relevant new or previously undisclosed information to the prosecutor as soon as practicable.
- 10.2 MBIE has a continuing obligation to investigate potentially exonerating material if it comes to hand (and to disclose new information to the defence).
- 10.3 New information may also be relevant to the ongoing obligation to consider the propriety of a prosecution (see public interest test –above).

11 Conduct of prosecutions

11.1 Choice of prosecutor

All MBIE prosecutions must be conducted by properly qualified legal counsel. Prosecutions may be carried out by in-house prosecutors or by Crown Solicitors or employees of Crown Solicitor firms under instruction from the relevant business unit. Crown solicitors may only undertake prosecutions for MBIE in the area for which they hold the Crown warrant.¹⁰

Some prosecutions cannot be undertaken by in-house prosecutors and so must be taken by Crown Solicitors, or in some cases taken over by Crown Solicitors following a plea or case review hearing. These are ‘Crown prosecutions’ and are set out in the Crown Prosecution Regulations 2013. Where a matter is transferred to a Crown Solicitor as a Crown prosecution, the in-house prosecutor and investigator must ensure that the Crown Solicitor receives the full file and accompanying prosecution report.

For all other prosecutions, the decision as to which prosecutor to use is made in accordance with the [Legal Services Policy](#), but the table below sets out some situations when a Crown Solicitor may be instructed to lead or support a prosecution.

⁹ Information about making a complaint about MBIE’s compliance with the Victims’ Rights Act is available on the MBIE website at <http://www.mbie.govt.nz/about/our-people/contact-us/victim-support-mailbox?searchterm=victim>.

¹⁰ See [letter from Deputy Solicitor-General to Crown Solicitors](#) dated 18 August 2014.

| Reason | Example |
|---|--|
| To support MBIE's capacity to provide services | Insufficient staff within a particular district or area of regulation to meet needs |
| Complex legal issues | Likely to require complex advocacy with national implications |
| High Profile | Case is high profile with considerable media interest. This may be because of the defendant's identity, international aspects, circumstances surrounding the case or the victims' identity |
| Independence from Ministry required | When the case calls for independent advice or advocacy – for example; when there is a perceived or actual conflict of interest |

11.2 Running of the case

Once the decision to prosecute is made, accountability for legal issues in connection with the file passes to the prosecutor. The prosecutor will consult the investigator or other person in charge of the file as to the conduct of the prosecution and keep them informed as to progress.

In the case of Crown Prosecutions, once the Crown has assumed responsibility for an MBIE prosecution, all decisions are matters for the Crown Prosecutor to decide, in consultation with MBIE. All prosecutors acting on behalf of MBIE are required to comply with all relevant professional obligations, including the requirement to present the prosecution case fairly and fully, but not to strive for a conviction.

The prosecutor must also keep the relevant manager and, for in-house prosecutions, the Manager Legal Services - Litigation, apprised of any significant developments in the file. "Significant developments" include:

- a. developments that may affect the conduct of other prosecutions
- b. indications of media interest, or developments of which the Ministry may wish to alert the media and
- c. matters affecting resourcing for the prosecution.

Except as otherwise instructed, the authority to accept, on behalf of MBIE any proposal for resolution of a prosecution remains with the prosecution decision maker, who must seek advice from the prosecutor. If the prosecutor thinks that a proposal may be made during a court hearing, he or she should discuss with the prosecution decision-maker what resolution would be acceptable before the hearing. In some cases, resolution proposals may also be made proactively by prosecutors, with the authority of the prosecution decision maker.

11.3 Agency appearances

In-house prosecutors may instruct a suitably qualified Departmental or Crown entity prosecutor from another agency to appear on a prosecution in certain circumstances, or use local Crown solicitors to act as agents for list appearances or sentencing etc.

The prosecutor will consult with the investigator and relevant manager before instructing out. Factors to be considered include the nature, complexity and importance of the appearance, its location, and cost.

In any such case the in-house prosecutor will brief counsel acting about the file.

11.4 Reporting following disposal of prosecutions

The prosecutor must, within five days of the completion of the prosecution, provide a prosecution report to the investigator or other person in charge of the file on the result. This report must be in

the form of the “Return on Prosecution” form annexed to these Guidelines and Procedures and must be copied to the Manager Legal Services – Litigation.

For in-house prosecutions, the individual prosecutors are responsible for reporting the disposed prosecution (and related hours, disbursements and costs), to the designated administrator in legal branch, to allow monthly reporting to the Public Prosecutions Unit at the Crown Law Office.

Where business units have briefed out prosecutions to Crown Solicitors, the business unit is responsible for providing the report to the legal branch administrator.

Where any oral decision has precedent value or contains a contentious ruling relating to the determination of a point of law that may be subject to appeal, the prosecutor should request the Court to have the decision typed up.

12 Appeals

12.1 The defendant or MBIE may appeal the following decisions of a Court:

- a. a pre-trial ruling (with leave of the Court)
- b. a sentence imposed
- c. a ruling by the trial Court (on a question of law, with leave of the Court)
- d. bail
- e. orders relating to name suppression and
- f. a costs order.

However, under the Cabinet Directions on the Conduct of Crown Legal Business 2012 and the [Solicitor-General’s Prosecution Guidelines](#), MBIE (or a Crown Solicitor) must obtain the Solicitor-General’s consent to appeal any decision of a court (except bail decisions which are within the authority of Crown solicitors).

12.2 Defendant Appeals

Any external prosecutor who receives notice of an appeal filed by a defendant, in a case originally prosecuted for MBIE by that prosecutor must immediately inform the instructing MBIE employee. This includes conviction appeals.

Any in house prosecutor who receives notice of an appeal filed by a defendant must immediately inform the Manager Legal Services – Litigation.

The business manager or Litigation Manager will discuss the appeal with the prosecutor who appeared on the prosecution and the prosecution decision maker before deciding whether to oppose the appeal.

For prosecutions taken by in house prosecutors the prosecutor or Litigation Manager will instruct a Crown Solicitor to represent MBIE on appeals in accordance with the Cabinet Directions on the Conduct of Crown Legal Business and the Crown Solicitors’ Terms of Office.

12.3 MBIE Appeals

No appeal (other than a bail appeal) may be filed on behalf of MBIE, whether by a MBIE prosecutor or by external counsel unless the prior written consent of the Solicitor-General has been obtained. The usual time frame for filing an appeal in the appropriate Court is within 20 working days of the decision being made.

The relevant business unit manager or prosecutor may initiate a request for approval to appeal. The initiator of the request is responsible for forwarding urgently to the Litigation Manager the following material:

- a. the decision to be appealed (or, in the case of an oral decision that has not been transcribed: the prosecutor's notes of the decision, to be followed by a typed transcript of the notes as soon as possible)
- b. a statement of the proposed ground(s) of appeal and details of the alleged errors in the judgment
- c. any written submissions for the Ministry or the defendant and
- d. an outline of the importance to the Ministry of conducting an appeal and any risks in doing so.

This information should be provided to the Litigation Manager as soon as possible but at the latest within five working days of the decision to be appealed.

The decision on requests for the Solicitor-General's consent to appeal will be made by the Litigation Manager in consultation with the business unit manager and the prosecution decision maker and prosecutor who appeared on the prosecution. This decision should be made by the Litigation Manager no later than five working days after receipt of the file.

Where the Litigation Manager agrees an appeal is appropriate, he or she will facilitate the request for approval to Crown Law (on behalf of the Solicitor General), with the assistance of the Prosecutor who appeared on the prosecution.

If the Solicitor-General consents to the appeal being filed, the appeal will be dealt with by either Crown Law or by a Crown Solicitor (depending on the circumstances).

12.4 Outcome of appeals

On receipt of the appeal judgment, counsel appearing on an appeal must forward a copy immediately to the relevant investigator or business unit manager, the in-house prosecutor (if relevant) and the Litigation Manager.

For a sentence appeal, the counsel must complete a report on the case in the standard Return on Prosecution format and provide it within five days to the relevant business unit and Litigation Manager.

13 Media comment

- 13.1 Publishing the nature and outcome of enforcement actions draws attention to the consequences of violating the law. It is a valuable tool for both educating duty holders and deterring non-compliance.
- 13.2 However, public statements concerning prosecutions and investigations must be treated with particular care.
- 13.3 The general expectation is that relevant business unit will provide a spokesperson and prosecutors will not make any public comment.
- 13.4 In communicating with the public through the media in relation to a prosecution, MBIE staff will act in accordance with the Crown Law Media Protocol for Prosecutors, [News Media Policy](#) and will act in a way that:
 - a. does not prejudice the right to a fair trial
 - b. supports the administration of justice and the integrity of the criminal justice system
 - c. respects the principle of open justice and
 - d. treats the victims of crime with courtesy and compassion, and respects their privacy.
- 13.5 MBIE will publicise the outcome of a prosecution where it considers it appropriate. This will be managed by the relevant business unit manager together with the communications and legal teams.

14 Civil Proceedings relating to prosecution action

14.1 Civil proceedings arising out of a prosecution, will be managed as follows:

- a. any application or other civil action against MBIE in the District Court that arises in the course of a prosecution must be managed by the relevant prosecutor or Crown Solicitor instructed on the prosecution and
- b. any application or other civil action against MBIE in the High Court that arises in the course of a prosecution or enforcement action (including judicial review) must be managed by the MBIE Prosecutor, Crown Solicitor and/or the Crown Law Office.

15 Diversion

15.1 Where MBIE business units operate a diversion scheme it is important that -

- a. there are clear guidelines on when the scheme should be used and the criteria for making any decision as to whether to offer diversion
- b. the diversion scheme is publicly available (eg. in the compliance and enforcement part of MBIE's website)
- c. the scheme is not mentioned to potential defendants during the course of an ongoing investigation (which could impact on the admissibility of evidence)
- d. the existence of the scheme is not taken into consideration until a decision to prosecute has been made and charges laid
- e. the diversion decision maker is independent of the investigator who prepared the prosecution
- f. the decision to offer diversion is consistent with the [Solicitor-General's Prosecution Guidelines](#), and in particular the public interest test, and takes into account the views of any victims.

16 Related documents

16.1 [Prosecution policy](#)

16.2 [Declaration of Interest policy](#)

16.3 [Delegations policy](#)

17 Help

17.1 If you have questions about these procedures, talk to your manager in the first instance.

17.2 Managers should seek advice from the Auckland Legal Manager, or Manager Legal Services – Litigation.

18 Appendices

18.1 **Appendix 1 – Roles under Procedure and Guidelines**

| Role | Responsibilities |
|--------------|---|
| Investigator | <ul style="list-style-type: none">Investigates suspected breaches of relevant Act, Regulation or other instrumentResponsible for preparing file for referral to a prosecutor for reviewEnsures the file contains all relevant evidence, identifies issues going towards weight, credibility and |

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| | |
|--|--|
| | <p>admissibility, and includes all relevant information in relation to the public interest assessment</p> <ul style="list-style-type: none"> • Prepares disclosure for prosecutor review and assists prosecutor with disclosure obligations. |
| Prosecution Decision Maker (within business unit) | <ul style="list-style-type: none"> • Reviews file and assesses in accordance with the Prosecution Policy, these Procedures and Guidelines and the Solicitor-General's Prosecution Guidelines • Advises investigator (or investigator's manager) if further inquiries or information are necessary or if the file is to a satisfactory standard • Makes prosecution decision • Records and places on the case file the reasons for the decision to prosecute or not • Where a decision is made to issue a written warning or to offer diversion, reasons for that decision must also be placed on the case file. |
| Prosecutor | <ul style="list-style-type: none"> • Reviews file and evidence to ensure that the Tests for Prosecution (evidential sufficiency and public interest) set out in the Solicitor-General's Prosecution Guidelines are met • If not satisfied that the test for prosecution has been met, the prosecutor provides a written recommendation to the prosecution decision maker that a decision of 'no prosecution' should be made • If satisfied that the test for prosecution has been met, the prosecutor documents and confirms this to the prosecution decision maker who will make the ultimate decision whether to initiate prosecution. |
| Manager Legal Services – Litigation | <ul style="list-style-type: none"> • This role is referred to in various places in procedures eg: clause 2 providing legal advice around conflicts of interest. |
| Chief Legal Officer and/or Business Unit Manager | <ul style="list-style-type: none"> • This role is referred to in various places in procedures eg: Responsibilities around conflict of interest – clause 2. |

18.2 Appendix 2 – MBIE Return on Prosecution *(Required for all disposed MBIE prosecutions)*

CRI No: *Insert CRI No.*

(eg: CRI-2015-004-001234)

FILE No: *Insert client ref/ActionStep reference if relevant*

TO: *Insert MBIE Business Group*
MBIE LEGAL SERVICES, WELLINGTON

Att: Insert name of client contact
Att: Manager Legal Services - Litigation

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FROM: *Insert name of prosecutor and firm*

PERSON PROSECUTING: *Insert name of person who signed charging documents*

DEFENDANT: *Insert name of defendant*

CHARGES : *Insert description of charges (eg. 5 x Produces a fraudulently obtained passport)*

SECTION and ACT: *Insert section and Act charges laid under eg. (s 351 Immigration Act 2009)*

DISTRICT COURT AT *{insert court }* **ON:** *(insert date of sentencing)*

JUDGE: *Insert name of sentencing Judge*

COUNSEL: **PROSECUTION:** *Insert name*

DEFENDANT: *Insert name*

PLEA: *Guilty/Not-guilty*

DECISION: *Date of decision and sentence outcome*

COMMENT: *Insert comments*

| Total hours spent on prosecution ¹¹ | Cost of Prosecution ¹² | Expenses (if any) |
|--|-----------------------------------|-------------------|
| | | |
| | | |
| | | |

Solicitor: *Name of counsel who has filled in ROP*

Date: *Date ROP filled in*

¹¹ From the date of the prosecution decision to disposal of the prosecution.

¹² Cost billed or to be billed for external prosecutions. Leave blank for in-house prosecutions.