

MPI Organisational Policy
Prosecutions and Infringements

Ministry for Primary Industries
Manatū Ahu Matua



Owner: Chief Legal Adviser
Published: 14 December 2016

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Office of the Director General
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OVERVIEW

Purpose

The purpose of this policy is to establish the principles to which MPI staff must adhere in dealing with:

- potential prosecutions;
- making prosecution decisions (including decisions to warn, to issue infringements, commence pecuniary penalty proceedings, or not to prosecute); and
- conducting prosecutions and/or related proceedings, or recommending appeal of a court decision in or related to criminal proceedings.

It also states when MPI staff must appear as expert witnesses.

Background

MPI administers a large number of Acts, Regulations and other legislative instruments across several different regulatory systems, including food safety, biosecurity, animal welfare, fisheries management, forestry and emissions trading. Investigation and Prosecution functions support these systems.

Some directorates that support those systems may have a variety of functions, including both management of compliance by warranted inspectors and the management of wider customer relationships. Decisions whether to initiate an investigation of potential breaches of legal requirements and whether to issue infringement notices may be undertaken in those directorates, but decisions whether to prosecute apparent breaches should be not made in directorates that are responsible for managing wider customer relationships. This separation ensures that prosecution decisions are not influenced or perceived to be influenced by those relationships. Non-compliances detected by directorates outside Compliance Services (for example, Spatial, Forestry and Land Management, Verification Services or Border Clearance Services) are therefore referred to Compliance Services for investigation and decision.

This policy updates and replaces the 31 July 2012 policy to reflect changes in the Legal and Operational contexts. This policy is subject to and should be read in conjunction with the Solicitor-General's [Prosecution Guidelines](#), as amended or replaced from time to time. If any inconsistency arises between this policy and those Guidelines, the Solicitor-General's Prosecution Guidelines prevail.

The Chief Legal Adviser issues MPI Prosecution Procedures and Guidelines stating practices and procedures that give effect to this Policy.



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WHO THIS POLICY APPLIES TO

This policy and any associated MPI Prosecution Procedures and Guidelines that may be issued by the Chief Legal Adviser must be adhered to and followed by:

- all MPI 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 this policy;
- all MPI staff involved in the preparation for, and conduct of, prosecutions brought by MPI (whether under legislation administered by MPI or the general law) and related court proceedings;
- all prosecutors acting for MPI; and
- witnesses giving evidence in respect of their role as an MPI employee or contractor, within any criminal proceedings or civil proceedings arising out of the criminal process.

SCOPE

What this policy covers

This Policy applies to all MPI staff dealing with potential prosecutions, making prosecution decisions (including decisions to warn, to issue infringements, commence pecuniary penalty proceedings, or not to prosecute), conducting prosecutions and/or related proceedings, or recommending appeal of a court decision in or related to criminal proceedings. It also states when MPI staff must appear as expert witnesses.



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RULES AND REQUIREMENTS:

1 INDEPENDENCE

The Solicitor-Generals' 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.”

This Policy sets out processes to protect the independence of the prosecution decision-maker.

Any matters that arise outside of this policy and its processes that may compromise or be seen as compromising independence must be raised with the Chief Legal Adviser.

MPI may develop sector compliance strategies to state MPI's priorities and guide deployment of Compliance Services' resources. Decision-makers should be aware of these strategies and take them into account, but prosecution decisions must be made by the responsible decision-maker with the benefit of expert legal advice.

Internal and external comment and discussion on prosecution matters (including reporting to SLT, Ministers or comment to the media) needs to recognise this independence both before and during prosecutions. Reports to Ministers and/or SLT should generally occur only once charges have been laid, as well as applying the “no surprises” policy in terms of matters that are likely to be controversial or the subject of public debate.¹ Public comment on investigations and prosecutions must follow the Media Protocol for Prosecutors.

2 CONFLICTS OF INTEREST

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 MPI prosecution or civil litigation arising out of or related to enforcement action that may reasonably be contemplated.

Any conflict of interest (whether actual, potential or perceived) must be disclosed immediately to the relevant regional Prosecution Team Leader, the Manager Prosecutions, or the Chief Legal Adviser. 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 Adviser's decision is final.

It is the responsibility of the person to whom the conflict is disclosed to record, in writing, the nature of the conflict, the date of disclosure, its impact on the prosecution if any and any directions given as to its management.

¹¹ “No Surprises Guidance” Cabinet 31 October 2016



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The presumption is that a prosecutor will remain on a prosecution file once engaged as legal adviser on that file. 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.

3 PROSECUTION DECISION MAKING

A prosecution decision must be made in every case where a breach of any Act, regulation, or other legislative instrument has been investigated and there is an offence provision available. If an investigation has been initiated by a warranted officer outside the Compliance Services directorate, the investigation file must be forwarded to Compliance Services and the prosecution decision made by an authorised manager within the Compliance Services directorate (unless the offence is an infringement offence).

Decision-making procedures

In accordance with the Solicitor-Generals' Prosecution Guidelines, a preliminary recommendation concerning a prosecution decision must be independently reviewed by an experienced solicitor.

When warranted officers of the Ministry investigate a suspected breach of any Act, Regulation or other instrument, it is the responsibility of the investigator to prepare the file for referral to a prosecutor for review.

The file should include copies of (or a full description of) the evidence available, including exonerating evidence, 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.

Legal review

Legal review will be carried out by a suitably qualified Prosecutions team lawyer.

All prosecutors must comply with the Directorate peer review policy.

The solicitor reviewing the file must thoroughly assess the matter in accordance with this Policy, any MPI Prosecution Procedures and Guidelines issued by the Chief Legal Adviser, and the Solicitor-General's *Prosecution Guidelines*.

The solicitor must advise the referrer, or the referrers' manager, if further investigations, inquiries or information are necessary (for example, as to other potential charges under non-MPI legislation), or if the file is not to a satisfactory standard.

Advice may also be sought from Crown Solicitors with the prior consent of the Manager Prosecutions or the Chief Legal Adviser, in accordance with the Provision of Legal Services Policy.



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3.1 PROSECUTION DECISION-MAKERS

Decision-makers

The decision as to what further action (if any) will be taken when a breach of MPI legislation has been investigated must be made by one of the following managers:

- the Director Compliance Services;
- the tier 4 Manager of the Fisheries Compliance Group, Animal Welfare Compliance Group, or Compliance Investigations Group in the Compliance Services directorate; and
- a tier 5 Manager in the Compliance Services Directorate expressly authorised in accordance with the MPI Prosecution Procedures and Guidelines.

Escalation criteria: It is expected that prosecution decisions will be made below Director level unless one or more of the following escalation criteria apply:

- the legislation, or the particular provision breached, is new or untried;
- there are potential issues with the exercise of search and seizure powers;
- the offending has resulted in death or serious injury;
- there are human rights issues;
- there are allegations that MPI has acted negligently or unlawfully; or
- any other reason that may indicate special sensitivity.

3.2 THRESHOLD FOR PROSECUTION

No prosecution may be commenced unless it meets the two part test set out in the Solicitor-General's *Prosecution Guidelines*:

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

Evidential sufficiency

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 and the evidential test detailed in the Solicitor-General's Guidelines.

Public interest assessment

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).



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All of the public interest factors set out in the Solicitor-General's *Prosecution Guidelines* will be taken into consideration, as applicable in any given case, as well as any other relevant matters going to the public interest.

The prosecution decision-maker must also take into account:

- MPI's statutory objectives and enforcement priorities including National Compliance sector strategies, if appropriate;
- alternatives to prosecution such as directive options to achieve compliance or pecuniary penalties;
- any existing or likely prosecution or other proceedings involving the defendant(s) by another government agency, and the likely outcome;
- the relevant statutory timeframes and the period since the matter first came to Ministry attention;
- the resources available to the Ministry relative to the public interest in a prosecution proceeding;
- any guidelines issued by the Chief Legal Adviser;
- the obsolescence or obscurity of the law; and
- whether the prosecution might be counter-productive, for example, by enabling a defendant to be seen as a martyr.

Factors that must not be taken into account include:

- colour, race, ethnicity, sex or marital status, religious, ethical or political beliefs;
- personal knowledge of the offender;
- political advantage or disadvantage to the prosecuting agency or people linked to it; and
- the possible effect on the personal or professional reputation or prospects of those responsible for decision making, the agency, or linked to it.

It is the responsibility of the prosecution decision-maker to decide whether it is in the public interest to take or continue a prosecution. The Prosecutor assigned to a prosecution file (whether before or after charging) is to provide public interest advice to the prosecution decision-maker, whether or not that advice is requested. 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 Chief Legal Adviser and the Director Compliance Services must be consulted before a decision is made.

If the Chief Legal Adviser and the Director Compliance Services cannot agree on the public interest, a decision to commence or continue the prosecution can only be made by the Director Compliance Services after obtaining legal advice from the relevant Crown Solicitor.



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Coordinated Enforcement and Prosecution Decision-Making

Government agencies should respond to criminal behaviour in a coordinated way. When determining whether to prosecute, the decision-maker should consider any existing or likely prosecution or other proceedings involving the defendant by another 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, MPI shall consider referring that matter to that other agency for decision to ensure a coordinated government response, prior to any formal warning being issued.

It is the responsibility of the Manager Prosecutions or the Chief Legal Adviser 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.

4 CHOICE OF CHARGES

It is the responsibility of the prosecutor 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;
- 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.

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 the most exceptional cases that it will be appropriate to select a more general charge with a higher penalty.

The relevant Crown Solicitor should be consulted in particularly complex or serious cases likely to result in Crown prosecutions.

5 INFRINGEMENTS

If a warranted officer detects an infringement offence and a written warning is not appropriate, the officer may issue or cause to be issued an infringement notice to the offending person, in accordance with the relevant Guidelines or Procedures.

Each infringement must be able to be proven. Procedures, including requirements for the file required to support an infringement, and file accountabilities will be stated in the MPI Prosecution Procedures and Guidelines.



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If a person issued with an infringement notice disputes the offence and/or formally requests a hearing, then the test for prosecution must be satisfied and the relevant procedures in this policy must be complied with before the Ministry files a notice of hearing in Court.

The decision to proceed to a defended hearing (or non-defended) on an infringement notice may be made by a Tier 4 Manager or a Tier 5 Manager who is authorised to make prosecution decisions.

An infringement notice may be revoked by a person authorised by the Director Compliance Services or the Director Border Clearance Services.

6 RECORDS, DISCLOSURE AND REPORTING

All significant prosecution advice and decisions (including 'no prosecution' decisions) must be recorded in writing, in accordance with the MPI Prosecution Procedures and Guidelines.

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.

It is the responsibility of the Prosecutor to maintain a record of any prosecution commenced and to report to the OIC and the relevant prosecution decision-maker.

It is the responsibility of the Prosecutor to ensure that MPI complies with all disclosure obligations, including those set out in the Criminal Disclosure Act 2008 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 OIC is expected to provide all necessary assistance to ensure that the prosecutor is able to discharge his or her responsibility.

It is the responsibility of the OIC to ensure those who need to be kept informed are notified of progress.

In cases involving a "victim" or "victims" for the purposes of the Victim Rights Act 2002:

- it is the responsibility of the OIC to keep victims informed of progress of the investigations and prosecutions in accordance with s 12 of that Act; and
- it is the responsibility of the Prosecutor to prepare victim impact statements.

7 WITNESSES

Any MPI employee who is requested by a Prosecutor or investigator to give evidence in support of a MPI prosecution must attend Court and assist upon request, unless there is reasonable apprehension of harm and the Prosecutions Manager has excused the witness in writing. It is the Prosecutor's responsibility to ensure that the witness' manager is notified of the request and that the witness is informed of any allowances that apply.

An MPI employee must give evidence in a prosecution that is not brought by MPI if summonsed. It is the responsibility of that employee to inform their manager and the Manager Prosecutions that they



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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.

MPI employees called to give expert evidence in a prosecution must comply with the Code of conduct for expert witnesses. For MPI prosecutions, it is the responsibility of the prosecutor to ensure that the witness understands their obligations as an expert witness.

8 NEW INFORMATION IN THE PROSECUTION CONTEXT

MPI staff must provide any relevant new or previously undisclosed information to the Prosecutor as soon as practicable.

MPI has a continuing obligation to investigate potentially exonerating material if it comes to hand (and to disclose new information to the defence).

New information may also be relevant to the ongoing obligation to consider the propriety of a prosecution (public interest test – see above).

9 CONDUCT OF PROSECUTIONS

9.1 GENERALLY

Once the decision to prosecute is made, accountability for legal issues in connection with the file passes to the prosecutor.

Generally, all MPI prosecutions must be conducted by properly qualified legal counsel. Prosecutions may be carried out by in-house Prosecutors (for non-Crown prosecutions) or by Crown Solicitors under instruction from the Manager Prosecutions or Team Leaders.

The Crown Solicitor must be instructed if:

- it is required under the Cabinet Directions for the Conduct of Crown Legal Business, the Criminal Procedure Act 2011, or any other legislation; the MPI Provision of Legal Services Policy, or any relevant guidance from the Solicitor-General; or
- the Manager Prosecutions considers it necessary or desirable having regard to the circumstances of the case. For example, in sensitive, significant or complex potential prosecutions.

The Prosecution team will consult the investigating unit as to the conduct of the prosecution and keep them informed as to progress.



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The responsibility for instructing external counsel, including Crown Solicitors, remains with the Manager Prosecutions and Prosecution Team Leaders who will inform and consult the Chief Legal Adviser as appropriate.

All prosecutors acting on behalf of MPI 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 conviction.

In the case of Crown Prosecutions, once the Crown has assumed responsibility for an MPI prosecution, all decisions are matters for the Crown prosecutor to decide, in consultation with MPI.

9.2 MINOR APPEARANCES

Trained MPI staff employed outside of the Legal Services Directorate may appear on instruction on minor matters, as agreed by the Chief Legal Adviser, Director Compliance Services and Director Border Clearance Services.

9.3 AGENCY APPEARANCES

MPI may instruct a suitably qualified Departmental prosecutor from another agency to appear on a prosecution in certain circumstances.

MPI Legal will consult with the OIC before instruction out. Factors to be considered include the nature, complexity and importance of the appearance, and costs.

In any such case MPI Legal will brief counsel acting as to the file.

10 APPEALS

10.1 DEFENDANT APPEALS

The relevant regional Prosecution Team Leader or the Manager Prosecutions will instruct an external Crown counsel to represent MPI on appeals in accordance with the MPI Prosecution Procedures and Guidelines.

10.2 MPI APPEALS

No appeal may be filed on behalf of MPI, whether by a MPI Prosecutor or by external counsel unless:

- it has been authorised by the Manager Prosecutions or the Chief Legal Adviser in consultation with the Director Compliance Services and in accordance with the MPI Prosecution Procedures and Guidelines; and
- the prior written consent of the Solicitor-General has been obtained.



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11 MEDIA COMMENT

Public statements concerning prosecutions and investigations must be treated with particular care. Any media comment during an investigation or prosecution must take into account the Crown Law Office *Media Protocol for Prosecutors* and the MPI Media Response Policy, and comply with the Prosecution Guidelines. The general expectation is that Compliance Services will provide a spokesperson and prosecutors will not make any public comment.

12 CIVIL PROCEEDINGS RELATING TO ENFORCEMENT ACTION

Civil proceedings arising out of enforcement action, including a prosecution, shall be managed as followed:

- any application or other civil action against MPI in the District Court that arises in the course of a prosecution or enforcement action must be managed by the MPI Prosecutor or Crown counsel instructed on the prosecution (unless the Manager Prosecutions directs otherwise);
- any application or other civil action against MPI in the High Court that arises in the course of a prosecution or enforcement action (including judicial review) must be managed by the MPI Prosecutor, Crown Solicitor and/or the Crown Law Office as directed by the Manager Prosecutions; and
- proceedings for pecuniary penalty orders shall be managed by analogy with prosecution decisions, as directed by the Manager Prosecutions or Chief Legal Adviser. Proceedings for pecuniary penalties must not be brought without the agreement of the relevant tier 4 Compliance Group Manager or the Director Compliance Services.



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BREACHES OF POLICY

Breaches of this policy (or related policies such as the Organisational Guidelines: Discipline – Dealing with Misconduct, the Conflict of Interest Organisational Guidelines, the Code of Conduct or the MPI Media Response policy) may trigger further action, the nature of which will be determined by the nature and significance of the breach.

AMENDMENTS TO THIS POLICY

Amendments to this policy may be made only by the Director-General. The Chief Legal Adviser must consult the Director Compliance Services before proposing any amendment.

OTHER REFERENCES



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DEFINITIONS

Term	meaning
Investigator	Any inspector or officer warranted under MPI legislation (administered or enforced) whose functions include investigation of suspected offending
OIC	Officer in charge
Legal Manager	Any manager reporting to the Chief Legal Adviser (including the Manager Prosecutions) or a regional Prosecution Team Leader
Regional Prosecution Team Leader	A team leader with prosecution responsibilities, reporting to a legal manager
Prosecutor	MPI in-house prosecutors, solicitors, (including the Manager Prosecutions and regional Prosecution Team Leader) and, where the context requires, external Crown counsel.
SLT	Senior Leadership Team

Document Information

The published version number and date is required in the following table.

Date	Version	Author	Comments
	1		
	2		
	3		