

MPI Organisational Policy
Prosecutions and Infringements

Ministry for Primary Industries
Manatū Ahu Matua



Owner: Chief Legal Adviser
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MPI Organisational Policy: Prosecutions and Infringements

Owner: Chief Legal Adviser/Director Legal Services
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MPI Organisational Policy

Prosecutions and Infringements

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1 OVERVIEW

1.1 PURPOSE

The purpose of this policy is to establish the principles which MPI staff must follow when:

- dealing with potential prosecutions;
- issuing infringement notices or written warnings;
- making prosecution decisions following an investigation (including decisions not to prosecute);
- making decisions concerning pecuniary penalty proceedings (where applicable);
- conducting prosecutions and/or related proceedings, or recommending appeal of a court decision in or related to criminal proceedings;
- appearing as witnesses in a prosecution brought by MPI, or when they are summonsed to give evidence in relation to their role in MPI in a prosecution brought by another agency.

The Policy outlines the relevant factors to be taken into account when decision-makers at MPI exercise their discretion, and it serves to inform the public and defence counsel on how prosecution decisions are made.

1.2 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, forestry and emissions trading. Compliance, investigation and prosecution functions support these systems.

Some Business Units that lead those systems may have a variety of functions, including both management of compliance by warranted inspectors and the management of wider functions and relationships. It is important that regulatory decisions, particularly decisions whether or not to initiate an investigation or commence a prosecution where there has been a breach of MPI's legislation, are made free from extraneous pressures and unwarranted stakeholder or political influence or intervention.

This policy is subject to, and should be read in conjunction with, the Solicitor-General's [Prosecution Guidelines](#), and other guidelines issued by the Solicitor-General specific to prosecutions.¹ If any inconsistency arises between this policy and those Guidelines, the Solicitor-General's Prosecution Guidelines will prevail. This policy should also be read alongside MPI's compliance and enforcement policies.

Additionally, from time to time the Chief Legal Adviser issues Procedures and Guidelines relating to Prosecutions and Infringements, which provide for more detailed operating practices and procedures to give effect to this Policy.

1.3 WHAT THIS POLICY COVERS

This Policy covers:

¹ <https://www.crownlaw.govt.nz/publications/prosecution-guidelines/>



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- Decisions and processes relating to infringement notices, potential prosecutions and prosecution decisions, including related civil proceedings and decisions to issue a written warning;
- Conduct of prosecutions and/or related civil proceedings for MPI, and appeal of court decisions related to criminal proceedings;
- Appearance of MPI staff as witnesses in prosecutions commenced by MPI and prosecutions by other agencies relating to MPI's functions.

This policy does not cover: initial investigations that do not progress to development of an Investigation Report; oral warnings; or exercise of administrative powers such as decisions to make a direction, or exercise recall/response powers.

2 WHO THIS POLICY APPLIES TO

This policy and any associated Prosecution or Infringement Procedures and Guidelines issued by the Chief Legal Adviser must be followed by:

- all MPI staff (whether as a statutory decision-maker or acting under delegation) who make a decision to prosecute or not to prosecute, or who take other actions or decisions within the 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
- any MPI staff giving evidence in a prosecution brought by MPI, or in a prosecution brought by another agency where their evidence relates to their role as an MPI employee.

3 INDEPENDENCE

3.1 GENERAL

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, and which may compromise or be seen as compromising that independence, must be raised with the Chief Legal Adviser.

MPI may develop sector compliance strategies to state MPI's regulatory priorities and guide the deployment of compliance resources. These strategies are developed by staff in the Business Unit that leads in the relevant regulatory system are moderated by the Compliance Oversight Group, a subcommittee of the Senior Leadership Team. Decision-makers should be aware of these strategies and must take them into account, but such strategies will not be determinative of individual prosecution decisions.



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Prosecution decisions must be made by the responsible decision-maker, free from undue or improper pressure from any source, political or otherwise, and with the benefit of legal advice when required by this policy.

3.2 COMPLIANCE FUNCTIONS IN BRANDED BUSINESS UNITS; “RESPONSIBLE DIRECTORS”

MPI’s branded Business Units each include officers warranted under legislation that they administer. Investigations in Corporate Services and the compliance functions in three branded Business Units undertake a range of investigations and include prosecution decision-makers: Agriculture & Investment Services (for offending against animal welfare legislation and the National Animal Identification and Tracing Act), Fisheries New Zealand and New Zealand Food Safety.

Warranted officers in Biosecurity New Zealand and Te Uru Rakau refer to Investigations in Corporate Services any investigations beyond infringement offences that require only retention of immediately available evidence. Their compliance functions do not include any prosecution decision-makers.

The Director Investigations and Compliance Support in Corporate Service and the directors responsible for compliance functions in AIS,² FNZ³ and NZFS⁴ are referred to as “responsible directors” in this policy.

The responsible directors in AIS, FNZ and NZFS or their senior managers⁵ may refer sensitive or complex investigations to Investigations, including (but not limited to) cases involving a high level of fraud or where there are breaches involving multiple pieces of legislation. The Director Investigations and Compliance Support will agree thresholds for reference to Investigations with relevant staff in each branded Business Unit (ie, responsible directors in AIS, FNZ and NZFS; and a director nominated by the DDGs who lead BNZ and TUR).

Staff outside the compliance functions in each of the branded Business Units have responsibilities that include working with representatives of iwi, industry and other sectors. Responsible directors do not have those relationship management roles, except as part of compliance and response functions. Prosecution decisions by any authorised prosecution decision-maker must comply with the Solicitor-General’s Prosecution Guidelines and this policy, and are required to meet the required standards of independence.

3.3 REPORTING ON PROSECUTION MATTERS

Internal and external comment and discussion on prosecution matters (including reporting to MPI’s Senior Leadership Team, Ministers or comment to the media) should respect the independence of prosecutorial decision-making.

Ministers need to be advised of significant issues within their portfolios, and are accountable to Parliament for them. Information relating to investigations and prosecutions should be provided in accordance with the “no surprises” principle, so they do not become involved in operational matters within Departments⁶.

² Director Compliance & Response

³ Director Fisheries Compliance

⁴ Director NZFS Food Compliance & Response

⁵ AIS: National Manager Animal Welfare & NAIT Compliance; FNZ: Regional Managers; NZFS: National Manager Food Compliance Services.

⁶ “No Surprises Guidance” Crown Law Office <https://www.crownlaw.govt.nz/assets/No-Surprises-Guidance-Sept-2020.pdf>



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Reports to Ministers should generally occur only once charges have been laid.

Reporting to the DDG who lead branded Business Units should reflect two principles:

- The DDG is responsible to the Director-General for the performance of that Business Unit and MPI's performance within that regulatory system, so must be informed about significant developments within it; and is ultimately responsible for decisions about efficient deployment of resources within it; but
- The DDG is not a warranted officer or prosecution decision-maker, so should not be called upon to make decisions about the conduct of investigations, exercise of investigative powers, commencement of a prosecution, choice of charges, or conduct or resolution of a prosecution.

Public comment on investigations and prosecutions must follow the Media Protocol for Prosecutors⁷.

4 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 related to enforcement action.

Any conflict of interest (whether actual, potential or perceived) must be disclosed immediately to the relevant Regional Manager Prosecutions, the National 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, any impact on the prosecution and any directions given as to its management. All staff are also required to comply with MPI's Conflicts of Interest Policy, where that applies.

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.

Where a person has disclosed a conflict of interest, that person must cease further involvement in the process.

5 INFRINGEMENTS

Warranted officers who issue an infringement notice when an infringement offence is detected are required to follow the processes in this section, Infringements Guidelines issued by the Chief Legal Advisor, and procedures adopted by the issuing officer's Business Unit; not the processes in section 7 below on Prosecution Decisions.

5.1 ISSUING INFRINGEMENT NOTICES OR WRITTEN WARNINGS FOR INFRINGEMENT OFFENCES

If a warranted officer detects an infringement offence and an oral 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 legislation and procedures issued by that officer's Business Unit.

⁷ Published by Crown Law dated 1 July 2013. See section 15 "Media Comment" below.



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If a warranted officer considers a written warning for an infringement offence would be appropriate instead of issuing an infringement notice, the officer should refer the matter to:

- *Animal Welfare and NAIT*: a Team Leader or Analyst designated by the National Manager;
- *Biosecurity*: a Manager designated by a Regional Commissioner;
- *Climate Change Response Act/emissions trading scheme*: a Manager designated by the Director Forestry and Land Management in Te Uru Rakau;
- *Fisheries*: any Fishery Officer may issue a warning;
- *Food*: a Regional Manager, Team Manager or National Manager.

Other prosecution decision-makers also have authority to issue warnings.

A written warning must not be issued unless the issuing officer is satisfied that the offence has been committed and could be proved in court, but that it is not in the public interest to issue an infringement notice. The public interest factors considered in prosecution decisions (section 6.2 below) are also relevant in this context.

A written warning should reflect the template letter approved by the issuing officer's Business Unit. See also section 8 below relating to warnings.

Each infringement notice issued must be able to be proven to the criminal standard of proof (beyond reasonable doubt). The issuing officer is responsible for ensuring that sufficient supporting documentation is collected and note book entries or job sheets written up, in accordance with the procedures issued by that officer's Business Unit.

5.2 RESPONSIBILITIES AFTER ISSUE OF AN INFRINGEMENT NOTICE

The issuing officer must ensure that the infringement notice and supporting documentation are entered promptly into relevant IT systems, and that any paper infringement notices plus supporting paper records are forwarded promptly to the MPI Infringements Processing Team.

An infringement notice may be revoked by a person authorised by a responsible director, a Regional Commissioner in Biosecurity New Zealand, or the Director Forestry and Land Management in Te Uru Rakau (an "adjudicator").⁸

The Infringements Processing Team is responsible for the effective and efficient processing of infringement notices, in accordance with the applicable statutory regime. They:

- Receive and process infringement fees;
- Issue reminder notices;
- Refer requests for waiver of an infringement notice and complaints about the issue of an infringement notice to the relevant adjudicator;
- Refer unpaid and undisputed infringement notices to the Ministry of Justice for collection;

⁸ Adjudicators for each regulatory system are identified in the Infringement Guidelines and Procedures.



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- Co-ordinate submission of infringement notices and supporting documents to the District Court where the offender does not challenge the notice but seeks a reduction in the infringement fee;
- Submit infringement notices to the District Court where the offender wishes to defend the notice, and arrange for a Prosecutor to appear.

5.3 DEFENDED INFRINGEMENT NOTICES

The issuing officer and their manager are responsible for preparation of evidence to support a defended infringement notice, including witness statements. The instructed Prosecutor is responsible for preparation of submissions to the Court and advising on the adequacy of the supporting evidence.

Defended infringement notices may be submitted to the District Court without a legal file review, but the Prosecutor instructed to appear must review the notice, supporting documentation and any explanatory or mitigating information provided by the defendant. If the Prosecutor advises that the evidence does not support the infringement notice, the relevant adjudicator or issuing officer must withdraw the notice.

Procedures, roles and responsibilities, and monitoring and reporting obligations are stated in the MPI Infringement Guidelines and Procedures.

6 BASIS OF A DECISION WHETHER TO PROSECUTE

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.

6.1 EVIDENTIAL SUFFICIENCY

It is the responsibility of the Prosecutor reviewing the file and the decision-maker to determine whether there is evidential sufficiency for the proposed charges or alternative charges, having regard to the evidence available and the evidential test detailed in the Solicitor-General's Guidelines.

A reasonable prospect of conviction will exist if, in relation to an identifiable individual, there is:

- credible evidence which can be adduced before a court; and
- upon which an impartial judge or jury could reasonably be expected to be satisfied beyond a reasonable doubt that the individual has committed a criminal offence.

Assessment of evidential sufficiency is an on-going obligation. If further significant information comes to light, the prosecution decision should be re-assessed.

6.2 PUBLIC INTEREST ASSESSMENT

The public interest factors contained in the Solicitor-General's *Prosecution Guidelines* will be taken into consideration, as well as the following matters going to the public interest:

- How serious is the offending? Did it result in:



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- serious harm to one or more animals or to the environment?
- serious harm to members of the public?
- serious financial loss to an individual, company or section of society?
- serious potential or actual harm to the relationship between tangata whenua and the environment?
- Is the offending likely to be continued or repeated?
- Was the offending commercially motivated, deliberate or seriously negligent?
- Does the defendant have relevant previous warnings or convictions?
- What penalty is the Court likely to impose?
- Has the defendant rectified the loss or harm caused (although defendants should not be able to avoid prosecution simply through paying compensation: see section 10.5 below)?
- Are there any extenuating or mitigating circumstances which mean that a prosecution is not in the public interest? For example, did the offending relate to non-commercial fishing for subsistence, which in future will be allowed by a customary authorisation? Or, is the potential defendant from outside New Zealand and unlikely to return?

The prosecution decision-maker must also take into account:

- MPI's statutory objectives and enforcement priorities including National Compliance sector strategies, if appropriate;
- If another agency has responsibility for administering the legislation under which any prosecution would be brought: any applicable enforcement policy of that agency;
- alternatives to prosecution such as directive options to achieve compliance, related administrative action (such as withdrawal/suspension/revocation of licence), asset recovery/civil forfeiture 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 and the likely length and cost of a prosecution, relative to the public interest in a prosecution proceeding;
- 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;



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- 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 or not 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 legal advice on the public interest test.

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 if new evidence comes to light) or in the defendant's circumstances (such as ill health).

6.3 POSSIBLE OUTCOMES OF THE DECISION

A decision whether to prosecute may have one of a range of outcomes:

- Decision not to prosecute because no offence was committed, or the evidence of offending is weak;
- Decision to issue an infringement notice, where there is an applicable infringement offence and the investigation file supports that (both sufficiency of evidence and public interest): see section 5 above;
- Referral to another agency for consideration of prosecution, asset recovery or other enforcement action: see section 7.5 below;
- Decision not to prosecute because prosecution is not in the public interest, in which case a warning may be appropriate: see section 8 below;
- Decision to prosecute: see section 9 below about choice of charges.

7 PROSECUTION DECISION MAKING PROCESS

7.1 INVESTIGATION FILE

A prosecution decision must be made in accordance with this policy in every case where a breach of legislation administered or enforced by MPI has been investigated and an offence provision appears to apply. (Routine decisions whether to issue an infringement notice without commencing an investigation are not required to follow the processes in this section. And this policy does not cover: initial investigations that do not progress to development of an Investigation Report; oral warnings; or exercise of administrative powers such as decisions to make a direction, or exercise recall/response powers.)

When warranted officers of the Ministry investigate a suspected breach of any Act, Regulation or other instrument, it is the responsibility of the officer leading an investigation to prepare an investigation file and Investigation Report in accordance with file-building standards issued by the Director Investigations and Compliance Support for referral to a Prosecutor for review; or, when a legal review is not required, for referral to the relevant prosecution decision-maker.



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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 which may impact on the assessment of the public interest test. This must include information about physical and/or mental ill health of the defendant, including the source of that information. If nothing is known, that should be recorded. The file should include any information, where known, indicating that prosecution may have a detrimental impact on the health of the defendant.

7.2 LEGAL REVIEW

7.2.1 Legal review not required

A preliminary recommendation concerning a prosecution decision (an Investigation Report) and the supporting investigation file must be independently reviewed by a Prosecutor in all cases, except for:

- minor Biosecurity, Fisheries, National Animal Tracing and Identification Act (NAIT) and Animal Welfare infringement offences for which a charging document is intended to be laid; or
- minor amateur fisheries prosecutions (excluding customary), where the evidence is straightforward, there is no commercial element and no defence has been raised by the defendant.

A prosecution decision in these cases may be made without a legal review only by prosecution decision-makers whom the responsible director⁹ has approved as qualified to make such decisions without a pre-charge legal review. In these cases a Prosecutor is still required to approve the wording of the charging document.

7.2.2 Legal review required

In all other cases, legal review of the investigator's Investigation Report and investigation file will be carried out by a suitably qualified Prosecutor, and where appropriate peer reviewed in accordance with the Legal Services directorate's peer review policy.

The Prosecutor and/or decision-maker reviewing the Investigation Report and supporting investigation file must thoroughly assess the matter in accordance with this Policy, and the Solicitor-General's *Prosecution Guidelines*.

The Prosecutor must advise the officer who referred the file for review, or their 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 built to a satisfactory standard. If this advice is not followed or there is disagreement between the Prosecutor and Compliance staff, the decision on whether to carry out further investigations or inquiries will be escalated in accordance with para 7.4 below.

Advice may also be sought from a Crown Solicitor with the prior consent of the National Manager Prosecutions or the Chief Legal Adviser.

⁹ In the case of biosecurity infringement offences, the responsible director is the Director Investigations and Compliance Support in Corporate Services.



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7.3 DECISION-MAKERS

The decision as to whether a prosecution or any other action will be taken following investigation of a suspected offence must be made by one of the following:

- A responsible director in AIS, Corporate Services, FNZ or NZFS;
- A Regional Manager Investigations ;
- The National Manager Food Compliance Services, or a Regional Manager Food Compliance Services;
- A Regional Manager in Fisheries Compliance;
- The National Manager Animal Welfare and NAIT Compliance, or a Regional Manager Animal Welfare and NAIT Compliance;

The Director Investigations and Compliance Support may make a prosecution decision in relation to an investigation undertaken by their staff, or any other investigation referred by a manager in another business unit. Other prosecution decision-makers are authorised in relation to investigations undertaken by staff in their Business Unit.

A Regional Manager in Food Compliance Services or Animal Welfare and NAIT Compliance may make decisions whether to prosecute only if expressly authorised by their responsible director, in accordance with the MPI Prosecution Procedures and Guidelines.

The Director Fisheries Compliance is the decision-maker for proposed international fishing prosecutions under section 113ZE Fisheries Act 1996, which also require consent of the Attorney-General.

The decision-maker must not have led or taken a significant role in the investigation.

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 requiring escalation

7.4 ESCALATION IN THE CASE OF DISAGREEMENT

If the prosecution decision-maker and the Prosecutor cannot agree on whether both requirements in the two-step test are satisfied or whether further inquiries or investigation is required, they should refer the decision to a more senior prosecution decision-maker and the National Manager Prosecutions. If the disagreement is not resolved, the Chief Legal Adviser and the responsible director will determine the outcome.



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If the Chief Legal Adviser and the responsible director cannot agree, the decision will be made by the responsible director after obtaining legal advice from the relevant Crown Solicitor (which will be followed, unless there are exceptional reasons to depart from that advice and those reasons are fully documented).

7.5 CO-ORDINATED ENFORCEMENT

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.

When considering offences against legislation that MPI does not administer, the prosecution decision-maker or Officer in Charge of the investigation (OIC) should consult the responsible agency before a decision to prosecute is made. The OIC should also provide that agency with reasonable notification as to progress and the outcome of any prosecution.

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 prosecution decision-maker should consider referring that matter to that other agency for decision to ensure a coordinated government response, prior to any formal warning being issued. (A warning issued by MPI may affect the other agency's ability to prosecute.)

Consideration should also be given to referring the matter to another law enforcement agency, where other offending has occurred, or other compliance action might be available, for example, the Serious Fraud Office, Inland Revenue, or New Zealand Police (including the Asset Recovery Unit).

Before making a referral to the Police ARU for recovery of proceeds of crime, the prosecution decision-maker should consider whether forfeiture under legislation enforced by MPI is available and appropriate; and, if not, whether additional forfeiture action should form part of MPI's compliance response to the offending. The availability of a civil forfeiture regime should be considered as part of the prosecution decision.

8 WARNINGS

8.1 BASIS FOR ISSUING A WRITTEN WARNING

A warning is a lawful alternative to a prosecution where the public interest test in taking or continuing a prosecution is not met. It is a tool intended to hold a person to account, and to deter them from future behaviour. In terms of MPI's VADE model, formal warnings are an option to assist compliance.

A written warning is an official communication from MPI to a person, natural or legal, informing them that MPI considers they may have committed an offence which could be subject to prosecution but in this case the public interest does not warrant prosecution (or the issuing of an infringement notice where that is an option).

A warning must be issued only where there is credible and admissible evidence that meets the test for evidential sufficiency under the test for prosecution set out above. A warning must not be issued where there is a mere suspicion of offending without sufficient evidence by which to prove the



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offence.¹⁰ A warning must also never be issued where there has been undesirable conduct that nevertheless does not amount to an offence.

Warnings may be issued for a range of purposes; including:

- to explain the law, that non-compliance is an offence, and to show that MPI takes the matter seriously; and/or
- to inform the individual that MPI considers they may have committed an offence which could be subject to prosecution but in this case the public interest does not warrant prosecution (or the issuing an infringement notice where that is an option), and/or
- to inform the individual that MPI considers that they may have committed an offence which could have been the subject of prosecution, but the statutory timeframe has passed;
- to shape future behaviour by giving the individual an opportunity to amend or address the behaviour, including to avoid the risk of prosecution (or infringement) in the future.

8.2 DECISION WHETHER TO ISSUE A WARNING

A written warning may be issued by a Prosecution Decision-maker (listed in section 7.3 above) or, in the case of an infringement offence, an officer listed in section 5.1 above.

Warnings may be issued to assist compliance in a range of situations. When deciding whether to issue a written warning, the Prosecution Decision-maker must consider:

- Any sector specific MPI strategy or priorities relating to the offending;
- The needs and interests of the person to be warned, their whānau and community;
- The needs and interests of any person harmed or affected by the person's behaviour, their whānau and community;
- The wider public interest.

Consideration must also be given to whether, in the circumstances, a warning is likely to achieve the intended purpose. For example, a warning may not be appropriate if a previous warning or educational letter has been ineffective.

Generally an officer will have put all findings that indicate offending to the person for response when an offence was detected or in the course of an investigation. If not, the decision-maker should consider whether a response to any findings should be sought before deciding to issue a warning.

8.3 VICTIMS

Care should be taken where an offence may involve a victim or victims and reparation may be in issue or there may be other related consequences that may flow from a conviction.

Where the victim has suffered financial loss through or by means of the offence and is seeking reparation, a warning should not be given unless the victim agrees to that course of action or enforceable and realistic arrangements for the payment of reparation are made. (See sections 10.5

¹⁰ An educational letter may be appropriate if there is not sufficient evidence of offending to support a warning letter. An educational letter must not suggest that the addressee may have committed an offence.



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and 12 below about plea arrangements and victims). Specific legal advice should be sought concerning cases that raise these factors.

8.4 WARNING LETTERS

A written warning issued following an investigation must be approved and issued by a Prosecution Decision-maker, following a template letter approved by the responsible director. Warnings for infringement offences must follow template letters approved in the issuing officer's Business Unit. Template letters must be consistent with the Solicitor-General's Guidelines for the Use of Warnings, and should note the recipient may seek a review if they do not accept the statements in the letter.

The warning must be recorded in the relevant MPI compliance system with a brief reason for the decision to warn.

The warning letter must not assert that an offence has been committed, but should say that in MPI's view the addressee's conduct may amount to a specified offence and that if the conduct is repeated a prosecution will be considered.¹¹

If the warned person is later prosecuted for other offending, MPI will generally refer to previous warnings in any Summary of Facts that is provided to the Court or in response to any suggestion on sentencing of prior good character or remorse. The warning letter should explain this.

8.5 REQUESTS FOR REVIEW

Any requests for review of a warning must be referred to the responsible director, who may either undertake the review personally or designate a suitably experienced officer in their directorate to undertake the review. The person undertaking the review must not have led or been significantly involved with the investigation.

8.6 RECONSIDERATION OF WARNINGS

A decision to warn and not to prosecute should be reconsidered only in an exceptional case and the requirements of section 7 of the Solicitor-General's Guidelines for the Use of Warnings have been met, for example where new evidence has been identified and the decision-maker has obtained advice from a prosecutor.

9 CHOICE OF CHARGES

9.1 MATTERS TO CONSIDER

If the decision is to prosecute, it is the responsibility of the Prosecutor to determine what charges are appropriate. 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.

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;

¹¹ See Solicitor-General's Guidelines for the Use of Warnings, paragraph 6.5. It is the role of the courts to determine authoritatively whether an offence has been committed, not the role of a regulatory agency like MPI.



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

9.2 CHARGES UNDER THE CRIMES ACT

A prosecution may be brought under the Crimes Act 1961 where a crime has been committed in relation to one or more areas of MPI's regulatory responsibility. Such a criminal prosecution can be instead of or in addition to a prosecution brought in accordance with legislation enforced by MPI. Such criminal prosecutions could involve:

- conduct that is in relation to MPI's regulated areas and which is so serious it warrants special consideration under the Crimes Act;
- conduct which interferes with MPI's ability to perform its functions, for example: deception, or knowingly providing information which is misleading or incorrect;
- withholding, concealing or destroying documents, relevant information or evidence.

Where prosecutions contemplated under the Crimes Act 1961 are being considered, the Prosecutor and decision-maker shall consult with the relevant regional Crown Solicitor.

The Prosecutor is not required to consult the Crown Solicitor before MPI lays charges under section 66 Crimes Act (parties to offences) or section 72 Crimes Act (attempts) where the substantive offence is one under legislation enforced by MPI.

10 CONDUCT OF PROSECUTIONS

10.1 GENERALLY

Once the decision to prosecute is made, accountability for legal issues in connection with the file passes to the Prosecutor. Subject to the Prosecutor's overriding duty to the Court, the Prosecutor acts on instructions from the OIC (or a more senior Prosecution Decision-maker where the decision on a particular issue is escalated).

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 on instructions from an in-house MPI Prosecutor, the National Manager Prosecutions or a Regional Manager Prosecutions.

The Crown Solicitor must be instructed if:



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- 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 National 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 Prosecutor will consult the OIC as to the conduct of the prosecution and keep them informed as to progress.

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

MPI will act fairly in its conduct of prosecutions, and in accordance with the Solicitor-General's Prosecution Guidelines.

All Prosecutors acting on behalf of MPI are required to comply with all relevant professional obligations, including the requirement to present the prosecution case fully and fairly with professional detachment. MPI Prosecutors have an overriding and paramount duty to the Court and are obliged to act in a way that does not undermine court processes. In presenting their case, MPI Prosecutors will avoid unduly emotive language, and inflaming bias or prejudice against a defendant.

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

10.2 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, responsible directors and Regional Commissioners in Biosecurity New Zealand.

10.3 AGENCY APPEARANCES

MPI may instruct a suitably qualified Departmental Prosecutor from another agency to appear on a prosecution in certain circumstances and in accordance with guidance on shared services issued by Crown Law.

The responsible MPI Prosecutor will consult with the OIC before instructing out MPI prosecutions to Crown Solicitors or other Crown agencies. Factors to be considered include the nature, complexity and importance of the appearance, and costs.

In any such case, the MPI Prosecutor will have responsibility for briefing counsel.

10.4 PLEA DISCUSSIONS AND ARRANGEMENTS

Plea arrangements may be contemplated by the OIC. The overarching consideration is the interests of justice, but the following considerations are relevant:

- The views of any victim of the offending;



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- Whether any proposed substitute charges are clearly supported by the evidence and adequately reflect the essential criminality of the conduct; and
- Whether the proposed charges agreed to provide sufficient scope for sentencing to reflect that criminality.

Decisions to offer or agree to a plea arrangement must first be approved by the National Manager Prosecutions or relevant Regional Manager Prosecutions. The final decision to offer or agree to the arrangement, if approved, will be made by the Prosecution Decision-maker.

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

- Proceed with unnecessary additional charges or a more serious charge with a view to securing a negotiated plea;
- Agree to a plea of guilty to an offence not disclosed by the evidence; or
- Agree to a plea of guilty on the condition that the Prosecutor will support a specific sentence.

10.5 PAYMENTS CONNECTED TO PLEA ARRANGEMENTS

Payment of reparation, a charitable donation, etc, must not be the principal reason for entering plea arrangements. An offer of payment that is conditional on a prosecution not being brought, or continued, is unlawful.

For a prosecution Decision-maker to agree to a plea arrangement, they must be satisfied the conditions proposed address the key public interest factors (related to the offending and underlying the decision to prosecute) to such a degree that it is no longer in the public interest for the prosecution to continue. A willingness to pay reparation or make amends in some other way can only be one of the relevant factors considered.

The OIC must also seek advice from the Prosecutor before agreeing to a payment as part of a plea agreement. Any victim must be consulted, and the OIC should consider whether it is necessary to consult any other directly interested person (such as a mātaihai management committee).

11 RECORDS, DISCLOSURE AND REPORTING

All significant prosecution advice and decisions (including 'no prosecution' decisions and decisions relating to the reduction of charges or acceptance of pleas) 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 promptly after each hearing

It is the responsibility of the Prosecutor and the OIC 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.



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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.

12 VICTIMS AND WITNESSES

12.1 VICTIMS

MPI will ensure that victims of crime (including any MPI staff who are victims of offending prosecuted by MPI) are treated at all times with courtesy and compassion and with respect for their dignity and privacy.

12.2 SUPPORTING VICTIMS AND WITNESSES

The relevant OIC will be the primary point of contact for victims and witnesses to ensure that they are provided with information at each stage of the prosecution process. MPI will comply with Crown Law guidance *Victims of Crime – Guidance for Prosecutors*, and the Victims’ Rights Act 2002.

12.3 MPI EMPLOYEES AS WITNESSES

Any MPI employee who is requested by a Prosecutor or warranted officer to give evidence in support of a MPI prosecution must attend Court and assist the Prosecutor upon request, unless there is good reason not to, such as the reasonable apprehension of harm, and the National Manager Prosecutions has excused the witness.

It is the OIC’s responsibility to ensure that the witness’ manager is notified of the request and that the witness is informed of any witness allowances that may apply to their attendance.

An MPI employee must give evidence in a prosecution that is not brought by MPI if summonsed to attend court. If another prosecuting agency requires an MPI employee to give evidence relating to their work at MPI, the employee must inform their manager and the National Manager Prosecutions that they have been summonsed and inform them of any potential risks arising out of the evidence that they may be required to give.

Witnesses 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 is qualified as an expert witness (whether an MPI employee or not), and understands their obligations.

13 CONTINUING DUTY TO REVIEW

MPI staff must provide any relevant new or previously undisclosed information to the Prosecutor as soon as practicable. The Prosecutor should advise the OIC and prosecution Decision-maker whether any such matters may require reconsideration of the decision to prosecute or choice of charges, whether the advice is sought or not.



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MPI has a continuing duty of review in relation to disclosure and an 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 whether the test for prosecution is still met. Assessment of evidential sufficiency and the public interest is an ongoing obligation. The decision to prosecute should be reassessed if there is any material change in the circumstances of the case (including any relevant developments in the law) or in the defendant's circumstances, such as significant ill health, a history of suicide attempts or suicidal ideation.

14 APPEALS

14.1 DEFENDANT APPEALS

The relevant Regional Manager Prosecutions or the National Manager Prosecutions will instruct an external Crown Solicitor to represent MPI on appeals made by defendants in accordance with the MPI Prosecution Procedures and Guidelines.

14.2 MPI APPEALS

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

- it has been authorised by the National Manager Prosecutions or the Chief Legal Adviser in consultation with the responsible director; and
- the prior written consent of the Solicitor-General has been obtained.

The local Crown Solicitor (or other Crown Solicitor in the event of a conflict) will file the notice of appeal and appear on the appeal for MPI.

15 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 the responsible business unit will provide a spokesperson and Prosecutors will not make any public comment.

16 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 Solicitor instructed on the prosecution (unless the National 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 National Manager Prosecutions; and



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- proceedings for pecuniary penalty orders shall be managed by analogy with prosecution decisions, as directed by the National Manager Prosecutions or Chief Legal Adviser. Proceedings for pecuniary penalties must not be brought without the agreement of the responsible director, following consultation with the Deputy Director-General who heads the relevant MPI Business Unit.

17 MISCELLANEOUS

17.1 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.

17.2 AMENDMENTS TO THIS POLICY

Amendments to this policy may be made only by the Director-General or the Senior Leadership Team, but the Chief Legal Adviser may make minor amendments to reflect changes in position titles or guidance issued by the Solicitor-General. The Chief Legal Adviser must consult the Director Investigations and Compliance Support and other responsible directors before making or proposing any amendment.

17.3 OTHER REFERENCES

[CO \(16\) 2: Cabinet Directions for the Conduct of Crown Legal Business 2016](#)

Crown Law's [Classification of In-house Public Prosecutors Guidance \(July-2020\)](#)

Crown Law's Guidance on Shared Services

Solicitor-General's [Prosecution Guidelines](#)

Solicitor-General's [Chief Executives and the "No Surprises" Principle](#)

[Solicitor-General's Guidelines for the Use of Warnings](#)

[Solicitor-General's Guidelines for Payments Connected to Plea Arrangements or Diversion](#)

[Crown Law's Victims of Crime – Guidance for Prosecutors](#)

Solicitor-General's [Media Protocol for Prosecutors](#)

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17.4 DEFINITIONS

Term	meaning
Defendant	A person charged in criminal proceedings, or who is proposed to be charged
OIC	Officer in charge of an investigation or prosecution



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National Manager Prosecutions	The national manager for the prosecutions team who reports to the Chief Legal Advisor, currently the National Manager Prosecutions and Support
MPI legislation	Legislation administered by the Ministry for Primary Industries, and legislation not MPI administered, but enforced by MPI
Prosecutor	MPI in-house Prosecutors, solicitors (including the National Manager Prosecutions and Regional Manager Prosecutions) and, where the context requires, external Crown counsel.
Regional Manager Prosecutions	A manager in Legal Services with prosecution responsibilities, reporting to the National Manager Prosecutions
Responsible directors	Directors who are responsible for the compliance functions in Agriculture and Investment Services, Corporate Services, Fisheries New Zealand and New Zealand Food Safety.

17.5 DOCUMENT INFORMATION

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

Date	Version	Author	Comments
December 2016	1	Gina de Graaff	Substantial revisions, re-issued by SLT
November 2022	2	Lisa Brown/Gina de Graaff	Minor, technical, required updates; new or revised sections on Independence, Infringements, Warnings, Plea arrangements, and changes resulting from the Strengthening Regulatory Systems change process
	3		
	4		