

CROWN LAW

# SOLICITOR-GENERAL'S PROSECUTION GUIDELINES

---

*As at 1 July 2013*



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## ATTORNEY-GENERAL'S INTRODUCTION

1. Under our constitutional arrangements, the Attorney-General is responsible through Parliament to the citizens of New Zealand for prosecutions carried out by or on behalf of the Crown. In practice, however, the prosecution process is superintended by the Solicitor-General, who, pursuant to s 9A of the Constitution Act 1986, shares all the relevant powers vested in the office of the Attorney-General. These arrangements have renewed force with the codification of the Solicitor-General's responsibility for public prosecutions in s 185 of the Criminal Procedure Act 2011.
2. Unlike most similar jurisdictions, New Zealand has no centralised decision-making agency in relation to prosecution decisions. In respect of Crown prosecutions, prosecutions are mainly conducted by Crown Solicitors – private practitioners appointed to prosecute under a warrant issued by the Governor-General. Other prosecutions are conducted by the New Zealand Police and numerous other enforcement agencies that are responsible for enforcing a particular regulatory area. Notably, the 2011 *Review of Public Prosecution Services* did not recommend any fundamental change to these arrangements.
3. The absence of a central decision-making process underscores the importance of comprehensive guidelines, and the acceptance of core prosecution values. The *Review of Public Prosecution Services* also reiterated the important role the Solicitor-General's Prosecution Guidelines play in setting core and unifying standards for the conduct of public prosecutions. The revised Guidelines reinforce the expectations that the Solicitor-General and I have of all prosecutors who prosecute on behalf of the State.
4. New Zealand is fortunate to be served by a public prosecution service that is professional, open, fair and responsible. These standards will continue through the day-to-day adherence to the values reflected in these Guidelines.

Hon Christopher Finlayson QC  
**Attorney-General**

## SOLICITOR-GENERAL'S INTRODUCTION

1. New Zealand's public prosecution system is in the midst of significant change. The Criminal Procedure Act 2011 changes the way criminal cases proceed through the courts and imposes new obligations on all parties to conduct cases in a different way. Fiscal restraints have forced Crown Solicitors and prosecuting agencies to consider how to maintain fundamental prosecutorial standards with more limited resources.
2. Notwithstanding this significant change, the essentials of good prosecution practice remain the same. This is reflected in these revised Guidelines which, in large part, continue to reflect the core principles established by the 2010 Guidelines. The revisions that have been made are largely those that are required to address the findings of the 2011 *Review of Public Prosecution Services* and to provide new guidance in light of the changes made by the Criminal Procedure Act 2011.
3. Revisions to reflect the *Review of Public Prosecution Services* include those that aim to reinforce the Solicitor-General's oversight of all public prosecutions. That oversight role is codified for the first time in the Criminal Procedure Act. A key way in which oversight is discharged is through these Guidelines, which apply more explicitly to government agencies than past versions. Other revisions to reflect the Criminal Procedure Act include guidance on the approach prosecutors should take to the Act's case management process, including charge discussions, and revised guidance on appeals.
4. As noted by the Attorney-General in his introduction, the promulgation of these Guidelines is an important unifying force in light of the diversity of New Zealand's prosecution arrangements. I am confident that adherence to these Guidelines by prosecutors will maintain a high quality public prosecution service which has the confidence of the public, the judiciary and the legal profession now and into the future.

Michael Heron QC  
**Solicitor-General**

## DEFINITIONS

|                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
|-----------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Attorney-General:     | The senior Law Officer of the Crown appointed under warrant by the Governor-General.                                                                                                                                                                                                                                                                                                                                                                                   |
| Solicitor-General:    | The junior Law Officer of the Crown appointed under warrant by the Governor-General pursuant to the Royal Prerogative.                                                                                                                                                                                                                                                                                                                                                 |
| Law Officers:         | The Attorney-General and the Solicitor-General.                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Crown Solicitors:     | <p>Those who hold the warrant of Crown Solicitor for the following regions:</p> <ul style="list-style-type: none"><li>• Auckland;</li><li>• Christchurch;</li><li>• Dunedin;</li><li>• Gisborne;</li><li>• Hamilton;</li><li>• Invercargill;</li><li>• Napier;</li><li>• New Plymouth;</li><li>• Palmerston North;</li><li>• Rotorua;</li><li>• Tasman;</li><li>• Tauranga;</li><li>• Timaru;</li><li>• Wanganui;</li><li>• Wellington;</li><li>• Whangarei.</li></ul> |
| Crown prosecutor:     | A Crown Solicitor or a lawyer representing a Crown Solicitor; or any other lawyer employed or instructed by the Solicitor-General to conduct a Crown prosecution.                                                                                                                                                                                                                                                                                                      |
| Crown prosecution:    | A prosecution of a kind specified in the Crown Prosecution Regulations 2013, and which must be conducted by the Solicitor-General or a Crown prosecutor.                                                                                                                                                                                                                                                                                                               |
| Public prosecution:   | A prosecution for an offence that is commenced by or on behalf of the Crown, including a prosecution commenced by a Crown entity as defined in the Crown Entities Act 2004.                                                                                                                                                                                                                                                                                            |
| Government agencies:  | All departments listed in Schedule 1, State Sector Act 1988 and Crown entities as defined in the Crown Entities Act 2004 who have the ability to commence and conduct prosecutions, and the New Zealand Police.                                                                                                                                                                                                                                                        |
| New Zealand Police:   | Includes all employees of the New Zealand Police, regardless of whether they are constables as defined in the Policing Act 2008.                                                                                                                                                                                                                                                                                                                                       |
| Enforcement agencies: | Includes government agencies.                                                                                                                                                                                                                                                                                                                                                                                                                                          |

## 1. PURPOSE AND PRINCIPLES OF THE GUIDELINES

- 1.1 The purpose of these Guidelines is to ensure that the principles and practices as to prosecutions in New Zealand are underpinned by core prosecution values. These values aim to achieve consistency and common standards in key decisions and trial practices. If these values are adhered to, New Zealand will continue to have prosecution processes that are open and fair to the defendant, witnesses and the victims of crime, and reflect the proper interests of society.
- 1.2 Compliance with these Guidelines is expected in respect of public prosecutions and Crown prosecutions. However, the Guidelines are intended to assist all those persons whose function it is to enforce the criminal law by instituting and conducting a criminal prosecution. Specifically these Guidelines are intended to assist in determining:
- 1.2.1 Whether criminal proceedings should be commenced;
  - 1.2.2 What charges should be filed;
  - 1.2.3 Whether, if commenced, criminal proceedings should be continued or discontinued.
- And to:
- 1.2.4 Provide guidance for the conduct of criminal prosecutions; and,
  - 1.2.5 Establish standards of conduct and practice that the Law Officers expect from those whose duties include conducting prosecutions.
- 1.3 The Guidelines reinforce the expectation of the Law Officers and the Courts that a prosecutor will act in a manner that is fundamentally fair, detached and objective. The prosecutor should act to foster a rational trial process, not one based on emotion or prejudice.

## 2. COMPLIANCE WITH THE GUIDELINES

- 2.1 All public prosecutions and Crown prosecutions, whether conducted by Crown prosecutors, government agencies or instructed counsel, should be conducted in accordance with these Guidelines.
- 2.2 Adherence to the Guidelines is also a condition of the warrant held by each Crown Solicitor.
- 2.3 The Guidelines are not an instruction manual for prosecutors, nor do they cover every decision that must be made by prosecutors and enforcement agencies. They do not purport to lay down any rule of law. They instead reflect the aspirations and practices of prosecutors who adhere to the United Nations Guidelines on the Role of the Prosecutor (1990) and the International Association of Prosecutors Standards (1999).

### **Private prosecutions**

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

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

### 3. THE SUPERVISION OF PROSECUTIONS

- 3.1 Section 185 of the Criminal Procedure Act 2011 codifies the Solicitor-General's long-standing responsibility to maintain general oversight of the conduct of public prosecutions. The discharge of this duty includes the issuing and maintenance of these Guidelines, and the provision of general advice and guidance to government agencies as required.
- 3.2 In respect of prosecutions by government departments to which the *Cabinet Directions for the Conduct of Crown Legal Business 2012* apply, the Solicitor-General retains oversight of legal services provided by Crown Solicitors, departmental lawyers or other instructed counsel and may direct the manner in which those services are provided.
- 3.3 The Solicitor-General's supervision of Crown prosecutions is more direct. The Solicitor-General must assume responsibility for and conduct every Crown prosecution from the time or stage prescribed in the Crown Prosecution Regulations 2013. A Crown prosecution must be conducted by a Crown prosecutor (ordinarily a Crown Solicitor or counsel employed in the Crown Solicitor's practice) in accordance with any directions given by the Solicitor-General (either generally or in the particular case).
- 3.4 In relation to most practical matters, the relationship between the Solicitor-General and a Crown Solicitor is based on the *Terms of Office* as well as practice and convention. While a Crown Solicitor is subject to any directions given by the Solicitor-General in respect of a Crown prosecution, it is the expectation of the Law Officers that opinions of the Solicitor-General in relation to all matters within the province of a Crown Solicitor will be respected and complied with and, in the case of Crown prosecutions, without resort to formal directions.
- 3.5 As a matter of practice, government agencies conducting prosecutions and Crown prosecutors (ordinarily a Crown Solicitor) are expected to inform the Solicitor-General or Deputy Solicitor-General (Criminal) of any matter which ought to be communicated to those offices. Without limiting the expectation, this will cover any matter of general public or legal importance or which gives rise to substantial or new forms of legal risk.
- 3.6 Section 176 of the Criminal Procedure Act 2011 recognises the common law right of the Attorney-General to intervene in the prosecution process and to stay a prosecution. The Solicitor-General may also exercise that power in accordance with s 9A of the Constitution Act 1986. Implicit in the Law Officers' ability to stay a prosecution is an ability to direct the manner in which a prosecution is to be conducted in order to avoid the need for the prosecution to be stayed.

#### 4. THE INDEPENDENCE OF THE DECISION-MAKER

- 4.1 The universally central tenet of a prosecution system under the rule of law in a democratic society is the independence of the prosecutor from persons or agencies that are not properly part of the prosecution decision-making process.
- 4.2 In practice in New Zealand, the independence of the prosecutor refers to freedom from undue or improper pressure from any source, political or otherwise. All government agencies should ensure the necessary processes are in place to protect the independence of the initial prosecution decision.

#### 5. THE DECISION TO PROSECUTE

##### **The Test for Prosecution**

- 5.1 Prosecutions ought to be initiated or continued only where the prosecutor is satisfied that the Test for Prosecution is met. The Test for Prosecution is met if:
- 5.1.1 The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and
- 5.1.2 Prosecution is required in the public interest – the Public Interest Test.
- 5.2 Each aspect of the test must be separately considered and satisfied before a decision to prosecute can be taken. The Evidential Test must be satisfied before the Public Interest Test is considered. The prosecutor must analyse and evaluate all of the evidence and information in a thorough and critical manner.

##### **The Evidential Test**

- 5.3 A reasonable prospect of conviction exists if, in relation to an identifiable person (whether natural or legal), there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence.
- 5.4 It is necessary that each element of this definition be fully examined when considering the evidential test in each particular case.

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

PROSECUTION GUIDELINES

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

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

### **The Public Interest Test**

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

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

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

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

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

#### ***Public interest considerations for prosecution***

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

5.8.2 Where the offence involved serious or significant violence;

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

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

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

- 5.8.6 Where the offence is prevalent;
- 5.8.7 Where the defendant was a ringleader or an organiser of the offence;
- 5.8.8 Where the offence was premeditated;
- 5.8.9 Where the offence was carried out by a group;
- 5.8.10 Where the offence was an incident of organised crime;
- 5.8.11 Where the victim of the offence, or their family, has been put in fear, or suffered personal attack, damage or disturbance. The more vulnerable the victim, the greater the aggravation;
- 5.8.12 Where the offender has created a serious risk of harm;
- 5.8.13 Where the offence has resulted in serious financial loss to an individual, corporation, trust person or society;
- 5.8.14 Where the defendant was in a position of authority or trust and the offence is an abuse of that position;
- 5.8.15 Where the offence was committed against a person serving the public, for example a doctor, nurse, member of the ambulance service, member of the fire service or a member of the police;
- 5.8.16 Where the defendant took advantage of a marked difference between the actual or developmental ages of the defendant and the victim;
- 5.8.17 Where the offence was motivated by hostility against a person because of their race, ethnicity, gender, sexual orientation, disability, religion, political beliefs, age, the office they hold, or similar factors;
- 5.8.18 Where there is any element of corruption.

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

***Public interest considerations against prosecution***

- 5.9.1 Where the Court is likely to impose a very small or nominal penalty;
- 5.9.2 Where the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by an error of judgement or a genuine mistake;
- 5.9.3 Where the offence is not on any test of a serious nature, and is unlikely to be repeated;
- 5.9.4 Where there has been a long passage of time between an offence taking place and the likely date of trial such as to give rise to undue delay or an abuse of process unless:

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

- 5.9.5 Where a prosecution is likely to have a detrimental effect on the physical or mental health of a victim or witness;
- 5.9.6 Where the defendant is elderly;
- 5.9.7 Where the defendant is a youth;
- 5.9.8 Where the defendant has no previous convictions;
- 5.9.9 Where the defendant was at the time of the offence or trial suffering from significant mental or physical ill-health;
- 5.9.10 Where the victim accepts that the defendant has rectified the loss or harm that was caused (although defendants should not be able to avoid prosecution simply because they pay compensation);
- 5.9.11 Where the recovery of the proceeds of crime can more effectively be pursued by civil action;
- 5.9.12 Where information may be made public that could disproportionately harm sources of information, international relations or national security;
- 5.9.13 Where any proper alternatives to prosecution are available (including disciplinary or other proceedings).
- 5.10 These considerations are not comprehensive or exhaustive. The public interest considerations which may properly be taken into account when deciding whether the public interest requires prosecution will vary from case to case. In regulatory prosecutions, for instance, relevant considerations will include an agency's statutory objectives and enforcement priorities.
- 5.11 Cost is also a relevant factor when making an overall assessment of the public interest. In each case where the evidential test has been met, the prosecutor will weigh the relevant public interest factors that are applicable. The prosecutor will then determine whether or not the public interest requires prosecution.

### **No prosecution**

- 5.12 If the prosecutor decides that there is insufficient evidence or that it is not in the public interest to prosecute, a decision of "no prosecution" will be taken.
- 5.13 A decision of "no prosecution" does not preclude any further consideration of a case by the prosecutor, if new and additional evidence becomes available, or a review of the original decision is required. It is anticipated that such a step will be rare.

## 6. REASONS FOR DECISIONS

- 6.1 Subject to considerations contained in the “Media Protocol for Prosecutors” (referred to at Guideline 30), in any case of significant public interest, the Crown Solicitor or a senior manager of the relevant government agency may if he or she sees fit, issue a statement giving broad reasons why a decision to prosecute or not to prosecute was made.
- 6.2 This step may also be taken by a Crown Solicitor in relation to a stay of proceedings or application to dismiss a charge under s 147 of the Criminal Procedure Act 2011 or a decision to offer no evidence.
- 6.3 The Solicitor-General should be consulted before any statements are issued by a Crown Solicitor.

## 7. REOPENING A PROSECUTION DECISION

- 7.1 People should be able to rely on decisions taken by prosecutors. Normally, if a prosecutor tells a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped, that is the end of the matter and the case will not start again.
- 7.2 Occasionally there are special reasons where a prosecutor will restart the prosecution where that course is available under the applicable law, particularly if the case is serious.
- 7.3 These reasons include:
  - 7.3.1 Rare cases where a reassessment of the original decision shows that it was wrong and should not be allowed to stand;
  - 7.3.2 Cases which are stopped so that more evidence which is likely to become available in the near future can be collected and prepared. In these cases, the prosecutor will tell the defendant that the prosecution may well start again; and
  - 7.3.3 Cases which are stopped because of a lack of evidence but where more significant evidence is discovered later.

## 8. THE CHOICE OF CHARGES

- 8.1 The nature and number of the charges filed should adequately reflect the criminality of the defendant’s conduct as disclosed by the facts to be alleged at trial. The charges may be representative where the criteria under s 20 of the Criminal Procedure Act 2011 are made out.
- 8.2 The number or seriousness of charges should not be inflated to increase the likelihood of an offer by the defendant to plead guilty to lesser charges.

### **Trying defendants or charges together**

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

- 8.4 The prosecutor should ensure that the number of charges, whether or not arising from the same or related criminal acts, is truly necessary to properly reflect the criminality of the defendant's alleged conduct.
- 8.5 The same principle should be applied to decisions about the number of people to be prosecuted in relation to any given event. Charges against multiple defendants should be filed only where that is necessary to put the full picture before the fact-finder, or the person charged has played more than a minor role in the offending.
- 8.6 In decisions both as to the number of charges or number of defendants, the prosecutor should take into account the cost of prosecuting multiple charges and defendants in proportion to the seriousness of the offending and any likely sentence. Such decisions should be made as early in the prosecution as possible.

## 9. REVIEW OF CHARGES

- 9.1 Wherever necessary and practicable, the charges to be filed should be reviewed by a senior prosecutor.
- 9.2 Once charges have been filed, and before trial, the prosecutor should review the charges to determine whether those are the charges that should be prosecuted or whether:
- 9.2.1 Any of the charges should be amended to bring them into conformity with the evidence available;
  - 9.2.2 Other charges should be added; and
  - 9.2.3 Any charges should be withdrawn (because, for example, they are no longer considered necessary in the public interest, or are not adequately supported by the evidence).
- 9.3 When the Solicitor-General or Crown prosecutor assumes responsibility for a Crown prosecution, he or she should undertake an independent review of the charges. There is a limited opportunity to amend or withdraw existing charges in Crown prosecutions without obtaining the leave of the Court, or to add new charges without filing a charging document. It is for the Solicitor-General or the Crown prosecutor to decide what of the original charges should remain, be amended or withdrawn, and what additional charges are required. The charges should be founded on the available evidence, and should reasonably reflect the criminality disclosed on the evidence.

## 10. COORDINATION OF PROSECUTION DECISIONS

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

## 11. STATUTORY CONSENTS TO PROSECUTIONS

- 11.1 There are numerous offences that can only be prosecuted with the consent of the Attorney-General. In practice this function is almost always undertaken by the Solicitor-General. Often, where offences may touch on matters of security or involve foreign relations or international treaty obligations, consent is required to ensure that the circumstances of the prosecution accord with the statutory purpose of the Act. The offence of bribery in relation to a Member of Parliament requires the consent of a High Court judge.
- 11.2 The process for recording consent is set out in s 24 of the Criminal Procedure Act 2011. Prosecutors seeking the Attorney-General's consent should provide a draft copy of the charging documents and sufficient material to allow the Solicitor-General to properly consider the evidence and relevant circumstances of the alleged offence.

## 12. IMMUNITIES FROM PROSECUTION

- 12.1 On occasions the prosecution case will depend upon the evidence of an accomplice or participant in an offence in order to proceed against a defendant considered to be more culpable or a greater risk to public safety.
- 12.2 Unless that potential witness has already been charged and sentenced he or she may be justified in declining to give evidence on the grounds of self-incrimination.
- 12.3 In such a case it will be necessary for the prosecutor to consider giving the witness immunity from prosecution. Immunity takes the form of a written undertaking from the Solicitor-General to exercise the power to stay if the witness is prosecuted for nominated offences. It thus protects the witness from both public and private prosecutions.
- 12.4 The only person able to give such an undertaking is the Solicitor-General.
- 12.5 The only purpose in giving immunity is to enable the prosecutor to use otherwise unavailable evidence.
- 12.6 Immunities are to be used sparingly and only in cases where it is demonstrably clear that without the evidence given under immunity the prosecution case is unlikely to succeed, or there is a risk it will be significantly weakened.
- 12.7 Before agreeing to give immunity, the Solicitor-General will almost invariably need to be satisfied of at least the following matters:
- 12.7.1 That the offence in respect of which the evidence is to be given is serious;
  - 12.7.2 That there are no other reasonably available avenues of gaining sufficient evidence to bring a successful prosecution other than relying upon the evidence to be given under immunity;
  - 12.7.3 That the evidence to be given under immunity is admissible, relevant and significantly strengthens the prosecution case;
  - 12.7.4 That the witness, while having committed some identifiable offence, is not an equal or greater risk to the public safety than the person to be tried;

- 12.7.5 That the evidence to be given under immunity is apparently credible and, preferably, supported by other admissible material;
- 12.7.6 That no inducement, other than the possibility of an immunity, has been suggested to the witness; and
- 12.7.7 That admissible evidence exists, sufficient to charge the witness with the offences he or she is believed to have committed.
- 12.8 The formal opinion of the senior prosecutor (almost invariably the Crown Solicitor) regarding the merits of the immunity will be required.
- 12.9 The witness who is to testify under immunity should provide a brief of the evidence he or she is to give. That person should be advised that they should seek independent legal advice, the reasonable cost of which will be met by the prosecution. The witness should be advised that should the application for immunity be declined the brief of evidence and any other information obtained from that person in connection with a promise to apply for immunity cannot be used against that person by the prosecution. The brief of evidence will be subject to the ordinary rules of disclosure.
- 13. **DIRECTION BY THE SOLICITOR-GENERAL THAT A PROSECUTION SHOULD BE CONDUCTED AS A CROWN PROSECUTION**
  - 13.1 Under regulation 4 of the Crown Prosecution Regulations 2013, the Solicitor-General may direct that, having regard to the particular features of the proceeding, the proceeding should be conducted as a Crown prosecution.
  - 13.2 A direction will only be issued in the rare case where the Solicitor-General's direct oversight of a prosecution is required. Features of a prosecution that may indicate a direction under regulation 4 is appropriate include where:
    - 13.2.1 The prosecution is for an offence that is so serious that it should be prosecuted by the Crown in the public interest;
    - 13.2.2 The prosecution is of an alleged offender whose criminal history is so serious that the offence should be prosecuted by the Crown in the public interest;
    - 13.2.3 The prosecution raises complex or novel legal principles;
    - 13.2.4 The prosecution raises issues that require the advocacy or independence of the Crown;
    - 13.2.5 The prosecution involves matters which are of particular general or public importance;
    - 13.2.6 A prosecution for the offence is rare or novel;
    - 13.2.7 The nature of the evidence and/or the characteristics of witnesses require specialist prosecution skills; or
    - 13.2.8 The prosecution involves highly sensitive and/or confidential Crown/government information and/or raises issues of national security.

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

## 14. WITNESS ANONYMITY ORDERS

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

## 15. BAIL

- 15.1 Generally, matters relating to bail are codified in the Bail Act 2000. In addition s 24(b) of the New Zealand Bill of Rights Act 1990 provides that those who are charged with criminal offences shall be released on reasonable terms and conditions unless there is just cause for continued detention.
- 15.2 The core principles in relation to whether to remand the defendant in custody or order release on bail are found in s 8 of the Bail Act 2000.
- 15.3 Prosecutors opposing bail should base their opposition only on factors relevant to bail and on the basis of credible, cogent and relevant information.
- 15.4 Where, by virtue of s 8(2)(b) of the Bail Act 2000 the issue of bail involves the strength of the prosecution case, prosecutors should pay special attention to s 20(2) of that Act.
- 15.5 In accordance with s 30 of the Victims' Rights Act 2002, prosecutors should make all reasonable efforts to ensure any views of the victim are put before the Court where an application for bail is made by a defendant charged with a specified offence under s 29.
- 15.6 Prosecutors should take account of the *Bail Practice Note (Bail Act 2000)* of 7 February 2002 issued by the Chief District Court Judge which details the Court's expectations of prosecutors.
- 15.7 Crown prosecutors appear on bail matters in two different capacities. If the prosecution is not a Crown prosecution, they may appear on instructions from the agency that commenced the proceeding. If the prosecution is a Crown prosecution, the Crown prosecutor appears as the prosecutor.
- 15.8 In both capacities the Crown prosecutor should seek and be cognisant of the views of the agency that commenced the proceeding as to any bail risks presented by the defendant, however, the ultimate decision as to what will be said to the Court about eligibility for bail is the responsibility of the Crown prosecutor. This is not incompatible with the role of that agency whose legitimate views as to bail are to be placed before the Court.

## 16. DISCLOSURE

### **Disclosure obligations**

- 16.1 Proper disclosure is central to preventing wrongful convictions. Under the Criminal Disclosure Act 2008 a “prosecutor” is the person in charge of the file or files relating to a criminal prosecution. Where the proceeding is a Crown prosecution, a Crown prosecutor will have custody of the trial file but the person in charge of the files is the person designated by the enforcement agency as the officer or employee responsible for the file. The Crown prosecutor should not be considered the “prosecutor” for the purposes of the Act. In any other prosecution (whether conducted by a Crown prosecutor or not) the prosecutor as well as the officer or employee designated by the relevant government agency as the person responsible for the file is relevantly a “prosecutor” in terms of the Act.
- 16.2 The Criminal Disclosure Act 2008 prescribes a comprehensive regime for disclosure by prosecutors to a defendant. Disclosure obligations will not be carried into effect merely by seeking assurances from the person in charge of the file that the trial file contains all necessary disclosure material and that any other material disclosed represents complete disclosure. In a Crown prosecution, a Crown prosecutor should ensure that the person in control of the relevant files is aware of and has complied with the obligations imposed by the Criminal Disclosure Act 2008.
- 16.3 Enforcement agencies should be in a position to verify what documents have been disclosed and when by appropriate record keeping.
- 16.4 For the purpose of disclosure, enforcement agencies shall ensure that the prosecutor has access to all relevant information relating to the charges in the possession of that agency.
- 16.5 Enforcement agencies and prosecutors should use their best endeavours to make initial disclosure by the time of the defendant’s first appearance to facilitate entry of a plea by the second appearance. As long as initial disclosure has been made, the Court has a discretion to require a plea under s 39(1) of the Criminal Procedure Act 2011.

### **Evidence that is not disclosed until trial**

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

### **Information which the prosecutor does not intend to produce in evidence**

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

### **Previous convictions of proposed witnesses**

- 16.8 Section 13(3)(d) of the Criminal Disclosure Act 2008 requires the prosecution to disclose any convictions of a prosecution witness that are known to the prosecutor and that may affect the credibility of that witness.
- 16.9 An enforcement agency entitled to access criminal record databases should do so as a matter of course. If the enforcement agency is in doubt about whether a conviction should be disclosed, counsel's advice should be taken. Any list of convictions is part of full disclosure and as such should be supplied as soon as is reasonably practicable after a defendant has pleaded not guilty in accordance with s 13(1) of the Criminal Disclosure Act 2008. If the prosecuting agency intends to withhold details of convictions, the defendant should be notified in sufficient time to enable rulings to be sought from the Court.

### **Disclosure of any inducement or immunity given to a witness**

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

### **Identity of informer**

- 16.11 There will be good reason for restricting disclosure where the identity of an informer is at stake. The general principle is that the identity of an informer may not be disclosed unless the Judge is of the opinion that the disclosure of the name of the informer, or of the nature of the information, is necessary or desirable in order to establish the innocence of the defendant.
- 16.12 A statutory restriction on disclosure of the true identity of undercover police officers is contained in s 108 of the Evidence Act 2006.

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

- 16.13 Government agencies are subject to the Official Information Act 1982, but Crown Solicitors are not. Official information should be made available unless there is good reason for withholding it. Under s 18(da) of the Act, a request for official information from a defendant or a person acting on behalf of the defendant may be refused if the defendant could seek the information under the Criminal Disclosure Act 2008.
- 16.14 While as a matter of practical convenience Crown Solicitors may facilitate responses to requests for official information, they are not as a matter of law obliged to do so. The responsibility to provide this information rests on government agencies, and requests made of a Crown Solicitor should be referred to them. The Crown Solicitor should be advised of all information supplied to other parties.
- 16.15 Government agencies and Crown Solicitors are subject to the Privacy Act 1993. Personal information (i.e. that particular category of official information held about an identifiable person) is the subject of an explicit right of access, upon request, by that person unless it comes within some limited exceptions. Under s 29(1)(ia) of the Act, an agency may refuse to disclose information to a defendant or a defendant's agent if the defendant could seek the information under the Criminal Disclosure Act 2008.

**“Third party” disclosure**

- 16.16 The Criminal Disclosure Act 2008 makes provision for a defendant to seek orders that a person other than the prosecutor disclose information likely to assist the defence. Section 26(1)(b) of the Act requires notice of the application to be served on the prosecutor and that person may be heard at a hearing under s 27.
- 16.17 At any hearing the prosecutor, while mindful of the right to a fair trial, may make submissions that assist the Court on the question of the relevance or admissibility of the evidence sought and, particularly where a third party is unrepresented, remind the Court of any statutory or other interests of the third party in non-disclosure.

**Contempt applications**

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

**17. CASE MANAGEMENT**

- 17.1 The case management provisions of the Criminal Procedure Act 2011 aim to reduce the time taken for cases to be resolved; better focus the next court appearance after the defendant enters a plea; and increase the proportion of cases in which pleas are entered or charges are withdrawn as a result of out-of-court discussions.
- 17.2 The obligation on a prosecutor is to engage in case management discussions and to jointly complete a case management memorandum. Prosecutors should use their best endeavours to engage defence counsel in discussions and assist with the completion of the memorandum and should document their efforts in this respect. There are costs sanctions for failure to comply with these and other obligations under the Criminal Procedure Act 2011.
- 17.3 In accordance with usual practice before the Act’s commencement, prosecutors should be prepared to conduct case management discussions on a without prejudice basis having regard to the purposes of the case management procedure in s 55(1)(a) of the Act.
- 17.4 Any agreement reached by the prosecutor as part of the case management discussions and recorded in the case management memorandum should bind any other prosecutor (for example, a different prosecutor who attends the case review hearing). Departure from an agreement reached as part of case management discussions should only occur in exceptional cases, and should be authorised by the Crown Solicitor or senior manager within the relevant government agency. Examples of exceptional circumstances may include where significant new evidence has come to light since the agreement was reached or where the prosecutor was unaware of information so that it should negate the agreement in the interests of justice.
- 17.5 In cases where defence counsel will not discuss case management or jointly complete the memorandum, the prosecutor should not file a unilateral case management memorandum. Prosecutors should, however, be prepared to discuss case management at the review hearing that will be held in the absence of a case management memorandum and be in a position to draw upon their record of the efforts taken to engage in the case management process.

## 18. PLEA DISCUSSIONS AND ARRANGEMENTS

- 18.1 Principled plea discussions and arrangements have a significant value for the administration of the criminal justice system, including:
- 18.1.1 Relieving victims or complainants of the burden of the trial process;
  - 18.1.2 Releasing the saved costs in Court and judicial time, prosecution costs, and legal aid resources to be better deployed in other areas of need;
  - 18.1.3 Providing a structured environment in which the defendant may accept any appropriate responsibility for his or her offending that may be reflected in any sentence imposed.
- 18.2 Subject to the requirements of these Guidelines, the Solicitor-General views it as appropriate for a prosecutor to engage with defence counsel in a process concerning disposition of charges by plea. In the majority of cases, plea discussions are likely to occur as part of the preparation of a joint case management memorandum following the entry of a not guilty plea.
- 18.3 Any discussions should be between the prosecutor and defence counsel, and not directly with the defendant. In any case where the defendant has waived their right to a lawyer, any question of appropriate charges should be dealt with at the case review hearing.
- 18.4 Any plea arrangement should be properly recorded in a form capable of being placed before a Court. The prosecutor may not depart from the terms of an arrangement unless he or she has been materially misled by any information (from any source) as to the facts relied on in the plea discussions and the Crown Solicitor or senior manager within the relevant government agency agrees that it is appropriate in the circumstances to repudiate the arrangement in whole or in part.
- 18.5 Where it is practical and appropriate, the victim or complainant should be informed of any plea discussions and given sufficient opportunity to make his or her position as to any proposed plea arrangement known to the prosecutor. It is expected that prosecutors will establish or continue effective processes to manage victims' expectations, consistent with the principle that while victims' rights are an integral part of the criminal justice system, ultimately the prosecutor should make decisions based on the broader public interest and interests of justice.
- 18.6 Plea arrangements may be contemplated in cases where the charges filed are "clearly supported" by the evidence. The overarching consideration is the interests of justice. However, the following considerations are relevant:
- 18.6.1 Whether the charges agreed to adequately reflect the essential criminality of the conduct; and
  - 18.6.2 Whether the charges agreed to provide sufficient scope for sentencing to reflect that criminality.

- 18.7 In the context of plea discussions, it is not acceptable for prosecutors to:
- 18.7.1 Proceed with unnecessary additional charges or a more serious charge with a view to securing a negotiated plea;
  - 18.7.2 Agree to a plea of guilty to an offence not disclosed by the evidence; or
  - 18.7.3 Agree to a plea of guilty on the premise that the prosecutor will support a specific sentence.
- 18.8 Plea discussions will often encompass discussions about the factual basis of sentencing. Any document in the nature of a summary of facts should contain a full account of the charges filed on the basis of those facts that could have been proved by admissible evidence if the matter went to trial. It should not omit any material fact for the purposes of any plea arrangement with the defendant, and in particular should not outline facts to the court which are misleading or, when measured against the essential elements of the offence to which the defendant has pleaded guilty, would cause the court to reject the plea in favour of a plea of not guilty. Facts that should not be omitted include the extent of the injury or damage suffered by a victim.
- 18.9 The Solicitor-General must approve all plea arrangements in relation to murder charges.

## 19. THE PROSECUTOR AND TRIAL FAIRNESS

- 19.1 The overarching duty of a prosecutor is to act in a manner that is fundamentally fair. Prosecutors should perform their obligations in a detached and objective manner, impartially and without delay.
- 19.2 Legal practitioners acting in a prosecutorial capacity should do so in accordance with their ethical obligations as officers of the Court and conduct themselves according to the rules of professional conduct.
- 19.3 Prosecutors should always protect the right to a fair trial. Subject to that requirement, prosecutors may act as strong advocates within the adversarial process and may prosecute their case forcefully in a firm and vigorous manner. However, prosecutors should not strive for a conviction. They should present their case dispassionately and avoid inflammatory language.
- 19.4 Prosecutors should ensure that they comply with the disclosure obligations contained in the Criminal Disclosure Act 2008.
- 19.5 Prosecutors should be cognisant of the needs of victims and ensure that, in accordance with the law and the requirements of a fair trial, victims and witnesses are treated with care and respect.
- 19.6 Prosecutors should be prepared to assist the trial Judge on matters of fact or law in relation to any matter in the summing up, whether or not the matter relates to the prosecutor's case.

## 20. ASSISTANCE TO THE COURT

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

- 20.2 Without compromising professional obligations and public responsibilities prosecutors should, where appropriate, assist the Court in the fair, prompt and cost efficient disposal of criminal matters.
- 20.3 In particular, but without limiting the general obligation, prosecutors should be astute to ensure that:
- 20.3.1 The number of witnesses called at trial is necessary;
  - 20.3.2 Courts are provided with information and submissions of a standard upon which the Court can rely;
  - 20.3.3 In the case of an unrepresented defendant where there is no amicus the Court is informed of any matter appearing to show that the defendant is unable reasonably to conduct his or her case; and
  - 20.3.4 The summing up is free from errors of fact or law irrespective of whether the particular point was more properly one for the defendant's trial counsel to make.

## 21. PROSECUTORS AND SENTENCING

- 21.1 The prosecutor should be prepared to draw the attention of the Court to the proven or accepted facts of the case and any binding or relevant sentencing principles.
- 21.2 While the prosecutor should not press for a particular term of imprisonment or any other sentence, where it is considered necessary or appropriate, he or she should assist the sentencing court by providing:
- 21.2.1 Any applicable principles from the Courts including guideline judgments;
  - 21.2.2 All proven aggravating factors including the convicted person's criminal record;
  - 21.2.3 The impact on any victims of the offending; and
  - 21.2.4 The prosecutor's view as to the appropriate sentence range or tariff.
- 21.3 A similar approach should be taken to any submissions from the prosecutor for the purposes of a sentence indication.
- 21.4 The Court may give a sentence indication if it is satisfied that the information available to it is sufficient for that purpose. Prosecutors are obliged to comply with a request from the court for additional information as may be made in accordance with s 61(3) of the Criminal Procedure Act 2011 or r 4.9 of the Criminal Procedure Rules 2012. A sentence indication which forms the basis of a defendant's guilty plea will ordinarily be binding on the sentencing Judge.

## 22. PRE-TRIAL APPLICATIONS

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

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

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

## 23. JURY SELECTION

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

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

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

## 24. PROCEEDING IN THE DEFENDANT’S ABSENCE

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

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

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

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

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

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

## 25. RETRIALS AND STAY OF PROCEEDINGS

- 25.1 The common law right of the Attorney-General to intervene in the prosecution process and to stay any prosecution from proceeding further is recognised in s 176 of the Criminal Procedure Act 2011.
- 25.2 In New Zealand the power to stay has been sparingly exercised. That conservative approach is likely to continue.
- 25.3 Generally speaking the power of entering a stay will be exercised in three types of situation:
- 25.3.1 Where a jury has been unable to agree after two trials. After a second disagreement the Crown Solicitor must refer the matter to the Solicitor-General for consideration of a stay. A stay will normally be directed unless the Solicitor-General is satisfied that some event, not relating to the strength of the Crown's case, brought about one or both of the disagreements, or that new and persuasive evidence would be available on a third trial, or that there is some other exceptional circumstance making a third trial desirable in the interests of justice.
  - 25.3.2 If the Solicitor-General is satisfied that the prosecution was commenced wrongly, or that circumstances have so altered since it was commenced as to make its continuation oppressive or otherwise unjust.
  - 25.3.3 To clear outstanding or stale charges or otherwise to conclude unresolved charges; for example, where an offender has been convicted on serious charges but a jury has disagreed on other less serious charges, or a convicted person is serving a substantial sentence and continuing with further charges would serve no worthwhile purpose.
- 25.4 The possible circumstances which may justify a stay under paragraphs 25.3.2 and 25.3.3 above are variable. In general terms, however, the same considerations will apply as are involved in the original decision to prosecute, always with the overriding concern that a prosecution not be continued when its continuance would be oppressive or otherwise not in the interests of justice.

## 26. APPEALS

### **Consent to appeal or bring judicial review proceedings**

- 26.1 Pursuant to the *Cabinet Directions on the Conduct of Crown Legal Business 2012* a government department must obtain the Solicitor-General's consent to appeal any decision of a Court or to commence judicial review proceedings. Pursuant to these Guidelines that direction is extended to any appeal by a public prosecutor or a Crown prosecutor.
- 26.2 Prosecutors should provide the Crown Law Office with the information and documents that are required for the Solicitor-General to decide whether consent should be given, as identified in the Crown Law Office *Prosecutors' Handbook*.

### **Appeals against pre-trial rulings**

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

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

### **Appeals against sentence**

- 26.4 The prosecutor has a right of appeal against sentence.
- 26.5 Section 246 of the Criminal Procedure Act 2011 requires that any appeal by a prosecutor against sentence, including an appeal by a private prosecutor, is only brought by or with the consent of the Solicitor-General.
- 26.6 Consent will not be given unless the sentence imposed is considered, in all of the circumstances, manifestly inadequate or contrary to principle.
- 26.7 In considering whether an appeal against sentence should be brought, prosecutors should take into account that:
- 26.7.1 A sentence will be increased on a prosecutor's appeal only where it is manifestly inadequate or contrary to principle;
- 26.7.2 Any increase will take the sentence imposed only to the lower end of the correct available range;
- 26.7.3 Despite paragraph 26.7.2 above, an appeal may be justified where the appeal involves an important matter of principle, or the appeal is to be taken to establish or modify a sentencing guideline judgment.
- 26.8 Where the appeal is to be taken on the grounds of error of principle it will be necessary to:
- 26.8.1 Identify the principle; and
- 26.8.2 Demonstrate either:
- that the principle is one of application beyond the facts of the particular case, or
  - that the sentence has brought about an unfairness having regard to sentences imposed on co-offenders, or in similar cases where the offenders are serving a term of imprisonment.

### **Appeals on questions of law**

- 26.9 Prosecutors may appeal on a question of law arising in a ruling by the trial court. Leave of the appeal court is required. The ruling must be made in proceedings that relate to or follow the determination of the charge or during the determination of the charge.
- 26.10 There must be a question of law that:
- 26.10.1 Was a significant factor in the disposition of the case; and
- 26.10.2 Has sufficient public interest to engage the appeal court.
- 26.11 An appeal on a question of law will only be appropriate if the ruling in question:

- 26.11.1 Is sufficiently clear and precise to be capable of being challenged; and
- 26.11.2 Is concerned with a point of law, rather than the sufficiency of the evidence in the case.
- 26.12 The ability to appeal on a question of law arising in a determination of the charge (except a question that arises in a jury verdict) is not intended to provide an ability to appeal based on the merits of the case.
- 26.13 If the appeal court in consequence of an appeal on a question of law orders a new trial Guideline 5 (above) will continue to be relevant.

### **Judicial review**

- 26.14 A judicial review of a Court's decision in a criminal prosecution may only be brought by or with the consent of the Solicitor-General.
- 26.15 Judicial review is not a review of the merits of a decision, but rather a review of the process by which the decision is made. The grounds on which a decision may be reviewed are limited. The scope of statutory rights of appeal in criminal cases means that there are few circumstances in which a judicial review of a decision in a criminal prosecution should be brought.
- 26.16 Prosecutors are referred to the guidance in these Guidelines as to when an appeal against a decision or ruling should be taken. That guidance also applies to a judicial review of that decision.

## **27. SOLICITOR-GENERAL'S REFERENCE PROCEDURE**

- 27.1 The Solicitor-General may refer a question of law that arises out of a trial to the Court of Appeal. A question of law that arises out of a first appeal against conviction or sentence to the High Court or Court of Appeal may also be referred to the Court of Appeal or the Supreme Court.
- 27.2 A Reference will only be appropriate if the ruling in question:
  - 27.2.1 Is sufficiently clear and precise to be capable of being challenged;
  - 27.2.2 Is concerned with a point of law, rather than the sufficiency of the evidence in the case; and
  - 27.2.3 Raises a point of practical importance which is likely to be followed in other cases.
- 27.3 The Reference procedure is not to be used:
  - 27.3.1 To determine theoretical questions of law; or
  - 27.3.2 To refer a ruling which is clearly in ignorance of or inconsistent with clear existing authority.
- 27.4 A material consideration may be whether the ruling has been reported and is likely to be followed in other cases.

## 28. RELATIONSHIP BETWEEN CROWN PROSECUTORS AND ENFORCEMENT AGENCIES

### **The Police or other investigator**

- 28.1 Crown prosecutors appear in the criminal courts in two distinct capacities, namely on instructions from the person or government agency who commenced the proceeding or, in respect of Crown prosecutions, as the Crown's representative.
- 28.2 When acting on instructions, the Crown prosecutor is instructed in that capacity as an agent or officer of the Crown and should still act in accordance with the applicable guidelines. While Crown prosecutors are expected to consult closely with and take into account the views of the investigator or officer in charge of the case on all significant matters, it is also the Law Officers' expectation that government agencies who commence proceedings will follow the advice of the Crown prosecutor as to the nature of the charges and conduct of the prosecution.
- 28.3 The relationship between the Crown prosecutor and the agency who commenced the proceeding should also be conducted in accordance with any Memorandum of Understanding or similar agreement between the Solicitor-General and the chief executive of that agency.

### **Recipients of advice**

- 28.4 Due to the increasing complexity of the criminal law and considerations arising from the New Zealand Bill of Rights Act 1990, many criminal or regulatory investigations will require specialised legal advice from the earliest stages.
- 28.5 In this regard, Crown Solicitors are expected to have and maintain sufficient capacity to give advice as and when necessary, and to develop and maintain appropriate relationships with the locally based government agencies to ensure effective legal advice is sought and given.
- 28.6 In giving investigative advice, the solicitor-client relationship is modified to the extent that the investigators to whom the advice is directed are expected to act in accordance with that advice.

### **Serious Fraud Prosecutors' Panel**

- 28.7 Members of the Serious Fraud Prosecutors' Panel are appointed by the Solicitor-General after consultation with the Director in accordance with s 48 of the Serious Fraud Office Act 1990. Proceedings in relation to the prosecution of serious or complex fraud are taken on behalf of the Director and subject to the Director's instruction until the Solicitor-General assumes responsibility for the prosecution in accordance with the Crown Prosecution Regulations 2013. Once the Solicitor-General has assumed responsibility for the prosecution, the Solicitor-General may give binding directions to an instructed panel member. Such directions will be given in consultation with the Director.
- 28.8 Panel members should consult the Director throughout the course of a prosecution and have regard to the Serious Fraud Office's broader objectives in relation to serious or complex fraud. Both before and after the point at which the Solicitor-General assumes responsibility for the prosecution, panel members must otherwise act in accordance with these Guidelines.

## **Crown prosecutions**

- 28.9 Once the Crown has assumed responsibility for a prosecution, all decisions in relation to disclosure, the charges filed, the evidence to be adduced, the conduct of the prosecution and the nature and scope of any continuing investigation (where it is probable that will result in evidence or information relevant to the trial) are matters solely for the Crown prosecutor to decide.
- 28.10 In the discharge of this responsibility, Crown prosecutors are expected to consult closely with and take into account the views of the investigator or officer in charge of the case and to explain the basis of any significant decision.

## **29. VICTIMS**

- 29.1 Victims of crime in the criminal justice system are to be:
- 29.1.1 Treated with courtesy and compassion; and with
  - 29.1.2 Respect for their dignity and privacy.
- 29.2 The key means of observing these principles is through the provision of information to ensure that victims understand the process and know what is happening at each stage. So far as is possible, the victim should have explained to them the court processes and procedures, and should be kept informed of what is happening during the course of the proceedings.
- 29.3 Prosecutors should seek to protect the victim's interests as best they can whilst fulfilling their duty to the Court and in the conduct of the prosecution on behalf of the Crown.
- 29.4 Crown prosecutors are referred to the protocol "Victims of Crime – Guidance for Prosecutors" (issued with these Guidelines) for greater detail as to the role and duties of prosecutors in respect of victims. Prosecutors in government agencies should be aware of and take into account the guidance provided in that protocol.

## **30. MEDIA**

- 30.1 When communicating with the public through the media, prosecutors are to ensure that they:
- 30.1.1 Do not make remarks that may prejudice fair trial interests or the perceived objectivity of the judge;
  - 30.1.2 Support the administration of justice and the integrity of the criminal justice system;
  - 30.1.3 Respect the principle of open justice;
  - 30.1.4 Recognise the public interest in receiving accurate information about the criminal justice system and criminal prosecutions; and
  - 30.1.5 Treat victims of crime with courtesy and compassion, and respect their dignity and privacy.

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