



**Te Tāhuhu o
te Mātauranga**
Ministry of Education

Prosecution and Warnings Policy

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**Te Kāwanatanga
o Aotearoa**
New Zealand Government

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Te Tāhuhu o te Mātauranga | Ministry of Education

Prosecution and Warnings Policy

Scope

1. This policy sets out the Ministry of Education's (Ministry) policy on prosecutions and warnings. It applies to any prosecution action being considered or undertaken by the Ministry, including prosecutions under the Education and Training Act 2020 and the Children's Act 2014.
2. This policy should be read together with the Solicitor-General's Prosecution Guidelines.

Application

3. This policy applies to all employees, contractors and secondees of the Ministry (Ministry Officials) and counsel acting on behalf of the Ministry in dealing with prosecutions or potential prosecutions brought by the Ministry.
4. This policy does not apply to prosecutions that are handled by other government agencies (such as the Police) on referral from the Ministry.

Purpose

5. This policy sets out the Ministry's procedures and expectations when dealing with potential prosecutions. It sets out the process to be followed in assessing a file for prosecution, and how the prosecution decision is to be made. It then sets out how prosecutions are to be conducted.
6. All public prosecuting agencies have been required by Cabinet, since 1 July 2013, to have a publicly available prosecution policy which sets out, among other things, the process for making prosecution decisions and the circumstances in which alternative methods of resolving a matter may be used. This policy intends to comply with that requirement.

Detailed explanation of policy

Objectives of the Ministry's prosecution activity

7. The Ministry enforces a small number of legislative provisions involving offences, and the objectives of particular prosecutions may vary depending on the purpose of those provisions.
8. The general objectives that apply across all prosecutions taken by the Ministry are:
 - (a) To ensure that appropriate and proportionate enforcement action is taken in response to breaches of the law;
 - (b) To ensure, where appropriate, there are adequate deterrents against offending;
 - (c) To ensure the use of appropriate charges under appropriate legislation; and
 - (d) To act rationally, impartially, fairly and in accordance with the Solicitor-General's Prosecution Guidelines.

Process for assessment of a file for prosecution

Referral and assessment of prosecution file

Evidential sufficiency assessment

14. When assessing evidential sufficiency, the test set out in the Solicitor-General's Prosecution Guidelines must be applied, namely that the evidence that can be adduced in Court is sufficient to provide a reasonable prospect of conviction.
15. All prosecutions must be initiated by the relevant business group or division by referral to a member of the Ministry's Legal team for assessment of evidential sufficiency.
16. If in the Ministry's Legal teams' assessment, the prosecution does not meet the evidential standard for prosecution, the responsible business group or division may choose to gather further evidence and refer the case back to the Ministry's Legal team for re-consideration.
17. If the requirements of the evidential test are met, the file will be referred to the Prosecution Decision-making Panel for consideration of whether prosecution is in the public interest.

Disputes

18. In the case of any dispute between the Ministry's Legal team and the responsible business group or division as to evidential sufficiency, or the particular charges to be filed in respect of the file, the relevant member of the Ministry's Legal team and the appropriate person from the responsible business group or division will attempt to resolve the dispute through discussion.
19. If the dispute is not able to be resolved, the final decision will be made by the Ministry's Chief Legal Advisor. The Ministry's Chief Legal Advisor may seek external advice from the Crown Law Office or a Crown Solicitor in making this assessment.

Prosecution Decision-making Panel

20. The Prosecution Decision-making Panel (Panel) is made up of the Ministry's Chief Legal Advisor (or their delegate), Hautū, Te Mahau | Education Services and a Manager from the business group or division that investigated the suspected offending. The Panel has authority to decide to refer cases for prosecution.
21. The Panel will consider the facts and circumstances of each case to determine if it is the public interest to prosecute and comply with the Solicitor-General's Prosecution Guidelines. The Panel will aim to make decisions by consensus. Where consensus cannot be reached a majority decision will apply.
22. Consideration of public interest will include any relevant factors in the Solicitor-General's Prosecution Guidelines, including cost-effectiveness and whether there are any proper alternatives to prosecution available. Alternatives to prosecution may include taking an educative approach or issuing an informal or formal warning.
23. Prosecution decisions must be made independently and be free from any undue or improper pressure (such as political pressure). If a person involved in making a prosecution decision is concerned about undue or improper pressure, the Ministry's Chief Legal Advisor should be consulted.

Selection of charges

24. If a decision to prosecute is made, then appropriate charges must be selected by the Panel.

25. The selection of charges must follow the guidance in the Solicitor-General's Prosecution Guidelines, particularly:
- (a) The number and nature of charges should reflect the totality of the offending; and
 - (b) Neither the number nor seriousness of charges should be decided by having regard to the impact of that decision on the likelihood of an offer by the defendant to plead guilty to lesser charges.

Conduct of prosecutions

26. All Ministry prosecutions must be conducted by properly qualified legal counsel, normally the Crown Solicitor under instruction from the Ministry's Legal team.
27. The Ministry's Legal team will manage the prosecution in consultation with the responsible business group or division and will keep them informed of progress. The responsibility for instructing Crown Solicitors (including providing instructions throughout the course of a prosecution) remains with the Ministry's Legal team.
28. Responsibility for meeting the various obligations under the Criminal Disclosure Act 2008 will rest with the relevant business group or division who will follow the advice of the relevant Crown Solicitor.
29. All prosecutors appearing for the Ministry must comply with the requirements of the Solicitor-General's Prosecution Guidelines and the relevant rules in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, particularly rule 13.12 which states:
- A prosecuting lawyer must act fairly and impartially at all times and in doing this must—
- (a) comply with all obligations concerning disclosure to the defence of evidence material to the prosecution and the defence; and
 - (b) present the prosecution case fully and fairly and with professional detachment; and
 - (c) avoid unduly emotive language and inflaming bias or prejudice against an accused person; and
 - (d) act in accordance with any ethical obligations that apply specifically to prosecutors acting for the Crown.
30. Appeals will only be commenced by counsel representing the Ministry after the Ministry's Chief Legal Advisor has reviewed a proposal for an appeal. The Crown Law Office will be consulted and the Solicitor-General's consent is usually required for appeals.

Formal Warnings

31. The Ministry may decide to issue a Formal Warning in relation to behaviour the Ministry considers could amount to criminal conduct.
32. The Ministry will follow the guidance contained in the Solicitor-General's Prosecution Guidelines for the use of Formal Warnings.
33. As part of the decision to prosecute, the Ministry must implement the Public Interest Test. This test recognises that not all behaviour that the Ministry considers may amount to criminal conduct requires a prosecution response. In these situations, the Ministry may instead choose to formally warn a person regarding behaviour that may amount to criminal conduct. Decisions will be made on a case-by-case basis. This may include situations where the Ministry considers a Formal Warning would better support a restorative and rehabilitative approach in the particular context.

Purpose of Formal Warnings

34. Formal Warnings may be issued by the Ministry for a range of different purposes, including to:

- (a) show that it takes the matter seriously;
- (b) impress on the person that, in the Ministry's view, the behaviour the person has engaged in amounts to criminal conduct that could otherwise be prosecuted but the Ministry has chosen not to prosecute;
- (c) mitigate the risk of the behaviour recurring in the future;
- (d) give the person an opportunity to amend or address the behaviour to avoid the risk of prosecution in the future; and
- (e) send a signal to the person, but also to others in similar situations, including the general public.

Process for issuing Formal Warnings

35. The investigation process leading up to a person being warned will follow the same path as the decision to prosecute. This will involve engaging the person under investigation to give effect to natural justice. Giving effect to natural justice will vary depending on the behaviour and the consequences for the person and will include:

- (a) Putting potential adverse findings to the investigated person for comment before a final decision to issue a Formal Warning is reached.
- (b) Depending on the circumstances, giving effect to natural justice may also include:
 - (i) The person consenting to receiving the Formal Warning and having the matter resolved in that way; and/or
 - (ii) The person admitting to the behaviour in respect of which they are being warned.

36. Formal Warnings will be issued as soon as practicable but, in any case, within a time period that would otherwise be acceptable if charges were being filed under the Criminal Procedure Act 2011.

Content of a Formal Warning

37. Each Formal Warning will be issued in writing and contain the following information:

- (a) the key facts and reasons that led to the issuing of the Formal Warning;
- (b) the consequences related to the Formal Warning – namely, the Formal Warning may be used by the Ministry in making future decisions regarding the issue and any relevant consequences that may impact because of this;
- (c) that the Formal Warning will be held on file by the Ministry and the length of time it will be held on file;
- (d) that if the person engages in similar behaviour in the future, they may be subject to prosecution under the relevant enactment;
- (e) whether the Formal Warning will be published;
- (f) that the Formal Warning will be shared with any person harmed by the behaviour;

- (g) of the person's right under the Privacy Act 2020, including the person's right to request a copy of personal information;
- (h) of the person's right to request a review of the Formal Warning (see below); and
- (i) any relevant response the person has made to the proposed Formal Warning when engaged with (e.g. whether they admitted or disputed the facts of the alleged issue, and whether they consented to the matter being dealt with through a Formal Warning).

Review of Formal Warning

- 38. A person who is issued with a Formal Warning has the option to have the warning reviewed.
- 39. The warned person has 28 calendar days from the day they receive the Formal Warning to request a review.
- 40. The review process will be suitably independent from the Prosecution Decision-making Panel who decided to issue a Formal Warning. This means that any review requested will be decided by the Secretary for Education (or their delegate) based on the papers.

Reconsideration of decision to issue Formal Warning

- 41. Reconsideration of a decision to issue a Formal Warning will be rare and will be made in line with the Solicitor-General's Prosecution Guidelines. Advice will be sought from the Ministry's Legal team where reconsideration of a decision to issue a Formal Warning is proposed.



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Ministry of Education

He mea tārai e mātou te mātauranga
kia rangatira ai, kia mana taurite ai ōna huanga.

We shape an education system that delivers
equitable and excellent outcomes.



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