

October 2013

# Criminal Prosecution Guidelines

(Attachment A to the Enforcement Response Guidelines)

# Contents

<b>Contents</b>	<b>2</b>
<b>Purpose</b>	<b>3</b>
<b>Scope</b>	<b>3</b>
<b>CPGS subject to Solicitor-General's Prosecution Guidelines</b>	<b>3</b>
<b>When the Commission may prosecute</b>	<b>4</b>
Prosecutions under our principal statutes	4
Prosecutions under the Crimes Act 1961	4
<b>Decisions to prosecute</b>	<b>4</b>
Evidential test	5
Public interest test	5
Other considerations	6
<b>Decision procedure</b>	<b>7</b>
<b>Choice of charges</b>	<b>7</b>
<b>Appeals from a prosecution</b>	<b>7</b>
<b>Impartiality of the decision-maker</b>	<b>7</b>
<b>Disclosure under the Criminal Disclosure Act 2008</b>	<b>8</b>
<b>Investigations involving other agencies</b>	<b>8</b>
<b>Amendments</b>	<b>8</b>

## Purpose

1. The Commerce Commission has issued these Criminal Prosecution Guidelines (CPGs) to provide greater public guidance as to the circumstances in which we will initiate a criminal prosecution, and the principles and practices applicable to a criminal prosecution.
2. The CPGs should be read alongside our published Enforcement Criteria, Model Litigant Policy, and Enforcement Response Guidelines (the ERGs)<sup>1</sup>. The CPGs are an attachment to the ERGs; where the ERGs are referenced in the CPGs, the relevant parts of the ERG are incorporated into the CPGs.
3. The CPGs are not exhaustive, and are not intended to be legally binding. We may revise the CPGs from time to time in accordance with our organisational objectives and priorities. The CPGs are also necessarily general, and for greater specificity readers should refer to the relevant offence statute under which a prosecution may be brought.

## Scope

4. The CPGs apply to all criminal prosecutions and potential criminal prosecutions arising from investigations by us under the laws we enforce.<sup>2,3</sup>
5. The CPGs apply to our decisions to initiate criminal proceedings and our decisions whether to appeal (or oppose an appeal) against a Court decision arising from a criminal prosecution. References in the CPGs to “prosecution” and “prosecution decisions” include appeal decisions.
6. The CPGs do not cover civil proceedings that we bring or other enforcement steps we may take.

## CPGs subject to Solicitor-General’s Prosecution Guidelines

7. The Solicitor-General’s Prosecution Guidelines<sup>4</sup> apply directly to public prosecutions undertaken by Crown agencies,<sup>5</sup> such as the Commission.
8. As such, we recognise that the CPGs are subject to the Solicitor-General’s Prosecution Guidelines. We adhere to the standards of good criminal prosecution practice expressed in the Solicitor-General’s Prosecution Guidelines, in addition to the principles expressed in the CPGs.
9. Our criminal prosecutions are conducted by Crown Solicitors throughout New Zealand, and sometimes by Queen’s Counsel, on our behalf. These lawyers are bound by the Solicitor-General’s Prosecution Guidelines when acting in that capacity, and we also expect them also to adhere to the practices and principles expressed in the CPGs.
10. The Solicitor-General’s Prosecution Guidelines are more specific and comprehensive than the CPGs, and should be read for greater detail on prosecutorial principles. Wherever possible, the CPGs should be read consistently with the Solicitor-General’s Prosecution Guidelines. In the event of a conflict between the CPGs and the Solicitor-General’s Prosecution Guidelines, the latter will prevail.

1. These are available on our website.

2. See the ERGs at [54]. The ERGs identify that not all breaches of the laws we enforce are criminal offences; many can only be the subject of civil proceedings.

3. As a result, the CPGs apply to a wider range of enforcement activities than the ERGs.

4. Solicitor-General’s Prosecution Guidelines 2013

5. See Attorney-General’s introduction at [2]-[3], and Solicitor-General’s Introduction at [3].

## When the Commission may prosecute

### Prosecutions under our principal statutes

11. We are empowered to bring criminal prosecutions under specific sections of the Commerce Act 1986, Fair Trading Act 1986, Credit Contracts and Consumer Finance Act 2003 (CCCF Act), Telecommunications Act 2001 and Dairy Industry Restructuring Act 2001.<sup>6</sup> Other criminal offences are likely to be added to this list by Parliament, from time to time.
12. In some cases, we have a choice between commencing a criminal prosecution or bringing civil proceedings for a penalty, compensation, declaration or other remedy. Considerations that are likely to influence our choice are listed in the ERGs at [55].

### Prosecutions under the Crimes Act 1961

13. We may bring a criminal prosecution under the Crimes Act 1961 where we consider that an offence under the Crimes Act has been committed in relation to one or more of our areas of responsibility. Such a criminal prosecution can be instead of or in addition to a prosecution under one of our principal statutes. Such criminal prosecutions could involve:<sup>7</sup>
  - 13.1 conduct that is in relation to one of our areas of responsibility and which is so serious it warrants special condemnation under the Crimes Act;<sup>8</sup> and
  - 13.2 conduct which interferes with our ability to perform our functions, for example:
    - 13.2.1 lying or knowingly providing information which is misleading or incorrect
    - 13.2.2 withholding, concealing or destroying documents.

## Decisions to prosecute

14. We recognise that the applicable test for whether we ought to initiate or continue a criminal prosecution is the Test for Prosecution in the Solicitor-General's Prosecution Guidelines, namely that:
  - 14.1 the evidence which can be adduced in court is sufficient to provide a "reasonable prospect of conviction": **the Evidential Test**; and
  - 14.2 criminal prosecution is required in the public interest: **the Public Interest Test**.
15. We must be satisfied that both limbs of the Test for Prosecution are satisfied before making a decision to commence criminal prosecution. In doing so we must first consider whether the Evidential Test is satisfied, before we then consider whether the Public Interest test is satisfied.<sup>9</sup>

6. Readers should consult each statute for up-to-date information on the specific sections of those Acts that may give rise to a criminal prosecution.

7. See ERGs at [59].

8. See, for example, the our criminal prosecution of company director Sonia Klair who pleaded guilty to 64 charges that we brought under the Crimes Act, in relation to her running a business which engaged in false billing practices, also known as pro-forma invoicing.

9. These tests apply to criminal prosecutions not to decisions whether to initiate civil proceedings.

## Evidential Test

16. If a matter does not pass the Evidential Test it will not proceed to criminal prosecution, no matter how important it may be.
17. In deciding whether the Evidential Test is met we must analyse and evaluate all of the evidence and information in a thorough, critical and impartial manner. A “reasonable prospect of conviction” exists if:<sup>10</sup>
  - ...in relation to an identifiable person (whether natural or legal), there is credible evidence which the Commission 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 a reasonable doubt that the individual who is prosecuted has committed a criminal offence.
18. When deciding whether there is sufficient evidence, we will consider whether the evidence gathered is admissible and reliable, and will consider factors that we are required or permitted to take into account by the Solicitor-General’s Prosecution Guidelines, including the following.<sup>11</sup>
  - 18.1 Does the evidence support the charges?
  - 18.2 Do the charges reflect the seriousness of the offending?
  - 18.3 Is it likely that the evidence will be excluded at court, for example because of how it was gathered? If so, is there sufficient other evidence for a realistic prospect of conviction?
  - 18.4 Is there evidence which might detract from the reliability of a confession, such as the defendant’s age, intelligence or level of understanding?
  - 18.5 What explanations has the defendant given? Is a court likely to find the explanations credible in the light of the evidence as a whole?
  - 18.6 Is the evidence credible (capable of belief)?
  - 18.7 Is there other evidence that we should seek out which may support or detract from the case?
19. We will continue to monitor whether the Evidential Test is met throughout the course of a criminal prosecution. If, as a result of continued investigation following the laying of charges we consider that:
  - 19.1 another charge is more suitable, we may amend the charge (or seek the leave of the Court to do so); or
  - 19.2 a charge should be withdrawn, withdraw the charge.

## Public Interest Test

20. Once we are satisfied that there is sufficient evidence to provide a reasonable prospect of conviction, we must consider whether the public interest requires a criminal prosecution. We are not required to prosecute all offences for which there is sufficient evidence. We will exercise our prosecutorial discretion in each case as to whether a criminal prosecution is required in the public interest.

10. See Solicitor-General’s Prosecution Guidelines at 5.3.

11. See Solicitor-General’s Prosecution Guidelines at 5.4.

21. Common instances where we may exercise our discretion not to take a criminal prosecution are where the case is not serious, or where a lesser enforcement response is appropriate (as provided for in our ERGs).
22. Conversely, we may be influenced towards bringing a Crimes Act prosecution as opposed to a criminal prosecution under the Fair Trading or CCCF Act where a criminal conviction would provide the Court with a broader range of penalties or sentencing options, or where the conduct is deserving of special condemnation by way of a Crimes Act prosecution.
23. A non-exhaustive list of public interest considerations that may be relevant is provided in the Solicitor-General's Prosecution Guidelines,<sup>12</sup> and include matters such as the following.
  - 23.1 How serious is the offending?
  - 23.2 Is it likely to be continued or repeated?
  - 23.3 Does the defendant have relevant previous warnings or convictions?
  - 23.4 Has the offence resulted in serious financial loss to an individual, company or section of society?
  - 23.5 What penalty is the Court likely to impose?
  - 23.6 Do we accept that the defendant has rectified the loss or harm caused (although defendants should not be able to avoid prosecution simply through paying compensation or rectifying loss)?
  - 23.7 Are any proper alternatives to prosecution available?
24. Cost (including our resources and funding) weighed against the seriousness of the offending and any likely penalty or sentence is a relevant factor we will consider when making an overall assessment of the public interest.<sup>13</sup>

### **Other considerations**

25. In taking a decision whether to prosecute, we will also consider:
  - 25.1 our Enforcement Criteria, which guide our discretion as to what enforcement action we undertake
  - 25.2 our ERGs, and the alternatives to criminal prosecution that are provided in that document
  - 25.3 the purposes of the laws that we are seeking to enforce by a proposed criminal prosecution
  - 25.4 our stated objectives and any enforcement priorities; and
  - 25.5 whether another prosecuting agency has or may bring criminal proceedings in relation to the same subject-matter as our proposed prosecution.
26. If we decide that there is insufficient evidence, or that it is not in the public interest to prosecute or to continue with a criminal prosecution, we may take a lower-level enforcement response; this can include taking no prosecution. The ERGs provide more information on these alternatives to criminal prosecution.

12. See Solicitor-General's Prosecution Guidelines at 5.8-5.11.

13. See Solicitor-General's Prosecution Guidelines at 5.11 and 8.6

27. A decision not to prosecute does not preclude us from further considering the case if new and additional evidence becomes available, or if a review of the original decision is required (provided always that we are within the applicable limitation period for bringing a prosecution). Additional decisions to prosecute will be conducted in accordance with the CPGs.

## Decision procedure

28. Every decision to prosecute must be taken by the majority of Commission members sitting as the relevant Division.<sup>14</sup>

## Choice of charges

29. The nature and number of charges brought 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 of the offending, when the criteria under section 20 of the Criminal Procedure Act 2011 are made out.
30. Under the laws that we enforce, we may bring a criminal prosecution against individuals, companies, businesses and other kinds of legal 'person'. The considerations governing prosecution against individuals are contained in the ERGs at [20]-[23] and the CPGs at [16]-[25]. (The ERGs at [20]-[23] discuss the factors the Commission will take into account when deciding on any enforcement action against individuals, the CPGs at [16]-[25] discuss the relevant considerations for all decisions on criminal prosecutions. Both sets of factors therefore apply to individuals when we are considering a criminal prosecution.)
31. We may choose to charge someone as a principal party, as a secondary party (someone who assisted in or facilitated another party to commit the offence) or, as the evidence allows, both.

## Appeals from a prosecution

32. Every decision to appeal against a criminal prosecution decision (including a sentencing decision) must be taken by the majority of Commission members sitting as the relevant Division.
33. The proposed appeal must also be referred by our instructed Crown Solicitor to the Solicitor-General for his consideration and approval, in accordance with the Criminal Procedure Act 2011.

## Impartiality of the decision-maker

34. All Commission staff and members with duties or accountabilities under the CPGs will act fairly, promptly, in accordance with the law, and without any actual or potential conflict of interest. In addition, those members of Commission staff who are admitted lawyers have additional responsibilities under the Lawyers and Conveyances Act (Lawyers: Conduct and Client Care) Rules 2008.

14. Commerce Act 1986, s16.

## **Disclosure under the Criminal Disclosure Act 2008**

35. Disclosure of evidence in a criminal prosecution is governed by the Criminal Disclosure Act 2008. Under the Act, the person in charge of the file is responsible for disclosure within the statutory timeframes. In Commission prosecutions, this will usually be the lead investigator assigned to the file.

## **Investigations involving other agencies**

36. It is not uncommon for more than one prosecution agency to investigate a particular matter where prosecution by any of those agencies could result.
37. Wherever possible, we will work collaboratively with those other agencies to ensure that investigations and criminal prosecutions are conducted effectively and efficiently. For example, in some cases it may be possible for agencies to share information, such as witness statements, to ensure that witnesses are not subjected to multiple interviews by different agencies.
38. Where reasonably practicable, we will consult with other relevant agencies before commencing a criminal prosecution, to satisfy ourselves that criminal prosecution by us is in the public interest.

## **Amendments**

39. We may amend the CPGs from time to time.



