



# **Criminal Prosecution Guidelines**

The Commerce Commission's Prosecution Policy

Date: 26 November 2025

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## 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, Enforcement and Compliance Priorities, Model Litigant Policy, and Enforcement Response Guidelines (the ERGs)<sup>1</sup>. These publications set out the objectives and priorities of our enforcement and prosecution activities. 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</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>3</sup> apply directly to public prosecutions undertaken by Crown agencies and entities,<sup>4</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.

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<sup>1</sup> These documents are available on our website.

<sup>2</sup> See the ERGs at [73]. The ERGs identify that not all breaches of the laws we enforce are criminal offences; many can only be the subject of civil proceedings. As a result, the CPGs apply to a narrower range of enforcement activities than the ERGs.

<sup>3</sup> [Solicitor-General's Prosecution Guidelines](#)

<sup>4</sup> See Attorney-General’s Foreword at [2], and Solicitor-General’s Introduction at [3]-[4].

9. Our criminal prosecutions are conducted by experienced prosecutors throughout New Zealand on our behalf.<sup>5</sup> 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.

## **When the Commission may prosecute**

### **Prosecutions under our principal statutes**

11. We are empowered to bring criminal prosecutions under specific sections of the laws we enforce.<sup>6</sup> Other criminal offences may 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 [80].

### **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:

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<sup>5</sup> We may instruct King's Counsel in some cases. We may also instruct a cartel panel prosecutor in cartel conduct cases involving immunity from prosecution: see Solicitor-General's Prosecution Guidelines ("Immunities in cartel cases", at 11). The Commission may also use in-house prosecutors who have been classified and approved by Crown Law's Public Prosecution Unit.

<sup>6</sup> 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. The list of Acts may change over time. See further details at: <https://comcom.govt.nz/about-us/our-role/laws-we-enforce>

<sup>7</sup> See ERGs at [83].

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

13.2.1 lying or knowingly providing information which is misleading or incorrect; and/or

13.2.2 withholding, concealing or destroying documents.

## Decisions to prosecute

### Alternatives to Prosecution to be considered first

14. Prosecution will usually only be considered after the other alternatives in our ERGs have been considered and rejected. This means that if there is another way of dealing with a particular case that is likely to be effective, and is appropriate in the circumstances, it should be used.<sup>9</sup>
15. The alternative enforcement responses in our ERGs should be considered sequentially, from least severe to most, before applying the Test for Prosecution below.<sup>10</sup>
16. However, there may be circumstances where it is not appropriate to consider alternatives to prosecution. An example is where a prosecution is clearly the necessary response because the offending is at least moderately serious.<sup>11</sup>
17. An assessment should also be made of the risk of further harm to the victim (if any), their whānau and the wider public when considering whether alternatives to prosecution should be used.

### Test for Prosecution

18. 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:
  - 18.1 the evidence which can be adduced in court is sufficient to prove the proposed charge beyond reasonable doubt: **the Evidential Test**; and
  - 18.2 criminal prosecution is required in the public interest: **the Public Interest Test**.
19. We will need to be satisfied that both limbs of the Test for Prosecution are satisfied before making a decision to commence criminal prosecution. In doing so, we will first consider whether the Evidential Test is satisfied, before we then consider whether the Public Interest test is satisfied.<sup>12</sup>

<sup>9</sup> See Solicitor-General's Prosecution Guidelines ("Prosecution Policies", at 1).

<sup>10</sup> The order of responses in the ERGs reflects this severity hierarchy. See also Solicitor-General's Prosecution Guidelines ("Prosecution Policies", at 13).

<sup>11</sup> See Solicitor-General's Prosecution Guidelines ("Prosecution Policies", at 14-15) for other examples, such as where particular conduct is an enforcement priority of the Commission, or where alternative action has previously been used.

<sup>12</sup> These tests apply to criminal prosecutions, not to decisions whether to initiate civil proceedings.

## Evidential Test

20. If a matter does not pass the Evidential Test, it will not proceed to criminal prosecution, no matter how important it may be.
21. In deciding whether the Evidential Test is met, we will analyse and evaluate all of the evidence and information in a thorough, critical and impartial manner. This analysis and evaluation require careful judgment in deciding whether a prosecution can be commenced.<sup>13</sup>

“The evaluation of the admissible evidence, and the assessment as to whether it is sufficient to prove the charge beyond reasonable doubt, is a matter of judgement rather than science. Prosecutors should anticipate likely defences and critically analyse the evidence on that basis. They should consider how a court might view particular pieces of evidence, based on their experience, and consider the significance of that. But they should not attempt to predict the outcome of a trial.”

22. When deciding whether there is sufficient evidence, we will consider whether the evidence gathered is “**available, admissible, credible and reliable**”<sup>14</sup>, 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>15</sup>
  - 22.1 Does the evidence support the charges?
  - 22.2 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?
  - 22.3 Is there evidence which might detract from the reliability of a confession, such as the defendant’s age, intelligence or level of understanding?
  - 22.4 What explanations has the defendant given? Is a court likely to find the explanations credible in the light of the evidence as a whole?
  - 22.5 Is the evidence credible (capable of belief)?
  - 22.6 Is there other evidence that we should seek out which may support or detract from the case?

## Public Interest Test

23. Once we are satisfied that there is sufficient evidence to prove the proposed charge beyond reasonable doubt, we will 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.

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<sup>13</sup> See Solicitor-General’s Prosecution Guidelines (“Decisions to prosecute”, at 18).

<sup>14</sup> See Solicitor-General’s Prosecution Guidelines (“Decisions to prosecute”, at 9 and 16).

<sup>15</sup> See Solicitor-General’s Prosecution Guidelines (“Decisions to prosecute”, at 7 – 18).

24. 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).
25. Conversely, we may be influenced towards bringing a Crimes Act prosecution as opposed to a civil or criminal prosecution under one of the statutes that we administer 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.
26. In general, there are four broad questions we consider when assessing whether the public interest requires prosecution:<sup>16</sup>
  - 26.1 How do the features of the **offending** weigh for or against prosecution?
  - 26.2 How do the personal characteristics and circumstances of the **defendant** weigh for or against prosecution?
  - 26.3 How do the interests of the **victim(s)** (if there are any) weigh for or against prosecution?<sup>17</sup>
  - 26.4 Are there any **alternative methods** of resolving the matter short of prosecution which are available and appropriate in the circumstances?
27. A non-exhaustive list of public interest considerations that may be relevant is provided in the Solicitor-General's Prosecution Guidelines,<sup>18</sup> and include matters such as the following.
  - 27.1 How serious is the offending?
  - 27.2 Is it likely to be continued or repeated?
  - 27.3 Do the charges reflect the seriousness of the offending?
  - 27.4 Does the defendant have relevant previous warnings or convictions?
  - 27.5 Has the offence resulted in serious financial loss to an individual, company or section of society?
  - 27.6 What penalty is the Court likely to impose?
  - 27.7 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)?

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<sup>16</sup> See Solicitor-General's Prosecution Guidelines ("Decisions to prosecute", at 28).

<sup>17</sup> See also the Commission's Victim's Rights Policy

<sup>18</sup> See Solicitor-General's Prosecution Guidelines ("Decisions to prosecute", at 29 – 46).

28. 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>19</sup>.

### **Other considerations**

29. In taking a decision whether to prosecute, we will also consider:
- 29.1 our Enforcement Criteria, which guide our discretion as to what enforcement action we undertake
  - 29.2 our ERGs, and the alternatives to criminal prosecution that are provided in that document
  - 29.3 the purposes of the laws that we are seeking to enforce by a proposed criminal prosecution
  - 29.4 our stated objectives and any enforcement priorities; and
  - 29.5 whether another prosecuting agency has or may bring criminal proceedings in relation to the same subject-matter as our proposed prosecution.
30. 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**

31. Every decision to prosecute must be taken by the Commission's Enforcement Committee, and the reasons for their decision recorded.

### **Choice of charges**

32. 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.
33. 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 [10] and the CPGs at [14]-[29]. (The ERGs at [10] discuss the factors the Commission will take into account when deciding on any enforcement action against individuals, the CPGs at [14]-[29] discuss the relevant considerations for all decisions

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<sup>19</sup> See Solicitor-General's Prosecution Guidelines ("Decisions to prosecute", at 23, 25 – 26).

on criminal prosecutions. Both sets of factors therefore apply to individuals when we are considering a criminal prosecution.)

34. 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.

### **Continuing obligation to review the prosecution decision**

35. We will continue to monitor whether the Evidential Test and Public Interest Test are met throughout the course of a criminal prosecution.<sup>20</sup> If, as a result of continued investigation following the laying of charges, we consider that:

35.1 another charge is more suitable; we may amend the charge (or seek the leave of the Court to do so); or

35.2 a charge should be withdrawn, withdraw the charge.

### **Appeals from a prosecution**

36. Every decision to appeal against a criminal prosecution decision (including a sentencing decision) must be taken by the Commission's Enforcement Committee.
37. The proposed appeal must also be referred by our instructed prosecutor to the Solicitor-General for their consideration and approval, in accordance with the Criminal Procedure Act 2011.<sup>21</sup>

### **Impartiality of the decision-maker**

38. 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 Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

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

39. 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.

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<sup>20</sup> See Solicitor-General's Prosecution Guidelines ("Decisions to prosecute", at 47 – 49).

<sup>21</sup> See footnote 6 above regarding referrals to the Solicitor-General to grant or decline immunity in cartel cases.

## Investigations involving other agencies

40. It is not uncommon for more than one prosecution agency to investigate a particular matter where prosecution by any of those agencies could result.
41. 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.
42. 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

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

## Version control

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