

ASSESSMENT OF THE INLAND REVENUE PROSECUTION FUNCTION



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Reviewer: Ian Murray, Barrister
Date review finalised: February 2022

INTRODUCTION

1. This report was commissioned by the Public Prosecutions Unit (PPU) within the Crown Law Office. The assessment considered the prosecution function operated by Inland Revenue. We spoke to a cross-section of interested parties for the purposes of the assessment; this report summarises the findings of that process.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

2. Our overall conclusion is that Inland Revenue carries out its prosecutions competently; it has clear guidelines as to how it makes its prosecution decisions; and, on the whole, it makes principled prosecuting decisions consistent with the Solicitor-General's Prosecution Guidelines.
3. More broadly, we reached the following conclusions:
 - 3.1. Inland Revenue prosecutes well. It has good procedures and systems in place for this purpose. Managers are engaged with their teams, manage their workload efficiently and provide effective oversight and supervision. Prosecutions are handled well regardless of whether they are carried out by internal prosecutors or briefed out.
 - 3.2. Inland Revenue complies with the Solicitor-General's Prosecution Guidelines and its own prosecution policies. Prosecution decisions are well considered, adequately documented and follow a robust methodology.
 - 3.3. Generally, Inland Revenue manages disclosure issues satisfactorily. In fact, the main concern was over-disclosing, rather than a lack of appropriate disclosure.
 - 3.4. While we understand the basis for concerns that Inland Revenue has been misleading taxpayers about the seriousness of failure to pay trust funds on to Inland Revenue, we do not consider that Inland Revenue is handling this issue inappropriately. We consider that it is aware of the risks and properly advise taxpayers of their legal position consistent with their role as the regulator. We do not consider that Inland Revenue is misleading taxpayers. We consider that it is up to individual taxpayers to take independent legal advice as to the seriousness of their conduct; taxpayers should not rely on Inland Revenue to provide that advice.
 - 3.5. The geographical spread of Inland Revenue's prosecutors potentially raises issues of independence, supervision and collegiality. But Inland Revenue has well-developed and effective systems to manage this; we do not consider it is a problem.
 - 3.6. We found some variability in the level of experience of Inland Revenue's prosecutors, but we consider that this is natural and understandable for a prosecuting agency. Inland Revenue is aware of the need to continually upskill prosecutors and use secondments to other government agencies to give its prosecutors prosecution experience.

- 3.7. While the number of prosecutions that Inland Revenue commences each year is relatively low, it is not inappropriately low. Criminal prosecution is only one of a range of tools that Inland Revenue uses to meet its enforcement purposes.
4. We recommend that Inland Revenue:
 - 4.1. periodically re-evaluate its prosecution policies to make sure that they remain fit for purpose;
 - 4.2. continue to monitor potential adverse effects from operating the regional prosecutors model; in particular, to ensure that collocating with compliance staff does not undermine prosecutors' independence;
 - 4.3. ensure ongoing monitoring of systems used for disclosure to ensure they remain fit for purpose, particularly for major prosecutions;
 - 4.4. continue to create opportunities for prosecutors to take part in secondments; and
 - 4.5. continue to monitor how it interacts with taxpayers who have potentially committed trust offences, to avoid misleading taxpayers about the seriousness of their situation.

BACKGROUND

5. In 2012 the PPU was set up within Crown Law to oversee public prosecutions. This was in part due to a Cabinet direction arising from the 2011 *Review of Public Prosecution Services*.¹ The PPU assists the Solicitor-General in the oversight of the quality and conduct of public prosecutions across government.
6. Mechanisms for enabling oversight include a reporting framework and assessments of prosecuting agencies' prosecution functions. The PPU launched the Public Prosecutions Reporting Framework (PPRF) in 2013, and the prosecution function assessments in 2018.
7. Inland Revenue has participated in the PPRF since 2015, when the framework came into effect, submitting monthly reports to the PPU for this purpose.
8. The objectives of this assessment are to:
 - 8.1. improve Crown Law's understanding of the process for making decisions to prosecute within Inland Revenue;
 - 8.2. improve Crown Law's understanding of the way in which these prosecutions are conducted and reported;
 - 8.3. identify areas for improving prosecution processes within Inland Revenue;

¹ John Spencer *Review of Public Prosecution Services* (September 2011).

- 8.4. ensure the rule of law is reflected in Inland Revenue’s prosecution decisions and processes; and
 - 8.5. identify whether there are ways in which the Solicitor-General could offer support or guidance to Inland Revenue.
9. The process for the assessment was as follows:
- 9.1. We conducted an initial information-gathering process, designed to collate existing policies, procedures, legislation and guidelines, bolstered by scoping interviews with relevant parties.
 - 9.2. We conducted a 360-degree assessment, talking to people involved in Inland Revenue prosecutions. This involved interviewing internal and external parties to test their understanding of prosecution systems and gain insight into how Inland Revenue’s prosecutions are conducted. We conducted the interviews in confidence. This report consolidates the views of interview participants, rather than directly quoting them. We wish to thank all participants for their time and assistance. The Appendix to this report sets out a list of interviewees.
 - 9.3. Following the interviews, we assessed the information we had gathered to identify common findings, including whether processes or policies could be improved (and, if so, how), and to identify whether the Solicitor-General could provide additional guidance or support to Inland Revenue.
 - 9.4. We provided the draft report, including recommendations, to Inland Revenue for their feedback, and subsequently incorporated that feedback.
 - 9.5. We finalised the report and sent copies to Inland Revenue and other key stakeholders.

THE ORGANISATIONAL STRUCTURE OF LEGAL SERVICES WITHIN INLAND REVENUE

10. Inland Revenue’s Legal Services group is an amalgamation of two previously distinct groups, litigation management (which handled Inland Revenue’s civil litigation) and the legal and technical group (which handled debt recovery and prosecutions).
11. Legal Services, in its current form, came into existence around February 2018. It is located within the Customer and Compliance Services – Business group. According to Inland Revenue’s website:

Legal Services provide tax technical and legal support for Inland Revenue. Their job is to support the integrity of the tax system and tax compliance by:

- providing Inland Revenue advice and support services to assist in the resolution of complex tax issues, including social policy
- litigating and prosecuting where enforcement is necessary

- representing Inland Revenue to identify and resolve issues arising from new legislation, court cases and tax disputes.
12. Presently, according to Inland Revenue's organisational structure, the head of Legal Services is the Legal Services Leader² (a Tier 3 managerial position), who reports to the Deputy Commissioner, Customer and Compliance Services – Business,³ who in turn reports to the Commissioner and Chief Executive of Inland Revenue.⁴ Immediately below the Legal Services Leader is the Group Lead, Legal Services role of which there are currently three. Below the Group Lead level there are team leaders (Team Leads and National Advisers). The team leader level leads teams made up mostly of Solicitors, but in some cases also non-lawyer Technical Specialists or teams of Business Support.
 13. The team leads come from different backgrounds and are not always litigators. Some come from a tax background, while others have a civil litigation background and others have a prosecution background. The team leaders receive training to manage all aspects of their work, including prosecutions.
 14. The Legal Services group is a nationwide team; there are lawyers (along with Technical Specialists and Business Support) in Takapuna, Manukau, Hamilton, Wellington, Christchurch and Dunedin. The group handles and provides provisional advice on prosecution and other litigation for the department, along with legal and technical advice and support, disputes resolution, assurance, and operational and technical statements.
 15. Inland Revenue advised that before the Legal Services amalgamation there had been noticeable regional variations in prosecution practice. As a result, the new Legal Services group has emphatically focused on consistency and good prosecution practice. The management team has pursued these aims in several ways.
 16. One such initiative is the Prosecution Working Group (PWG), which meets approximately every six to eight weeks, and is made up of Legal Services staff. The PWG has representatives from around the country, and its prosecutors have different levels of experience.
 17. The terms of reference for the group note:

It is considered appropriate that IR look at how it manages its prosecution activity to ensure that current practices meet best practice and also to ensure that there is a reasonably consistent approach to this activity at a national level.
 18. The group's primary objectives are:
 - a. To ensure that IR takes as consistent an approach as possible to its prosecutions to ensure that the public of New Zealand are treated in an equal way for similar offending

² Presently this position is occupied by Karen Whitiskie.

³ Presently this position is occupied by Cath Atkins.

⁴ Presently this position is occupied by Naomi Ferguson.

and b. To relook at current practices to ensure that they meet best practice and to refresh them if necessary.

19. The ambit of the PWG is to consider both technical matters, e.g. sentencing approaches, as well as operational matters, e.g. the implementation of the updated “Public Prosecution Unit classification system” in 2020.
20. The Powers and Prosecution Governance Committee (the PPGC) is another group set up after the amalgamation that formed the Legal Services group. The PPGC meets every two months. It includes Legal Services staff as well as group leads from other parts of the organisation. It is chaired by the Legal Services Leader.
21. The PPGC’s objectives are:
 - to provide governance and oversight of IR’s prosecutions and the exercise of the Commissioner’s access, search and information gathering powers and activities, to identify and consider significant emerging trends, risks or developments in the area of prosecution and information gathering powers and activities, to monitor how technical expertise and quality is maintained across IR in the area of prosecutions and information gathering powers and activities and to consider and determine, or make recommendations on, important “big picture” or future-looking issues relevant to IR’s prosecutions and information gathering powers and activities.
22. A more recent development is the Prosecutors Forum, which is a more informal group led by one of the senior prosecutors in the Christchurch office, who was responsible for developing the group. The Prosecutors Forum comprises frontline prosecutors, who meet over Microsoft Teams to discuss their prosecutions. This provides them with easy access to different viewpoints on the issues they are currently dealing with, from a group of their peers.
23. Inland Revenue also operate a structured staff supervision process. This has recently been updated to recognise changes to the PPU classification framework. All prosecutors meet with their team leader twice a month. One of these meetings is an informal catch-up, and the second is a more formal meeting, called a ‘my plan’ conversation. The ‘my plan’ meetings are focused on the goals and aspirations of the particular staff member and provide an overview of their development needs.
24. There is a focus on training within Legal Services. Managers prepare and update training spreadsheets, keeping a record of the training that staff members receive. Staff are supported to undertake various types of training, including New Zealand Law Society and New Zealand Bar Association courses, New Zealand Police prosecution courses and the Departmental Prosecutors Forum⁵ boot camp.
25. Every month Inland Revenue monitors its prosecution activity and generates detailed reports containing statistics on completed prosecutions. This provides a valuable snapshot on how

⁵ The Departmental Prosecutors Forum provides an opportunity for departmental prosecutors to network and attend seminars relevant to their roles.

prosecutions are being undertaken. It is distributed on Inland Revenue's intranet for all staff to read. It includes a comprehensive sentencing spreadsheet.

26. Inland Revenue appears to be committed to finding the best way to work with and within the PPU classification system. After the introduction of the PPU framework, Inland Revenue began surveying staff to assess how the classification scheme was working for its staff.
27. Defendants in Inland Revenue prosecutions plead guilty at a high rate, so opportunities to prosecute judge-alone trials are infrequent. To ensure that staff have opportunities to maintain or improve their PPU classification, management staff have developed relationships with the Police Prosecution Service (PPS) and Stats NZ. Inland Revenue staff are regularly seconded to PPS, where staff have opportunities to prosecute judge-alone trials. Inland Revenue staff worked with Stats NZ to prosecute defendants charged with failing to complete the last Census. This also provided them with valuable opportunities to prosecute judge-alone trials. Inland Revenue also has ad hoc arrangements for staff to be seconded to Meredith Connell, the Auckland Crown Solicitor's Office and the Crown Law Office, all of which provide staff with an opportunity to gain valuable litigation experience.
28. On occasion, Inland Revenue prosecutors act as junior counsel with Crown Solicitors when Inland Revenue cases become Crown prosecutions. This also provides staff with an opportunity for valuable litigation experience and feedback to assist with PPU classification.

INLAND REVENUE PROSECUTION DECISION-MAKING PROCESSES

29. Like all prosecuting agencies, Inland Revenue applies the Solicitor-General's Prosecution Guidelines when making decisions about commencing and continuing prosecutions. It has also developed internal guidelines to supplement those guidelines: a set of internal guidelines is available to Inland Revenue staff and a separate set is available to the public.⁶
30. The prosecution decision-making process Inland Revenue uses is a conventional one. The process is summarised below.
31. Where Inland Revenue suspects an offence, it refers the case to the relevant compliance group to investigate. At this stage, an investigator (Customer Compliance Specialist) is allocated the case and will carry out the necessary enquiries. Once the investigation is complete, the investigator prepares a report and refers the file to their manager (Group Lead). The manager considers the case to ensure any prosecution is carried out consistently with the particular group's enforcement priorities.
32. Inland Revenue, like all regulators, has a range of regulatory responses, dictated partly by its statutory objectives and partly by the individual group's enforcement priorities. These potential regulatory responses include:

⁶ These can be found at <https://www.taxtechnical.ird.govt.nz/about/our-prosecution-guidelines>

- 32.1. no action to be taken (for example, when the evidential test is not met or action is not in the public interest);
 - 32.2. taking civil rather than criminal proceedings;
 - 32.3. imposing shortfall penalties instead of prosecuting (see para 77 below); and
 - 32.4. prosecution.
33. Where prosecution is recommended, the manager refers the file to Legal Services. Team leads then assign the file to a prosecutor, who carries out a prosecution legal review. The prosecutor can recommend that further enquiries be made or additional evidence be obtained before the prosecution commences. Once the file is in the right state for advice to be given, the prosecutor prepares a prosecution opinion.
 34. The initial stage of preparing an opinion involves the prosecutor considering the evidence to assess whether the two parts of the test for prosecution are met:⁷ first, evidential sufficiency (reasonable prospects of conviction) and, second, whether it is in the public interest to commence the prosecution.
 35. The next stage is peer review: a second prosecutor considers the file and reviews the original prosecution decision. The third stage is critical task assurance, which is a form of quality control that ensures the key parts of the assessment have been carried out, rather than a further review on the merits. Once the prosecution review is completed, prosecutors provide their advice to the designated decision maker.
 36. Ordinarily, the prosecution decision will be made by a Tier 4 manager (Group Lead) within the particular investigation branch (Customer Segment) that is carrying out the investigation.
 37. The decision is guided by the opinion of the prosecutor but is ultimately made independently by the manager. If the prosecutor and the manager agree (as occurs in the majority of cases), the case is straightforward, and proceeds as agreed. If they disagree, the escalation policy set out in the prosecution policy is followed: managers higher up the hierarchy (the Group Lead, Legal Services and then the Legal Services Leader) decide what happens next.
 38. It may be the case that, ultimately, the Legal Services Leader makes the decision whether or not to prosecute. If necessary, he or she may seek advice from a Crown Solicitor.
 39. If the case is proceeding as a prosecution, it will be allocated to a prosecutor to take forward. This will often (but not necessarily) be the prosecutor who provided the initial legal advice.
 40. According to Inland Revenue's decision-making process, during the course of the case, if a Crown Solicitor has been instructed, all decisions during litigation rest with the Crown

⁷ Prosecution decisions are governed by Inland Revenue's internal prosecution policy and guidelines, as well as the Solicitor-General's Prosecution Guidelines.

Solicitor, subject to the final control of the Solicitor-General. In this case Inland Revenue's views will be considered and followed unless there are good reasons for not doing so.

41. Where Legal Services staff are appearing for the Commissioner, the decisions in litigation must be made in accordance with their duties as officers of the court. However, Legal Services staff will consult with the relevant customer compliance team when making decisions on such matters as amending or withdrawing charges or considering settlement offers.

OUR ANALYSIS

42. For our assessment, we interviewed a wide range of people who could provide views from different perspectives on all aspects of Inland Revenue prosecutions. Our assessment took an impressionistic approach, distilling views from interviews into a series of themes.
43. The consensus of our interviewees was that Inland Revenue carries out its prosecutions competently and professionally. The in-house prosecutors were generally seen as capable prosecutors who routinely prosecute well and make high-quality prosecution decisions.
44. Our view is that Inland Revenue's current processes are efficient and effective. Management staff put significant time and effort into obtaining quality data to enable them to monitor individual staff workloads and monitor how quickly and efficiently the work is being carried out. Such processes are necessary when a prosecution team operates as Inland Revenue does on a regional model.
45. The team leads appeared to be engaged with their teams and had good overviews of how the teams were performing and how the work was being carried out.
46. On the whole, we were impressed with the way the Legal Services group operated and the quality of the work that it undertook. However, some issues came to our attention during the assessment that we considered warranted further consideration. The following sections consider those issues.

ISSUES

47. The five issues that we considered warranted special consideration were as follows.
 - 47.1. *Disclosure*: Generally, the comments on Inland Revenue's disclosure procedures were favourable, but some interviewees raised concerns that Inland Revenue "over disclosed"; that is, defence counsel dealt with so much disclosure that they struggled to work their way through it.
 - 47.2. *Prosecution of trust offences*: "Trust offences" refers to charges of failure to account for PAYE and GST to Inland Revenue. Some interviewees expressed concerns about Inland Revenue's behaviour in such situations being inconsistent.

- 47.3. *Geographical spread of the prosecution team:* The geographical spread of Inland Revenue’s prosecutors can create issues of independence, consistency, supervision and oversight, as well as collegiality. Some interviewees expressed a concern that internal prosecutors may not operate sufficiently independently from investigators.
- 47.4. *Prosecutors’ experience levels:* We found a potential issue in regard to the varying levels of prosecutors’ experience, which could lead to inconsistencies of approach.
- 47.5. *Number of prosecutions:* We wanted to explore whether Inland Revenue prosecutes a sufficient number of cases. Given Inland Revenue has a connection to almost every person in the country, the number of prosecutions it actually undertakes could be seen as comparatively low. This raises the possibility that Inland Revenue is under prosecuting, and not making use of an important tool in its enforcement kit.

Disclosure

48. As recent high-profile cases⁸ have highlighted, disclosure remains a major risk for prosecuting agencies. As a result, we decided to carefully consider the way Inland Revenue manages issues relating to disclosure in our assessment.
49. On the whole, we concluded that, ordinarily, Inland Revenue satisfactorily manages disclosure issues. There are clear rules about how disclosure is to be undertaken in the internal disclosure guidelines. Prosecutors, managers and investigators know their respective roles, and in most cases follow the proper process, which works well.
50. Some interviewees raised a concern that Inland Revenue “over-disclosed” information. The essence of the concern was that the quantity of information disclosed in Inland Revenue prosecutions could be significant, so that it was challenging for defence counsel to work their way through the material. This concern is understandable; it is symptomatic of the modern trend of increasingly complicated trials. The quantity of information associated with modern-day trials, especially for document-heavy cases such Inland Revenue fraud allegations, is substantial. It is inevitable that Inland Revenue will disclose significant amounts of information.
51. While accepting the difficulties processing large quantities of information poses for defence counsel, we do not consider that there is anything Inland Revenue can do to address this situation. A more selective approach to the volume of information provided might pose real legal risks. Failure to provide all relevant information has caused significant problems for the prosecution in recent cases, including the real prospects of a stay⁹ and also costs awards against the prosecution.¹⁰ As required by the Criminal Disclosure Act 2008, Inland Revenue is obliged to provide all relevant information. Where there is uncertainty as to the relevance of a particular document it may be prudent to err on the side of disclosure.

⁸ *R v Lyttle* [2020] NZHC 488 and *Bublitz v R* [2019] NZCA 379.

⁹ A stay was almost granted in *R v Lyttle* [2020] NZHC 488.

¹⁰ As occurred in *R v Lyttle* [2020] NZHC 488 and *Bublitz v R* [2019] NZCA 379.

52. Our conclusion is that Inland Revenue generally handles disclosure appropriately, and no real problems arise from the disclosure systems it operates.

Prosecution and Trust Offences

53. Another issue raised by more than one interviewee related to the way Inland Revenue investigates and prosecutes some types of charges; particularly charges involving a failure to pay PAYE or GST (trust offences).¹¹ Some interviewees expressed concerns about defendants who deducted PAYE or collected GST and whose businesses were in financial trouble, but who were up front with Inland Revenue about their difficulties. We heard that, in some of these cases, Inland Revenue essentially appeared to condone what the defendants were doing, aiming to work through the difficulties with the companies concerned, until such time as the business failed, at which point Inland Revenue would appear to pivot, and prosecute the taxpayers. The concern was that the seriousness of the defendant's potential legal jeopardy was never brought home to them by Inland Revenue's initial approach. As a result, from the outside, it appeared that Inland Revenue initially did not oppose what the taxpayer was doing, and subsequently came down very hard on them in court.
54. The staff with whom we discussed this issue understood the nature of the concerns and the need to ensure that taxpayers are not accidentally misled as to the jeopardy they may be in if they have not paid trust monies, but those same staff made it clear that was not occurring
55. Inland Revenue has specific written guidance and instructions for staff that deal with failure to account cases which primarily involve PAYE. These instructions cover how to gather and review evidence and also make clear the importance of ensuring legal support is sought where required. The guidance also covers the issuing of warning letters which outline the possibility of penalties including criminal prosecution for late or non-payment of the PAYE owed. There are also instructions to the IR staff member dealing with the matter to contact the recipient of the letter ten days after the letter is issued and that the staff member should verbally advise the customer that:
- 55.1 Failure to account is a criminal offence which may result in a fine of up to \$50,000 and/or imprisonment for up to 5 years.
- 55.2 Inland Revenue may also consider imposing shortfall penalties and the maximum is 187.5% of the outstanding tax made up of 150% for evasion plus 25% for obstruction.
56. If the entity being considered for prosecution is a company, the staff member is advised to ensure that each and every director has been advised of their obligation and the consequences of not meeting their obligation.

¹¹ GST and PAYE are deducted by the taxpayer and held on trust for Inland Revenue. There is an obligation to pay these to Inland Revenue. Failure to do so is treated seriously and can lead to prosecution for criminal offending.

57. During the phone call the staff member is advised to ask the customer to confirm they have understood the consequences and how and when payment of arrears will be made.
58. There is also a clear warning on the letter that “Inland Revenue can still prosecute for the offence of failing to account even when the debt has been paid.”
59. We carefully considered this issue, and specifically discussed it with senior managers. The discussions were productive; ultimately, we concluded that Inland Revenue’s practices were not concerning. We saw nothing improper in the way Inland Revenue staff acted, and we do not consider that there is anything more that Inland Revenue staff should do in these cases. Generally, the taxpayers in question engaged accountants and sometimes lawyers. We consider that it was also the responsibility of these professionals to advise the taxpayers of their obligations and the potential consequences of breach.
60. The staff with whom we discussed this issue understood the nature of the concerns and the need to ensure that taxpayers are not accidentally misled as to the jeopardy they may be in if they have not paid trust monies, but made it clear that that was not what was occurring. We were satisfied that staff did not do anything inappropriate.

Geographical spread of the prosecution team

61. As already noted, Inland Revenue’s prosecution team is spread out around the country; some staff work in the same offices as investigation staff. This can bring challenges and require careful management: first, to ensure that prosecutors remain independent from the clients they are advising and, second, to ensure that geographical separation does not compromise the ability of the prosecution team to effectively carry out its business. There can also be issues with supervision and collegiality. We concluded that it was important for our assessment to carefully consider the impact of this arrangement.

Oversight and collegiality

62. There are essentially two options for a regulatory prosecution team that needs to cover the country: either it covers the country from one central location, or it is spread among the regions, allocating responsibility for particular geographical areas.
63. There are advantages and disadvantages associated with each of these arrangements. Centralisation makes supervision and oversight easier and enhances collegiality, but it means that lawyers must travel to cover the spread of courts around the country or instruct local Crown Solicitors to cover court appearances. There can also be a disconnect with regionally based clients. Regionalisation enhances client relations and makes servicing courts easier but makes supervision and oversight harder and can affect collegiality.
64. Inland Revenue has chosen a regional set-up. We did not consider that maintaining collegiality and proper oversight was a significant problem for Inland Revenue. Our clear impression was that the regional team structure operated well. For the purposes of this assessment, Inland Revenue provided us with a large volume of internal documentation showing the processes it

uses to monitor and assess how the prosecution team is operating as a team and individually, and how their work is being carried out.

65. It appeared to us that although staff were geographically spread out, there was a good sense of collegiality and effective mechanisms for sharing work and maintaining consistency. We considered the Prosecutors Forum to be a valuable initiative (see para 22 above).
66. It appeared to us that team leaders had good awareness of workflow and maintained effective oversight of what was happening within their teams and who was doing what work. We consider that the processes Inland Revenue has adopted for supervision of prosecutors and their casework are excellent.

Maintaining independence

67. The Solicitor-General's Prosecution Guidelines note the importance of prosecutorial independence in this way:

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.

68. Many of Inland Revenue's prosecutors are located in Inland Revenue offices along with the investigators. We considered that we should look for potential problems with this arrangement.
69. The arrangement is designed to ensure that prosecutors can provide independent prosecution advice to investigators and decision makers. In our view, the arrangement works well, and is an effective way for prosecutors to develop and maintain healthy working relationships with investigation staff. It allows compliance staff to get informal legal advice easily, which benefits the wider organisation. We consider that there are sufficient safeguards to ensure that, while working with investigation staff, prosecutors nonetheless maintain their independence.
70. Absent completely removing the prosecution function from regulatory agencies, there is always the potential for the appearance of a lack of independence. But we consider that a more nuanced assessment is important. Ultimately, we concluded that, despite Inland Revenue's prosecutors working closely with the investigation teams, they satisfactorily maintain their independence, and independence in their prosecution decision making, and the arrangement brings positive benefits, including the investigation teams having easy access to high-quality legal advice.

Prosecutors' experience levels

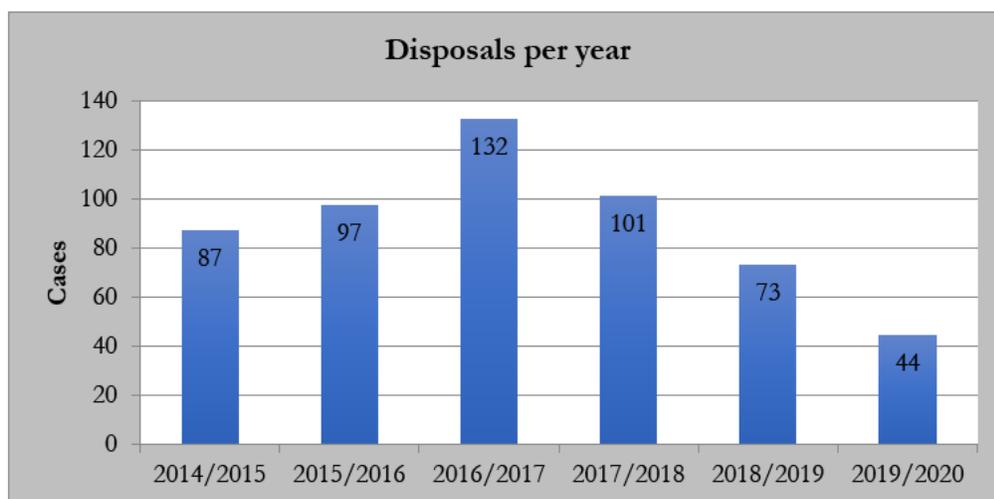
71. Interviewees also raised an issue relating to variability in the levels of experience of Inland Revenue prosecutors. The concern expressed was that there was a degree of variability in the

performance of in-house prosecutors. Obviously, all prosecuting agencies have (and need to have) prosecutors at different levels of experience. This allows the agencies to assign prosecutors at an appropriate level of seniority for particular cases. Having said this, we wanted to ensure that, at Inland Revenue, there was proper oversight over more junior prosecution staff.

72. We looked closely at Inland Revenue’s mentoring and supervision processes. We concluded that Inland Revenue has comprehensive and, in our view, very effective processes to assess its staff and manage their career development. Managers keep detailed spreadsheets about their staff and supervisors. They are proactive in managing their prosecutors’ classification under the PPU framework, and in ensuring clear supervision.
73. Ultimately, we concluded that there was nothing wrong with the way Inland Revenue managed the differences in prosecutors’ levels of experience. In fact, we considered that Inland Revenue managed this issue very well.

Number of prosecutions

74. The final issue we wanted to carefully consider was whether Inland Revenue prosecutes a sufficient number of cases, given its large regulatory footprint. Inland Revenue probably touches more people’s lives than any other New Zealand government department. In light of that, its number of prosecutions appears to be relatively modest.
75. The graph below sets out the number of prosecutions Inland Revenue disposed of annually between 2014/2015 and 2019/2020.



76. As previously noted, criminal prosecution is not Inland Revenue’s only enforcement option. It can also take civil action to recover tax – although obviously that only recovers what is already owed, so arguably does not impose any real penalty for the misbehaviour.

77. Another enforcement option is to impose shortfall penalties. The Commissioner can take this course in certain circumstances.¹² As the name suggests, shortfall penalties are focused on the amount of underpaid tax, as well as the reason for the underpayment. The more culpable the taxpayer is for underpaying tax, the higher the penalty imposed. Penalties range from 20%, where the taxpayer does not take reasonable care or takes an unacceptable tax position to 150%, in cases of tax evasion. This is designed to provide a deterrent response to improper behaviour by a taxpayer short of prosecuting them.
78. The following tables set out details of shortfall penalties imposed for the years ended 30 June 2017, 2018 and 2019.

Category of shortfall penalty	2017		
	Amount payable	Number	Percentage of total
Not taking reasonable care	\$1,005,231	1,259	13.9%
Unacceptable tax position	\$4,245,661	82	0.9%
Gross carelessness	\$6,041,946	3,916	43.4%
Abusive tax position	\$1,694,748	17	0.2%
Evasion or similar act	\$16,584,366	3,755	41.6%
Promoter	\$0	0	0.0%
TOTAL	\$29,571,952	9,029	100%

Category of shortfall penalty	2018		
	Amount payable	Number	Percentage of total
Not taking reasonable care	\$1,148,005	1,270	16.2%
Unacceptable tax position	\$786,607	56	0.7%
Gross carelessness	\$8,529,216	3,257	41.5%
Abusive tax position	\$12,633,322	27	0.4%
Evasion or similar act	\$13,176,815	3,212	40.9%
Promoter	\$478,774	26	0.3%
TOTAL	\$36,752,739	7,848	100%

¹² See <https://www.ird.govt.nz/managing-my-tax/penalties-and-interest/penalties-and-debt/shortfall-penalties>

Category of shortfall penalty	2019		
	Amount payable	Number	Percentage of total
Not taking reasonable care	\$647,492	981	15.4%
Unacceptable tax position	\$1,489,968	42	0.7%
Gross carelessness	\$6,529,334	2,435	38.3%
Abusive tax position	\$48,052,584	29	0.4%
Evasion or similar act	\$11,363,179	2,873	45.2%
Promoter	\$0	0	0.0%
TOTAL	\$68,082,557	6,360	100%

79. We carefully considered the number of prosecutions that IRD commences and asked for particular feedback from senior management in the Legal Services group.
80. We were advised that over recent years Inland Revenue has focused on successfully achieving their business transformation programme and supporting Government COVID support packages. This has had a consequential impact on the progress of prosecution matters. With the completion of Inland Revenue's business transformation programme, it has been refreshing its compliance approach and priorities which includes a revised approach to debt management which will include more targeted and escalating responses for deliberate non-compliance. We were told that one of the benefits of the business transformation programme is better intelligence and increased analytical capability to identify a range of non-compliant behaviour. Some of this can now be addressed quickly with system or rule changes to prevent individuals benefiting from deliberate non-compliance.
81. We were also advised that prosecution action remains a key part of Inland Revenue's compliance approach and is used in the appropriate cases. We further note that while the number of shortfall penalty cases is trending slightly downwards, the total amount of penalties recovered has increased which is likely in our view to have a deterrent effect.
82. Ultimately, we concluded that Inland Revenue's approach was reasonable and justifiable. All prosecuting agencies are entitled to decide how to use their finite resources to best meet their enforcement objectives and priorities. Inland Revenue undertakes this decision making carefully. It uses a combination of enforcement options to achieve its enforcement goals. Inland Revenue generally uses civil cases if it wants to clarify the law. It uses shortfall penalties in less serious cases, and it prosecutes in more serious cases. It strategically decides what it is trying to achieve from each prosecution. That is an appropriate approach. We decided that Inland Revenue applied its prosecution enforcement strategy appropriately, and that there is no basis to conclude that, despite the downward trend over recent years, it is failing to prosecute where it should do so, or that it prosecutes too infrequently to meet its enforcement goals.

CONCLUSIONS AND RECOMMENDATIONS

83. We reached the following conclusions:

- 83.1. Inland Revenue carries out its prosecution function well. It has good procedures and systems in place to monitor staff and to track its work. Managers have a good oversight of their teams, and both internal prosecutors and external counsel managed the workloads well.
- 83.2. We are satisfied that Inland Revenue complies with the Solicitor-General's Prosecution Guidelines and with its own internal prosecution policy and guidelines. We consider that the prosecution decisions Inland Revenue makes follow a robust process and are well considered.
- 83.3. Inland Revenue manages disclosure issues satisfactorily. While we can understand the concerns of defence counsel about information overload, we do not consider that there is anything that Inland Revenue can do to alleviate those concerns.
- 83.4. While we see where concerns of misinforming taxpayers about the seriousness of their failure to pay trust funds could arise, we do not consider that Inland Revenue is misleading taxpayers about their legal jeopardy. We are of the view that Inland Revenue provides appropriate guidance to taxpayers and further it is for taxpayers themselves to take independent advice on this issue. Inland Revenue is aware of the risk of misleading taxpayers.
- 83.5. The geographical spread of Inland Revenue's prosecution teams could raise issues of independence, supervision and oversight, as well as collegiality. However, Inland Revenue has clear, robust and effective systems in place to manage this issue.
- 83.6. Inland Revenue is carrying out its prosecution function fairly and competently. It has good procedures in place to manage both staff and its work. Managers are engaged with their teams, managing workload and providing good oversight and supervision. Prosecutions are handled well, whether by internal or external prosecutors.
- 83.7. There was some variability in the levels of experience of Inland Revenue's prosecutors and the amount of prosecution work they are carrying out. We consider that this is not uncommon and should not be a problem as long as more junior prosecutors receive adequate supervision. We are satisfied that Inland Revenue's systems of supervision are effective and note that it also effectively uses secondments as a way for its staff to gain experience.
- 83.8. At first glance, the number of prosecutions that Inland Revenue commences each year seems relatively low. However, after careful consideration, we concluded that it is not inappropriately low. Criminal prosecutions are only one of a number of tools that Inland Revenue uses to meet its enforcement purposes. The combination of the tools

it uses is appropriate and the amount Inland Revenue recovers from shortfall penalties is increasing.

84. Our recommendations are that Inland Revenue should:
 - 84.1. periodically evaluate whether their prosecution policies and guidelines remain appropriate for the ever-evolving nature of prosecution;
 - 84.2. ensure ongoing monitoring of systems used for disclosure to ensure they remain fit for purpose, particularly for major prosecutions;
 - 84.3. monitor potential adverse effects from operating a regional prosecutors model: in particular, to ensure that working closely with investigation staff does not undermine prosecutor independence;
 - 84.4. continue to create opportunities for prosecutors to take part in secondments, to assist them to develop and refine their advocacy skills; and
 - 84.5. continue to monitor how it interacts with taxpayers who could potentially be prosecuted for trust offences, to ensure it does not mislead taxpayers about their legal liability.
85. On the whole, we were impressed by the way in which Inland Revenue's prosecution model was operating and with the staff who handled Inland Revenue's prosecutions. We have made some recommendations suggesting minor improvements to the system, but overall, we conclude that Inland Revenue's prosecutions are working well.

APPENDIX - LIST OF INTERVIEW PARTICIPANTS

We spoke to the following people for the purposes of this assessment:

Raquel Greive	Group Lead, Legal Services
Trevor Jeffries	Group Lead, Customer Compliance
Graham Poppelwell	Group Lead, Customer Compliance
Karen Whitiskie	Legal Services Leader, Legal Services
Shaurya Malaviya	Team Lead, Legal Service
Charles Walmsley	Solicitor / Prosecutor
Peter Broczek	Solicitor / Prosecutor
Dale La Hood	Partner at Luke Cunningham Clere (Wellington Crown Solicitor's Office)
Mike Lennard	Barrister at Stout Street Chambers
Virginia Diefenbach	Solicitor / Prosecutor
Sarah Shannon	Team Lead, Legal Service Team
Jonathan Eaton QC	Barrister at Riverside Chambers
Catherine Bibbey	Barrister at Signal Hill Chambers
Jeremy Bioletti	Jeremy Bioletti Law
Brian Dickey	Auckland Crown Solicitor - Meredith Connell
Jackson Webber	Partner at O'Donoghue Webber (Tasman Crown Solicitor's Office)
Clayton Walker	Partner at Elvidge & Partners (Napier Crown Solicitor's Office)