

CROWN LAW

SOLICITOR-GENERAL'S GUIDELINES
FOR DIVERSION SCHEMES

As at 6 August 2021



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1. APPLICATION

- 1.1 These Guidelines have been written for prosecutors, but other participants in the justice system may find them useful.
- 1.2 The purpose of these Guidelines is to identify the considerations for an enforcement agency in choosing to develop a diversion scheme and the key features required to reduce the risk of improper use of prosecution processes, criticism, and litigation in circumstances where diversion is an available option and may be proposed, following a decision to prosecute.¹
- 1.3 These Guidelines should be read together with the *Solicitor-General's Prosecution Guidelines* 2013 (*Prosecution Guidelines*), along with any other guidelines issued by the Solicitor-General specific to prosecutions. If there is any inconsistency between these Guidelines and the *Prosecution Guidelines*, these Guidelines should be preferred.

2. COMPLIANCE

- 2.1 It is expected all public prosecutions, whether conducted by Crown prosecutors, government agencies or (instructed) counsel, should take these Guidelines into due consideration in circumstances where a diversion scheme is being proposed and/or diversion is proposed, following a decision to prosecute.

3. DIVERSION SCHEMES (NON-STATUTORY)

Introduction

- 3.1 Diversion, as used in these Guidelines, means a non-statutory scheme operated by an enforcement agency. Diversion provides an alternative means of resolving some offences without going through a formal trial process, while still addressing the key public interest factors leading to the decision to prosecute. This type of diversion scheme differs from other options that may be available to some government agencies through statutory-based enforcement frameworks, such as can be found in the Health and Safety in Employment legislation.
- 3.2 A criticism of diversion schemes is "prosecution creep". There is concern that such schemes are used in cases where a proper analysis under the test for prosecution would not have favoured prosecution at all; leading some innocent defendants to choose to not defend a charge that should never have been brought in the first place. Such circumstances create a situation where a prosecutor may improperly assume the role that the Court is meant to play in the prosecution process.
- 3.3 Any diversion scheme operated by an enforcement agency should be cognisant of these potential concerns and ensure that robust procedures are put in place to manage them.
- 3.4 Diversion must only to be offered to a defendant, after the prosecution decision has been made and once a charge is filed.

¹ Pre-charge schemes for disposing of criminal matters are not dealt with in these Guidelines and should instead be considered under the *Solicitor-General's Prosecution Guidelines* 2013.

- 3.5 The purposes of diversion are typically to:
- 3.5.1 address offending behaviour that has resulted in charges;
 - 3.5.2 balance the needs of victims, the offender and their communities;
 - 3.5.3 give offenders an opportunity to avoid conviction; and
 - 3.5.4 reduce re-offending.²

Approach

- 3.6 If an enforcement agency chooses to develop a diversion scheme, it has to bear in mind the following principles:
- 3.6.1 Ensure there are clear and documented guidelines on when the scheme is to be used and the criteria for making any decisions as to whether to offer diversion.
 - 3.6.2 Make information about the scheme publicly available, ideally on a website.
 - 3.6.3 Not mention the scheme to potential defendants during the course of an ongoing investigation to avoid it becoming a factor in the decision to prosecute.
 - 3.6.4 Not take the existence of the scheme (or any other resolution options) into consideration until a decision to prosecute has been made.
 - 3.6.5 Have a decision maker who is distinct from the investigator and the person who recommended the prosecution.
 - 3.6.6 Briefly record the reasons for making an offer of diversion.
 - 3.6.7 Adhere to the enforcement agency's guidelines and these Guidelines.
 - 3.6.8 Create victim engagement and consultation procedures in respect of offers of diversion and ensure they are followed.
 - 3.6.9 Incorporate a regular oversight and an internal review mechanism to ensure consistency of approach concerning the use of diversion by the enforcement agency.

Clear guidelines on when the scheme should be used

- 3.7 A robust and transparent process will be necessary if an enforcement agency wishes to implement a diversion scheme. It must operate on the basis that, while the prosecution was correctly commenced, in certain circumstances and for clear reasons it would no longer be in the public interest to continue the prosecution. If appropriate, diversion is an opportunity for the public interest factors to be satisfied through a formal arrangement, without subjecting the parties to a trial process.
- 3.8 A formal arrangement should be in writing and will invariably set out conditions to be met (typically by the defendant) within a reasonable period or on an ongoing basis. Following consultation with any victim(s), the arrangement will need to be agreed to by

² This list reflects the purposes outlined in the Police Adult Diversion Scheme material (as at 30 June 2021). See <https://www.police.govt.nz/about-us/publication/adult-diversion-scheme>

the defendant. Any consequences for failing to meet the conditions must be clearly stipulated (including the possibility of proceeding with the prosecution).

- 3.9 The types of conditions which ought to be considered include: the offender taking educational courses; making a reparation payment to the victim(s); completing community service hours; limiting contact with certain people and places; and undertaking rehabilitative programmes (where, for instance, alcohol, drugs, addiction or violence have been contributing factors).
- 3.10 The starting point for enforcement agencies developing a diversion scheme will be to clearly understand the purpose of the scheme and why it is being used. What offences or offenders are being targeted? Given the discretion to prosecute in the first place, why (and in what circumstances) would a prosecution be commenced and then later discontinued?
- 3.11 It will also be important to ensure that the decision to offer diversion is aligned with the statutory purposes of the legislation containing the offences being prosecuted and governing the enforcement agency.
- 3.12 Ordinarily diversion is only offered to first-time offenders who have committed offences of low to moderate seriousness. The rationale for offering diversion will usually include a mix of “offender-based” criteria and “offence-based” criteria. A discretion may be reserved to apply it to other types of defendants in deserving cases, particularly where the consequences of a conviction would be out of proportion to the seriousness of the offending.³
- 3.13 Once commenced, a prosecution can be discontinued in the light of changed circumstances and for clear reasons. There is no default position that prosecutions properly commenced should proceed. If the conditions proposed address the key public interest factors (related to the offending and underlying the decision to prosecute) to such a degree that it is no longer in the public interest for the prosecution to continue, then diversion may be offered. An important rehabilitative element in diversion arrangements is that the defendant accepts responsibility for the offending and agrees with the summary of facts.

Information on the scheme should be publicly available, but must only be mentioned or considered after a prosecution decision is made

- 3.14 At a minimum, the existence of the scheme and the guidelines for its operation must be publicly available on an enforcement agency’s website.
- 3.15 It is essential that the possibility of diversion plays no part in the decision to prosecute. It is an irrelevant consideration at that stage, given the risk of prosecution creep. An enforcement agency’s prosecution policy documents must recognise that fact.
- 3.16 There also should be no mention of the existence of the scheme to potential defendants during an active investigation, up until the point the decision to prosecute is made. If a defendant, aware of the existence of the scheme, raises it then the

³ In developing a diversion scheme, an enforcement agency may find reviewing the way other existing diversion schemes operate, and the manner in which they are documented, useful. One such existing scheme is the Police Adult Diversion Scheme.

investigator should advise that it is not part of the consideration at that stage of the case.

- 3.17 This approach will satisfy the need for public notification of the scheme but minimise the danger of defendants being induced to acknowledge guilt on the expectation they will be offered diversion as an easy resolution.

A diversion decision maker distinct from the original decisions maker(s)

- 3.18 A key feature in operating a transparent and effective diversion scheme is that the person who investigated the offence and who recommended a prosecution is not the person who makes the diversion decision. This provides the necessary independence and detachment for the decision.

Adhere to guidelines and anchor decisions to the Prosecution Guidelines

- 3.19 Ensuring the enforcement agency's prosecution policy, prosecution procedures and guidelines, as well as its diversion policy, and the *Prosecution Guidelines* are properly adhered to will significantly reduce (if not eliminate) the risk that the decision can be successfully reviewed.
- 3.20 The decision must justify why the original decision to prosecute should be replaced by the offer of diversion. That will likely be because if certain conditions are met satisfactorily then it is no longer in the public interest for the prosecution to continue. This decision should be recorded.

Victim engagement and consultation procedures

- 3.21 Depending on the nature of the charge and if there are victims of the offending, engagement with the victims ought to occur early in the process and continue right through to the time that diversion is offered. Victims must be consulted on both whether diversion should be offered and what conditions might apply. Meaningful consultation with, and consideration of the views of, the victims are part of the process. The victims ought to also be forewarned the diversion decision is being made; advised immediately when the diversion decision has been made; and kept updated regarding the outcome of diversion.
- 3.22 Where possible and if applicable, prosecutors should ascertain if the victims have Victim Advisers and ensure consultation concerning the victims is undertaken in the manner agreed with victims. This may mean meeting directly with the victims or the Victim Advisers, or include attendance (and input) at meetings by support people and/or Victim Advisers.
- 3.23 Victim opposition will not prohibit diversion being offered, but appropriate weight should be given to an expression of opposition to the outcome, as a factor in reaching a decision on whether or not to offer diversion. This recognises that, other than the defendant, victims are most directly affected.