

CROWN LAW

SOLICITOR-GENERAL'S GUIDELINES
FOR PAYMENTS CONNECTED TO
PLEA ARRANGEMENTS OR DIVERSION

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 reinforce the need to ensure that payment of reparation is not the principal reason for entering plea arrangements or offering diversion.
- 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 plea arrangement or diversion is proposed, following a decision to prosecute.

3. PAYMENTS CONNECTED TO PLEA ARRANGEMENTS OR DIVERSION

Introduction

- 3.1 An enforcement agency may enter into a plea arrangement or operate a diversion scheme that includes the payment of reparation. However, where an offer of payment is the primary reason for the discontinuance of a prosecution the principles developed by the Supreme Court in *Osborne & Rockhouse*¹ strongly suggest the arrangement will be unlawful – such circumstances may be said to create “a matter of private bargain”.

Payment of reparation

- 3.2 An offer of payment that is conditional on a prosecution not being brought, or continued, is unlawful.
- 3.3 Properly applying the public interest test and ensuring that reparation is not a pivotal aspect of the decision-making process are essential to deciding whether it is appropriate to enter plea arrangements or offer diversion (usually in circumstances where the alleged offending is of a low to moderate seriousness).

¹ *Osborne & Rockhouse v WorkSafe New Zealand* [2017] NZSC 175 at [75] citing *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch 173.

- 3.4 An enforcement agency's policies should include clear directions concerning reparation. These policies should incorporate the method for receiving and administering payment of reparation; a mechanism to enable advice to be sought from a Crown prosecutor before agreeing such payments; and the nature of the consequences for the defendant in the event they fail to make the payment of reparation (in the manner agreed) once proceedings are discontinued.
- 3.5 A willingness to make amends can only be one of the relevant factors considered. For a prosecutor to agree to a plea arrangement or diversion, they must be satisfied 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.
- 3.6 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 will ensure the effects experienced by the victims (such as loss, damage or expense) can be ascertained; whilst managing expectations regarding what can be reasonably sought in the circumstances (bearing in mind the means and capacity of the defendant).
- 3.7 Typical payments that can form conditions include the payment of reasonable expenses incurred by the victim as a result of the offending, and payments to charity.
- 3.8 Enforcement agencies should avoid the appearance of any private bargain with defendants and be cautious before incorporating payment of fines and costs into diversion conditions.