Te Tari Ture o te Karauna
Crown Law

5 February 2026

[redacted]

Official information request for Solicitor-General Prosecution Guidelines
Our Ref: OIA-2526121

I refer to your official information request which, on 22 January 2026, Police transferred to Crown Law for response, as the information requested is closely connected with our functions:

> *We are seeking copies of the Solicitor-General Prosecution Guidelines that exist between 1993-2013.*

I can advise that, in addition to the 2013 Guidelines which are on Crown Law's website, the Solicitor-General issued Prosecution Guidelines in 1992 and 2010 (both **enclosed**).

I also note that, prior to the current iteration of the Prosecution Guidelines, the Solicitor-General issued various additional guidelines which can be found at Prosecution Guidelines » Crown Law. I do not understand your official information request to encompass these additional guidelines, but please let us know if you want us to search for any historic versions of these documents.

Please note that we may publish this response (with your personal details redacted), and any related documents, on Crown Law's website if we decide proactive release of this information is or may be in the public interest. If you have any concerns about this, please let us know within 10 working days of the date of this letter.

If you wish to discuss this decision with us, please feel free to contact me at [redacted].

Nāku noa, nā

[redacted]
Briar Charmley
Crown Counsel | Principal Legal Advisor

Encl Solicitor-General's Prosecution Guidelines 1992
Solicitor-General's Prosecution Guidelines 2010

CROWN LAW OFFICE

PROSECUTION GUIDELINES

As at 09 March 1992

Te Tari Ture o te Karauna
Crown Law

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1. Introduction

1.1 Almost invariably it is the responsibility of officers and agencies of the State to investigate offences and prosecute offenders. It is the Attorney-General and Solicitor-General, as the Law Officers of the Crown, whose responsibility it is to ensure that those officers and agencies behave with propriety and in accordance with principle in carrying out their functions.

1.2 The State bears a dual responsibility in its administration of the criminal law. Behaviour classified as criminal has been deemed so harmful to society generally that the State, on behalf of all its citizens, accepts the responsibility to investigate, prosecute and punish those behaving in that way.

1.3 The State also accepts the responsibility of ensuring, through institutions and procedures it establishes, that those suspected or accused of criminal conduct are afforded the right of fair and proper process at all stages of investigation and trial.

1.4 Those dual responsibilities are often in tension. The individual subjected to the criminal justice process will rarely believe that it is working in his or her favour; the investigating and prosecuting agencies will not wish to see someone they believe guilty elude conviction.

1.5 The decision to begin a prosecution against an individual has profound consequences. The individual is no longer a suspect, but is formally and publicly accused of an offence. Even if eventually acquitted, he or she will be subjected to the stresses of public opprobrium, court appearances and, possibly, a loss of liberty while awaiting trial.

1.6 It is of great importance therefore that decisions to commence and to continue prosecutions be made on a principled and publicly known basis. The purpose of these guidelines is to indicate, in a general way, the bases on which the Law Officers expect those decisions to be made.

2. Who may Institute Prosecutions

2.1 Any person may institute a prosecution for an offence against the general criminal law and, with some specific exceptions, for regulatory offences. Some prosecutions require the prior consent of the Attorney-General; the procedure for obtaining that consent is outlined in section 4. Every prosecution is commenced by way of an Information laid under the provisions of the Summary Proceedings Act 1957 and the person bringing the prosecution is known as the "informant". In practice almost all prosecutions for offences against the general criminal law are brought by the Police and those for regulatory offences by officers of Government Departments or Local Authorities.

2.2 In the case of prosecutions brought by Crown agencies for offences triable only on Indictment, or those on which the accused has exercised a right of electing trial by jury, the informant ceases to be the prosecutor from the point at which the accused is committed for trial. At that point the prosecution becomes a "Crown" matter and only the Attorney-General, Solicitor-General or a Crown Solicitor may lay an Indictment. The laying of Indictments is dealt with in section 5.

2.3 The Attorney-General as the Senior Law Officer of the Crown has ultimate responsibility for the Crown's prosecution processes. Successive Attorneys-General however have taken the view that it is inappropriate for them, as Ministers in the Government of the day, to become involved in decision making about the prosecution of individuals.

2.4 In New Zealand the Attorney-General and Solicitor-General have co-extensive original powers. With some specified exceptions the Solicitor-General may perform any function given to the Attorney-General. In practice the Solicitor-General exercises all of the Law Officer functions relating to the prosecution process.

2.5 The initial decision to prosecute rests with the Police in the case of the general criminal law, or an officer of some other central or local government agency charged with administering the legislation creating the offence. It is frequently the case that the Police or agency will consult a Crown Solicitor or the Solicitor-General for advice as to whether a prosecution would be well founded. It is however never for the Solicitor-General or the Crown Solicitor to make the initial decision to prosecute; it is their function to advise.

3. The Decision to Prosecute

In making the decision to initiate a prosecution there are two major factors to be considered; evidential sufficiency and the public interest.

3.1 Evidential Sufficiency

The first question always to be considered under this head is whether the prosecutor is satisfied that there is admissible and reliable evidence that an offence has been committed by an identifiable person.

The second question is whether that evidence is sufficiently strong to establish a prima facie case; that is, if that evidence is accepted as credible by a properly directed jury it could find guilt proved beyond reasonable doubt.

3.2 (in the original there is no paragraph 3.2)

3.3 The Public Interest

3.3.1 The second major consideration is whether, given that an evidential basis for the prosecution exists, the public interest requires the prosecution to proceed. Factors which can lead to a decision to prosecute or not, will vary infinitely and from case to case. Generally, the more serious the charge and the stronger the evidence to support it, the less likely it will be that it can properly

be disposed of other than by prosecution. A dominant factor is that ordinarily the public interest will not require a prosecution to proceed unless it is more likely than not that it will result in a conviction. This assessment will often be a difficult one to make and in some cases it may not be possible to say with any confidence that either a conviction or an acquittal is the more likely result. In cases of such doubt it may be appropriate to proceed with the prosecution as, if the balance is so even, it could probably be said that the final arbiter should be a Court. It needs to be said also that the public interest may indicate that some classes of offending, eg driving with excess breath or blood alcohol levels, may require that prosecution will almost invariably follow if the necessary evidence is available.

3.3.2 Other factors which may arise for consideration in determining whether the public interest requires a prosecution include:

(a) the seriousness or, conversely, the triviality of the alleged offence; ie whether the conduct really warrants the intervention of the criminal law;

(b) all mitigating or aggravating circumstances;

(c) he youth, old age, physical or mental health of the alleged offender;

(d) the staleness of the alleged offence;

(e) the degree of culpability of the alleged offender;

(f) the effect of a decision not to prosecute on public opinion;

(g) the obsolescence or obscurity of the law;

(h) whether the prosecution might be counter-productive; for example by enabling an accused to be seen as a martyr;

(i) the availability of any proper alternatives to prosecution;

(j) the prevalence of the alleged offence and the need for deterrence;

(k) whether the consequences of any resulting conviction would be unduly harsh and oppressive;

(l) the entitlement of the Crown or any other person to compensation, reparation or forfeiture as a consequence of conviction;

(m) the attitude of the victim of the alleged offence to a prosecution;

(n) the likely length and expense of the trial;

(o) whether the accused is willing to co-operate in the investigation or prosecution of others or the extent to which the accused has already done so;

(p) the likely sentence imposed in the event of conviction having regard to the sentencing options available to the Court.

3.3.3 None of these factors, or indeed any others which may arise in particular cases, will necessarily be determinative in themselves; all relevant factors must be balanced.

3.3.4 A decision whether or not to prosecute must clearly not be influenced by:

(a) the colour, race, ethnic or national origins, sex, marital status or religious, ethical or political beliefs of the accused;

(b) the prosecutor's personal views concerning the accused or the victim;

(c) possible political advantage or disadvantage to the Government or any political organisation;

(d) the possible effect on the personal or professional reputation or prospects of those responsible for the prosecution decision.

4. Consent to Prosecutions

4.1 A number of statutory provisions creating offences require that, before a prosecution is commenced, the consent of the Attorney-General is to be obtained. This is a function carried out in practice by the Solicitor-General (see section 2). The consent, if given, is signified by way of endorsement on the Information. Requests for consent should be directed to the Solicitor-General with full details of the alleged offence and the evidence available to be called.

4.2 The reasons for requiring that consent vary. In general terms however the consent requirement is imposed to prevent the frivolous, vengeful or 'political' use of the offence provisions.

4.3 A list of the provisions creating offences for which the Attorney-General's consent is required is given in Appendix 1.

5. Indictments

5.1 The power of the Attorney-General and Crown Solicitors to present an Indictment is recognised in s 345 of the Crimes Act 1961. Almost invariably it is a Crown Solicitor who does so. In exercising that power, the Crown Solicitor acts entirely independently of the Police or other investigating agency and is not subject to their instructions.

5.2 A Crown Solicitor may present an Indictment "… for any charge or charges founded on the evidence disclosed in any depositions taken against such person…". A Crown Solicitor may therefore present an Indictment containing a charge different from, or additional to, that originally contained in the Information, so long as it is founded on evidence contained in the depositions. In exercising that power a Crown Solicitor is exercising, de novo, the discretion to prosecute. All factors affecting that discretion arise again for consideration.

5.3 Where the District Court has committed on some charges only, the prosecution has a number of options available if it wishes nevertheless to proceed to trial on the charges in respect of which there has been no committal:

(a) the Crown Solicitor may exercise the power of laying an indictment under s 345 notwithstanding the lack of a committal on those charges;

(b) an application may be made to a High Court Judge for written consent to present an Indictment notwithstanding the lack of a committal on that or those charges;

(c) the Attorney-General (in practice the Solicitor-General) may present an Indictment (known as an "ex officio Indictment") or give written consent to the presentation of an Indictment notwithstanding the lack of a committal on that or those charges;

(d) the Information or Informations on which there has been no committal may be re-laid and taken to depositions again.

5.4 The use of an ex officio indictment or the giving of consent by the Attorney-General has been very rare and is likely to remain so.

6. Stay of Proceedings

6.1 The common law right of the Attorney-General to intervene in the prosecution process and to stay any prosecution from proceeding further is recognised in ss 77A and 173 of the Summary Proceedings Act 1957 and s 378 of the Crimes Act 1961.

6.2 In New Zealand the power of stay has been sparingly exercised. That conservative approach is likely to continue.

6.3 Generally speaking the power of entering a stay will be exercised in three types of situation:

(a) Where a jury has been unable to agree in two trials. After a second disagreement the Crown Solicitor must refer the matter to the Solicitor-General for consideration of a stay. Unless the Solicitor-General is satisfied that some event not relating to the strength of the Crown's case brought about one or both of the disagreements, or that new and persuasive evidence would be available on a

third trial, or that there is some other exceptional circumstance making a third trial desirable in the interests of justice, a stay will be directed.

(b) If the Solicitor-General is satisfied that the prosecution was commenced wrongly, or that circumstances have so altered since it was commenced as to make its continuation oppressive or otherwise unjust, a stay will be directed.

(c) A stay will be directed to clear outstanding or stale charges or otherwise to conclude an untidy situation; eg where for instance an accused has been convicted on serious charges but a jury had disagreed on others less serious, or a convicted person is serving a substantial sentence and continuing with further charges would serve no worthwhile purpose.

6.4 The possible circumstances which may justify a stay under heads (b) and (c) above are almost infinitely variable. In general terms however the same considerations will apply as are involved in the original decision to prosecute, always with the overriding concern that a prosecution not be continued when its continuance would be oppressive or otherwise not in the interests of justice.

7. Withdrawal of Charges and Arrangements as to Charges

7.1 Circumstances can change, or new facts come to light, which make it necessary to reconsider the appropriateness of the charges originally laid.

7.2 If after a review against the relevant criteria it is clear that a charge should not be pursued, it should be discontinued at the first opportunity. The mode of discontinuance will depend on the court before which the charge is pending and the stage the proceedings have reached. Similarly, if it is plain that a charge should be amended, that should be done at the first opportunity.

7.3 If a charge is not to be proceeded with because a witness declines to give evidence and there are acceptable reasons why he or she should not be forced to do so, it will generally be preferable to ask the Court to dismiss the charge for want of prosecution. That course should be followed, rather than seeking a stay from the Solicitor-General, to ensure that the reasons for the discontinuance are publicly stated.

7.4 Arrangements between the prosecutor and the accused person as to the laying or proceeding with charges to which the accused is prepared to enter a plea of guilty can be consistent with the requirements of justice, subject to constraints which must be clearly understood and followed by prosecutors.

7.5 Those constraints are:

(a) No such arrangement is to be initiated by the prosecutor.

(b) No proposal to come to such an arrangement is to be entertained by a prosecutor unless:

(i) there is a proper evidential base for the charges to be laid or proceeded with and, conversely, there is not evidence which would clearly support a more serious charge;

(ii) the charges to be proceeded with fairly represent the criminal conduct of the accused and provide a proper basis for the Court to assess an appropriate sentence;

(iii) the accused clearly admits guilt of those charges which are to be proceeded with.

(c) The prosecutor must not agree to promote or support any particular sentencing option. In every case the informant or the Solicitor-General will reserve the possibility of an appeal against sentence if the sentence imposed is considered manifestly inadequate or wrong in principle.

(d) A prosecutor must not lay charges or retain them after it is clear that they should not be proceeded with for the purpose of promoting or assisting in any discussions about such an arrangement.

(e) In the case of summary prosecutions, every such arrangement must be approved by the Officer in Charge of the relevant Police prosecution section or, in the case of another Crown prosecuting agency, the senior legal officer of that agency. After committal for trial approval must be given by the relevant Crown Solicitor personally. In cases involving homicide, sexual violation or drug dealing offences involving class A drugs the approval of the Solicitor-General must also be obtained.

7.6 In addition to the matters outlined above a decision to enter into such an arrangement should be based on the following considerations:

(a) whether the accused is willing to co-operate in the investigation or prosecution of others or the extent to which the accused has already done so;

(b) whether the sentence that is likely to be imposed if the charges are pursued as proposed would be appropriate for the criminal conduct involved;

(c) the desirability of prompt and certain despatch of the case;

(d) the strength of the prosecution case;

(e) the likely affects on witnesses of being required to give evidence;

(f) in cases where there has been a financial loss, whether the accused has made restitution or arrangements for restitution;

(g) the need to avoid delay in the despatch of other pending cases.

8. The Role of the Prosecutor in Sentencing

8.1 Until relatively recently the "traditional" view of the prosecutors role at sentencing prevailed; ie the prosecutor should maintain disinterest in the sentence imposed. That view cannot survive in the face of the Crown's right to appeal against a sentence considered to be manifestly inadequate or wrong in principle.

8.2 At sentencing, counsel for the prosecution should be prepared to assist the Court, to the degree the Judge indicates is appropriate, with submissions on the following matters:

(a) the Crown's version of the facts;

(b) comment upon or, if necessary, contradiction of the matters put forward in mitigation by the accused;

(c) the accused's criminal history, if any;

(d) the relevant sentencing principles and guideline judgments.

8.3 Counsel for the prosecution should not press for a particular term or level of sentence. It is the Crown's duty to assist the sentencing Court to avoid errors of principle or sentences which are totally at odds with prevailing levels for comparable offences and offenders.

9. Witness Immunities

9.1 It is sometimes the case that the Crown will need to rely upon the evidence of a minor accomplice or participant in an offence in order to proceed against an accused considered to be of greater significance in the offending.

9.2 Unless that potential witness has already been charged and sentenced he or she will be justified in declining to give evidence on the grounds of self-incrimination.

9.3 In such a case it will be necessary for the Crown to consider giving the witness an immunity from prosecution. An immunity takes the form of a written undertaking from the Solicitor-General to exercise the power of stay if the witness is prosecuted for nominated offences. It thus protects the witness from both Crown and private prosecutions.

9.4 It is to be noted that the only person able to give such an undertaking is the Solicitor-General.

9.5 The purpose of giving an immunity must clearly be borne in mind. That purpose is to enable the Crown to use otherwise unavailable evidence. In

exchange for that it will, with reluctance and as a last resort, grant immunity on specified offences. In particular, the giving of an immunity is not to be seen as an opportunity for an informer to wipe the slate clean.

9.6 Immunities are given reluctantly and only as a last resort in cases where it would not otherwise be possible to prosecute an accused for a serious offence.

9.7 Before agreeing to give an immunity the Solicitor-General will almost invariably require to be satisfied of at least the following matters:

(a) that the offence in respect of which the evidence is to be given is serious both as to its nature and circumstances;

(b) that all avenues of gaining sufficient evidence to prosecute, other than relying upon the evidence to be given under immunity, have been exhausted;

(c) that the evidence to be given under immunity is admissible, relevant and significantly strengthens the Crown's case;

(d) that the witness, while having himself or herself committed some identifiable offence, was a minor participant only;

(e) that the evidence to be given under immunity is apparently credible and, preferably, corroborated by other admissible material;

(f) that no inducement, other than the possibility of an immunity, has been suggested to the witness;

(g) that admissible evidence exists, sufficient to charge the witness with the offences he or she is believed to have committed.

9.8 In order to preserve the integrity of the evidence to be given under immunity it will almost always be desirable for the witness to have independent legal advice. Preferably that advice should be obtained before the witness signs a brief of evidence or depositions statement. Counsel for the witness should, if the witness wishes to seek an immunity, obtain instructions to write to the officer in charge of the case or, if the Solicitor-General is already involved, to the Solicitor-General direct. The letter should set out in full detail the evidence able to be given by the witness but without naming him or her. If satisfied that an immunity is justified the Solicitor-General can then advise the witness's counsel that an immunity will be given. Counsel will then be able to name the witness in the knowledge that a formal immunity will be forthcoming.

10. Disclosure and Discovery

10.1 The aim of the prosecution is to prove its charge beyond reasonable doubt and it is therefore clearly in the interests of justice that accused persons are fully informed of the case against them. At present, voluntary pre-trial

disclosure of information relating to the Crown case is largely a matter for the prosecutors discretion to be exercised in accordance with the guiding principle of fairness to the accused. Nevertheless there are a minimal number of legal obligations with which the prosecution must comply.

10.2 Trial on Indictment

10.2.1 Before trial on indictment an accused person is entitled to peruse depositions taken on his committal for trial or the written statements of witnesses admitted instead of depositions. Section 183 Summary Proceedings Act 1957.

10.2.2 The prosecutor does not have to put forward all the evidence at depositions. However s 368(1) of the Crimes Act 1961 provides that the trial may be adjourned or the jury discharged if the accused has been prejudiced by the surprise production of a witness who has not made a deposition. Therefore in practice the prosecutor should provide adequate notice of intention to call any additional witness and provide the defence with a brief of the evidence that witness will give.

10.3 Information which the Prosecutor does not Intend to Produce in Evidence

10.3.1 The prosecutor must make available to the defence the names and addresses of all those who have been interviewed who are able to give evidence on a material subject but whom the prosecution does not intend to call, irrespective of the prosecutor's view of credibility (*R v Mason* [1975] 2 NZLR 289). It is for the prosecutor to decide whether the evidence is "material" (*R v Quinn* [1991] 3 NZLR 146) but that decision must be reached with complete fairness to the defence.

10.3.2 In the absence of an Official Information Act request there is no general common law duty placed on the prosecution to make available to the defence written statements obtained by the Police from persons the prosecution does not intend to call as witnesses at the trial. However in "truly exceptional circumstances" the Court may exercise its discretion to order production if it considers that a refusal to do so might result in unfairness to the accused and perhaps a miscarriage of justice. *R v Mason* [1976] 2 NZLR 122.

10.3.3 A statutory exception to the general principle against production of written statements is contained in s 344C Crimes Act 1961 which deals with identification of witnesses.

10.4 Statements made by Witnesses to be called by the Prosecution

10.4.1 In the absence of an Official Information Act request there is no general rule of law requiring the prosecution to supply defence counsel with copies of all statements made by persons who are to be called to give evidence. An exception to this general rule is where the witness has made a previous inconsistent statement. Where there is any conflict that may be material between the

evidence of a witness and other statements made by the witness, the defence is entitled to see those other statements. *R v Wickliffe* [1986] 1 NZLR 4; *Re Appelgren* [1991] 1 NZLR 431; *R v Nankervill* (CA 342/89 4 May 1990).

10.4.2 A second exception is where a statement is specifically shown to an accused for the precise purpose of noting his reaction thereto; in such cases the accused is entitled to obtain production of the statement. *R v Church* [1974] 2 NZLR 117.

10.5 Character of Witness

10.5.1 Before all defended trials the prosecution has a duty to disclose any previous convictions of a proposed witness where credibility is likely to be in issue and the conviction could reasonably be said to affect credibility. *Wilson v Police and Elliot* (CA 90/91 20 December 1991).

10.5.2 For trials on indictment a prosecuting agency entitled to access to the Wanganui computer should make a computer check as a matter of course. For summary trials the agency should make such a check if requested by the defence. If the prosecuting agency is in doubt about whether a conviction should be disclosed, counsel's advice should be taken. Any list of convictions should be supplied a reasonable time before trial (normally at least a week). If the prosecuting agency intends to withhold details of convictions, the defence should be notified in sufficient time to enable rulings to be sought from the trial court.

10.6 Disclosure of any Inducement or Immunity given to a Witness

The defence must always be advised of the terms of any immunity from prosecution given to any witness. Likewise the existence of any other factor which might operate as an inducement to a witness to give evidence should be disclosed to the defence. This includes the fact that the witness is a paid Police informer. *R v Chignell* [1991] 2 NZLR 257.

10.7 Identity of Informer

There will be good reason for restricting disclosure where the identity of an informer is at stake. The general principle is that the identity of an informer may not be disclosed unless the Judge is of the opinion that the disclosure of the name of the informer, or of the nature of the information is necessary or desirable in order to establish the innocence of the accused. *R v Hughes* [1986] 2 NZLR 129, 133.

10.7.1 A statutory restriction on disclosure of the true identity of undercover police officers is contained in s 13A Evidence Act 1908.

10.8 Preliminary Hearings

Special provisions for preliminary hearings in cases of a sexual nature are set out in Part VA Summary Proceedings Act 1957. Section 185C(4) requires

the prosecutor to give the complainant's written statement to the defence at least 7 days before the hearing.

10.9 Minor Offences

In the case of minor as opposed to summary offences, defined in s 20A Summary Proceedings Act 1957, the prosecution must serve on the defence a notice of prosecution which will provide information in a brief form as to the essential nature of the charge and other relevant matters outlined in the section.

10.10 DSIR Examinations

As a matter of ethical obligation the prosecutor is required to provide access to the defence to forensic evidence prepared by the DSIR. (New Zealand Law Society, Rules of Professional Conduct, Appendix 2.)

10.11 Obligations on Request under Official Information Act 1982

10.11.1 Crown Solicitors are not part of a 'department or organisation' and are not therefore subject to the Official Information Act 1982. While as a matter of practical convenience they may facilitate responses to requests for information, they are not as a matter of law obliged to do so. The responsibility to provide information rests on the Police or other prosecuting agency, and requests made of a Crown Solicitor should be referred to them. The Crown Solicitor should be advised of all information supplied to other parties.

10.11.2 Personal information ie that particular category of official information held about an identifiable person, is the subject of an explicit right of access, upon request, given to that person, unless it comes within some limited exceptions. Relevance is not the test under the Official Information Act.

10.11.3 The effect of the Court of Appeal decision in Commissioner of *Police v Ombudsman* [1988] 1 NZLR 385 is that the exercise of a defendant's right to personal information will not ordinarily prejudice the maintenance of the law (and fair trials), as shown by the traditional disclosure prosecution information for indictable trials. The practice should therefore be that there will be disclosure on request of briefs of evidence, witness statements or notes of interviews containing information about the defendant. Where briefs, statements or job sheets do not exist, the prosecution should as a matter of practice provide to the defence a summary of the facts on which the prosecution will be based.

10.11.4 The duty will generally apply only after criminal proceedings have been commenced, and information may be withheld if a specific risk (such as fabrication of evidence or intimidation of a witness) is shown. Any disputes should be determined as incidental or preliminary matters by the trial court.

10.12 The aim of pre-trial disclosure is to ensure fairness to the accused and to achieve efficiency in the prosecution process. Bearing those aims in mind,

any doubt as to whether the balance is in favour of, or against disclosure should be resolved in favour of disclosure.

11. Victims of Offences

11.1 Victims of offences are entitled to be treated by prosecutors with courtesy, compassion and respect for their personal dignity and privacy. Section 3 Victims of Offences Act 1987.

11.2 The prosecuting authority or officers of the court (to use the language of the Act) are required to make available to a victim information about the following:

(a) progress of the investigation of the offence;

(b) the charges laid or the reasons for not laying charges;

(c) the role of the victim as a witness in the prosecution of the offence;

(d) the date and place of the hearing of the proceedings; and

(e) the outcome of the proceedings including any proceedings on appeal.

11.3 For the purposes of the Victims of Offences Act, Crown Solicitors are not "prosecuting authorities".

11.4 Responsibility for notifying the victim of these matters has been allocated as between the prosecuting authorities and the officers of the court as follows:

(a) The Police accept that all information about actions before a prosecution is commenced is within their ambit.

(b) Before verdict:

In the case of a not guilty plea the prosecuting authorities are normally in contact with the victim until the verdict is given.

In the case of a guilty plea, the prosecuting authority which is laying the charge must inform the victim of the first date of a court appearance. At the same time it is required to hand to the victim information about the court process beyond that point, describing the processes of appeal, remand, adjournment, etc and informing the victim that it is his or her choice whether to follow the case through the court process. If the victim is unable to attend the hearing in person, he or she can obtain information from the court.

(c) After verdict:

Once a verdict has been reached the prosecuting authority will inform the victim of the outcome of the

case. The letter containing the information should give further information about possible actions after the outcome eg appeal and rehearing.

(d) After sentence:

The prosecuting authority should hand to the court information about the victim's name and address so that the court may notify the victim of any rehearing.

(e) Appeal:

In the case of an appeal after trial on indictment, the Crown Law Office will notify the victim of the date on which it will be heard, and after the appeal send a copy of the Judgment to the victim.

11.5 In addition to providing information about the proceedings, a prosecutor has responsibilities in relation to Victim Impact Statements. A sentencing Judge is to be informed about any physical or emotional harm, or any loss of or damage to property, suffered by the victim through or by means of the offence, and any other effects of the offence on the victim. Such information is to be conveyed to the Judge by the prosecutor, either orally or by means of a written statement. The courts have indicated that Crown Solicitors have a certain responsibility to ensure that Victim impact Statements fulfil their proper purpose ie a brief description of the impact on the victim and not a supplementary statement of facts adding additional offences and circumstances of aggravation.

11.6 The Victims of Offences Act also requires that in the case of a charge of sexual violation or other serious assault or injury the prosecutor should convey to the judicial officer any fears held by the victim about the release on bail of the alleged offender.

12. Crown Appeals against Sentence

12.1 It is for the Solicitor-General to determine in all cases whether an appeal against sentence should be taken. In respect of sentences passed on conviction on indictment, the appeal is taken in the name of the Solicitor-General; in respect of sentences imposed under the summary jurisdiction of the District Court the appeal is taken in the name of the informant, with the written consent of Solicitor-General.

12.2 The guiding principles for prosecutors in deciding whether a matter should be referred to the Solicitor-General for consideration of a Crown appeal are whether there are good grounds to argue that:

(a) the sentence is manifestly inadequate; or

(b) there has been a serious error in sentencing principle.

12.3 Manifestly Inadequate

12.3.1 The sentence imposed must be manifestly inadequate: – the Crown's right of appeal is not intended to be a corrective procedure for every sentence considered to be lenient.

12.3.2 The considerations justifying an increase in sentence must be more compelling than those which might justify a reduction. Even where a sentence is found to be manifestly inadequate, the court will increase it only to the minimum extent required in the interests of justice.

12.3.3 A particular sentence, or sentences generally for a particular type of crime, may be considered manifestly inadequate if they do not fulfil their deterrent or denunciatory functions. A Crown appeal may be considered where it is clear that the offence requires a heavier sentence in the public interest for the purposes of general or individual deterrence or to express community denunciation because of the nature of the offence.

12.4 Error of Principle

12.4.1 Where a sentence is based upon a wrong principle, the error involved must be one that is important in a sense that it is likely to have implications beyond that particular case in which it has arisen.

12.4.2 The court is reluctant to interfere if this would cause some other injustice to the offender, eg by changing what is generally deemed a wholly inappropriate sentence to which the offender is nevertheless responding. The court is also reluctant to uphold a Crown appeal if the prosecution did not do all that could reasonably have been expected of it to avoid the error at first instance. In no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at trial. Section 389 Crimes Act 1961.

12.5 Time Limits

Appeals against sentences imposed in the indictable jurisdiction must be filed within 28 days. The time limit for the summary jurisdiction is 28 days. Given the short time limits for filing an appeal, particularly to the Court of Appeal after trial on indictment, and the uncertainty which a Crown appeal poses for the defendant in question, the need to refer materials speedily to the Solicitor-General is paramount. For the same reason it is only in exceptional cases of unavoidable delay that the Solicitor-General will seek leave to appeal out of time.

12.6 The information required for consideration of appeals includes:

(a) Indictment or Information;

(b) notes of Evidence or Summary of Facts;

(c) copies of the Pre-Sentence Report, Victim Impact Report and any other reports made available to the sentencing Judge;

(d) a list of any previous convictions;

(e) a note of the Judge's or District Court Judge's remarks on sentence;

(f) the comments and recommendations of the Crown Solicitor or prosecutor.

12.7 In general the main purpose of a Crown appeal is to ensure that errors of principle are corrected and not perpetuated, and that sentences for offences of generally comparable culpability are reasonably uniform and appropriate having regard to the seriousness and prevalence of the offence.

CROWN LAW

PROSECUTION GUIDELINES

As at 1 January 2010

Te Tari Ture o te Karauna
Crown Law

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ATTORNEY-GENERAL'S INTRODUCTION

1. The prosecution system in New Zealand differs from most similar jurisdictions in that trials on indictment are conducted by Crown Solicitors - private practitioners appointed to prosecute under a warrant issued by the Governor-General. New Zealand is also one of the few jurisdictions remaining where summary prosecutions are conducted by specially trained members of the Police who need not be legally qualified.

2. New Zealand prosecutors provide a professional, open, fair and responsible prosecution service. These standards will continue through the day-to-day adherence to the values reflected in these Guidelines.

3. Under our constitutional arrangements the Attorney-General is responsible through Parliament to the citizens of New Zealand for prosecutions carried out by or on behalf of the Crown. In practice, however, the prosecution process is superintended by the Solicitor-General, who, pursuant to s 9A Constitution Act 1986, shares all the relevant powers vested in the office of Attorney-General.

4. The previous Prosecution Guidelines were promulgated in 1992. Since that time there have been substantial changes in the criminal justice system. Prosecutions have become much more complicated and there is now a large, complex and rapidly expanding set of principles arising from the implementation of the New Zealand Bill of Rights Act 1990.

5. These revised Guidelines are a response to these changes, and reflect both my expectations and, I am sure, those of the judiciary, legal profession, enforcement agencies and the public, of prosecutors and prosecution services in the 21st Century.

Hon Christopher Finlayson
Attorney-General

SOLICITOR-GENERAL'S INTRODUCTION

1. Crown Solicitors were first appointed in New Zealand in 1864. Crown Solicitors were initially supervised by the Colonial Secretary's Office. In 1873 the Department of Justice and Crown Law Office were separately formed out of the Colonial Secretary's Office. Crown Solicitors were then supervised by the Department of Justice until 1918 when the responsibility for overseeing Crown Solicitors was transferred to the Crown Law Office. The Solicitor-General of the day, Mr J Salmond (later the Hon Sir John Salmond) described Crown Solicitors as being "...Officers of the Crown Law Office ... under the control and supervision of the Law Officers of the Crown".[1]

2. The relationship between Crown Solicitors and the Solicitor-General has evolved considerably since 1918. Crown Solicitors are now substantially autonomous when making prosecution decisions and conducting trials. Nevertheless, all Crown Solicitors in New Zealand understand they are accountable to the Solicitor-General and are expected to comply with the views of the Solicitor-General on the rare occasions that the guidance of the Solicitor-General is required.

3. These Guidelines endeavour to reflect the respectful relationship which exists between the Solicitor-General, Crown Solicitors and prosecutors in enforcement agencies. The Guidelines also endeavour to incorporate international best practices. These Guidelines draw extensively upon the Prosecution Guidelines developed by the Director of Public Prosecutions for Australia in 1990, the Crown Prosecution Service for England and Wales in 2004, the Public Prosecution Service for Northern Ireland in 2005, and the Director of Public Prosecutions for Ireland in 2006.

4. These Guidelines could not have been developed without the invaluable assistance provided by Mr J Pike, General Counsel in Crown Law, Mr C Mander, Deputy Solicitor-General (Criminal) and members of the Crown Law Criminal Team.

Dr D B Collins QC
Solicitor-General

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1 Memorandum from the Solicitor-General to Attorney-General, 3 September 1918.

DEFINITIONS

Attorney-General:	The senior Law Officer of the Crown appointed under warrant by the Governor-General.
Solicitor-General:	The junior Law Officer of the Crown appointed under warrant by the Governor-General pursuant to the Royal Prerogative.
Law Officers:	The Attorney-General and the Solicitor-General.
Crown Solicitors:	Those who hold the warrant of Crown Solicitor for the following High Court districts: • Whangarei; • Auckland; • Hamilton; • Tauranga; • Rotorua; • New Plymouth; • Wanganui; • Palmerston North; • Napier, including Gisborne; • Wellington; • Nelson and Blenheim; • Christchurch and Greymouth; • Timaru; • Dunedin; • Invercargill.
Government agencies:	All departments listed in Schedule 1, State Sector Act 1988, Local Authorities, as defined in the Local Government Act 2002, and Crown entities as defined in the Crown Entities Act 2004 who have the ability to commence and conduct summary prosecutions.
New Zealand Police:	Includes all employees of the New Zealand Police, regardless of whether they are Constables as defined in the Policing Act 2008.
Enforcement Agencies:	Includes Government agencies and the New Zealand Police.
Law Enforcement Officer:	A member of an enforcement agency.

1. PROSECUTIONS IN NEW ZEALAND

1.1 As the Attorney-General has noted in his introduction to these Guidelines, New Zealand has no centralised decision making agency in relation to prosecution decisions either in relation to serious offences prosecuted on indictment in the High or District Courts or summarily in the District Court. Decisions in the first category of prosecutions are made by Crown Solicitors. There are currently 15 Crown Solicitors. Decisions in the second category may be made by a variety of agencies such as the New Zealand Police and various Government agencies (such as Ministry of Social Development, Inland Revenue Department, Department of Labour, New Zealand Customs Service, Ministry of Fisheries and the Civil Aviation Authority, to name but a few).

1.2 There is no overarching day to day supervision of the prosecution decisions made by any of these agencies. Neither the Attorney-General nor the Solicitor-General may give directions in relation to trials on indictment. Each Law Officer, however, has the statutory power to stay a prosecution. In relation to summary prosecutions brought by Government Departments listed in Schedule 1 of the State Sector Act 1988 (which excludes the New Zealand Police), the Solicitor-General can give binding directions.

1.3 Subject to any rulings by a Court, prosecutions in relation to any particular charges are brought and continued by the person in the relevant enforcement agency making the operative decisions, subject to any supervisory structures within the particular agency.

1.4 In the rare case of poor decision-making, the Court seized of a particular prosecution may exercise its inherent remedial powers to prevent an abuse of its processes. The Courts in New Zealand have declined to hear challenges to prosecution decisions either in summary or indictable cases brought by way of judicial review. Principled decisions in accordance with these Guidelines will help to ensure that the Courts in New Zealand will see little reason to countenance challenges to a prosecution decision.

1.5 The absence of any central decision making process has the effect of underscoring the importance of comprehensive guidelines, and the acceptance of core prosecution values. The acceptance by the New Zealand Police Prosecution Service of the value and purpose of these Guidelines will have the effect of ensuring consistency and common standards for all prosecutions.

2. PURPOSE AND PRINCIPLES OF THE GUIDELINES

2.1 These Guidelines are intended to assist all those persons whose function it is to enforce the criminal law by instituting and conducting a criminal prosecution. The purpose of these Guidelines is to ensure that the principles and practices as to prosecutions in New Zealand are underpinned by unified values. These values aim to achieve consistency in key decisions and trial practices. If these values are adhered to, New Zealand will continue to have prosecution processes that are open, fair to the defendant, witnesses and the victims of crime, and reflect the proper interests of society.

2.2 Specifically these Guidelines are intended to assist in determining:

2.2.1 Whether criminal proceedings should be commenced;

2.2.2 What charges should be laid;

2.2.3 Whether, if commenced, criminal proceedings should be continued or discontinued.

And to:

2.2.4 Provide guidance for the conduct of criminal prosecutions; and,

2.2.5 Establish standards of conduct and practice that the Law Officers expect from those whose duties include conducting prosecutions.

2.3 The Guidelines reinforce the expectation of the Law Officers and the Courts that a prosecutor will act in a manner that is fundamentally fair, detached and objective. As explained in *R v B (RB)* (2001) 152 CCC (3d) 437, 443 (BCCA) the prosecutor should act to foster a rational trial process, not one based on emotion or prejudice.

3. APPLICATION OF THE GUIDELINES

3.1 These Guidelines are to apply from 1 January 2010.

3.2 The Guidelines are not an instruction manual for prosecutors, nor do they necessarily cover every decision that must be made by prosecutors and enforcement agencies. They do not purport to lay down any rule of law. However, as the Guidelines reflect the aspirations and practices of prosecutors who adhere to the UN Guidelines on the Role of the Prosecutor and the International Association of Prosecutors Standards (1999), it is the expectation of the Law Officers that all prosecutions in New Zealand will be conducted in accordance with the principles in these Guidelines.

3.3 In relation to trials on indictment it is the expectation of the Solicitor-General that adherence to the Guidelines is a condition of the warrant held by each Crown Solicitor.

"PRIVATE" PROSECUTIONS

3.4 Despite periodic calls for the abolition of the right currently vested in any person to lay an information, so-called private prosecutions remain as a part of our system of criminal justice. They are now recognised in s 6 Criminal Disclosure Act 2008 and are bound by its provisions.

3.5 The Solicitor-General has neither a role nor authority in relation to private prosecutions, unless the power to stay a prosecution or to take over a trial on indictment is exercised. However, the Solicitor-General would expect law practitioners acting for an informant in a private prosecution, to adhere to the Law Society's general rules of professional conduct and to all relevant principles in these Guidelines.

4. THE INDEPENDENCE OF THE DECISION-MAKER

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 political or public pressure. All Government agencies should ensure wherever it is reasonably practicable to do so, that the initial prosecution decision is made by legal officers independently from other branches of the agency and acting in accordance with these Guidelines.

4.3 The independence of Crown Solicitors is explained further in Guideline 5.

5. THE SUPERVISION OF PROSECUTIONS

5.1 There is no direct control of prosecutions in New Zealand by any "central authority". The supervision of all prosecutions of indictments presented by the Crown Solicitor is the responsibility of that Crown Solicitor. In carrying out the duties of that office, the Crown Solicitor is expected as a matter of practice to inform the Solicitor-General or Deputy Solicitor-General of any matter which ought to be communicated to those offices. Without limiting the expectation, this will cover any matter of general public or legal importance.

5.2 The relationship between the Solicitor-General and Crown Solicitors is governed in some matters by the Crown Solicitor Regulations 1994 and the Cabinet Directions for the Conduct of Crown Legal Business 1993. In relation to most practical matters, however, the relationship is based on practice and convention. It is the expectation of the Law Officers that opinions of the Solicitor-General in relation to matters within the province of a Crown Solicitor will be respected and complied with.

5.3 In practice, all prosecutions on indictment are commenced with the laying of an information in form SP2 by the Police, or the laying of an information where the defendant can and does elect trial by jury.

5.4 While the New Zealand Police are independent from other branches of the Government, these Guidelines are intended to assist the New Zealand Police as well as Government agencies in deciding:

5.4.1 Whether to prosecute; and if so,

5.4.2 What charges should be laid.

5.5 Following committal it is for the Crown Solicitor to decide what charges are laid.

5.6 It will continue to be the responsibility of the New Zealand Police to create and maintain supervisory structures in relation to charging and prosecuting in the summary hearing jurisdiction.

5.7 It is the expectation of the Law Officers that all Government agencies with prosecution functions will create or maintain decision-making structures to ensure that prosecution decisions and practice are in accordance with these Guidelines.

6. THE DECISION TO PROSECUTE

THE TEST FOR PROSECUTION

6.1 Prosecutions ought to be initiated or continued only where the prosecutor is satisfied that the Test for Prosecution is met. The Test for Prosecution is met if:

6.1.1 The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and

6.1.2 Prosecution is required in the public interest – the Public Interest Test.

6.2 Each aspect of the test must be separately considered and satisfied before a decision to prosecute can be taken. The Evidential Test must be satisfied before the Public Interest Test is considered. The prosecutor must analyse and evaluate all of the evidence and information in a thorough and critical manner.

THE EVIDENTIAL TEST

6.3 A reasonable prospect of conviction exists if, in relation to an identifiable individual, there is credible evidence which the prosecution 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 reasonable doubt that the individual who is prosecuted has committed a criminal offence.

6.4 It is necessary that each element of this definition be fully examined when considering the evidential test in each particular case.

Element	**Description**
Identifiable individual	There will often be cases where it is clear that an offence has been committed but there is difficulty identifying who has committed it. A prosecution can only take place where the evidence sufficiently identifies that a particular person is responsible. Where no such person can be identified, and the case cannot be presented as joint liability there can be no prosecution.
Credible evidence	This means evidence which is capable of belief. It *may* be necessary to question a witness before coming to a decision as to whether the evidence

Element	Description
	of that witness could be accepted as credible. It may be that a witness is plainly at risk of being so discredited that no Court could safely rely on his/her evidence. In such a case it may be concluded that there is, having regard to all the evidence, no reasonable prospect of obtaining a conviction. If, however, it is judged that a Court in all the circumstances of the case could reasonably rely on the evidence of a witness, notwithstanding any particular difficulties, then such evidence is credible and must be taken into account. Prosecutors may be required to make an assessment of the quality of the evidence. Where there are substantial concerns as to the creditability of essential evidence, criminal proceedings may not be appropriate as the evidential test may not be capable of being met. Where there are credibility issues, prosecutors must look closely at the evidence when deciding if there is a reasonable prospect of conviction.
Evidence which the prosecution can adduce	Only evidence which is or reliably will be available, and legally admissible can be taken into account in reaching a decision to prosecute. Prosecutors should seek to anticipate even without pre-trial matters being raised whether it is likely that evidence will be admitted or excluded by the Court. For example, is it foreseeable that the evidence will be excluded because of the way it was obtained? If so, prosecutors must consider whether there is sufficient other evidence for a reasonable prospect of conviction.
Could reasonably be expected to be satisfied	What is required by the evidential test is that there is an objectively reasonable prospect of a conviction on the evidence. The apparent cogency and creditability of evidence is not a mathematical science, but rather a matter of judgment for the prosecutor. In forming his or her judgment the prosecutor shall endeavour to anticipate and evaluate likely defences.
Beyond reasonable doubt	The evidence available to the prosecutor must be capable of reaching the high standard of proof required by the criminal law.

Element	Description
Commission of a criminal offence	This requires that careful analysis is made of the law in order to identify what offence or offences may have been committed and to consider the evidence against each of the ingredients which establish the particular offence.

THE PUBLIC INTEREST TEST

6.5 Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of conviction, the next consideration is whether the public interest requires a prosecution. It is not the rule that all offences for which there are sufficient evidence must be prosecuted. Prosecutors must exercise their discretion as to whether a prosecution is required in the public interest.

6.6 In a time honoured statement made in 1951 Sir Hartley Shawcross QC MP, the then United Kingdom Attorney-General, made the following statement to Parliament in relation to prosecutorial discretion:

> "It has never been the rule in this country … that suspected criminal offences must automatically be subject of prosecution."

6.7 Broadly, the presumption is that the public interest requires prosecution where there has been a contravention of the criminal law. This presumption provides the starting point for consideration of each individual case. In some instances the serious nature of the case will make the presumption a very strong one. However, there will be circumstances in which, although the evidence is sufficient to provide a reasonable prospect of conviction, the offence is not serious and prosecution is not required in the public interest. Prosecutors for instance should positively consider the appropriateness of any diversionary option (particularly if the defendant is a youth).

6.8 The following section lists some public interest considerations for prosecution which may be relevant and require consideration by a prosecutor when determining where the public interest lies in any particular case. The following list is illustrative only.

PUBLIC INTEREST CONSIDERATIONS FOR PROSECUTION

6.8.1 The predominant consideration is the seriousness of the offence. Where a conviction is likely to result in a significant penalty including any confiscation order or disqualification, then there is a strong public interest for a prosecution;

6.8.2 Where the defendant was in a position of authority or trust and the offence is an abuse of that position;

6.8.3 Where the defendant was a ringleader or an organiser of the offence;

6.8.4 Where the offence was premeditated;

6.8.5 Where the offence was carried out by a group;

6.8.6 Where the offence was carried out pursuant to a plan in pursuit of organised crime or was an offence involving serious or significant violence;

6.8.7 Where the offence was motivated by hostility against a person because of their race, ethnicity, sexual orientation, disability, religion, political beliefs, age, the office they hold, or similar factors;

6.8.8 Where the offence is prevalent;

6.8.9 Where the offence has resulted in serious financial loss to an individual, corporation, trust person or society;

6.8.10 Where the offence was committed against a person serving the public, for example a doctor, nurse, member of the ambulance service, member of the fire service or a member of the police;

6.8.11 Where the victim of the offence, or their family, has been put in fear, or suffered personal attack, damage or disturbance. The more vulnerable the victim, the greater the aggravation;

6.8.12 Where there is a marked difference between the actual or mental ages of the defendant and the victim and where the defendant took advantage of this;

6.8.13 Where there is any element of corruption;

6.8.14 Where the defendant has previous convictions, diversions or cautions which are relevant;

6.8.15 Where the defendant is alleged to have committed an offence whilst on bail, on probation, or subject to a suspended sentence or an order binding the defendant to keep the peace, or when released on parole from a prison or a place of detention or otherwise subject to a Court order;

6.8.16 Where there are grounds for believing that the offence is likely to be continued or repeated, for example, where there is a history of recurring conduct.

6.9 The following section lists some public interest considerations against prosecution which may be relevant and require consideration by a prosecutor when determining where the public interest lies in any particular case. The following list is illustrative only.

PUBLIC INTEREST CONSIDERATIONS AGAINST PROSECUTION

6.9.1 Where the Court is likely to impose a very small or nominal penalty;

6.9.2 Where the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by an error of judgement or a genuine mistake;

6.9.3 Where the offence is not on any test of a serious nature, and is unlikely to be repeated;

6.9.4 Where there has been a long passage of time between an offence taking place and the likely date of trial such as to give rise to undue delay or an abuse of process unless:

- the offence is serious;
- delay has been caused in part by the defendant;
- the offence has only recently come to light; or
- the complexity of the offence has resulted in a lengthy investigation.

6.9.5 Where a prosecution is likely to have a detrimental effect on the physical or mental health of a victim or witness;

6.9.6 Where the defendant is elderly;

6.9.7 Where the defendant is a youth;

6.9.8 Where the defendant has no previous convictions;

6.9.9 Where the defendant was at the time of the offence or trial suffering from significant mental or physical ill-health;

6.9.10 Where the victim accepts that the defendant has rectified the loss or harm that was caused (although defendants must not be able to avoid prosecution simply because they pay compensation);

6.9.11 Where the recovery of the proceeds of crime can more effectively be pursued by civil action;

6.9.12 Where information may be made public that could disproportionately harm sources of information, international relations or national security;

6.9.13 Where any proper alternatives to prosecution are available.

6.10 These considerations are not comprehensive or exhaustive. The public interest considerations which may properly be taken into account when deciding whether the public interest requires prosecution will vary from case to case. In each case where the evidential test has been passed, the prosecutor will weigh the relevant public interest factors that are applicable. The prosecutor will then determine whether or not the public interest requires prosecution.

NO PROSECUTION

6.11 If the prosecutor decides that there is insufficient evidence or that it is not in the public interest to prosecute, a decision of 'no prosecution' will be taken.

6.12 A decision of 'no prosecution' does not preclude any further consideration of a case by the prosecutor, if new and additional evidence becomes available, or a review of the original decision is required.

7. REASONS FOR DECISIONS

7.1 Subject to considerations contained in the "Media Protocol for Prosecutors" (referred to at Guideline 30), in any case of wide public interest, the Crown Solicitor may if he or she sees fit, issue a statement giving broad reasons why a decision to prosecute or not to prosecute was made.

7.2 This step may also be taken by a Crown Solicitor in relation to a stay of proceedings or application under s 347 of the Crimes Act or a decision to offer no evidence.

7.3 The Solicitor-General should be consulted before any statements are issued by a Crown Solicitor.

8. REOPENING A PROSECUTION DECISION

8.1 People should be able to rely on decisions taken by prosecutors. Normally, if a prosecutor tells a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped, that is the end of the matter and the case will not start again.

8.2 Occasionally there are special reasons where a prosecutor will restart the prosecution where that course is available under the applicable law, particularly if the case is serious.

8.3 These reasons include:

8.3.1 Rare cases where a reassessment of the original decision shows that it was clearly wrong and should not be allowed to stand;

8.3.2 Cases which are stopped so that more evidence which is likely to become available in the near future can be collected and prepared. In these cases, the prosecutor will tell the defendant that the prosecution may well start again; and

8.3.3 Cases which are stopped because of a lack of evidence but where more significant evidence is discovered later.

9. THE CHOICE OF CHARGES

9.1 Once there has been a decision to prosecute a decision then needs to be made as to which charges should be laid.

9.2 In both the summary and indictable jurisdictions the nature and number of the charges laid should truly reflect the totality of the offending disclosed by the facts to be alleged at trial.

9.3 The number of charges must reflect the alleged conduct and the public interest in having appropriate convictions entered against the defendant.

9.4 Ordinarily, this will result in charges being brought in respect of all alleged crimes punishable by seven or more years' imprisonment.

9.5 The decision will also be weighted towards inclusion of charges where the alleged crimes are to be laid against a member of an organised crime organisation.

9.6 Neither the number nor seriousness of charges should be decided by having regard to the impact of that decision on the likelihood of an offer by the defendant to plead guilty to lesser charges.

10. REVIEW OF CHARGES

10.1 Wherever necessary and practicable, the charges to be laid whether summarily or on indictment should be reviewed by a senior prosecutor.

10.2 Once charges have been laid, and before trial, the prosecutor should review those charges to determine whether those are the charges that should be prosecuted or whether:

10.2.1 Any of the charges should be amended to bring them into conformity with the evidence available;

10.2.2 Other charges should be added;

10.2.3 Any charges should be withdrawn (because, for example, they are no longer considered necessary in the public interest, or are not adequately supported by the evidence).

11. STATUTORY CONSENTS TO PROSECUTIONS

11.1 There are numerous offences that cannot be prosecuted without the consent of the Attorney-General. In practice this function is almost always undertaken by the Solicitor-General. Often, where offences may touch on matters of security or involve foreign relations or international treaty obligations, consent is required to ensure that the circumstances of the prosecution accord with the statutory purpose of the Act. The offence of bribery in relation to a Member of Parliament requires the consent of a High Court judge.

11.2 The process for recording consent is set out in s 314 of the Crimes Act 1961 and must be strictly followed. Prosecutors seeking the Attorney-General's consent must provide a copy of the information(s) and sufficient material to allow the Solicitor-General to properly consider the evidence and relevant circumstances of the alleged offence.

11.3 Prosecutors are referred to the list of statutory offences requiring the consent of the Attorney-General issued with these Guidelines.

12. IMMUNITIES FROM PROSECUTION

12.1 On occasions the prosecution case will depend upon the evidence of an accomplice or participant in an offence in order to proceed against a defendant considered to be a greater risk to the public safety, or more culpable.

12.2 Unless that potential witness has already been charged and sentenced he or she will be justified in declining to give evidence on the grounds of self-incrimination.

12.3 In such a case it will be necessary for the Crown to consider giving the witness immunity from prosecution. Immunity takes the form of a written undertaking from the Solicitor-General to exercise the power to stay if the witness is prosecuted for nominated offences. It thus protects the witness from both Crown and private prosecutions.

12.4 It is to be noted that the only person able to give such an undertaking is the Solicitor-General.

12.5 The only purpose in giving immunity is to enable the Crown to use otherwise unavailable evidence.

12.6 Immunities are to be used sparingly and only in cases where it is demonstrably clear that without the evidence given under immunity the prosecution case is unlikely to succeed, or there is a risk it will be significantly weakened.

12.7 Before agreeing to give immunity, the Solicitor-General will almost invariably need to be satisfied of at least the following matters:

12.7.1 That the offence in respect of which the evidence is to be given is serious;

12.7.2 That all reasonably available avenues of gaining sufficient evidence to bring a successful prosecution other than relying upon the evidence to be given under immunity, have been exhausted;

12.7.3 That the evidence to be given under immunity is admissible, relevant and significantly strengthens the prosecution case;

12.7.4 That the witness, while having committed some identifiable offence, is not an equal or greater risk to the public safety than the person to be tried;

12.7.5 That the evidence to be given under immunity is apparently credible and, preferably, supported by other admissible material;

12.7.6 That no inducement, other than the possibility of an immunity, has been suggested to the witness;

12.7.7 That admissible evidence exists, sufficient to charge the witness with the offences he or she is believed to have committed.

12.8 The formal opinion of prosecuting counsel (almost invariably the Crown Solicitor) regarding the merits of the immunity will be required.

12.9 The witness who is to testify under immunity should provide a brief of the evidence he or she is to give. That person should be advised that they should seek independent legal advice, the reasonable cost of which will be met by the prosecution. The witness must be advised that should the application for immunity be declined the brief of evidence and any other information obtained from that person in connection with a promise to apply for immunity cannot be used against that person.

13. WITNESS ANONYMITY ORDERS

13.1 Under s 110 of the Evidence Act 2006 both the prosecutor and the accused in a trial on indictment may seek a pre-trial order from a Judge excusing the person who is to testify from disclosing to the other party that person's name, address, occupation or other identifying particulars.

13.2 Such orders may be sought prior to, during or after committal, or during trial.

13.3 The order may be made where the safety of the witness or any other person is likely to be endangered, or there is likely to be serious damage to property if the witness's identity is disclosed: and withholding that person's identity would not be contrary to the interests of justice.

13.4 All applications for witness anonymity orders by an enforcement agency must have the prior approval of the Solicitor-General. In truly exigent circumstances retrospective approval will be contemplated.

13.5 When the application is made the Solicitor-General must be provided with material from the person in relation to whom the order is sought; either in statement or affidavit form, explaining that person's perception of the likely danger to them or the risk of serious damage to property. That statement must be accompanied by a report from the Police as to the likelihood of danger, or serious damage to property and with an opinion from or through the Crown Solicitor as to the application of ss 110(4)(a) or 112(4) of the Evidence Act 2006.

14. BAIL

14.1 Generally, all matters relating to bail are codified in the Bail Act 2000. In addition s 24(b) of the New Zealand Bill of Rights Act 1990 provides that those who are charged with criminal offences shall be released on reasonable terms and conditions unless there is just cause for continued detention.

14.2 The core principles in relation to whether to remand the defendant in custody or order release on bail are found in s 8 of the Bail Act 2000.

14.3 Prosecutors opposing bail must base their opposition only on factors relevant to bail and on the basis of credible, cogent and relevant information.

14.4 Where, by virtue of s 8(2)(b) of the Bail Act 2000 the issue of bail involves the strength of the prosecution case, prosecutors must pay special attention to s 20(2) of that Act.

14.5 In accordance with s 29 of the Victims' Rights Act 2002, prosecutors must make all reasonable efforts to ensure any views of the victim are put before the Court where an application for bail is made by a defendant charged with a specified offence under s 30.

14.6 Prosecutors must take account of the *Bail Practice Note (Bail Act 2000)* of 7 February 2002 issued by the Chief District Court Judge which details the Court's expectations of prosecution counsel.

14.7 Crown Solicitors appear on bail matters in two different capacities. At any stage of the proceedings before an indictment is filed, the Crown Solicitor or a member of his or her prosecution staff appear on instructions from the informant. Post-indictment the Crown Solicitor appears as the prosecutor.

14.8 In both capacities the Crown Solicitor must seek and accept police expertise as to any bail risks presented by the defendant, however, the ultimate decision as to what will be said to the Court about eligibility for bail is the responsibility of the Crown Solicitor. This is not incompatible with the role of the Police whose legitimate views as to bail must be placed before the Court.

15. DISCLOSURE

15.1 Proper disclosure is seen as central to preventing wrongful convictions. Under the Criminal Disclosure Act 2008, a "prosecutor" is the person in charge of the file or files relating to a criminal prosecution. Where the proceeding is on indictment a Crown Solicitor or his or her employees will have custody of the trial file but the person in charge of the files is the person designated by the NZ Police (or other prosecuting agency) as the Officer in Charge of the file. A Crown Solicitor or his or her employees should not be considered the prosecutor for the purposes of the Act. In any prosecution conducted by a Crown Solicitor other than on indictment that person as well as the informant is relevantly a "prosecutor" in terms of the Act.

15.2 The Act prescribes a comprehensive regime for disclosure by prosecutors to a defendant. Notwithstanding a Crown Solicitor not having charge of the file or files he or she in a trial on indictment must ensure that the person in control of the relevant files is aware of and has complied with the obligations imposed by the Criminal Disclosure Act 2008.

15.3 This obligation will not be carried into effect merely by seeking assurances from enforcement agencies that the trial file given to the Crown Solicitor contains all necessary disclosure material and that any other material disclosed represents complete disclosure.

15.4 For the purpose of disclosure, the Crown Solicitor and the enforcement agencies shall ensure that the Crown Solicitor has access to all relevant information relating to the charges in the possession of the enforcement agencies.

15.5 The Criminal Disclosure Act 2008 requires disclosure to a defendant to occur at four phases, namely:

15.5.1 Initial disclosure (s 12(1));

15.5.2 Further disclosure (s 12(2));

15.5.3 Full disclosure (s 13);

15.5.4 Additional disclosure (s 14).

INITIAL DISCLOSURE

15.6 Initial disclosure requires a prosecutor to provide the defendant at the commencement of criminal proceedings with the following information:

15.6.1 A summary which fairly informs the defendant of the facts on which it is alleged an offence has been committed and the facts alleged against the defendant.

15.6.2 The defendant's right to apply for further information before entering a plea.

15.6.3 The maximum penalty for the offence.

15.6.4 A list of the defendant's previous convictions or offences to which s 284(1)(g) Children, Young Persons, and their Families Act 1989 applies.

FURTHER DISCLOSURE

15.7 Further disclosure can occur at any time after the criminal proceedings are commenced. Further disclosure must be provided as soon as is reasonably practicable when it is requested in writing by the defendant. The following information may be covered by a request for further disclosure:

15.7.1 The names of any witnesses whom the prosecutor intends to call at the hearing or trial; and

15.7.2 A list of the exhibits that are proposed to be produced on behalf of the prosecution at the hearing or trial; and

15.7.3 A copy of all records of the interviews with the defendant; and

15.7.4 A copy of all records of interviews with prosecution witnesses by a law enforcement officer that contain relevant information; and

15.7.5 A copy of job sheets and other notes of evidence completed or taken by a law enforcement officer that contain relevant information; and

15.7.6 A copy of any records of the evidence produced by a testing device that contains relevant information; and

15.7.7 A copy of any diagrams and photographs made or taken by a law enforcement officer that contains relevant information and are intended to be introduced as evidence as part of the case for the prosecution; and

15.7.8 A copy of any video interview with the defendant; and

15.7.9 A copy of relevant records concerning compliance with New Zealand Bill of Rights Act 1990; and

15.7.10 A copy of any statement made by or record of interview with a co-defendant in any case where the defendants are to be prosecuted together for the same offence; and

15.7.11 A list of any of the above information that the prosecutor refuses to disclose pursuant to ss 15, 16, 17 or 18 of the Criminal Disclosure Act 2008, and such further details relating to that refusal as required by the Act.

FULL DISCLOSURE

15.8 Full disclosure occurs as soon as possible after the defendant either:

15.8.1 Pleads not guilty to an offence proceeded against summarily;

15.8.2 Elects trial by jury;

15.8.3 First appears in court on an indictable charge.

15.9 Full disclosure includes the following information:

15.9.1 A copy of any statement made by a prosecution witness; and

15.9.2 A copy of any brief of evidence that has been prepared in relation to a prosecution witness; and

15.9.3 The name and, if, disclosure is authorised under s 17 of the Criminal Disclosure Act 2008, the address of any person interviewed by the prosecutor who gave relevant information and whom the prosecutor does not intend to call as a witness; and

- any written account of the interview, whether signed or unsigned, and any other record of the interview; and
- any statement made to the prosecutor by the person; and

15.9.4 Any convictions of a prosecution witness that are known to the prosecutor and that may affect the credibility of that witness; and

15.9.5 A list of all exhibits that the prosecutor proposes to have introduced as evidence as part of the case; and

15.9.6 A list of all relevant exhibits in the possession of the prosecutor that the prosecutor does not propose to have introduced as evidence; and

15.9.7 A copy of any information supplied to the prosecutor in connection with the case by any person or persons whom the prosecutor proposes to call to give evidence as an expert witness or witnesses; and

15.9.8 A copy of any relevant information supplied to the prosecutor by a person or persons whom the prosecutor considered calling to give evidence as an expert witness or witnesses, but elected not to call.

ADDITIONAL DISCLOSURE

15.10 At any time after the duty to make full disclosure has arisen the defendant may make a request for additional information. The prosecutor or Crown Solicitor must comply with this additional request, unless:

15.10.1 The request is for information that is not relevant;

15.10.2 The request appears to be frivolous or vexatious;

15.10.3 The request relates to information that may be withheld under ss 15, 16, 17, or 18 Criminal Disclosure Act 2008.

TRIAL ON INDICTMENT

15.11 The prosecutor is not limited at trial to the evidence filed or adduced for the purpose of committal. However, s 368(1) of the Crimes Act 1961 provides that the trial may be adjourned or the jury discharged if the accused has been prejudiced by the surprise production of a witness who has not made a deposition. Therefore in practice the prosecutor should provide adequate notice of intention to call any additional witness and provide the defence and the Court with a brief of the evidence that witness will give.

INFORMATION WHICH THE PROSECUTOR DOES NOT INTEND TO PRODUCE IN EVIDENCE

15.12 Prosecutors are reminded to make available to the defence the names, and if authorised under s 17 Criminal Disclosure Act 2008, the addresses of all those who have been interviewed who are able to give evidence on a relevant subject but whom the prosecution does not intend to call, irrespective of the prosecutor's view of credibility. It is for the prosecutor to decide whether the evidence is "relevant". "Relevance" is defined in s 8 Criminal Disclosure Act 2008 as meaning "... information or an exhibit ... that tends to support or rebut, or has a material bearing on, the case against the defendant".

CHARACTER OF WITNESSES

15.13 Before all defended trials the prosecution has a duty to disclose any previous convictions of a proposed witness where credibility is likely to be in issue and the conviction could reasonably be said to be relevant or affect credibility (*Wilson v Police & Anor* [1992] 2 NZLR 533 (CA)).

15.14 For trials on indictment an enforcement agency entitled to access criminal record databases should do so as a matter of course. If the enforcement agency is in doubt about whether a conviction should be disclosed, counsel's advice should be taken. Any list of convictions should be supplied a reasonable time before trial. If the prosecuting agency intends to withhold details of convictions, the defendant should be notified in sufficient time to enable rulings to be sought from the trial court.

DISCLOSURE OF ANY INDUCEMENT OR IMMUNITY GIVEN TO A WITNESS

15.15 The defendant must always be advised of the terms of any immunity from prosecution given to any witness. Likewise the existence of any other factor which might operate as an inducement to a witness to give evidence should be disclosed to the defendant. This includes the fact that the witness has been paid for providing information (*R v Chignell* [1991] 2 NZLR 257).

IDENTITY OF INFORMER

15.16 There will be good reason for restricting disclosure where the identity of an informer is at stake. The general principle is that the identity of an informer may not be disclosed unless the Judge is of the opinion that the disclosure of the name of the informer, or of the nature of the information is necessary or desirable in order to establish the innocence of the defendant.

15.17 A statutory restriction on disclosure of the true identity of undercover police officers is contained in s 108 Evidence Act 2006.

MINOR OFFENCES

15.18 In the case of minor (as opposed to summary) offences, defined in s 20A(12) Summary Proceedings Act 1957, the prosecution must serve on the defence a notice of prosecution which will provide information in a brief form as to the essential nature of the charge and other relevant matters outlined in the section.

OBLIGATIONS OR REQUESTS UNDER OFFICIAL INFORMATION ACT 1982

15.19 Crown Solicitors are not subject to the Official Information Act 1982. While as a matter of practical convenience they may facilitate responses to requests for information, they are not as a matter of law obliged to do so. The responsibility to provide information rests on the Police or other enforcement agency, and requests made of a Crown Solicitor should be referred to them. The Crown Solicitor should be advised of all information supplied to other parties.

15.20 Personal information (i.e. that particular category of official information held about an identifiable person) is the subject of an explicit right of access, upon request, given to that person, unless it comes within some limited exceptions.

15.21 The effect of the Court of Appeal decision in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 is that the exercise of a defendant's right to personal information will not ordinarily prejudice the maintenance of the law (and fair trials).

15.22 The aim of pre-trial disclosure is to ensure fairness to the defendant and to achieve efficiency in the prosecution process. Bearing those aims in mind, any doubt as to whether the balance is in favour of, or against disclosure should be resolved in favour of disclosure.

"THIRD PARTY" DISCLOSURE

15.23 The Criminal Disclosure Act 2008 makes provision for a defendant to seek orders that a person other than the prosecutor disclose information likely to assist the defence. Section 26(1)(b) of the Act requires notice of the application to be served on the prosecutor and that person may be heard at a hearing under s 27 of the Criminal Disclosure Act 2008.

15.24 At any hearing the prosecutor, while mindful of the right to a fair trial, may make submissions that assist the Court on the question of the relevance or admissibility of the evidence sought and, particularly where a third party is unrepresented, remind the Court of any statutory or other values favouring the privacy or property rights of the third party.

CONTEMPT APPLICATIONS

15.25 In relation to a s 27 non-party disclosure hearing, any contempt application under s 29(6) of the Criminal Disclosure Act should be referred to the Deputy Solicitor-General (Criminal).

16. PLEA DISCUSSIONS AND ARRANGEMENTS

16.1 Principled plea discussions and arrangements have a significant value for the administration of the criminal justice system, including:

16.1.1 Relieving victims or complainants from the burden of the trial process;

16.1.2 Releasing the saved costs in Court and judicial time, prosecution costs, and legal aid resources to be better deployed in other areas of need;

16.1.3 Providing a structured environment in which the defendant may accept any appropriate responsibility for his or her offending that may be reflected in any sentence imposed.

16.2 The process of plea discussion and arrangement must not be initiated by the prosecutor. Any discussions should be between the prosecutor and defence

counsel, and not directly with the defendant. In any case where the defendant has waived their right to counsel, any question of appropriate charges should be dealt with by way of a sentence indication hearing.

16.3 The Solicitor-General, however, views it as appropriate for a prosecutor (with the approval of the relevant Crown Solicitor generally or in particular cases) to indicate to defence counsel a willingness to consult concerning disposition of charges by plea.

16.4 No plea discussion or arrangement should take place on the premise that the prosecutor will support a specific sentence. Any question of sentence will proceed on the basis of the prosecutor's obligation to the Court under Guideline 19.

16.5 Any plea arrangement must be properly recorded in a form capable of being placed before a Court. The prosecutor may not depart from the terms of an arrangement unless he or she has been materially misled by any information (from any source) as to the facts relied on in the plea discussions and the Solicitor-General agrees that it is appropriate in the circumstances to repudiate the arrangement in whole or in part.

16.6 The victim or complainant must be informed of any plea discussions and given sufficient opportunity to make his or her position as to any proposed plea arrangement known to the prosecutor. It is expected that prosecutors will establish or continue effective processes to manage the victims' expectations, consistent with the principle that while victims' rights are an integral part of the criminal justice system, ultimately the prosecutor must make decisions based on the public interest and interests of justice.

16.7 There is no principle that plea arrangements may not be contemplated in cases where the charge laid is "clearly supported" by the evidence. The overarching consideration is the interests of justice, however, it is not acceptable for the defence to offer or for the prosecutor to accept facts for the purposes of plea discussion that are misleading, or for either party to suppress relevant information that should properly be before the Court.

16.8 Any document in the nature of a summary of facts must contain a full and verifiable account of the charges laid and must not contain or omit any material fact for the purposes of any plea arrangement with the defendant.

16.9 No plea arrangement may be concluded in any case where the nature of the crime or the alleged offender is such that it is clearly in the public interest that the matter proceeds on the basis of the charges laid.

16.10 The current rule, that all plea arrangements in relation to murder charges must be approved by the Solicitor-General, is continued.

16.11 Where there is to be a sentence indication hearing, any plea arrangements should be notified to the presiding Judge.

17. THE PROSECUTOR AND TRIAL FAIRNESS

17.1 The duties of prosecutors in relation to the accused's right to a fair trial involve numerous and complex principles.

17.2 The principal areas where the duties arise are:

17.2.1 Disclosure. All Crown Solicitors and prosecutors must ensure they comply with the disclosure obligations contained in the Criminal Disclosure Act 2008.

17.2.2 In prosecuting. Prosecutors represent the public and the public interest. Presenting the prosecution case requires professionalism, objectivity and detachment that is also cognisant of the reasonable needs of any victims of the crime.

17.2.3 The prosecutor must not display what could appear to be a personal interest in the outcome, and must act with regard to the overarching values of a fair trial.

17.2.4 The prosecutor may be obliged to call a witness although that person adds little to the prosecution case but whose testimony may favour the defendant's case.

17.2.5 A prosecutor may call a witness who is likely to be declared a hostile witness if the prosecutor reasonably believes that cross-examination will be allowed by the Judge pursuant to s 94 of the Evidence Act 2006.

17.2.6 In trials on indictment the prosecutor should be prepared to assist the trial Judge on matters of fact or law in relation to any matter in the summing up, whether or not the matter relates to the prosecutor's case.

18. ASSISTANCE TO THE COURT

18.1 The obtaining of a conviction is a consequence, but not the purpose of a prosecution.

18.2 Without compromising their professional obligations and public responsibilities prosecutors should, where appropriate, assist the trial court in the fair, prompt and cost efficient disposal of criminal matters.

18.3 In particular, but without limiting the general obligation, prosecutors should be astute to ensure that:

18.3.1 The number of witnesses called at trial is reasonably necessary.

18.3.2 Courts continue to be given information and submissions of a standard upon which the Court can rely.

18.3.3 In the case of an unrepresented accused where there is no amicus the court is informed of any matter appearing to show that the accused is unable reasonably to conduct his or her case.

18.3.4 The summing up is free from errors of fact or law irrespective of whether the particular point was more properly one for the accused's trial counsel to make.

19. THE PROSECUTOR AND SENTENCING

19.1 Prosecutors must take account of the Practice Note of 21 May 2003, *Sentencing*, issued by the Chief Justice and the Chief District Court Judge.

19.2 The prosecutor must file a sentencing memorandum that draws the attention of the Court to the proven facts of the case and any binding or relevant sentencing principles. The memorandum should include a full submission as to the proper sentencing options.

19.3 While counsel for the prosecution should not press for a particular term of imprisonment or any other sentence, the prosecutor should ensure that the sentencing court is aware of:

19.3.1 Any applicable principles from the Courts;

19.3.2 All proven aggravating factors including the convicted person's criminal record; and

19.3.3 The impact on any victims of the offending.

19.4 Prosecutors must take account of the Practice Note issued by the Chief District Court Judge, *Committal Procedure in the District Court* (in force from 29 June 2009), paragraphs 13–20, as to the procedure for sentence indication hearings prior to committal or trial in the District Court.

20. PRINCIPLES RELATING TO INDICTMENTS

20.1 Guideline 5 sets out in general terms the respective powers and responsibilities of informants and Crown Solicitors.

20.2 The Crown Solicitor is responsible for the counts laid in an indictment, and the number of those counts.

20.3 The charges laid must be founded on the evidence disclosed in any depositions, and should reasonably reflect the criminality disclosed on the evidence.

20.4 The Crown Solicitor should ensure that the number of counts in an indictment whether or not arising from the same or related criminal acts are truly necessary to reflect the totality of the allegations or are necessary having regard to the test for prosecution.

20.5 The same principle should be applied to joinder of parties. Those to be indicted jointly should be joined only where joinder is necessary to put the full picture before the jury, or the person joined has played more than a minor role in the offending.

20.6 In decisions both as to joinder of counts or joinder of parties, the Crown Solicitor should take into account the cost of prosecuting multiple counts and parties in proportion to the seriousness of the offending and any likely sentence.

20.7 Where persons to be indicted are members of an organised criminal group that factor will be relevant to the joinder of parties.

21. PRE-TRIAL APPLICATIONS

21.1 The need for, and nature of, pre-trial applications brought by the Crown are, and will remain, a matter of judgement for the prosecutor. It is anticipated that in all such cases the Crown Solicitor will ensure through effective quality control mechanisms that all applications are justified in the circumstances at the time, are properly supported by the relevant law and evidence, and are filed in a timely fashion.

21.2 In relation to applications as to the admissibility of evidence under s 344A of the Crimes Act 1961, the prosecutor is not necessarily obliged to file an application if they believe there is no arguable case as to admissibility of the evidence in question.

21.3 Prosecutors must take account of the *Practice Note on Pre-Trial Applications in High Court and District Court Criminal Jury Cases* of 5 November 2007 issued by the Chief Judges of the High Court and District Court.

22. JURY SELECTION

22.1 The Supreme Court judgment in *R v Gordon-Smith (No 2)* [2009] 1 NZLR 725 confirmed the lawfulness of the practice known as "jury vetting", whereby Crown Solicitors receive from the Police information about previous criminal convictions of those whose names appear on the jury panel, to assist in determining whether or not to challenge those people from becoming jurors.

22.2 It is to be noted that the practice of jury vetting does not apply to persons whose criminal convictions are covered by the Criminal Records (Clean Slate) Act 2004.

22.3 In *Gordon-Smith* the Supreme Court held that a Crown Solicitor should disclose to an accused any previous convictions of a potential juror known to the Crown, if the previous convictions give rise to a real risk that the juror might be prejudiced against the accused or in favour of the Crown. Disclosure is otherwise not required.

23. RETRIALS AND STAY OF PROCEEDINGS

23.1 The common law right of the Attorney-General to intervene in the prosecution process and to stay any prosecution from proceeding further is recognised in ss 77A and 159 of the Summary Proceedings Act 1957 and s 378 of the Crimes Act 1961.

23.2 In New Zealand the power to stay has been sparingly exercised. That conservative approach is likely to continue.

23.3 Generally speaking the power of entering a stay will be exercised in three types of situation:

23.3.1 Where a jury has been unable to agree after two trials. After a second disagreement the Crown Solicitor must refer the matter to the Solicitor-General for consideration of a stay. A stay will normally be directed unless the Solicitor-General is satisfied that some event, not relating to the strength of the Crown's case, brought about one or both of the disagreements, or that new and persuasive evidence would be available on a third trial, or that there is some other exceptional circumstance making a third trial desirable in the interests of justice.

23.3.2 If the Solicitor-General is satisfied that the prosecution was commenced wrongly, or that circumstances have so altered since it was commenced as to make its continuation oppressive or otherwise unjust, a stay will be directed.

23.3.3 A stay will be directed to clear outstanding or stale charges or otherwise to conclude unresolved charges; for example, where an offender has been convicted on serious charges but a jury has disagreed on other less serious charges, or a convicted person is serving a substantial sentence and continuing with further charges would serve no worthwhile purpose.

23.4 The possible circumstances which may justify a stay under Guidelines 23.3.2 and 23.3.3 above are variable. In general terms, however, the same considerations will apply as are involved in the original decision to prosecute, always with the overriding concern that a prosecution not be continued when its continuance would be oppressive or otherwise not in the interests of justice.

24. APPEALS FROM THE SUMMARY JURISDICTION

QUESTIONS OF LAW

24.1 Prosecutors may appeal only on questions of law from a decision dismissing an information following a summary hearing. The appeal provisions of s 107 of the Summary Proceedings Act 1957 are not intended to create a right of appeal based on the merits of the case.

24.2 There must be a question of law that:

24.2.1 Was a significant factor in the disposition of the case; and

24.2.2 Has sufficient public interest to engage the High Court or Court of Appeal.

24.3 Any prosecutor who is acting for a Government agency must obtain the consent of the Solicitor-General before lodging an appeal against a decision from a summary hearing.

24.4 The prosecutor must provide the Solicitor-General with:

24.4.1 The decision to be appealed;

24.4.2 Where that is not reasonably available, a full note of the issue for appeal and background to the prosecution;

24.4.3 The proposed draft question of law; and

24.4.4 All relevant circumstances of the prosecution going to the public interest in appealing to the High Court.

SENTENCE

24.5 Prosecutors may appeal against sentence only with the consent of the Solicitor-General pursuant to s 115A of the Summary Proceedings Act 1957. This applies to sentences imposed after summary conviction on indictable matters where the sentence does not exceed 5 years' imprisonment and/or a fine of $10,000.

24.6 Appeals will not be filed unless the sentence imposed is, in all of the circumstances, plainly inadequate or contrary to principle.

24.7 In considering whether a sentence is plainly inadequate the prosecutor must take into account the settled principle that the court in allowing such an appeal will increase the sentence only to the lower end of the applicable sentencing range.

24.8 Where the appeal is to be taken on the grounds of error of principle it will be necessary to:

24.8.1 Identify the principle; and

24.8.2 Demonstrate either:

- that the principle is one of application beyond the facts of the particular case, or
- the sentence has brought about an unfairness having regard to sentences imposed on co-offenders, or in similar cases where the offenders are serving a term of imprisonment.

24.9 For the purposes of considering an application for consent to appeal against sentence the Solicitor-General must, as soon as practicable after sentence is imposed, be provided with:

24.9.1 The charges in issue;

24.9.2 The notes of evidence or a full summary of facts;

24.9.3 Copies of pre-sentence reports and information placed before the sentencing judge;

24.9.4 The Judge's reasons for the sentence or a full account of those reasons;

24.9.5 An opinion from the relevant Crown Solicitor as to the merits of the proposed appeal, or from the prosecutor through that person's supervisor in the case of a summary prosecution.

24.10 The time limit for appeals against sentence from the summary jurisdiction is 28 days, and extensions of time will be contemplated only in very special cases. Time is therefore of the essence in seeking the necessary statutory approval.

25. APPEALS: PRE-TRIAL RULINGS

25.1 No appeal against a pre-trial ruling may be taken without the prior approval of the Solicitor-General.

25.2 In seeking such approval the Crown Solicitor shall forward to the Crown Law Office:

25.2.1 The pre-trial ruling;

25.2.2 Any notes of evidence taken at a *voir dire*;

25.2.3 A copy of the submissions as to law and fact made at the pre-trial hearing;

25.2.4 Where it is not evident, a note of the importance of the evidence to the prosecution case.

25.3 The Crown Solicitor should be aware of the amended rules under the Court of Appeal (Criminal) Rules 2001 which require more detailed information in relation to leave applications, in designated formats, than was previously the case.

25.4 Under Rule 5B(3) an application by a prosecutor for leave to appeal must be made by way of notice under Form 1B which requires detailed reasons. Rule 5C requires that the respondent who is served with the notice of application for leave to appeal must respond within 5 working days by way of reply memorandum, and consent or oppose the application with reasons.

25.5 It is would therefore assist the Solicitor-General if the Crown Solicitor sets out in a cover letter, with the above documentation, the reasons for leave, or the reasons why the Solicitor-General as respondent should consent to or oppose the leave application.

25.6 Prosecutors should also be aware of the 10 day time limit to file notification of a leave to appeal application under s 379A of the Crimes Act. Notice must be given within 10 days (not "working days") after the decision of the Court is given, irrespective of whether reasons for the decision are given at a later date, or whether any further steps are required in respect of the decision. Often a critical factor in relation to these appeals will be the trial date and any reason why the trial may not be adjourned.

25.7 The provisions of this Guideline with necessary modifications apply to appeals on a question of law, following the discharge of an accused or stay of prosecution, as provided under s 381A of the Crimes Act 1961.

25.8 Section 381A(2) provides that the prosecutor must apply as soon as reasonably practicable after the Judge gives their reasons for the direction, and in no case later than 10 days after the reasons have been given. If an application is made to the Judge after the 10 day period, it is unlikely to be entertained.

26. APPEALS: SENTENCE (INDICTABLE)

26.1 Appeals against sentence must by law be the subject of a leave application in the name of the Solicitor-General. In seeking the exercise of this power prosecutors must take into account:

26.1.1 A sentence will be increased on a Solicitor-General appeal only where it is plainly inadequate;

26.1.2 Any increase will take the sentence imposed only to the lower end of the correct available range;

26.1.3 However, despite 26.1.2 above, an appeal may be justified where the appeal involves an important matter of principle, or the case is to be taken to establish or modify a sentencing guideline judgment.

26.2 Prosecutors should forward to the Solicitor-General:

26.2.1 The sentencing notes;

26.2.2 Any relevant evidence;

26.2.3 The report before the sentencing judge;

26.2.4 All the submissions on sentence made before the sentencing judge.

26.3 In the case of proposed sentence appeals in the indictable jurisdiction, there must be a clear indication that the relevant Crown Solicitor has reviewed and endorsed the application to the Solicitor-General.

26.4 The time limit for all appeals against sentence in the indictable jurisdiction is 28 days, and extensions of time will be contemplated only in very special cases. Time is therefore of the essence in seeking the necessary statutory approval.

27. APPEALS: RESERVING QUESTIONS OF LAW

27.1 Pursuant to s 380 of the Crimes Act 1961 the prosecutor may seek to have a question of law reserved by a trial judge. For jurisdictional reasons the question must be reserved (although not stated) while the defendant is in the charge of the jury. It is the obligation of the prosecutor to ensure that the point to be reserved is:

27.1.1 A question of law; and

27.1.2 Of sufficient importance to reserve either:

- because of its public importance; or
- the seriousness of the counts to which the question relates.

27.2 If the Court of Appeal in consequence of the s 380 procedure orders a new trial the provisions of Guideline 6 will continue to be relevant.

28. RELATIONSHIP BETWEEN CROWN SOLICITORS AND ENFORCEMENT AGENCIES

THE POLICE OR OTHER INVESTIGATOR

28.1 Crown Solicitors appear in the criminal courts in two distinct capacities, namely on instructions from an informant or, after committal, as the Crown's representative.

28.2 In summary hearings or committal hearings any appearance of the Crown Solicitor or his or her prosecutors will be on the instructions of the informant.

28.3 In this capacity, the Crown Solicitor must still act in accordance with the applicable guidelines as if prosecuting on indictment.

28.4 While the Crown Solicitor appears on instructions, it is the Law Officers' expectation that informants who are Government agencies will be bound to follow the advice of the Crown Solicitor as to the nature of the charges and conduct of the prosecution.

28.5 Where the informant is a member of the Police, the relationship between that person and the Crown Solicitor shall be in accordance with protocols issued as part of these Guidelines.

RECIPIENTS OF ADVICE

28.6 Due to the increasing complexity of the criminal law and considerations arising from the New Zealand Bill of Rights Act 1990, many criminal or regulatory investigations will require specialised legal advice from the earliest stages.

28.7 In this regard, Crown Solicitors are expected to have and maintain sufficient capacity to give advice as and when necessary, and to develop and maintain

appropriate relationships with the locally based Government agencies and Police to ensure effective legal advice is sought and given.

28.8 In giving investigative advice, the solicitor-client relationship is modified to the extent that the investigators to whom the advice is directed are expected to act in accordance with that advice.

THE POLICE: POST-COMMITTAL

28.9 Once a defendant has been committed for trial, all decisions in relation to disclosure, the charges laid, the evidence to be adduced, the conduct of the prosecution and the nature and scope of any continuing investigation (where it is probable that will result in evidence or information relevant to the trial) are matters solely for the Crown Solicitor to decide.

28.10 In the discharge of this responsibility, Crown Solicitors are expected to consult closely with the officer in charge of the case and to explain the basis of any significant decision.

29. VICTIMS

29.1 Victims of crime in the criminal justice system are to be:

29.1.1 Treated with courtesy and compassion; and with

29.1.2 Respect for their dignity and privacy.

29.2 The key means of observing these principles is through the provision of information to ensure that victims understand the process and know what is happening at each stage. So far as is possible, the victim should have explained to them the court processes and procedures, and should be kept informed of what is happening during the course of the proceedings.

29.3 Prosecutors should seek to protect the victim's interests as best they can whilst fulfilling their duty to the Court and in the conduct of the prosecution on behalf of the Crown.

29.4 Crown Solicitors are referred to the protocol "Victims of Crime – Guidance for Prosecutors" (reissued with these Guidelines) for greater detail as to the role and duties of prosecutors in respect of victims.

30. MEDIA

30.1 When communicating with the public through the media, prosecutors are to ensure that they:

30.1.1 Avoid making remarks that may prejudice fair trial interests;

30.1.2 Support the administration of justice and the integrity of the criminal justice system;

30.1.3 Respect the principle of open justice;

30.1.4 Recognise the public interest in receiving accurate information about the criminal justice system and criminal prosecutions; and

30.1.5 Treat victims of crime with courtesy and compassion, and respect their dignity and privacy.

30.2 Crown Solicitors are referred to the document "Media Protocol for Prosecutors" (reissued with these Guidelines) for greater detail as to the role and duties of prosecutors in respect of the media.