



Ministry of

Fisheries

Te Tautiaki i nga tini a Tangaroa

PROSECUTION AND APPEAL STANDARDS AND PROCEDURES

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Responsibility: National Manager Fisheries Compliance

Introduction

Purpose The purpose of this policy statement is to establish standard procedures to be followed by Compliance staff in making decisions to prosecute, and recommending appeals. It also establishes standards to be met by prosecutors in any Ministry prosecution.

Scope

- This policy shall be followed by all Ministry of Fisheries Compliance Business staff involved in the preparation for, and conduct of, prosecutions relating to Acts administered by the Ministry of Fisheries, and related prosecutions,
- The prosecutor standards shall be adhered to by all prosecutors acting for the Ministry of Fisheries.

Legal

- State Sector Act 1998
- Fisheries Act, 1996 and 1983

Structure of Policy Statement This CPS is structured as follows:

- Chapter 1 Policy
- Chapter 2 Conduct of prosecution
- Chapter 3 Prosecutor standards and procedures
- Chapter 4 Appeals

Definitions

NMFC	National Manager Fisheries Compliance
MSS	Manager Surveillance Services
MIS	Manager Investigation Services
IM	Investigations Manager
DCM	District Compliance Manager
CFP	Chief Fisheries Prosecutor
SFP	Senior Fisheries Prosecutor
FP	Fisheries Prosecutor
DM	Decision Maker - the manager acting under appropriate delegated authority who makes the decision to prosecute, warn, discontinue or not prosecute

Chapter 1 – Policy: Decision to Prosecute

Decision to Prosecute

1. This policy statement applies to all cases involving alleged offences under New Zealand Fisheries legislation and associated regulations, except for the regulatory offences dealt with under CPS 7A.
2. Before any person is prosecuted for a breach of fisheries law, two separate decisions must be made:
 - (a) Is it appropriate to prosecute in the circumstances of the case?; and
 - (b) Is there sufficient evidence to succeed with a prosecution?
3. Where a breach of fisheries law is detected, the decision on what further action, including the decision to issue a written warning or to prosecute, shall be made by either the NMFC, MIS, MSS or DCM or IM acting under delegated authority.

The decision as to whether there is sufficient evidence to support a prosecution shall be made by an SFP or FP.

4. In domestic fisheries matters¹ the prosecution decision maker will be the MIS or MSS.
5. In international fisheries² matters the prosecution decision maker shall be the NMFC.

Prosecutions under other legislation

6. No Ministry employee may lay an information alleging offences against other than that specified in paragraphs 4 and 5, or conduct any prosecution in respect of such an information unless the prior written advice of the Chief Fisheries Prosecutor (CFP) has been obtained and approval given by MIS or MSS.

Before any SFP requests a Crown Solicitor to commence indictable proceedings against any person, that SFP shall consult with at least one other SFP or the Chief Fisheries Prosecutor.

¹ Cases involving alleged offences against the Fisheries Act 1983, the Fisheries Act 1996, the Marine Farming Act 1973 and related regulations, other than regulations to which CPS 7A applies, other fisheries legislation administered by the Ministry (except cases involving foreign licensed fishing vessels, foreign nations, foreign registered companies or cases involving New Zealand registered vessels registered pursuant to Section 57(8) of the Fisheries Act 1983).

² (a) Offences against the Territorial Sea and Exclusive Economic Zone Act 1978, the Driftnet Prohibition Act 1991, or regulations made under these Acts, or

(b) Offences involving foreign fishing vessels, foreign registered companies, foreign nationals or vessels registered pursuant to Section 57(8) of the Fisheries Act 1983.

Civil action 7. Any civil action taken against the Ministry in the course of a fisheries prosecution shall be managed by the Manager, Legal Services with appropriate support from the Compliance Business.

Delegation of prosecution decision-making 8. Where the NMFC, MIS or MSS is satisfied that it is appropriate to do so, he/she may, generally or in respect of a particular case or class of cases, delegate the responsibility to make prosecution decisions, to a named third tier manager (MIS, MSS), or fourth tier manager (DCM, IM) as the case may be.

Each such delegation shall be in writing, specifying the case or class of cases to which it relates and the conditions and guidelines relating to that delegation. The delegation may be withdrawn at any time.

The NMFC, MSS, MIS remains accountable for all prosecution decisions, including those of their delegates, and must have adequate administrative systems in place to enable timely and effective monitoring and auditing of all prosecution decision-making.

Process and criteria for delegation The following process and criteria establishes the basis on which delegated authority to approve prosecutions may be given to a fourth tier manager.

Process 9. Process

- (a) A DCM, IM or other fourth tier manager may request delegation to make prosecution decisions.
- (b) The MSS or MIS may delegate to any DCM or IM or other fourth tier manager the ability to make prosecution decisions.
- (c) The MSS or MIS will provide in writing reasons to the respective IM, DCM or other fourth tier manager why delegation to approve prosecutions is not given.
- (d) The decision to delegate prosecution decision-making will be made on the criteria outlined in 9(a)-(f) below.
- (e) DCMs, IMs or other fourth tier manager should note the contents of Section 10 of the policy, in particular 10(a).
- (f) Where a DCM, IM or other fourth tier manager cannot satisfy the criteria in 10(a), the file shall be referred to the respective MSS or MIS for a prosecution decision.

Criteria 10. Criteria

- (a) The DCM, IM or other fourth tier manager must have been appointed to his/her **current** position for more than 12 months and overall performance in that position has been assessed as satisfactory.
- (b) A high level of demonstrated competence and understanding of legal knowledge, case file management and decision-making skills together with sound judgement skills as assessed by the MIS or MSS.
- (c) A satisfactory analysis of the previous 10 case files from the DCM's, IM's are compared with the DCM's, IM's or fourth tier manager's recommendation with the MSS or MIS final decision.

- (d) The comments, if any, made by the SFP or Crown Solicitor in relation to the file construction and factual backing for prosecution recommendations and charges for the above 10 previous case files.
 - (e) Information provided by the DCM, IM or fourth tier manager in support of any request for delegation authority to make prosecution decisions.
 - (f) The quality of warning decisions made by the DCM or fourth tier manager under delegation during the past 12 months.
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Decision-making procedure

11. Every person making a decision to prosecute must comply with the following procedures and standards;
- (a) The decision must be based only on information contained in the case file.
 - (b) The decision-maker:
 - (i) Must not have had any “significant involvement”³ in the preparation of the case file.
 - (ii) Must be satisfied that all relevant information has been obtained and that the file is prepared to a satisfactory standard.
 - (iii) Must consider whether prosecution is, in the circumstances, the most appropriate course of action to influence future compliance with New Zealand fisheries law.
 - (iv) Must have considered, and applied, the current Crown Law prosecution guidelines issued by the Solicitor General.
 - (v) Must record, and place on the case file, the reasons for the decision to prosecute or not.
 - (vi) Must address each and every element of this section including the specific Crown Law guidelines by way of check list annexed to the decision-making report.

Where a decision is made to issue a written warning, reasons for that decision must be placed on file.

Concurrence of SFP

12. Where the decision-maker, having applied the standards outlined in Section 11, considers that prosecution is appropriate, she/he shall refer the file to the SFP or FP for advice. The SFP or FP may give advice on any legal issue raised by the file and shall provide written advice on whether there is sufficient evidence to proceed with the prosecution, and if there are any other legal deficiencies in the file.

In cases under the Acts specified in 5 above, the NMFC shall, in addition to referring the case file to the CFP or SFP for advice, also obtain advice from the Chief Legal Advisor, Ministry of Foreign Affairs and Trade.

³ “Significant involvement” in the preparation of the case file means the personal involvement in gathering evidence, discussing evidence with witnesses, alleged offenders, or other parties who may be perceived to have a vested interest in the decision, handling or collating of exhibits and any other operational decisions relating to the case. It does not include the allocation of staff and resources to the case and the general management of staff.

No information shall be laid unless:

- (a) There is agreement between the decision maker, and the SFP, FP on the persons to be charged and the charges to be laid; or
- (b) In any case where the decision maker and the SFP, FP are unable to concur and the decision maker wishes to proceed with one or more informations, the file shall be referred to the decision maker's immediate manager for a decision; or
- (c) The NMFC so directs after taking advice from the CFP.

Accountability

13. Once the decision to prosecute is finalised, the accountability for legal issues in connection with the prosecution file passes to the SFP. In particular, the SFP is responsible for:

- (a) Determining the wording of the information(s);
 - (b) Ensuring the prosecution file is prepared to an appropriate standard;
 - (c) Instructing a non-Ministry prosecutor if necessary;
 - (d) Monitoring progress of the prosecution; and
 - (e) Providing or facilitating support for any non Ministry prosecutor.
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Chapter 2 – Conduct of the prosecution

Conduct of Prosecution

1. Once the decision to prosecute is made, the decision as to who will conduct the case will be made by the SFP.
 2. Unless the SFP instructs a prosecutor outside the Ministry, all prosecutions in a region will be carried out by the SFP, a Fisheries Prosecutor, or, where the MSS or MIS agrees, a Fisheries Officer under the direction of a SFP.
 3. Every prosecutor acting on behalf of the Ministry, whether an employee or otherwise, must comply with the Prosecutor Standards and Procedures outlined below in Chapter 3.
 4. The CFP shall put in place a process to identify cases which may present significant risk to the Ministry. These shall include large and/or technically complex cases, cases involving major fishing enterprises, international cases or cases involving the use of well resourced defence teams.
 5. In such cases the CFP shall ensure an appropriate level of legal representation including the use of one or more Crown Solicitors or Queens Council's supported by a strong MFish legal and operational team.
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Chapter 3 – Prosecutor standards and procedures

- Scope** Except as otherwise provided in this policy statement, the prosecutor has the authority to conduct the prosecution in the manner she/he considers best.
- Ethical requirements and codes**
1. Prosecutors appearing for the Ministry are expected to observe all relevant ethical requirements and codes of practice as set by the New Zealand Law Society or the Solicitor General. If a prosecutor considers that, either generally or in a particular case, there is a conflict between the obligation under this clause, and those imposed by other clauses, the prosecutor should advise the instructing SFP immediately, in order that the Solicitor General's advice can be obtained.
- File review**
2. The prosecutor is responsible for reviewing the completed prosecution file to ensure that it is sufficiently detailed and documented to support a successful prosecution of the informations to which it relates.
- Familiarity with charges**
3. The prosecutor must, prior to the hearing, be familiar with the charges, the facts (including Briefs of Evidence certificates, etc) and with any legal issues (e.g., admissibility of evidence) likely to arise during the case, including issues of which the prosecutor has been notified of by the instructing Senior Fisheries Prosecutor or defense council.
- Every completed prosecution file must be prepared to the extent necessary to enable the Ministry prosecution standard to be met.
- File defects**
4. Every prosecutor who (except where the instructions clearly show the case is a 'test' case) receives a completed file of a lesser standard, shall immediately notify the OIC (and where the standard is substantially less than required, the SFP), with details of the file defects and advice for improvements or further enquiry.
 5. The Ministry prosecution standard requires that at the commencement of a prosecution, it is highly probable that a competent prosecutor could, by relying on the file and the evidence contained in it, obtain convictions for all charges laid (except those laid in the alternative).
- Consultation**
6. The prosecutor shall ensure that there is effective and timely consultation in respect of the case:
 - (a) With the OIC on matters of file preparation and presentation; and
 - (b) With the instructing SFP on any legal issues that could affect the prosecution.
- Certification provisions of Fisheries Act**
7. Prosecutors shall employ, except where inappropriate or instructed otherwise, the certification provisions of the Fisheries Act 1996 and 1983, in proving, or negating matters relevant to the prosecution.

- Level of Counsel Expertise**
8. Where the case is conducted by someone other than the instructed prosecutor by the SFP, it is the responsibility of the instructed prosecutor to ensure that the prosecutor has a sufficient level of expertise to conduct the case, or is effectively supervised by Counsel with sufficient expertise. This includes situations where agents are employed in other areas.
- Obligations to keep RFP/SFP informed**
9. Prosecutors are expected to be familiar with relevant fisheries legislation and case law or to have approached the instructing SFP for assistance/
10. The prosecutor should ensure that all correspondence relevant to the preparation and administration of the prosecution is forwarded to the OIC, and all correspondence related to the conduct of the case (e.g., adjournments, proposals for changes in charges or pleas, preliminary legal issues) is forwarded to the instructing SFP in a timely manner to ensure that both the OIC and SFP are kept adequately informed, and are able to carry out their responsibilities.
- Resolution of prosecution**
11. Prosecutors (other than SFPs) may only appear in any prosecution, on behalf of the Ministry of Fisheries, if instructed to do so by a SFP. A general authority may be issued by an SFP to FP where appropriate.
12. Except as otherwise instructed, the authority to accept, on behalf of the Ministry, any proposal for resolution of a prosecution, remains with the prosecution decision-maker who shall seek advice from the prosecutor.
13. No appeal is to be initiated or defended on behalf of the Ministry unless:
- (a) The instructing SFP has been notified and agrees; and
 - (b) In the case of Crown initiated appeals the approval of the Solicitor General is obtained.
 - (c) The procedure in Chapter 4 of this policy has been complied with.
- Engaging agents**
14. Where agents have to be engaged (e.g., where proceedings are adjourned to another area), a suitable prosecutor from another Crown Solicitor's Office should be instructed. If that is not possible, further instructions should be sought from the instructing SFP.
- MFish approach**
15. Unless the instructing SFP specifies otherwise, the decision as to which charges shall be laid and against whom, rests with the prosecutor.
16. When appearing on the Ministry's behalf, prosecutors shall have regard to, and apply, the following Ministry approach to prosecutions and sentencing:
- (a) Notwithstanding the strict liability provisions of the Fisheries Act, and Ministry takes an active stance on the need to negate defences;
 - (b) The prosecutor should take an active role in assisting the Court on relevant case law and legal principles to be applied. This includes the presentation of written submissions where appropriate;
 - (c) Where forfeiture will occur as a consequence of conviction, the prosecutor should produce a schedule of forfeit items;

- (d) Prosecutors should oppose applications for non-forfeiture orders based on “special reasons”, unless instructed otherwise by the instructing SFP. Prosecutors should ask defence counsel if any such application is intended and, where a prosecutor considers grounds exist for such an order (either because of his/her own views or those put forward by defence counsel), instructions should be sought from the instructing SFP.
- (e) The Ministry takes an active role on sentencing and the need to put relevant sentencing material before the Court in order that nationally consistent and appropriate penalties are imposed.

**Prosecution
report**

17. The prosecutor shall, within five days of the completion of the prosecution, provide a prosecution report, in the Ministry standard format, on the result.

The result shall, in the case of a non-Ministry prosecutor, be supplied to the instructing SFP, and in the case of a Ministry prosecutor, be supplied to the OIC.

Where any oral decision relating to the determination of a point of law has sentencing precedent value or contains contentious rulings that may be subject to appeal, the prosecutor should seek to have the decision typed up.

**Accounts
payment**

18. All accounts, for payment for prosecutions taken on behalf of the Ministry, should be directed to the instructing SFP. In prolonged or lengthy cases invoices should be submitted on a regular basis to avoid a single large invoice at the completion of the case.
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Chapter 4 – Appeals

- Appeals by the defendant**
1. Any non-Ministry prosecutor who receives notice of an appeal filed by a defendant, in a case originally prosecuted for the Ministry by that prosecutor, shall immediately inform the instructing SFP.
 2. Where a case was prosecuted by a non-Ministry prosecutor, SFP, the appeal should be conducted by that prosecutor unless the considers the Ministry's aims would be better served by another solicitor conducting the appeal, in which case the SFP should consult with the CFP before advising the outside prosecutor on who will conduct the Ministry's case as respondent.
 3. The instructing SFP shall advise the non-Ministry prosecutor, as soon as practicable after receiving notice of the appeal, whether the Ministry wishes to conduct the appeal or not.
 4. If the appeal is to be conducted by the SFP, it is the responsibility of the SFP to ensure that Crown Law approval is obtained unless prior general approval has been given.
- Appeal by the Crown**
5. No appeal shall be commenced on behalf of the Crown, whether by a Ministry prosecutor or otherwise, in respect of a District Court or High Court decision on fisheries matters, unless the procedure outlined below has been complied with and the written approval of the Solicitor General or his delegate has been obtained.
- Procedure to obtain approval from Solicitor General for permission to appeal**
- 6.1 Either the NMFC, MIS, MSS, SFP may initiate a request for approval to appeal.
 - 6.2 The initiator of the request is responsible for preparing a file to accompany the request. The file must contain:
 - (a) A comprehensive report on the decision to be appealed.
 - (b) A statement of the proposed ground(s) of appeal.
 - (c) Details of the alleged errors in the judgement to be appealed.
 - (d) Risks and benefits to the Ministry of conducting an appeal.
 - 6.3 The decision on requests for appeal approval will be made by the CFP, after discussion within an appeal panel which consist of:
 - (a) A SFP.
 - (b) The MIS, or MSS, or NMFC.
 - (c) The CFP or her/his delegate.

6.4 The appeal panel may meet through tele-conference and the CFP shall place on the file a written record of reasons for the appeal decision.

6.5 Where the panel agrees an appeal is appropriate, it is the responsibility of the SFP who originated the request to prepare and deliver the request for approval to the Solicitor General. The file sent to the Solicitor General must contain at least all the information placed before the appeal panel.

6.6 Where the Solicitor General's approval to appeal is obtained, the SFP shall:

- (b) In consultation with the CFP and subject to para 6.7, determine whether outside counsel should conduct the appeal.
- (c) Prepare the appeal file and circulate submissions to SFPs and CFP for comment, and
- (d) Obtain Solicitor General approval to act unless a general approval already exists.

6.7 Where outside counsel has acted in the case under appeal, that counsel (or other suitably experienced counsel from a Crown Solicitor firm) should conduct the appeal. The Solicitor General's opinion on suitable counsel shall be obtained:

- (a) In all appeals from High Court decisions.
- (b) Where a SFP wishes to conduct an appeal from a case prosecuted by outside counsel.

6.8 Reports – Every prosecutor shall, on receipt of the appeal judgement, complete a report on the case in the Ministry standard format. The report and a copy of the judgement shall be supplied within five days to:

- (a) In the case of a Ministry prosecutor, each SFP, the OIC, MIS, MSS and the CFP.
 - (b) In the case of an outside prosecutor, the instructing SFP.
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