

November 2023

How we make prosecution decisions

This policy's purpose

This policy sets out our approach to prosecution, including our decision-making process. It applies to all criminal prosecutions we take under the legislation we enforce.¹

The policy should be read alongside these policies:

- [When we intervene](#)
- [How we investigate](#)
- [How we make enforcement decisions](#)
- [Prosecution publishing](#)

Our prosecution decisions:

- comply with legislation
- are made by a delegated decision maker
- are made independently and free from improper influence and undue pressure from any source³
- take relevant policies and guidance into account
- are consistent
- are fair and reasonable
- are evidence-based and proportionate
- are timely, and
- are documented and transparent.

Our approach to prosecution

We follow the [Solicitor-General's Prosecution Guidelines](#) when we make decisions about prosecutions.

In general, we're guided by our regulatory approach. This approach is set out in our policy *How we make enforcement decisions*. The exception to this is the initial decision to prosecute. The decision maker doesn't consider regulatory risk as a factor in this decision.² This protects the independence of the prosecutor.

We may take 'no harm' prosecutions, where although no one was harmed, the risk's seriousness means it should be addressed by prosecution.

Specific public interest considerations

When we consider the public interest, we include our enforcement priorities and specific public interest considerations that relate to our regulatory role. Our enforcement priorities are set out separately as they change over time.

Our specific public interest considerations are:

- where noncompliance has resulted in serious harm or death
- reckless and/or negligent disregard for health and safety requirements
- work carried out, or supply or use of a product, without appropriate authorisation or licence or in serious noncompliance with a safety case

¹ Our legislation includes Health and Safety at Work Act 2015 (HSWA), Hazardous Substances and New Organisms Act 1996, Electricity Act 1992, Gas Act 1992, and associated regulations.

² Regulatory risk is the risk to us in failing to achieve our regulatory objectives. This is also known as 'political risk' because if we fail to achieve our regulatory objectives people will lose confidence in us as a regulator.

³ Independence in this context means "freedom from undue or improper pressure from any source, political or otherwise"(Solicitor-General's [Prosecution Guidelines](#) p.6).

- a duty holder's standard of managing health and safety is found to be far below what's required by legislation and creates significant risk
- adverse conduct for a prohibited health and safety reason under Part 3 of HSWA
- a provisional improvement notice, which an inspector hasn't been required to review and hasn't been complied with
- a breach of a worker participation or engagement duty is considered to have contributed to a death or serious injury, or the risk of death or serious injury
- failure to comply with a notice, direction, instruction, or requirement given by WorkSafe operational staff, especially where the risk that was subject to it:
 - still exists, or
 - wasn't remedied until a significant time after the date specified in the notice, direction, instruction, or requirement
- coercion or inducement in breach of s92 of HSWA
- contravention of an enforceable undertaking
- obstruction of operational staff while exercising their statutory powers.

Where the evidential test is met, we weigh the relevant public interest factors and then decide whether or not the public interest is met.

How we make decisions about prosecutions

When we describe the decision-making process we refer to 'operational staff' and the 'operational decision maker'.

Operational staff include inspectors, investigators, technical officers, kaiarawhiti, those in principal and management roles, and subject matter experts.

The operational decision maker is in a role that has the delegation to make the appropriate decision and it is standard practice for someone in that role to use the delegation. In cases of public significance, it may be more appropriate for a delegated manager above the usual operational decision maker to make that decision. The operational decision maker may change during the prosecution process, depending on availability and requirements.

Operational staff make decisions about prosecution recommendations

When deciding whether to recommend prosecution, operational staff consider the evidential test, the public interest test, and WorkSafe's additional public interest factors. If they think prosecution is justified, they recommend this to the operational decision maker.

If there is sufficient evidence, but it might not be in the public interest to prosecute, operational staff may ask the operational decision maker for advice. Operational staff may also seek a legal opinion.

If the operational decision maker endorses the recommendation, the report and case file are referred to WorkSafe Legal. If the operational decision maker doesn't endorse the recommendation, they may send the file back for further work or for a different kind of intervention.

Legal decides whether the test for prosecution is met

Legal provides an independent view on whether the test for prosecution is met.

A lawyer carries out a written legal review of all investigation files being considered for prosecution to decide whether the test for prosecution is met. This includes the evidential test and the public interest test. A Legal manager or the Principal Legal Advisor (Litigation) reviews the advice. When the advice is finalised it is provided to operational staff, including the operational decision maker. Sometimes the legal review is carried out by an external lawyer.

Outcomes from the legal review on the test for prosecution

There are three possible outcomes after Legal provides advice about the test for prosecution, depending on whether operational staff agree with the legal advice. These are that Legal finds the test for prosecution:

- is met and the operational decision maker decides whether to take a prosecution
- isn't met and the operational decision maker agrees, and the file is closed, or
- isn't met but the operational decision maker doesn't agree.

When the test for prosecution is met

If the test for prosecution is met, the operational decision maker makes the final decision about whether to start a prosecution. The decision must be made by an operational decision maker who has the appropriate delegation.

The operational decision maker needs to consider whether taking this prosecution fits with current enforcement priorities.

Cases of public significance

At WorkSafe cases that are of public significance include fatalities. They may also include:

- offending against vulnerable victims, including children, the elderly, disabled people, and pregnant people
- cases where the prosecution decision is likely to be challenged by a victim or representative, a union, or employer organisation
- a notification of interest in knowing of enforcement action taken has been received, and
- cases with a high likelihood of media attention.

In cases of public significance, it may be more appropriate for a delegated manager above the usual operational decision maker to make the decision to start a prosecution.

When the legal advice is the test for prosecution isn't met but operational staff disagree

When operational staff disagree that the test for prosecution isn't met, they should work with Legal to try to find a resolution. If they can't resolve it together, operational staff may request a referral to the Principal Legal Advisor (Litigation) or an external lawyer for binding legal advice.

Legal and operational staff agree the charges

Legal and operational staff decide which charges to file as part of the decision to prosecute. They decide which legislation to file a charge under by considering the alleged conduct's nature and the charge that best reflects that conduct. Before a charge can be filed its content must be approved by the Chief Legal Advisor or delegate.

If Legal and operational staff can't agree on the charges, they follow the same process as disagreement on the test for prosecution.

Continuous review of the charges

Charges should be periodically reviewed by the prosecuting lawyer to determine whether they should continue, be amended, added, or withdrawn. Charges can be withdrawn if, for example, they are no longer supported by the evidence or are no longer considered to be in the public interest. A decision to withdraw or add charges must be made by the operational decision maker.

Amendments to the wording of a charge must be approved by the Chief Legal Adviser or delegate.

Decisions to amend a charge provision must be made by the operational decision maker and approved by the Chief Legal Advisor or delegate.

Legal and the operational decision maker offer or agree to a plea arrangement

All decisions to offer or agree to a plea arrangement must be approved by the Chief Legal Advisor or delegate. If approved, the decision to offer or agree to the arrangement is made by the operational decision maker.

Legal and the operational decision maker decide to seek or agree to withdrawal of charges

If the test for prosecution is no longer met the prosecution can't continue and the charges must be withdrawn. A decision to seek or agree to a withdrawal of charges must be approved by the Chief Legal Advisor or delegate. If this is approved, the decision to seek or agree to a withdrawal must be made by the operational decision maker. If the operational staff don't agree that the test for prosecution is no longer met, the matter must be referred to the Principal Legal Advisor (Litigation) or an external lawyer for a binding decision.

WorkSafe may assist the sentencing courts to assess sentencing options

We assist the sentencing court by providing information relevant to the Court's assessment of the appropriate sentencing outcome, when invited to do so. When making submissions we consider the case's circumstances and support a sentence that's consistent with the principles and purposes of sentencing. This includes:

- promoting accountability, responsibility and deterrence in the offender, and
- providing for victims' interests, including reparation.

If we submit reparations is an available sentence, we are acting as a prosecutor and not as an advocate for the victim or their whānau. This is distinct from our obligations under the Victims' Rights Act 2002, which we will meet.

We may also apply for other orders, such as name suppression or regulator's costs orders.

WorkSafe may decide to appeal

WorkSafe can appeal a:

- pre-trial ruling (with leave of the court)
- sentence imposed, and
- ruling by the trial court (on a question of law, with leave of the court).

As a public prosecutor, we must obtain the Solicitor-General's consent to bring an appeal. A decision to seek consent to appeal must be made by the Chief Legal Advisor.

Private prosecutions

We acknowledge private prosecutions are an important tool in the work health and safety system. They provide an opportunity for victims, their whānau, or other parties to take a prosecution when we do not. Our website has more information about private prosecutions. People are entitled to bring a private prosecution under HSWA in relation to an offence if:

- they have given us notice of their interest in knowing about any enforcement or prosecution action taken for a particular incident, situation, or set of circumstances
- neither WorkSafe nor any other regulatory agency has taken or intends to take any action, and
- we have notified them of this.

A private prosecution may also be taken with leave of the Court.

Working with victims

We keep victims informed about our decisions in line with:

- the Victims' Rights Act
- the Victims Code, and
- and the Solicitor-General's protocol Victims of Crime - Guidance for Prosecutors.

We're also guided by our policy [How we work with victims](#)

Media and publicity

We will publicise the outcome of a prosecution when appropriate. The delegated operational decision maker will lead this, working with Legal and communications staff.

For further information about the approach to media and publicity during and at the conclusion of a prosecution see our *Prosecutions publishing* policy, and the [Crown Law Media Protocol for Prosecutors](#)

Decision maker summary

DECISION	DECISION MAKER
Recommend prosecution	Operational decision maker
Test for prosecution is met	Legal ⁴
Start prosecution	Operational decision maker
Agree the charges	Legal and operational decision maker
Approve the charges	Chief Legal Advisor or delegate
Withdraw or add charges	Operational decision maker
Amend charge wording	Chief Legal Advisor
Amend a charge provision	Operational decision maker
Approve amendment to charge provision	Chief Legal Advisor or delegate
Approve decision to offer or agree to plea arrangement	Chief Legal Advisor or delegate
Offer or agree to a plea arrangement	Operational decision maker
Approval to seek or agree to withdrawal of charges	Chief Legal Advisor or delegate
Seek or agree to withdrawal of charges	Operational decision maker ⁴
Decision to seek consent to appeal	Chief Legal Advisor

⁴ See policy for next steps if the operational decision maker disagrees with Legal.