

Prosecution Policy

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Owner	Deputy Chief Executive Legal & Corporate
Approver	Chief Executive
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Objectives

1. The objective of this prosecution policy is to document the principles and processes relating to the Serious Fraud Office's (SFO) approach to prosecutorial decision-making and to support the SFO's statutory mandate to:
 - (a) facilitate the detection and investigation of cases of serious or complex fraud; and
 - (b) enable proceedings relating to such fraud to be taken expeditiously.

Policy statement

2. The decision to prosecute must be made in a transparent, consistent, and principled manner. The SFO makes all such decisions in accordance with *The Solicitor-General's Prosecution Guidelines* issued by the Crown Law Office – Te Tari Ture o te Karauna (**Prosecution Guidelines**).¹ Accordingly, this policy should be read together with the Prosecution Guidelines.
3. The SFO is a highly specialised law enforcement agency whose objectives and priorities include the deterrence and disruption of serious or complex fraud, including corruption and bribery, in order to protect New Zealand's economic and financial wellbeing. For the SFO, holding offenders to account by way of prosecution action (where appropriate) is essential to fulfilling these objectives and priorities.

¹ Crown Law Office – Te Tari Ture o te Karauna *The Solicitor-General's Prosecution Guidelines – Te Aratohu Aru a te Rōia Mātāmua o te Karauna* (January 2025) [**Prosecution Guidelines**].

4. The Prosecution Guidelines reinforce the independence of the Director as the prosecutorial decision-maker.² Section 30 of the Serious Fraud Office Act 1990 (**SFO Act**) also confirms this position. Additionally, the Director's decision to commence a prosecution is not reviewable by any court, further reinforcing the Director's prosecutorial independence.³

Scope

5. This policy sets out the approach of the SFO to prosecutions. It applies to any prosecution action being considered or undertaken by the Director of the SFO.
6. This policy should be read together with the Prosecution Guidelines.

Application

7. This policy applies to all designated members of the SFO,⁴ employees,⁵ and Panel Counsel.⁶

Definitions

Administrative fixture — a sitting of a court at any stage of the proceedings that does not

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- (a) result in an interim or final judgment, ruling or decision of the court but excluding any sitting where an order of the court is reasonably expected to be made with prior consent of all affected parties; or
- (b) have the purpose or likely purpose of materially altering the position of any of the parties to the proceeding unless the alteration is with prior consent of all affected parties.

An example of an administrative fixture is one where the court sets due dates for the filing of written submissions. A Case Review Hearing may be an administrative fixture, depending on the likely content of that hearing.

² At Principal Guideline, [8.2].

³ Serious Fraud Office Act 1990, s 20(b) and (c) [**SFO Act**].

⁴ SFO Act, s 2 definition of "designated member".

⁵ SFO Act, s 2 definition of "employee".

⁶ SFO Act, s 48

Case Team — members of the SFO who conduct investigations, make operational recommendations to the Director, including prosecution recommendations, and support Panel Counsel in the preparation and conduct of prosecutions.

Director — means the Director and Chief Executive of the Serious Fraud Office. The Director has statutory responsibility for operational decision-making under the SFO Act. The Director is the Senior Manager for the purpose of the Prosecution Guidelines.⁷

Investigation Review Panel — a group that includes members of the SFO’s Senior Leadership Team, the Chief Legal Advisor, and Operational Case Leaders who review all recommendations to open a Part 2 investigation.

Mandate — the SFO’s mandate is preventing, detecting, investigating and prosecuting cases of serious or complex fraud, including corruption.

Panel Counsel — lawyers who are members of the Serious Fraud Prosecutors Panel as established by s 48 of the SFO Act. Panel Counsel conduct prosecutions on behalf of the SFO (and the Solicitor-General once the prosecution becomes a Crown Prosecution).

Part 1 enquiry — an enquiry commenced by the Director pursuant to s 4 of the SFO Act when the Director has reason to suspect that an investigation into the affairs of any person may disclose serious or complex fraud.

Part 2 investigation — an investigation commenced by the Director pursuant to s 7 of the SFO Act when the Director has reasonable grounds to believe that an offence involving serious or complex fraud may have been committed.

Prosecution — a proceeding in the District or High Court under the [Criminal Procedure Act 2011](#) in respect of an offence.

Prosecution Review Panel — a group that includes members of the SFO’s Senior Leadership Team, the Chief Legal Advisor, and Panel Counsel, who review all recommendations to prosecute made by a Case Team.

SFO Lawyers — Any lawyers employed by the SFO.

SFO Prosecutors — Any lawyers employed by the SFO who have been classified as an in-house public prosecutor pursuant to the Classification of Serious Fraud Office In-House Public Prosecutors.

Test for Prosecution — a two-stage test under the Prosecution Guidelines:

⁷ Prosecution Guidelines, above n 1, at Glossary, 6.

- The first stage is the Evidential Test: Is there enough evidence to prove the proposed charge beyond reasonable doubt?
- The second stage is the Public Interest Test: Does the public interest require a prosecution to be brought?

Prosecution decision-making

8. In determining whether to prosecute, the Director, as the decision-maker, takes into account:
 - a) The purposes of the SFO Act, including enabling proceedings relating to serious or complex fraud to be taken expeditiously; and
 - b) Any relevant matters from the Prosecution Guidelines.
9. Other factors the Director may take into account include:
 - a) Section 8 of the SFO Act;
 - b) The SFO's Strategic Priorities, including its purpose of protecting New Zealanders' financial and economic wellbeing;
 - c) The specialist resources available to the SFO so it can focus them on prosecutions which have the greatest potential to disrupt and deter serious fraud, including corruption; and
 - d) Any legal action taken by another Prosecuting agency in relation to the subject matter.

Process for prosecutorial decision-making

10. Complaints, referrals and intelligence are considered by the SFO to determine if the SFO Act criteria are met to open a Part 1 enquiry or a Part 2 investigation under the SFO Act.
11. Part 1 enquiry recommendations are reviewed by a SFO Manager and Deputy Chief Executive before being forwarded to the Director to consider whether the grounds are met to open a Part 1 enquiry pursuant to s 4 of the SFO Act.
12. All Part 2 investigation recommendations are reviewed and discussed by the Investigation Review Panel before the Director decides whether to open a Part 2 investigation pursuant to s 7 of the SFO Act.
13. If the Director commences a Part 2 investigation, a Case Team is appointed to investigate the matter and has, under delegation, the authority to exercise some of the Director's powers under the SFO Act.

14. If the Case Team, in consultation with Panel Counsel, consider the Test for Prosecution is met, a recommendation to prosecute will be made to the Director. A Prosecution Review Panel will discuss the recommendation with the Director to inform the Director's decision-making.
15. The final decision on whether to commence a prosecution is made by the Director.
16. Prosecution decisions must be made independently and be free from any undue or improper pressure (such as political pressure) or conflicts. If a person involved in making a prosecution decision is concerned about undue or improper pressure, the Chief Legal Advisor should be consulted.
17. If the Case Team recommends no prosecution action, the Director may make the decision to close the file without any referral to a Prosecution Review Panel.
18. If the SFO considers that the Test for Prosecution is met and decide not to commence a prosecution, the SFO may refer the matter to another law enforcement agency for further prosecutorial consideration.

Panel appointment

19. Appointment to the Serious Fraud Prosecutors Panel occurs every five years or earlier if required. Members of the Panel are appointed by the Solicitor-General in consultation with the Director.
20. Panel Counsel will be appointed to the investigation at an appropriate time. Usually, the appointment is made when the Case Team have identified sufficient evidence to begin the preparation of a prosecution recommendation for the Director, although Panel Counsel may be appointed earlier or later depending on the circumstances.
21. Under the Terms of Engagement for Members of the Serious Fraud Prosecutors Panel, the SFO is responsible for the fees of Panel Counsel through the investigation stage and up until a plea is entered by a defendant. Upon the first entry of a plea by a defendant, the prosecution becomes a Crown Prosecution, and the Crown Law Office assumes responsibility for Panel Counsel's fees. In circumstances where there are multiple defendants, the entry of a plea by any one of the defendants triggers the Crown Law Office's responsibility for the fees of Panel Counsel.

Conduct of prosecutions

22. All SFO prosecutions must be conducted by Panel Counsel. SFO Prosecutors may also appear on SFO matters alongside Panel Counsel and may also conduct administrative fixtures as sole counsel in accordance with their classification as in-house public prosecutors.

Selection of charges

23. The SFO Lawyer on the Case Team considers the appropriate selection of charges, in consultation with the rest of the Case Team, Panel Counsel, and the Prosecution Guidelines, before submitting them to the Prosecution Review Panel and the Director.
24. The Director will make the decision to prosecute. If a decision is made to prosecute, Panel Counsel will make a recommendation on what charges to file. The selection of charges will follow the guidance in the Prosecution Guidelines, including:
 - (a) The number and nature of charges should reflect the totality of the offending; and
 - (b) 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.

Attorney-General leave

25. For offences that require the leave of the Attorney-General to prosecute pursuant to s 106 of the Crimes Act 1961 or s 12 of the Secret Commissions Act 1910, the procedure set down in s 24 of the Criminal Procedure Act 2011 is to be followed and leave obtained by the SFO prior to filing the relevant charges.

Review of the prosecution

26. Once a prosecution has commenced, Panel Counsel, in consultation with the Director or delegate, will keep the decision to prosecute under review throughout the life of the case to ensure that it remains appropriate to continue with the prosecution and that the charges are correct. Charges can be amended or withdrawn if, for example, they are no longer supported by the evidence or are no longer considered to be in the public interest. The following decisions must be made by Panel Counsel in consultation with the Director or delegate:
 - a) Withdrawing or adding charges;

- b) Amendments to the wording of a charge; and
- c) Amendments to the charge provision/s.

27. Consent of the Attorney-General may be required for new or substantially amended charges. The Director and Panel Counsel, with the assistance of the Case Team and Legal Services, will be responsible for seeking the Attorney-General's consent.

Plea arrangements

27. Panel Counsel must consult with the Director or delegate before offering or entering into any plea arrangements, with the final decision on offering or entering into any plea arrangements made by Panel Counsel.

Reviews of decisions not to prosecute

- 28. Section 49(b) of the SFO Act provides that there is no obligation imposed on the Director or any other person to commence a prosecution relating to any particular case of fraud. This is a broad and overriding discretion and can apply even if the Test for Prosecution is otherwise met.
- 29. If the SFO decides not to proceed with a prosecution, it will take reasonable steps to explain to any victim(s) the reasons for its decision in accordance with the SFO's obligations under s 12(1)(b) of the Victims' Rights Act 2002.
- 30. While there is no statutory right to request a review of a decision not to prosecute, victims and interested members of the public may seek a review. A request for review is available for cases where:
 - a. the SFO considers the case comes within its mandate; and
 - b. there are sufficient grounds to commence a Part 2 investigation under s 7 of the SFO Act; and
 - c. the decision not to prosecute was based on the Test for Prosecution.
- 31. To request a review, the request must be submitted in writing to the Director, setting out the grounds of the request.
- 32. The Director will consider the request in consultation with members of the Senior Leadership Team. The SFO will advise the requester within 30 working days, unless further time is required, whether the SFO will conduct a review of its decision not to commence a prosecution. A review will follow the same process for prosecutorial decision-making.

Appeals

33. The Director may seek leave to appeal a ruling made in the course of a prosecution. Appeals by the prosecution require the consent of the Solicitor-General. The Director and Chief Legal Advisor, with the assistance of the Case Team and Legal Services, are responsible for seeking the Solicitor-General's consent prior to seeking leave to appeal.

Joint investigations/prosecutions

34. The SFO may conduct joint investigations or prosecutions with other agencies where appropriate. Formal agreements will be in place that identify the approach to the investigation and the role of each agency, including whether it is a supported investigation (where there is one lead agency supported by one or more other agencies) or whether it is a fully joint investigation. All joint investigations must be approved by the Director.

Referral to other agencies

35. If the SFO receives a complaint that it considers does not come within its mandate, but may be considered a crime, it may advise the complainant which law enforcement or regulatory agency is most appropriate to contact. Alternatively, the SFO may refer the complaint to the appropriate law enforcement or regulatory agency on its own initiative.
36. During a Part 1 enquiry or Part 2 investigation, the SFO may identify evidence of alleged criminal offending that does not come within the SFO's mandate. In that circumstance, the SFO may refer the alleged offending to the appropriate law enforcement or regulatory agency.
37. The SFO may refer information in its possession to the New Zealand Police's Asset Recovery Unit (**ARU**) when it considers the matter may be of interest to the ARU or come within their remit.
38. Any referral or release of information to another agency will be done in accordance with the relevant provisions of the SFO Act, the Privacy Act 2020, and any other applicable law.

Warnings

39. The SFO is a highly specialised law enforcement agency that is statutorily mandated to investigate and prosecute offending that involves serious or complex fraud, including corruption and bribery. The SFO is unable to investigate criminal offending that falls outside of this definition. This means that the SFO's operating environment is such that prosecution of particular conduct is an enforcement priority.⁸
40. The SFO does not issue formal warnings. However, if the SFO considers the conduct under investigation could have potentially been considered an offence and the available evidence does not reach the threshold of evidential sufficiency, then the SFO may decide to take an educative approach and notify that individual of the investigation outcome to ensure they are aware of their obligations and the consequences. This decision will be made on a case-by-case basis, with the Director as the ultimate decision-maker on whether to take an educative approach.

⁸ Prosecution Guidelines, above n 1, at Prosecution policies, [15.3].