

Prosecution Policy

| | |
|-------------------|---|
| Last Review Date: | May 2021 |
| Next Review Date: | May 2023 |
| Approved by: | Organisational Health Committee; May 2021 |
| Owner: | General Manager Integrity and Debt |

Purpose

1. The purpose of this policy is to record the Ministry of Social Development's (MSD) commitment to the core prosecution values identified in the Solicitor General's Prosecution Guidelines and to guide decision makers in the application of those guidelines when making prosecution decisions related to external client fraud, after investigation by MSD.

Policy Statement

2. MSD has a responsibility to protect the integrity of the benefit system.
3. Most clients are honest about their situation and want to do the right thing. MSD wants to make it easy for these clients to do this.
4. MSD works closely with clients as part of its day to day service, to help them towards independence. Effective, open communication helps ensure clients receive full and correct entitlement, while also supporting fraud prevention.
5. MSD's investigative resources are focused on responding to deliberate and intentional fraud.
6. Prosecution is reserved for the most serious cases of fraud.

Scope

7. This policy applies to all MSD employees involved in investigating fraud and making decisions on whether to prosecute for fraud. This includes Investigators, managers, lawyers and the Fraud Prosecution Review Panel.

Policy /requirements / principles

MSD's strategic goals and objectives

8. For MSD, prosecution decisions should also take account of MSD's Purpose and Strategic Direction, as well as legislative principles, particularly when considering the public interest in taking a prosecution.

MSD's Purpose and Strategic Direction

Purpose

- "We help New Zealanders to be safe, strong and independent."

Strategic Direction - Te Pae Tawhiti – our Future

- Mana Manaaki
 - A positive experience every time
- Kotahitanga

- Partnering for greater impact
- Kia Takatū tatou
 - Supporting long-term social and economic development

Te Pae Tata – Māori Strategy and Action Plan

Guiding principles:

- **Hoatanga Rangapū**
 - We will act reasonably, honourably and in good faith towards Māori
- **Tiakitanga**
 - We will recognise and provide for Māori perspectives and values and take positive steps to ensure Māori interests are protected
- **Whakaurunga**
 - We will enable and support Māori to actively participate in all matters that increase Māori wellbeing

Social Security Act 2018 Principles¹

Every person performing or exercising a duty, function, or power under this Act must have regard to the following general principles:

- a) work in paid employment offers the best opportunity for people to achieve social and economic well-being:
- b) the priority for people of working age should be to find and retain work.
- c) people for whom work may not currently be an appropriate outcome should be assisted to prepare for work in the future and develop employment-focused skills:
- d) people for whom work is not appropriate should be supported in accordance with this Act.

9. In this context, MSD will consider a person's dishonest actions and balance those with their personal circumstances, and the effect a prosecution might have on their ability to be (and keep others) safe, strong and independent. Prosecution decisions need to be taken in the context of MSD's responsibilities under the Social Security Act 2018 and other legislation, to provide financial and other support to help people to support themselves and their dependents or to alleviate hardship.

10. Clients will be treated with dignity and professionalism, regardless of any offending that may have been committed and MSD practices, processes and decisions will be objective, fair and consistent.

11. MSD is committed to using Te Pae Tata and Te Tiriti o Waitangi principles to inform our approach to prosecution and the outcomes MSD wants to achieve, with wider MSD engagement with Māori.

¹ Section 3 - Social Security Act 2018

12. This includes building Te Ao Māori capability across Integrity and Debt to better understand and fulfil MSD's role as Te Tiriti partners. Integrity and Debt staff will develop both personally and professionally and this will reflect growth through how service is delivered and support sustainable outcomes for Māori.

Legislative compliance / Fiscal responsibility

13. There is legislation which requires MSD to manage and minimise the risk of abuse of the support systems it has responsibility for.

14. The Public Finance Act 1989 and the Public Service Act 2020 set out the responsibilities of Ministers and Chief Executives for effective and efficient fiscal management.

15. The Social Security Act 2018, imposes a duty on MSD to inquire into claims for benefit (s298), allows MSD to review entitlement to a benefit (s304) and provides powers to ask questions and to obtain information to carry out these functions (Schedule 6). The Education and Training Act 2020 and the Public and Community Housing Management Act 1992 set out similar provisions regarding MSD's responsibilities under those Acts.

16. The legislation also sets out criminal offences for those who deliberately withhold relevant information or provide false information, and penalties for those offences on conviction.

17. The investigation and prosecution of offences fits within this framework.

Solicitor General's Prosecution Guidelines

18. *The Solicitor General's Prosecution Guidelines* provide guidance to assist MSD (and other prosecuting agencies) to decide on prosecution action, and MSD makes prosecution decisions in compliance with the Guidelines.

19. The Guidelines emphasise several points of a prosecution system operating under the rule of law in a democratic society. The first is that the prosecutor must be free of pressure from sources not properly part of the prosecution decision-making process.

20. The second deals with the prosecution decision itself. Under New Zealand's common law adversarial system, a prosecutor must be satisfied of two things:

- that the Evidential Test is met, i.e. the evidence that can be put to the court provides a reasonable prospect of conviction, and
- that the Public Interest test is met, i.e. that only those breaches of the criminal law where the public interest warrants a prosecution will proceed to that step.

The Evidential Test

21. The Evidential Test is fundamental. There must never be a prosecution without evidence providing a reasonable prospect of conviction. A lawyer must confirm that the Evidential Test requirements are met before a case can be considered further for prosecution.

The Public Interest Test

22. If the requirements of the Evidential Test are met, then consideration must be given to whether it is in the public interest to prosecute. *“It is not the rule that all offences for which there is sufficient evidence must be prosecuted. Prosecutors must exercise their discretion as to whether a prosecution is required in the public interest.”*
23. As well as the expectations set out above, the Solicitor General’s Prosecution Guidelines include factors to be taken into account in assessing the Public Interest aspect of the prosecution decision. This includes the statement that ... *“relevant considerations will include an agency’s statutory objectives and enforcement priorities”*.

[Read the Solicitor General's Prosecution Guidelines](#)

The types of behaviour that may result in a decision to prosecute

24. Offences against legislation administered by MSD will generally be either where clients omit to tell MSD relevant information or provide false information to mislead MSD. The first and main response is to intervene early to make sure clients understand their obligations and to assist them to give MSD correct information so MSD can get their entitlements right.
25. Where evidence confirms that clients have failed to give the correct information, then an overpayment will be established and recovery of this money will be sought from the client. Where clients have deliberately and intentionally sought to defraud MSD, prosecution action will be considered, in addition to any overpayment established.

MSD’s public Interest factors

26. Some key factors for and against prosecution are considered below. These lists are not exhaustive.
27. Factors favouring prosecution are:
- The gravity of offending, including the length of offending and the level of deliberate deception
 - acts of commission rather than omission
 - a history of non-compliance (not restricted to previous convictions)
 - the degree of non-compliance (e.g. the gravity of offending)
 - the amount overpaid (greater loss = more reason to prosecute)
 - organised and systematic attacks on the social assistance systems, (e.g. scams involving collusion between two or more people)
 - using false or altered documents
 - being untruthful to a member of MSD’s staff
 - where a person has not taken clear opportunities to advise of a change in circumstances
28. Factors against prosecution are:
- a first offence where a warning may be more appropriate
 - the availability of effective alternatives to prosecution (e.g. where an offender has repaid the debt or made substantial efforts to do so)
 - where the offence is relatively minor, or the overpayment is small

- the impact of prosecution on the ability of the client to obtain / sustain employment that supports their long-term independence.
- where there may have been opportunities for MSD to have intervened, which potentially could have discouraged offending
- where the client (or their family) may be particularly vulnerable e.g. family violence, serious mental health issues.

Voluntary disclosures and their effect on prosecutions

29. MSD wants to encourage voluntary compliance and disclosure, if a client has made a full voluntary disclosure that was not prompted by the commencement of an investigation, this will be an important factor to be weighed in the consideration of whether to prosecute or not.

The choice of charges

30. MSD may prosecute criminal non-compliance in areas covered by legislation within its administrative responsibility. However, charges under other Acts, e.g. the Crimes Act 1961, may be considered where this is more appropriate. This may occur for example, where the offending involves: the use of one or more false, stolen or borrowed identities; forgery or the use of false documents; collusion with others; or other aggravating factors.
31. The choice of charges depends on public interest factors and the evidence. A serious offence may be more suitably prosecuted under the Crimes Act 1961 rather than the Social Security Act 2018, Public and Community Housing Management Act 1992 or the Education and Training Act 2020.
32. Section 20(2) of the Criminal Procedure Act 2011 (CPA) provides for representative charges. This provision allows multiple offences of the same type to be included in a single charging document if the offending occurs in similar circumstances such that the defendant would be likely to enter the same plea to the charges if they were charged separately, and the number of offences would make it unduly difficult for the court to manage if charged separately but tried together. MSD will consider whether the facts of a case make representative charges appropriate.

Public statements

33. MSD may issue a public statement about prosecutions where there is significant public interest in doing so; including deterring future non-compliance, encouraging and reinforcing compliant behaviours and maintaining society's perception of the integrity of MSD payment systems. In doing so MSD will have regard to the "Media Protocol for Prosecutors" issued by the Solicitor-General.
34. MSD may respond to public/media interest in a case or may proactively comment.

Responsibilities

(Specific and general responsibilities of staff to ensure compliance with the policy)

| Person/Party | Responsibilities |
|--|--|
| DCE, Service Delivery Chief Legal Advisor | <ul style="list-style-type: none"> Maintain oversight of policy |
| General Manager Integrity and Debt | <ul style="list-style-type: none"> Manage day to day implementation of the prosecution policy Ensure compliance with the policy by the Fraud Prosecution Review Panel Provide periodic reporting to the DCE Service Delivery and the Organisational Health Committee on application of the policy |
| National Manager Client Service Integrity Team Manager MSD Legal (Litigation) | <ul style="list-style-type: none"> Manage decisions on cases to be referred for consideration by the Fraud Prosecution Review Panel |

Definitions

(Explanation of terms used in the policy and in fulfilling responsibilities in the policy)

| Word/ phrase | Definition |
|---------------|---|
| Investigation | This involves investigation into a client's entitlement where MSD believes they may be committing fraud. The outcome in these cases could be an overpayment, the imposition of a penalty, or in the most severe cases, prosecution. |

Related policies

No related policies

Appendix

- Fraud Prosecution Review Panel Terms of Reference

Appendix



MINISTRY OF
SOCIAL DEVELOPMENT
Te Manatū Whakahiato Ora

Ministry of Social Development Prosecution Review Panel: Terms of Reference

Purpose

1. The Ministry of Social Development (the Ministry) Prosecution Review Panel (the Panel) was established on 1 February 2018 to consider submissions where an investigation has identified fraud, to decide if a prosecution is the appropriate response to that fraud.

Responsibilities

2. The Panel has authority to make decisions on behalf of the Ministry in relation to cases of fraud considered for prosecution. Prior to referral to the Panel, cases will have been reviewed by a lawyer to ensure that the case satisfies the required Evidential Test.
3. The Panel will consider the facts and circumstances of each case to determine if it is in the public interest to refer the case for prosecution. This will include taking account of:

Ministry of Social Development Purpose

- “We help New Zealanders to be safe, strong and independent.”

Strategic Direction - Te Pae Tawhiti – our Future

- Mana Manaaki
 - A positive experience every time
- Kotahitanga
 - Partnering for greater impact
- Kia Takatū tatou
 - Supporting long-term social and economic development

Te Pae Tata – Māori Strategy and Action Plan

Guiding principles:

- **Hoatanga Rangapū**
 - We will act reasonably, honourably and in good faith towards Māori
- **Tiakitanga**
 - We will recognise and provide for Māori perspectives and values and take positive steps to ensure Māori interests are protected
- **Whakaurunga**
 - We will enable and support Māori to actively participate in all matters that increase Māori wellbeing

- The Panel will comply with the Solicitor-General's Prosecution Guidelines and the Ministry's Prosecution Policy when considering cases for prosecution. Guidelines for the Panel including extracts from the S-G Guidelines and the prosecution decision making process are attached as **Appendix 1**

Membership

- The Panel will be chaired by one of the following persons:

| Panel Role | Position |
|-------------------|---|
| Chair | General Manager Integrity & Debt |
| Deputy Chair | National Manager Client Service Integrity |
| Deputy Chair | Area Manager Client Service Integrity |
| Deputy Chair | Operations Manager Client Service Integrity |

- When not chairing a meeting, Deputies may instead attend as a Panel member.
- The Panel will be set up to ensure that it, as a whole, has the skills, knowledge and ability to fulfil its purpose and properly discharge its roles and responsibilities. The Manager responsible for referring a case to the Panel, and the Investigator who prepared the referral to the Panel, will be available to the Panel and may attend Panel meetings as requested by the Chair to answer any questions that the Panel may have.
- A quorum is required in order for the Panel to conduct business.
- The requirement for a quorum will be met if 5 members attend and must include:

The Chair or a Deputy Chair; and

Integrity & Debt

At least one of the following Panel members from Integrity & Debt:

| Panel Role | Position |
|-------------------|---|
| Panel Member | Operations Manager Client Service Integrity |
| Panel Member | Area Manager Client Service Integrity |
| Panel Member | Team Manager Information and Advice, Integrity & Debt |
| Panel Member | Senior Advisor (Integrity), Integrity & Debt |

Legal

At least one Team Leader or Senior Lawyer from MSD's internal legal team

Senior Ministry Staff

At least one Senior Ministry staff member outside of Integrity and Debt.

The term “Senior Ministry staff member” includes but is not limited to, Principal Advisors, Senior Advisors, Regional Commissioners, and Managers or Specialists with appropriate experience and expertise.

10. Each Panel member will hold office for 12 months with the option for membership to be renewed annually at the beginning of each calendar year. New Panel members may be added to the Panel to replace vacancies or otherwise as required, at the discretion of the General Manager Integrity and Debt.
11. The Panel may have external attendees on an ad hoc basis for specific purposes. These purposes may include, but are not limited to, providing specialist advice, key external government agencies or representatives from other Ministry business units. Attendance must be approved in advance by the meeting Chair.

Chair’s responsibilities

12. The Panel Chair will:
 - (a) check with members to ensure:
 - i. that conflicts of interest are managed at every meeting
 - ii. they have completed appropriate training as needed
 - (b) report to Senior Management (Executive level) on Panel decisions as required.

Members’ responsibilities

13. All Panel members will complete any training the Chair considers necessary.
14. Members will endeavour to attend all meetings they are invited to attend. If a member is unable to attend for any reason, they should decline an invitation to the meeting as early as possible.
15. All Panel members including the Chair will review relevant referrals in advance of Panel meetings and declare any conflicts of interest in advance of the meeting.
16. Members may also be required to perform tasks or accept responsibilities as required.
17. The Panel will meet weekly (by electronic calendar invitation) in person, by telephone or video conference facilities.
18. The Panel can be convened inter-sessionally in circumstances where an urgent case(s) requires a decision.

Decision making

19. The Panel will aim to make decisions by consensus. Where consensus cannot be reached a majority decision will apply. If the Panel vote is evenly split then the decision will be not to prosecute as a majority could not be reached.

Administration

20. The Panel Administrator will:

- (a) with the Chair, coordinate all the Panel business and administration, including scheduling meetings and forming and distributing agendas
- (b) attend Panel meetings and record and distribute meeting decisions within five business days after the meeting
- (c) circulate prosecution referrals for consideration by the Panel at least two business days before the next scheduled meeting
- (d) provide notice of cancellation at least one day before the scheduled meeting
- (e) maintain a register of current members.

21. Following meetings, the Panel Administrator will:

- (a) notify the referring manager of the Panel decision
- (b) add a note to the client's IMS record advising of the decision and attach the referral with the decision section completed
- (c) update the Prosecution Outcome spread sheet.

Disestablishment

22. The Panel Chair will notify and seek approval from the Deputy Chief Executive Service Delivery to disestablish the Panel.

23. Reasons for disestablishing the Panel may include that the purpose of the Panel has been revised or revoked.



MINISTRY OF
SOCIAL DEVELOPMENT
Te Manatū Whakahiato Ora

Ministry of Social Development Prosecution Review Panel: Guidelines for Panel decision making

Introduction

1. These guidelines are to assist the Ministry of Social Development (the Ministry) Prosecution Review Panel (the Panel) in arriving at their decision as to whether a case should be forwarded for prosecution. Prosecutions have serious consequences for Ministry clients and the decision to prosecute should be made with full regard to the impact it could have on the client and their whanau. Prosecution is the option of last resort in terms of the way the Ministry responds to instances of fraud.
2. The Ministry determines cases for prosecution based on the Solicitor-General's Prosecution Guidelines. These guidelines have two tests that must be met: that the evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and that a prosecution is required in the public interest – the Public Interest Test. The evidential sufficiency test has already been endorsed by a lawyer before the case is referred to the Panel. The Panel's task is to consider whether or not it is in the public interest to proceed with a prosecution.
3. As part of the Public Interest Test the Solicitor-General's Guidelines include that "*relevant considerations will include an agency's statutory objectives and enforcement priorities*". The Panel should take account of the Ministry's aims and consider how a prosecution might affect a client's ability to be or to become safe, strong and independent, including their potential to move into employment.
4. There is an extensive but non-exhaustive list of factors in the Solicitor-General's Prosecution Guidelines that the Panel should consider when deciding if a prosecution is in the public interest. The factors most relevant to Ministry prosecutions are noted below.
5. To assist the Panel, a template (refer to the *Decision to Prosecute Template* document) will be provided for each case, containing a summary of the known facts under four headings:
 - A profile of the client
 - The circumstances of the offending
 - The possible consequences of undertaking a prosecution
 - Factors in the client's favour

Background to Ministry Prosecutions

6. The Ministry administers the payment of benefits under the Social Security Act 2018 and the New Zealand Superannuation and Retirement Income Act 2001, student allowances under the Education and Training Act 2020, and income-related rents under the Public and Community Housing Management Act 1992.
7. The Ministry employs investigative staff with the role of investigating cases of suspected fraud on the part of people who have obtained financial assistance under schemes administered by the Ministry.
8. The Ministry has an in house Legal Services team who assess cases where prosecution is contemplated, and conduct those cases if prosecution is initiated.

Purpose and Principles

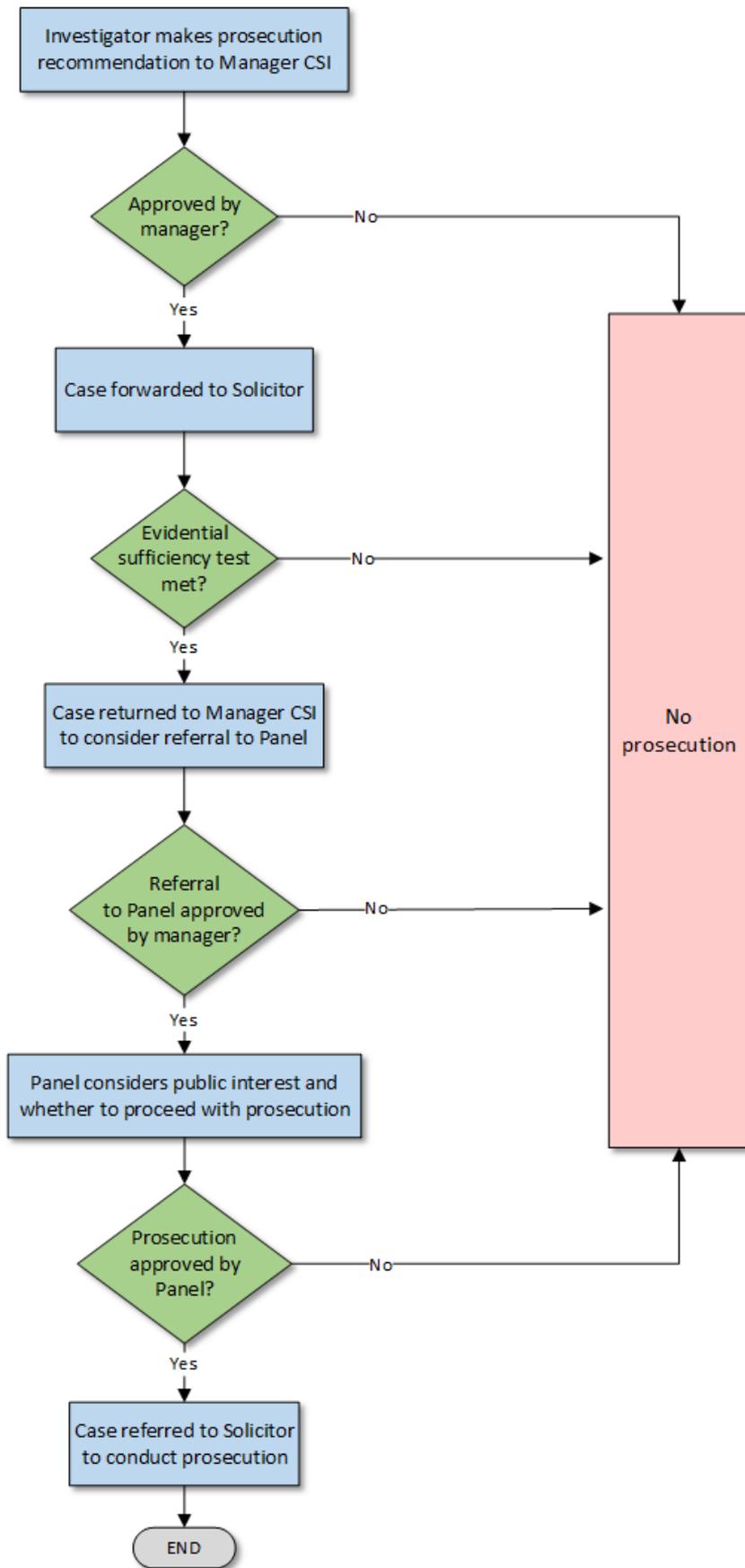
9. The Solicitor-General's Prosecution Guidelines recognise that the principles and practices as to prosecutions in New Zealand are underpinned by core prosecution values that aim to achieve consistency and common standards in decision making and trial practices.
10. Adherence to these values will result in prosecution processes that are open and fair to the defendant, witnesses and the victims of crime, and reflect the proper interests of society.

Prosecution Decision Making Process

11. The decision as to whether a person who has been the subject of an investigation by the Ministry is to be prosecuted will be made in a four-step process:
 - i) The Ministry investigator will make a recommendation to their Client Service Integrity Manager that the matter be referred to Legal Services to consider prosecution.
 - ii) The manager will consider the recommendation and decide whether to refer the matter to Legal Services to consider prosecution.
 - iii) If referred by the manager, Legal Services will review the file in accordance with the Solicitor-General's Prosecution Guidelines and decide whether the evidential sufficiency test is met. If Legal Services determine that the evidential sufficiency test is met, the matter will be referred to the Panel by the Manager Client Service Integrity.
 - iv) The Panel assesses the case and determines if the Public Interest test is met and if the case will be referred back to Legal Services to proceed with prosecution action.

Prosecution Decision Making Flow Chart

Last updated 28 October 2021



The Decision to Prosecute - the Public Interest Test

12. It is not the rule that all criminal offences for which there is sufficient evidence, must be prosecuted. The Panel must exercise discretion as to whether a prosecution is required in the public interest.

13. 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, prosecution resources are not limitless. There will be circumstances in which, although the evidence is sufficient to provide a reasonable prospect of conviction, prosecution is not required in the public interest.

14. The Solicitor-General's Prosecution Guidelines provide some generic illustrative lists of factors for and against prosecution that could be considered in determining whether in the particular case it is in the Public interest to proceed with prosecution.

15. The Solicitor-General's Prosecution Guidelines also allow us to consider particular organisational objectives. In this context other matters which could be considered from an MSD perspective could be the impact a prosecution may have on:
 - a client's ability to sustain or move into employment
 - the clients ability to support dependent children
 - the client's longer term ability to become sustainably independent of the benefit system.

16. The following two sections list some public interest considerations for prosecution which may be relevant and require consideration by the Panel when determining where the public interest lies in any particular case. The following list is illustrative only.

Public interest considerations for prosecution

1. The predominant consideration is the seriousness of the offence. The gravity of the maximum sentence and the anticipated penalty is likely to be a strong factor in determining the seriousness of the offence;
2. 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;
3. Where the defendant has relevant previous convictions, diversions or cautions;
4. Where the defendant is alleged to have committed an offence whilst on bail or subject to a sentence, or otherwise subject to a Court order;
5. Where the offence is prevalent;
6. Where the defendant was a ringleader or an organiser of the offence;
7. Where the offence was premeditated;
8. Where the offence was carried out by a group;
9. Where the offence was an incident of organised crime;
10. Where there is any element of corruption.

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

Public interest considerations against prosecution

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

3. Where on any test, the offence is not of a serious nature, and is unlikely to be repeated;
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; or
 - delay has been caused in part by the defendant; or
 - the offence has only recently come to light; or
 - the complexity of the offence has resulted in a lengthy investigation.
5. Where a prosecution is likely to have a detrimental effect on the physical or mental health of a victim or witness;
6. Where the defendant is elderly;
7. Where the defendant is a youth;
8. Where the defendant has no previous convictions;
9. Where the defendant was at the time of the offence or trial suffering from significant mental or physical ill-health;
10. Where the Ministry 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);
11. Where the recovery of the proceeds of crime can more effectively be pursued by civil action;
12. Where information may be made public that could disproportionately harm sources of information, international relations or national security;
13. Where any proper alternatives to prosecution are available (including disciplinary or other proceedings).
14. Cost is also a relevant factor when making an overall assessment of the public interest. In each case the Panel will weigh the relevant public interest factors that are applicable. The Panel will then determine whether or not the public interest requires prosecution.
15. Relevant consideration will include the Ministry's statutory objectives and enforcement priorities. The Ministry's purpose is to help New Zealanders to help themselves to be safe,

strong and independent, including improving employment outcomes for clients. The future employment prospects of a client and their ability to be independent of the benefit system are important factors for the Panel to consider.

16. As part of the Ministry's social investment approach, the Ministry will help more people get into work and live independent, successful lives. Reducing long-term welfare dependence is to enhance people's well-being through connecting more New Zealanders to the workforce. The Panel should consider the prosecution in the context of these organisational objectives.