



Prosecution policy

Approved by	Chief Executive
Policy owner	General Counsel
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1. Purpose

The Water Services Authority–Taumata Arowai (**the Authority**) is responsible for monitoring and enforcing compliance with the Water Services Act 2021 (**the Act**) and associated secondary legislation.

Prosecution is one of a range of compliance and enforcement interventions available to the Authority and sits at the serious end of interventions. Due to the potential for serious consequences for both persons charged with offences and the Authority, it is important that the Authority uses prosecutions lawfully and appropriately.

This policy sets out how the Authority will use and manage prosecutions.

2. Scope of this policy

This policy provides guidance to be followed by the Chief Executive and other contributing Authority staff in deciding whether to initiate a prosecution following an investigation. The policy also provides guidance about the ongoing conduct of, and decisions made during, the prosecution process.

This policy does not apply to written warnings, infringement notices, injunctions, directions, compliance orders, enforceable undertakings or other interventions under the Act. Alternatives to prosecution should, however, be considered as part of the prosecution decision-making process where appropriate.

This policy does not cover private prosecutions or orders for costs in prosecution proceedings.

3. Related legislation, policies and guidance

All prosecutions will be conducted in accordance with relevant legislative requirements, policies and guidelines including the Solicitor-General’s Prosecution Guidelines.

This policy should be read in conjunction with the:

- [Water Services Act 2021](#)
- [Criminal Disclosure Act 2008](#)
- [Criminal Procedure Act 2011](#)
- [Solicitor-General’s Prosecution Guidelines](#)
- Authority’s [Compliance, Monitoring and Enforcement Strategy](#).

4. Statutory purpose

The Authority operates in a regulatory context and the statutory purposes set out in the Act guide the Authority’s decision-making processes. This is particularly relevant for assessing the public interest elements of a prosecution decision.

The main purpose of the Act is to ensure that drinking water suppliers provide safe drinking water to consumers. To achieve this, the Act provides for:¹

- a regulatory framework consistent with international best practice, including duties to have a drinking water safety plan and comply with legislative requirements (such as drinking water standards)

¹ Water Services Act 2021, s 3(1).



- a source water risk management framework, which operates in conjunction with the Resource Management Act 1991 and secondary legislation made under it, and
- mechanisms to enable regulation to be proportionate to the scale, complexity and risk profile of drinking water supplies.

There are no offence provisions related to the Act's additional purposes,² which include providing transparency about the performance of drinking water, wastewater and stormwater networks, building capability across the water services sector, and establishing a framework for the continuous and progressive improvement of the quality of water services.

5. Guiding principles for prosecution decisions

The Authority's decisions to prosecute will be:

- proportionate
- independent
- fair and objective, and
- aligned with the Authority's enforcement objectives.

5.1. Proportionate

Prosecution is one of the mechanisms in the Act that enables regulation to be proportionate to scale, complexity and risk profile.

Prosecution decisions are guided by the Authority's Compliance, Monitoring and Enforcement Strategy³ which sets out the Authority's regulatory approach. The Authority adjusts how it works with suppliers according to a range of factors, including:

- the size and complexity of a supply
- the level of risk to the people using water from a supply
- a supplier's history of performance and compliance, and
- a supplier's willingness to engage with us and make improvements.

5.2. Independent

Prosecution is part of the Chief Executive's statutorily independent function to monitor and enforce compliance with the Act.

Anyone involved in the prosecution process must act independently.

Anyone with an actual, potential or perceived conflict of interest must not be involved in a prosecution decision.

² Water Service Act 2021, s 3(2).

³ Section 136(7) of the Act requires that the chief executive must have regard to the drinking water compliance, monitoring and enforcement strategy when performing the chief executive's functions. Under s 159, only the chief executive may bring a prosecution under the Act.



5.3. Fair and objective

Prosecution decisions will be made fairly and objectively to ensure equitable outcomes and that any person charged with an offence can receive a fair trial.

Everyone involved in prosecutions or potential prosecutions must uphold the rule of law, and conduct themselves free of the influence of any personal biases, sympathies or prejudice.

5.4. Alignment with enforcement objectives

The Authority's enforcement objectives are described in the Compliance, Monitoring and Enforcement Strategy.

They also include:

- the need for general and specific deterrence in appropriate circumstances
- respect for the rule of law, and
- the need to ensure the integrity and credibility of the drinking water regulatory system.

6. Decision to prosecute

6.1. Decision-making process

All prosecutions will be preceded by an investigation and legal review of the resulting investigation report. Any recommendation to take a prosecution must be made in accordance with this policy and the Solicitor-General's Prosecution Guidelines.

The decision to commence a prosecution will be made by the Chief Executive. In reaching the decision, the Chief Executive will:

- consider all the information in the investigation report
- consider any relevant internal and/or external advice
- consider any relevant considerations arising under the Treaty of Waitangi (Te Tiriti o Waitangi) and its principles, including Treaty settlement obligations
- have regard to the Compliance, Monitoring and Enforcement Strategy
- consider available alternatives to prosecution where appropriate
- consider the estimated cost and resource impacts of a prosecution
- consider whether or how a prosecution aligns with the Authority's enforcement objectives
- consider any of the Authority's statutory operating principles that are relevant.⁴

6.2. The test for prosecution

The Chief Executive must be satisfied that the 'test for prosecution' in the Solicitor-General's Prosecution Guidelines is met. This test has two stages:

- Is there enough evidence to prove the proposed charge beyond reasonable doubt? (the evidential test)
- Does the public interest require a prosecution to be brought? (the public interest test).

⁴ Water Services Authority–Taumata Arowai Act 2020, s 18.



The evidential test

The evidential test is satisfied if there is enough available, admissible, credible, and reliable evidence to put before a court to lead to a reasonable prospect of conviction by a judge or jury.

An assessment of the evidential test will include whether any evidence indicates a defence is likely to be successful.

The evidential test will usually be considered first. However, when a prosecution is clearly not in the public interest a full evaluation of the evidence is not necessary.

The public interest test

A prosecution must not be brought unless the public interest requires it.

Not all provable offences must be prosecuted. Even if the evidence is overwhelming, there must be an assessment of whether a prosecution is required in the public interest before a decision is made.

The Authority will consider whether an alternative to prosecution is an appropriate response to the offending and whether the offence is at a level of seriousness that requires prosecution.

In addition to the public interest factors in the Solicitor-General's Prosecution Guidelines, the statutory objectives, operating principles and enforcement priorities of the Authority will be considered. Particular statutory objectives include protecting and promoting drinking water safety and related public health outcomes.⁵

The Authority will consider any harm that occurred or risk of harm to consumers of drinking water when determining the seriousness of an offence. The sentencing criteria in [section 194 of the Act](#) will be considered in this assessment.

6.3. Alternatives to prosecution

The Authority has a range of statutory and non-statutory compliance and enforcement tools available, including:

- directions
- compliance orders
- infringement notices
- enforceable undertakings
- written warnings, and
- educative approaches.

The decision-making process should consider prosecution as part of a range of available tools, and involve an assessment of how each tool may:

- address the offending conduct
- restore the position of those affected
- hold the person accountable, and
- meet the Authority's enforcement objectives.

The Authority's Compliance, Monitoring and Enforcement Strategy guides this assessment.

⁵ Water Services Authority–Taumata Arowai Act 2020, s 10.



Further enforcement action may also be taken to hold an offender accountable when a compliance tool such as a direction or compliance order has been used to address or remedy an immediate risk. For offending that is at least of moderate seriousness, it may be appropriate not to assess alternatives.

6.4. Limitation period and extension of time

With some exceptions, a prosecution brought by the Chief Executive must be initiated within 12 months after the date on which the matters on which the offence is based first became known, or ought reasonably to have become known, to the Chief Executive.

The Chief Executive may apply to the District Court to extend the time to start a prosecution for up to 12 months.⁶ The Chief Executive will consider whether the court can be satisfied that the investigation is complex or time consuming, it is in the public interest that a charging document be filed after expiry, and that the defendant will not be unfairly prejudiced by the delay.

6.5. Other agencies

The Authority will co-ordinate enforcement action with any other regulatory or enforcement agencies that are responding to the same situation. When deciding whether to prosecute, the Authority will consider any existing or likely prosecution or enforcement action by another agency. Where it is decided that another agency is to be the lead prosecuting agency, the Authority will provide any appropriate assistance.

7. Conduct during a prosecution

7.1. Plea negotiations

The Solicitor-General's Prosecution Guidelines recognise that principled plea discussions and arrangements have benefits for individuals and for the administration of the criminal justice system. The Authority may consider a plea arrangement when it is in the interests of justice and the public interest test is met.

An offer to pay reparation must not be the primary reason for amending or withdrawing a charge. All decisions to agree to a plea arrangement will be made by the Chief Executive.

7.2. Ongoing review of charges

After filing charges, the prosecutor (whether internal or external) is responsible for reviewing whether the prosecution should continue at any time if further information is received or there is a material change in circumstances.

The prosecutor may seek to add, withdraw or amend charges where appropriate, with the approval of the Chief Executive.

Alternatives to prosecution will again be considered at this stage, if appropriate.

7.3. Sentencing

Where a prosecution results in a guilty plea or conviction, a range of sentencing options is available to the court.

The Authority will make submissions consistent with:

⁶ Water Services Act 2021, ss 162 and 163.



- the sentencing criteria in the Act⁷
- the purposes and principles of sentencing in the Sentencing Act 2002, and
- the Compliance, Monitoring and Enforcement Strategy.

When making submissions, the Authority will also consider the financial capacity of the defendant for a sentence involving financial penalties. Emphasis may be placed on other sentencing options if the defendant has limited capacity to pay.

The Act provides for additional sentencing options to a fine or imprisonment and reparation. Where appropriate, the Authority may apply for other orders. The Authority may also respond to orders applied for by the defence or initiated by the court. The options include:

- court-ordered enforceable undertakings⁸
- injunctions⁹
- supervision and training orders¹⁰
- restriction or prohibition.¹¹

These alternative sentencing options will be considered, consistent with the objectives of the Compliance, Monitoring and Enforcement Strategy and our regulatory approach.

7.4. Reparation

Where relevant, the Authority may seek sentences of reparation and may request supporting information from victims to assist the court. In seeking reparation, the Authority is fulfilling its role as a prosecutor and is not acting as an advocate for the victim(s).

Where the victim(s) or their representatives wish to volunteer information to assist the court in determining reparation, the Authority will receive this, consider it and, where relevant, provide it to the court.

Should a victim(s) seek the court's permission to be separately represented at sentencing, this will not be opposed by the Authority.

8. Other issues

8.1. Conflicts of interest

Everyone involved in prosecutions, or potential prosecutions, must be free of any actual, potential or perceived conflict of interest.

⁷ Water Services Act 2021, s 194.

⁸ Under s 196 of the Act, the court may (with or without recording a conviction) adjourn a proceeding for up to two years and make an order for the release of the offender if the offender gives an undertaking with specified conditions (a court-ordered enforceable undertaking).

⁹ Under s 197 of the Act, if a court finds a person guilty of an offence against this Act, the court may issue an injunction requiring the offender to cease any particular conduct or action that constitutes a contravention of this Act or regulations.

¹⁰ Under s 198 of the Act, the court may make an order requiring an offender to work under supervision for a period that the court specifies or arrange for one or more employees to undertake a specified course of training.

¹¹ Under s 199(1) of the Act, the court may make a restriction order, which specifies the ways in which the person is restricted in operating a drinking water supply, or a prohibition order, which prohibits the person from operating a drinking water supply or specified aspects of the supply.



Any staff member with an actual, potential or perceived conflict of interest in relation to a prosecution or a potential prosecution must declare this conflict in accordance with the Authority's Conflicts of Interest Policy and Code of Conduct.

8.2. Appeals

The Authority may appeal the following decisions of the court:

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

The Authority must obtain the leave of the Solicitor-General to appeal against a sentence imposed.¹² Before seeking leave from the Solicitor-General, the Authority will first review the matter and obtain legal advice as to whether an appeal is warranted.

A decision to appeal must be made by Chief Executive.

8.3. Victims

The Authority will ensure that any victims of offending have a designated primary contact within or on behalf of the Authority, who will ensure that victims or their representatives are provided information at each stage of the prosecution process and that they understand what is happening. The level of engagement will be informed by the victim's wishes. The Authority will comply with the:

- [Victims' Rights Act 2002](#)
- Public Service Commission's [Te Mahi me ngā Mōrehu Working with Survivors](#)
- [Solicitor General's Prosecution Guidelines – Victims](#).

An alternative approach may be taken for large scale incidents where it may not be practicable to identify and contact each individual victim.

The Authority will ensure that victims are always treated in a culturally sensitive and appropriate manner with courtesy and respect, and with due regard to their privacy. Internal or external advice on the application of tikanga and kawa will be sought in appropriate circumstances in line with the needs and wishes of the victim.

Upon request by, or on behalf of a victim, the prosecutor will seek the court's permission for a Victim Impact Statement to be read to the court.

8.4. Tikanga

Tikanga may be a relevant consideration in prosecution decisions and the conduct of prosecutions. The Authority will seek advice on tikanga when appropriate.

¹² Criminal Procedure Act 2011, s 246.



8.5. Decisions not to prosecute

If the Authority investigates a matter and decides not to prosecute, the decision must be explained to any known victims (where practicable)¹³ and any person who has notified the Chief Executive of their interest in the decision.¹⁴

A decision not to prosecute may be reversed if a review within the limitation period shows that a different decision should have been made or if there is new material evidence. A reversal of a decision must be in the public interest.

The Authority may receive a request to review a decision not to prosecute by a victim or other interested person. If the circumstances warrant it, the Chief Executive may consider appointing independent internal or external advisors to review the investigation and advice that lead to the decision.

8.6. Media and publicity

Prosecutors will follow the [Solicitor General's Prosecution Guidelines – Media](#). The Authority will act in a way that:

- does not prejudice the right to a fair trial
- supports the administration of justice and the integrity of the criminal justice system
- respects the principle of open justice, and
- treats victims of crime with courtesy and compassion and respects their privacy.

Publishing general information on the nature and outcome of prosecutions draws attention to the consequences of violating the law. It is a valuable tool for both educating and deterring future non-compliance. The Authority may publicise the outcome of a particular prosecution where it considers it appropriate.

¹³ Victims Rights Act 2002, s 12(1)(b).

¹⁴ Water Services Act 2021, s 158.