



INITIATING AND CONDUCTING PROSECUTIONS

OPERATIONAL POLICY

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ABOUT THIS POLICY

Introduction

1. This policy outlines the New Zealand Customs Service's (Customs) approach to initiating and conducting prosecutions. This includes:
 - the objectives of Customs' prosecution activities.
 - the roles and responsibilities of Customs' staff involved in prosecutions.
 - the process for making a prosecution decision.
 - Customs' role in supporting the Crown solicitor in conducting a prosecution.
2. The main purpose of the policy is to:
 - determine whether prosecution is appropriate rather than other enforcement action.
 - ensure that prosecution decisions are consistent, cost effective and are in the public interest.
3. Read this policy in conjunction with Customs Enforcement Guidelines which outline Customs enforcement objectives, enforcement options available, and circumstances in which they should be considered.
4. This policy is subject to and should be read in conjunction with the [Solicitor-General's Prosecution Guidelines](#). If any inconsistency arises between this policy and those guidelines, the Solicitor-General's Prosecution Guidelines prevail.

Related documents

5. Use this operational policy in conjunction with the following documents:

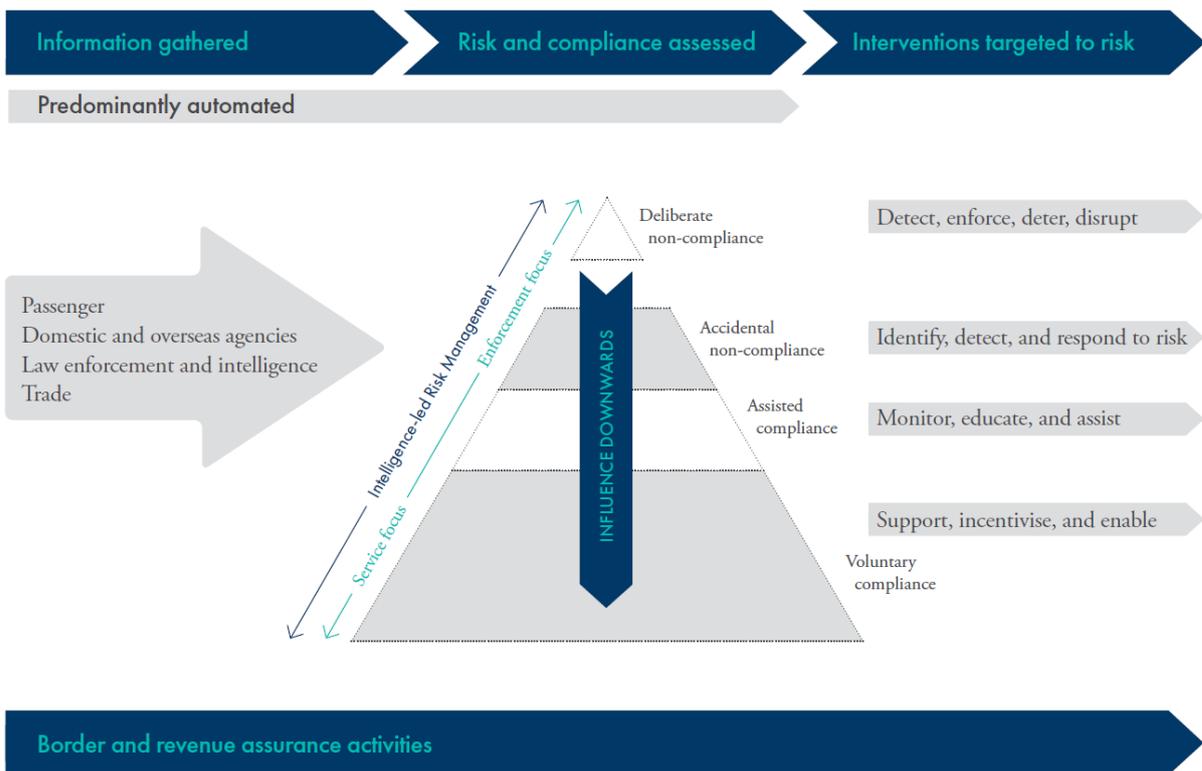
Document name	Document type
Customs Enforcement Guidelines	Internal Guidance
Customs Formal Warnings policy	Operational Policy
Customs Issue a Formal Warning Letter	Internal Procedure
Customs Issue a Formal Warning verbally	Internal Procedure
Customs Infringement Notice Scheme	Operational Policy
Customs Infringement Notices Guidelines	Internal Guidance
Solicitor-General's Prosecution Guidelines	External guidance
Ministry of Justice: Guidelines on Criminal Procedure Act 2011	External guidance and forms

Statutory Consents to Prosecutions	External Guidance
Crown Law Media Protocol	External Guidance

Prosecution objectives

- Prosecution should not be the default option for all offences. Where there are other appropriate enforcement options available these should be carefully considered first. Customs Enforcement Guidelines set out Customs’ enforcement objectives and the different enforcement options available with criteria and considerations for when their use is appropriate.
- The laws we administer or operate under provide us with a broad range of sanctions or enforcement actions. Appropriate actions should be selected to mitigate the impact of harms caused by the offences and to influence both the individual person and other users to comply in the future.

Figure 2: Customs approach to non-compliance



- We endeavour to encourage compliant behaviours by providing information, education, and guidance to users of our services.
- Where there is non-compliant behaviour, Customs will take appropriate and proportionate action from least to most restrictive, following our Enforcement Guidelines. Enforcement options include:
 - No action taken.

- Refer to another agency.
- Providing information and/or education.
- Issuing a verbal or written warning.
- Issuing an infringement notice.
- Cash sum - only for border cash reporting offences¹.
- Imposing an administrative penalty.
- Suspending or revoking privileges.
- Suspending or revoking licences.
- Prosecution.

Note: Where offending involves revenue, Customs will seek to collect all duty owing – regardless of whether the matter proceeds to prosecution. This includes the imposition of interest and penalties and may include debt recovery actions.

10. Prosecution action is a significant enforcement option and will be undertaken by Customs in a consistent and targeted manner in accordance with Customs' Enforcement Guidelines. In general, the highest priority for prosecution are offences that would be likely to cause the greatest amount of harm to persons and/or New Zealand. The severity of the enforcement action taken should be appropriate to the nature and seriousness of the offence but there may also be circumstances where prosecution is considered appropriate for deliberate and repeated lower-level offending, e.g. where infringement notices do not change behaviour.
11. At every point of the process for investigation of suspected offending, managers, supervisors, and staff should be mindful of Customs' overall approach to enforcement to ensure the effort invested is proportionate to the risks presented. Supervisors should ensure there is early engagement with Customs Legal.

Roles and responsibilities

12. The table below lists the roles and responsibilities of those involved in a prosecution:

Role	Responsibilities
Customs officer	A Customs officer of any rank in charge of an investigation that may lead to a prosecution. Once charges are filed, they liaise with the Crown solicitor managing the prosecution.
Supervisor	A supervisor (Customs Technical Specialist, Supervising Customs Officer or other as

¹ Only applies to *Anti-Money Laundering and Countering Financing of Terrorism Act 2009* border cash reporting offences under ss 106 & 107.

	appropriate) maintains day-to-day oversight of activities that may lead to a prosecution.
Manager	<p>Group Managers, Managers and Chief Customs Officers are responsible for ensuring that this policy is followed, and for setting the overall direction of investigative and prosecution activity.</p> <p>Tier 4 Managers make the final decision on prosecution, but this may be escalated to a Tier 3 Manager in some circumstances (listed below)</p>
Customs Legal	Customs Legal provides support and advice on investigations and prosecutions.
Chief Legal Advisor	The Chief Legal Advisor has oversight of, and is responsible for, the overall conduct of Customs' prosecutions.
Crown solicitor	<p>All prosecutions are undertaken by a Crown solicitor once charges are filed. Crown solicitors have the responsibility in defined districts for the conduct of prosecutions on behalf of the Crown.</p> <p>Crown solicitors are private legal practitioners appointed on the recommendation of the Attorney-General and by warrant of the Governor-General.²</p>

² The list of Crown solicitors is available at www.crownlaw.govt.nz/about-us/crown-solicitor-contacts/

Types of prosecution

13. This policy applies to all decisions to prosecute, and prosecution activities conducted by Crown solicitors on behalf of Customs. This comprises both:
 - Customs (public) prosecutions, which are conducted by Crown solicitors on Customs' behalf, and
 - Crown prosecutions, which must be conducted by the Solicitor-General, or Crown solicitors.

Customs (public) prosecutions

14. Customs may commence prosecution action for some offences, including under the Customs and Excise Act 2018, the Crimes Act 1961, the Misuse of Drugs Act 1975, and the Films, Videos, and Publications Classifications Act 1993 where the test for prosecution is met.
15. The Crown solicitor conducts all Customs prosecutions.

Crown prosecutions

16. Section 187 of the Criminal Procedure Act 2011 provides that the Solicitor-General must assume responsibility for and conduct every Crown prosecution for certain categories of offences, from the time or stage in the proceedings prescribed in the Crown Prosecution Regulations 2013. 'Crown assumed' offences are more serious and include offending under the Misuse of Drugs Act 1975.
17. These cases must be prosecuted by the Solicitor-General, or by Crown solicitors.

The Attorney-General's consent is required for some Crown prosecutions

18. Some offences can only be prosecuted with the consent of the Attorney-General. This includes, for example, the prosecution of drug offences committed outside of New Zealand (including within international waters) under [section 28A of the Misuse of Drugs Act 1975](#).³
19. The Crown Law Guideline [Statutory consents to prosecutions](#) sets out the matters prosecutors should consider, and the process to follow, when seeking consent to prosecute an offence for which statutory consent is required.

MAKING A DECISION TO PROSECUTE

Prosecution decision-makers

20. Customs Enforcement Guidelines outline the appropriate policies and procedures to follow for decisions on enforcement tools other than prosecution decisions.

³ The full list of offences is available at: [Statutory Offences Requiring the Consent of the Attorney-General](#)

21. The final decision on whether to proceed to prosecution must be made by a Tier 4 manager (or equivalent), following an appropriate review of the investigation file by Customs Legal.
22. Prosecution decisions must be escalated to a Tier 3 manager and Customs Legal notified of the escalation, if one or more of the following escalation criteria apply:
 - the legislation, or the particular provisions, are new or untested.
 - there are potential issues with the exercise of Customs' powers.
 - there are allegations that Customs has acted negligently or unlawfully.
 - there are allegations of actual or threatened harm or violence towards Customs employees or contractors.
 - any other reason that involves special sensitivity or potential risk to Customs.

The decision to prosecute must be made independently

23. The independence of the prosecutor is a critical part of New Zealand's criminal justice system. This means that all decisions relating to prosecutions should be made freely from undue or improper pressure from any source.
24. Undue or improper pressure includes political pressure, a conflict of interest, pressure to prosecute without sufficient evidence or where not in the public interest, or a perception that prosecution could have an adverse impact on Customs' wider relationship with a particular industry or entity.
25. The need for independence does not affect Customs' ability to set different enforcement options for different types of offending or industry groups to guide the deployment of resources. Decision-makers should take these options into account.
26. Internal and external comment and discussion on prosecution decisions by Customs staff (including reporting to the Customs Executive Board, Ministers, or comment to the media) needs to recognise the independence of the prosecution decision. Reports to the Minister should generally occur after charges have been filed, unless the "no surprises" rule applies, e.g. matters that are likely to be controversial or subject to public debate.
27. Customs staff should raise any matters arising out of this policy that may compromise or be seen as compromising independent decision making, with the Chief Legal Advisor.

Making unbiased decisions

28. Prosecutorial decisions should be made with a view to fairness and equitable criminal justice outcomes for all. This means that there should be no avoidable or remediable differences in treatment of approach that may have an unfair effect on particular groups or people.⁴

⁴ [Making unbiased decisions » Crown Law](#)

29. Customs prosecution decisions are made independently from the Customs officer who has investigated the matter to minimise any inappropriate conscious or unconscious bias that may result in an inequitable prosecution outcome.
30. Customs requires prosecution decision-making to be recorded on a Decision to Prosecute Memorandum ('DTP') which ensures considered, logical and transparent decision-making. Customs will work towards developing a system for undertaking periodic blind peer review of DTP with the identifying particulars (age, ethnicity, gender, disability, occupation, residential address) redacted to identify any potentially biased decision-making. Customs is working towards systematically collecting and analysing data to inform areas for further research into whether there is bias in its decision-making. Customs also has modules on unconscious bias available for training of staff.
31. Customs acknowledges that a more diverse workforce can improve understanding and identification of the biases present in decision-making and therefore promotes recruitment, retention, promotion, and other organisational policies that improve and support diversity.

Filing a charge(s) following an arrest:

32. In all cases of an arrest the [Arrest - Operational Policy](#), [Decide whether to arrest a suspected offender guidelines](#) and [Associated Arrest Procedures](#) must be followed.
33. In cases where a suspect is arrested following the procedures set out in these documents, any charge(s) must be filed promptly after the arrest. In these circumstances, it is expected that the Customs officer has considered the test for prosecution in consultation with their supervisor to confirm there is sufficient evidence of the offending, and prosecution is in the public interest, before the decision to charge the suspect is made.
34. It is recognised that in an arrest situation the Customs officer may not have all the information available or be able to consider all the factors required in the test for prosecution. The decision to prosecute should be made on the evidence and information available at the time and reasons recorded. In these circumstances the decision will be reviewed by the relevant Crown Solicitor, who will be better placed to make this assessment at a later date.
35. In all other cases, at the conclusion of the investigation, the decision-making procedure is as outlined below.

Decision-making process: Non-arrest

36. The decision-making process for whether to proceed with a prosecution is set out below.

Step 1: Consideration of appropriate enforcement tool

37. The Customs officer responsible for the investigation file should first consider Customs Enforcement guidelines to determine the most appropriate response in the circumstances. Where prosecution is considered appropriate proceed to Step 2.

Step 2: Recommendation by Customs officer

38. The Customs officer assesses whether the case meets the test for prosecution, including whether the alleged offending falls within the applicable limitation period, and makes a recommendation to their supervisor whether to proceed with a prosecution by completing a DTP.

Step 3: Review by supervisor

39. The draft DTP is reviewed by a supervisor and if the supervisor agrees with the Customs officer's recommendation the file and completed DTP is referred to Customs Legal. The supervisor may also refer the file back to the Customs officer if further information or enquiries are required.

Step 4: Review by Customs Legal

40. The Customs officer's recommendation and analysis of the evidence and public interest factors in the DTP is reviewed by Customs Legal. This review is an objective assessment and will advise on whether the test for prosecution is met and whether the charge(s) identified are correct. Customs Legal will then make a recommendation to the relevant manager on the DTP.

Step 5: Manager makes decision on whether to prosecute

41. The relevant manager will consider the recommendation made by the Customs officer and the advice from Customs Legal. They will either make the decision to prosecute and approve filing charges or not and record their decision and reasons on the DTP. If the relevant manager considers that there is sufficient evidence, but an alternative enforcement tool may be more appropriate the matter may be referred back to the Customs officer for further consideration.

The test for prosecution

42. The test for prosecution is set out in the Solicitor-General's Prosecution Guidelines. Customs will initiate prosecutions only where the test for prosecution is met **and** prosecution is consistent with Customs' approach to compliance as outline in Customs Enforcement Guidelines.
43. The Solicitor-General's Prosecution Guidelines provide guidance on the standards required to meet this test, and should be applied, in conjunction with Customs Enforcement Guidelines.
44. There are two stages in the test for prosecution:
- the evidence which can be put before the Court is sufficient to "prove the proposed charge beyond a reasonable doubt" - the **Evidential Test**, and
 - criminal prosecution is required in the public interest - the **Public Interest Test**.
45. Each stage of the test is considered separately. A Customs officer **must** be satisfied that both limbs of the test for prosecution are met before recommending to their supervisor to commence a prosecution. The two parts of the test are set out below.

46. Generally, the two stages are applied in the above sequence, with the evidential test considered first. However, if the decision-maker is of the clear view that a prosecution is *not* required in the public interest, a decision can be made on that basis without the need to comprehensively evaluate evidential sufficiency.
47. Unless there are clear reasons why Customs considers that prosecution will almost always be warranted for a particular offence, as set out in Customs Enforcement Guidelines, prosecution should only be considered after alternative options under the Customs Enforcement Guidelines are worked through.

First stage: Is there sufficient evidence?

48. Before recommending prosecution, a Customs officer should first be satisfied that there is enough relevant and admissible evidence to prove the proposed charge beyond a reasonable doubt.
49. When deciding whether there is enough evidence, the Customs officer should consider whether the evidence is available, admissible, reliable and credible.
50. During the assessment of the evidence, it may become apparent that further investigation is required before a decision on prosecution can be made. If this occurs the Customs officer should make further enquiries and return to the assessment when the enquiries have been completed, and all avenues of investigation are exhausted.
51. Where there is an obvious or clearly available defence, the Customs officer should consider whether it can be rebutted to the requisite standard on the evidence available. If it cannot, the evidential test will not be made out.

Second stage: Is prosecution in the public interest?

52. If it is determined there is sufficient evidence to support a prosecution, the Customs officer should then consider whether the public interest requires a prosecution.
53. Not all offences must be prosecuted. Customs will follow the Enforcement Guidelines and exercise its judgment in accordance with its enforcement objectives and priorities, while taking into account available resources and the likely cost of prosecution.
54. Where Customs considers that an alternative enforcement tool under its Enforcement Guidelines is available and appropriate and that it can effectively respond to the offending and meet the needs of any victims, their whanau, or the broader community, then prosecution does not need to be considered.
55. Assessing the public interest involves balancing all the factors relevant to the individual case when making the decision. While these factors may vary, a primary consideration is the seriousness of the offence, as generally, the more serious the offence the more likely a prosecution. However, no one factor is determinative on its own.
56. A non-exhaustive list of such factors is contained in the Solicitor-General's Prosecution Guidelines and set out at appendix 1.

57. As prosecutors will usually be unaware of the full extent of a suspect's personal circumstances at the time that a prosecution decision is made, the decisions should be reviewed whenever significant new information about a suspect or defendant comes to light.

Choice of charges

58. Where evidence supports charges for more than one offence the Customs officer preparing the DTP should decide which charge (or charges) is the most appropriate in the circumstances. Just because multiple charges may be available this does not automatically mean that they should all proceed to prosecution. In deciding which legislation to file a charge under the Customs officer should consider the nature of the alleged conduct and the charge that would most appropriately address that conduct.
59. The charge(s) selected should be those that most accurately and adequately reflect the seriousness and totality of the offending and provide the court with an appropriate basis for sentencing. The number or seriousness of the charges should never be inflated to encourage a guilty plea to a lesser charge, or fewer charges.
60. Where the offending relates to acts or omissions attributed to a company or other corporate entity; the charges should reflect the purposes of the legislation and party liability. Consideration should be given to who should be charged – the company or its officers and employees.⁵ It may be appropriate to charge a company where the threat of significant financial penalties, even to the point of liquidation, is an effective deterrent.

Conduct of prosecutions

Instructing the Crown solicitor

61. The Crown solicitor conducts all Customs prosecutions.
62. When an investigation reaches a point where an arrest or filing charges is considered likely, the Customs officer should provide the Crown solicitor a brief overview of the investigation, investigation name, the likely charges, the number of suspects and/or defendants, termination date if applicable, and the likely timing for filing charges.
63. Customs must file the charge(s) where the offending occurred, or where the defendant is believed to be located. Customs must instruct the Crown Solicitor responsible for the region where the charging documents are filed.⁶ In cases where there are multiple offences which have occurred in several different areas, Customs will instruct the Crown solicitor in the area where a majority or the most serious offending took place.

⁵ Customs and Excise Act 2018, ss 394- 395

⁶ The full list of Crown solicitor contacts is available at: www.crownlaw.govt.nz/about-us/crown-solicitor-contacts/

Oversight and management of prosecutions

64. The Chief Legal Advisor has oversight of, and is responsible for, the overall conduct of Customs' prosecutions. Supervisors should ensure there is early engagement with Customs Legal. The Crown solicitor is responsible for managing individual prosecutions after charges are filed. The Crown solicitor responsible for managing a prosecution may provide advice and recommendations to Customs relating to that prosecution.
65. All Crown solicitors who have been instructed, and are acting on behalf of Customs, are required to comply with all relevant professional obligations, including the requirement to present the prosecution case fairly and fully but not to strive for conviction at any cost.
66. For Crown prosecutions, once the Crown has assumed responsibility, all decisions are matters for the Crown solicitor to decide in consultation with Customs.

Responsibilities of the Customs officer

67. Customs officers will work collaboratively with Crown solicitors, respecting their separate responsibilities, ensuring the right mix of checks and balances exist in bringing a criminal case to justice.
68. All Customs' staff involved in a prosecution will maintain a high standard of professional and ethical conduct. The instructing Customs officer will:
 - act in a manner that is fundamentally fair, perform their obligations objectively, impartially and without delay.
 - ensure all information and assistance required by the Crown Solicitor is provided promptly.
 - comply with the disclosure obligations contained in the Criminal Disclosure Act 2008.
 - ensure that disclosure obligations are met and that the Crown Solicitor also receives copies of any disclosure provided to defence counsel.

Working with other agencies

69. It is not uncommon that more than one government agency may investigate a particular matter, in circumstances where a prosecution by any of the agencies involved could result.
70. Customs may have a Memorandum of Understanding (MOU) with some agencies which sets out how this relationship will work.
71. If there isn't a MOU, Customs will consult with other agencies, where it is reasonably practicable, prior to the filing of any charge, to satisfy itself that the commencement of a prosecution by Customs will be in the public interest.
72. Those consultations may, at Customs' discretion, impact on its decision to bring a charge(s), or the timing of any charges being brought (e.g. to await a prosecution decision in respect of more serious offending) to avoid prejudicing another agency's investigation.

Media and public communications

73. Public statements about prosecutions and investigations should be treated with particular care. Any media comment during an investigation or prosecution should take the [Crown Law Media Protocol](#) into account and comply with Customs' internal media policy.

Appeals

74. The Solicitor General's consent is required for a prosecution appeal. The process for seeking consent is set out in Appendix 1 (for non-Crown prosecutions) and Appendix 2 (for Crown prosecutions) of the [Crown Law Appeals Guidelines](#).
75. Despite the above the Solicitor-General has authorised Crown Solicitors to give consent for appeals to the High Court against decisions concerning bail and name suppression, given the need for urgent decisions in such cases.

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Appendix 1: Table of Public Interest Factors (non-exhaustive)

Factor	Considerations
Personal characteristics and circumstances of the suspect	<p>For prosecution:</p> <ul style="list-style-type: none"> ➤ The suspect was in a position of authority or trust. ➤ The suspect was a ringleader/organiser of the offence. ➤ The suspect poses a high level of risk to the safety of the public or any individual person. ➤ The suspect's relevant previous warnings, infringements, or convictions. ➤ The suspect committed the offence whilst on bail/probation/parole/subject to another Court order. ➤ There is a high likelihood of the suspect continuing or repeating the offence. <p>Against Prosecution:</p> <ul style="list-style-type: none"> ➤ The suspect is elderly or a youth. ➤ The suspect is a first-time offender. ➤ The suspect has a disability or significant physical or mental health issues which may have had a causative role in the offending. ➤ There are relevant features of the suspect's background known to the prosecutor which may shed some light on the suspects culpability or role in the offending. ➤ The suspect has no previous relevant warnings, infringements, or convictions. ➤ The likelihood of the suspect continuing or repeating the offence is low. ➤ The suspect has expressed remorse or participated in a form of restorative justice. ➤ The suspect has provided assistance to authorities. ➤ The suspect has been subject to other consequences because of the offending (including loss or harm or legal consequences such as loss of employment or action taken by another agency).
Features of the offending	<p>For prosecution:</p> <ul style="list-style-type: none"> ➤ The offending is serious, and a significant penalty is likely to be imposed by the Court.

- The suspect's involvement and level of culpability was significant.
- There is a strong need for deterrence for this type of offending.
- Extent of harm to any victims (whether identified or unidentified) or the community as a whole
- The offending is prevalent and there is a need for deterrence.

Against prosecution:

- The offence is not serious and is unlikely to be repeated.
- The Court is likely to impose a very small or nominal penalty.
- The loss or harm suffered is minor and was the result of a single incident, error of judgement or genuine mistake.
- A long period of time has passed since the offence took place and a likely trial date is such as to give rise to undue delay or an abuse of process but only if:
 - the offence wasn't serious.
 - the defendant didn't cause the delay.
- The suspect has rectified the loss or harm caused

Other factors

- Are there any proper alternatives to prosecution available and appropriate in the circumstances?
 - Is the prosecution likely to have a detrimental effect on the physical/mental health of a victim/witness?
 - Will information be made public that could disproportionately harm sources of information, international relations, or national security?
 - Whether the recovery of the proceeds of crime may be more effectively pursued by civil action
 - Does the cost of bringing the prosecutions outweigh the seriousness of the offending. This includes consideration of the time and resources to be spent by the courts and other agencies and cost to the criminal justice system as a whole.
-

Appendix 2: Key legislation

The following legislation forms the basis of the prosecutions operating environment:

- [Customs and Excise Act 2018](#)
- [Criminal Procedure Act 2011](#) governs criminal procedure from the commencement of proceedings through to disposition and appeal.
- [Criminal Procedure Rules 2012](#) regulates the practice and procedure of District Courts and the High Court in the exercise of the criminal jurisdiction.
- [Crown Prosecution Regulations 2013](#) details when a prosecution is a Crown Prosecution for the purposes of the Criminal Procedure Act 2011.
- [Criminal Disclosure Act 2008](#) codifies the rules governing the disclosure of information by Customs and third parties to defendants.
- [New Zealand Bill of Rights Act 1990](#) codifies procedural rights and requirements for defendants and Customs.
- [Bail Act 2000](#) determines procedures for the granting and opposing of bail.
- [Sentencing Act 2002](#) sets out sentencing options and procedures relevant to sentencing considerations.
- [Evidence Act 2006](#) sets out the requirements for the preparation and delivery of evidence at court.
- [Victims' Rights Act 2002](#) sets out government agency interaction requirements with victims, including victim impact statements.