



Ministry of Social Development

Prosecution Policy

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Owner:	General Manager Integrity and Debt

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Purpose

1. In line with the Solicitor-General's Prosecution Guidelines¹, the Ministry of Social Development (MSD) is required to have a publicly available policy that outlines its process for making decisions whether to prosecute, and when matters may be resolved without prosecution, including alternative responses.
2. This Policy is subject to the Solicitor-General's Prosecution Guidelines.

Policy Statement

3. MSD has a responsibility to protect the integrity of the benefit system.
4. Most clients are honest about their situation and want to do the right thing. MSD wants to make it easy for clients to do this.
5. Every day, MSD works closely with clients to help them towards independence, while also supporting fraud prevention.
6. MSD's overall approach is to intervene early when integrity concerns are raised.
7. MSD's investigative resources are focused on responding to deliberate fraud. Fraud is where someone has intentionally misled MSD, to receive financial and/or other support to which they or someone else are not entitled.

¹ [Prosecution Guidelines » Crown Law](#)

8. Matters under investigation are assessed on a case-by-case basis, to determine the most appropriate response, proportionate to any offending.
9. Any response will seek to denounce and deter the conduct or offending, including the recovery of any debt, assisting or making amends to any victim, and supporting rehabilitation.

Scope

10. This policy applies to all MSD employees involved in investigating suspected offences committed by clients or others and making decisions on whether to prosecute for offending. This includes Investigators, managers, lawyers, and the MSD Prosecution Review Panel.
11. This Policy covers the prosecution decision process but does not apply to prosecution activity beyond the decision to prosecute.
12. This Policy does not apply to warnings or sanctions related to non-criminal, Social Security Act 2018 obligations failures; or to warnings issued to clients or others in relation to aggressive or abusive behaviour.
13. Prosecution decisions related to internal fraud are covered by the MSD Internal Fraud and Corruption Policy.

Policy principles

MSD's strategic goals and objectives

- **Our Purpose**
 - *We help New Zealanders to be safe, strong and independent.*
- **Our Strategic Direction - Te Pae Tawhiti**
 - *Mana Manaaki – A positive experience every time*
 - *Kotahitanga – Partnering for greater impact*
 - *Kia Takatū tatou – Supporting long-term social and economic development.*
- **Our Māori Strategy – Te Pae Tata**
 - *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.*
- **Our Pacific Prosperity Strategy**
 - Our purpose – To rejuvenate the Ministry's delivery and engagement of services for Pacific peoples, families and communities, so they are safe, thrive and flourish in Aotearoa.

14. MSD's prosecution decisions take account of its purpose and strategic direction, as well as its legislative requirements, particularly when considering the public interest in taking a prosecution.
15. 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.
16. MSD is committed to using Te Pae Tata and Te Tiriti o Waitangi principles to inform its approach and the outcomes MSD wants to achieve.
17. 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 to keep others) safe, strong and independent
 - treat people with dignity and professionalism, regardless of any offending that may have been committed
 - ensure its practices, processes and decisions are objective, fair, transparent, and consistent.

Social Security Act 2018 Principles²

18. Every person performing or exercising a duty, function, or power under this Act must have regard to the following general principles:
 - work in paid employment offers the best opportunity for people to achieve social and economic well-being:
 - the priority for people of working age should be to find and retain work.
 - 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:
 - people for whom work is not appropriate should be supported in accordance with this Act.

Legislative compliance / Fiscal responsibility

19. There is legislation which requires MSD to manage and minimise the risk of abuse of the support systems it has responsibility for.
 - 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.
 - The Social Security Act 2018 imposes a duty on MSD to inquire into claims for benefit (s 298), allows MSD to review entitlement to a benefit (s 304), and provides powers to ask questions and to obtain information to carry out these functions (Schedule 6).

² [Section 4 – Principles \(Social Security Act 2018\)](#)

- 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.

20. 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.
21. The investigation of offences, and decisions on the appropriate response to offences, fits within this framework.

Solicitor-General's Prosecution Guidelines

22. The *Solicitor-General's Prosecution Guidelines* (the Guidelines) provide guidance to assist MSD (and other prosecuting agencies) to decide on prosecution. MSD makes prosecution decisions in compliance with the Guidelines.
23. 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. 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. is there enough evidence to prove the proposed charge beyond reasonable doubt, and
 - that the Public Interest test is met, i.e. that only those breaches of the criminal law where the public interest requires a prosecution will proceed to that step.

Policy considerations

Relationship between Investigators and Prosecutors

24. Prosecutors and Investigators have different responsibilities in regard to prosecutions. While Prosecutors are expected to cooperate and consult with Investigators on key decisions, they ultimately make prosecution decisions independently of Investigators.
25. Prosecutors may offer legal advice as part of the process for making prosecutorial decisions and that advice is a factor to be considered when making decisions.

Evidential Test

26. The Evidential Test is fundamental. There must never be a prosecution where there is insufficient evidence to prove the proposed charge beyond reasonable doubt. A lawyer must confirm that the Evidential Test requirements are met before a case can be considered for prosecution.
27. In some cases, if it is clear that a prosecution does not meet the Public Interest Test, a decision can be made on that basis without the need to complete an Evidential Test.

Public Interest Test

28. If the requirements of the Evidential Test are met, then consideration must be given to whether prosecution is required in the public interest.
29. The Guidelines include factors to be considered 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”.
30. Some additional key public interest factors for and against prosecution relevant to MSD are set out below. These lists are not exhaustive.
31. People under investigation are encouraged to and are provided every opportunity to talk to us but, it is not uncommon for them to choose not to do so.
32. Factors favouring prosecution may include:
 - the gravity of offending, including 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 amount of any overpayment established
 - the use of organised, widespread and/or systematic attacks on, including collusion to misuse, the welfare system or other financial supports administered by MSD
 - using false or altered documents
 - using documents or an identity belonging to someone else
 - where the offending results in harm to another person
 - being untruthful to a member of MSD’s staff
 - where a person has not taken clear opportunities to advise of a change in circumstances.
 - where a previous warning or other sanction has been issued.
33. Factors against prosecution may include:
 - a first offence where a warning may be more appropriate
 - the availability of effective alternatives to prosecution
 - where the offence is relatively minor, or any overpayment established is small
 - the impact of prosecution on the ability of a client to obtain or sustain employment that supports their long-term independence
 - where there may have been opportunities for MSD to have intervened, which potentially could have impacted offending

- a person's personal circumstances or where the person (or their family) may be particularly vulnerable e.g. family harm, serious mental health issues, disability.
- where the person has taken action to address the underlying causes of offending

Public Interest Test: Considering the seriousness of any offending

34. Offences against legislation administered by MSD will generally be either where someone omits to tell MSD relevant information or provides false information to mislead MSD.
35. Prosecution is generally considered for offending of at least moderate seriousness.
36. MSD places considerable trust in the honesty of clients. This helps to avoid onerous verification requirements for applicants for assistance or in complying with their ongoing obligations and allows quick and easy access to assistance for those in need. The extent to which this trust is breached is considered as a factor when deciding on prosecution.
37. For instance, an isolated instance of someone failing to advise MSD of income they may have received could be at the lower end of offending, while someone who uses a false or stolen identity, or who colludes with others to defraud MSD, would be considered more serious.
38. Some offending might not be considered serious in isolation but may be considered more serious if it is becoming or is likely to become widespread, especially through deliberate action.
39. In general, where evidence confirms that someone has failed to give the correct information, resulting in payments made in excess of entitlement, then an overpayment will be established, and recovery of this money will be sought. Where someone has deliberately and intentionally sought to defraud MSD, prosecution action will be considered, in addition to any overpayment established.

Public Interest Test: Voluntary disclosures and their effect on prosecutions

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

Public Interest Test: Interagency Investigations

41. From time-to-time MSD may undertake investigations and/or prosecutions in conjunction with another agency. Where a co-ordinated prosecution is being considered, the decision will be made in consultation with the other agency, having regard to both agencies prosecution policies.

Conscious and Unconscious Bias

- 42. Biases can undermine the administration of justice and lead to unfair decision-making or judgements.
- 43. Independent prosecution decisions, separate from the Investigator, are an important safeguard against conscious and unconscious bias.
- 44. A further safeguard is by anonymising referrals to the MSD Prosecution Review Panel.
- 45. Responsibility for understanding, identifying, and addressing biases rests with all Investigators and Prosecutors.

Decision making process

- 46. Where an investigator concludes that a prosecution may be appropriate, they will consult with their manager and a lawyer, on the outcome of the investigation. This must include consideration of non-prosecution responses available.
- 47. A lawyer will undertake an assessment of the Evidential Test and the Public Interest Test and if they are satisfied that the Tests are met, the case is referred to the MSD Prosecution Review Panel to make the decision to determine whether MSD will begin prosecution.

Choice of charges

- 48. MSD may prosecute criminal non-compliance in areas covered by legislation within its administrative responsibility. A list of this legislation is available on the MSD website.³
- 49. However, charges under other Acts, such as 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.
- 50. Section 20(2) of the Criminal Procedure Act 2011 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.

Responses other than prosecution

- 51. It has never been the case that all offences must be prosecuted. While prosecution will ordinarily be the appropriate response to serious criminal offending, it should otherwise be used only where it is proportionate to the circumstances of the case.

³ [Legislation \(MSD\)](#)

52. A prosecution should only be commenced if the matter warrants the intervention of the criminal law. If there is another way of dealing with a particular case that is effective and appropriate in the circumstances, it should be used. MSD has a range of responses to behaviour it believes may amount to criminal behaviour. More than one of these responses may be used where this is considered appropriate and proportionate.
53. All available response options are considered when deciding which are proportionate and appropriate to the offending. These include:

Education

Advice to the offender of their inappropriate behaviour and how to comply in future.

Warning

Issue the offender a warning that they may have committed a specific offence, that MSD has decided not to prosecute in this instance, but further offending may result in prosecution being considered (See Warnings).

Financial Penalty

Imposition of a financial penalty under Section 354, Social Security Act 2018, where, in MSD's opinion, the person has received payment in excess of entitlement, and which was obtained by fraud.

Civil Recovery⁴

Commence civil recovery action to recover any payment made in excess of entitlement.

Low Trust Client Management (LTCM)

Clients who have been identified as having abused the benefit system may be assigned to LTCM. When someone has been assigned to LTCM, they have restricted functional access to MyMSD and are required to have face to face contact and to provide specific or additional verification, when seeking any financial assistance. Clients may be assigned as LTCM for a specified period or, in significantly serious cases, permanently. Clients may be assigned to LTCM in addition to or apart from prosecution or other responses.

Warnings

54. Warnings will be considered as one of the available responses to offending. Warnings should be used appropriately, consistently, and in accordance with the principles of natural justice.
55. MSD must be satisfied that there is sufficient evidence of an offence before issuing a warning. For MSD, the standard of proof required for a warning to be given is on the balance of probabilities i.e. the evidence establishes that it is more likely than not that the behaviour concerned has occurred. MSD considers that this standard is appropriate because:

⁴ Likely to be only used in cases involving COVID19 Wage Subsidy

- We need to balance the wellbeing of clients against the need to effectively manage public money.
- This is consistent with the standard used by MSD to make other decisions affecting clients, including stopping a benefit payment or establishing and recovering any debt.
- The consequences of a warning are significantly less than that of a prosecution.

56. It is unlikely that a warning would adequately respond to conduct which, if proved, would amount to serious offending.

57. When considering whether a warning is the appropriate response to behaviour MSD believes could amount to criminal conduct, MSD will take account of the Public Interest factors (referred to earlier in this Policy) relevant to the individual.

58. MSD's purpose in issuing a warning is to:

- show that MSD takes the matter seriously
- impress on the person that MSD considers the conduct is criminal and could have been prosecuted
- give the person an opportunity to address the underlying drivers of the conduct or make amends for it
- deter the person and others, from engaging in similar conduct in the future
- provide a record to be taken into account when considering any future offending.

59. Where someone re-offends following an earlier warning, the earlier warning will be a factor in deciding whether to prosecute for the new offending. The length of time since the warning was issued will be a relevant consideration.

Issuing a warning under this Policy

60. Warnings issued under this Policy should include:

- An accurate summary of the key acts underpinning the warning
- The reasons for issuing the warning
- The consequences of the warning which include:
 - i. That the warning will be held in MSD's Investigation Management System
 - ii. That the warning may be a factor in deciding what action is appropriate for future criminal behaviour
- The person's rights in relation to the warning, including rights under the Privacy Act 2020

61. Warnings issued under this Policy must not imply that an offence has been committed, or that an offence is proven. The warning may set out that in MSD's view, the conduct or behaviour concerned may amount to a specific offence and that, if repeated, a prosecution

may be considered. The length of time since the warning was issued will be a relevant factor in that consideration.

62. Warnings will be recorded in MSD's Investigation Management System. The nature of MSD's investigations (including that our investigations relate to periods of offending and not one-off matters, and our ongoing relationships with clients) means that removing warnings is inappropriate.
63. MSD does not have any power of arrest and cannot compel someone to speak to us. People under investigation are encouraged to and are provided every opportunity to talk to us but, it is not uncommon for them to choose not to do so.
64. MSD's warnings approach varies from the Solicitor-General's Guidelines in that MSD will not generally seek the consent of someone before issuing a warning and that warnings will not be removed from a person's record.

Reconsideration of a warning

65. People who have been issued a warning under this Policy may request that the warning be reconsidered, or MSD may initiate reconsideration of a warning.
66. Reasons for reconsidering a warning include that:
 - A reconsideration of the imposition of the warning shows that warning should not be allowed to stand; and/or
 - A review of the original overpayment or benefit decision shows that part of the decision is overturned; and
 - New evidence means the original decision to issue a formal warning was not appropriate.

Media enquiries

67. Open justice is in the public interest. It promotes public scrutiny of, and confidence in, the justice system. Accurate media reporting is a critical component of open justice, as few people have direct access to the courts.
68. However, it is also vital to protect fair trial rights, respect legal restrictions on publication, be respectful of current court processes, and comply with professional obligations.
69. MSD will be cautious in making any comment prior to charges being filed. Any statement may be at a very general level, related to process, and will not provide any specific information about charges (if any) being considered or any identifiable individual being investigated.
70. In general, after charges have been laid, MSD may provide information about the charges, the defendant, and the progress of proceedings. However, MSD will always consider whether

there are any reasons in a particular case, that make it inappropriate to put the information in the public domain.

Victims

71. While MSD will generally be the primary victim of offences, there will be times when there are other victims involved, particularly where someone's identity has been stolen or misused, to commit offences.
72. In some cases, the victim may initially be the subject of an investigation into offences committed in their name.
73. Where victims are identified, MSD will ensure that any effect on that victim's benefit entitlement is rectified, and they will be supported and informed of the outcome of any investigation, to the extent to which they wish to be informed, taking into account privacy and other considerations.
74. The effect on any victim will be a factor considered in the prosecution decision relating to the offender.
75. MSD will comply with the Solicitor-General's Guidelines and the Victims' Rights Act 2002.

Appendix:

Responsibilities

Person/Party	Responsibilities
DCE Service Delivery Chief Legal Advisor	<ul style="list-style-type: none"> Maintain oversight of the Policy.
General Manager Integrity and Debt	<ul style="list-style-type: none"> Manage day to day implementation of the Policy Ensure compliance with the Policy by the MSD 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 Deputy Chief Legal Advisor	<ul style="list-style-type: none"> Coordinate referrals and advice for consideration by the MSD Prosecution Review Panel.

Definitions

Word/ phrase	Definition
Investigation	Gathering information and acting on more serious integrity issues, which could result in prosecution.
Investigator	MSD staff responsible for investigating allegations of fraud or non-compliance related to benefits, social housing, and other programs, supports or services administered by MSD.
MSD Prosecution Review Panel	A representative body within MSD responsible for the final decision to refer for prosecution.
Offending	Any act or behaviour that constitutes an offence, including dishonesty, or deception.
Prosecutor	Any person who makes a prosecution decision, or conducts a prosecution, including representing the prosecuting agency in court.

Related policies

MSD Internal Fraud and Corruption Policy

MSD Low Trust Client Management Policy