

## Prosecutions Policy

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<b>Policy owner</b>	Head of Legal
<b>Policy administrator</b>	Manager, Legal Services
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<b>Related policies and legislation</b>	Natural Hazards Insurance Act 2023 Earthquake Commission Act 1993 Crimes Act 1961 Summary Offences Act 1981 Criminal Disclosure Act 2008 Criminal Procedure Act 2011 Building Act 2004 Official Information Act 1982 Privacy Act 2020 Public Service Act 2020 Human Rights Act 1993 New Zealand Bill of Rights Act 1990 Evidence Act 2006 Solicitor-General's Prosecution Guidelines 2024 Crown Law's Victims of Crime–Guidance for Prosecutors Crown Law's Media Protocol for Prosecutors NHI Fraud Policy NHI Declinature Policy NHI Risk Management Policy NHI Delegations Framework NHI Speak Up Policy

## Introduction

The Natural Hazards Commission Toka Tū Ake (NHC Toka Tū Ake) administers a statutory scheme that provides natural hazard cover for residential homes and land.

Specifically, the scheme provides insurance for loss or damage arising from an earthquake, landslide, volcanic activity, hydrothermal activity, tsunami, storm or flood (land cover only) and fire caused by any of the above natural hazards. The terms of the insurance cover are set out in

the Natural Hazards Insurance Act 2023 (NHI Act), which came into force in 1 July 2024 replacing the Earthquake Commission Act 1993 (EQC Act). Residential property owners have access to natural hazard cover if they hold an insurance policy with cover for fire damage for a private dwelling.

NHC Toka Tū Ake's other functions include administering the natural hazard fund, obtaining reinsurance, and facilitating research and education relating to natural disaster. NHC Toka Tū Ake may also undertake other functions if directed by the Minister.

After a natural disaster, NHC Toka Tū Ake can be operating in a post disaster setting under emergency conditions. Emergency disaster relief efforts and the ensuing rebuilding operations, with their substantial flow of money, goods, and services, and the major infrastructure projects that are often required after a disaster increase the risk of fraudulent and corrupt behaviour.

NHC Toka Tū Ake is committed to protecting public resources through a programme of fraud and corruption risk management. Prosecution action is one of several fraud and corruption risk management enforcement responses that may be implemented by NHC Toka Tū Ake where fraud or corruption has been identified and certain criteria are met.

NHC Toka Tū Ake may also commence prosecutions for offences under its principal statute – the NHIA. NHC Toka Tū Ake may also commence prosecutions under other statutes where it considers an offence has potentially been committed during its operational responsibilities. In particular, NHC Toka Tū Ake will contemplate prosecution as a response to conduct that interferes with the organisation's ability to perform its statutory functions, for example where NHC Toka Tū Ake is knowingly or wilfully provided with information that is incorrect or misleading.

NHC Toka Tū Ake's views prosecution as a deterrent and ensures that those who breach the law are held to account. Prosecution action may be taken where there is sufficient evidence of an offence, and it is in the public interest to do so.

NHC Toka Tū Ake will use prosecution in a deliberate and considered manner. Decisions to prosecute and whether to continue with prosecutions, will be made with reference to the principles in the Solicitor-General's Prosecution Guideline 2024 (Prosecution Guidelines) including acting fairly and objectively, independently from political or other influence, giving effect to the law, proportionate to the circumstances, respecting victims and any relevant enforcement policies and/or guidelines.

## **Purpose**

The purpose of this policy is to:

- Provide guidance on the principles and practices when contemplating potential prosecutions or conducting prosecution proceedings.
- Ensure that relevant factors are considered in decisions to prosecute or continue with prosecutions.
- Ensure that decisions to prosecute, or continue to prosecute, are made fairly, consistently and are proportionate to the seriousness of the behaviour.
- Ensure that any other relevant enforcement policies and/or guidelines are considered.

## Scope

This policy applies to prosecutions and potential prosecutions arising from investigations and enquiries conducted by NHC Toka Tū Ake relating to its statutory and operational functions.

This policy does not apply to referrals to external investigation and prosecution agencies such as the Serious Fraud Office, New Zealand Police or Ministry of Business, Innovation and Employment.

## NHC Toka Tū Ake's Decision-making Framework

NHC Toka Tū Ake will consider each case on its merits when making the decision to prosecute. NHC Toka Tū Ake will apply the Prosecution Guidelines (including the facts of each case, the relevant legislation, the evidence and the public interest) as well as any other relevant enforcement policies and/or guidelines.

The key factors and behaviours that are relevant to a decision to prosecute will vary from case to case. However, and without limiting NHC Toka Tū Ake's discretion to prosecute any individual case, key factors and behaviours will include:

- Whether there is strong evidence of potential offending.
- Whether the alleged offending was intentional or calculated.
- Whether there are more appropriate alternatives to prosecution.

This prosecution policy is subject to the Prosecution Guidelines) and establishes a structured approach for deciding on prosecutions being conducted by NHC Toka Tū Ake.

The Prosecution Guidelines establish the 'Test for Prosecution'. There are two stages to that test: the first is the 'Evidential Test' and the second is the 'Public Interest Test'. Both tests should be met before a prosecution is commenced.

Where the internal review process of an NHC Toka Tū Ake investigation indicates that there is sufficient evidence that establishes a reasonable prospect of conviction of a potential offence, the Test for Prosecution should be applied to the evidence ensuring the Prosecution Guidelines are followed.

## Evidential Test

To meet the Evidential Test, NHC Toka Tū Ake must be satisfied that there is enough evidence to prove the proposed charge beyond reasonable doubt.

A reasonable prospect of conviction will exist if, in relation to an identifiable person (whether natural or legal), there is credible evidence which could be given before a Court and upon which a Judge or jury could reasonably be expected to be satisfied beyond reasonable doubt that the individual has committed an offence.

If the Evidential Test is not met, then NHC Toka Tū Ake will not refer the matter for prosecution.

If the Evidential Test is met, then NHC Toka Tū Ake will proceed to the second stage of the Prosecution Test, the Public Interest Test, to determine whether a prosecution is warranted.

## Public Interest Test

To meet the Public Interest Test, NHC Toka Tū Ake should consider whether public interest requires a prosecution to be brought. Not all offences, in respect of which the Evidential Test has been satisfied, must be prosecuted. NHC Toka Tū Ake will exercise its discretion as to whether a prosecution is required in the public interest.

There are a multitude of factors that may be considered in determining whether prosecution is in the public interest. A non-exhaustive list of the factors determining whether prosecution is in the public interest are set out in the Prosecution Guidelines, which are clear that in regulatory prosecutions the statutory objectives and enforcement priorities of a Crown Entity will be relevant public interest considerations.

The key factors that NHC Toka Tū Ake will consider when deciding whether or not to prosecute vary, but the following aspects of public interest will be considered:

### The Offending

- The seriousness of the offending (the gravity of the maximum sentence and the anticipated penalty is likely to be a strong factor in determining the seriousness of the offence);
- The suspect's involvement and level of wrongdoing;
- Whether there is a need to deter that type of offending;
- Whether the sentence would be minor; and
- Whether there are any national security concerns.

### The Suspect

- Age (both young and elderly) and whether the impact will be disproportionate (this is also relevant to the risk of reoffending);
- Disabilities or health issues connected to the offending;
- Prior criminal history (if any) and is it likely that the offending be continued or repeated;
- Risk to the public; and
- Any background that may connect to the offending.

### The Victim

- Ongoing safety for the victim and their whānau and community;
- Impact on their physical and mental health of the decision to prosecute or not to;
- Will the ability to obtain reparation be affected; and
- Are they eligible for registration on the Victim Notification Register.

### Alternatives to Prosecution

- Are there any other methods to resolve the matter.

### NHC Toka Tū Ake Policy Considerations

- Any steps taken by the suspect to rectify the loss or harm caused.
- Whether NHC Toka Tū Ake given any previous warnings or declinature.
- The extent of the loss or harm.
- The likely penalty awarded by the Court.
- The availability of any alternative and appropriate enforcement responses.
- Whether the suspect was a ringleader or an organiser of the offence.

- Whether the offence was premeditated.
- Whether the offence was carried out by a group.
- Whether the suspect has created a serious risk of harm.
- Whether there has been an abuse of power for private gain.

## Declinature

For any claim related matter where the circumstances of the claim give rise to concerns about misdescription, misrepresentation or fraud, NHC Toka Tū Ake will consider formal declinature of the claim as set out in sections 71 and 72 of the NHI Act as an alternative to prosecution or in some cases, in addition to prosecution.

Sections 71 and 72 prescribe circumstances where the Commission may decline (or meet part only of) a claim made under any insurance of any property under the NHI Act. The Section 154 of the NHI Act defines Misleading Information as 'information that is false, misleading in a material or particular, or misleading because of the omission of a material particular'.

For the purposes of this Policy the circumstances that will be considered for declinature are where there is:

- Any wilful and material misdescription of any of the property, or of any building or land in or on which the property is situated; or
- Any misrepresentation as to any matter material for the purpose of estimating the value of the property; or
- The claim is in any respect fraudulent.

## Prosecution Decision

The decision to bring a prosecution will be made in accordance with the NHC Toka Tū Ake Delegations Framework (Decision Maker). As at the date of this policy the Decision Maker is the Chief Executive, the Chief Strategy Officer or Head of Legal.

All recommendations to bring a prosecution must be supported by both the Head of Risk and Assurance (or equivalent should this role title change), and the Head of Legal (or equivalent should this role title change).

If the Head of Risk and Assurance, and the Head of Legal, following Legal Team review, are satisfied that the Test for Prosecution has been met, they will document and confirm this to the Decision Maker who will make the final decision whether to commence a prosecution.

This advice from the Head of Risk and Assurance and the Head of Legal following Legal Team review to the Decision Maker must, at a minimum include:

- An outline of the facts of the case.
- The evidence considered by the Head of Risk and Assurance and the Head of Legal and any possible issues of admissibility that have been identified

Advice on whether the evidential and public interest tests have been met.

- Consideration on whether the proposed prosecution would meet the Prosecutors Guidelines.

A decision not to prosecute does not preclude any further consideration of a case by NHC Toka Tū Ake if new and additional information becomes available, or if a review of the original decision is required.

A final decision to prosecute shall only be exercised by a person or persons authorised in the NHC Toka Tū Ake Delegations Framework.

Once the decision is made to prosecute, the Legal Team will be responsible for instructing the prosecutor.

## **Other Agencies**

It is not uncommon that more than one agency may investigate a particular matter, in circumstances where prosecution by any one of those agencies could result. Depending on the circumstances, this may result in one of those agencies being designated a 'lead agency' for the purposes of the investigation.

NHC Toka Tū Ake will work collaboratively with those other agencies to ensure that investigations are carried out in the most expedient and robust manner. For example, in some cases it may be possible for agencies to share information, such as witness statements, to ensure that witnesses are not subjected to multiple interviews by different agencies. Care will always be required however to ensure that the sharing of information does not compromise the investigation(s).

Where reasonably practicable, NHC Toka Tū Ake will consult with other agencies prior to the filing of any charge, to satisfy itself that the commencement of a prosecution by NHC Toka Tū Ake will be in the public interest. These consultations may, at NHC Toka Tū Ake's discretion, impact on its decision to bring a charge(s), or the timing of any charges being brought (for example, to await a prosecution decision in respect of more serious offences).

## **Choice of charges**

Where a decision to prosecute is made, consideration will be given to the charges that are most appropriate. Sections 17-20 of the Criminal Procedure Act 2011 place requirements on the content and choice of charges, which must be met.

The Solicitor-General's Prosecution Guidelines provide broad guidance about choosing charges. Considerations include:

- The nature and number of charges filed should reflect the criminality of the defendant's conduct as disclosed by the facts to be alleged at trial.
- The number or seriousness of charges should not be inflated to increase the likelihood of an offer by the defendant to plead guilty to lesser charges.
- Charges against multiple defendants should be filed only where that is necessary to put the full picture before the fact finder, or the person charged has played more than a minor role in the offending.

NHC Toka Tū Ake may bring charges under the legislation that it administers or other legislation, including the Crimes Act 1961. When deciding which legislation to file a charge under, NHC Toka Tū Ake will consider the nature of the alleged conduct and the charge that would be most appropriately to prosecute that conduct.

Some offences, due to their seriousness, require the consent of the Attorney-General before a charge can be filed. Where these charges are contemplated by NHC Toka Tū Ake, such consent will always be obtained prior to the filing of charges.

Where a charge is to be filed by NHC Toka Tū Ake, the content of the charge must first be approved by the Decision Maker, following input from the Legal team.

## **Review by Prosecutor**

Where NHC Toka Tū Ake is satisfied that the Test for Prosecution has been met, NHC Toka Tū Ake may instruct the Crown Solicitors Office, an external Barrister or Solicitor to conduct the prosecution.

NHC Toka Tū Ake expects that its instruction to prosecute will be reviewed by a Crown Solicitors Office, and external Barrister or Solicitor prior to the filing of any charges to ensure that the Test for Prosecution set out in Prosecution Guidelines is met. This review is an integral independent check within the process.

## **Review of charges**

After filing charges, the Crown Solicitors Office or external Barrister or Solicitor, in consultation with the Head of Risk and Assurance and Head of Legal are responsible for periodically reviewing charges to determine whether:

- Charges should be amended.
- Additional charges should be laid.
- Some or all the charges should be withdrawn (for example they are no longer supported by the evidence or are not considered necessary in the public interest).

A review by the Crown Solicitors Office or external Barrister or Solicitor, in consultation with the Head of Risk and Assurance and Head of Legal, may also occur prior to a matter proceeding to trial and whenever there is a material change in circumstances about the charges.

A decision to amend, add or withdraw charges will be made by the Decision Maker in accordance with the NHC Toka Tū Ake Delegations Framework, on advice from the Crown Solicitors Office or external Barrister or Solicitor and must be supported by the Head of Risk and Assurance and the Head of Legal.

The Head of Legal will ensure that the Solicitor-General or Deputy Solicitor General is informed of matters that should be communicated to those offices in accordance with clause 15 of the Prosecution Guidelines, for example, matters of general public or legal importance, or which give rise to substantial or new forms of legal risk). As an approved prosecution agency, NHC Toka Tū Ake also has the obligation of annual reporting to Crown Law about internal investigations and prosecutions, via an annual questionnaire.