



23 September 2015

Liam Stoneley
fyi-request-2959-c926da46@requests.fyi.org.nz

Dear Mr Stoneley

I refer to your email of 20 July 2015 requesting, under the Official Information Act 1982:

- *all documents, manuals or reports regarding private prosecutions in New Zealand; and*
- *anything that helps citizens understand the process of how to proceed with private prosecutions.*

On 14 September, we provided you with a number of documents which fell within the scope of the request. We are now providing you with the remaining documents on which further consultation was completed.

I would also like to thank you for your email of 21 September 2015 and follow up questions. We have provided you with CPAI Factsheet 12 which was missed during our information gathering processes. We apologise for this oversight and for not making this document available to you following your first request. Please note that Factsheet 12 is an old document which relates to changes that were made as a result of the Criminal Procedure Act 2011. While much of the information in the document is still correct, a more up to date source of the same information is sections 26 and 33 of the Criminal Procedure Act (available at www.legislation.govt.nz), with which the document aligns.

Approach to your request

The table below lists documents that fall within the scope of your request and contains details of the information in these documents which is released to you. I have interpreted your request to exclude purely administrative correspondence, for example, emails organising meetings or acknowledging receipt of documents.

Parts have been withheld or refused under:

- section 9(2)(a) of the OIA in order to protect the privacy of individuals;
- 9(2)(g)(i) of the OIA to protect the free and frank expression of opinions between officials and Ministers of the Crown;
- 9(2)(h) of the OIA to maintain legal professional privilege;
- 9(2)(f)(ii) of the OIA to protect collective and individual ministerial responsibility;

- 18(d) of the OIA because the information requested will be made publically available within 6 weeks.

Other parts of the documents have been released to you.

Where information has been withheld under sections of the OIA I am satisfied that there are no other public interest considerations that render it desirable to make the information available.

	Document	Date	Comment
1	Correspondence between the Minister of Justice and a member of the public.	5/12/2002	Names and details of individuals withheld under s9(2)(a) to protect the privacy of those individuals
2	Correspondence between the Minister of Justice and the Commissioner of the New Zealand Police.	10/12/2002	Released in full.
3	Correspondence between Ministry of Justice officials and officials from the Ministry of Business, Innovation, and Employment (MBIE) consulting on a private prosecutions briefing relating to the Health and Safety at Work Act 2015.	8/12/2014-9/12/2014	Names and details of individuals withheld under s9(2)(a) to protect the privacy of those individuals. Parts withheld under s9(2)(g)(i) to protect the free and frank expression of opinions between officials and Ministers of the Crown.
4	Correspondence between agencies about a private prosecutions briefing relating to the Health and Safety at Work Act.	12/12/2014-16/12/2014	Names and details of individuals withheld under s9(2)(a) to protect the privacy of those individuals. Parts withheld under s9(2)(g)(i) to protect the free and frank expression of opinions between officials and Ministers of the Crown.
5	Correspondence between Justice officials about private prosecutions relating to the Health and Safety at Work Act.	24/12/2014-07/01/2015	Names and details of individuals withheld under s9(2)(a) to protect the privacy of those individuals. Parts withheld under s9(2)(g)(i) to protect the free and frank expression of opinions between officials and Ministers of the Crown.
6	Correspondence between agencies about private prosecutions relating to the Health and Safety at Work Act.	21/01/2015	Names and details of individuals withheld under s9(2)(a) to protect the privacy of those individuals. Parts withheld under s9(2)(g)(i) to protect the free and frank expression of opinions between officials and Ministers of the Crown.
7	Correspondence between Justice and MBIE following a meeting about private prosecutions relating to the Health and Safety at Work Act.	22/01/2015-23/01/2015	Names and details of individuals withheld under s9(2)(a) to protect the privacy of those individuals. Parts withheld under s9(2)(g)(i) to protect the free and frank expression of opinions between officials and Ministers of the Crown.
8	Correspondence between Justice and MBIE about general questions on private prosecutions	22/01/2015-27/01/2015	Names and details of individuals withheld under s9(2)(a) to protect the privacy of those individuals.

9	Correspondence between Justice and MBIE following a meeting on proposed changes to private prosecutions relating to the Health and Safety at Work Act	27/01/2015	Names and details of individuals withheld under s9(2)(a) to protect the privacy of those individuals.
10	Correspondence between agencies and updates about private prosecutions relating to the Health and Safety at Work Act.	28/01/2015-03/02/2015	Names and details of individuals withheld under s9(2)(a) to protect the privacy of those individuals. Parts withheld under s9(2)(g)(i) to protect the free and frank expression of opinions between officials and Ministers of the Crown.
11	Correspondence between the Ministry of Justice and the Office of the Minister of Justice about private prosecutions	03/02/32015	Names and details of individuals withheld under s9(2)(a) to protect the privacy of those individuals.
12	Correspondence between agencies about private prosecutions relating to the Health and Safety at Work Act.	04/02/2015	Names and details of individuals withheld under s9(2)(a) to protect the privacy of those individuals.
13	Briefing to the Hon Michael Woodhouse on private prosecutions relating to the Health and Safety at Work Act.	10/12/2014	Names and details of individuals withheld under s9(2)(a) to protect the privacy of those individuals. Parts withheld under s9(2)(g)(i) to protect the free and frank expression of opinions between officials and Ministers of the Crown. Parts withheld under s 9(2)(h) of the to maintain legal professional privilege; Parts withheld under s9(2)(f)(ii) to protect collective and individual ministerial responsibility
14	Cabinet Paper produced by MBIE on the Health and Safety at Work Act	(undated)	Refused under 18(d) of the OIA because the information requested will be made publically available within 6 weeks.

You have the right under section 28(3) of the OIA to complain to the Ombudsman about the decision to withhold some of the information requested.

Yours sincerely,



Brendan Gage
Manager
Criminal Law Team
Ministry of Justice

9(2)(a)
Dear 9(2)(a)

Thank you for your letter, dated 5 December 2002, regarding private prosecutions of police officers.

As Minister of Justice I cannot comment on the particular circumstances of Constable Abbott's case. This is because of the constitutional principle that the courts must operate, and be seen to operate, without any suggestion of political interference.

As a result of the public calls by Police Commissioner Rob Robinson and Police Association President Greg O'Connor for limits on the right to privately prosecute police officers, I have asked Ministry of Justice officials to carry out some work in this area. That work is ongoing and no final policy decisions have been made. However, it is my preliminary view that the right to privately prosecute where the State has decided not to do so is an important safeguard in a democratic society. In Constable Abbott's case, I have every sympathy for the ordeal that he and his family went through. However, as his own lawyer acknowledged, the trial allowed conflicting accounts of events to be publicly aired and brought a level of finality to the issue that would have been difficult to achieve by other means.

There are statutory protections available to ensure that spurious cases do not proceed. For example, the Attorney-General can issue a stay of proceedings, or a judge may order the discharge of an accused if satisfied that there is not sufficient evidence on which a jury could properly convict. At a practical level, there are financial constraints on private prosecutors, who are not eligible for legal aid and, if found to have acted in bad faith, may be required to pay costs and damages. The effectiveness of these factors is demonstrated by the fact that, of the 15 private prosecutions of police officers in the last decade, only one (Constable Abbott's) has proceeded to trial.

Yours sincerely

Hon Phil Goff
Minister of Justice

2

Rob Robinson
Commissioner
New Zealand Police
P O Box 3017
WELLINGTON

Dear Rob

Thank you for your letter dated 10 December 2002, on the subject of private prosecutions, and also for your kind Christmas wishes.

I am aware that the private prosecution of Constable Abbott has been a difficult time for both the constable and the police in general, and I understand the context in which your comments were made. However, the right to privately prosecute in criminal cases where the State has omitted to do so is long-standing, and an important constitutional safeguard. This was also the view reached by the Law Commission when it reviewed the matter (including receiving public submissions) a few years ago. I note that figures recently collated by your staff indicate that these kinds of cases occur quite infrequently, and are almost invariably dismissed by the courts at an early stage. In Constable Abbott's case, the prosecution has allowed conflicting accounts of the events of that night to be publicly aired, and the jury verdict has brought a degree of finality to the matter in a way that would be difficult to achieve by other means.

I have asked Ministry of Justice officials to continue to progress ongoing work in this area. Ultimately I am happy for various options to address the issue to be outlined and debated in a paper to Cabinet sometime in the new year.

I wish yourself and your family the best for the festive season.

Yours sincerely

Hon Phil Goff
Minister of Justice

From: 9(2)(a)
Sent: Tuesday, 9 December 2014 1:21 p.m.
To: 9(2)(a)
Cc: Fraser, Warren; 9(2)(a) r
Subject: RE: police corrections private prosecutions briefing 5 Dec - revised after agency feedback [IN-CONFIDENCE]

Hi 9(2)(a)

Thanks for the opportunity to comment on this paper: Out of Scope.

9(2)(g)(i)

9(2)(g)(i)

As you have noted in paragraph 21, the District Courts are currently tasked with deciding whether a criminal private prosecution may be filed. (See section 26 of the Criminal Procedure Act 2011.) The District Courts have a robust process for determining whether a private prosecution can be filed or not. The Criminal Procedure Act 2011 is a recent piece of legislation that was developed over a period of five or six years;

9(2)(g)(i)

9(2)(g)(i)

Kind regards,
9(2)(a)

Out of Scope.

From: 9(2)(a)
Sent: Friday, 5 December 2014 4:01 p.m.
To: 9(2)(a)
Cc: I
Bronwyn Turley (Bronwyn.Turley@mbie.govt.nz)
Subject: police corrections private prosecutions briefing 5 Dec - revised after agency feedback [IN-CONFIDENCE]

Good afternoon,

Attached is our latest draft of the joint ministerial briefing on the private prosecutions paper.

It's had some close review here, and we have attempted to incorporate all comments received from Police and Corrections.

In the draft you'll not three highlighted areas.

The first concerns text about the prosecution commenced against the Commissioner of Police under the current Act and amends the text inserted by Police, which we think referred to a situation that is highly unlikely to arise under the Bill. We are happy to discuss this further, so please get back to me with any comments or problems with it.

Secondly, we have inserted "analysis" text concerning option 3. It is represented as MBIE's view, and summarises the practicalities of the option from the point of view of whether it will work, and implications for the working of the Bill more generally. Again, we are happy to discuss whether this meets Corrections' concerns.

The third highlighted text is in the Next Steps section at the back of the paper. It refers to an Supplementary Order Paper being prepared to accompany the Bill at committee of the whole of the House. We will need to clarify this with Ministers, and it may be that the matter is raised with the select committee. If either agency has a view on this, please advise.

In the meantime, our deadline for the briefing is Wednesday, so please provide me with your comments by midday Tuesday.

Many thanks

9(2)(a)

SENIOR POLICY ADVISOR
Health, Safety and Compensation Frameworks Policy
Labour & Commercial Environment
Ministry of Business, Innovation & Employment (MBIE)

9(2)(a)

15 Stout Street | PO Box 1473, Wellington 6140, New Zealand



9 (2) (a)

From: 9 (2) (a)
Sent: Friday, 12 December 2014 11:35 a.m.
To: 9 (2) (a)
Cc: Fraser, Warren
Subject: FW: Health and Safety Reform Bill: Private prosecutions briefing [IN-CONFIDENCE]
Attachments: ATT00001.txt; 1063 14-15 Private prosecutions FINAL (3).docx

Hi 9 (2) (a)

Can you please look at MBIE's updated briefing and let me know your thoughts.

9(2)(a) says this briefing is for our information and to inform our interagency discussions

out of scope
out of scope

9 (2)(g)(i)

I've highlighted in blue text the parts of the briefing that discuss or relate to our viewpoint.

Cheers,
9(2)(a)

From: 9 (2) (a)
Sent: Friday, 12 December 2014 10:28 a.m.
To: 9 (2) (a)
Cc: Bronwyn Turley; 9 (2) (a)
Subject: Health and Safety Reform Bill: Private prosecutions briefing [IN-CONFIDENCE]

Kia ora koutu,

Out of scope

We have also referred to comment received from the Ministry of Justice on the use of the High Court as a review mechanism, and will be including Justice in further discussions.

9(2)(g)(i)

9(2)(a)

SENIOR POLICY ADVISOR
Health, Safety and Compensation Frameworks Policy
Labour & Commercial Environment
Ministry of Business, Innovation & Employment (MBIE)

9(2)

15 Stout Street | PO Box 1473, Wellington 6140, New Zealand



9(2)(a)

From: 9(2)(a)
Sent: Monday, 15 December 2014 4:40 p.m.
To: 9(2)(a)
Cc:
Subject: FW: Health and Safety Reform Bill: Private prosecutions briefing [IN-CONFIDENCE]
Categories: 2. Urgent Not Important

Hi

Are you okay with me sending the email below to Bob?

9(2)(g)(i)

Cheers,
9(2)(a)

Hi 9(2)(a)

9(2)(g)(i)

However, I acknowledge that you intend to include us in any discussions about this proposal. We look forward to hearing back from you in early 2015 about how you intend to proceed.

Kind regards,
9(2)(a)

From: 9(2)(a)
Sent: Monday, 15 December 2014 2:56 p.m.
To: 9(2)(a)
Cc: Bronwyn Turley;
Subject: RE: Health and Safety Reform Bill: Private prosecutions briefing [IN-CONFIDENCE]

Good afternoon 9(2)(a)

9(2)(g)(i)

I have circulated the briefing internally. I'll be in touch to let you know next steps at this end.

Regards



9(2)(a)

Manager Corrections Policy | Service Development
Department of Corrections | Ara Poutama Aotearoa

✉ email: 9(2)(a)
☎ DDI:

From:

Sent: 12 December 2014 10:28 a.m.

To: q (2) (a)

Cc: Bronwyn Turley;

Subject: Health and Safety Reform Bill: Private prosecutions briefing [IN-CONFIDENCE]

Kia ora koutu,

out of scope

We have also referred to comment received from the Ministry of Justice on the use of the High Court as a review mechanism, and will be including Justice in further discussions.

out of scope.

regards

SENIOR POLICY ADVISOR
Health, Safety and Compensation Frameworks Policy
Labour & Commercial Environment
Ministry of Business, Innovation & Employment (MBIE)
q (2) (a)
15 Stout Street | PO Box 1473, Wellington 6140, New Zealand



q (2) (a)

From:
Sent: Tuesday, 16 December 2014 2:20 p.m.
To: q (2) (a)
Cc:
Subject: RE: Health and Safety Reform Bill: Private prosecutions briefing [IN-CONFIDENCE]

Hi q (2) (a)

q (2) (g) (i)

However, I acknowledge you intend to include us in any discussions about this proposal. We look forward to hearing back from you in early 2015 about how you intend to proceed.

Kind regards,
q (2) (a)

F:

Out of scope.

Out of
Scope

From:

Sent: Friday, 12 December 2014 10:28 a.m.

To: q (2) (a)

Cc: Bronwyn Turley;

Subject: Health and Safety Reform Bill: Private prosecutions briefing [IN-CONFIDENCE]

for was (2)
Kia ora koutu,

Out of Scope

q (2) (a)

SENIOR POLICY ADVISOR
Health, Safety and Compensation Frameworks Policy
Labour & Commercial Environment
Ministry of Business, Innovation & Employment (MBIE)

Out of scope

From: 9 (2) (a)
Sent: Tuesday, 16 December 2014 3:03 p.m.
To: 9 (2) (a)
Subject: RE: Health and Safety Reform Bill: Private prosecutions briefing [IN-CONFIDENCE]

Thanks 9 (2) (a)

No need to read too much into an information only briefing, but we are obligated to advise our Minister on issues that he is responsible for.

Looking forward to including Justice in the discussion in the New Year.

regards

9 (2) (a)
SENIOR POLICY ADVISOR
Health, Safety and Compensation Frameworks Policy
Labour & Commercial Environment
Ministry of Business, Innovation & Employment (MBIE)
9 (2) (a)
15 Stout Street | PO Box 1473, Wellington 6140, New Zealand



From: 9 (2) (a)
Sent: Tuesday, 16 December 2014 2:20 p.m.
To: 9 (2) (a)
Cc: 9 (2) (a)
Subject: RE: Health and Safety Reform Bill: Private prosecutions briefing [IN-CONFIDENCE]

Hi 9 (2) (a)

9 (2) (g) (i)

However, I acknowledge you intend to include us in any discussions about this proposal. We look forward to hearing back from you in early 2015 about how you intend to proceed.

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From: 9(2)(a)
Sent: Wednesday, 7 January 2015 9:20 a.m.
To:
Subject: FW: Private prosecutions draft for Feb 11 Cabinet paper [UNCLASSIFIED]

Hi 9(2)(a)

Thanks again for the discussion we had last year about MBIE's proposal to have the *High Court* decide whether a private prosecution may be accepted for filing. As you can see from the update below, MBIE have taken our feedback on board and are now recommending that the *District Court* decide. This will mitigate the concerns we had raised.

I won't keep you in the loop about the proposal any more unless any other issues arise.

Cheers,

From: 9(2)(a)
Sent: Wednesday, 7 January 2015 9:11 a.m.
To: 9(2)(a)
Subject: RE: Private prosecutions draft for Feb 11 Cabinet paper [UNCLASSIFIED]

Kia ora ' 9(2)(a)

Thanks for this update. What are your proposed next steps for this proposal to get agreement between Corrections and Police?

Our concerns will be mitigated by your decision to recommend the District Court rather than the High Court. Thanks for taking on our feedback on board. We want to be kept in the loop about the proposal just to make sure no other Justice related issues arise.

Cheers,

9(2)(a)

From: 9(2)(a)
Sent: Wednesday, 24 December 2014 11:53 a.m.
To: 9(2)(a)
Cc:
Subject: Private prosecutions draft for Feb 11 Cabinet paper [UNCLASSIFIED]

Good morning,
9(2)(a)

has just emailed people concerning, among other things, circulating a draft of the Cabinet paper on the Health and Safety Reform Bill planned for EGI on 11 February.

With the matter of private prosecutions still unresolved, and me being on leave till January 26, I've been asked to provide some placeholder text for the Cabinet paper in the event that agencies are unable to reach agreement on a solution before then. The text I've drafted is below, for your information and review.

9(2)(a)

In the meantime, please be in touch with _____ after 5 January to continue discussions on the best outcome for all agencies.

And compliments of the season!

Regards

9(2)(4)

SENIOR POLICY ADVISOR
Health, Safety and Compensation Frameworks Policy
Labour & Commercial Environment
Ministry of Business, Innovation & Employment (MBIE)

9(2)(9)

15 Stout Street | PO Box 1473, Wellington 6140, New Zealand



MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT
HOKIINA WIRAHAUATUOKI



9(2)(g)(i)

From: 9(2)(a)
Sent: Wednesday, 21 January 2015 1:55 p.m.
To: 9(2)(a)
Subject: Private prosecutions under Health and Safety Bill

Hi
What do you think about this email to 9(2)(a) and 9(2)(a). Have you managed to organise a time for them to meet with us?
Out of Scope.

9(2)(a)
9(2)(a)
Kia ora and

We're seeking your opinion on proposed changes to private prosecutions under the Health and Safety Bill.

9(2)(g)(i)

Background

The Health and Safety Bill is currently before the Select Committee. MBIE is drafting a Cabinet paper that would add some things to the Bill - and add to the provisions relating to private prosecutions.

As with the current Act, the Bill would bar private prosecutions where a regulator takes enforcement action against any person. Where the regulator does not take enforcement action, the Bill would set out grounds on which the court could grant leave for a private prosecution to be brought.

9(2)(g)(i)

The Bill is currently silent on whether the High Court or District Court should consider a leave application.

Most prosecutions under the Bill would continue to be heard in the District Court. There is one offence in the Bill that is punishable by a term of imprisonment up to 5 years. This would be a Cat 3 offence, so it would depend on the protocol agreed between the DCJ and the HCJ whether prosecutions would be heard in the High Court or District Court.

Which court should consider leave applications for private prosecutions under the Health and Safety Bill?

There are a number of conflicting factors to decide which court should consider leave applications:

Reasons for the District Court

- Most health and safety cases will be heard in the District Court. DCJs will be trained on the new Bill; HCJs will not.
- The District Court currently hears leave applications for private prosecutions under CPA.
- There will likely be a very small number of applications for leave filed, so it would be strange if there were one health and safety case every few years that is heard by the High Court.
- If it were the High Court, the avenue for review would be to the Court of Appeal. This would be a high first right of appeal (which could be troublesome both for the plaintiff and the defendant).

Reasons for the High Court

- Arguably the High Court is better placed to decide the public policy question of whether a private prosecution under the Health and Safety Bill should be allowed to proceed. Leave applications in this context may raise broader public policy considerations than under CPA.
- As there will likely be a very small number of applications for leave filed, it would be better for the High Court to decide these applications.

9(2)(a)

9(2)(a)

From: 9(2)(a)
Sent: Wednesday, 21 January 2015 4:00 p.m.
To: 9(2)(a)
Cc: Harrington, Chris
Subject: For your review by 10am Thursday: proposed changes to private prosecutions under Health and Safety Bill

Categories: Waiting response

Hi 9(2)(a)

Can you please review this proposed email from Chris to MBIE by 10.00 am tomorrow. I don't feel I've captured everything we want to say, so please add stuff and delete anything unnecessary!

Cheers!

9(2)(a)

Hi Karl

I'm emailing to follow up yesterday's meeting with Police, Corrections, MBIE and Justice about proposed changes to private prosecutions under the Health and Safety Bill. You asked _____ and _____ to talk further with their colleagues to determine how strongly Justice feels about the grounds and process for leave, and the appropriate court for considering leave applications.

Overall position

9(2)(g)(i)

All acts should reflect the criminal procedure set out in the Criminal Procedure Act 2011. This Act is, as the name suggests, the overarching piece of legislation dealing with criminal procedure. It represented a significant change to the way criminal trials operate. It has been in force for less than two years, and its impacts are still being monitored and assessed.

9(2)(g)(i)

Grounds and process

As noted above, the Ministry strongly believes the grounds should be the same as those in the Criminal Procedure Act. I understand Corrections and Police wanted to see some changes to the grounds to ensure judges fully consider

the public policy implications of allowing a private prosecution under the Bill. However, I am confident the current test requires judges to turn their mind to the policy considerations involved in this unique context.

Which court should consider leave applications?

I understand these reasons were discussed at the meeting in favour of the District Court:

- Most health and safety cases will be heard in the District Court. District Court Judges will be trained on the new Bill; High Court Judges will not.
- The District Court already hears leave applications for private prosecutions under the Criminal Procedure Act.
- There will likely be a very small number of applications for leave filed, so it would be strange if there were one or two health and safety case every few years where the High Court has to decide whether the case may be accepted for filing.
- If it were the High Court, the avenue for review would be to the Court of Appeal. This would be a high first right of appeal (which could be troublesome for the plaintiff or the defendant, depending on the circumstances).

I would like to emphasise one further point. One of the aims with the Criminal Procedure Act was for all cases to commence in the District Court, regardless of complexity. This policy decision recognised that District Court Judges are capable of hearing and determining initial matters of criminal procedure. Requiring the High Court to consider leave applications under the Health and Safety Bill would interfere with this overarching feature of the Criminal Procedure Act. The Ministry does not believe the policy considerations - although unique in this particular context - justify requiring the High Court to decide whether to accept a private prosecution for filing.

As an aside, something that does not seem to have been considered is whether the High Court would have to decide all substantive private prosecution cases, regardless of the offence in question. Would the High Court have to determine all substantive private prosecution cases even if those cases would otherwise be heard in the District Court? This could be an unwanted consequence from this policy proposal.

9(2)(g)(i) I appreciate you are under tight time frames so we are happy to discuss this further with you.

Kind regards,

Chris Harrington
Courts and Tribunals Policy Manager

7

From: (S9(2)(a))
Sent: Friday, 23 January 2015 5:05 p.m.
To: Bronwyn Turley;
Cc:
Subject: RE: Follow-up to yesterday's meeting

Hi again

(S9(2)(g)(i))

out of scope

I hope to be able to elaborate further on the reasons for our objections early next week. We are also working to provide Corrections with further information on private prosecutions to allow them to make an informed assessment.

Kind regards,

From: (S9(2)(a))
Sent: Thursday, 22 January 2015 5:24 p.m.
To: Bronwyn Turley;
Cc:
Subject: Follow-up to yesterday's meeting

Kia ora tātou

Unfortunately, we have not been able to collate the Ministry's position on the two points we discussed yesterday (the appropriate court to consider leave applications and the grounds for these applications). The matter has proven more complicated than we initially anticipated due to the interaction of the proposed Health and Safety Bill and the Criminal Procedure Act.

We will endeavour to get back to you tomorrow.

Kind regards,



Policy Advisor | Courts and Tribunals Policy

(S9(2)(a))

www.justice.govt.nz

 Please consider the environment before printing this email

8

9(2)(a)

From:
Sent: Tuesday, 27 January 2015 10:37 a.m.
To:
Cc: 9(2)(a)
Subject: RE: Health and safety private prosecutions

Kia ora 9(2)(a)

Please find some answers to your questions below.

1. Can you confirm that the filing fee for a leave application for a criminal proceeding in the District Court **and** High Court is \$35?

It currently costs \$30 to seek to file a charging document for a private prosecution under s 26(1) of the Criminal Procedure Act (CPA). \$35 was wrongly quoted at last Wednesday's meeting.

There is currently no set fee for private prosecution leave hearings in the High Court because the High Court does not hear these applications. It may well be that the Ministry of Justice would need a filing fee to try and recoup some of the cost involved in hearing such an application. We cannot say at this stage what that fee would be because the proposed Cabinet paper text does not state whether hearings would be heard 'on the papers' (as with the CPA) or at an 'in person' hearing. We may also need to clarify whether these hearings would be in the criminal jurisdiction (which seems likely) or in the civil jurisdiction, and this would impact the fee.

2. Can you also confirm that there would be no hearing fee for the leave hearing on the applicant, but a costs order could be made against them if they fail to obtain leave?

Again, this depends on whether leave applications for health and safety cases are dealt with in the civil or criminal jurisdiction of the court, and whether they are to be heard 'on the papers' or at an 'in person' hearing.

Here are the likely costs processes for each jurisdiction if decided at a hearing (where costs orders are most relevant):

- If a leave application is filed in the criminal jurisdiction then the normal practice is that there is no hearing fee but the unsuccessful party can expect to have a costs order made against them.
- If a leave application is filed in the civil jurisdiction then the first half day of an interlocutory application hearing is normally covered in the filing fee. Half-day hearing fees would be imposed for hearings that take longer than a half day.

3. Do you have information on how many private health and safety prosecutions have been filed in the District Court in the last two years? I want to be able to provide our Chief Executive with numbers to show the District Court are currently dealing with these matters.
4. Do you have information on how many other private prosecutions (criminal and civil) have been filed in the District Court the last two years? Similarly, numbers would be helpful to put the arguments to the CE.

In 2013/14 there were 24 cases brought by private prosecutors. In 2012/13 there were 61 cases brought by private prosecutors. Of these 85 cases, only one was brought under the Health and Safety in Employment Act (in 2013/14).

In our view, these numbers support the District Courts deciding whether to accept private prosecutions under the Health and Safety Bill. District Court Judges will hear almost all health and safety cases, and they already have expertise in deciding whether to accept charging documents for private prosecutions under the Criminal Procedure Act. It would be anomalous to have one or two health and safety leave applications decided in the High Court.

Kind regards,

Out of Scope .

From: [redacted] 9(2)(a)
Sent: Thursday, 27 January 2015 9:09 a.m.
To: 9(2)(a)
Subject: Health and safety private prosecutions

Good morning . 9(2)(a)

Following the meeting with MBIE yesterday I was hoping that you could confirm a couple of points with me/provide me some more information on private prosecutions if its information that you have access to.

1. Can you confirm that the filing fee for a leave application for a criminal proceeding in the District Court **and** High Court is \$35?
2. Can you also confirm that there would be no hearing fee for the leave hearing on the applicant, but a costs order could be made against them if they fail to obtain leave?
3. Do you have information on how many private health and safety prosecutions have been filed in the District Court in the last two years? I want to be able to provide our Chief Executive with numbers to show the District Court are currently dealing with these matters.

4. Do you have information on how many other private prosecutions (criminal and civil) have been filed in the District Court the last two years? Similarly, numbers would be helpful to put the arguments to the CE.

I look forward to hearing from you.

Thank you and kind regards

9(2)(a)

Policy Adviser | Corrections Policy | Service Development
Department of Corrections | Ara Poutama Aotearoa

Email:
DDI:
Ext:

9(2)(a)

9

Out of Scope

9(2)(a)

From: ..
Sent: Tuesday, 27 January 2015 12:58 p.m.
To:
Cc: 9(2)(a)
Subject: RE: HSR Bill: Ministry of Justice feedback on proposed changes to private prosecution regime [IN-CONFIDENCE]

Hi 9(2)(a)

I have just forwarded me your email, as I'm back from holidays and back on the paperwork for the private prosecutions issue with the Bill.

9(2)(a)

Regarding the timing of the Cabinet paper, I will soon be sending you a draft of a Cabinet paper for consideration by EGI on 11 February. It contains material on the private prosecution issue based on last week's discussions with Corrections, Justice and Police. We have been instructed by our Minister to deal with all the matters in the current paper in a single paper on that date, so that provides our deadline.

With that in mind, we've read and discussed Chris Harrington's note and attachment, sent this morning, and would like to meet with you to discuss how we address matters for the Cabinet paper.

9(2)(a)

I would be keen to meet with you and your colleagues today if possible, or at your earliest convenience.

We have a meeting room here, or can visit your office. Please let me know the earliest time available.

Regards

SENIOR POLICY ADVISOR
Health, Safety and Compensation Frameworks Policy
Labour & Commercial Environment
Ministry of Business, Innovation & Employment (MBIE)
15 Stout Street | PO Box 1473, Wellington 6140, New Zealand

9(2)(a)
9(2)(a)



out of
Scope.

From: Harrington, Chris
Sent: Tuesday, 27 January 2015 10:39 a.m.
To: 9(2)(a)
Cc: Bronwyn Turley;
Subject: HSR Bill: Ministry of Justice feedback on proposed changes to private prosecution regime

Hi 9(2)(a)

I'm emailing to follow up last Wednesday's meeting with Police, Corrections, MBIE and Justice about proposed changes to private prosecutions under the Health and Safety Bill. You asked 9(2)(a) and to talk further with their colleagues to determine how strongly Justice feels about the appropriate court for considering leave applications, and the grounds and process for leave.

The Ministry's position is set out in the attached document. We are concerned about the interaction of the proposed Health and Safety Bill with the Criminal Procedure Act (CPA). It would be inappropriate to change the CPA's private prosecution requirements in legislation that establishes some criminal offences but does not deal with criminal procedure as a whole. The Ministry considers that it is not necessary to change the grounds or procedure for private prosecutions, which is provided by the CPA.

We look forward to hearing how you intend to proceed with the proposals, once you've received further feedback from Corrections and Police. We may wish to escalate this matter further, depending on the outcome of your discussions with these agencies.

Kind regards

Chris Harrington
Acting Manager
Courts & Tribunals Policy
Ministry of Justice

DDI:

Ext:

Cell:

10

From: (MOS)
 Sent: Wednesday, 28 January 2015 4:58 p.m. (92)(a)
 To: (MBIE)
 Cc: ; Bronwyn Turley
 Subject: RE: Health and Safety Reform Bill [IN-CONFIDENCE]

Hi (MBIE)

Thanks for the opportunity to comment on this Cabinet paper. My comments are only on the private prosecutions section - both for reasons of time and because colleagues of mine have already response on other aspects.

Summary of the Ministry's position

(92)(g)(i)

Which court should consider leave applications?

(92)(g)(i)

The CPA requires all criminal proceedings to be commenced in the District Courts, including private prosecutions and regardless of seriousness or complexity (see section 14 of the CPA). Section 26 of the CPA sets out a leave process for private prosecutions: unless the Registrar accepts a charging document for filing, a District Court Judge must determine whether proceedings can be commenced. Section 26 does not include the wording "leave"; however that is the practical effect of the provision. Further, the effect of section 26 is not limited by section 106 of the Crimes Act 1961, which requires the leave of the A-G to commence specified prosecutions. If a private prosecutor was granted leave by the A-G, section 26 of the CPA would still apply (with the further requirement in section 24 of the CPA that where consent of the A-G (including leave) is required, that a memorandum setting out that consent must accompany the charging document).

Section 26 of the CPA provides a procedural framework for the consideration of leave for commencing proceedings, including requirements for formal statements and exhibits sufficient to justify a trial. There are fees payable by a private prosecutor connected to this section. The District Court has processes and procedures in place, including at an IT system level that the High Court does not.

(92)(g)(i)

- o District Court Judges have experience in deciding leave applications for private prosecutions. In 2013/14 there were 24 cases brought by private prosecutors. In 2012/13 there were 61 cases brought by private prosecutors. The grounds for deciding whether to give leave under the CPA are evidential sufficiency and abuse of process. The Ministry believes Judges usually consider public policy issues as part of the abuse of process ground.
- o The District Court Judiciary will be more familiar with the HSB than the High Court Judiciary. Most health and safety cases will be heard in the District Courts. District Court Judges will be trained on the HSB; High Court Judges may not.
- o Only one of the 85 private prosecution cases in 2012/13 and 2013/14 was brought under the Health and Safety in Employment Act. It would be anomalous if there were one or two health and safety cases where the High Court had to decide whether the case may be accepted for filing when the vast majority of cases will be heard by the District Courts.

(92)(g)(i)

- If leave applications are heard in the High Court, the avenue for review would be to the Court of Appeal. This would be a high first right of review (which could be troublesome for the plaintiff or the defendant, depending on the circumstances).

s 9(2)(g)(i)

Procedure

The benefit of having the District Courts determine leave applications under the HSB is that the procedure of the CPA and the Criminal Procedure Rules would apply. This procedure for private prosecutions appears to be working well (noting, of course, that it has been in force for only 18 months.)

The Ministry proposes that the HSB should limit the procedure in section 26 of the CPA in one respect. Section 26(1)(a) of the CPA should not apply. This provision allows a Registrar to accept a private prosecutor's charging document for filing. Its purpose is to allow reputable private prosecutors (such as the SPCA) to have their charging documents accepted for filing without having to obtain leave from a District Court Judge. The Ministry considers that this provision would create unnecessary conflict with the approach under the HSB private prosecutor's regime.

Grounds

9(2)(g)(i)

Further comments

Under the subheading "Availability of the offender", the paper states:

There are situations where the regulatory agency would bring a prosecution but is unable to because the offender is unavailable for some reason. This would include, for example, because the offender has died, has fled the country or is unable to be found.

The fact that an offender has fled the country or cannot be found should not prevent a regulatory agency from bringing a prosecution. The regulatory agency should still bring the prosecution; otherwise the statutory time limit for prosecutions may run out. The Ministry suggests that these two situations should not be treated as if a prosecution had been taken. The Ministry accepts that where an offender has died it is sensible to treat this as if a prosecution had been taken, so that a potential private prosecutor would need leave to bring the private prosecution.

Out of Scope.

Kind regards,

From:

noJ

S 9(2)(ca)

Sent:

Tuesday, 3 February 2015 10:02 a.m.

To:

noJ

Cc:

Harrington, Chris

Subject:

RE: Health & Safety Reform Bill - update from Karl Simpson, MBIE

Morning all

S 9(2)(g)(i)

Cheers,

noJ

out of scope

From:

Sent: Monday, 2 February 2015 4:20 p.m.

To: Harrington, Chris

Cc:

Subject: RE: Health & Safety Reform Bill - update from Karl Simpson, MBIE

Hi Chris,

s 9(2)(g)(i)

Regards

s 9(2)(a)



Senior Business Advisor | Higher Courts Operations Support

www.justice.govt.nz

From: Harrington, Chris
Sent: Thursday, 29 January 2015 1:26 p.m.
To: MOJ
Cc: Fairhall, Ruth
Subject: Health & Safety Reform Bill - update from Karl Simpson, MBIE

s 9(2)(a)

Hi everyone,

MBIE

I had a call from [redacted] with an update on the draft Cabinet paper on the HSR Bill. The issues he covered were:

- Availability of the offender. The paper will refer only to when the offender has died, and not the other circumstances when they can't be found. There is some detail to work out but MBIE doesn't think this needs to be dealt with in the Cabinet paper.
- Grounds. The additional tests (public policy and purposes) will be dealt with as a subset of the abuse of process test.
- High Court/District Court. The paper has square-bracketed text about the High Court as the preferred option and a note that this is to be confirmed. The paper also includes our arguments for the District Court. MBIE is briefing the Minister, suggesting that he talk to his colleagues. It is possible the meeting between Ministers could occur early next week. I'll check what we're saying in the weekly report.

There's one other issue which [redacted] has raised (no appeal if the process is in the High Court) and I'll send her our comments.

MBIE

Chris Harrington
Acting Manager
Courts & Tribunals Policy
Ministry of Justice

DDI:
Ext:
Cell:

s 9(2)(a)

From: _____
Sent: Tuesday, 3 February 2015 10:20 a.m. *S 9(2)(a)*
To: _____
Subject: RE: Cab EGI Paper HS Reform Bill Additional Decisions Feb 2015 [IN-CONFIDENCE]

Kia ora _____ *MBIE*

Thanks for sending this around. I have no further comments on the private prosecutions part of the Cabinet paper.

Kind regards,

_____ *MOJ*

From: _____ *MBIE*
Sent: Tuesday, 3 February 2015 9:52 a.m.
To: _____ *Police* _____ *Police* _____ *MOJ*
Police
Harrington, Chris
Cc: _____ *MBIE* ; Bronwyn Turley *S 9(2)(a)*
Subject: FW: Cab EGI Paper HS Reform Bill Additional Decisions Feb 2015 [IN-CONFIDENCE]
Importance: High

Dear all,

I understand _____ has spoken with respective agencies about progress on the private prosecutions issue in our Cabinet paper.

Attached is our latest draft, with the recommendation changed to leave applications continuing to being heard in District Courts. Please refer to paragraphs 116 to 144.

This follows discussions between Ministers Woodhouse and Adams yesterday afternoon.

Minister Woodhouse intends to sign the paper out at 3.30pm today, so please be back to me before noon if there are any changes or further comments you wish to make.

Many thanks

_____ *MBIE*
SENIOR POLICY ADVISOR
Health, Safety and Compensation Frameworks Policy
Labour & Commercial Environment
Ministry of Business, Innovation & Employment (MBIE)

S 9(2)(a)

15 Stout Street | PO Box 1473, Wellington 6140, New Zealand

 **MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HEKINA WHAKATUTUKI



9 (2) (a)

From: 9 (2) (a)
Sent: Tuesday, 3 February 2015 4:34 p.m.
To: Jane Fletcher
Cc: wayne.newall@parliament.govt.nz; Stuart.McGilvray@parliament.govt.nz; Harrington, Chris
Subject: DC or HC? Private prosecutions under the Health and Safety Bill
Attachments: Cab EGI Paper HS Reform Bill Additional Decisions Feb 2015.docx

Hi Jane

At yesterday's officials' meeting, the Minister asked for more information on why the Ministry considers the District Courts, not the High Court, should decide leave applications for private prosecutions under the Health and Safety Bill.

We understand Ministers Adams and Woodhouse have spoken about this issue and Minister Woodhouse has now indicated his preference for the District Courts hearing applications for leave to bring a private prosecution.

We consider the District Courts, not the High Court, should decide these leave applications because:

- The Criminal Procedure Act 2011 (CPA) requires all criminal proceedings to be commenced in the District Courts, including private prosecutions and regardless of seriousness or complexity.
- Section 26 of the CPA provides a procedural framework for the consideration of leave for commencing proceedings, including requirements for formal statements and exhibits sufficient to justify a trial. There are fees payable by a private prosecutor connected to this section. The District Court has processes and procedures in place, including at an IT system level that the High Court does not.
- If leave applications are heard in the High Court, there would be no avenue for review.
- The District Court Judiciary is capable of considering whether leave should be given to allow a private prosecution under the Bill, and has experience in deciding leave applications for private prosecutions.
- The District Court Judiciary will be more familiar with the Bill than the High Court Judiciary. Most health and safety cases will be heard in the District Courts. District Court Judges will be trained on the Bill; High Court Judges may not.
- It would be anomalous if there were one or two health and safety cases where the High Court had to decide whether the case may be accepted for filing when the vast majority of cases will be heard by the District Courts.

The **attached** draft Cabinet paper provides more information. MBIE has advised that Minister Woodhouse intends to sign off on this today.

Cheers,

9 (2) (a)



9 (2) (a)
 Policy Advisor | Courts and Tribunals Policy
 9 (2) (a)
www.justice.govt.nz

Please consider the environment before printing this email

12

From:
Sent: Wednesday, 4 February 2015 1:28 p.m.
To: 9 (2) (a)
Subject: FW: Final Cabinet papers seeking policy decisions about the HSR Bill and regulations to support the new health and safety at work Act [IN-CONFIDENCE]
Attachments: Cab EGI Paper HS Reform Bill Additional Decisions Feb 2015.docx; Cab paper policy decisions phase one regs PAPER A.docx; Cab paper policy decisions phase one regs PAPER B.docx; Phase one regs RIS.docx; ATT00001.txt

Hi all

We've received confirmation that Minister Woodhouse signed the Cabinet paper yesterday, approving the District Courts as the forum for hearing private prosecution leave applications under the Health and Safety Bill. 005

Out of scope

9 (2) (a)

From: 9 (2) (a)
Sent: Wednesday, 4 February 2015 12:33 p.m.

9 (2) (a)

and safety at work Act [IN-CONFIDENCE]

Good afternoon everyone,

Please find attached the final versions of:

1. The Cabinet paper recently circulated by my colleague [redacted] on proposals to improve the Health and Safety Reform Bill
2. The two Cabinet papers seeking initial decisions about the first phase of regulations to support the new Act, and
3. the regulations RIS (now a separate document, but still to be read as appendix three to the regs Paper A).

The Minister signed these yesterday afternoon, and they have been lodged with Cabinet Office this morning for consideration by EGI on Wednesday 11 February, and subsequently Cabinet on Monday 16 February. Note that some elements of the papers will have changed since you last saw them.

Out of scope

Kind regards

q(2)(a)

q(2)(a)

PRINCIPAL POLICY ADVISOR

Labour Environment | Health, Safety and Compensation Frameworks Policy team

Ministry of Business, Innovation & Employment (MBIE)

[SS-03-21-03]



MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT
HOKINA WHAKATUTUKI



q(2)(a)

15 Stout Street | PO Box 1473 | Wellington 6140 | Aotearoa

The information contained in this document is intended only for the addressee and is not necessarily the views nor the official communication of the Ministry of Business, Innovation & Employment.

From:

Sent: Wednesday, 28 January 2015 5:27 p.m.

q(2)(a)

Hello all,

Out of scope

Kind regards

9(2)(a)

9(2)(a)

PRINCIPAL POLICY ADVISOR

Labour Environment | Health, Safety and Compensation Frameworks Policy team

Ministry of Business, Innovation & Employment (MBIE)

[SS-03-21-03]



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HIRIŌA WHAKATUTUKI



9(2)(a)

15 Stout Street | PO Box 1473 | Wellington 6140 | Aotearoa

The information contained in this document is intended only for the addressee and is not necessarily the views nor the official communication of the Ministry of Business, Innovation & Employment.



BRIEFING

Health and Safety Reform Bill: Private prosecutions involving criminal actions of third parties

Date:	10 December 2014	Priority:	Medium
Security classification:	In Confidence	Tracking number:	1063 14-15

Action sought		
	Action sought	Deadline
Hon Michael Woodhouse Minister for Workplace Relations and Safety	Note the contents of this briefing	17 December 2014

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Bronwyn Turley	Manager, Health and Safety and Compensation Frameworks	04 901 8569	9(2)(a)	✓
9(2)(a)	Senior Policy Advisor	9(2)(a)	n/a	

The following departments/agencies have been consulted [double click box & click 'checked']					
<input type="checkbox"/> Treasury	<input checked="" type="checkbox"/> MoJ	<input type="checkbox"/> NZTE	<input type="checkbox"/> MSD	<input type="checkbox"/> TEC	<input type="checkbox"/> MoE
<input type="checkbox"/> MFAT	<input type="checkbox"/> MPI	<input type="checkbox"/> MfE	<input type="checkbox"/> DIA	<input type="checkbox"/> TPK	<input type="checkbox"/> MoH
		<input type="checkbox"/> Other:	NZ Police, Department of Corrections, Worksafe		

Minister's office to complete:

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

Comments:



BRIEFING

Health and Safety Reform Bill: Private prosecutions involving criminal actions of third parties

Date:	10 December 2014	Priority:	Medium
Security classification:	In Confidence	Tracking number:	1063 14-15

Purpose

This paper provides an update on work to develop changes to the Health and Safety Reform Bill to address concerns about the possibility of private prosecutions being taken under the Bill against New Zealand Police, the Department of Corrections and other agencies or their officers resulting from incidents involving the criminal acts of third parties.

Executive summary

1. During the development of the Health and Safety Reform Bill, a policy matter was identified in respect of the potential for liability to arise under the Bill from the criminal actions of third parties. 9 (2) (a) (i)
2. In 2010 two private prosecutions were attempted by individuals against the Police and Corrections under section 15 of the HSE Act. They alleged that Police and Corrections were liable for harm caused to members of the public by the criminal actions of persons being managed within the criminal justice system.
3. The Bill has a similar provision to section 15. Crown Law have advised that similar proceedings are highly unlikely to be successful under the Bill, as they would not be covered by the scope of the duties in the Bill.
4. When the Bill was considered by Cabinet Economic Growth and Infrastructure (EGI) Committee, EGI invited the Minister of Labour, in consultation with the Minister of Corrections and Minister of Police, to report back seeking agreement to any changes necessary to respond to this issue, following advice from officials and after submissions had been heard on the Bill.
5. In March, following reference from the Cabinet Legislation Committee, Cabinet noted the EGI decisions, and invited the Minister of Labour to report to EGI on the issue in sufficient time to allow consideration by the select committee.
6. In the event, the current provisions of the Bill concerning private prosecutions have attracted few submissions. All have been in support of the ability to bring a private prosecution being retained and there was only one indirect reference to the potential for private prosecutions of criminal justice agencies.
7. MBIE, Police and Corrections have been working together to discuss a range of options to address the problem.
8. Four options were considered as addressing the problem while reflecting minimum change to the policy intent of the Bill's provisions, particularly clause 30(2). These, and agency responses to options, are summarised in the briefing. Preference was given to options involving changes to the Bill to provide procedural limitations. However, some options could be applied either procedurally or substantively.

9. Agencies have narrowed the consideration of options down to two, but Police and Corrections each express a different preference, and the Ministry of Justice has concerns about the procedural option favoured by Police and MBIE.
10. MBIE will continue to work with the three agencies concerned to arrive at an amendment that is agreeable to all agencies without unduly disrupting the operation of the Bill. We will prepare a joint ministerial briefing on the preferred option/s early in the New Year.
11. MBIE will discuss with your office the best way to progress the chosen option/s.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a. **Note** that MBIE has consulted extensively with New Zealand Police and the Department of Corrections on options to limit the potential for private prosecutions under the proposed new Health and Safety at Work Act to be brought against agencies resulting from criminal actions of third parties.

Noted
- b. **Note** that the agencies have narrowed the consideration of options down to two, but Police and Corrections each express a preference for different options, and discussions are continuing.

Noted
- c. **Note** that we will discuss further with your office the best way to progress the chosen option/s.

Noted
- d. **Note** that MBIE continues to work with the other agencies to prepare a joint ministerial briefing on the preferred option/s in the New Year.

Noted

Bronwyn Turley
**Manager, Health and Safety and
 Compensation Frameworks,**
 Labour and Commercial Environment, MBIE

..... / /

Hon Michael Woodhouse
**Minister for Workplace Relations and
 Safety**

..... / /

Background

12. The Health and Safety Reform Bill (the Bill) proposes new health and safety legislation to replace the current Health and Safety in Employment Act 1992 (HSE Act) and Machinery Act 1950. The Bill is currently before the Transport and Industrial Relations Select Committee.
13. During the development of the Bill, a policy matter was identified in respect of the potential for liability to arise under the Bill from the criminal actions of third parties. This matter was of particular concern to the New Zealand Police (Police) and the Department of Corrections (Corrections) due to their role in managing offenders and persons suspected of committing

9 (2) (a) (i)

15. The issue of potential liability first arose in 2010 under the HSE Act. Section 15 of that Act requires every employer to take all practicable steps to ensure that no action or inaction of any employee while at work harms any other person.
16. In that year, two private prosecutions were attempted by individuals against the Police and Corrections under section 15 of the HSE Act. They alleged that Police and Corrections were liable for harm caused to members of the public by the criminal actions of persons being managed within the criminal justice system.
17. Garth McVicar, CEO of the Sensible Sentencing Trust at the time, commenced one prosecution against Corrections and Police alleging liability for the murder of Karl Kuchenbecker by Graeme Burton. Graeme Burton was on parole at the time. The second prosecution was commenced against Corrections and Police by Judy Ashton, the mother of Debbie Ashton. It alleged liability for the death of her daughter who was killed by parolee Johnathon Barclay who was driving recklessly.
18. Both cases alleged that Corrections and Police had failed to safely manage the offenders. These prosecutions failed because they were not filed in time and therefore the substantive cases were not heard.
19. Crown Law advised on 26 May 2014 that similar proceedings are highly unlikely to be successful under the Bill, as they would not be covered by the scope of the duties in the Bill. However, these cases have created uncertainty regarding the potential application of health

20.

9 (2) (f) (ii)

21. Clause 30(2) of the Bill requires a person conducting a business or undertaking (PCBU) to ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk by work carried out by the business or undertaking. The duty does not differ substantially from that operating under section 15 of the HSE Act, and therefore does not resolve the uncertainty created by the earlier cases.
22. On 19 February 2014, the Bill was considered by Cabinet Economic Growth and Infrastructure (EGI) Committee [EGI (14) 7 refers]. EGI invited the Minister of Labour, in consultation with the Minister of Corrections and Minister of Police, to report back seeking agreement to any changes necessary to respond to this issue, following advice from officials and after submissions had been heard on the Bill [EGI Min (14) 2/9 refers].
23. On 10 March 2014, following reference from the Cabinet Legislation Committee, Cabinet noted the EGI decisions, and invited the Minister of Labour to report to EGI on the issue in sufficient time to allow consideration by the select committee [CAB Min (14) 8/8 refers].

24. In practice, this has not occurred and the select committee received and heard submissions without this matter being drawn to its attention. The current provisions of the Bill concerning private prosecutions have attracted few submissions. All have been in support of the ability to bring a private prosecution being retained. One submitter referred to the potential for criminal justice agencies and others to be the subject of prosecutions, as a potential unintended consequence of the duty in clause 30(2), but did not submit on the topic beyond that. As such, the matter is unlikely to be addressed by the select committee in its report.

9 (2) (4)

In recognition of costs and reputational risks, MBIE has worked with agencies to develop procedural solutions

28. Discussions amongst the agencies determined that the problem to be addressed is the potential for aggrieved parties to use health and safety legislation as a means of “forum shopping” to seek redress through the potential for criminal sanctions or reparations under the Bill, over and above other legislation and procedures designed specifically to address the issue they might be facing.
29. MBIE recognises that using private prosecutions in this way is not appropriate when it relates to the intervening criminal actions of third parties. MBIE also recognises that, while such a private prosecution is unlikely to be successful, it can result in significant costs for agencies and the taxpayer, as well as reputational damage. It also risks undermining the regime because it takes the focus away from work health and safety.

9 (2) (g) (i)

9 (2) (4)

The law as drafted and under consideration by the select committee

32. New Zealand’s general approach is not to restrict the ability to take private prosecutions under most legislative regimes. The Criminal Procedure Act 2011 introduced an evidential sufficiency test, mitigating the potential for ill-founded or vexatious litigation.

33. The Bill is unusual in that it precludes bringing a private prosecution while the regulator is investigating an alleged breach, and restricts private prosecutions to situations where the regulator or another regulatory agency has not sought to bring a prosecution against any other defendant under the Bill in respect of the same matter. The Bill continues this approach from the HSE Act (amended in 2002 to remove the strict regulator monopoly on prosecutions), ensuring that the Crown, in the public interest, retains primary responsibility for prosecuting health and safety offences.
34. As drafted the Bill contains the following arrangements for private prosecutions:
- Primary responsibility for enforcement under the Bill rests with the regulator.
 - Private prosecutions are allowed where the regulator has not taken enforcement action under the Bill and there is not a prosecution of any possible defendant¹ under any other Act by a regulatory agency.
 - For a private prosecution to proceed, a person (not necessarily the prosecutor) must have received notification from the regulator that neither enforcement action under the Bill nor prosecution action by another regulatory agency under another Act in relation to the same matter or set of circumstances has occurred or will occur.
 - Where a person receives notice that a potential defendant has been prosecuted under another Act in respect of the same incident, i.e. not under the Bill, then they may still commence a private prosecution if they have leave of the court. As most prosecutions under the Bill will occur in the District Court, leave would need to be given by a District Court.
35. As noted above, there were a limited number of select committee submissions on this aspect of the Bill, and those received were generally in favour of retaining private prosecutions.
36. The Bill differs from the Australian Model Law. The Model Law retains a regulator monopoly on prosecution, but a person may apply to the regulator to request that the regulator bring a prosecution. If the regulator advises that no prosecution will be brought, the applicant can request that the matter be considered by the Director of Public Prosecutions (DPP) (in the jurisdictions that have such a post). The DPP can recommend that the regulator bring a prosecution, or the DPP may take the prosecution (in certain jurisdictions).

Policy options considered by agencies

37. MBIE, Police and Corrections have been working together to discuss a range of options for addressing the problem.
38. As noted above, preference was given to options involving changes to the Bill to provide procedural limitations to private prosecutions arising from incidents involving the criminal acts of third parties. However, some options could be applied either procedurally or substantively.
39. Four options were considered as addressing the problem while reflecting minimum change to the policy intent of the Bill's provisions, particularly clause 30(2). They were:

¹ The Bill as drafted repeats the wording in the current Act. Although it has not been litigated, it was referred to by Miller J in *McVicar v District Court* at Wellington HC [2011] NZHC 20 in paragraphs 46 to 48. He confirmed that there were two possible interpretations of the current section. The first is that "any defendant" means any possible defendant under any Act or only possible defendants under the HSE Act. The latter has been assumed to be the correct interpretation of the Bill as drafted, but the Departmental report will recommend redrafting to take the first meaning.

Option 1: Requiring leave of the High Court in all cases involving a prosecution under another Act

40. This option would insert a requirement that leave to take a private prosecution be obtained from the High Court where a person has been, or will be, prosecuted by a regulatory agency under another Act in respect of the same incident or set of circumstances. As drafted the Bill requires leave of the District Court where a possible defendant *under the Bill* has been prosecuted by a regulatory agency. The departmental report will propose that this is amended to refer to a possible defendant under any enactment.
41. The Bill would also be amended to describe a process and the basis on which leave would be granted by the High Court.

Option 2: Requiring leave of the High Court as in option 1 and excluding all cases involving serious criminal offences

42. As with option 1, this option would require leave of the High Court to be obtained for a private prosecution in any case where the matter involves a prosecution under another Act. In addition, this option would specify that the High Court would not be able to give leave for a private prosecution to proceed when the prosecution under another Act is for a serious criminal offence. This option would require a legislative description or list of which offences would be considered to be serious criminal offences.

Option 3: Requiring leave of the High Court where an alleged breach by any defendant leads to harm outside a workplace

43. This option would limit the use of private prosecutions in situations where the harm arising from the alleged breach occurs outside the place where the PCBU or other duty-holder carries out their work, which place includes where their workers may go or likely to be while at work.
44. This option has potential application beyond the problem identified by agencies as it would apply in all cases where the harm was not linked to a workplace.

Option 4: Excluding private prosecutions in any situations where the alleged breach by any defendant concerns the performance or otherwise of a statutory function performed under the Policing Act, Corrections Act, Mental Health Act etc.

45. This option would exclude private prosecutions in respect of certain activities carried out by officials under statutory authority that have an impact on the rights and freedoms of others.
46. Which statutory functions would be exempted would need to be determined. They could be referenced in the Bill either by listing the relevant Acts or parts of an Act, or by means of a generic description consistent with the policy intent
47. The intention would be to draw a distinction between the performance of these roles and other types of work covered by the Bill.

9(2)(g)(i)

q (2) (g) (i)

MBIE's preferred option: Requiring leave of the High Court in all cases involving a prosecution under another Act

61. MBIE's preferred option (option 1 in the above summary) would introduce a requirement to obtain leave of the High Court to take a private prosecution in relation to any matter where another person has been, or will be, prosecuted by a regulatory agency under another Act in respect of the same incident or set of circumstances.
62. It would require new drafting which would describe the process for obtaining leave and the basis on which leave would be granted by the High Court. It is intended that the presiding judge would be required to refuse leave for a private prosecution where:
 - a. the evidence is insufficient; or
 - b. it is an abuse of process; or
 - c. it would be inconsistent with the purposes of the Bill.
63. The purpose of the Bill is set out in clause 3 which, at clause 3(1)(a) refers to "protecting workers and other persons against harm to their health, safety and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant".
64. Clause 3(2) says that in furthering that purpose "regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable".

Advantages of the proposed amendment

65. The most significant advantage of the proposal is that it does not change the substantive duties set out in the Bill while providing sufficient protection from vexatious prosecutions and the potential for "forum shopping".
66. The approach is flexible. The inclusion of specific criteria for the grant of leave provides the least scope for unintended outcomes. It also allows scope for development of the law.

Disadvantages of the proposed amendment

67. Elevation of consideration of leave to the High Court may increase legal costs for both parties to potential private prosecutions. In addition, the smaller number of High Court locations across the country means that private prosecutors and defendants may face additional travel costs to pursue a case.
68. Further, the proposed criteria rely on the High Court determining a number of matters about a case, including whether a private prosecution is "consistent with the purposes of the Act". This may require significant consideration of a case at leave stage in some circumstances with associated costs and impact on court time.
69. Finally, this proposal still enables private prosecutions to be pursued with the leave of the High Court. There is a slight risk of the High Court granting leave in cases beyond the Government's understanding of the policy intent of the Bill, which would be hard to address subsequently while maintaining the policy intent of any amendment.

Implementation and resourcing implications

70. WorkSafe New Zealand and the Ministry of Justice were consulted on the implications of the proposed amendment.
71. Worksafe New Zealand have advised that there are no resourcing or implementation implications to consider with the amendment.

Ministry of Justice response

72. The Ministry of Justice (MoJ) were consulted on the preferred option and have offered a preliminary response without further discussion with MBIE or other agencies. Their initial view is that the decision to accept a private prosecution for filing should remain with District Courts.
73. The Ministry of Justice do not oppose the application of the criteria but consider that using the High Court would limit access to justice and would create a disproportionate appeal process. They consider the Criminal Procedure Act 2011 as providing an adequate threshold for private prosecutions and that District Court judges are adequately qualified to make decisions such as are required by the proposed test.
74. MoJ are concerned that the proposal would affect potential private litigants' access to justice because of the higher filing costs imposed on applicants. If the High Court refused to grant leave, the applicant's first right of appeal on that decision would be to the Court of Appeal, which would be expensive (currently \$1,100) and a very high level for a first right of appeal.
75. MBIE will take further advice and, along with the other agencies, will meet with the Ministry of Justice to discuss these concerns and offer other perspectives than that of the potential litigant.

Next steps

76. As outlined above, agencies have narrowed the consideration of options down to two, but Police and Corrections each express a preference for different options, and the Ministry of Justice has concerns about the procedural option favoured by Police and MBIE.
77. MBIE will continue to work with the three agencies concerned to arrive at an amendment that is agreeable to all agencies without unduly disrupting the operation of the Bill. We will prepare a joint ministerial briefing on the preferred option/s early in the New Year.
78. We will discuss with your office the best way to progress the chosen option/s.



UNREPRESENTED DEFENDANTS & PRIVATE PROSECUTORS

Last factsheet: Who can a Judge direct to file evidence before a charging document may be filed?

A: A Crown prosecutor

B: An unrepresented defendant

C: A private prosecutor

D: The officer in charge

What is changing?

The Criminal Procedure Act 2011 ("the Act") introduces new processes for unrepresented defendants (currently referred to as 'self-represented defendants') and new requirements for private prosecutors.

What is changing for unrepresented defendants?

An unrepresented defendant must provide information to the court at the case review hearing. If the case is to proceed to a jury trial, he or she must also provide information to the court at trial callover. Unrepresented defendants are not required to file a case management memorandum (CMM) or a trial callover memorandum (TCM). The Registrar must ensure an unrepresented defendant has notice of the information he or she must provide to the court (if applicable) including:

- changes to plea
- request for a sentence indication
- admissions of fact (that the prosecutor won't have to prove)
- identification of facts and issues that he or she will, or will not, dispute at the trial
- notice of any pre-trial applications to be made
- number of witnesses proposed to be called, estimated duration of the defence case, and any other information in relation to the management of the trial that is required by rules of court.

The Registrar must ensure an unrepresented defendant has notice of the information he or she must provide to the court.

What is changing for private prosecutors?

When a private prosecutor seeks to file a charging document, the Registrar may accept the charging document, not accept it for want of form (essential content is missing), or refer it to a Judge for a direction that formal statements (and exhibits) forming the evidence (or part of) that the private prosecutor proposes to call at trial be filed.

The Registrar must refer any formal statements and exhibits filed by the private prosecutor to the Judge who will determine whether the charging document should be accepted for filing.

The Judge must direct the charging document not be accepted for filing if the evidence provided is insufficient to justify a trial, or the proposed prosecution is otherwise an abuse of process. If so, the Registrar must notify the proposed private prosecutor that the charging document will not be accepted for filing, and retain a copy of the proposed charging document.

Issuing a summons for a private prosecution

If the charging document is accepted for filing, the Judge or the Registrar must issue a summons to the defendant.

What are the expected benefits of these changes?

The changes for unrepresented defendants allow cases to proceed with the necessary information, without the case management memorandum process. The changes for private prosecutors are intended to ensure that in applicable cases there is sufficient evidence to justify a trial.

Next week: Will the Criminal Procedure Act 2011 apply in the Youth Court?

A: Yes, with necessary modifications

B: Yes, exactly as in District Courts

C: No, it does not apply

D: Yes, but only if adult co-defendants

