

**INVESTIGATION UNIT
TRAINING PACKAGE**

(P)

PROSECUTIONS MODULE

Units

<i>Unit P1</i>	<i>Prosecutions</i>
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RELEASED UNDER THE
OFFICIAL INFORMATION ACT

MODULE 5: PROSECUTIONS
Unit P1: PROSECUTIONS

Unit P1: PROSECUTIONS

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Objectives

By the end of this unit you will be able to:

- prepare/present an accurate and professional file to the prosecutor
- ensure that all matters required to be presented to court are clear and accurate

PROSECUTIONS

INTRODUCTION

The decision to refer a matter for prosecution depends on sound, objective judgment to ensure that justice is served. The fullest assessment of all relevant factors must be considered to ensure that cases referred for prosecution are appropriately identified and are able to withstand public scrutiny.

There should be no automatic presumption that any welfare fraud matter will automatically proceed to prosecution. This means that the decision-making process cannot be reduced to a mathematical equation or the simplistic mechanical 'ticking off' of various criteria factors.

In many cases it will be obvious that a crime has been committed - but this is not the be-all and end-all of the matter. In the judicious exercising of discretion you must take into account the:

- circumstances of the offender
- particular circumstances of the offence
- overall interests of the public

This all-encompassing approach makes it more certain that effective justice will be done.

An overarching principle is that the Ministry must endeavor to exercise consistency in its decisions to prosecute offenders. All welfare fraud offenders must be treated equitably and fairly. There cannot be any bias or favour shown, or any irrelevant determinants used in arriving at the decision to refer for prosecution or not.

The decision to prosecute is based on two broad factors;

- Evidential sufficiency
- Public interest

These guidelines will assist you to assess all of the circumstances to enable you to exercise discretion and decide if a case is appropriate or not for referral to prosecution.

This involves:

- Considering 'evidential sufficiency' and 'public interest' to determine the merits of your case.
- Making a note of any significant factors that support or detract from a prosecution.
- If necessary, discussing the merits of the case with your Operations Manager or Senior Fraud Investigation Adviser or Legal Services solicitor¹.

¹ Please note with respect to Legal Services - it is an important principle in deciding cases for prosecution, that there should be independence of the prosecutor from the investigative arm of the Ministry. After receiving cases from NFIU, Legal Services will independently review the evidence and make their

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- Including a summary of your reasons for your decision in IMS – either to refer for prosecution or not. Your decision summary in IMS sets out the thought processes that led to you appropriately exercise the discretion to refer for prosecution or not.

EVIDENTIAL SUFFICIENCY

The evidence gathered must be sufficient to provide a realistic prospect of gaining a conviction. That prospect must be reasonable in all the circumstances.

The evidence establishing actus reus ("guilty act") and mens rea ("guilty mind") must be provable to the standard of 'beyond reasonable doubt'.

Witnesses must be unbiased, reliable and credible and able to give accurate evidence. The evidence gained must be admissible in Court. Inculpatory statements made by defendants must be admissible.

Evidential sufficiency factors to be weighed when considering prosecution includes:

- Evidence must establish that an offence occurred to the required standard of beyond reasonable doubt
- Evidence which is capable of belief must be able to be adduced
- Evidence must be admissible
- The evidence obtained by search warrant must be lawfully obtained
- The evidence obtained by section 11 Social Security Act must be lawfully obtained
- Admission/confession statements must be lawfully obtained and admissible
- Witnesses must be reliable and competent. They must not be liable to exaggerating or bias, or in any other respect demonstrate that they are unreliable
- Witnesses must be consistent in their evidence
- Witnesses must not have a motive for telling an untruth or less than the whole truth
- Witnesses must not be affected by mental illness to the extent that their evidence is unreliable
- Witnesses must be able to stand up to robust cross-examination
- Witnesses should not generally have previous convictions that are likely to weaken their credibility
- Where there might otherwise be doubts concerning a particular piece of evidence, there must be independent evidence to support it
- There must be clear evidence that the person responsible for the offence can be identified
- There must be evidence available to support each element of the particular offence

determination on all the facts. The Ministry's Legal Services solicitors are also Officers of the Court and must maintain independence in considering cases for prosecution

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- Where relevant – for example in relationship cases - the evidence must cover the full period of the offending

If you cannot meet the requirements of 'Evidential Sufficiency', 'Public Interest' becomes redundant. Therefore no decision to prosecute can be made.

PUBLIC INTEREST

The public interest test is more complex and subjective. The public interest is a balancing of factors for and against prosecution action and the particular weight that any single factor might provide. The Ministry must carefully exercise its discretion in deciding whether a prosecution is in the public interest. The Courts may form an unfavorable view of the Ministry if matters being prosecuted are determined by the Judiciary to not be in the public interest.

In broad general terms, the more serious the overall circumstances of the offending, the more likely a prosecution should proceed.

Factors to take into account when considering a matter for prosecution

Under the following three headings are listed factors that the Ministry needs to take into account when considering a matter for prosecution.

- You cannot necessarily focus on any one factor to assist you in arriving at a determination. Instead you must look at the sum totality of all the factors as they impact on a particular case.
- There will be cases that have significant reasons justifying a decision to prosecute, but may have other compelling reasons why a prosecution is not in the public interest.

You must weigh up these factors and determine if the circumstances in totality give reason for us to prosecute.

Factors that would lend weight to a decision to refer for prosecution

- On conviction, a significant sentence would be imposed
- The evidence shows the offending was premeditated
- The evidence shows the offending was sophisticated and not opportunistic
- The offender's degree of culpability and responsibility was significant
- The duration of the offending was extensive
- The offender used false or stolen identities

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- The offending involves multiple benefits
- The offender has previous convictions for dishonesty offences (if known)
- The offender is a recidivist welfare fraudster (not necessarily with previous convictions)
- Without a prosecution, the offender is likely to reoffend
- The quantum of the overpayment is significant
- The offender had opportunities to tell the Ministry the truth and cease the offending; but chose instead to lie and continue to defraud
- The offender forged or altered documents
- The offender was in a position of authority or trust and the offence was an abuse of that position (for example an employee of the Ministry)
- There is an element of corruption (for example an employee of the Ministry)
- The offender committed these offences while on bail or while facing other charges
- The evidence shows the offending was organised by two or more co-offenders
- The offender offended against other Government agencies to defraud the Ministry
- The offender aided, abetted or counselled another person to defraud the Ministry
- The type of offending albeit for small amounts is widespread (for example tenancy bond fraud)
- The scale and scope of the offending could undermine public confidence in the welfare system
- The public's confidence in the integrity of the welfare system will be served
- Welfare fraud needs to be denounced to deter others
- The prevalence of the type of offending requires deterrence

Factors that MIGHT lend weight to a decision NOT to refer for prosecution

- The Court is likely to impose a very small or nominal penalty
- The Ministry has contributed to the offending, for example by administrative failings
- Where the Ministry is responsible for any undue delay in investigating the matter or is responsible for any abuse of process
- Where the length of the investigation was unreasonable in the circumstances
- The circumstances of the offending are trivial
- The offender is suffering from a terminal illness where death is imminent
- The offender was suffering from serious physical and/or sexual abuse from a partner to the level of battered woman's syndrome (relationship matters)
- The offender was coerced and driven to offending by another party

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- The offender has self-disclosed, co-operated fully or made full restitution
- The consequences of a prosecution and conviction would be significantly and disproportionately harsh or oppressive
- Where a prosecution is likely to have a detrimental effect on the physical or mental health of a witness
- The offender's age is less than 18 or greater than 75

Factors that are generally irrelevant considerations

- The personal views of the Investigator (or others involved) in deciding to prosecute or not
- After being discovered the offender offers to make restitution to avoid prosecution
- The offender's race, ethnicity, religion, gender, sexual orientation, political association, occupation
- The offender is a public figure
- The effect that a conviction might have on an offender's personal or professional circumstances

When considering a case for prosecution, you need to weigh up all the factors in terms of both evidential sufficiency and public interest. A case will only be considered appropriate to refer to prosecution if the various factors, unique to that particular case, persuade you on balance to take that action.

Determine firstly the evidential sufficiency test. If that is satisfied, then proceed to consider the public interest test. The weight of factors is not based on the number of factors, rather it is on how various factors relate to a specific unique offender and all the circumstances relating to that offender.

You have a duty to ensure that the exercising of the discretion to decide which cases will or will not be referred for prosecution is consistent. The public and offenders have a right to know under what circumstances they can expect to be prosecuted for welfare fraud.

You need to be mindful that a criminal prosecution may risk injustice. A crime may well have been committed, but in weighing the overall circumstances of the facts and the human being involved, referral to the criminal courts may not be warranted.

You need to be equally mindful that a decision not to prosecute may well invite criticism and condemnation from the public. The exercising of discretion must therefore be open to analysis and satisfy the scrutiny of all stakeholders.

In previous modules "Planning an Investigation" and "Investigative Approach" you will have learned how an inquiry or investigation should be carried out. Given the inquiry has been conducted in the proper manner, and there is sufficient evidence available then you can begin to prepare your file for prosecution.

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Once charged it is the defendant's own decision whether to plead guilty or not guilty to the charge. However, in order to justify proceeding with a prosecution, sufficient evidence will be required to demonstrate that fraud has occurred. If the defendant denies the charge(s), then even more detail will be required to prove the disputed facts.

Most cases that are taken to court require the presentation of evidence in documentary form.

Almost all of the Ministry's prosecutions are instigated by summons. As previously mentioned Ministry staff do not have arrest and detention powers. In rare and certain circumstances when Police are involved a client may be arrested.

The Ministry's Legal Services section will determine whether you have sufficient evidence and confirm whether your prosecution referral can proceed.

The investigator will be responsible for preparing the file ready for court.

We will now consider the documentation required for the matter to be referred to Legal Services for prosecution.

PREPARING A FILE FOR PROSECUTION

Once you have concluded that prosecution action is the appropriate sanction you will need to prepare an exhibits file. This is a separate file from your investigation file. The evidence held in the investigation file will need to be placed in the exhibits file, numbered and sleeved. You need to prepare a list of exhibits to act as a contents page for the exhibits file.

The exhibits file must include all of the evidence you are relying on to prove your case.

When the defendant's lawyer makes a written request for disclosure under section 12(2) of the Criminal Disclosure Act 2008, you will provide them with a copy of everything in your exhibits file. Therefore it is vital that your exhibits file includes all the evidence obtained that is mentioned in section 12(2).

Section 12(2) requires you to disclose the following types of evidence:

- All records of interviews with the defendant (including audio recordings, transcripts, written statements, notes in your note book and notes on trace / ims / aimos)
- All records of interviews with prosecution witnesses (including audio recordings, transcripts, written statements, notes in your note book and notes on trace / ims / aimos)
- All job sheets and other notes of evidence i.e. notes in your note book and notes on IMS / aimos
- Diagrams and photographs that are intended to be produced as evidence
- Statements or records of interviews with co-defendants

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(n.b. section 12(2) imposes other requirements not mentioned here, but for the purpose of deciding what to put in the exhibits file, this is what you need to know. Please refer to separate disclosure training for a full explanation of your obligations under the Criminal Disclosure Act 2008)

Therefore the exhibits file must include all of the above, as well as any other relevant evidence you have obtained.

LEGAL FILE

You also need to prepare the documents for the legal file, which is the file that Legal Services solicitors will use to manage the prosecution. If you are prosecuting a couple, each defendant will need one legal file each. The legal file will include:

- A prosecution referral sheet
- A summary of facts (including schedule of previous overpayments)
- Draft charging documents and summons
- List of witnesses
- List of exhibits
- Copies of the following exhibits (if present):
 - o Overpayment assessment (one page summary)
 - o The defendant's statement (transcript if required)
 - o IMS and/or AIMOS notes
 - o Witness statements
 - o Work verification from employers(n.b. tabbed and in same order as list of exhibits)

The entire file will need to be available to the solicitor who undertakes the checking of the prosecution. It is advisable that the file not be removed from your office by the prosecutor to avoid the risk of it being lost.

Once you have prepared the exhibits file and legal file, Legal Services will review your referral. The legal file will be taken by Legal Services and the investigation and exhibit files must be retained by the fraud team.

Witness list

A witness list is part of the Legal file. It contains a list of witnesses, their contact details and links them to exhibits. The following template is an example of a witness list.

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Ministry of Social Development
v
Julio Mallard

WITNESSES

No.	Name and contacts details	Exhibit
1	Julie Weaver 31 Donoghue Road Rotorua (07) 856-9999	1,3,4,9,12,15
2	Warren Young 172 Main Road Gisborne (07) 389-9999	2
3	Nigel Stilwell 9 Rotokauri Drive Rotorua (027) 896-9854	11, 13,14
4	Nicola Wright 286 Wellington Street Rotorua	7,8

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The Summary of Facts

This document provides the Court with the facts upon which "the charging documents" are based.

The heading shows the defendant's details, the charges and maximum penalty.

Defendant's Details

The defendant's full name, address, age and date of birth must be stated and must agree with the details on the information.

The Charge

On the heading to the summary of facts, it is sufficient to state only the nature of the charge.

Statute

The section of the statute creating the offence in which the defendant is charged with must be accurate and as set out in the information.

Maximum Penalty

The two main reasons for showing the maximum penalty are:

1. To give the prosecutor an indication as to whether or not the defendant has the right of election for trial by jury. The defendant only has the right of election if the maximum penalty is more than two years imprisonment. (Social Security Act charges cannot be determined by a jury trial).
2. The Judge may ask the prosecutor as to the penalty which the statute provides for the offence.

The penalty must be accurately stated from the statute.

The body of the summary of facts

The court needs to know the circumstances surrounding the offence. In other words, it needs a brief summary of what took place.

What is it?

It is a clear and concise written account of how the offence was committed.

What must it do?

It must:

1. Show the date and place of the commission of the offence.
2. Outline how the offence was committed.

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3. Include overpayment details.
4. Contain the explanation given by the defendant.

How it is prepared?

It is prepared in paragraph form and typed in double spacing. The summary must be brief and objective. It must only contain facts which are relevant and able to be proved.

The summary should be written in such a way that describes step by step everything that happened. It must follow a chronological sequence as to how the offence was committed.

Note: A summary of facts must not contain any obscene language, 'slang' words, innuendos or abbreviations. Remember, it is for use in court and as such it must be accurate and objective in all aspects.

Template

A template summary of facts is available on *Doogle* that has been prepared by Legal Services. The template has been designed to give an appropriate structure for the average benefit fraud case. However you should regard it as a starting point only. Your priority is to accurately describe the offences that have been committed. Do not slavishly stick to the template if it does not fit your case.

Points to note in relation to template

Italics

When something is in italics it means you need to fill in the details that are relevant to your case i.e. "[TYPE] Benefit" becomes, say "Domestic purposes benefit".

"AND/OR"

These are in the template for your guidance only and should be deleted for the final version.

Sub-headings e.g. "WORKING"

These are in the template for your guidance only and should be deleted for the final version.

When the Defendant enters a guilty plea the prosecutor reads the summary of facts to the court. A copy of the summary of facts must always be kept on the file for reference.

Note: A summary of facts is ONLY used when a plea of guilty is entered.

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Charging documents

What are they?

The charging document is used to commence a prosecution in the District Court.

The charging document contains details of the defendant's alleged offending (i.e. the offences for which MSD is charging the defendant; s127 Social Security Act, s228 Crimes Act).

What law applies to them?

The law on how to commence a criminal proceeding is set out at Part 2 of the Criminal Procedure Act 2011 (CPA) and Rule 3.1 of the Criminal Procedure Rules 2012 (CPRules).

Section 14

Section 14 requires that the charging document must be filed in the court nearest to either:

- where the offence was allegedly committed, or
- where the defendant may be found
- however, *if all parties agree*, the charging document may be filed in another District Court

Section 16

Section 16 requires that a charging document must be for one offence only and must include —

- (a) particulars of the defendant; and
- (b) particulars of the person commencing the proceeding; and
- (c) a statement by the person commencing the proceeding that he or she has good cause to suspect that the defendant has committed the offence specified in the charge; and
- (d) particulars of the charge that satisfy the requirements of section 17;
- (e) the name of the employer of the person commencing the proceeding and particulars of an appropriate contact person in relation to the prosecution; and
- (f) any other information required by rules of court

Section 17

Section 17 requires that the charge must relate to a single offence and must contain sufficient particulars to fully and fairly inform the defendant about the offence with which they are charged.

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Requirements for a charging document

A charging document must:

- be accurate
- fairly inform the defendant of a particular offence
- show the correct date of the offence
- show the place where the offence was committed
- show the correct statute and section of the offence
- show the correct charge
- be filed within the legal time limit
- show the place of hearing (date and time)
- **does not need to be sworn**, but must be signed by the Investigator (as prosecutor who has good cause to suspect)
- use Legal Services' address as the address for service

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Template Charging Document

A copy of the standard form charging document issued by the Ministry of Justice is to be used by the Ministry and is available on *Doogle*.

<http://doogle/resources/helping-clients/procedures-manuals/integrity/nfiu/criminal-procedure-act-2011.html>

A template for the wording of every offence you are likely to use on a charging document is also available on *Doogle*. They have been prepared by Legal Services. They are found on five separate documents as follows:

1. Social Security Act charges template

Use for charges of benefit fraud under the Social Security Act, namely willful omissions to advise a change in circumstances, false statements, and failure to comply with a section 11 request.

2. Education Act charges s.307AA (providing false or misleading information) template

Use for charges of student allowance or student loan fraud under the Education Act involving the making of false statements.

3. Education Act charges s.307AA (omission) template

Use for charges of student allowance or student loan fraud under the Education Act involving an omission to advise of a change in circumstances.

4. Crimes Act charges template

Use for charges of dishonestly using documents, obtaining by deception, forgery, using forged documents, altering documents, and using altered documents. N.B. The charges in this document are only available if the offence was committed on or after 1 October 2003.

5. Crimes Act charges (prior to October 2003) template

Use for Crimes Act charges where the offence was committed before 1 October 2003. The available charges are fraudulently using documents, forgery, uttering (or using) forged documents, altering documents, and using altered documents.

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Filing a charging document

The Criminal Procedure Rules, Rule 2.3(2) provides that a charging document can be filed by delivering it to the Registry by hand. Delivery by hand would include by courier to the Registry's physical street address (Not the postal address).

The District Court will accept your charging document(s) and commence processing them in their system. That will result in the Court issuing the Ministry with the date for first call, and with the Court Record Number (CRN) which is the unique identification number for each charging document to enable the IO to complete the summons.

Summons

How to summons a defendant

What are they?

The issuing of a summons is the way in which MSD (the prosecutor) notifies the defendant of the date of his/her first court appearance. Under the CPA, the obligation has shifted from the Court to the prosecutor (Investigator) to prepare and issue a summons.

As the summons is the first way a defendant is notified of charges they must contain detail sufficient for the defendant to engage private legal counsel.

Summons template

A copy of the standard form 'summons to defendant' document has been prepared by the Ministry of Justice and the template document is available on *Doogle*.

The prosecutor (Investigator) must sign the summons document, but it does not need to be sworn.

The summons must clearly show the date of the first call hearing, so that the defendant is informed when he/she must turn up to court.

The court will provide the Ministry with the first call hearing date to be entered onto the summons document. The court will also advise the prosecutor of the criminal record number (CRN) which is the unique record number for each charge. These numbers must be recorded onto the summons document by the prosecutor before it is served on the defendant.

What law applies to them?

Sections 28-34 of the Criminal Procedure Act, and Rules 3.2, 3.4, 3.7 of the Criminal Procedure Rules apply.

The IO will create, sign and issue a summons to the defendant before or after they file the charging document with the court. Prior to issuing the summons the IO will obtain the first call date and the CRN from the Court.

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There is no requirement to prepare one summons per charging document. One summons can be prepared for each defendant (case) as long as all the charges have the same first call date. The summons must detail all offences that are to be heard together on the date of the first call. If there are separate offences that are not related to the original case, then a summons should be completed for each case.

Note that the service of a summons triggers the Prosecutor's disclosure obligations under the Criminal Disclosure Act 2008. It is the Ministry's practice that Initial Mandatory Disclosure together with a copy of each charging document is delivered to the defendant at the time that the summons is served.

Serving summons

A summons can be served by any officer or employee of the Ministry. A template summons document can be found on *Doogie*.

<http://doogie.ssi.govt.nz/resources/helping-clients/procedures-manuals/integrity/nfiu/criminal-procedure-act-2011.html>

You will need to ensure that the summons clearly indicates the date and time in which the defendant has to appear.

You will need to prepare the Initial Mandatory Disclosure to provide to the defendant at the time that you serve on the defendant. A copy of each charging document is to be provided to the defendant at the time that he/she is served, together with Initial Mandatory Disclosure.

The summons should be served on the defendant personally if possible. However Rule 2.6 of the Criminal Procedure Rules 2012, permits service on a "member of his family" who is a) living with him and b) aged 18 or over. "Member of his family" means a "father, mother, wife, husband, civil-union partner, de facto partner, child, brother, sister, half-brother, or half-sister."

The summons (and copy of the charging document) can be served on a family member in accordance with Rule 2.6, but the Initial Mandatory Disclosure cannot. If the summons is served on a family member, it is recommended that the Initial Mandatory Disclosure be couriered to the defendant's last known address.

Under the Criminal Procedure Act there is no longer a requirement that you must file proof of service with the District Court. However you must provide proof of summons service to Legal Services' for retention on the prosecution file. (In the event that the defendant fails to appear, then the Solicitor will be required to show proof of service to the Court).

In order to show proof of service, take a photocopy of the summons document, and after serving the summons, endorse the date, time, place and mode of service and the name of person served (and relationship to the defendant if defendant not personally served) onto the photocopy.

Promptly update IMS with date of summons service and provision of initial mandatory disclosure, and send proof of summons service to Legal Services.

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If you cannot find the defendant or any person qualifying under Rule 2.6, you will need to prepare and swear an "affidavit of non service" that tells the Court what you have done to try to serve the summons. The prosecutor will use that affidavit as an evidential basis for asking the Court to issue a warrant to arrest the defendant in lieu of serving them with a summons.

EFFECTS OF THE CRIMINAL DISCLOSURE ACT 2011

The Criminal Procedure Act 2011 (CPA) sets out the procedure for the conduct of all criminal proceedings. This Act represents the most significant reform of criminal Court procedures in over 50 years, with the aim of reducing unnecessary delays, improve efficiency of Court processes, reduce legislative complexity and enable Courts to adopt improved information technology (where appropriate).

The CPA provides for a number of terminology name changes as follows:

From: Defendant or Accused	-To: Defendant
Prosecutor or informant	- Prosecutor
Defended hearing	- Judge Alone Trial
Summary or Indictable	- Categories of offences
Information/Indictment	- Charging document (or charging list if before a Jury)
Laid	Filed

The CPA establishes four offence categories and two types of trial process; Judge Alone Trials (JAT) and Jury Trials (section 6 CPA).

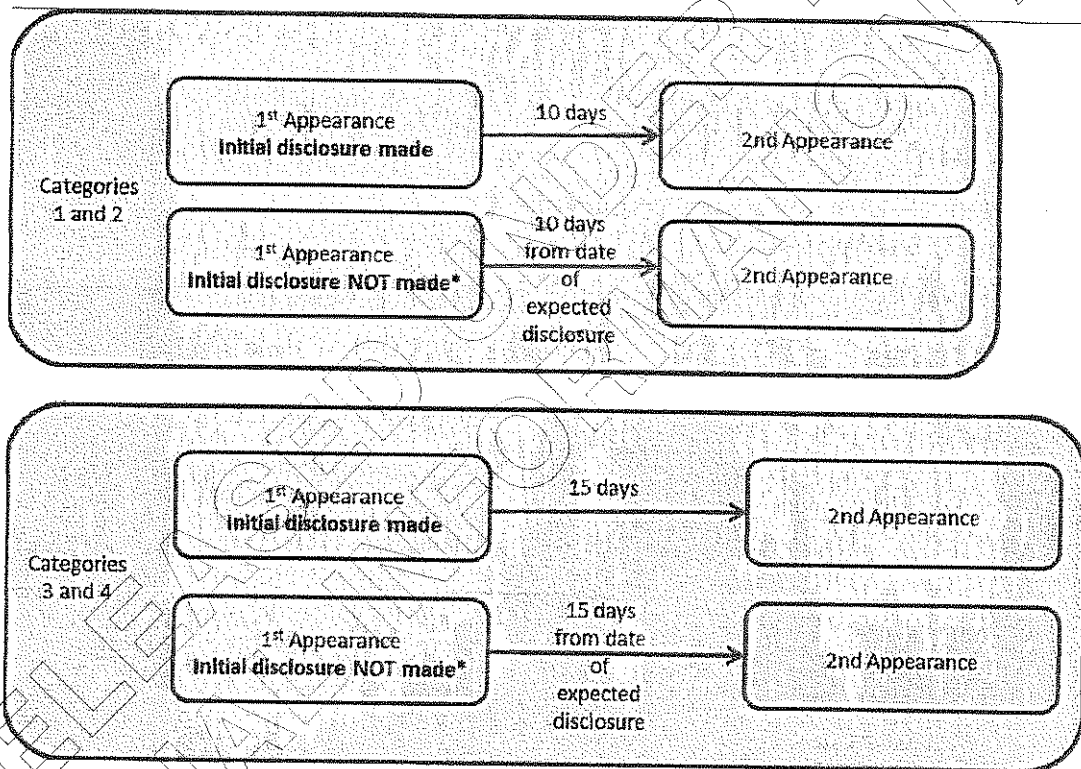
Category 1	Offences not punishable by imprisonment. (e.g. s11 Social Security Act)	Tried by JAT by Judge, Community Magistrate or JP
Category 2	Offences punishable by less than 2 years imprisonment. Cannot elect jury trial. (e.g. s127 Social Security Act, s307AA Education Act).	Tried by JAT (unless transferred to High Court)
Category 3	Offences punishable by 2 years imprisonment or more. Can elect jury trial. (e.g. s228, s240 (over \$1000) s256 Crimes Act)	Tried by JAT, can elect Trial. If elect Jury Trial, the Court may order a Judge Alone hearing if matter is long/complex/or involves juror intimidation.
Category 4	High Court only offences (Schedule 1) eg murder, treason	Tried by High Court jury

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Conspiring or attempting to commit an offence or inciting, procuring or attempting to procure a person to commit an offence in a given category is also an offence in that category. Similarly being an accessory after the fact to an offence in a certain category is also an offence in that category.

TIMING OF EVENTS DURING A PROSECUTION

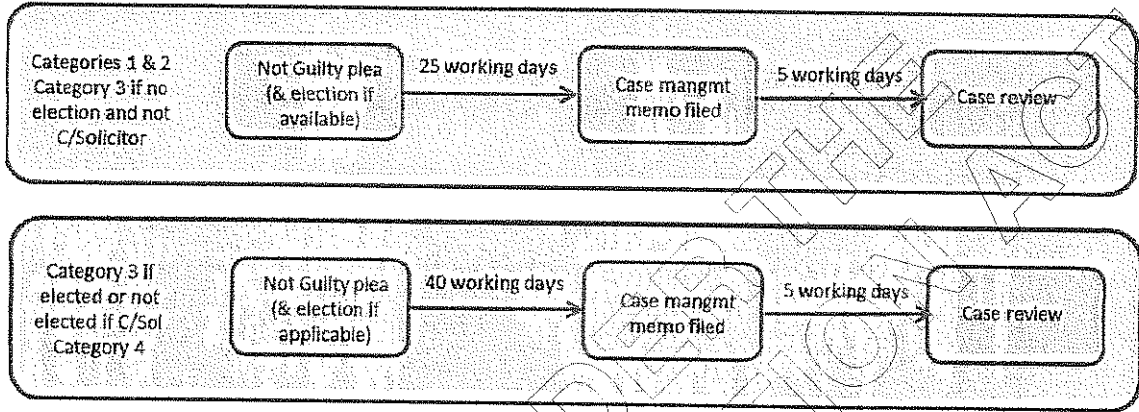
Figure 1: Timing of first and second appearances (Rule 4.1 Criminal Procedure Rules)



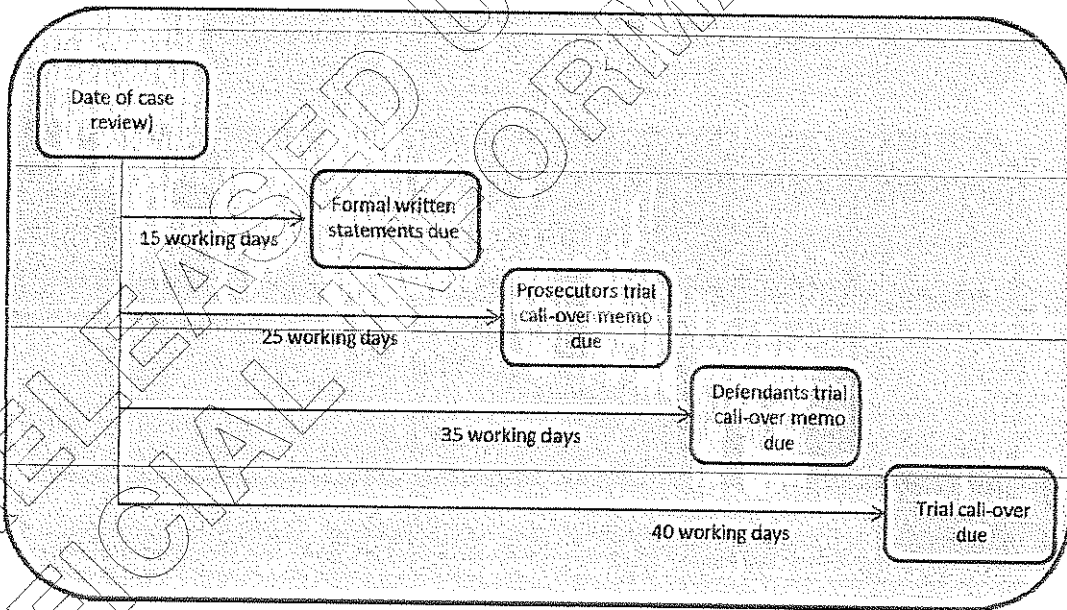
(*Prosecutor must advise of expected date of disclosure. Cannot be later than the applicable date, i.e. 21 days from date of summons service, section 12(4) Criminal Disclosure Act)

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**Figure 2: Timing of Case Review
 (Rule 4.2 CP Rules)**



**Figure 3: Timing of a Jury Trial call-over
 (Rule 4.3 CPRules)**



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PHASES OF DISTRICT COURT ACTION

A prosecution can go through many different phases set out below: -

First appearance (first call)

The first occasion on which the matter is called in court.

Enlarged

The matter is adjourned to a later date because either the summons has not been served or proof of service is not available

Warrant to arrest

A warrant authorised and issued by the Court to the NZ Police to arrest an individual and bring them before the Court. A warrant is generally issued if the defendant has been served but does not appear in court on the date and time stated on the summons, or on any date the case is adjourned to.

Warrant in lieu

A warrant of arrest issued where no service on the defendant was effected and the court is persuaded by an affidavit of non service that the only way to obtain the defendant's appearance is through his or her arrest.

Remanded

The defendant is required to appear at a later date for a further hearing. This can either be in custody, on bail (subject to a bail bond requiring the defendant's appearance at the next hearing, or at large (not subject to any legal status). If the defendant is remanded at large but fails to appear at the next hearing, a warrant to arrest can still be issued.

Second Appearance

The Criminal Procedure Act prescribes the time frames between the first and second hearings. The timing of the second appearance depends on the category of the offence. Where the maximum sentence for the offending is less than two years imprisonment the offence is category 2. For offending with a maximum sentence in excess of two years imprisonment, the offending is category 3.

For category 2 cases, the timing of the second appearance must not be later than 10 working days after the first appearance (where initial disclosure has been made).

For category 3 offences, the second appearance must not be later than 15 working days after the first appearance (where initial disclosure has been made).

Adjourned

A term used with reference to the case as opposed to the defendant.

Remanded without plea

The remand takes place without the defendant having been required to enter a plea.

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Disclosure

Disclosure is the production, at the request of the defence, of documents in the possession of the prosecution. Normally this refers to a request under section 12(2) of the Criminal Disclosure Act 2008 for production of the documents specified in that provision. It can also refer to full disclosure of the Ministry's file that must be provided automatically upon the defendant pleading not guilty.

Plea

The defendant's counsel formally advises the court whether they are pleading guilty or not guilty.

Guilty plea

When a defendant enters a plea of "Guilty" they will then proceed towards sentencing (see sentencing indication).

Not guilty plea

When the defendant enters a plea of "Not Guilty", and chooses to defend the matter then all facts alleged in the charging document must be proven at a defended hearing. The burden of proof is on the prosecution to prove the charges. The standard of proof the prosecution must meet is "beyond reasonable doubt". In other words, the Judge or jury must be left with no reasonable doubt about the defendant's guilt before finding the defendant guilty.

When the defendant pleads not guilty, the Investigator's responsibilities are broadly as follows:

1. Complete FULL disclosure of all relevant documentation
2. Summons the witnesses and make any travel arrangements
3. Complete witness statements
4. Complete a list of prosecution witnesses to be called at the hearing
5. Complete a list of exhibits to be produced
6. Copy the trial bundle
7. Obtain the originals of all exhibits
8. Organise material relating to the prosecution witnesses
9. Complete post hearing formalities

The entry of a not guilty plea triggers a legal obligation on the prosecution to make full disclosure of all relevant information to the defence (subject to any withholding grounds that apply). For more information see section 13, Criminal Disclosure Act 2008 and specific training on criminal disclosure.

Judge Alone Hearing vs. Jury Trial

The defendant's counsel must formally advise the court whether the defendant wishes to be tried by a Judge Alone or by way of a Jury Trial.

If a Judge Alone hearing is elected then the defendant can plead guilty immediately or enter a plea of not guilty. Where a not guilty plea is entered the matter is adjourned

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and proceeds down the 'Not Guilty' path to a "Case Review Hearing" and ultimately to a defended hearing.

If a Jury Trial is elected then the case similarly proceeds down the 'Not Guilty' path and the matter is adjourned to a Case Review Hearing and ultimately is adjourned for trial by jury. The election usually occurs at the same time as the entering of the plea.

Case Review hearing

When a defendant pleads not guilty the matter is adjourned for a Case Review Hearing (CRH). The registrar will notify the parties of the date of the CRH. For a category 2 offence the adjournment period between the not guilty plea being entered and the case review hearing is 30 working days. For a category 3 offence the adjournment period is 45 working days.

Five days prior to the case review hearing a case management memo must be filed with the Court by defence counsel. Case management discussions must be held between the parties and a case management memo is completed to ascertain whether the proceedings will proceed to trial, and if so, make any arrangements necessary for a fair and quick resolution of the hearing. Case management discussions will involve a frank exchange of views between prosecution and defence. An indication is required of the number of witnesses on each side, an estimate of the hearing time needed, and any issues that need to be resolved to allow the hearing to proceed smoothly.

Pre-trial admissibility hearing

Where the matter is proceeding to a defended hearing before a Judge Alone, if there are any issues as to the admissibility of any evidence to be produced, then an application can be made to have these issues sorted out by a Judge prior to the actual hearing.

Judge Alone Hearing

A hearing before a Judge at which the evidence for and against the defendant including the production of exhibits is presented by witnesses, and a Judge makes a decision on the guilt or otherwise of the defendant.

Jury Trial

A hearing before a Judge and jury at which the evidence for and against the defendant is presented by witnesses and the production of exhibits, and the jury (subject to legal directions given by the Judge) makes a decision on the guilt or otherwise of the defendant. If the jury finds the defendant guilty on some or all of the charges, the case proceeds to "sentencing" as described earlier.

If a defendant elects trial by jury, once the matter has been adjourned from the Case Review to a trial call over the prosecution is handed over to the Crown Solicitor and he/she is now responsible for the case.

The Ministry must prepare formal written statements (similar to briefs of evidence) for all the prosecution witnesses. The formal statements require a declaration from the

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witness that their statement is true. The CPA allows a range of material to be used as evidence including audio/visual recordings. The formal statements must be provided to the Crown Solicitor no later than 5 working days after the proceeding has been adjourned for trial call over. The Crown Solicitor will advise whether any changes need to be made to the witness statements (which the IO will attend to); however it will be the Crown Solicitor who files the statements in Court. The Crown solicitor will also serve a copy of the formal statements upon all parties. However it is the Ministry's job to file and serve the exhibits. You must liaise with the Crown Solicitor about when to file the exhibits with the Court.

The formal statements will be filed by the Crown Solicitor 25 working days before the call over date.

Call over (Jury Trial)

Under the CPA, this is the hearing to determine the date of the jury trial. The Ministry's case will now be with the Crown Solicitor. The Court wants to know if the matter is still proceeding and if the parties are ready. The call over marks the date for filing any pre-trial applications. Fifteen days prior to the trial call over, the Crown Solicitor will have filed a memorandum advising the Court and defence of various matters to assist in the management of the trial.

Proceeding in the absence of the defendant

The defendant is required to be present in Court for plea and sentencing. A case review hearing may proceed in the absence of the defendant if the Court is satisfied that it would be in the interests of justice. If there is no reasonable excuse for the defendant's absence at a Judge Alone hearing or trial, and the Court is satisfied that the defendant's absence will not prejudice the case, then the hearing may proceed.

Sentencing Indication

This is an indication from the presiding Judge in open court at the request of the defence of his or her views on a probable sentence based on the summary of facts and such other information as the defence and prosecution may wish to put before the court at the time of such request.

Pre-sentence report (Provision of Advice to Court (PAC) Report)

A report prepared by the Community Probation Service at the request of the court to assist the court in arriving at the proper sentence – it should be noted that the court is not bound by the recommendations contained in such a report.

Sentencing

The hearing at which the court is addressed by both parties on the appropriate sentence for the defendant and the decision of the court is announced.

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SUMMONS WITNESSES

Before the date for the defended hearing is set down you should contact the witnesses for the prosecution and ask them for any dates they will be unable to attend court. The Ministry solicitor conducting the case needs to know these dates so that he or she does not agree to have a defended hearing on a date on which not all the witnesses are available.

When the defended hearing date is set, all the prosecution witnesses need to be summonsed.

The following process needs to be followed:

- Witness summons is prepared by the Investigator
- Two copies of each summons are taken to the Court Registrar
- Court Registrar signs both copies
- Investigator personally serves witnesses with one copy of their summons
- Investigator endorses other copy of the summons with a note recording the date, time and place the summons was served, and signs and dates the note

For any witness who has to travel a significant distance, request your support or administration officer to arrange their travel and any accommodation.

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Example of a witness summons

SUMMONS TO WITNESS

CRN: XXXXXXXXXXXXX

TO:⁽¹⁾ XXXXX

(1) Full Name

Of⁽²⁾ XXXXX

(2) Address and Occupation

Business Address: XXXXX

Pvte Phone: XXXXX Bus Phone: XXXXX

YOU ARE SUMMONED at the request of the Informant to appear as a witness at the District Court at XXXXX on XXX day the XXth day of XXXXX 200X, at 10.00a.m. and on such other days as may be directed by the Court to give evidence in respect of a charge of:

Benefit fraud

laid by ⁽³⁾ Ministry of Social Development

(3) Name of informant or complainant

Officer in Charge of Case: FULL NAME OF INVESTIGATOR

Against ⁽⁴⁾ FULL NAME OF DEFENDANT

(4) Name of defendant

You are required to bring with you and produce (specify what is to be produced): XXXXX

Dated at XXX(COURT) this XXX day of XXX 200X

Deputy Registrar

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WITNESSES' STATEMENTS

Formerly known as 'briefs of evidence', a witness statement is any statement which presents clearly and concisely in an orderly manner, **ALL** the admissible evidence that can be given by a witness in support of the charge(s). It's no longer a requirement that they have to be written, and can include an audio statement.

Statements required at a Judge Alone trial do not need to be formal, and do not need to be signed or contain a declaration that it is correct. However MSD practice is that where a witness is presenting a written statement that he or she signs and dates the document. In this way defence counsel are assured that the witness has read and adopted the document that he or she has signed.

Witness statements for a Jury Trial need to be filed with the Court prior to trial. The Prosecutor (now the Crown Solicitor) is required to file *formal statements* from potential witnesses in relation to the jury trial. A formal statement contains the evidence of a witness along with a declaration that it is true. The CPA approach to formal statements allows a range of material to be used as a statement including original police interviews and audio visual recordings. However if a video/audio interview is filed as a formal statement, a transcript of that interview must be filed at the same time.

What must a statement contain?

- Evidence assisting to establish the essential ingredients of the offence.
- Evidence to identify the defendant (not every witness will be called to identify the defendant).

Why is a witness statement prepared?

- It is used as a guide by the Prosecutor when conducting the examination-in-chief of the witness, so that they know prior to the hearing what the witness is going to say.
- To provide the defendant or their counsel with the evidence to be produced during the hearing.

To prepare a witness statement you must know the law relating to the offence and you should have a knowledge and understanding of the laws of evidence as well.

When preparing the 'statement' you should:

- have knowledge of the file
- be aware of any likely defenses to be raised
- know what exhibits are to be produced
- know which ingredient of the offence each witness will prove
- ensure only relevant and admissible evidence is given
- ensure all witnesses have personal knowledge of the evidence they are giving.

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How is a Witness Statement prepared?

Any written statement must be CLEAR and CONCISE so that it is SIMPLE TO READ.

Remember – present the facts in the simplest manner to avoid any confusion when the case is proceeding in court.

A written statement should have the following:

- a HEADING
- a FORMAT
- the CONTENT
- REFERENCES made to the evidence obtained to support the charge.

The Heading

Each written Witness Statement needs to have a heading similar to the example provided below.

The Format

1. It must be typed in double spacing
2. Make each fact a single paragraph
3. The witness's particulars are set in the first paragraph - immediately under the "heading"
4. Must be constructed in chronological sequence to allow the witness to give a smooth account of the events
5. Allow plenty of margin space around the script for use by the prosecutor
6. Typed on one side of page only
7. A separate witness statement is needed for each witness.

The Content

A witness can only give evidence of what he/she can prove. The facts given must be:

- factual
- accurate and not 'biased'
- admissible
- relevant
- free from hearsay evidence (unless an exception to the hearsay rule applies)

References

While giving evidence, a witness may be required to identify the defendant, or produce a document. When this is the case, reference is made in the left hand margin of the written statement which calls the prosecutor's attention to it.

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When a witness identifies the defendant there will be evidence given as to the association with the defendant followed by the words "I interviewed the defendant BROWN who I identify as being in court today (WITNESS TO IDENTIFY). The words 'WITNESS TO IDENTIFY' is typed in capital letters to make it stand out. In the margin on the same line as 'WITNESS TO IDENTIFY' is typed the words "ID DEFT".

When producing a document the witness will give evidence as to how they are in possession of it, followed by the words - I now produce the "....." (and name the article) as 'EXHIBIT.....'. The word 'EXHIBIT' is typed in capital letters to make it stand out and be clearly visible. In the left hand margin on the same line as the words 'produced as an exhibit' is typed 'EXH. '

A witness may have to refer to an exhibit which has been produced by another witness. In this case a comment such as "witness refers to 'EXHIBIT' " is written into the 'brief' and in the left hand margin on the same line as this comment is written 'EXH' (referred).

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Example of a written witness statement

Ministry of Social Development
v
Lady Gaga

Alice WHITE to prove

That is my full name. I am a case manager at the Hastings Work and Income office. Work and Income is a service of the Ministry of Social Development.

The defendant applied for a Domestic Purposes Benefit on 7 October 2011 at the Hastings office.

She completed an application form.

She produced her driver's licence as identity.

On the form at question 24 the defendant has stated she has no husband and has answered "not applicable" (N/A) to questions 25-31 relating to the details of any husband or defacto.

She has signed the form directly below a declaration which I will read to the Court.