

Ministry for the Environment

Waste Minimisation Act Prosecution Policy



Contents

Section 1: Overview	3
Purpose.....	3
Why does the Ministry prosecute?	3
How does prosecuting support the Compliance Model?.....	4
Section 2: Types of offences	5
WMA offences – contravening regulations.....	5
WMA procedural offences	6
Crimes Act offences	6
Offence categories.....	7
Section 3: Prosecution process	8
Stages of a prosecution	8
Decision making process	9
Section 4: Decision guidelines	10
Test for prosecution	10
The evidence test	10
Public interest test.....	11
Irrelevant factors	12

Section 1: Overview

Purpose

The Prosecutions Policy serves as a guide for the Ministry to decide whether to prosecute people or organisations following an investigation into breaches against the Waste Minimisation Act 2008 (WMA).

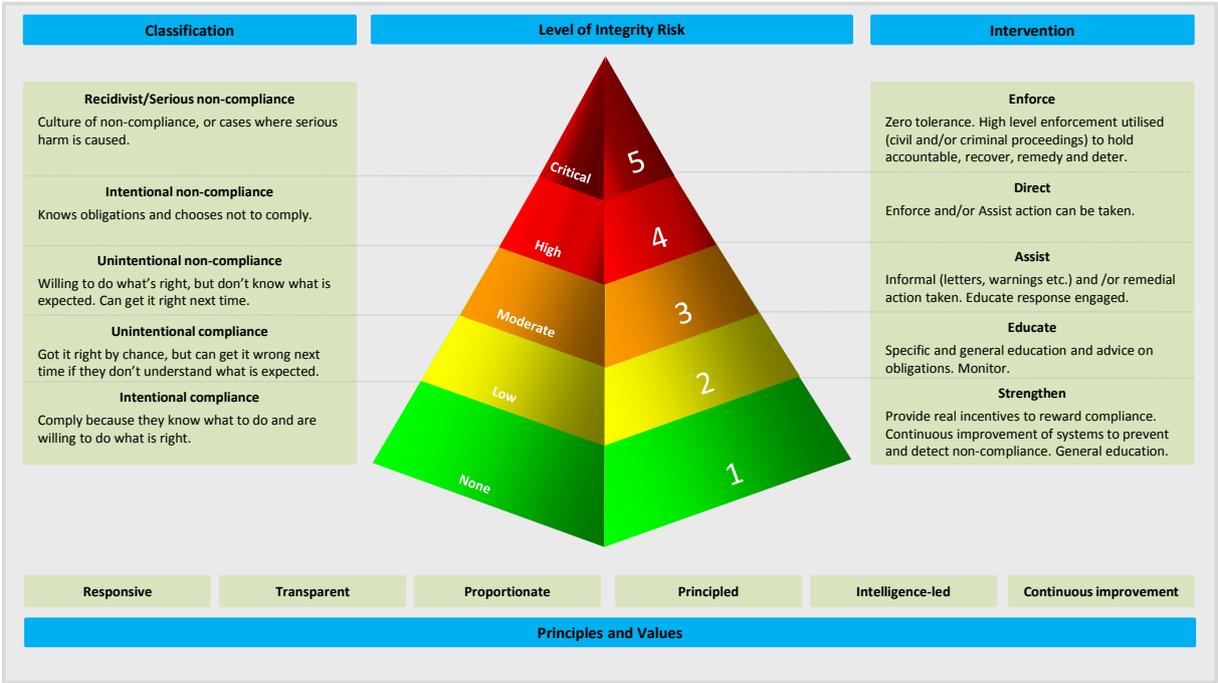
The Prosecutions Policy:

- Identifies how the prosecution tool, as a means of achieving compliance, supports the WMA compliance model
- Sets out principles that the Ministry will apply when exercising its discretion to prosecute.

Why does the Ministry prosecute?

The WMA compliance model (see Figure 1) sets out the Ministry’s approach to promoting and ensuring compliance with the WMA. The model recognises that a balanced and proportionate response is required to meet the varying levels of non-compliant behaviour and the integrity risks or harms created.

Figure 1: The WMA Compliance Model



There are a number of tools the Ministry can use to ensure compliance. The compliance model provides guidance on how all of the available tools can be utilised most effectively, whether they be informal tools or legal enforcement tools.

The WMA creates offences where a person or organisation fails to meet their obligations by contravening regulations made under the WMA. The Ministry prosecutes people or organisations in order to hold them accountable and to deter them and others from breaching the regulations. General deterrence of the sector must be underpinned by an effective communications strategy.

How does prosecuting support the Compliance Model?

Table 1 sets out the role of prosecutions in supporting the compliance model by identifying the risks created in high/critical integrity risk cases and how the prosecution tool can be used to mitigate those risks.

Table 1: Role of Prosecutions in the Compliance Model

Level of Integrity Risk	Risks	Prosecution as mitigation tool
<p>Level 4/5: High/critical</p>	<p>At an individual/transactional level:</p> <ul style="list-style-type: none"> • Non-compliant behaviour becomes entrenched if not deterred • Increased frequency (and costs) of monitoring in the future • Records are consistently incorrect • Significant financial loss/harm (e.g. through levy avoidance). <p>At a strategic level:</p> <ul style="list-style-type: none"> • Non-compliance is indirectly encouraged - perception that ‘we won’t get caught’ or, if caught ‘nothing will happen’ • Ministry not seen as credible regulator. <p>At a public/reputational level:</p> <ul style="list-style-type: none"> • Loss of trust and confidence in the Ministry’s ability to effectively regulate the WMA • Compliant regulated sector perceives there is an unfair playing field if there is no accountability for non-compliant regulated sector 	<p>Deter person or organisation by:</p> <ul style="list-style-type: none"> • Holding to account by securing a conviction • Imposition of a fine (monetary penalty/disincentive) • Negative publicity, reputational harm. <p>Deter public by:</p> <ul style="list-style-type: none"> • Publicly demonstrating that the Ministry will hold people and organisations accountable – a media and communications strategy is critical. <p>Trust and confidence built by:</p> <ul style="list-style-type: none"> • Being seen to hold people and organisations to account • Ensuring prosecutions are supported by proactive strategies to educate and work with the sector.

The compliance model describes five levels of risk that may arise from non-compliant behaviour of people and organisations under the WMA.

The Ministry’s approach to Level 2 and 3 cases is to encourage compliance by proactively working with the regulated sector. For Level 4 cases, the Ministry can consider actions other than prosecuting where the risks are not as evident and other means of ensuring compliance can achieve the objectives. The approach for Level 5 cases is to direct and enforce compliance (a push towards compliance).

Section 2: Types of offences

This section summarises the main types of offences that could be detected by enforcement officers during the course of carrying out a WMA investigation. Whether the Ministry chooses to prosecute will depend on how it exercises its discretion in accordance with the Prosecutions Policy. This section summarises offences under the following categories:

- WMA offences where regulations are breached
- WMA procedural offences
- Crimes Act offences.

WMA offences – contravening regulations

Section 65 of the WMA creates offences where a person contravenes regulations made under the WMA. If a person commits an offence under section 65, the maximum penalty is a fine not exceeding \$100,000.

Under section 86, regulations can be made by the Minister for the following purposes:

- Requiring the *operator of a disposal facility* to keep and provide to the levy collector, records and information to enable the levy to be accurately calculated (s 86(1)(a))
- Requiring *classes of persons* to keep and provide information to assist with compilation of statistics (s 86(1)(b))
- Requiring *territorial authorities* to keep and provide information and records in relation to levy spending and performance against their waste management and minimisation plans and performance standards set by the Minister (s 86(1)(c)).

To date, one set of regulations has been made under the WMA - the Waste Minimisation (Calculation and Payment of Waste Disposal Levy) Regulations 2009 (**the Regulations**). The Regulations create the following obligations or duties on disposal operators:

- Provide monthly and annual returns (clause 6 – 7)
- Ensuring returns include declarations verifying the information (clause 8)
- Keep and provide records and information (clauses 34 – 37) so that amounts of levy can be accurately calculated.

In light of the regulations that apply, Table 2 summarises the relevant offences that the Ministry can prosecute under the WMA.

Table 2: Summary of WMA Offences

Section	Summary
65(1)(e)	A person contravenes regulations made under s 86(1)(a) or (b) of the WMA
65(1)(f)	A person provides information, records or other information required by regulation 86(1)(a) – (c) of the WMA and knowingly supplies false or misleading information
65(1)(f)	A person provides information, records or other information required by regulation 86(1)(a) – (c) of the WMA and knowingly makes any material omission

WMA procedural offences

Table 3 sets out the procedural offences created under section 65(3) of the WMA. The offences involve situations where an enforcement officer or auditor is prevented from performing their functions or duties under the WMA. The maximum penalty for these offences is \$5,000.

Table 3: Section 65 WMA procedural offences

Section	Summary	Description
65(3)(a)	Obstructs enforcement officer	Person intentionally prevents enforcement officer or auditor from carrying out his or her statutory functions or duties
65(3)(b)(i)	Refuses to give information	Person refuses to give information to an enforcement officer or auditor exercising power under section 79 (which requires the person to provide information)
65(3)(b)(ii)	Intentionally supplies false or misleading information	Person intentionally/deliberately provides false or misleading information to an enforcement officer or auditor exercising power under section 79 (which requires the person to provide information)
65(3)(c)	Inciting non-compliance	Person incites any other person to: <ul style="list-style-type: none"> - obstruct and enforcement officer - refuse to give information - intentionally supply false or misleading information.

Crimes Act offences

People or organisations may also commit criminal offences in addition to breaching the WMA. An enforcement officer's primary role (and the use of WMA powers) is to carry out an inquiry into alleged breaches of the WMA. However, there will be cases where an enforcement officer lawfully collects information under the WMA, but in going so uncovers evidence of a crime (e.g. making false declarations).

A summary of possible Crimes Act offences that may be detected are set out in Table 4.

Table 4: Crimes Act 1961 offences

Section	Summary	Description
111	False statements or declarations (max penalty 3 years' imprisonment)	<ul style="list-style-type: none"> • Person is required or permitted by law to make any statement or declaration before any officer or person authorised by law to take or receive it • Makes a statement or declaration that would amount to perjury if made on oath in a judicial proceeding.
228	Dishonestly using a document (max 7 years imprisonment)	<ul style="list-style-type: none"> • Dishonestly uses (e.g. submits) a document with intent to obtain a service, pecuniary

Section	Summary	Description
		advantage or valuable consideration
240	Obtains by deception Penalties: <ul style="list-style-type: none"> • 7 years where value >\$1,000 • 1 year where value >\$500 - ≤\$1,000 • 3 months where value ≤\$500 	<ul style="list-style-type: none"> • By deception: <ul style="list-style-type: none"> ○ Obtains ownership of, or control over, any property, pecuniary advantage, benefit or valuable consideration; or ○ Induces or causes any other person to deliver over, execute, make, accept, endorse, destroy, or alter any document or thing capable of being used to derive a pecuniary advantage; or ○ Causes loss to any other person

Offence categories

The Criminal Procedure Act 2011 (CPA) sets out the procedure for all criminal prosecutions. Offences are divided into four categories. For the purpose of the types of offences that the Ministry is likely to prosecute, the three offence categories that apply and the trial process is set out in Table 5.

Table 5: Criminal Procedure Act 2011 – offence categories

Offence Category	Description	Offences	Trial jurisdiction
Cat 1	Offences not punishable by imprisonment	WMA s 65(1)(e),(f) WMA s 65(3)	Tried by Judge-alone procedure in the District Court by: <ul style="list-style-type: none"> • DC Judge • ≥ one Community Magistrate • ≥ one JP.
Cat 2	Offences punishable by less than 2 years imprisonment, non-electable	Crimes Act s 240 (where value ≤\$1,000)	Tried by Judge-alone procedure in the District Court unless transferred to the HC for trial on application by one or both parties
Cat 3	Offences punishable by 2 years imprisonment or more	Crimes Act s 240 (where value >\$1,000) Crimes Act s 111, 228(b)	Tried by Judge-alone procedure in the District Court unless defendant elects trial by jury Tried in the DC unless transferred to the HC on application by one or both parties. Court may nevertheless order trial by Judge for long and complex trials or where juror intimidation is an issue.

Most, if not all, of the Ministry's prosecutions will be Category 1 offences and will proceed expeditiously before a Judge alone. Any WMA prosecution will be a Category 1 offence. If the Ministry chooses to prosecute for Crimes Act offences where the value exceeds \$1,000, they will be Category 3 cases and could proceed to trial before a jury.

Section 3: Prosecution process

This section summarises the prosecution process. The section focuses specifically on the process for making decisions to prosecute.

Stages of a prosecution

Figure 2 illustrates the high level stages involved in the prosecution process. The ‘stages of a prosecution’ are the four procedural stages provided for under the CPA.

Figure 2: The Stages of Prosecution



Prosecution decision

The first step involves the Ministry making a decision to prosecute a person or agency. The Ministry exercises a discretion to prosecute. The Prosecution Policy sets out how the Ministry should exercise that discretion in a manner that supports the compliance model and promotes the compliance principles and values. The decision making guidelines draw upon the Crown Law’s Prosecution Guidelines¹ but have been tailored to meet the Ministry’s compliance goals and objectives. Decisions to prosecute or not prosecute are reviewed by independent legal advisors. Independent legal advice is also sought to determine if there should be a prosecution.

Commencement

A prosecution is commenced by drafting and filing a charging document and notifying the defendant of the charge (or intention to charge) through the summons procedure.

Administration

The administration stage of the prosecution is the period between the defendant’s first appearance in Court and where a plea is entered.

Review

If a defendant enters a not guilty plea to a category 2 or 3 offence the case is automatically placed under the mandatory case management process to assess whether it will proceed to trial and to make arrangements for its fair and expeditious resolution.

If a defendant pleads not guilty to a category 1 offence, a Judge may direct that the case be placed under case management, if it will facilitate resolution of the proceeding or is otherwise in the interests of justice. The Judge can make the direction on his/her own motion or upon application by the prosecution or defendant.

Trial

If the case is not resolved during the review stage, the case proceeds to a Judge alone or jury trial.

¹ Crown Law Office, July 2013

Decision making process

Enforcement officer report

The enforcement officer responsible for conducting the investigation will prepare a report in accordance with the Investigations Manual. This report will contain information to assist the Enforcement Decisions Group (**EDG**) decide whether to recommend prosecution to the Secretary for the Environment.

Review of report

The Manager Waste Operations will review the Investigation Report to ensure it meets the required standard in the Investigations Manual before it is submitted to the EDG.

EDG review

The EDG will review the enforcement officer's Investigation Report and consider whether the prosecution test (as outlined in Section 4 of the Prosecution Policy) has been met in accordance with the decision making guidelines.

If the EDG is not satisfied that the prosecution test is met, a decision of no prosecution will be taken.

If the EDG is satisfied that the prosecution test is met the enforcement officer will seek an independent legal review and obtain a criminal liability opinion addressing whether there is sufficient admissible evidence to provide a reasonable prospect of conviction. If the opinion concurs with the EDG then its recommendation to prosecute will be escalated to the Secretary for the Environment for approval.

If the opinion concludes that there is insufficient evidence, the EDG will review its decision.

Secretary for the Environment approval

The Secretary for the Environment will receive the EDG's recommendation to prosecute and will be provided with:

- The investigation report
- Criminal liability opinion
- EDG's prosecution making summary.

If the Secretary for the Environment decides that the prosecution test has not been satisfied a decision of no prosecution will be taken.

If the Secretary for the Environment agrees with the recommendations of the EDG he or she will approve the Ministry commencing a prosecution.

Commencing the prosecution

If the Ministry decides to prosecute, the enforcement officer will be responsible for managing the conduct of the prosecution with the assistance of the prosecutor.

Section 4: Decision guidelines

This section sets out the principles and guidelines that the Ministry will apply when deciding whether or not to prosecute. The Guidelines draw upon Crown Law’s Prosecution Guidelines² but have been tailored to meet the Ministry’s compliance goals and objectives.

Test for prosecution

Prosecutions should be initiated only where the Ministry is satisfied that the test for prosecution is met. The test for prosecution is met if:

- The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction (**the evidence test**); and
- Prosecution is required in the public interest (**the public interest test**).

Each aspect of the test must be separately considered and satisfied before a decision to prosecute is made.

The first step is to determine whether there is sufficient evidence to prove that the offence alleged has been committed. If there is sufficient evidence, the Ministry can consider the second step. If there is insufficient evidence there is no need to go on to apply the public interest test.

The evidence test

A reasonable prospect of conviction exists if there is credible evidence which the Ministry can produce in Court and upon which an impartial Judge or jury, properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the person has committed the offence(s). The following questions are useful to consider (see also Table 6):

- What elements of the offence need to be proven?
- What evidence is needed to prove each element?
- Can the evidence be produced in Court?
- If the evidence is accepted, could a Judge reasonably convict?

Table 6: The evidence test

Description	Explanation
Identifiable individual/agency	A prosecution can only take place where the evidence sufficiently identifies that a particular person or organisation (or both) is liable.
Credible admissible evidence	Credible means the evidence is capable of belief. The credibility of evidence impacts on the prospect of a conviction. Does the witness have motivation to lie? Is the witness plainly at risk of being so discredited that no Court could safely rely on the proposed evidence? Is there other evidence to corroborate or refute their account? Only evidence which is admissible can be taken into account. Consideration should be given to whether it is foreseeable that certain evidence could be excluded, including the admissibility of hearsay evidence.
Offence established	Careful analysis must be made of the legal elements of the offence which may have been committed and to consider the elements or ingredients of the

² Crown Law Office, January 2010.

Description	Explanation
	particular offence. This should be addressed in the investigations report.
Reasonable prospect of conviction	<p>A Judge or jury must be satisfied 'beyond reasonable doubt' that the alleged offence has been committed. The evidence available must be capable of reaching the high standard of beyond reasonable doubt.</p> <p>The Ministry must be satisfied that, viewed objectively, there is a reasonable prospect of a conviction on the evidence. The cogency and credibility of the evidence is not a mathematical science, but a matter of judgement.</p> <p>Possible defences should be anticipated and taken into account.</p>

Public interest test

Once satisfied that there is sufficient evidence to prosecute, the next step requires the Ministry to exercise its discretion as to whether a prosecution is required in the public interest.

The following principles must also be taken into account:

- Decisions must be made in a timely manner (there are 12 month time limitations in filing charging documents)
- Each case should be considered on its own merits
- Decisions should be applied consistency
- All relevant public interest factors in these Guidelines will be considered
- Any irrelevant public interest factors will not be taken into account
- The extent to which prosecuting helps the Ministry achieve its compliance objectives is an important consideration.

Tables 7 and 8 respectively set out the specific factors in favour of and against prosecuting, having regard to the types of prosecutions the Ministry is likely to take. No one factor is necessarily determinative. The Ministry must balance all of the factors.

Table 7: The public interest factors in favour of prosecuting

Description	Explanation/guide
Seriousness of the offending	<p>The maximum penalty for the offence is an indicator of the seriousness of the crime. Generally:</p> <ul style="list-style-type: none"> • WMA offences are Category 1 offences (lower end of the scale) • Crimes Act offences are Category 2/3 offences (moderate end of the scale).
Level of integrity risk	<p>For Category 1 offences the Ministry will consider the level of integrity risk to assess the seriousness of the offending within the context of the effective administration of the WMA and the Ministry's compliance goals. Critical risk (Level 5) cases will create a strong presumption in favour of prosecution.</p>
Deliberate/intentional	<p>Intention is inferred from all of the circumstances (e.g. interactions with the Ministry where obligations were clearly communicated).</p> <p>Deliberate or intentional non compliance creates high or critical risks for the Ministry.</p>
Recidivist behaviour	<p>Repeat non-compliance will strongly point in favour of prosecuting, particularly where the Ministry has used other tools to promote and direct compliance. However, even repeated failures to respond to informal interventions (such as</p>

Description	Explanation/guide
	warnings) is relevant here.
Degree of premeditation	Premeditation means that there is a degree of planning involved and a willingness by the person or organisation to actively avoid their obligations. The degree of sophistication to avoid their obligations is a factor.
Financial loss/pecuniary gain	Offending that has resulted in serious financial loss, or where the defendant receives a pecuniary advantage or benefit should be deterred. The regulated sector should not profit from non-compliant behaviour or receive an unfair advantage. Levy avoidance (reducing available funding) also undermines the ability of the Ministry to achieve the objectives of the WMA to reduce waste.
Prevalence of offending	Where the Ministry observes emerging patterns or trends, prosecuting cases where there are emerging risks can act as a general deterrent.

Table 8: The public interest factors against prosecuting

Description	Explanation
Harm remedied	A person or organisation has taken immediate action to remedy the breach or loss.
Remorse	The person or organisation has expressed genuine remorse and willingness to comply in the future. The history will be important in assessing remorse.
Low risk	The person or organisation has taken active steps to prevent further breaches (e.g. changes to systems/processes) and the Ministry is satisfied that the person or organisation will fall into the low/no integrity risk category in the future.
Costs of prosecuting out of all proportion to address risk	The Ministry cannot calculate with absolute certainty what the cost of a prosecution will be. Strong evidential cases likely to result in guilty pleas will cost significantly less than a case that proceeds to trial. The Ministry will need to consider: <ul style="list-style-type: none"> • The seriousness of the offending • The level of integrity risk • The extent to which specific and general deterrence is required • Whether other alternative actions provides a better solution.

Irrelevant factors

The Ministry will not take into account irrelevant factors in evaluating whether it is in the public interest. Irrelevant factors include the:

- Race, colour, ethnic origin, sex, religious beliefs, social position, marital status, sexual preference, political opinions or cultural views of the alleged offender
- Possible political consequences of the exercise or non-exercise of discretion
- Public or political views of others
- Enforcement officer's or the decision maker's personal feelings concerning the alleged offender
- Possible effect of the decision on the personal or professional circumstances of the decision maker.