

Policy – Prosecutions Policy

Policy details	
Owner	Head of Legal
Position Administering this policy	Legal team (Position to be advised)
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Related Policies and Legislation	Earthquake Commission Act 1993 Crimes Act 1961 Summary Offences Act 1981 Criminal Disclosure Act 2008 Criminal Procedure Act 2011 Building Act 2004 Official Information Act 1982 Privacy Act 1993 State Sector Act 1988 Human Rights Act 1993 New Zealand Bill of Rights Act 1990 Evidence Act 2006 Solicitor-General’s Prosecution Guidelines 2013 Victims of Crimes- Crown Law Guidelines for Prosecutors Crown Law Media Protocol for Prosecutors EQC Fraud Policy 8 EQC Declinature Policy EQC Risk Management Policy EQC Delegations Framework EQC Protected Disclosures Policy

Introduction

The Earthquake Commission (EQC) administers a statutory scheme that provides natural disaster insurance for residential homes and land.. Specifically, the scheme provides insurance for loss or damage arising from an earthquake, natural landslip, volcanic eruption, hydrothermal activity, tsunami and natural disaster fire; and (for land only) storm or flood. The terms of the insurance cover are set out in the Earthquake Commission Act 1993 and any subsequent amendments (EQC Act). Residential property owners have access to the EQC cover if they hold an insurance policy with cover for fire damage for a private dwelling.

EQC's other functions include administering the natural disaster fund, obtaining reinsurance, and facilitating research and education relating to natural disaster. EQC can also undertake other functions if directed by the Minister.

After a natural disaster, EQC can be operating in a post disaster setting under emergency conditions. Emergency disaster relief efforts and the ensuing rebuilding operations, with their substantial flow of money, goods, and services, and the major infrastructure projects that are often required after a disaster exacerbate the risk of fraudulent and corrupt behaviour. EQC is committed to protecting public resources through a programme of fraud and corruption risk management. Prosecution action is one of a number of fraud and corruption risk management enforcement responses that may be implemented by EQC where fraud or corruption has been identified and certain thresholds are met.

EQC may also bring prosecutions for offences under its principal statute – the EQC Act. EQC may also bring prosecutions under other statutes where it considers an offence has potentially been committed in the course of its operational responsibilities. In particular, EQC will contemplate prosecution as a response to conduct that interferes with the organisation's ability to perform its statutory functions, for example where EQC is knowingly or willfully provided with information that is incorrect or misleading.

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

EQC will use prosecution in a deliberate and considered manner. Decisions to prosecute and whether or not to continue with prosecutions, will be made fairly and consistently, will be proportionate to the seriousness of the behaviour and will be in accordance with this prosecution policy and any specific enforcement policies or guidelines that are relevant.

Purpose

The purpose of this policy is to:

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

Scope

This policy applies to prosecutions and potential prosecutions arising from investigations and enquiries conducted by EQC relating to our statutory and operational functions.

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

EQC's Prosecution Decision Making Framework

EQC will consider each case on its merits when making the decision to prosecute. EQC will apply the Solicitor-General's Prosecution Guidelines (including the facts of each case, the relevant legislation, the evidence and the public interest) as well as any specific internal enforcement policies/guidelines.

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

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

This prosecution policy is subject to the Solicitor-General's Prosecution Guidelines, and establishes a structured approach for deciding on prosecutions being conducted by EQC.

The Solicitor-General's Prosecution Guidelines establish the '*Test for Prosecution*'. There are two limbs to that test; the *Evidential Test* and the *Public Interest Test*. Both must be met before a prosecution can be initiated.

Where the internal review process of an EQC investigation indicates that there is sufficient evidence that establishes a reasonable prospect of conviction of a potential offence, the matter is subjected to an *Evidential Test* and *Public Interest Test*, ensuring the Solicitor-General's Prosecution Guidelines are followed.

Evidential Test

To meet the *Evidential Test*, EQC must be satisfied that the evidence to be given in Court is sufficient to provide a reasonable prospect of conviction.

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

If the *Evidential Test* is not met, then EQC will not refer the matter for prosecution.

If the *Evidential Test* is met, then EQC will proceed to the second element, the *Public Interest Test*, and decide if a prosecution is warranted.

Public Interest Test

Following the *Evidential Test*, the next test is the *Public Interest Test*. Not all offences, in respect of which the *Evidential Test* has been satisfied, must be prosecuted. EQC will exercise its discretion as to whether a prosecution is required in the public interest.

There are a multitude of factors that may be considered in determining whether prosecution is in the public interest. A non-exhaustive list of such factors is contained in the Solicitor-General's Prosecution Guidelines. These guidelines also make clear that, in regulatory prosecutions, the statutory objectives and enforcement priorities of a Crown Entity will be relevant public interest considerations.

The key factors that would contribute towards a decision by EQC to prosecute will vary but the following public interest considerations will be taken into account:

- The seriousness of the offence (the gravity of the maximum sentence and the anticipated penalty is likely to be a strong factor in determining the seriousness of the offence);
- Where there are grounds for believing that the offence is likely to be continued or repeated, for example, where there is a history of recurring conduct;
- Any steps taken by the offender to rectify the loss or harm caused;
- The previous conduct of the offender including any previous warnings or declinature given by EQC;
- The extent of the loss or harm as a result of the offender's conduct;
- The likely penalty awarded by the Court;
- The availability of any alternative and appropriate enforcement responses.
- Where the defendant was a ringleader or an organiser of the offence;
- Where the offence was premeditated;
- Where the offence was carried out by a group;
- Where the offender has created a serious risk of harm;
- Where there has been an abuse of entrusted power for private gain.

Declinature

For any claim related matter where the circumstances of the claim give rise to concerns about misdescription, misrepresentation or fraud, EQC will consider formal declinature of the claim as set out in Schedule 3 clause 3 of the EQC Act as an alternative to prosecution or in some cases, in addition to prosecution.

Schedule 3, clause 3 prescribes circumstances where the Commission may decline (or meet part only of) a claim made under any insurance of any property under the EQC Act.

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

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

Prosecution Decision

The decision to bring a prosecution will be made in accordance with the *EQC Delegations Framework* (Decision Maker). As at the date of this policy the Decision Maker is the Chief Executive or the Chief Financial Officer (CFO).

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

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

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

- An outline of the facts of the case;
- The evidence considered by the Head of Risk and Assurance and the **Head of Legal** and any possible issues of admissibility that have been identified.
- Advice on whether the evidential and public interests tests have been met.
- Whether the proposed prosecution would likely meet the Solicitor-General's Guidelines.

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

A final decision to prosecute shall only be exercised by a person or persons authorised by EQCs Delegations Framework.

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

Other Agencies

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

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

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

Choice of charges

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

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

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

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

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

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

Review by Prosecutor

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

EQC expects that its instruction to prosecute will be reviewed by a Crown Solicitors Office or external Barrister or Solicitor prior to the filing of any charges to ensure that the *Test for Prosecution* set out in the Solicitor-General's Prosecution Guidelines is met. This review is an integral independent check within the process.

Review of charges

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

- a. Charges should be amended;
- b. Further additional charges should be laid;
- c. Some or all of the charges should be withdrawn (if, for example, they are no longer supported by the evidence, or are not considered necessary in the public interest).

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

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

EQC's Head of Legal will ensure that the Solicitor-General or Deputy Solicitor General is informed of matters that should be communicated to those offices in accordance with cl 3.5 of the Solicitor General's Prosecution Guidelines (for example, matters of general public or legal importance, or which give rise to substantial or new forms of legal risk). As an approved prosecution agency, EQC also has the obligation of annual reporting to Crown Law about internal investigations and prosecutions, via an annual questionnaire.