



MINISTRY OF FINANCE AND ECONOMIC MANAGEMENT
GOVERNMENT OF THE COOK ISLANDS

To: Xavier Mitchell, Collector of Inland Revenue and Comptroller of Customs
Subject: Revenue Management Division (“RMD”) Prosecution Guidelines
Date: 6 June 2019

Introduction

1. The purpose of this Memorandum is to provide the Collector (the “Collector”) and Comptroller of Customs (“the Comptroller”) guidelines for prosecuting criminal offending (“Prosecution Guidelines”).
2. Prosecution is one way the Collector and the Comptroller protects the integrity of the tax system and the Cook Islands borders. It is an enforcement activity, usually of last resort, applied in conformity with these guidelines, and against those who refuse to comply with their tax and customs obligations. The sanction of criminal conviction and punishment assures compliant members of the community, who indirectly bear the burden of others non-compliance, that the Collector and Comptroller will take enforcement action against non-compliers where appropriate.

Purpose

3. The purpose of these Prosecution Guidelines are to set out:
 - 3.1 The link with RMD’s strategic goals and direction;
 - 3.2 The types of non-compliance that may result in a decision to prosecute;
 - 3.3 The factors that may influence a decision to prosecute;
 - 3.4 The choice of charges; and
 - 3.5 The approach to publicising and measuring prosecution results.

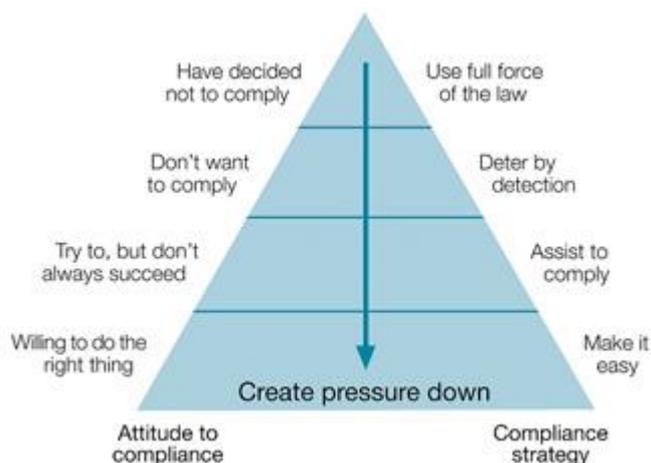
4. These guidelines are designed to ensure a consistent approach to the Collector and Comptrollers' approach to prosecutions of criminal offending under legislation administered by the Collector and Comptroller.

Link to strategic goals and direction

5. The link to RMD's strategic goals and direction concerns compliance, the contributions necessary to the economic and social well-being of the Cook Islands by collecting revenue to pay for public services, and protecting of the Cook Islands borders.
6. Prosecution activity supports, amongst other things:
 - 6.1 Maintaining the public confidence and trust in the tax and customs systems by ensuring all members of the community pay the correct amount of liability required by law, and by ensuring the borders of the Cook Islands are protected;
 - 6.2 Ensuring true, complete and accurate information is supplied to RMD as and when required by law; and
 - 6.3 Act as a deterrent against tax and customs offending which impacts upon the community as a whole.

RMD's compliance model

7. The Collector and Comptroller undertakes certain law enforcement activities to protect the integrity of the tax and customs system. The following compliance model guides the approach.



8. Most customers, – represented by the pyramid's two lower levels – try to or do comply with their obligations. RMD's main compliance responses are aimed at helping these customers where they err and generally making it easy for them to get it right and hard to get it wrong.
9. Unfortunately some customers – the pyramid's top two levels - are reluctant to comply. In the worst cases they deliberately and actively evade their responsibilities in breach of their legal responsibilities. In this context evasion of tax and customs duties has been appropriately characterised by the Court as 'theft from the community.'
10. RMD's first and main response to non-compliant behaviour is education. At the top level of deliberate non-compliance, the Collector and Comptroller enforces compliance by prosecuting offenders. The purpose is to create 'downward pressure' that moves non-compliers from the top of the model to a position lower down.
11. These Prosecution Guidelines support RMD's strategic direction and the Collectors and Comptrollers statutory responsibilities by describing factors designed to ensure that prosecution:
 - 11.1 Is an appropriate, consistent and fair response for the type and level of non-compliance identified;
 - 11.2 Positively influences future compliance by appropriate publicity of convictions;
 - 11.3 Is an integral component of a balanced compliance programme; and
 - 11.4 Recognises and affirms compliant behaviour.

The types of non-compliance that may result in a decision to prosecute

12. The Collector and Comptroller may prosecute criminal non-compliance under the Income Tax Act 1997 (and related Regulations), Value Added Tax Act 1997, Departure Tax Act 2012, and Customs Revenue and Boarder Protection Act 2012. Prosecutions may also be conducted, where appropriate, under other Acts, such as the Crimes Act 1969, Arms Ordinance 1954, and Narcotics and Misuse of Drugs Act 2004.
13. The Collector and Comptroller engages with other law enforcement agencies, including the Cook Islands Police and Financial Intelligence Unit to deal with non-compliance. Subject to section 7 of the Income Tax Act 1997, the Collector may refer cases to the other law enforcement agencies for investigation.

Types of non-compliance that justify prosecution

14. Examples of non-compliant behaviours that may justify prosecution action, includes amongst other things:

14.1 Non-filing of tax returns;

14.2 Falsifying documents intended to be provided to the Collector or Comptroller;

14.3 Making false declarations and breaching broader entry obligations;

14.4 Defrauding the Comptroller of revenue;

14.5 Failing to provide information when requested by the Collector or Comptroller;

14.6 Obstruction of the Collector and Comptroller in the execution of his/her lawful duties;

14.7 Misuse of revenue held in trust, such as PAYE deductions;

14.8 False refund/deduction/rebate customs claims;

14.9 The importation of prohibited, dangerous or undeclared goods; and

14.10 Money laundering and terrorist financing.

15. The Collector and Comptroller may also prosecute third parties for aiding, abetting, or conspiring in, the commission of criminal conduct or for inciting, counselling or procuring persons to engage in such conduct.

Factors that may influence the Collector and Comptrollers' decision to prosecute¹

16. The decision to prosecute is governed by two important considerations. Firstly, the Collector and Comptrollers' decision to prosecute must be free of pressure from sources not properly part of the prosecution decision-making process. Secondly, the prosecution decision will be made once the prosecutor is satisfied of two things: (i) that the Evidential Test is met, (i.e. that there is evidence sufficient to provide a reasonable prospect of conviction), and (ii) that the Public Interest test is met (i.e. that only those breaches of the criminal law where the public interest warrants a prosecution will proceed to that step.

The Evidential Test

17. The Evidential Test is fundamental. There must never be a prosecution without evidence providing a reasonable prospect of conviction.

The Public Interest Test-Factors favouring prosecution

18. The general public interest factors include, but are not limited to²:

- 18.1 The predominant consideration is 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;
- 18.2 Where the offence is prevalent;
- 18.3 Where the defendant was a ringleader or an organiser of the offence;
- 18.4 Where the offence was premeditated;
- 18.5 Where the offence was carried out by a group;

¹ The Collector and Comptroller has reference to the principles set out in the New Zealand Solicitor General Prosecution Guidelines 2013, with any necessary modification, and in conjunction with these guidelines, when making decisions to prosecute. (<http://www.crownlaw.govt.nz/publications/prosecution-guidelines/>)

² These factors are derived from the NZ Solicitor General Prosecution Guidelines 2013 with any necessary modification.

- 18.6 Where the offence was an incident of organised crime;
- 18.7 Where the offence has resulted in serious financial loss to the Crown or society;
- 18.8 Where the defendant was in a position of authority or trust and the offence is an abuse of that position;
- 18.9 Where there is any element of corruption;
- 18.10 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;
- 18.11 Where the defendant has relevant previous convictions, suspended sentences or cautions;
- 18.12 Where the defendant is alleged to have committed an offence whilst on bail or subject to a sentence, or otherwise subject to a Court order;

The Collectors and Comptrollers specific Public Interest factors

19. In addition to the general Public Interest factors, the Collector and Comptroller will also consider the following specific factors which favour prosecution:
 - 19.1 Conformity with RMD's compliance strategies, especially current risk factors (e.g. accommodation and construction industry, cash economy);
 - 19.2 A history of non-compliance (not restricted to previous convictions);
 - 19.3 The degree of non-compliance (e.g. the gravity & prevalence of offending);
 - 19.4 Loss of government revenue (greater loss equals more reason to prosecute);
 - 19.5 Damage to the integrity of the revenue or customs system or boarder security;
 - 19.6 Damage to society caused by the prohibited importation of items (i.e. drugs, firearms, dangerous and prohibited goods, and objectionable materials);
 - 19.7 Misuse of corporate entities for a criminal purposes; and
 - 19.8 Organised and systematic attacks on the tax and Customs systems.

Factors against prosecution

20. The factors against prosecution include:

20.1 The availability of effective alternatives to prosecution (e.g. where a defaulter has made good the losses to the Revenue, has paid any additional taxes or duties, and the educational/compliance/integrity/deterrence aspect is met by imposition of a suitable civil penalty); and

20.2 Where alternatives to prosecution are available and a prosecution, though still justifiable, would consume resources that could be better used elsewhere.

The choice of charges

21. Many offences against the legislation administered by the Collector and Comptroller also fall within the definitions of crimes under other enactments, including, the Crimes Act 1969, Arms Ordinance 1954, and Narcotics and Misuse of Drugs Act 2004.

22. The choice of charges depends on the evidence, the avoidance of technicalities and the ease of explaining specific crimes to juries. Public interest factors also bear on the choice of charges.

Procedural matters

23. The Collector and Comptroller will, where appropriate and provided for by the relevant Act, lay representative charges. Representative charges are used for convenience and administrative ease, as revenue and Customs offending often involves multiple repeated conduct, in which only the date of offending is materially different.

24. In suitable cases the Collector and Comptroller may also lay charges in the alternative.

25. Given the wide range of offences that can be charged for tax and customs offending, some of these offences are punishable by fine only, while other charges are punishable by terms of imprisonment. The selection of the nature of the charges will determine whether there is a right to elect trial by Judge, Justices or by a jury in accordance with the Judicature Act 1980-1981.

26. In the appropriate cases, the Collector and Comptroller may also seek to recover proceeds of crime related to such offending in accordance with the Proceeds of Crimes Act 2003.
27. The Collector may also assess and recover penal tax imposed against a person or entity that has also been convicted under the Income Tax Act 1997 for the same offence.

Publicity

28. The Collector and Comptroller may publicise convictions for offences based on public interest, including deterring future non-compliance, encouraging and reinforcing compliant behaviours and maintaining society's perception of the integrity and confidence in the tax and Customs system.

Measuring prosecution activity

29. The Collector and Comptroller will periodically review:
- 29.1 The range and nature of prosecution cases;
 - 29.2 The outcomes of these cases;
 - 29.3 RMD's decision-making processes for robustness, impartiality and conformity with the law and RMD strategies and responsibilities;
 - 29.4 The effective and efficient use of our resources in undertaking prosecution activities; and
 - 29.5 The influence of these outcomes on compliance behaviour and protecting the integrity of the tax and Customs systems.

Xavier Mitchell
Collector and Comptroller