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OWNER: Governing Council

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DATE APPROVED: 29 February 2024

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NEXT REVIEW DATE: February 2027

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## Prosecution and Warning Policy

### Whāinga Matua | Purpose

1. The purpose of this Policy is to set out the guidelines and standards to be followed by the Teaching Council of Aotearoa New Zealand (the Council) when deciding:
  - 1.1 whether to prosecute under section 662 of the Education and Training Act 2020 (**Act**); and
  - 1.2 how such prosecutions should be undertaken.

### Korahi | Scope

2. This policy applies to:
  - a. registered kaiako | teachers;
  - b. Principals/tumuaki/ECE professional leaders (Professional leaders);
  - c. persons holding a Tūranga Whakaako Whai-herenga | Limited Authority to Teach (LAT);
  - d. employers of kaiako | teachers, professional leaders, and persons required to hold a LAT, including managers of early learning services and kindergartens and Boards of Trustees (or their equivalent); and
  - e. Council staff and lawyers acting on behalf of the Council who are dealing with prosecutions, potential prosecutions, and warnings.

### Whāinga | Objectives

3. The object of this Policy is to provide a framework for the Council to make prosecution decisions under the Act.
4. This Policy will also ensure that all relevant Council staff, external lawyers, the teaching profession, stakeholders, and the wider public understand how the Council makes prosecution decisions and their role in that process.
5. Finally, this Policy has been created with the Council's Ngā Uara<sup>1</sup> (Values) in mind. It is expected that decisions made under this policy will take Ngā Uara (values) into consideration.

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<sup>1</sup> See Code at [Our Code, Our Standards: Teaching Council of Aotearoa New Zealand](#).

## Ngā Aratohu | Solicitor-General's Prosecution Guidelines

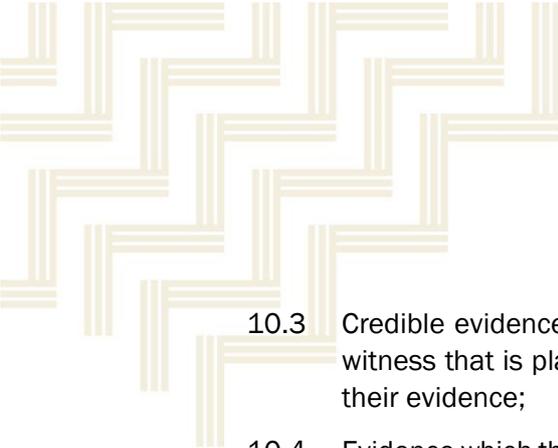
6. The Council will conduct prosecutions under the Solicitor-General's Prosecution Guidelines (the **Prosecution Guidelines**). The Prosecution Guidelines inform decisions on several issues, including:
  - 6.1 whether prosecutions should be commenced;
  - 6.2 what charges should be filed; and
  - 6.3 whether proceedings should be continued or discontinued, once they have commenced.

## Te Kōwhiringa | Prosecution decision-making factors

7. The decision to prosecute (or not to prosecute) will be based on the following factors:
  - 7.1 The Solicitor-General's [Prosecution Guidelines](#);
  - 7.2 Whether the case falls within the Council's functions and powers as outlined in Section 479 (1)(pa) and types of offences as outlined in Section 662 of the Act;
  - 7.3 The resources available to the Council;
  - 7.4 Whether another prosecuting agency has or will bring criminal proceedings for the same subject matter as the Council's potential prosecution;
  - 7.5 Whether there is a more appropriate process that can be considered based on the facts of the situation; and
  - 7.6 Other matters such as the case being part of a wider trend of behaviour the Council is seeking to address. A trend may be regional or national or in relation to a particular education setting.

## Whakamātautau | Test for prosecution

8. In relation to the Prosecution Guidelines, the Council will only initiate prosecutions where the Test for Prosecution is met. This is where:
  - 8.1 the evidence which can be presented in Court is sufficient to provide a reasonable prospect of conviction (the **Evidential Test**); and
  - 8.2 prosecution is required in the public interest (the **Public Interest Test**).
9. Each aspect of the test is separately considered and must both be satisfied before a decision is taken to prosecute. The Evidential Test must be satisfied before the Public Interest test is considered.
10. For the Evidential Test, the following essential elements must be satisfied:
  - 10.1 An identifiable individual;
  - 10.2 The commission of a criminal offence, requiring consideration of the elements of the offence or offences that may have been committed;

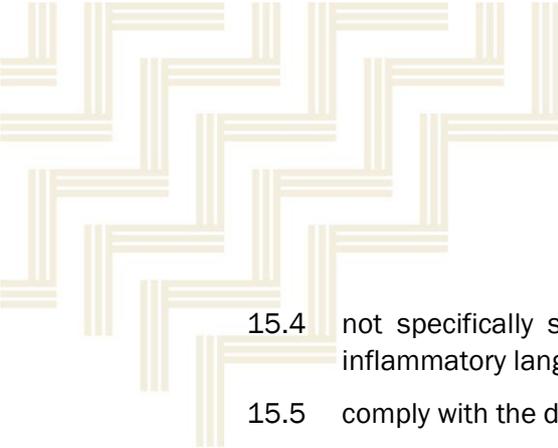
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- 10.3 Credible evidence, meaning evidence capable of belief. For example, there might be a witness that is plainly at risk of being discredited such that no Court could safely rely on their evidence;
  - 10.4 Evidence which the prosecution can present, taking into account any potential challenging to admissibility: and
  - 10.5 A factfinder could reasonably be expected to be satisfied beyond reasonable doubt. This requires an objectively reasonable prospect of conviction. This must take into account potential defence and whether the evidence reaches the high standard of proof required in criminal law.
11. In terms of the Public Interest Test, the Prosecution Guidelines set out considerations to be taken into account whether a prosecution is in the Public Interest. The Council will consider these factors as appropriate. The Council must consider, in determining whether prosecution is not in the public interest:
    - 11.1 whether there are any proper alternatives to prosecution available; and
    - 11.2 whether prosecution is the appropriate way to give effect to the Council's functions and responsibilities under the Act.
  12. Even if a matter meets the test for prosecution in terms of the Prosecution Guidelines, the decision of whether the Council will undertake a prosecution in a specific case will be made in accordance with this Policy. In some cases, while prosecution is possible, it may be considered that a different response is more appropriate. For example, a decision may be made to issue a warning letter instead (see below section on warnings).

## **Te Tukanga | Decision-making process**

13. A decision to prosecute will be made by the Council's chief executive, following investigation by Council staff.

## **Mana Whakahaere | Management and oversight of council prosecutions**

14. Once a decision is made to prosecute, the Council will brief an external lawyer who will have primary responsibility for the conduct of the prosecution.
15. All Council staff involved in managing a prosecution will maintain a high standard of professional and ethical conduct and manage the case in a way that is consistent with the defendant's right to a fair trial. Those involved in the prosecution should:
  - 15.1 act in a fundamentally fair manner, performing their obligations in an objective and detached manner, impartially and without delay;
  - 15.2 act in accordance with their ethical obligations as officers of the Court and conduct themselves according to the rules of professional conduct;
  - 15.3 Act in accordance with their responsibilities as representatives of the teaching profession's professional body;

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- 15.4 not specifically strive for a conviction but present the case dispassionately without inflammatory language;
  - 15.5 comply with the disclosure obligations contained in the Criminal Disclosure Act 2008;
  - 15.6 ensure all participants and kaiako | teachers have an opportunity to express their views; and
  - 15.7 assist the Court on matters of fact or law, whether that relates to the prosecution case.
16. The Council's staff should also conduct themselves in accordance with their ethical obligations, the rules of professional conduct and the Council's Ngā Uara (Values).

## **Pāpāho | Media and publicity**

17. While the starting point for prosecutions in the District Court is open justice, the Council itself will not comment on or personally publicise information about prosecutions while they are underway.
18. If a very significant public interest is proven, following legal advice, the Council may consider publicising aspects of the case while the prosecution is ongoing. Moreover, the Council may consider publicising the outcome of a prosecution where appropriate.
19. In communicating with the public through the media in relation to the prosecution, Council staff will act in accordance with the Crown Law Media Protocol for Prosecutors, and will:
  - 19.1 do so in consideration of Ngā Uara (Values);
  - 19.2 act in a way that does not prejudice the right to a fair trial;
  - 19.3 support the administration of justice and the integrity of the criminal system;
  - 19.4 respect the principle of open justice;
  - 19.5 recognise the public interest in receiving accurate information about the criminal justice system and criminal prosecutions; and
  - 19.6 treat any victims and witnesses with courtesy and compassion and respect their dignity and privacy.

## **Ngā Kaiwhāki | Victims and witnesses**

20. The Council will ensure those adversely impacted are always treated with courtesy and compassion and with respect for their dignity and privacy.
21. The Council's chief executive will determine the Council staff member who will be the primary point of contact for those adversely impacted and will ensure they are provided with information at each stage of the process to ensure that they understand the process and are aware of what is happening. The Council will comply with the Victims' Rights Act 2002.
22. The relevant Council staff member will also ensure that witnesses are kept informed and treated with courtesy throughout the prosecution process.
23. Where Council employees are witnesses in a prosecution, the solicitor in charge of the prosecution will inform their manager. The employee(s) will attend Court and assist as requested. If a Council employee is required to be a witness for the defence in a prosecution, the employee should promptly inform their manager and the Council's external lawyer of this requirement.

## Whakatūpatotanga | Warnings

24. Warnings may be issued to kaiako | teachers, professional leaders and their employers where the kaiako | teacher or professional leader has committed any of the offences outlined in Section 662 of the Act, including but not limited to:
  - 24.1 Continued to teach without a practising certificate beyond the permitted 20 half days per year; and/or
  - 24.2 Was employed without a current practising certificate.
25. In these circumstances the Council may decide to issue a warning to a person in relation to behaviour that the Council considers could amount to criminal conduct.
26. The Council will follow the guidance contained in the Solicitor General's [Guidelines](#) for the use of warnings.
27. Before a warning is issued, Council staff will:
  - 27.1 Contact the kaiako | teacher or professional leader by email to advise their practising certificate has expired and the action required;
  - 27.2 Complete a further follow-up by email and/or telephone one week later; and
  - 27.3 Advise their current employer (where applicable) that the kaiako | teacher or professional leader is teaching without a practising certificate.

## Te Whakatau kia Whakatūpatotanga | When warnings may be issued

28. As part of the decision to prosecute, the Council must implement the Public Interest Test. This test recognises that not all behaviour that the Council considers may amount to criminal conduct requires a prosecution response. In these situations, the Council may instead choose to warn a person regarding behaviour that may amount to criminal conduct. Decisions will be made on a case-by-case basis. This may include situations where the Council considers a warning would better support a restorative and rehabilitative approach in the particular context. Decisions will be made with reference to Ngā Uara (Values), particularly Manaakitanga. Decisions will also consider the reputation of the teaching profession and the safety of children and young people.

## Te Kaupapa o te Whakatūpatotanga | Purpose of warnings

29. The Council may issue warnings for a range of different purposes, including to:
  - 29.1 show that it takes the matter seriously;
  - 29.2 impress on the person that, in the Council's view, the behaviour the person has engaged in amounts to criminal conduct that could otherwise be prosecuted but the Council has chosen not to prosecute;
  - 29.3 mitigate the risk of the behaviour recurring in the future;
  - 29.4 give the person an opportunity to amend or address the behaviour to avoid the risk of prosecution in the future; and

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- 29.5 send a signal to the person, but also to others in similar situations, including the general public.

## **Te Tukanga mo ngā Whakatūpatotanga | Process for issuing warnings**

30. The investigation process leading up to a person being warned will follow the same path as the decision to prosecute. This will involve a Council staff member engaging the person under investigation to give effect to natural justice. Giving effect to natural justice will vary depending on the behaviour and the consequences for the person and will include:
- 30.1 the Council staff member discussing the issue with the person being investigated at the time, or shortly after, the issue has been noticed; and
  - 30.2 Putting potential adverse findings to the investigated person for comment before a final decision to issue a warning is reached.
31. Depending on the circumstances, giving effect to natural justice may also include:
- 31.1 The person consenting to receiving the warning and having the matter resolved in that way; and/or
  - 31.2 The person admitting to the behaviour in respect of which they are being warned.
32. Warnings will be issued by the Council as soon as practicable but in any case, within a time period that would otherwise be acceptable if charges were being filed under the Criminal Procedure Act 2011. For charges under section 662 of the Education and Training Act, this would be within six months from when the alleged offence was committed.
33. A decision to warn a person will be made on advice from Council staff investigating the issue.
34. Once issued with a warning, the warned person has the right to request a review of the warning (see 'Review of a warning' below at [37]).

## **Te Kiko o te Whakatūpatotanga | Content of a warning**

35. Each warning will be issued in writing and contain the following information:
- 35.1 the key facts and reasons that led to the issuing of the warning;
  - 35.2 the consequences related to the warning – namely, the warning may be used by the Council in making future decisions regarding the issue and any relevant consequences that may impact because of this;
  - 35.3 that the warning will be held on file by the Council;
  - 35.4 that if the person engages in similar behaviour in the future, they may be subject to prosecution under the relevant enactment;
  - 35.5 that the existence of the warning will be shared with any person harmed by the behaviour on a confidential basis;
  - 35.6 of the person's right under the Privacy Act 2020, including the person's right to request a copy of personal information;



35.7 of the person's right to request a review of the warning (see below); and

35.8 any relevant response the person has made to the proposed warning when engaged with (e.g. whether they admitted or disputed the facts of the alleged issue, and whether they consented to the matter being dealt with through a warning).

## **Te Aotake o te Whakatūpatotanga | Review of a warning**

36. A person who is issued with a warning by the Council has the option to have the warning reviewed.
37. The warned person has 28 calendar days from the day they receive the warning to request a review. A warning is deemed to be received:
  - 37.1 for an electronic warning sent to the person by email, unless the contrary is shown, at the time the email first enters an information system by the receiving party; or
  - 37.2 for a warning delivered, posted, or left at the person's usual or last known place of residence or business, unless the contrary is shown, when it would have been delivered in the ordinary course of post.
38. The review process will be suitably independent from the Council staff member who decided to warn. This means that the review process will be conducted by a separate group of Council staff and the decision will be made by the Council's chief executive. Council staff who worked on the initial warning will have no input in the review process, other than to hand over the file.