

# Enforcement Policy

## Kaupapa

Manatū Taonga – Ministry for Culture and Heritage is responsible for administering cultural and heritage legislation.

The Ministry has a responsibility to enforce provisions of these Acts by investigating possible breaches and taking appropriate action, including prosecution of offences where it is determined to be in the public interest to do so, following an analysis of all relevant considerations.

The purpose of this Policy is to:

- provide a guide for the Ministry to enforce legislation
- ensure consistent, appropriate, timely, effective and coordinated enforcement action is taken by or on behalf of the Ministry.

## 1. Ngā mātāpono | Principles

The Ministry will investigate alleged or suspected unlawful behaviour in a way that is lawful, reasonable, and fair. The Ministry will take into account efficient use of resources, and maintenance of public trust in its authority to collect information. Investigation methods must, to the extent possible, ensure the success of any following enforcement action.

Enforcement action must be appropriate, proportionate, and timely, taking into account the circumstances of each case. Prosecution is one of several responses the Ministry may use when administering the Acts. The fundamental objective of any prosecution is to hold those accountable who commit offences. Another goal of enforcement is to improve compliance.

In exercising enforcement powers the Ministry will also have regard to the likelihood that the desired outcome will be achieved in a cost effective manner.

Enforcement will be applied consistently across all sectors, administered fairly and comply with the statutory powers of the Ministry and the principles of natural justice.

## 2. Te aronga | Scope

This policy covers the principles and decision-making criteria as well as the process for investigation of alleged or suspected breaches and subsequent enforcement action taken by or behalf of the Ministry. Details of relevant legislation are set out in the Āpitihanga 1 | Appendix 1 below.

## 3. Ngā taipitopito o te kaupapa | Policy statements

### 4.1 Decision to investigate

The relevant tier 3 manager (or equivalent) will decide whether the Ministry will conduct an investigation. The relevant manager is responsible for the conduct of the investigation.

The Ministry may decide to investigate possible unlawful behaviour on receipt of a complaint or other written notice from an individual, organisation, or another government agency, or if a matter comes to its attention from its own monitoring processes.

To investigate a complaint the Ministry must be satisfied that there is enough evidence to justify further action. A bare allegation or simple assertion of wrongdoing is not enough. A complaint must be precise, with information about the time and nature of the alleged behaviour.

#### 4.2 Investigation Process

Where a decision is taken to investigate the Ministry will gather relevant information carefully to ascertain the facts and to evaluate whether there has been a breach of the relevant Act. This involves considering whether the facts disclose a breach and whether any exclusion or defence is likely to apply.

As part of the investigation the Ministry should contact any parties the Ministry considers relevant to the investigation. The Ministry must check that all sources of information are appropriate and reliable, including any originating complaint. If the Ministry becomes aware that any information provided has been illegally obtained by a third party it will report the matter to the New Zealand Police.

The Ministry is authorised to collect, hold, and use personal information in the investigation of possible offences. The Ministry must at all times comply with the Privacy Act 2020 and staff must comply with the Code of Conduct for the State Services. The Ministry may use external security consultants for the purpose of gathering information relating to the alleged offending only. The Ministry may not use external security consultants undertake any exercise that would not be lawful and ethical for its own staff to undertake.

The Ministry will notify the alleged offender to seek context and give an opportunity to respond to the matter unless in the circumstances there is a good reason why the alleged offender should not be contacted. Where practicable the alleged offender will have an opportunity to be heard.

Although the alleged offender has the right to know details of the complaint the Ministry must not disclose personal information of any complainant. This is consistent with the approach of all prosecuting agencies. It is important that members of the public feel free to provide information about possible unlawful behaviour without fear of their identity being disclosed.

The Ministry is not an enforcement officer under the Search and Surveillance Act 2012 and may not exercise powers under that Act. Discuss with the legal team if the investigation requires search or surveillance.

Each complaint will vary according to complexity. Reasonable endeavours must be made to complete each investigation promptly.

On completion of the investigation the Ministry will produce a final report and a recommended outcome on enforcement action.

The Ministry's legal team is available to advise at any stage of an investigation and should be consulted immediately if it becomes likely that formal legal action will be taken.

#### 4.3 Decision to prosecute

The Chief Executive, on advice from the investigating manager and the Chief Legal Advisor, will decide whether to commence a prosecution or other formal legal proceedings.

If the investigation discloses that an offence has likely been committed, and the Ministry considers the circumstances warrant it, the Ministry may begin a prosecution. The Chief Legal Adviser and the manager responsible for the investigation must agree that prosecution is appropriate and take advice from the Crown Law Office (or a Crown Solicitor) before recommending to the Chief Executive a prosecution be commenced.

Any enforcement action, whether it be a formal warning, prosecution, or other legal proceedings, should be subject to a process that considers:

- criteria of the relevant Act
- evidential sufficiency
- public interest factors.

In general, it is more likely that the Ministry will consider prosecution for recidivist or serious non-compliance, and that unintentional and one-off non-compliance will warrant some other enforcement action. However, the Ministry must exercise its judgement as to whether it will prosecute or take other enforcement action in the particular circumstances of each case.

Where prosecution is contemplated, evidential sufficiency and public interest must be analysed based on the circumstances of the case. The Solicitor-General's Prosecution Guidelines<sup>1</sup> have further details.

Evidential sufficiency includes having admissible and reliable evidence that an offence has been committed, and whether that evidence is sufficiently strong to establish a prima facie case.

Some of the public interest factors to consider are:

- how serious was the offence?
- are there any mitigating or aggravating circumstances?
- was the offence premeditated?
- have there been previous warnings?
- has the offence resulted in financial gain to the alleged offender, or financial loss to another individual or organisation?
- are there grounds to believe that the offence is likely to be continued or repeated?
- is prosecution an efficient and effective use of Ministry resources?
- would prosecution be consistent with Ministry action in similar circumstances?

No one factor will determine the decision to prosecute or not but all relevant factors must be considered, including advice from the Crown Law Office. While cost alone is not a determining factor, it is relevant to the public interest. The Ministry must respond consistently when dealing with similar cases but will take the specific circumstances of each case into account.

#### **4. Prosecution process**

The legal team will coordinate this process and will either act themselves or instruct the Crown Law Office or appropriate Crown Solicitor to act as the prosecutor and file the charges in the appropriate Court.

The Ministry will liaise with Crown Law to seek the Attorney-General's consent where required by the relevant legislation. In practice this role is undertaken by the Solicitor-

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<sup>1</sup> Available on the Crown Law Office website [www.crownlaw.govt.nz](http://www.crownlaw.govt.nz)

General. This will include the Ministry providing a copy of the information and sufficient evidential material.

#### 4.1 The Criminal Disclosure Act 2008

Where the Ministry commences proceedings, it must comply with the Criminal Disclosure Act 2008. The purpose of that Act is “to promote fair, effective, and efficient disclosure of relevant information between the prosecution and the defence, and by non-parties, for the purposes of criminal proceedings”. The Chief Legal Adviser will be responsible for meeting the various obligations of this Act.

#### 4.2 Choice of proceedings

A possible alternative to a charge under an Act is an application under the Criminal Proceeds (Recovery) Act 2009 (CP(R)A) for a profit forfeiture order if actions of the person are considered to amount to “significant criminal activity”. “Significant criminal activity” is defined in section 6 of the CP(R)A, and includes, “activity engaged in by a person that if proceeded against as a criminal offence would amount to offending... from which property, proceeds or benefits of a value of \$30,000 have, directly or indirectly, been acquired or derived”. Action under the CP(R)A is brought by the Commissioner of Police.

#### 4.3 Appeals

The Chief Executive will decide whether to appeal any court decision against the Ministry, on advice from the Chief Legal Advisor. Any appeal from a court decision requires the consent of the Solicitor-General.

### **5. Other enforcement action**

#### 5.1 Formal warning

A decision may be made by the Ministry not to prosecute an individual, but to issue a formal written warning that a breach has occurred, and no prosecution will be taken in respect of that breach at this time.

Examples of when a formal warning may be appropriate include:

- a minor or technical breach has occurred
- the breach is clearly unintentional
- the matter is one that has been quickly remedied and put right.

#### 5.2 Other compliance actions

The Ministry has other options for improving compliance with legislation, including:

- education
- other assistance.

#### 5.3 Reporting

The Ministry may make public reports of investigations on a case-by-case basis. The Ministry will decide how much of an investigation it will publicly report, having regard to the privacy of

the individuals, public interest in maintenance of the law, and the responsibility of individuals to comply with legislation.

## **6. Ngā mana whakahaere | Responsibilities and Accountabilities**

The Ministry for Culture and Heritage must:

- consider all allegations based on the decision-making framework as set out above
- conduct a fair and robust investigation appropriate to the circumstances
- consider prosecution based on the evidential sufficiency and public interest tests.

## **7. Te matai me te whai tikanga | Monitoring compliance**

The Pou Arataki Ture, Chief Legal Advisor will report regularly to MLT on enforcement activities undertaken.

## **8. Mā wai e āwhina | Where to get help**

For help with this policy contact the Pou Arataki Ture, Chief Legal Advisor.

## **9. Te tātari me te whakahou | Review of the policy**

The Ministry will review this policy from time to time, and may amend or replace the policy as appropriate.

## Āpitianga 1 | Appendix 1 Legislative framework

### Broadcasting Act 1989

The Ministry also administers section 81 of the Broadcasting Act, which prohibits the broadcasting advertising programmes on television on Sundays and Anzac Day (between the hours 6am and noon) and on Christmas day, Good Friday and Easter Sunday (at any time), and prohibits the broadcasting of advertising on radio on Christmas Day, Good Friday and Easter Sunday.

The Ministry administers Parts 1-4 and section 81 of the Act, which means it is responsible for enforcement of breaches of several sections.

A summary of each offence and its penalty are set out below:

<b>Section of Act</b>	<b>Summary</b>	<b>Applicable penalty</b>
<b>Section 14(a)</b>	Failure to comply with an order made by the BSA under section 13(1) (decisions on complaints where the BSA considers a complaint is justified)	A fine not exceeding \$100,000
<b>Section 14(b)</b>	Contravening an order made by the BSA under section 13A with respect to a series	A fine not exceeding \$100,000
<b>Section 30</b>	Failure to comply with a rule made by the BSA under section 30 in relation to retention of recordings of programmes	A fine not exceeding \$5,000
<b>Section 30G</b>	Contravening section 30A requiring a broadcaster to give to the BSA not later than 31 July each year, a return of the total revenue derived from that broadcaster in that financial year from broadcasting in New Zealand	A fine not exceeding \$100,000
<b>Section 81</b>	Broadcasting advertising programmes: <ul style="list-style-type: none"> <li>• on television <ul style="list-style-type: none"> <li>○ during the hours between 6 am and noon on Sunday or Anzac Day; or</li> <li>○ on Christmas Day, Good Friday or Easter Sunday</li> </ul> </li> <li>• on sound radio on Christmas Day, Good Friday or Easter Sunday</li> </ul>	A fine not exceeding \$100,000

The Ministry has developed a checklist to help determine whether section 81 might have been breached in any particular circumstance. The checklist is set out below.

The penalty for an offence under sections 14, 30G and 81 is a fine up to a maximum of \$100,000. This means the District Court has jurisdiction over the offence as a category 1 offence under the Criminal Procedure Act 2011 (CPA).

A charging document may be filed up to 5 years after the date an offence is committed in relation to a category 1 offence with a maximum fine greater than \$20,000, unless the prior consent of the Solicitor-General has been obtained to file a charging document after that date (section 25(3)(c) of the CPA).

As the penalty for an offence against section 30 is a fine not exceeding \$5,000, it is also a category 1 offence under the CPA. Under section 25(3)(a)(ii) of the CPA charges for offences that have a penalty not including imprisonment but including a fine not exceeding \$7,500 must be laid within 6 months after the date on which the offence was committed.

### **Section 81 checklist**

- 1) Has a television or radio broadcaster broadcast a programme to the public at large? *(Transmissions on demand to particular persons, or performances or displays in a public place are not “broadcasts”.)*
- 2) Was the broadcast at a restricted time? *(Any time on Christmas Day, Good Friday or Easter Sunday for television or radio, plus between 6am and noon on a Sunday or Anzac Day for television.)*
- 3) Did the programme consist of more than alphanumeric text? *(A broadcast of predominantly alphanumeric text is not a “programme”.)*
- 4) Was the programme (or part of the programme) primarily intended to promote the interests of any person, or a product or service for the commercial advantage of any person? *(In other words, was it an advertisement?)*
- 5) Did the programme (or part of the programme) consist of or include a promotional credit in respect of a sponsorship or underwriting arrangement? *(Such promotional credits are permitted at restricted times under section 81.)*
- 6) Was payment made (in money or otherwise) for the programme (or part of the programme)? *(Only advertising programmes that are paid for are regulated under section 81.)*
- 7) Was the broadcast primarily directed at persons temporarily resident in holiday accommodations? *(Advertising programmes primarily directed at holiday makers are permitted at restricted times under section 81.)*
- 8) Was the advertisement a promotion for a scheduled programme of the broadcaster, or for a station identity on behalf of a broadcaster? *(These are not advertising programmes under section 81.)*
- 9) Was the advertisement an election programme? *(These are not advertising programmes under section 81.)*
- 10) Did the programme originate outside New Zealand, was it targeted primarily at audiences outside New Zealand, and was it produced and transmitted simultaneously

to New Zealand audiences and audiences outside New Zealand? (These programmes transmitted from outside New Zealand are not covered by section 81.)

## Flags, Emblems, and Names Protection Act 1981

The Flags, Emblems and Names Protection Act 1981 (FENPA) regulates the use of the New Zealand Flag, and contains provisions regarding unauthorised use of the word 'Royal', the Coat of Arms and other symbols of national identity, and use of words relating to the New Zealand government.

The offences under the Act are set out below:

Section of FENPA	Description
Section 11	Offences involving New Zealand flag
Section 12	Unauthorised use of Royal and vice-regal emblems
Section 13	Unauthorised use of State emblems
Section 14	Unauthorised use of words suggesting Royal or government patronage
Section 15	Advertisements claiming government patronage
Section 16	Unauthorised use of name and emblem of United Nations and other international organisations
Section 17	Use of the word Anzac
Section 18	Unauthorised use of name Returned Services' Association
Section 18A	<u>Unauthorised use of words and emblems relating to 28th Māori Battalion</u>
Section 19	Unauthorised use of names, uniforms, etc, of Girl Guides Association and Toc H, Incorporated
Section 20	Unauthorised use of certain commercial names
Section 20AAA	<u>Unauthorised use of King George the Fifth Memorial Children's Health Camps Federation emblem</u>

There is a general penalty covering offences under the Act (section 24):

- in the case of an individual, a fine not exceeding \$5,000;
- in the case of a body corporate, a fine not exceeding \$50,000 and, where the offence is a continuing one, a further fine not exceeding \$5,000 for every day during which the offence has continued.

Section 20AAA is an exception and states a specific penalty for offences against that section: in all cases a fine not exceeding \$2,000.

### *Court jurisdiction*

All the offences in FENPA are Category 1 offences. This means the District Court has jurisdiction over the offence under the Criminal Procedure Act 2011 (CPA).

### *Timeframes*

All offences under FENPA are Category 1 offences. Under section 25(3)(a)(ii) of the CPA, charges for offences that have a penalty not including imprisonment but including a fine not exceeding \$7,500 must be laid within 6 months after the date on which the offence was committed. Section 25(4) of the CPA provides that the timeframe must be determined by reference to the maximum fine that may be imposed for the initial offending, where the offence is a continuing one. Section 25(5) provides that the same timeframes apply to offences involving body corporates irrespective of the penalty that may be imposed against the body corporate. Accordingly, the timeframe for commencing proceedings under FENPA is 6 months after the date an offence is committed.

## **Protected Objects Act 1975**

The Protected Objects Act 1975 (POA) regulates the export and import of protected New Zealand objects and foreign objects, the sale and trade of taonga tūturu (Māori objects more than 50 years old), and the ownership of newly-found taonga tūturu. Amendments to the POA that came into force in 2007 enabled New Zealand to accede to two international conventions, increasing international protection for New Zealand heritage objects

### *List of offences*

Summaries of each offence under the POA, its penalty and category of offence under the Criminal Procedure Act 2011 (CPA) are set out below:

#### **Offences relating to export**

<b>Section of POA</b>	<b>Summary</b>	<b>Applicable penalty</b>	<b>CPA category</b>
Section 5(2)	exporting, or attempting to export, a protected New Zealand object, other than in accordance with subsection (1) or without reasonable excuse in the circumstances	in the case of an individual, a fine not exceeding \$100,000 or a term of imprisonment not exceeding 5 years, or to both  in the case of a body corporate, a fine not exceeding \$200,000	3
Section 18A	wilfully damaging or destroying a protected New Zealand object that is subject to an export application, or has been refused export permission under this Act	in the case of an individual, a fine not exceeding \$10,000 for each object or a term of imprisonment not exceeding 2 years	3

		in the case of a body corporate, a fine not exceeding \$20,000 for each object	
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### Offences relating to taonga tūturu

Section of Act	Summary	Applicable penalty	CPA category
Section 11(9)	failing to notify of the finding of a taonga tūturu in accordance with section 11(3) of the Act, knowing or having reasonable cause to suspect it is a taonga tūturu	in the case of an individual, a fine not exceeding \$10,000 for each taonga tūturu  in the case of a body corporate, a fine not exceeding \$20,000 for each taonga tūturu	1
Section 13(4)	every person, other than a registered collector, who contravenes the provisions of section 13 with respect to the disposal of taonga tūturu:  - selling or otherwise disposing of a taonga tūturu knowing or having reasonable cause to suspect it is a taonga tūturu otherwise than to a registered collector or to a public museum or through the offices of a licensed auctioneer or a licensed secondhand dealer (section 13(1))  - being a person entrusted with the custody of any taonga tūturu in accordance with section 11(4) of the Act, disposing of such taonga tūturu other than at the direction of the chief executive (section 13(2))	in the case of an individual, a fine not exceeding \$10,000 for each taonga tūturu  in the case of a body corporate, a fine not exceeding \$20,000 for each taonga tūturu	1
Section 14(6)(a)	every person who, not being a registered collector, (i) acquires or attempts to	in the case of an individual, a fine not exceeding \$10,000 for each taonga tūturu	1

	acquire a taonga tūturu, knowing or having reasonable cause to suspect that it is a taonga tūturu, otherwise than in accordance with any provision of this Act; or (ii) falsely declares to any person that he or she is a registered collector	in the case of a body corporate, a fine not exceeding \$20,000 for each taonga tūturu	
Section 14(6)(b)	every person who, being a registered collector, fails to comply with any of the conditions of registration specified in subsection (3)	in the case of an individual, a fine not exceeding \$10,000 for each taonga tūturu  in the case of a body corporate, a fine not exceeding \$20,000 for each taonga tūturu	1
Section 14A(2)	being the executor of an estate of a registered collector, knowingly failing to notify the chief executive as soon as practicable (but no later than 90 days after the death of that collector) that the collector has died in accordance with subsection (1)	in the case of an individual, a fine not exceeding \$10,000  in the case of a body corporate, a fine not exceeding \$20,000	1
Section 15(6)(a)	every person who, in a manner contrary to the provisions of this section, purchases or attempts to purchase, or sells or attempts to sell, a taonga tūturu, knowing or having reasonable cause to suspect that it is a taonga tūturu, or falsely declares to any person that he or she is a licensed auctioneer or a licensed secondhand dealer	in the case of an individual, a fine not exceeding \$10,000 for each taonga tūturu  in the case of a body corporate, a fine not exceeding \$20,000 for each taonga tūturu	1
Section 15(6)(b)	every person who, being a licensed auctioneer or a licensed secondhand dealer, fails to comply with any of the conditions of his or her licence specified in subsection (2)	in the case of an individual, a fine not exceeding \$10,000 for each taonga tūturu	1

		in the case of a body corporate, a fine not exceeding \$20,000 for each taonga tūturu	
Section 16(4)(a)	every person who knowingly removes or alters the registration number identifying any taonga tūturu for which a certificate of examination has been issued	in the case of an individual, a fine not exceeding \$10,000 for each taonga tūturu  in the case of a body corporate, a fine not exceeding \$20,000 for each taonga tūturu	1
Section 16(4)(b)	every person who knowingly alters a certificate of examination issued by an authorised public museum in respect of any taonga tūturu	in the case of an individual, a fine not exceeding \$10,000 for each taonga tūturu  in the case of a body corporate, a fine not exceeding \$20,000 for each taonga tūturu	1
Section 16(4)(c)	every person who makes or causes to be made any certificate of examination purporting to be issued by an authorised public museum without the authority of that museum	in the case of an individual, a fine not exceeding \$10,000 for each taonga tūturu  in the case of a body corporate, a fine not exceeding \$20,000 for each taonga tūturu	1
Section 17	every person who knowingly discloses information relating to the ownership or location of any taonga tūturu to any other person except as required or permitted pursuant to this Act or with the written consent of the chief executive or of the owner of the taonga tūturu or of the person having lawful custody thereof	in the case of an individual, a fine not exceeding \$10,000 for each taonga tūturu  in the case of a body corporate, a fine not exceeding \$20,000 for each taonga tūturu	1
Section 18(2)	every person who, without reasonable cause, manufactures for sale a replica of a taonga tūturu and	in the case of an individual, a fine not exceeding \$10,000 for each taonga tūturu	1

	fails to clearly and permanently identify it as such in accordance with subsection (1)	in the case of a body corporate, a fine not exceeding \$20,000 for each taonga tūturu	
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### *Court jurisdiction*

With the exception of the offences under section 5 and section 18A of the POA, the above offences are all Category 1 offences. This means the District Court has jurisdiction over the offence under the CPA. The two category 3 offences come under the jurisdiction of the District Court unless the matter is transferred to the High Court.

### *Timeframes*

The CPA sets out timeframes for lodging charges based on the category of offence. Section 10(5) of the POA provides a specific time frame for commencing a prosecution in relation to the offence of export without permission (section 5), which overrides the CPA. That time limit is 5 years.

As section 18A of the POA (wilful damage) carries a penalty of up to 2 years' imprisonment, under section 25(2)(a) of the CPA charges must be filed within 5 years after the date on which the offence was committed, unless the prior consent of the Solicitor-General is obtained to file a charging document after that date.

All other offences under the Act are category 1 offences and have a time frame for commencing proceedings of 12 months after the date an offence is committed.