



Energy and Resource Markets Diversion Scheme Policy

EXECUTIVE SUMMARY

Key points to note in this policy are:

- The primary purposes of diversion are rehabilitation and reparation.
- A defendant's eligibility for diversion is considered once it is determined that a prosecution is justified and preferably before a plea is entered.
- The criteria for diversion are defendant-based and offence-based and are fundamental to considering and offering diversion. The criteria must be met and the views of the officer in charge (OC) of the case considered before diversion can be offered.
- Even when an initial decision to offer diversion was made in a court environment, a formal one to one diversion interview should be conducted to assess the defendant's suitability for diversion.
- Diversion conditions must be proportionate to the offence and appropriately balance the public interest in justice being pursued through diversion; be achievable; and be appropriate in all the circumstances.
- Sufficient proof from the defendant that the diversion conditions have been met, before requesting the court dismiss the charge.

INTRODUCTION

The Energy and Resource Markets Branch (ERM) of the Ministry of Business, Innovation and Employment ("MBIE") Diversion Scheme ("diversion") is an alternative method of resolving criminal prosecutions. Diversion gives prosecutors the discretion to withdraw the charges against a defendant in return for informal (non-court ordered) activities designed to amend or reduce the harm caused by their offending or reduce the risk of future offending.

The MBIE in house litigation team is responsible for diversion but discusses eligible cases with the officer in charge of the case (OC) and that officer's business unit if necessary (ERM Compliance Team).

The aim of this diversion policy is to achieve consistency in availability and approach as well as focussing on the primary purposes.

Diversion enables eligible defendants to complete diversion activities within a given timeframe to avoid both a full prosecution and the possibility of receiving a conviction. This means that judicial time is able to be reserved for more serious offences and defendants.



Advantages of the diversion approach

The advantages of the diversion approach are:

- the legal standards (evidential and public interest tests) have been met to show that the offence should have resulted in a charge within the criminal justice system
- a charging document has already been filed in the court and can proceed if the defendant does not complete the terms of diversion
- the process has the incentive of the “shadow of the court” to bring to bear on the defendant.

Purposes of diversion

The primary purposes of diversion are rehabilitation and reparation. The secondary function of diversion is to:

- encourage the defendant to take responsibility and show remorse for their actions
- eliminate factors that put the defendant at risk of re-offending (e.g. obtaining a permit)
- avoid the defendant’s first conviction and give them another chance.

Reparation

Reparation might include:

- the payment of money to compensate
- obtaining the necessary permit
- making good damage done to property (e.g. restoring land)
- writing a letter of apology.

Relationship with the criminal justice system

Cases that receive diversion are redirected away from the formal criminal justice system. The judiciary therefore reviews only those cases that are of public interest and require the full intervention of the criminal law.

Participation in diversion will usually be initiated at or about the time of the defendant’s first court appearance, within the registrar’s list. A defendant’s charge(s) will be adjourned for a fixed period to enable diversion to be considered, offered and completed before the next court appearance date.



DIVERSION PROCESS

Stage	Part of process
1	Charging document filed.
2	File evaluation.
3	First court appearance.
4	Diversion interview.
5	Diversion agreement with conditions.
6	Monitoring compliance.
7	Completing diversion.

WHEN TO CONSIDER DIVERSION

A defendant's eligibility for diversion is considered once it is determined that:

- a prosecution commenced is justified (in terms of the Solicitor – General's Prosecution Guidelines) and
- diversion may be an appropriate disposal outcome.

Do not consider diversion where there is insufficient evidence to support a charge proceeding. Deal with each case's facts on their merits.

When deciding whether to proceed with a prosecution (i.e. file a charging document) the key question is always whether the conduct really warrants the intervention of the criminal law.

It is preferable that diversion is considered **before** a plea is entered.

In some circumstances a defendant may have entered a plea and then seek to be considered for diversion.



If a defendant has entered.....	they
a not guilty plea but has subsequently acknowledged guilt	can still be considered for diversion.
a guilty plea	can be considered for diversion. Generally charges where a guilty plea has been entered cannot be dismissed under section 147 Criminal procedure Act 2011. However dismissal following a diversion notification under section 148(1) CPA is a mandatory direction, and is there to entitle the person who has completed diversion to the protection afforded by section 147(6) CPA (deemed acquittal).
a special plea under section 45 Criminal Procedure Act 2011, and it is accepted by the Court	cannot be considered for diversion as the charge will be dismissed anyway.

Note that an intimated guilty plea in court must not be a prerequisite for diversion.

WHO CAN BE CONSIDERED FOR DIVERSION?

A defendant can be considered for diversion after they have met the diversion criteria.

They can also be considered for diversion if they have:

- entered a plea but not been convicted
- not entered a plea, but have acknowledged guilt.

Note that a guilty plea (either entered or intimated) in court must not be a prerequisite nor a bar for diversion.

To ensure consistency and fairness each case must be decided on its merits.

The OC case:

- recommends a defendant's suitability for diversion
- considers the circumstances of the offence.

The decision whether to offer diversion rests primarily on prosecutions, but agreement between the prosecutor and the OC should be sought wherever possible. Where the OC and prosecutor disagree, diversion should not be offered until the disagreement is settled by escalation to the manager of litigation. If there is still disagreement following this process, the decision should be made by the Chief Legal Advisor, as any final decision should be a legal one.

The criteria for diversion are defendant-based and offence-based. The criteria are fundamental to considering and offering diversion. The criteria must be met and OC case's views considered before diversion can be offered.



Defendant-based criteria

Consider these circumstances when determining whether defendant-based criteria are achievable.

First-time defendant

The diversion scheme was primarily designed to give first time defendants an opportunity to avoid receiving a conviction.

Generally, a first offender is considered suitable for diversion. However, the offence-based criteria must also be considered.

Previous diversion, past convictions

In some circumstances, it will be appropriate to consider diversion of a defendant who has received diversion before or who has previous convictions, For example:

- the direct or indirect consequences of not offering diversion would be out of proportion to the seriousness of the offence, AND
- the previous diversion was more than 5 years ago, OR
- the last conviction was more than 5 years ago.

There will be cases where the diversion decision may be unclear due to past offences, or the type of charge involved. The prosecutor must decide each case on its merits.

Accepts responsibility for offence

The defendant must accept full responsibility for the offence by:

- admitting that they committed the offence
- showing remorse for their actions, and
- having intimated (but not entered) a guilty plea to the offence (optional).

A defendant who has pleaded not guilty is not barred from consideration for diversion, provided they now accept responsibility and meet the other diversion criteria.

Acceptance of responsibility without entry of a plea, is also not a bar to consideration for diversion.



Offence-based criteria

There are two aspects you **must** consider for offence-based criteria:

- the offence seriousness by offence type and case circumstances
- view of the OC case.

The circumstances of the offending suggest that public interest would not be compromised if the offence was dealt with through diversion.

Offence types

You cannot set hard and fast rules on particular offence types. Every case must be examined individually and considered on its merits. There will be cases when the legal description of the offence or the maximum penalty may appear serious but when the offence is considered in the context of the facts, it is not.

You can consider diversion where the offence is serious but the circumstances are at the bottom end of the scale and the effect of a conviction is out of all proportion to the offence's seriousness.

Offence seriousness by case circumstances

The Prosecutor must:

- consider the seriousness and nature of the offence in the circumstances of the case, and
- determine the public interest in a prosecution proceeding which must also reflect the offence's particular circumstances.

To do this, consider particular aggravating and mitigating factors in relation to the offence.

The first court appearance

At the first court appearance, the defendant has access to speak to the duty lawyer and may also have the opportunity to discuss the case with the judge. However, in most cases the adjournment is sought by a registrar in the registrar's list before the defendant appears before the judge. This process ensures that the scheme is transparent.

Prosecutors forming the view that a defendant may be considered for diversion should ensure that no plea is entered and seek an adjournment. The adjournment should be long enough to allow time for:

- the diversion interview to be held
- diversion requirements to be determined and agreed, and



- where appropriate, the diversion requirements to be completed before the next court appearance.

There are timeframes set out in the Criminal Procedure Rules 2012 for the time between the first and second appearance and time to case review, which may not be sufficient for the diversion process to occur. Prosecutors must make an oral application at the time of the adjournment for either:

- i. an extension of time between first and second appearance, or
- ii. a departure from the Case Management Memorandum (CMM) process, or
- iii. an extension of the time to case review hearing and for filing a CMM.

As the appearance where diversion is likely to be signalled will probably be before a registrar, only i) or iii) can be requested, as registrars cannot order a departure from CMM process.

Note: Diversion is not agreed to at this point. The case is stood down to consider diversion. It can only be offered to the defendant once the interview has been held.

Arrange an interview time

The diversion interview provides the opportunity to assess the defendant's suitability for considering diversion. You must not minimise the importance of the interview.

All defendants' whose cases are adjourned to consider diversion must have a face-to-face diversion interview. While the initial decision to offer diversion may be made within the court environment, a formal one to one diversion interview must be conducted.

This interview must happen as soon as practical after their court appearance. An interview time may be set up with the defendant before they leave court, or it may occur immediately following court. If this is not possible a time and date will be made that suits all parties.

What to consider for suitability

To consider a defendant's suitability for diversion, the prosecutor must ensure that the diversion criteria is met and all information from the offender and offence-based criteria is obtained.

DURING THE INTERVIEW

Defendant's views

The interview gives the defendant an opportunity to:

- express their understanding of the offence's impact on themselves
- explore the possible reasons for the offending



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- consider what the impact of a criminal conviction might be on their life or their whānau or family's life
 - have support people attend the diversion interview
 - accept diversion or exercise their right to test the prosecution before a court.

Informing the defendant

In the interview the diversion interviewer must explain to the defendant:

- the purposes and benefits of division
- the ground rules for diversion, and
- what happens if/when diversion is completed.

During the interview, the interviewer must determine whether the defendant accepts responsibility for the offending. If the defendant does not, diversion is not appropriate.

The interview will also explore possible conditions of division that are appropriate, proportionate and achievable before the next scheduled court date. Refer to the Guiding principles of selecting conditions.

The interviewer must also inform the defendant that:

- they must voluntarily accept to undertake diversion with its attached conditions instead of continuing a prosecution
- any discussions of the offence are 'without prejudice'. This means that if diversion does not proceed then no evidence concerning the diversion discussions can be called at the defendant's trial
- if they commit more offences during their diversion period, they may no longer be suitable for diversion.

AFTER THE DIVERSION INTERVIEW

Diversion offer

The approved prosecutor makes the decision to issue diversion only after the:

- diversion interview has been held, and
- the defendant agrees, in principle, to the conditions that will form part of the diversion agreement.

If the diversion offer is accepted, you must prepare the diversion agreement for the defendant to formally accept and sign the conditions.



The defendant may withdraw from diversion at any stage of the process before their next court appearance.

Right to review

The defendant or their counsel may request, in writing or verbally, a review of either:

- the decision to consider, offer, or not offer diversion
- the diversion offer conditions.

The review process must be undertaken either by:

- a different MBIE litigation solicitor
- the Manager of Litigation
- the Chief Legal Advisor.

Note: The final decision whether to grant diversion or not rests with the Chief Legal Advisor and no further right of review is available past this point.

The diversion agreement

The agreement must include:

- the defendant's acceptance of responsibility for the offence
- the defendant's contact details
- the agreed diversion conditions (these conditions must be explained to the defendant in full)
- acknowledgement that the defendant has been informed of the terms of diversion relating to failure to complete and that information about the offence is 'without prejudice'
- the expectations and times for completing the conditions. This includes providing receipts
- the adjournment date and recognition of the prosecutors action following successful completion, i.e. they will notify the registrar to withdraw the charge and conversely, the impact of failure to comply with the agreement
- the charge may be dismissed by the registrar on the papers, rather than being in open court. The defendant's attendance will be excused unless the defendant wishes to appear and have the charge dismissed in open court.

The defendant may discuss the agreement with a lawyer before signing it to make it valid. After the agreement is signed, a copy of the agreement must be given to the defendant either immediately after the interview or sent by post as soon as possible.



DIVERSION CONDITIONS

Imposing conditions in the diversion agreement is an opportunity to find a meaningful way to deal with a defendant who:

- has admitted responsibility for their offending
- has shown remorse for their actions
- is prepared to be accountable for those actions.

Some diversion conditions can target the reasons for offending and highlight the purpose of diversion.

In setting the conditions of diversion, the prosecutor must take into account, the defendant's full circumstances and ability to comply with those conditions. The defendant may decline or accept the diversion agreement.

GUIDING PRINCIPLES OF SELECTING CONDITIONS

These three principles will guide the prosecutor's selection of diversion conditions.

Principle	Description
Proportionality	The condition must be proportionate to the offence and must appropriately balance the public interest in justice being pursued through diversion. The condition(s) must not be more onerous than a sentence that might be imposed by the court following a conviction.
Achievability	All conditions must be able to be completed within the adjournment period (or any extension that is granted to that period) to the satisfaction of the prosecutor before a charge is dismissed.
Appropriateness	The conditions should be targeted towards reparation, the defendant's rehabilitation or a combination of the two to ensure the purposes of diversion are met.



REPARATION

Reparation should consist of any reasonable expense incurred as a direct result of the offence.
For

If....	Then....
The defendant cannot pay full reparation or disputes the amount of the reparation	The general rule should be that the case is referred back for the prosecution to continue. In certain circumstances, if the victim agrees, a defendant without financial ability can: <ul style="list-style-type: none">• Be given time to pay
	All reparation must be paid before the prosecution agrees to withdraw a charge. If this is not done and an extension of the adjournment is not considered appropriate then prosecution against the defendant will be continued.
The defendant agrees to pay	<ul style="list-style-type: none">• The offender can pay the money directly• Send a bank cheque

MONITORING DIVERSION CONDITIONS

The defendant must give the prosecutor evidence to prove that the diversion conditions have been met. This should be provided no later than three days before the defendant's next court appearance.

FURTHER ADJOURNMENT

A further adjournment may be sought from the registrar, under section 167 of the Criminal Procedure Act 2011 where there is an early indication that the conditions cannot be completed within the timeframe, and that additional time would be appropriate due to the defendant's response.

If the diversion officer after discussion with those involved considers diversion is not applicable, the case will proceed through the prosecution process.



DISMISSING THE CHARGE DUE TO SUCCESSFUL COMPLETION OF DIVERSION

When diversion has been completed to the prosecutor's satisfaction, they must send a letter to the registrar (under section 148 Criminal procedure Act 2011).

In their letter, the prosecutor must:

- Request the court dismiss the charge under section 147 Criminal Procedure Act due to successful completion of diversion
- Apply for the defendant to be excused from appearing in court.

Note that if a defendant wishes to seek permanent name suppression they must appear in court and apply just as any other defendant.

FAILURE TO COMPLETE DIVERSION

If diversion is not completed to the prosecutor's satisfaction, the diversion is recorded as "No, Failed to Complete Contract" and the defendant must attend court on the date the case had originally been adjourned to. The defendant will be required to enter a plea (if they have been given the opportunity to seek legal advice) and the case will progress through the normal Criminal Procedure Act process.

CONFIDENTIALITY

It is important to recognise that under the Privacy Act 1993, information about individuals held by MBIE, including prosecution / diversion information, cannot be disclosed except by the person's consent, by a court order or if required under the Official Information Act 1982. Accordingly, any information about diversion cases should not be released to any person, including the media without first obtaining legal / privacy advice.

Note, that the offer and completion of diversion will be a matter of public record where the charges have been filed and withdrawn, unless final name suppression was granted. Care should be taken over whether interim name suppression will expire and whether final name suppression should be applied for. This may necessitate a further court appearance beyond completion of the diversion contract and the usual consequent withdrawal of charges.