
Auckland Council Diversion Policy

1 December 2022

Policy statement and principles

1. The Diversion Scheme (**diversion**) is intended to function as a lawful exercise of the Auckland Council's (**Council**) prosecutorial discretion that can apply to eligible offenders. The Council will use best endeavours to have regard to Te Ao Māori and to apply Tikanga customs and practices in the implementation of diversion.
2. The purpose of diversion is to:
 - a) address offending behaviour that has resulted in charges;
 - b) balance the needs of victims, the offender and their communities (including the need to achieve compliance and remediate any harm);
 - c) give offenders an opportunity to avoid conviction; and
 - d) reduce re-offending.
3. The implementation of a diversion scheme is consistent with clause [3.1] of the Solicitor-General's Guidelines for Diversion Schemes which states that: "*Diversion provides an alternative means of resolving some offences without going through a formal trial process, while still addressing the key public interest factors leading to the decision to prosecute*".
4. Cases that are progressed through diversion will be directed away from the formal criminal justice system.

Decision making

5. The responsibility for decisions on diversion will ultimately rest with the Team Leader - Enforcement at Legal Services.
6. The possibility of diversion should play no part in the decision to prosecute. Diversion should only be considered after a prosecution decision is made.
7. Diversion decisions will be exercised on fair and ethical considerations in accordance with the Solicitor-General's Prosecution Guidelines and the Solicitor-General's Guidelines for Diversion Schemes.
8. As part of the process for diversion referrals, prosecutors must consider the public interest factors for and against prosecution. While public interest factors against prosecution may not

have outweighed the decision to prosecute, those factors may support a subsequent decision to offer diversion.

9. If the offender is known (via a personal or professional connection) to the Team Leader - Enforcement, the diversion officer, or the Officer-In-Charge, a conflict of interest must be declared as soon as practicable. The Manager Regulatory & Enforcement will consider the declaration and determine whether an alternative approach must be arranged to manage the conflict.
10. The availability of diversion as an alternative to full prosecution does not, in any way, limit the Council's sole discretion to decide which enforcement option it pursues in response to any alleged offending.

Diversion recommendation

11. After the charging document(s) have been filed in Court, the Officer-In-Charge may, with the approval of their Manager, make a recommendation to the Prosecutor that an offender is considered for a diversion referral (**diversion recommendation**).
12. Where a diversion recommendation is made, the Prosecutor is obliged to consider whether a diversion referral should be made.

Prosecutor's referral

13. Independently of whether a diversion recommendation is made, the decision to refer an offender to the Diversion Officer (**diversion referral**) may be made following:
 - a) a referral from the Prosecutor, with approval from the Team Leader - Enforcement;
 - b) consultation with the Officer-In-Charge and their Manager, except in cases where a diversion recommendation has already been made; and
 - c) consultation with the Victim(s)¹, if applicable, regarding the diversion referral and any diversion conditions that might be appropriate.
14. Following a diversion referral, an offender may be invited to an interview with the Diversion Officer (**diversion interview**) at any stage after the filing of a charging document(s) up until the time their case is adjourned for sentencing.
15. In most cases, eligible offenders will be offered an opportunity to participate in diversion at the time of their first court appearance.
16. Where a diversion referral is made, the Prosecutor should ensure that no plea is entered and seek an adjournment. The adjournment should be long enough to allow time for:
 - a) the diversion interview to be held; and
 - b) diversion conditions to be determined and agreed.
17. In the event that a plea is entered, a referral for diversion can still be made. An offender who has pleaded not guilty is not barred from consideration for diversion, provided they now accept responsibility and diversion is appropriate having regard to the referral criteria.

¹ The views of the victim are important but are not determinative of whether diversion will be offered and/or on what conditions.

18. Where a diversion referral is made, the Prosecutor is responsible for completing the diversion referral memorandum.

Referral criteria

19. The Prosecutor must consider the following offender and offence-based criteria before a diversion referral is made:

Offender-based criteria

- a) Is the offender a first-time offender?
- b) Has the offender indicated an intention to accept responsibility?
- c) Does the offender have a history of enforcement action against them (e.g. an infringement offence relating to a similar breach)?

Offence-based criteria

- d) Is the offending serious (consider both the offence type and the circumstances)?
 - e) Does the Officer-In-Charge and their Manager support diversion?
 - f) Does the Victim (if applicable) support diversion?
 - g) Has compliance been achieved and/or the harm remediated (if applicable)?
 - h) Does a mandatory court order (i.e. destruction of the dog) apply to the charge(s)?
 - i) Have circumstances changed so as to render the mandatory order redundant (i.e. voluntary euthanasia of the dog)?
20. The above criteria should be considered holistically by the Prosecutor to determine whether an offender is a suitable candidate for a diversion referral.
21. Diversion can be considered for any person including Council employees.
22. If a Council employee has been charged with an offence and is seeking diversion, the file and supporting material must first be considered and endorsed by the Team Leader - Enforcement, prior to progressing it through to the Manager Regulatory & Enforcement for their approval.

Diversion conditions

23. Before the interview, the Diversion Officer will prepare a diversion agreement which stipulates the offender's diversion conditions.
24. Diversion conditions can include any one or combination of the following that are appropriate in the circumstances:
- a) apology letter;
 - b) meeting with the Victim;
 - c) reparation;
 - d) rehabilitation;

- e) remediation;
 - f) compliance;
 - g) community service; or
 - h) any other offence related condition.
25. The Diversion Officer may stipulate any diversion conditions, provided those conditions are either:
- a) relevant to addressing the underlying causes of the offending (i.e. rehabilitation); and/or
 - b) relevant to addressing the harm caused by the offending (i.e. reparation, compliance and remediation); and/or
 - c) designed to give back to the community (i.e. community service).
26. Diversion conditions must be proportionate to the offence and should not be more onerous than a sentence that might be imposed by a Court.
27. The Diversion Officer should have regard to Te Ao Māori and Tikanga customs and practices in the development and implementation of diversion conditions.
28. Health and safety matters must be considered before community service is established as a diversion condition.

Diversion interview

29. During the diversion interview:
- a) the Diversion Officer will explain:
 - i) the purposes and benefits of diversion;
 - ii) the process for diversion, including what happens when diversion is completed;
 - iii) that diversion is voluntary and any discussions of the offence are 'without prejudice' (meaning the discussions will not be adduced in evidence at the offender's trial);
 - iv) that if the offender admits other offences during the interview, these will be disclosed to the Officer-in-Charge and dealt with separately from the diversion offence (the offender to be cautioned); and
 - v) the diversion conditions.
 - b) the offender will be given an opportunity to:
 - i) admit that they committed the offence and to demonstrate remorse;
 - ii) express their understanding of the offence's impact on themselves and any victim(s);
 - iii) explore possible reasons for their offending; and

- iv) consider what impact a criminal conviction might have on their life or their whanau or family's life.
30. The diversion conditions and the timeframe for completing those conditions will be recorded in the diversion agreement which must be signed by the offender and the Diversion Officer.
 31. If the Diversion Officer and the offender cannot agree on the diversion conditions, the Diversion Officer may decline diversion, and the Prosecutor will continue prosecuting the offender through the formal court process.
 32. Following the diversion interview, the Diversion Officer must be satisfied that:
 - a) the offender accepts responsibility for their offending;
 - b) the offender is willing to complete their diversion conditions; and
 - c) that if the offender were to complete their diversion conditions then it would no longer be in the public interest for the prosecution to continue.
 33. If the Diversion Officer is not satisfied of the above, diversion must be declined, and the Prosecutor will continue prosecuting the offender through the formal court process.
 34. A record of the Diversion Decision (accept or decline) should be kept including the reasons for the decision.

Adjournments to complete diversion

35. The Diversion Officer must inform the Prosecutor of the expected timeframe for the offender to complete their diversion conditions.
36. At the offender's next court appearance following their diversion interview, the Prosecutor will seek an adjournment to allow time for the offender to complete their conditions for diversion.

Completion of diversion conditions

37. The Diversion Officer must inform the Prosecutor once they are satisfied that the offender has completed their diversion conditions.
38. At the offender's next court appearance following completion of their diversion conditions, the Prosecutor will seek the court's leave to have the offender's charges withdrawn or dismissed.

Failure to complete diversion conditions

39. If the offender fails to complete their diversion conditions within the timeframe stipulated in their diversion agreement, the Diversion Officer may decline diversion and the Prosecutor will continue prosecuting the offender through the formal court process.
40. The issue of whether an offender has completed a diversion condition will be assessed and determined by the Diversion Officer.

Extensions of time

41. The Diversion Officer may, at their discretion, decide to extend the timeframe for completing any condition stipulated in an offender's diversion agreement.
42. Where a timeframe has been extended, the Diversion Officer will notify the Prosecutor who will seek any necessary adjournments at court.

Right of review

43. The offender or their lawyer may request in writing a review of:
- a) the decision not to make a diversion referral;
 - b) the diversion conditions;
 - c) the decision to decline diversion; and/or
 - d) the decision not to extend time to complete any condition/s.
44. The review process may be undertaken by any of the following persons:
- a) a senior lawyer from an external provider; or
 - b) the Manager Regulatory & Enforcement, Legal Services.
45. The decision of the person reviewing the decision is final. There is no further right of review past this point.

Privacy

46. Under the Privacy Act 2020 an individual can:
- a) access their personal information, including records relating to diversion;
 - b) request a correction of their information; and
 - c) authorise information about them being disclosed to a third party.
47. Disclosures to third parties will be considered on a case by case basis to ensure that the disclosure is authorised freely without threats or inducements.²

Monitoring and auditing diversion

48. The objective of monitoring and auditing diversion is to:
- a) assess the scheme's delivery;
 - b) identify difficulties and problems; and
 - c) recommend remedial action for problems.
49. Although no two cases are identical, Prosecutors and the Diversion Officer should use best endeavours to make consistent decisions to preserve the integrity of diversion.
50. The Team Leader - Enforcement will monitor the Diversion Officer's activities to ensure they are consistently and transparently following diversion policies and procedures.
51. If practicable, a regular audit of diversion decisions should be carried out to review:

² For example, if an employer or employer's agent contacts Council seeking information on whether a job applicant had been considered for diversion, the information should not normally be disclosed, as there is an implication of a threat of the employee not getting the position applied for.

- a) the consistency of decision making;
- b) the types of offences diverted;
- c) the conditions of diversion agreements; and
- d) any audit trails relating to the completion of diversion agreements.

52. The results of the audit and any recommendations should be provided to the Team Leader - Enforcement to recommend changes to diversion if appropriate.

Policy submission

The diversion policy has been submitted for approval.



John Kang

Team Leader - Enforcement
Legal Services | Auckland Council

External review

The diversion policy has been externally reviewed by Meredith Connell, Office of the Crown Solicitor at Auckland.



Steve Symon

Partner
Meredith Connell



David Collins

Senior Associate
Meredith Connell

Policy approval

The diversion policy has been approved and is effective from the date specified below.



Helen Wild

General Counsel
Auckland Council



Christian Brown

Manager Regulatory & Enforcement
Legal Services | Auckland Council

The diversion policy is effective from: 1 December 2022

Glossary

“Diversion Officer”: The lawyer (or council officer) from Enforcement, Legal Services who is designated by the Team Leader - Enforcement, Legal Services to be the Diversion Officer.

“Manager”: The Tier 4 Manager in relation to the Officer-In-Charge.

“Manager Regulatory & Enforcement”: The Manager in charge of the Regulatory & Enforcement Team at Auckland Council, Legal Services.

“Offender”: The defendant (natural persons or body corporate) in a criminal prosecution.

“Officer-In-Charge”: The designated enforcement officer in relation to the prosecution against the defendant. This will usually be the officer who investigated the defendant’s alleged offending.

“Prosecutor”: The lawyer who is conducting the prosecution against the defendant. This includes the assigned in-house lawyer (or council officer) from the Council’s Legal Services or the assigned external lawyer (if the prosecution is briefed to an external barrister or law firm).

“Team Leader - Enforcement”: The Principal Solicitor in charge of the Enforcement Team at Auckland Council, Legal Services.

“Victim”: Has the same meaning as provided by section 4 of the Sentencing Act 2002.