Appendix 2,
Report RS-14-1302

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Mr Pat Dougherty
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Dear Mr Dougherty,

Review of Oriwa Crescent prosecutions

I enclose my completed review.

Yours sincerely,

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REVIEW OF ORIWA CRESCENT PROSECUTIONS

1. When Mr and Mrs Standen of Oriwa Crescent, Otaki, decided in early August 2013 to get a contractor to cut some native trees on their property that they thought were rotting so that their grandchildren could play safely, they could hardly have imagined that it would lead to being featured on *Campbell Live*, the subject of nationwide media interest including comments to the media by a Cabinet Minister and the subject of discussion at the Council table.

2. This review emanates from the aftermath of all that.

3. The terms of reference of the review are stated below, first in general terms, and then I have set out eight specific questions that I am also directed to answer. The general terms of reference are as follows:

> *"The review should consider: the Council's own investigation, administration and decision making processes; the advice sought from external parties; and which external influences affected the Council's decision making.*
>
> *In particular, the Council is interested in identifying the lessons to be learned from these events and wishes to understand the changes and improvements that should be captured and integrated into business processes.*
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> *The review should be thorough, involving an examination of relevant documentation and interviews with staff, elected representatives and advisers who provided legal and ecological advice as appropriate, and needs to be completed as quickly as can be achieved without adversely affecting the quality of the outcome. The review should also comment on the effect of the media coverage and the appropriateness of the media strategy adopted by Council."*

4. The particular questions that have been asked in the terms of reference are as follows:

> *"1. How robust was the case for prosecution in each case?* (McLeavey, Standen, Monkeyman) *How well were the cases presented?*
>
> *2. Was the decision to prosecute correct? Did the Council adequately consider all the enforcement options available?*
>
> *3. Provide comment on the role of elected representatives versus officers in enforcement decisions in general/for this incident.*

4. *In particular, provide comment on how decisions relating to public interest should be made.*

5. *How did the Council come to believe the landowners as well as the contractor should be prosecuted? How did this become 'fact' rather than an interpretation of where liability was perceived to lie?*

6. *Should corroboration of the Standen's defence have been sought earlier?*

7. *Why did advice about the strength of the Council's case change after charges were laid: ie what happened that the original 'clear breach of the District Plan' was no longer an 'open and shut case' and the likelihood of a successful prosecution was considered to have reduced?*

8. *Was the best legal advice provided?"*

How this review is organised

5. Appendix 1 sets out all of the persons interviewed, plus an indication of the fairly extensive documentary evidence that was reviewed. Cognisant of the legal employment relationships peculiar to local government, I have anonymised all references to Council officers below the level of Chief Executive both here and in Appendix 2.

6. Appendix 2 sets out a chronology of the events. By way of explanation of the function of that, there are not many disputed facts as to what happened in the course of this prosecution. There are some, but not many. Therefore, rather than set out a long narrative of events before moving to any analysis, I intend Appendix 2 to effectively be that narrative.

7. On that basis my review exercise can move directly to analysis, assessment and recommendation. Appendix 3 sets out my specific recommendations.

8. I will therefore undertake the review exercise under the following headings:

   8.1 What went right, what went wrong, and why;

   8.2 How that can be fixed through best practice;

   8.3 My answers to the specific questions.

What went right, and what went wrong, and why

9. The Council officer who was on duty responded to the complaints appropriately. I do not find that there was anything remarkable about his initial investigation or the way in which he documented that. I have not undertaken a site visit and with the passage of time, I am not sure that it would be useful. While there is plainly a difference of view as to how one might regard the extent of the work, this much is clear: it was certainly more than minor tree trimming but less than wholesale clear felling. To put the matter another way, it is plain that the areas of bush at the back of the two properties concerned remain viable and obvious enclaves of native bush, but within those enclaves it is equally plain that more than trivial cutting has occurred[1].

10. Thus the initial officer response to regard the cutting as more than trivial was appropriate, at least at that stage.

11. I have one reservation about that initial officer response concerning the desirability of seeking an explanation for the apparent non-compliance or transgression. That is something that could be sought at any time from the very beginning of the officer response through to a later stage, such as after the initial investigation. I will deal with it more fully at that later stage, but my point for now is that this is the first moment when it could have been explicitly sought.

12. The next step was similarly unremarkable. The officers identified that they needed the appropriate expert ecologist advice and they sought it. Of course that needed a return to the property with the ecologist. That in turn triggered the issue of informed consent and/or obtaining a search warrant. Although they had already had some general discussions, it was also at this stage that officers sought particular specialist prosecution advice from external solicitors, Luke Cunningham and Clere (LCC). Despite the fact that the Council regularly prosecutes in respect of matters like dogs and parking, it is some considerable time since this Council brought a prosecution under the Resource Management Act 1991 (RMA). In that sense it was something of new ground.

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1 There are in excess of 100 photographs on the files

13. With regard to preparing a search warrant application, LCC suggested the officer seek guidance from an officer in another local authority who was very experienced in obtaining search warrants. That was sought and obtained.

14. I find nothing remarkable about the informed consent/search warrant procedure that was adopted and followed. I note that much was made in the eventual media coverage of the fact that a policeman was present when the officers went back to the Oriwa Crescent properties with the search warrants. That is a statutory requirement whenever search warrants are executed under the RMA. It is a very sensible precaution and is done for the protection of both the parties the subject of the search, as well as the local authority officers. This is because the power to enter and search is an intrusion into a fundamental civil liberty.

15. Assisted by the officer the ecologist completed her task and thereafter she provided a draft and then a final report. That was duly forwarded to LCC who then provided a full assessment of the prospects of bringing charges against three possible defendants: the Standens, the McLeaveys and the contractor (Monkeyman). Obviously that report is a significant step in the prosecution process. In my view it is a very comprehensive assessment of the position as matters stood at that point. It concluded that charges could be brought. Importantly, however, it contained a section that referred to what is sometimes called the prosecutorial discretion or, sometimes simply described as the public interest factor in deciding whether a prosecution should be brought, even if all the elements of the offence at issue are present. In this review I will call it the "public interest discretion". To put this in layman's terms that might be more plainly understood, it is the equivalent of the village constable of another era letting the offender off with a warning or less, because the criminality was minimal even though an offence had clearly been committed.

16. In a modern context and in respect of this type of offending, that can be more than just a discretion as to whether or not to prosecute at all. As long as it is within the time for this option[2], it might also extend to the decision as to whether the

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2 Although it is not a prescribed time limit, in practical terms decisions to issue infringement notices really need to be made within about four months of the infringing conduct in order to meet the next regulatory requirements.

infringement notice procedure should be preferred. In other words, on a continuum of increasing seriousness, that discretion here would extend thus:

16.1 No action at all;

16.2 No action but a warning given;

16.3 Infringement Notice;

16.4 Prosecution.

17. In the RMA context, there are also some tangential options as well, such as abatement notices and enforcement orders, although I am not suggesting those options were warranted here.

18. It is at this point that, in my view, the first obvious errors were made. Although the Council in rather an ad hoc sense went through a form of overall assessment and approval of the decision to prosecute, I think it fell short of what was needed. I am not saying that the process was completely deficient because the decision to prosecute was certainly elevated, and also had some lateral input at that stage as well. However, prosecutions are serious steps to take – the maximum penalties under the RMA are quite significant and the stigma of conviction can have all sorts of serious consequences. That is why many local authorities mark this step out distinctly, ensuring that at least one "fresh pair of eyes" is involved, sometimes more than that. Many require an actual meeting involving at least three people so that views can be tested, rather than just memoranda countersigned or emails exchanged.

19. In my view it is at this point where there was a significant opportunity for things to have taken a different course. I consider that the assessment of the public interest discretion factor was not robust enough. Had there been a robust assessment, the following matters would have been brought into consideration:

19.1 While deterrence is often an important factor in any prosecution, there was no particular district wide problem or issue regarding unauthorised destruction of native bush.

19.2 The work had stopped immediately – there was no suggestion or risk of further non-compliance on the part of the landowners.

19.3 The landowners were two elderly couples and of course the bush concerned was literally in their backyards. I would nonetheless suggest some care here – simply because a "would be" defendant is elderly or retired is not a reason of itself not to prosecute. Something like 25% of the Kapiti District's population is retired.

19.4 It was known that both couples had used a contractor.

19.5 But perhaps most importantly with regard to the Standens, the apparent reliance on a Council brochure was known. (The role the brochure had played in the instructions given by the Standens to Monkeyman was not yet known, but the fact that the brochure had been involved was.)

20. I would mention one additional factor, although I am not sure that it would be of more than marginal relevance. The ecologist's report identifies the fact that a cycle of rotting and regeneration is a feature of New Zealand indigenous growth. In other words, indigenous flora that might appear at first glance to be rotten may in fact be well capable of regeneration. It is possible that a non-expert might therefore treat some flora as rotten or diseased (and beyond any prospect of survival) which an expert would not.

21. The role of the brochure is significant. It does not of itself exculpate any of the would-be defendants. One could say that it does enough to make it clear that there are limitations on what can be done by way of trimming in native bush where that is protected. But it is confusing, and it could be read to permit trimming and tidying of rotten indigenous flora as not requiring a resource consent. It was also apparently quite old, and pre-dated the proposed district plan and therefore was blind to the effect of s.86B(3) of the RMA and the rules of that plan that would take immediate legal effect. I understand that the brochure was nonetheless still available at some Council outlets.

22. Whatever the accuracy or inaccuracy of the brochure, the more important point is the significance of that and the other factors mentioned above in assessing the overall criminality of the landowners. I consider even its mention ought to have

raised at least a question mark over the assessment of the overall criminality as to the appropriate enforcement step. And this is where the link to the absence of a statement or explanation from the would-be defendants becomes significant.

23. In other words, if not obtained already, this is the point where a robust assessment would have looked closely at the would-be defendants' explanation, if there was one.

24. In this case, the explanations that had been given from the landowners were exiguous. In the case of Monkeyman, there was nothing at all. I accept, of course, that no person the subject of this sort of investigation is obliged to give an explanation or a statement. However, it is highly likely that if such a step had been taken here, two further factors would have quickly emerged:

    24.1 Most importantly, the role of the brochure in the instructions given to Monkeyman – at least by the Standens.

    24.2 The circumstances of the landowning couples, and their role in local conservation – particularly the Standens.

25. It was also at this point that the suggestion appears to have been conveyed to the Chief Executive after an officers' briefing that it was necessary to prosecute the landowners in order to prosecute the contractor. That of itself would disincentivise a robust consideration of non-prosecution options as against the landowners.

26. One of the exercises I conducted was to test the views of the various officers knowing now what they know, as against the decision to prosecute made at that time. I do not intend to traverse the individual results, and there was some variation. But what is interesting is that none of them would have reached exactly the same position as they took at that time. When asked about relative culpability, all placed the Standens at the lowest end of the scale and Monkeyman at the highest. All regret that the possibility of an infringement notice was not brought into the mix for consideration somewhere.

27. In reviewing the decision to prosecute, I am very mindful of the fact that we are talking about the exercise of a discretion in this instance, not whether some

evidential element was missing or whether there was some other technical deficiency in the prosecution. The very nature of the discretion would permit a range of views in the sense that in a marginal case two competent officers armed with all the facts might reach a different conclusion. And we are doing all this with the benefit of hindsight. Nonetheless, looking at all the factors here, I do not consider that the options were adequately considered in respect of the Standens, and possibly the McLeaveys as well, and if they had been, prosecutions may well not have resulted.

28. I have a different view of the position regarding Monkeyman. I would have thought a skilled contractor, or someone who held himself out to be that, would be familiar with the applicable rules in the localities in which he is working. In that sense, this is no different to the householder who contracts a plumber to make kitchen alterations. Whilst obviously the property owner is ultimately answerable at law too, one would have thought that in the first instance the plumber would know the requirements of the local rules and bylaws. And if there was any doubt, he would go and find out.

29. The last point I would make under the exercise of the public interest discretion is that it does not end at this point. It is a continuing discretion in the sense that even after charges are laid it is open to a prosecuting authority to reconsider its position in the light of further information coming to hand.

30. The next aspect of what happened which warrants comment is the degree of political involvement. As will be seen shortly, I am critical of that. But before I do so, a preliminary point is worthy of mention.

31. Given my findings above concerning what happened over the deficiencies in the decision to lay charges and the (failed) exercise of the public interest discretion, the politicians who did get involved in this case might well say:

> *"Surely, even if political interference in the case of "ordinary" prosecutions is inappropriate, the situation where there has been a deficient decision to prosecute would be a circumstance where comment at the political level is appropriate?"*

32. My response to that is an unequivocal "no". In the circumstance of a deficient decision to prosecute, the charges will come before the court, and the court will

assess the criminality and deal with the charges accordingly. Indeed, in this particular instance that is exactly what happened with the McLeaveys, who after all had pleaded guilty and indicated a willingness to make a charitable payment on a discharge without conviction. Notwithstanding that indication, the court refused to require that payment. In other words, the appropriate outcome can and should be left to the Courts, and no one has suggested that the result in the McLeaveys' case came about because the Judge was affected by the publicity.

33. Although the Minister's comments in the media were not the first "political" public statement, my consideration of the political involvement here begins with those comments. The Minister for the Environment chose to make comments that were highly critical of the decision to prosecute. In my opinion, this was inappropriate. The danger of such comment is that it can be perceived to be an attempt to influence a matter before a court – particularly a prosecution. The fact I happen to agree with her that the decision to prosecute was deficient, makes not one jot of difference. Comment by a Minister of the Crown like this throws up all sorts of awkward issues. What if there were other facts unknown to the Minister? Does the Council then get into a debate or exchange with the Minister over why the charges were laid – all ahead of any hearing itself? Do the comments mean that a different approach would be taken to would-be defendants who are elderly? What if next time the decision at issue is one not to prosecute, is it then appropriate for the Minister to state publicly that a prosecution ought to have been brought?

34. I do not confine my observations to the Minister's media comments. As I have said above, there were earlier public statements that ought not to have been made. I was sufficiently puzzled by the fact that they had been made to enquire whether the incoming Councillors in October/November 2013 had been given a proper induction briefing on these sorts of issues. The briefing PowerPoints do not explicitly touch on this. However, I would have thought that the principle that elected politicians should not publicly comment on decisions to prosecute was generally well understood. Or at least I thought it was. Perhaps the topic needs to be explicitly addressed at induction briefings.

35. There is another dimension to this discrete to the RMA. Under s.84 of that Act every local authority has a statutory obligation to enforce its own district plan. That places an additional burden on Council officers who have the carriage of that

unrewarding task. It is not particularly clear to me where any consideration of that aspect is apparent in either the Minister's comments or in the conduct of the local authority politicians that either previously or subsequently entered into the debate.

36. If the people of Kapiti want to have district plan rules that guarantee a pleasant and harmonious environment in which to live and work, the last thing they need is Council officers who carry the heavy onus of ensuring compliance but who are now gun shy on account of the possibility of public statements by politicians.

37. Unsurprisingly, these various public comments excited the Councillors and Otaki Community Board members to be seen to react. I say "unsurprisingly" because it is an entirely natural reaction on their part to be concerned that the actions of the local authority of which they were members were being ridiculed on a national scale. Much of the councillor comment and conduct that followed is attributable to that.

38. However, that still does not justify it. There should never have been any exploration by the councillors of the merits or otherwise of these prosecutions. I was frankly surprised to see the degree to which public comment had been made about the individual cases, and I was even more surprised to learn that these matters had been debated at the Council table.

39. Having now had the benefit of interviews with a number of the political personnel involved, I am quite sure that those that made such comments did so feeling that they were doing the right thing and unaware that it was inappropriate. I would characterise the conduct as more naïve than anything else. But it should never have happened, and in the vast bulk of local authorities that I have dealt with that is a boundary line that is well understood.

40. It should also be clearly understood that my above observations relate to those who did choose to make public comment. There were in fact many elected members who did not, who respected the fact that this was an enforcement decision for staff and a matter before the Courts, and who chose to remain silent under what must have been significant mounting pressure.

41. The last dimension on which some general comment can be made is the communications and media management of this matter.

42. In a sense, what happened here was a manifestation of the earlier mistakes. The Council's communication management was completely compromised and placed in an impossible situation. With public comments by the Minister and some sitting Councillors excoriating the Council's decision to prosecute and venturing into factual aspects, the natural instinct of any similar entity's communications management will be to try to defend the decision and explain or justify it. That is a perfectly acceptable dynamic around most public decision making. But the position with prosecutions (and probably any matter before a court) is different. The urge to go on the front foot can lead to further problems, and that is exactly what happened here. The difficulties that ensued are self-evident from the chronology.

43. With virtually all such prosecutions there is really only one effective media strategy. When the local authority is approached, it should simply state an inability to comment because the matter is before the court. That is a sound strategy because:

(a) Most of the time it is difficult for any local authority to win a media battle over a decision to bring such a prosecution. Local authorities are probably the easiest targets in New Zealand for stories about rampant petty bureaucracy. It is better to leave what is said in the courtroom to be the direct source of any media publicity.

(b) By making no further comment officers and Council avoid getting into further trouble by opening themselves to the criticism that they are seeking to influence the outcome (as actually happened here over Monkeyman) or even creating a further unnecessary story.

44. In short, the Council's communications team felt frustrated and wrong footed by the blaze of publicity that occurred, and would have dearly wished to have been briefed from an early point in order to justify and explain the Council's position. While being totally sympathetic to that urge, my view is that no engagement with the media on this matter should have occurred in the first place. All that the ensuing publicity achieved here was to needlessly and unfairly portray the Council as vacillating and incompetent.

How can that be fixed through best practice?

45. The following best practice process outline is based on the experience of a large number of local authorities over many years. I have not outlined every step of the process. Many of those steps are self-evident. I have limited the outline to the steps relevant to this review.

46. Starting at the initial alert of a non-compliance issue, at some point after it is apprehended that a compliance issue has arisen, and an investigation of the facts has occurred (even if only partial) some effort should be made to seek an explanation or statement from the would-be defendant. Of course, a would-be defendant is not obliged to give an explanation or statement, but in a sense a failure to provide one fortifies the prosecution's justification to proceed for the time being on the basis that there is no adequate justification or explanation for what has occurred.

47. There are a number of reasons for obtaining a statement from a would-be defendant that have nothing to do with the public interest discretion – e.g. obtaining an admission of certain facts that might be otherwise difficult to prove, or securing evidence of a state of knowledge where that is an element of the offending. However, what is especially relevant to the exercise of the discretion to prosecute, is that sometimes the explanatory statement will throw up facts or matters that would not otherwise have been known to the investigating officers and might well go to diminishing or removing criminality. Before leaving this topic, however, it should be noted that there can be some special skills involved in taking such statements. There can also be admissibility issues, and thus some training of officers may be required.

48. With the investigation complete and all of the facts assembled, including any explanation that might have been given along with the legal advice from the lawyers who would be prosecuting (if charges are to be laid), a watershed consideration must take place as to whether or not to prosecute and the possible exercise of the public interest discretion. Ideally, that should be a face to face discussion after those participating have reviewed all the material. In my view, in the local authorities where this works well there will be two other features:

48.1 It will involve at least one officer, if not two, who are able to view the whole exercise with "a fresh pair of eyes". In other words, they will have had no involvement up to this point.

48.2 The meeting should take place at a very senior officer level, but not involve the chief executive. The reason for not involving the chief executive is that it leaves one final option for intervention at a later stage should the circumstances require it.

49. I should mention here that I have seen the draft Enforcement Policy that was used as something of a guide in this case. It is perfectly satisfactory as far as it goes, but it does not specify the features I have set out above vis-á-vis what it calls the "Enforcement Decision Panel".

50. If a decision is made to prosecute, then the Mayor and Councillors (and Community Board members where relevant) should be advised of:

(a) The identity of the parties being prosecuted;

(b) The nature of the charges;

and nothing else. That ensures that councillors and community board members are aware of the fact of a prosecution, and should they be contacted they will not be compromised because they will be able to avoid involvement. At no point from here should any local government politician have any involvement in or be making any statement about the prosecution.

51. As recently as 2011 the Auditor General has noted the undesirability of even an appearance of political decision-making in relation to public prosecutions. In her report "Managing Fresh Water Quality: Challenges for Regional Councils" she referred to that principle as well established in central government, and then went on to say:

> *"We see no reason for different principles to apply when the enforcement agency is a local authority. In our view, councillors should not be involved either in decisions to prosecute or to investigate or hear grievances about cases."*

52. If councillors harbour concerns that the discretion to prosecute is being exercised inappropriately, then that will be a matter that they are entitled to raise in the context of the employment of the chief executive – usually in his/her performance review. It should never be a matter of direct criticism or attack by a councillor directed at a council officer junior to the chief executive. The reasons for that are well established and should not require further explanation from me. They will also usually be manifested in some way in the Code of Conduct.

53. As I indicated earlier, a minimalist approach should be taken to media comment on behalf of the Council itself in the course of a prosecution. Even after an outcome, any public statement needs to be handled carefully. Ideally, it would be a matter of liaison between the Council's communications team, but with at least a quick cross-check with prosecuting counsel.

My answers to the specific questions

How robust was the case for the prosecution in each case? (McLeavey, Standen, Monkeyman) How well were the cases presented?

54. I am interpreting this question as directed to whether the elements of the offences were present, and in sufficiently robust form to justify a conclusion that a prima facie case could be made out.

55. In my view, there was a prima facie case that could be made out against all three defendants. There were, however, some differences and it is appropriate that those be discussed.

56. Starting with the Standens, I have found nothing to fault the prosecutor's assessment as to all the elements of the charges. There might have been an issue at trial as to the presence of whether the area of bush squarely met the requirements of the rule, but notwithstanding the learned Judge's queries about that, I tend to the view that on full argument the prosecution position would have prevailed.

57. I am aware that the Standens would have argued at trial:

(a) That no tree met the girth/threshold requirements of the rule;

(b) That there was no proof of date when the trees were cut;

(c) That there would have been difficulty in proving this was indigenous flora because photographs would show that it probably post-dates 1980.

58. The first two points appear to be answered in the ecologist's evidence. Of course, it is always possible that the Standens might have called their own evidence to displace the prosecution case to its required standard of proof. As to the third, I am dubious that the mere fact that the indigenous growth post-dates 1980 defeats the requirements of the rule.

59. But there is another factor that might well have resulted in an acquittal. This is a positive defence and not part of the prima facie case of a prosecution. If the Standens could establish that they had relied on a competent contractor, then had the case gone to trial they might have succeeded in avoiding conviction under s.340 of the RMA. But it must be emphasised that this is a matter of justification or excuse to be established by a defendant. It does not form part of the prima facie case. In my view, the prima facie case for the prosecution was present and was robust as against the Standens.

60. The "McKenzie Friend" for the Standens states that the reason the Council withdrew the prosecution against them (the Standens) had nothing to do with the media attention. The councillors say it had everything to do with that.

61. Having examined the prosecution file, it is clear to me that neither are correct.

62. The reason for the withdrawal in the Standens' case was a reconsideration of the public interest discretion which, as mentioned earlier, is an ongoing duty, not any identified deficiency in the *prima facie* case, and not media pressure. The reconsideration was based on the overall diminished criminality attributable to the Standens, and most particularly their instructions to the contractor specifically utilising the Council's brochure which, as explained previously, at best amounted to a possible positive defence.

63. Turning to the McLeaveys, the analysis of whether there was sufficient and robust evidence for a prima facie case against them is very much the same as against the Standens. The ecological report identifies a greater number of trees affected in their case, but that does not change the elements analysis. Similarly, there is an inference on the files that the McLeaveys used the same contractor as the Standens

and therefore the same positive defence arises as a possibility, but again not as part of the *prima facie* case assessment, and utilisation of the Council brochure did not seem to feature in their case.

64. Finally, with regard to Monkeyman, with the exception of tidying up the appropriate identification of the defendant, all of the elements of a *prima facie* case against the Standens and the McLeaveys would be equally applicable against Monkeyman, and the s.340 positive defence would be unavailable.

65. Having reviewed the entire prosecution files, and subject only to correcting the name of Monkeyman as a defendant, which should not have been a major issue[3], I can find no aspect of the presentation of any of the cases as deficient. To the contrary, they appear to have been very competently presented, including during the last phase when withdrawals for guilty pleas were being implemented.

Was the decision to prosecute correct? Did the Council adequately consider all the enforcement options available?

66. I do not consider the decision to prosecute was correct – at least in the case of the Standens, and possibly also in the case of the McLeaveys. Allowing for the fact that this is a discretion, I am still of the view that the decision to prosecute the Standens was inappropriate in all the circumstances. This has already been discussed in the general part of this review, but specifically in relation to the Standens, the following factors are relevant to that decision:

66.1 They had entrusted the task to an ostensibly skilled contractor with the specific instruction to comply with the rules set out in the Council brochure.

66.2 They had stopped work immediately at the first suggestion of a compliance issue and there was no threat that the work would continue.

66.3 There was no suggestion of a district deterrence issue or broader compliance problem over unauthorised clearing of native growth.

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[3] The need to correct the defendant's name in the Monkeyman prosecution was not a fatal flaw. As long as the prosecution could eventually show that the identity originally charged was the same person named in any amendment, on recent authority that would have sufficed and been permitted.

66.4 Although it should not be over emphasised, the Standens' personal circumstances were also relevant in that they were a mature couple who had made, and continue to make, significant contributions to environmental protection in the locality.

67. The overall criminality was minimal. Within the ambit of the public interest discretion on the basis of these factors, an appropriate decision would have been to decide not to prosecute. Below that level a mere warning would probably have been the most appropriate outcome or, if within sufficient time, at worst the issue of an infringement notice.

68. In respect of the McLeaveys, a similar approach could have been open, although in their cases there are some differences from the Standens that might be noted:

68.1 It would appear that the modifications were greater on the McLeavey property.

68.2 The McLeaveys admitted the objective had been to improve their vista (as opposed to being entirely for the purpose of removing dead or rotten trees).

68.3 Perhaps the degree of direct involvement in other environmental conservation work might not have been as marked.

68.4 The Council brochure does not appear to have been utilised, or if it was it does not seem to have been a matter of specific direction or reliance.

69. However, all other factors were similar to the Standens and even allowing for a range within the discretion, I would have thought that this also was a situation where it would have been perfectly appropriate to select an outcome short of prosecution. The prospect of an infringement notice was probably more apt in the case of the McLeaveys than the Standens, but even with the McLeaveys something less than that might have been open.

70. With regard to Monkeyman, I think the position is rather different. In my view, a commercial contractor should be expected to know the rules, or at least be willing to ascertain them – particularly in a situation where the landowner has particularly instructed the contractor to carry out the work in compliance with the Council's rules.

71. Having said that, I would not entirely have ruled out a decision not to prosecute and simply proceed with an infringement notice at the bottom end for Monkeyman. That option might have been open. All I am saying is that, at the top end, a decision to prosecute was certainly well within the appropriate exercise of the public interest discretion and entirely justifiable.

Provide comment on the role of elected representatives versus officers in enforcement decisions in general/or this incident.

72. In the general section of this review I have already made comment on this topic. In short, elected representatives should take no role at all in enforcement decisions. There is nothing unique or special about this incident that would justify a different approach. Any involvement of elected representatives in enforcement decisions opens the door to the conclusion that the enforcement decisions (whichever way they go) have been subjected to political interference or influence.

73. Certainly, elected representatives should be advised of the fact of enforcement decisions, but no more than that. Even that is intended to enable elected representatives to quarantine themselves from any accusation of political interference. If elected representatives consider that these sorts of incidents should not result in prosecution, their appropriate response is to change the district plan rules – not to try to second-guess or unstitch particular enforcement decisions.

In particular, provide comment on how decisions relating to public interest should be made

74. As to the process aspect of this, I have already provided some observations in the general part of this review. In short, there needs to be a high level officer meeting that includes officers capable of bringing a fresh pair of eyes to the consideration, but that group of officers ideally would not include the chief executive. Preferably there should be a face to face meeting once all the materials have been assembled and the critical delegated decision as to whether or not to prosecute should be made by this high level group.

75. As to the actual factors involved in that decision, that is necessarily rather variable depending on the type of prosecution involved. But at the core of the exercise is an overall assessment of criminality. Factors that can be identified in respect of this type of RMA prosecution would be:

75.1 Any explanation given;

75.2 Reliance on professional advice, or even Council communications;

75.3 Whether there was any ongoing risk;

75.4 Whether deterrence features heavily as a factor;

75.5 The personal circumstances of the would-be defendants;

75.6 Whether other enforcement options better fit the circumstances and meet enforcement objectives.

How did the Council come to believe the landowners as well as the contractor should be prosecuted? How did this become 'fact' rather than an interpretation of where liability was perceived to lie?

76. The background to this is that a statement to the media on behalf of the Council suggested that one of the factors in continuing to prosecute the landowners was that that was necessary to sheet home charges against the contractor. This statement had its provenance in a series of events commencing with the briefings following the officers' site visits.

77. I have concluded that that statement came to be made as a result of a misunderstanding. The officers to whom it was attributed say that that was not what was meant, but rather the intent was to convey the point that if a conviction were to be obtained against either or both landowners, the prospects of obtaining a conviction against the contractor might well be easier.

78. It is certainly not the case that convictions against the landowners would have been necessary to secure a conviction against the contractor.

79. It would be a fair observation that if convictions were obtained against the landowners, while it would still be possible that a prosecution against the contractor might well fail as a separate exercise, in the ordinary course of events that might be seen as advantageous to the prospects of successfully prosecuting the contractor. But that could never be a stand-alone reason for deciding to prosecute the landowners.

80. It was unfortunate that this misunderstanding arose, and having arisen, that the correct position was not drawn to the officer's attention. Yet again, it demonstrates the undesirability of offering any comment in the first place – a situation forced on the officer by the public comments of the politicians.

Should corroboration of the Standens' defence have been sought earlier?

81. As indicated earlier, in my view an understanding of the Standens' defence, or perhaps more accurately an understanding of their explanation, should have been sought earlier. The critical information was the nature of the instructions to the contractor to comply with the Council's rules, and manifested in handing the brochure to the contractor. It is more a matter of comprehending that that was the explanation the Standens were giving and accepting it as most likely correct, rather than "corroboration" in any legal sense. After all, in this instance the contractor might just as easily have elected not to provide any "corroboration" which would still have left the Council with having to decide whether or not to accept that explanation.

82. The important point is that there was an opportunity to identify the Standens' explanation and to obtain more detail at a much earlier point, and before the decision to prosecute was made.

83. Had the prosecution proceeded, the Standens' explanation would have been raised by them as a possible positive defence. If the details had been obtained earlier it is much more likely a decision would have been made not to prosecute the Standens.

Why did advice about the strength of the Council's case change after charges were laid, i.e. what happened that the original 'clear breach of the district plan' was no longer an 'open and shut case' and the likelihood of a successful prosecution was considered to have reduced?

84. This question needs to be unravelled to some extent.

85. Having reviewed the *prima facie* evidence, in my view there was a 'clear breach of the district plan' by all three would-be defendants on the face of the prosecution evidence. That never changed. It is possible that in the case of the Standens they may have been able to call their own evidence to show that the girth provisions of the district plan were not breached, but that would have been a matter of a simple evidential contest at a defended hearing and the Council was going to call

evidence to the contrary. The position remains that there was *prima facie* evidence of a clear breach of the district plan in all three cases.

86. But that does not mean that a successful prosecution will automatically follow. It needs to be remembered that for these offences it is open to a defendant to answer a strong prima facie case with a successful s.340 RMA defence.

87. It is true that LCC indicated a likelihood of a successful prosecution, but that written advice was not expressed in terms of being an 'open and shut case' or anywhere near as unqualified as that. Further, that written advice specifically pointed to the public interest discretion over whether or not to prosecute and made the point that that was a decision for Council. However, it does seem that in verbal briefings with the Chief Executive, the expressions "a strong case" and "an open and shut case" were used. The Chief Executive quite understandably drew confidence from the site visits by his officers and their verbal briefings that followed, plus the LCC written advice.

88. But, regardless of that, I am not sure that it could be said that the likelihood of successful outcome was considered to have markedly reduced later on when the media got involved – at least in the case of two out of the three defendants. Certainly in the case of the Standens the possible positive defence had more starkly emerged. A reassessment of the likelihood of a successful outcome in that case was certainly justifiable, although not essential.

89. In the case of the McLeaveys and Monkeyman, no new facts had emerged and no new legal principles or technical issues were identified that changed the assessment.

90. The reality of what changed was that there was a realisation that certainly in the case of the Standens, and probably the McLeaveys, the decision to prosecute them was too heavy handed, and it would have been far more appropriate to have exercised the discretion to deal with their non-compliances in some other way short of prosecution.

91. The further reality was that by the time that that belated realisation overtook the prosecutions, the accompanying media frenzy had effectively rendered the

continuing prosecution of Monkeyman untenable, remembering that Monkeyman had elected trial by jury.

Was the best legal advice provided?

92. The legal advice on the prosecution was obtained from LCC. A partner of that firm holds the warrant as Crown Solicitor for the Wellington region and prior to his appointment it has been held by a member of that firm for many years. LCC would be regarded as the pre-eminent firm of prosecuting lawyers in Wellington and has a national reputation as such.

93. The partner in charge of this particular prosecution is an experienced prosecutor in the criminal courts having conducted many criminal trials at a high level. He also has expertise and a special interest in local body prosecutions under the RMA, which is no doubt why this particular matter was directed to him. He prosecutes regularly for the Wellington Regional Council (ie Greater Wellington) under the RMA, as well as for a Crown entity.

94. So I do not consider that the choice of prosecutor, as such, could be faulted.

95. Turning to the legal advice itself, I have closely examined the entire LCC involvement and I am unable to fault it other than in respect of the relatively minor matter of identifying the appropriate defendant for "Monkeyman" – something that could be relatively easily fixed. In particular, I note that they did a comprehensive review of the potential prosecutions in writing in a letter dated 22 November 2013 that covered off all the appropriate topics.

96. I conclude that the best legal advice was provided, both in terms of the firm that was chosen, and the actual advice that was given.

APPENDIX 1

List of persons interviewed:

Officer A – Duty Compliance Officer when complaints received

Officer B – Senior In-house legal counsel – Tim Power

Officer C – Group Manager Community Services – Tamsin Evans

Officer D – Management officer consulted by Officer A

Officer E – Communications Officer

Pat Dougherty, Chief Executive

James Cootes, Chair of Otaki Community Board

Colin Pearce, Member of Otaki Community Board

Ross Church, Mayor

Tom Gilbert, Partner of Luke Cunningham Clere

Emma Light (by telephone only), staff solicitor of Luke Cunningham Clere

Councillor Gurunathan

Councillor Jackie Elliot

Christopher Ruthe (former solicitor and "McKenzie friend" for the Standens)

Documentary and other evidence reviewed:

Internal Council file and email exchanges

Luke Cunningham Clere file

Ecologist's draft and final reports

Kapiti Coast District Council Operative District Plan

Various newspaper articles and notes of interviews

Draft Enforcement Policy

Video recording of television broadcast "Campbell Live"

Council brochure "Trees for Kapiti"

Briefing PowerPoints for Council members' induction 2013

APPENDIX 2 – CHRONOLOGY

01.08.13	Two telephone complaints received by Council
01.08.13	Officer A (Duty Officer) attends at Oriwa Crescent, Otaki and takes notes and photographs
14.08.13	Council letter to Standens, McLeaveys and Monkeyman
15-29.08.13	Officer A consults Officer B (in house legal counsel) and Officer D and then Luke Cunningham Clere (LCC) initially consulted and give preliminary views followed by formal retainer
29.08.13	Letter from Standens to Council including reference to employing professional arborist and use of Council brochure
29.08.13	Letter from McLeaveys acknowledging purpose of the tree topping was to retain their vista
09.09.13	Application for search warrants
23.09.13	Officer A attends at Oriwa Crescent, Otaki with search warrant plus ecologist and Police constable. Standens give informed consent. McLeaveys are out when warrant executed although one returns part way through. Notes and photographs taken
01.10.13	Draft ecologist's report is received
22.10.13 to 06.11.13	Internal discussion and exchanges in order to brief planning evidence
12.11.13	Draft brief of planning evidence is circulated
15.11.13	Council sends its file to LCC for opinion on viability of prosecution
22.11.13	LCC comprehensive advice to Council that it is appropriate to lay charges against the Standens, the McLeaveys and Monkeyman (referring at one point to "Monkeyman Tree Services Limited"). The advice specifically refers to the prosecution guidelines relevant to the discretion and states that it is a matter for the Council to assess, although the advice does indicate LCC's then view that a prosecution would be justifiable in the circumstances.
25.11.13	Officer A prepares memorandum to Officer C attaching evidence and LCC advice and recommending prosecution
26.11.13	Approval given to prosecute
02.12.13	Officer D and a community board member visit the Standens and view the relevant areas. Officer D tells the Standens that given the amount of

	modification the Council could not ignore the situation.
11.12.13	LCC instructed to prepare charges. Some debate as to whether to lay charges under both Operative Plan and Proposed Plan plus confirmation that Monkeyman to be included
19.12.13	Council officers review draft charges, Officer A forwards updated planning evidence to LCC and requests that prosecution is only under the Operative Plan and that Council wished to be sensitive over laying charges close to the holiday period
19.12.13	Officer A forwards completed ecologists report to LCC
23.12.13	Charges laid against the Standens, the McLeaveys and "Monkeyman Tree Services"
09.01.14	Council letter to the Standens advising of decision to prosecute them
20.01.14	Standens write to Council complaining of their treatment (including the search) and referring again to engaging "professionals" along with being "guided" by the Council brochure
21.01.14	Charging documents returned by Court to LCC
29.01.14	Council seeks advice from LCC as to process from here
29.01.14	LCC advise forward process
30.01.14	LCC forward draft summaries of fact to Council
31.01.14	Council signs summonses to defendants
03.02.14	Council officers provide feedback on summaries
10.02.14	LCC provide package to go with service
12.02.14	Charges served on Standens along with summary of facts and summons
13.02.14	Council letter to the Standens acknowledging their letter and referring further contact to Luke Cunningham and Clere
13.02.14	Charges served on McLeaveys along with summary of facts and summons
13.02.14	Charges served on Monkeyman along with summary of facts and summons
17.02.14	Christopher Ruthe (the Standens "McKenzie Friend") advises the Court the Standens will be pleading not guilty at first call and seeking appearance be excused
17.02.14	Dominion Post reporter contacts Officer E to respond to accusations that Council had been heavy handed in dealing with the Standens

17.02.14	Councillor comment on Standen case to *Kapiti News* and other media
18.02.14	Officer A advises LCC Council has no objection to Standens appearance being excused
20.02.14	Minister for the Environment issues public statement "Minister Blasts Ridiculous Tree Felling Charge"
20.02.14	Campbell Live and RadioNZ make contact. Chief Executive interviewed on Campbell Live which includes councillor advocating withdrawal of charges. Briefing to Council's Corporate Business Committee on prosecution
21.02.14	Officer B checks with LCC as to whether advice given on Solicitor-General's guidelines (i.e. the public interest discretion) and also checks on some earlier advice by Simpson Grierson on the application of the tree rules
21.02.14	Monkeyman (Craig Eddie) makes contact with LCC
21.02.14	Court advises that the Standens and Monkeyman cases are adjourned to a review hearing on 8 April 2014 with not guilty pleas recorded
23.02.14	Christopher Ruthe complains adverse statements by Chief Executive and a councillor are compromising their trial
24.02.14	Tom Gilbert (LCC) advises Council that presence of Police officer on execution of a warrant under the RMA is a statutory requirement
24.02.14	Initial disclosure provided by LCC to Monkeyman
24.02.14	Officer B makes site visit and prepares legal background with Council's Communications team
25.02.14	Christopher Ruthe indicates Standens will elect a jury trial
26.02.14	Officer B indicates to LCC Council interest in discharge without conviction for both the Standens and McLeaveys and asks for consideration of how to raise with their lawyers
26.02.14	Councillor comment in the "*Kapiti News*"
26.02.14	Emma Light/Tom Gilbert speak to Mrs McLeavey about guilty plea options if the Council's intelligence was correct that they were intending to plead guilty. Mrs McLeavey indicates they were receptive to that option. They then ring Craig Eddie of Monkeyman Tree Services who said he had no lawyer acting but had entered a not guilty plea. There was some discussion around who the conviction would be against plus the amount of a donation if Monkeyman pleaded guilty. Craig Eddie said he would consult a lawyer before deciding what to do. They then ring the Standens and spoke to Mr Standen who was still hoping the charges would be withdrawn and considered that was the best thing for the Council. Tom Gilbert raised the option of making a donation to an environmental cause. Mr Standen explains the extent of their involvement with Keep Otaki Beautiful plus

	voluntary work in a local park. Mr Standen also says they had bought the house just a year ago and that they had used a Council brochure when engaging and instructing a professional arborist, and that the Council should withdraw the charges against them. They then contact Christopher Ruthe who said that at least 35% of the trees on the Standen's property had nothing to do with either the Standens or Monkeyman and had been cut by the neighbours earlier. Later Mrs McLeavey rang back confirming that she and her husband favoured the option LCC had put forward and would enter guilty pleas on that basis
27.02.14	McLeaveys appear, guilty pleas are indicated along with intention to apply for discharge without conviction at sentencing, and they are remanded at large
28.02.14	TV3 apply for "in Court camera" approval
03.03.14	Mrs McLeavey speaks to Tom Gilbert indicating uncertainty about proceeding with guilty plea and possible donation because retrospective consent is not an option
03.03.14	Standens make official information request about tree felling complaints and action thereon
04.03.14	Emma Light telephones Mrs McLeavey to further explore guilty plea plus donation sentencing option
06.03.14	*DominionPost* applies for leave to take in Court photographs on 8 April 2014
10.03.14	Discussion between Officer B and Mr Standen and then Tom Gilbert regarding disposal of Standen charges
10.03.14	Officer B emails Christopher Ruthe that Council will not oppose a discharge without conviction for the Standens and no need for a donation, but they would need to provide an affidavit setting out the instructions they gave the contractor. Also a joint media statement should be agreed
14.03.14	Christopher Ruthe telephones Tom Gilbert to indicate that while the Standens are interested in the discharge without conviction possibility, that still had to be confirmed and they were reluctant to admit guilt which is a necessary part of that
17.03.14	Officer B visits Oriwa Crescent with Christopher Ruthe
24.03.14	Costas Matsis and Tom Gilbert discuss the possibility of Monkeyman guilty pleas with restorative justice options possibly open ie conviction and discharge of the trading entity plus a donation to a suitable environmental cause
25.03.14	LCC advise Court that Council does not oppose still photographs being taken of the defendants but opposes filming

26.03.14	Christopher Ruthe indicates the Standens will affirm they instructed the contractor to undertake all work in compliance with the Council guidelines as per the brochure, but if not resolved will proceed with a jury trial
27.03.14	LCC advise Council that it is appropriate to review the continuation of the prosecution of the Standens in the light of the further information and its effect on the public interest test. The advice draws a distinction with the McLeaveys over the extent of the work and says the new information is the Standens' commitment to the environment and the detail of the instructions they had given to Monkeyman
31.03.14	Christopher Ruthe calls Tom Gilbert concerned because two councillors have told him the Council's advice is that it was "a 100% slam-dunk case they couldn't lose" which Tom Gilbert states was not the legal advice and is never the LCC approach
31.03.14	Council instructs LCC to seek an adjournment to allow sufficient time to make further inquiries suggested by the Chief Executive
01.04.14	Tom Gilbert seeks Costas Matsis confirmation that the Standens instructed Monkeyman in terms of the Council brochure, and also explores conviction and discharge plus appropriate donation for outcome of Monkeyman prosecution
03.04.14	Costas Matsis (lawyer for Monkeyman) responds by telephone to Tom Gilbert stating preference that no conviction is entered. But Tom Gilbert indicates on his instructions a conviction would be a bottom line. However, it is stated that the Standens did show Monkeyman a brochure and instructed him to proceed in accordance with that. The whole conversation is without prejudice
03.04.14	A councillor telephones Tom Gilbert wanting information which the latter declines to give
03.04.14	Judge rules that still photographs only in Court
03.04.14	Officer B advises Tom Gilbert that the charges against the Standens are to be withdrawn
03.04.14	Tom Gilbert reverts to Costas Matsis that a conviction against Monkeyman is a bottom line but makes suggestions regarding donation
04.04.14	*DominionPost* front page article that charges against the Standens to be dropped and quoting Council as saying that by talking to Monkeyman it had been able to substantiate the Standen's account in respect of the use of the brochure. Costas Matsis emails Tom Gilbert complaining of adverse publicity
04.04.14	Costas Matsis complains to Tom Gilbert that the newspaper revelation that the Standens had shown the brochure to Monkeyman had to be a reference to the earlier (Gilbert/Matsis) without prejudice conversation

04.04.14	Charlotte Brook (Public Prosecutions Unit at Crown Law Office) contacts Tom Gilbert to check that the prosecution guidelines have been applied
04.04.14	*Voxy.co.nz* article quoting Officer C stating the decision to prosecute was based on sound legal advice and the decision to withdraw the charges against the Standens was based on new information which was the corroboration by the contractor that the Standens had referred him to a Council brochure. TV3 News website article quoted the Council as saying that it was necessary to prosecute the Standens "in order to take on the arborists Monkeyman Tree Services"
07.04.14	Tom Gilbert advises Costas Matsis the newspaper article misreported the basis of the decision not to proceed against the Standens but that Council has confirmed it intends to proceed against Monkeyman although amenable to a conviction and discharge on terms
07.04.14	Costas Matsis notes no direct response to his previous complaint about the newspaper article and that that is prejudicing a fair trial for Monkeyman. Tom Gilbert asks Council to refrain from mentioning Monkeyman
08.04.14	Monkeyman case remanded to 14 May 2014. Standen charges withdrawn
08.04.14	*Stuff* article stating the Council said it had confirmation from the arborist that the Standens had referred him to the Council brochure. NewstalkZB website article states that the Council has just found out "the elderly couple gave the contractor a brochure on its rules on native trees before they did the job"
10.04.14	"Please explain" meeting with councillors
10.04.14	*Stuff* article referring to a Council meeting that day in which Officer C said the new information was the corroboration by Monkeyman that the Standens had referred him to the Council brochure
14.04.14	Officer C contacts Tom Gilbert to get an assessment of the strength of the case against Monkeyman. Tom Gilbert stands by the opinion of 22 November 2013 but emphasises no guarantee can be given
16.04.14	Costas Matsis advises Monkeyman is unwilling to agree to conviction plus discharge on terms, points to the prejudicial media statements by Council about Monkeyman and states Council should withdraw the charges (given that it is to be a jury trial), and if not accepted, Monkeyman will apply for a stay of proceedings
16.04.14	Tom Gilbert relays to Council the Monkeyman position and emphasises the importance of avoiding media comment, although advising that a stay is unlikely to succeed
22.04.14	McLeaveys write to LCC stating they are perplexed that the Council has withdrawn all charges against the Standens, but not against them and query whether that is because they (the McLeaveys) have not sought media attention. They state they will seek a discharge without conviction and will

	now retain a lawyer
24.04.14	LCC send case management memorandum to Costas Matsis on the basis that a jury trial will proceed
28.04.14	Sentencing of McLeaveys adjourned to 14 May 2014
29.04.14	Costas Matsis signals Monkeyman will raise a defence under s.341
05.05.14	Court advise *DominionPost* have applied for in court still photography of McLeavey sentencing and Monkeyman next call
05.05.14	LCC forward McLeavey letter of 22 April to Council
07.05.14	Emma Light telephones Mrs McLeavey and discusses possible donations if a discharge without conviction occurs. Mrs McLeavey queries whether the Council's position has changed in the light of their letter
07.05.14	LCC file the prosecutor's sentencing submissions indicating no opposition to a discharge without conviction and consideration given of appropriate environment organisation to receive a donation
08.05.14	A draft without prejudice letter from Costas Matsis is received from an unspecified third party (but never received by Council) repeating reference to media comment about Monkeyman by Council, and making a final offer involving a plea of guilty to one representative charge but on an amended summary of facts, a discharge and a donation, no orders for costs plus Council to publicly retract some of the previous public statements. It is clear that this is draft advice for Craig Eddie not intended for the Council
08.05.14	Exchanges between Officer B and Emma Light/Tom Gilbert as to confusion about differing versions of Costas Matsis' letter
08.05.14	Tom Gilbert alerts Costas Matsis of confusion over the receipt of the draft letter
08.05.14	Costas Matsis confirms alternative version is a draft and the correct position is as per 16 April 2014
08.05.14	Briefing of councillors who are told not to comment further
14.05.14	Court sentencing of McLeaveys. After hearing submissions of both sides the Judge, after expressing some doubt that these particular mahoe trees would fall within the relevant Rule, declines to direct any donation or payment of any costs and makes observations that the matter is effectively trivial and a prosecution has been an over-kill. 20 or so people attending in Court clap. Monkeyman is also called and adjourned a trial call-over in Palmerston North but Judge indicates that he hopes some other resolution occurs before then. Charlotte Brook briefed by LCC on outcome
14.05.14	Tom Gilbert provides further advice on the public interest test as to whether the Monkeyman prosecution should continue in the light of Judge Dwyer's comments at the McLeavey sentencing. While stating a view that there was

	still sufficient evidence to prosecute Monkeyman and there had been nothing to change that, given the indication by the Court that the offending was at the very low end it would be open to the Council to take the view that continuing was no longer in the public interest. However, an additional complication was that by reason of the jury trial election the Crown Solicitor at Palmerston North would have to be the person to be satisfied the charges should be withdrawn. Again, a no media comment position is urged
14.05.14	Council advises LCC that it no longer considers the prosecution of Monkeyman in the public interest
14.05.14	Tom Gilbert notes that media comment is likely on behalf of the Council as a result of the attention the matter is getting but nonetheless advises against it
15.05.14	Tom Gilbert alerts Palmerston North Crown Solicitor of position.
20.05.14	LCC forward file to Crown Solicitor
13 .06.14	Crown Solicitor, while noting that the evidential test for a viable prosecution was met, files memorandum seeking leave to withdraw charges against Monkeyman on the basis that the prosecution would not be in the public interest

APPENDIX 3 – RECOMMENDATIONS

1. At an early stage in the investigation, and at least no later than step 2 below, an explanation should be sought from the would-be defendant. It may be that interviewing officers will need some special training for this.

2. There should be a clear and distinct step in the prosecution assessment process within Council when, after all the information is assembled (including the relevant legal advice) where the overall public interest discretion as to whether or not to prosecute is made. That separate and distinct step should:

   (a) Include whether some lesser step to the laying of charges should be preferred (ie an infringement notice or a mere warning). If an infringement notice is a possibility, this step should be no later than four months after the conduct in issue.

   (b) More than one person should be involved, including at least one senior Council officer or consultant who is bringing "a fresh pair of eyes" to the decision. But the personnel involved should not include the Chief Executive, nor councillors or community board members.

   (c) There should be a meeting at which views and recommendations are tested and explored.

3. At some point after a decision to lay charges is made, the following should be advised of the persons against whom charges are being laid and the nature of those charges (and nothing more);

   3.1 Council members;

   3.2 Members of the relevant Community Board.

4. The Council should adopt a strict policy of minimising any public comment on the merits or otherwise of any non-compliance actions it is taking. Some limited comment confined to information about process would be the exception. Anything beyond that should both state the fact of no comment being made and the premise for it being an inability to do so.

5. The limitations around Council members' involvement in or comment on individual decisions to prosecute should be included in the induction briefing.