Proceedings for offences generally

375 Prosecution of offences

(1) Except as otherwise provided in this Act, all offences against this Act may be prosecuted, and all fines or sums of money imposed or declared to be due or owing by or under this Act may be sued for and recovered before a court of competent jurisdiction.

(2) In this section, court of competent jurisdiction means a court having jurisdiction for punishment of offences of the same nature or for the recovery of fines or sums of money of the relevant amount.

Compare: 1991 No 150 s 85

BL375.01 Legislative background
Section 375 corresponds to s 85 BA91.

376 Offences punishable on summary conviction (*Repealed*)

History
Section 376 was repealed, as from 1 July 2013, by s 413 Criminal Procedure Act 2011 (2011 No 81).
See cl 2 Criminal Procedure Act Commencement Order 2013 (SR 2013/162).

377 [Filing charging document]

Any of the following persons may [file a charging document] for an offence against this Act:
(a) the chief executive; or
(b) a territorial authority; or
(c) a regional authority; or
(d) any person referred to in section 176(g).

History
The heading to s 377 was substituted, as from 1 July 2013, by s 413 Criminal Procedure Act 2011 (2011 No 81).
See cl 2 Criminal Procedure Act Commencement Order 2013 (SR 2013/162).
Section 377 was amended, as from 1 July 2013, by s 413 Criminal Procedure Act 2011 (2011 No 81) by substituting "file a charging document" for "lay an information".
See cl 2 Criminal Procedure Act Commencement Order 2013 (SR 2013/162).

Synopsis
A summary prosecution may be brought by the chief executive, a territorial authority, a regional authority, or any of the persons entitled to be parties to a determination under s 176(g).

BL377.01 Legislative background
There was no equivalent to this section in BA91.

BL377.02 Persons referred to in s 176(g)
See BLPt5Sub1.06(2) for a list of the persons referred to in s 176(g).

BL377.03 Multiplicity of informations
In *Wilson v Fowler* HC Auckland AP203/98, 16 March 1999, the Court suggested that whether a prosecution is based on multiple charges, or on representative charges with an

emphasis on the more serious, is a matter of prosecutorial discretion to be carefully evaluated. However, where there is a multiplicity of charges, that may be a factor leading to conviction and discharge on some counts.

In *Wellington City Council v Govan* [2000] DCR 223 (DC), the defendants were charged with offences under s 80(1)(b) BA91, which has no equivalent in BA04 (see BLPt5Sub1.02). The informations charged that each defendant had "used a building or permitted another person to use a building, for a use, namely residential accommodation, for which the building was not safe, or for which the building had inadequate means of escape from fire".

Those informations were held to be contrary to s 16(1) Summary Proceedings Act 1957 in that they were not "for one offence only" but each contained four offences. They were not saved by the proviso to that section because they did not "charge in the alternative . . . different acts . . . stated in the alternative in the enactment under which the charge is brought".

> "[T]he concepts of using and permitting another to use are quite distinct . . . they are separate acts creating separate offences . . . A building may be 'not safe' without its having inadequate means of escape from fire.
>
> "The informant was obliged to choose between the offences or to lay separate charges."

The Court could not amend the charges under s 42 Summary Proceedings Act 1957 because they were "so defective as to be regarded as nullities" in that "neither defendant is in a position to ascertain the real charge he faces from the wording of the information". That being so, the charges were not saved by s 204 Summary Proceedings Act 1957.

BL377.04 Territorial authority laying information

In *Waimate District Council v Williams* DC Timaru CRI-2011-076-1459, 26 June 2013, the Chief Executive was held not to have appropriate delegated authority to make the decision to prosecute for Building Act offences and lay an information under s 377. The reference to the territorial authority in s 377(b) could be contrasted with the use of the term "Chief Executive" (of the Ministry) in s 377(a). Although the territorial authority cannot swear an information, as it is not a natural person, the Building Act specifically contemplates delegation of powers under s 232.

It was also clear when comparing the approach in the Building Act 1991 that the power to lay an information was more limited in the Building Act 2004. The chief executive could not rely on ss 12 and 42 of the Local Government Act 2002 for authority. Nor could the defective information be saved by s 204 of the Summary Proceedings Act 1957.

For a detailed consideration of the numerous errors that preceded the authority's decision to commence the prosecutions, including: the failure of the authority to consider the delegation issue when it should have; the failure to consider alternatives to prosecution; the lack of openness about the decision to prosecute; and the failure to address a conflict of interest issue, see the successful application by the defendant for costs under the Costs in Criminal Cases Act 1967 and the successful appeal by the defendant: *Waimate District Council v Williams* [2013] DCR 79 (DC); *Williams v Waimate District Council* [2013] NZHC 2922.

[378 Time limit for filing charging document

Despite anything to the contrary in section 25 of the Criminal Procedure Act 2011, the limitation period in respect of an offence against this Act ends on the date that is 6 months after the date when the matter giving rise to the charge first became known, or should have become known, to any of the following persons:

(a) the chief executive; or
(b) a territorial authority; or
(c) a regional authority; or
(d) any person referred to in section 176(g).]

History
Section 378 was substituted, as from 1 July 2013, by s 413 Criminal Procedure Act 2011 (2011 No 81).
See cl 2 Criminal Procedure Act Commencement Order 2013 (SR 2013/162).

Synopsis
An information must be laid within 6 months after any of the persons entitled to lay an information knew or should have known about the offence.

BL378.01 Legislative background
Section 378 corresponds to s 80(4) BA91.

BL378.02 Section 14 Summary Proceedings Act 1957
Section 16 Summary Proceedings Act 1957, in effect, provides that an information must be laid within 6 months "from the time when the matter of the information arose". Thus s 378 makes it possible to lay an information in respect of offences under BA04 even though the matter of the information arose more than 6 months previously provided that it had not become known to the person laying the information more than 6 months previously.

BL378.03 "The matter giving rise to the information"
The phrase "contravention giving rise to the information" in s 80(4) BA91 is now "the matter giving rise to the information". The latter corresponds more closely to s 14 Summary Proceedings Act 1957. Furthermore, whether or not there was in fact a "contravention" when the information is laid has not been judicially established. It is suggested that decided cases on s 80(4) BA91 are still good law in respect of s 378.

BL378.04 "Became known"
In the absence of decided case, it is suggested that the fact that one of the persons who may lay an information knew, or should have known, of a matter more than 6 months earlier should not prevent another such person from laying an information in respect of that matter. In other words, it is suggested that the words "to any of the following persons" should be read as meaning "to the person laying the information, being any of the following persons".

BL378.05 Persons referred to in s 176(g)
See BLPt5Sub1.06(2) for a list of the persons referred to in s 176(g).

BL378.06 Actual knowledge
Provisions virtually identical to s 378 appear in several other Acts. The phrase "first became known, or should have become known" refers to both actual and constructive knowledge. As to actual knowledge, it was held in *Russell v Wirihana* (1986) 2 FRNZ 461 (HC), at p 468, a case under the Social Security Act 1964, that:

> "Time does not necessarily run from the receipt by an officer of an allegation of the commission of an offence, but it will generally run from the time when that officer has sufficient information of the likelihood of the commission of an offence to justify an investigation of that matter."

BL378.07 Constructive knowledge
As to constructive knowledge, in a case under RMA91 it was held that the time when the contravention should have become known had the connotation of "an authority would be "unable to over look, looking at the context in which it can reasonably function and operate, it cannot justify having missed".": *Auckland Regional Council v Auckland City Council* [1997] NZRMA 330 (DC), quoting pre-trial ruling No 5, *R v Kiwi Well Drilling Co Ltd* DC Auckland T147/96, 31 July 1996.
That reasoning was applied to the s 80(4) BA91 (now s 378), time limit in *Gisborne District Council v Weatherhead* DC Gisborne CRN7016006603, 29 May 1998 where a

charge of undertaking building work without building consent under s 80(1)(a) BA91 (now s 40(2)) was dismissed, and was upheld on appeal in *Weatherhead v Gisborne District Council* HC Gisborne AP12/98, 15 March 1999.

The *Kiwi Well* and *Weatherhead* decisions mentioned above were cited and followed in *Christchurch City Council v Smith Crane & Construction Ltd* DC Christchurch CRI-2009-009-12480, 19 February 2010.

BL378.08 Knowledge of contravention itself

In *Auckland City Council v Watts & Hughes Projects Ltd* (1997) 3 ELRNZ 89 (DC), it was held that under s 338(4) of the RMA91 (which is effectively identical to s 378 except that it uses the word "contravention" rather than "matter") it was the contravention itself which must become known to the territorial authority, not merely the facts establishing the contravention. In that case, building officials inspecting building work under a building consent had been aware of the unrelated excavation on the same site but had not been aware that a resource consent required for the excavation had not been obtained:

> "Inspectors cannot reasonably be expected to look further than [the work under the building consent which they came to inspect] and speculate on what other resource consents are necessary on a part of the site they are not inspecting . . . There must be a clearer link between the physical facts of the case and a person's responsibility to know they are a contravention before an application to strike out will succeed by establishing constructive knowledge."

It is suggested that is good law in respect of s 378 despite its use of the word "matter" rather than "contravention".

BL378.09 Matter giving rise to the information

A mid-trial ruling in *Rotorua District Council v Catley* DC Rotorua CRN7063008040-2, 31 July 1998, addressed the 6-month limit of s 80(4) of the BA91 (now s 378) in the context that the particular notices to rectify (now notices to fix) which were the subject of the prosecutions, were the fourth set of notices, the first set having been issued more than a year earlier. Thus, although the information was laid within 6 months of the fourth set, it was out of time in relation to the first. It was held, distinguishing *Andrew Housing Ltd v Southland District Council* [1996] 1 NZLR 589 (HC), that in s 80(4) BA91 (now s 378) the words "contravention giving rise to the information" meant the contravention of the notice itself, not the "particulars of contravention" attached to the first notice. At a practical level, territorial authorities would often become aware of breaches of BA91 (now BA04) or of the Building Code, with a notice to rectify issued only after discussion and correspondence.

BL378.10 Preserving the ability to lay an information

As was recognised in *Rotorua District Council v Catley* DC Rotorua CRN7063008040-2, 31 July 1998, a territorial authority or regional authority discovering facts that could lead it to lay an information, will frequently enter into discussions and correspondence with an eye to ensuring that the building work concerned complies with the Building Code (or the building consent, see BLPt2Sub5.01). In such circumstances it is easy for 6 months to pass before a decision is made about laying an information, by which time it is too late.

It is, therefore, suggested that territorial authorities and regional authorities adopt a policy in such circumstances, and perhaps particularly when they consider that someone has done building work that does not comply with a building consent, of issuing, under s 165, a notice to fix requiring building work to be carried out to rectify the non-compliance. By issuing the notice to fix, the territorial authority or regional authority preserved its ability to lay an information because although the original offence of doing the work may have occurred more than 6 months earlier, any continuing offence under s 168 of failing to comply with the notice to fix occurs afresh every day. See BL380.02.