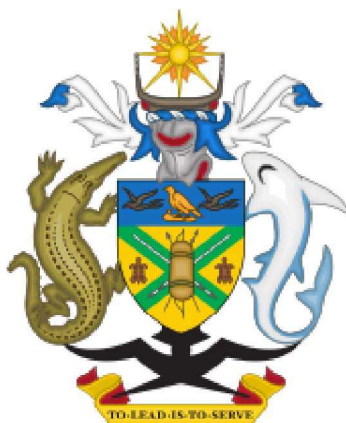


OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

SOLOMON ISLANDS



PROSECUTION POLICY

**OFFICE OF THE DIRECTOR OF PUBLIC
PROSECUTIONS**

SOLOMON ISLANDS

PROSECUTION POLICY

***WAKA BLONG OFIS BLO PROSIKIUSEN
LONG SOLOMON AELAN***

~ Policy current as at January 2022 ~

OUR VISION:

A safe and just Solomon Islands supported by a constitutionally independent public prosecution service under the rule of law.

OUR MISSION:

Delivering an independent, fair and effective prosecution service.

OUR VALUES:

- *Independence – We act only according to the law of Solomon Islands and in the public interest, without regard to inappropriate influences.*
- *Accountability – We are responsible for and report upon our actions, decisions and performance.*
- *Respect - We understand and value our diverse community and strive to meet its needs.*
- *Ethical and with integrity – We are fair to all, honest in all aspects of our work, always act in the best interests of justice, maintain confidentiality and practice our values in every aspect of our service.*
- *Efficiency – We will build, making best use of resources, high quality work practices and case management to meet deadlines, preparation and case completion requirements.*

INTRODUCTION

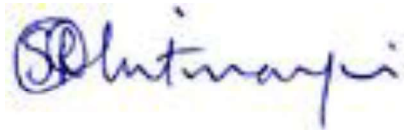
The Solomon Islands Office of the Director of Public Prosecutions (ODPP) is established under section 91(4) of the Constitution to institute and conduct criminal proceedings on behalf of the Crown (that is the Independent State of Solomon Islands). Cases are prepared and conducted by lawyers employed in the ODPP.

The Prosecution Policy provides guidelines for making decisions within the prosecution process. The Policy is based on the principles of fairness, openness, consistency, accountability and efficiency that the ODPP seeks to apply in prosecuting offences against the laws of the Solomon Islands. It outlines the principles upon which decisions are made by the Director in the institution and conduct of prosecutions. In doing so, the aim of the policy is to assist officers in ODPP, in the assessment and conduct of individual matters.

In providing a standard set of principles the Prosecution Policy also intends, at a broader level, to promote consistency and fairness in the exercise of discretion by the Director, and where appropriate ODPP officers, in the making of such decisions. Standard principles promote timely and efficient resolution of matters.

Furthermore, in accordance with the obligations of transparency and accountability, the publication of the Prosecution Policy is intended to inform persons affected by decisions made by the Director, including the public generally, of the principles upon which decisions are made and to make those principles known in advance.

The Prosecution Policy does not attempt to cover all questions that may arise in the prosecution process and the role of the prosecutor in their determination. It is sufficient to state that throughout a prosecution, the prosecutor must conduct himself or herself in a manner which will maintain, promote and defend the interests of justice. In the final analysis the prosecutor is not a servant of government or individuals - he or she is a servant of justice.



Rachel Olutimayin

Director of Public Prosecutions

Solomon Islands

21 January 2022



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1. ROLE AND DUTIES OF THE PROSECUTOR

- 1.1 The Office of the Director of Public Prosecutions (ODPP) is independent and represents the community and not any private or sectional interest.
- 1.2 The Director acts independently of the government and of political influence. It is only for cases that concern the defence, security or international relations of the Solomon Islands that the Director will act in accordance with any directions from the Minister responsible for justice: see section 91(7) of the Constitution.
- 1.3 The prosecutor owes a duty of fairness to the court and the community. The community's interest is two-fold: that those who are guilty are brought to justice and that those who are innocent are not wrongly convicted. The prosecutor's role is to assist the court and do justice between the community and the offender according to law and the principle of fairness.
- 1.4 A prosecutor:
- a) has a duty to act fairly and impartially.
 - b) represents the community, acting independently and in the public interest.
 - c) has the duty to ensure that the prosecution case is presented properly and with fairness to the accused.



- d) is entitled to firmly and vigorously urge the Crown view about a particular issue and to test the case advanced on behalf of an accused by all proper means provided by the criminal trial process which is an accusatorial and adversarial procedure.
- e) must offer all evidence relevant to the Crown case.
- f) has a continuing obligation of disclosure, including material that may assist the accused.
- g) must avoid submissions of fact that are not soundly based.
- h) must never seek to persuade a point of view by introducing prejudice.
- i) must not advance any argument that does not carry weight in his or her own mind or try to shut out any relevant evidence that would be important to the interests of the person accused;
- j) must inform the court of authorities or trial directions appropriate to the case, even where unfavorable to the prosecution.

1.5 The prosecution also has a right to be treated fairly and this right must not be overlooked. The prosecution must maintain that right in the interests of justice. This may mean, for example, that an adjournment must be sought when insufficient notice is given to the prosecution in the following situations: listing of cases; alibi evidence; representations by an unavailable person; or expert evidence to be called by the defence.



2. THE DECISION TO PROSECUTE

- 2.1 The decision to prosecute is the most important step in the prosecution process. Not everyone suspected or alleged to have committed a crime will be prosecuted. The decision to prosecute is a discretionary one and will involve consideration of a number of factors.

Step 1: Is there sufficient evidence?

- 2.2 A prosecution should not proceed unless there is sufficient evidence before a Magistrate or evidence capable of securing a conviction before a Judge: see sections 197 and 269 of the Criminal Procedure Code. This is essentially the prima facie test. It requires an assessment of all of the evidence. All elements of a charge must be satisfied.

Step 2: Is there a reasonable prospect of securing a conviction?

- 2.3 This requires an exercise in judgment and an evaluation of the available evidence and the strength of the prosecution case. The prosecutor is required to assess the quality and persuasive strength of the evidence as it is likely to be at trial.



2.4 It will require the consideration of all aspects of the evidence, including:

- a) admissibility of evidence, including any confessions;
- b) reliability of evidence, including identification;
- c) any possible defences;
- d) the extent of any contradictory evidence;
- e) competency of witnesses;
- f) compellability of witnesses;
- g) credibility of witnesses;
- h) availability of witnesses;
- i) whether witnesses will be unfavourable;
- j) any other factors relevant to the merits of the Crown case.

2.5 This list is not exhaustive and the matters to be considered will depend upon the circumstances of each individual case. None of the above matters should be viewed in isolation but rather in the context of the entire case.

Step 3: Is the prosecution in the public interest?

2.6 While there may be reasonable prospects of securing a conviction, there may be discretionary factors that dictate that a matter should not proceed. These factors may be varied and will depend upon an individual case.



2.7 Factors to consider in determining the public interest include:

- a) the seriousness or, conversely, the triviality of the alleged offence or that it is of a “technical” nature;
- b) any mitigating or aggravating circumstances;
- c) the youth, age, intelligence, physical health, mental health or special infirmity of the accused, a witness or victim;
- d) the antecedents and background of the accused;
- e) the risk of re-offending by the accused;
- f) the staleness of the alleged offence;
- g) delay and the effect of such delay, and any reasons for such delay;
- h) the degree of culpability of the alleged offender in connection with the offence;
- i) the effect on public order and morale;
- j) the obsolescence or obscurity of the law;
- k) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
- l) the availability and efficacy of any alternatives to prosecution;
- m) the prevalence of the alleged offence and the need for deterrence, both personal and general;
- n) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
- o) whether the alleged offence is of considerable public concern;



- p) any entitlement of the Crown or other person or body to criminal compensation, reparation, forfeiture or civil remedy if prosecution is taken;
- q) the attitude of the victim of the alleged offence to a prosecution and the interests of the victim – including whether the change of attitude has been activated by fear or intimidation;
- r) the likely length and expense of a trial;
- s) special circumstances that would prevent a fair trial being conducted;
- t) whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
- u) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court; and
- v) the necessity to maintain public confidence in such basic institutions as the Parliament and the Courts.

2.8 The applicability of and weight to be given to these and other factors will depend on the circumstances of each case.



Improper considerations

2.9 A decision whether to prosecute must not be influenced by:

- a) the race, religion, sex, national origin, social affiliation or political views;
- b) personal feelings concerning the accused or the victim;
- c) whether or not the accused has paid compensation or participated in reconciliation with the victim (see below);
- d) possible political advantage or disadvantage to the government or any political party, group or individual.
- e) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution or otherwise involved in its conduct;
- f) any possible media or community reaction to the decision.

Customary Law

2.10 Customary law including customary reconciliation practices are part of the daily lives of many Solomon Islanders. However, where there is a conflict between customary law and the Law of the Solomon Islands, the latter will prevail (Schedule 3, section 3(2) Constitution).



- 2.11 An accused person cannot avoid prosecution simply because they have paid compensation or participated in reconciliation with the victim. Customary reconciliation will also be relevant in the exercise of the court's sentencing powers.
- 2.12 A Magistrate may promote reconciliation for cases involving more minor criminal offences of a personal or private nature: see section 35(1) of the Magistrates' Courts Act. In such cases, the prosecutor should assist the court by ensuring that all relevant information about any alleged settlement of the matter is made available. The prosecutor is to ensure that the complainant understands what is happening and that they agree that the matter is settled.



3. THE DECISION TO PROSECUTE PARTICULAR CASES

Young Offenders

3.1 Special considerations apply to the prosecution of young offenders.

- The welfare of the young person and rehabilitation should be carefully considered;
- Ordinarily the public interest will not require the prosecution of a child who is a first offender where the offence is minor;
- The seriousness of the offence or serial offending will generally require a prosecution;
- Driving offences that endanger the child and other members of the community should be viewed seriously.

3.2 It is recognised that early encounters with the criminal justice system can damage the development of children. Consequently, a prosecution should be regarded as a severe measure to take against a young person. Prosecutors should consider diversionary options that may be available and appropriate in the circumstances.

3.3 The public interest factors should be considered with particular regard to:

- a) the seriousness of the offence;



- b) the age and apparent maturity and mental capacity of the young offender;
- c) the available alternatives to prosecution, and their efficacy;
- d) the sentencing options available to courts dealing with young offenders if the prosecution was successful
- e) the young offender's family circumstances, particularly whether the parents of the young offender appear able and prepared to exercise effective discipline and control over the young offender;
- f) the young offender's antecedents, including the circumstances of any previous caution the young offender may have been given, and whether they are such as to indicate that a less formal disposal of the present matter would be inappropriate;
- g) whether a prosecution would be likely to be harmful to the young offender or be inappropriate, having regard to such matters as the personality of the young offender and his or her family circumstances;
- h) the welfare and rehabilitation of the young offender.

3.4 A young person may be prosecuted for a sexual offence where the young person has exercised force, coerced someone younger, or otherwise acted without the consent of the other person. A young person should not be prosecuted for:

- a) a sexual offence in which he or she is also the “complainant”, as in the case of sexual intercourse or indecent act on a child. The underage



target of such activity cannot be a party to it, no matter how willing he or she is.

- b) for sexual experimentation involving young people of similar ages in consensual activity.

Mental Health Issues

3.5 Issues concerning the mental health of an offender may be raised at any time during the course of a prosecution. The public interest factors should be considered with particular attention to:

- a) the intelligence, mental health or special vulnerability of the offender;
- b) the seriousness or relative triviality of the alleged offence;
- c) the need for general and/or specific deterrence;
- d) whether the alleged offence is of considerable public concern.

3.6 Offenders with a mental disorder should not be prosecuted for trivial offences which pose no threat to the community. A prosecution may be warranted where there is a risk of re-offending by a repeat offender with no viable alternative to prosecution. Regard must be had to:

- a) details of previous and present offences;
- b) the nature of the offender's condition; and
- c) the likelihood of re-offending.



- 3.7 In rare cases, continuation of the prosecution may so seriously aggravate an offender's mental health that this outweighs factors in favour of the prosecution. Where the matter would clearly proceed but for mental deterioration, an independent assessment may be sought.
- 3.8 The separate issue of unfitness to be tried is usually raised with the court by the defence. However, the issue can also be raised by the accused personally or the prosecution. In the unusual circumstances where there is an obvious fitness issue, it should be raised by the prosecution.

Prosecution of Corporations

- 3.9 As a general rule, a reference in legislation to a person includes a reference to a corporation as well as an individual: see section 16 of the Interpretation and General Provisions Act. Consequently, a corporation may be liable for any criminal offence except those that by their nature cannot be committed by an artificial entity (for example sexual offences). There are also offences that apply solely to corporations.
- 3.10 The enforcement of the law against corporate offenders, where appropriate, will have a deterrent effect, protect the public, and support ethical business practices. Prosecuting corporations, where appropriate, will capture the full range of criminality involved. The prosecution of a corporation should not be seen as a substitute for the prosecution of criminally culpable



individuals such as directors, officers, employees, or shareholders. Prosecuting such individuals provides a strong deterrent against future corporate wrongdoing.

- 3.11 The fact that a corporation is insolvent does not preclude a prosecution of the corporation. On some occasions it will be appropriate to charge a natural person as an accessory to an offence committed by a corporation, notwithstanding that there is no charge against the corporation itself. This situation may be appropriate when a corporation has ceased to exist, or is in administration, liquidation or receivership.
- 3.12 When considering whether the prosecution of a corporation is in the public interest, particular regard should be had to:
- a) any history of similar conduct including prior warnings, sanctions or criminal charges;
 - b) whether the corporation's directors or high-level management engaged in the conduct or permitted the commission of the alleged offence.
 - c) whether the corporation had a corporate culture that required compliance with the law;
 - d) whether the corporation reported the wrongdoing within a reasonable time after the offending became known;



- e) an existing, genuinely proactive approach adopted by the corporation involving self-reporting and remedial actions, including compensation to victims;
- f) the availability of alternative civil or regulatory remedies;
- g) whether the offending represents actions of isolated individuals or was part of a corporate culture;
- h) if the offending is historical, whether the corporation in its current form is effectively a different body to that which committed the offences.

Prosecution of Foreign Nationals

3.13 Foreign nationals that commit offences in the Solomon Islands should be prosecuted, subject to considerations around diplomatic immunity. Different considerations apply to foreign nationals who would otherwise have no right or expectation to remain in the Solomon Islands after being dealt with.

3.14 Proceedings for the trial of a foreign national require leave of the Director that it is expedient that such proceedings be instituted: see section 126 of the Criminal Procedure Code.



- 3.15 The fundamental issue is whether there are good reasons that the foreign national should remain in the Solomon Islands temporarily for the purposes of the administration of criminal justice in relation to an offence.
- 3.16 When considering whether the prosecution of a foreign national is in the public interest, particular regard should be had to:
- a) the seriousness of the offence, particularly whether or not a custodial term of imprisonment is likely;
 - b) the likelihood that the foreign national being remanded in custody;
 - c) the length of time that the foreign national will likely remain in the Solomon Islands, the support available to the foreign national, and any matters personal to the foreign national;
 - d) the attitude of the complainant and informant;
 - e) the cost and availability of resources required for the prosecution;
 - f) the absence of issues of rehabilitation in sentencing, given that the foreign national will not be released back into the Solomon Islands community.



4. **TIMELINESS**

4.1 A fundamental obligation of the prosecution is to assist in the timely and efficient administration of justice. To this end:

- a) cases should be prepared for hearing as quickly as possible;
- b) cases involving child witnesses should be prioritised;
- c) an Information should be filed within 28 days from committal (see Part 5 of the ODPP Prosecution Policy);
- d) any amendment to an Information should be made known to the defence as soon as possible;
- e) a submission from defence should be responded to within 7 days (see Part 9 of the ODPP Prosecution Policy);
- f) a request for advice from an external agency should be completed within 28 days from receipt of the file (see Part 14 of the ODPP Prosecution Policy);
- g) the adjournment of any trial or other listing should be avoided by prompt attention to the form of the Information, the availability of witnesses and any other matter which may cause delay. Adjournments will not be sought by or acceded to by a prosecutor unless there are substantial reasons in favour of the adjournment.



5. COMPLAINTS AND INFORMATION

- 5.1 An Information can only be signed by the Director. The Attorney-General can sign an Information in the Director's absence: see 91(9) of the Constitution.
- 5.2 An Information should be presented within 28 days of a preliminary examination in the Magistrates Court.
- 5.3 Charges must adequately and appropriately reflect the criminality that can be reasonably proven. Prosecutors should select charges which:
- a) reflect the nature and extent of the criminal conduct; and
 - b) provide the court with an appropriate basis for sentence.
- 5.4 In the ordinary course the charge should be the most serious one disclosed by the evidence. In some instances, however, it may be appropriate to proceed with a charge which is not the most serious having regard to:
- a) the strength of the prosecution case;
 - b) probable lines of defence to a particular charge; and
 - c) the desirability of presenting the case in court in a clear and simple way.
- 5.5 It is not appropriate to overcharge to provide scope for plea negotiation.



- 5.6 In all cases, prosecutors must guard against the risk of unduly lengthy or complex trials (obviously there will be cases where complexity and length are unavoidable).
- 5.7 Substantive charges are to be preferred to conspiracy where possible. However, conspiracy may be the only appropriate charge in view of the facts and the need to reflect the overall criminality of the conduct alleged.

High Court Applications for Committal

- 5.8 A decision made by a Magistrate as to whether to commit an offender for trial does not absolve a prosecutor from independently reviewing the available evidence and deciding whether the matter should still proceed in the High Court.
- 5.9 The Director may apply to the High Court for a warrant for the arrest and committal for trial of an accused even when a Magistrate discharges the accused on a preliminary enquiry: see section 218 of the Criminal Procedure Code.
- 5.10 An application should only be made when it can be confidently asserted that the magistrate made an error in declining to commit, or fresh evidence has since become available and it can be confidently asserted that, if that



evidence had been available at the time of the committal proceedings, the magistrate would have committed the accused for trial.

5.11 A decision whether or not to make an application should be made within 1 month of the preliminary enquiry. The accused should be given an opportunity to make submissions. Applications may not be made after six months: see section 218(2) of the Criminal Procedure Code.

5.12 The Information is to be filed in the High Court Registry after an application is granted.



6. DISCLOSURE

6.1 The prosecutor is under a continuing obligation to make full disclosure to the accused to ensure a fair trial. This includes disclosure of all material which:

- a) is relevant or possibly relevant to an issue in the case, whether inculpatory or exculpatory;
- b) raises or possibly raises a new issue whose existence is not apparent from the evidence the prosecution proposes to use; and
- c) holds out a real as opposed to fanciful prospect of providing a lead to evidence which goes to (a) or (b) above.

6.2 The prosecutor is also under a duty to disclose to the defence information in its possession which is relevant to the credibility or reliability of a prosecution witness, for example:

- a) a relevant previous conviction or finding of guilt;
- b) a statement made by a witness which is inconsistent with any prior statement of the witness;
- c) a relevant adverse finding in other criminal proceedings or in non-criminal proceedings;
- d) evidence before a court or tribunal which reflects adversely on the witness;



- e) any physical or mental condition which may affect reliability;
- f) any concession which has been granted to the witness in order to secure the witness's testimony for the prosecution.

6.3 The prosecutor must fulfil the duty of disclosure as soon as reasonably practicable. The duty of disclosure continues throughout the prosecution process and any subsequent appeal.

6.4 In fulfilling its disclosure obligations, the prosecution must have regard to the protection of the privacy of victims and other witnesses. It is for the prosecutor to make an assessment of information to be disclosed. The prosecution should be cautious about disclosing personal information, including the address or telephone number of any person.

6.5 The prosecution duty of disclosure does not extend to disclosing material:

- a) relevant only to the credibility of defence (as distinct from prosecution) witnesses;
- b) relevant only to the credibility of the accused;
- c) relevant only because it might deter an accused from giving false evidence or raising an issue of fact which might be shown to be false; or
- d) for the purpose of preventing an accused from creating a forensic disadvantage for himself or herself, if at the time the prosecution



became aware of the material it was not seen as relevant to an issue in the case or otherwise disclosable.

6.6 The prosecution may refuse to disclose material on the ground of public interest immunity:

- a) the material is clearly irrelevant;
- b) to prevent the identification of an informer;
- c) to protect the safety or security of persons who have supplied information to Police;
- d) the material if disclosed could prejudice an ongoing investigation, or facilitate the commission of other offences;
- e) the material discloses Police methods that are not a matter of public knowledge;
- f) the material relates to internal workings of the Royal Solomon Islands Police Force;
- g) the material was supplied to Police on condition that it would not be disclosed; or
- h) the material relates to national security.

6.7 These circumstances will be rare and information should only be withheld with the approval of the Director. The prosecutor must inform defence of the claim of public interest immunity and the basis for that claim. Where a



claim for public interest immunity is made before a court then the question of disclosure will be settled by that court.

6.8 Legal professional privilege will ordinarily be claimed against the production of any document in the nature of an internal ODPP advice or opinion.

6.9 Sensitive evidence is that which contains an image of a person which is obscene or indecent or would otherwise violate the person's privacy. It will include videotaped interviews with complainants of sexual offences containing accounts of sexual activity, pornography, child computer games, and police photographs of naked complainants.

6.10 Sensitive evidence:

- must not be copied, other than for a legitimate purpose connected with a proceeding;
- must be made available for viewing by the defence upon a request if, the evidence is relevant to either the prosecution or defence case;
- may be made available for analysis by an appropriately qualified expert (for the prosecution or defence). Such release must first be authorised by the Director, upon such conditions as thought appropriate.



6.11 In appropriate cases a prosecutor may conditionally disclose sensitive material to the defence on the basis of a defence undertaking not to disclose the material to parties other than the accused and his counsel.



7. VICTIMS

- 7.1 A victim is a person who has suffered harm either as a direct result of an unlawful act or as an immediate family member, or dependant, of the direct victim.
- 7.2 The ODPP will treat victims with courtesy, compassion and respect. The ODPP will also treat a victim in a way that is responsive to his or her age, gender, ethnic, cultural or linguistic diversity, disability or other special needs.
- 7.3 The ODPP will protect a victim's privacy as far as possible and will take into account the victim's welfare at all appropriate stages.
- 7.4 Victims should be informed in a timely manner of:
- a) charges laid or reasons for not laying charges;
 - b) any decision to change, modify or not proceed with charges laid and any decision to accept a plea to a less serious charge;
 - c) the date and place of hearing of any charge laid; and
 - d) the outcome of proceedings, including appeal proceedings, and sentence imposed.



- 7.5 Where a victim is to be called as a witness, the prosecutor is to hold a conference with the victim beforehand.
- 7.6 The views of victims will be sought, considered and taken into account in making decisions about prosecutions. The victim's views are important but will not alone be determinative. It is the general public, not any private individual or sectional, interest that must be served.
- 7.7 The views of a victim should be recorded on the ODPP file.
- 7.8 A victim impact statement is evidence before the court on sentence and should be tendered in the sentencing process. Where a victim impact statement has been received by the prosecution and the victim consents to its presentation, the prosecutor must present the document to the court before it sentences an offender in relation to the offence. A copy should be provided to the defence.
- 7.9 When a victim has suffered a loss that can be supported by documentation, the prosecutor will seek a compensation order from the court at sentence: see section 27 of the Penal Code.



8. WITNESSES

Selection of witnesses

- 8.1 In deciding whether or not to call a particular witness the prosecutor must be fair to the accused. The general principle is that the Crown should call all witnesses capable of giving evidence relevant to the guilt or innocence of the accused.
- 8.2 The prosecutor should not call:
- unchallenged evidence that is merely repetitious; or
 - a witness who the prosecutor believes on reasonable grounds to be unreliable. The mere fact that a witness contradicts the Crown case will not constitute reasonable grounds.
- 8.3 The defence should be informed at the earliest possible time of the decision not to call a witness who might otherwise reasonably be expected to be called. Where appropriate the witness should be made available to the defence.



Child Witnesses

- 8.4 All cases involving child witnesses must be prioritised.
- 8.5 The prosecutor is to ensure that a child witness is appropriately prepared and supported for his or her appearance in court. Child witnesses are to be treated in a manner consistent with the provisions of the UN Convention on the Rights of the Child.
- 8.6 Child witnesses under the age of 5 years must be met by the prosecutor before a matter is listed for trial. A witness support officer will also attend the meeting. If there are any concerns regarding competency of the witness, the prosecutor must raise it immediately with the Director.
- 8.7 Prosecutors should ensure that they are familiar with the legislated provisions available for children to give evidence at court. Consideration should be given to the use of protective measures. The orders sought in all matters where children are witnesses will include:
- a) restriction on the publication of the name of the child and the accused;
 - b) closure of the court when they give evidence; and
 - c) for sexual and domestic violence offences, the screening of an accused from their sight (for example, video conferencing facilities or screens).



Vulnerable adult witnesses

- 8.8 A vulnerable witness has a wide definition: see section 41 of the Evidence Act 2009. It includes any person whose capacity to give evidence may be limited. It may include victims or witnesses of particular types of offences, and witnesses with a disability (for example, intellectual disability, physical disability, sensory disability or psychiatric disability).
- 8.9 Consideration should be given to the use of available measures (for example, screens, closed courts, restriction on the publication of the witness's identity) for giving evidence that could assist vulnerable adult witnesses, particularly in matters related to personal violence or sexual assault.

Witness conferences

- 8.10 There is an obligation upon prosecutors to confer with witnesses at the earliest available opportunity before all court hearings. Conferences allow prosecutors to obtain information from and about witnesses on evidentiary issues. It is also an opportunity to provide witnesses and victims relevant information about the criminal proceedings.
- 8.11 In sexual assault matters, complainants should be informed of the requirement to recount in precise detail the sexual assault, including



explicit and detailed acts of sexual intercourse and sexual penetration. Complainants are to be informed that the reason for that is to enable the prosecution to prove all of the elements of the offence.

8.12 Conferences should also be conducted for the purpose of informing victims of charge negotiations and to discuss any statements of agreed facts. Victims may wish to have the presence of a support person during a conference.

8.13 Early conferences allow for more effective screening of cases and more accurate disclosure of relevant material. Notes taken during conferencing with all witnesses are subject to disclosure obligations: see Part 6 of the ODPP Prosecution Policy.

Expert witnesses

8.14 When a prosecutor proposes to call a government medical officer or other expert as a witness, all reasonable efforts should be made to ensure that the witness is present at court no longer than is necessary to give the required evidence.



Interpreters

- 8.15 Care must be taken to ensure that every prosecution witness who needs an interpreter to testify has an appropriate interpreter.

Improper questions

- 8.16 Prosecutors have a responsibility to protect witnesses, particularly youthful witnesses, against threatening, unfair or unduly repetitive cross-examination by making proper objection: see section 66 of the Evidence Act 2009.
- 8.17 Questions should be framed in language that the witness understands. Prosecutors need to be particularly sensitive to the manner of questioning children and intellectually disabled witnesses.
- 8.18 Generally, questions about previous sexual activities of a complainant will be irrelevant and inadmissible and should be objected to by the prosecutor: see section 58 of the Evidence Act 2009.



9. CHARGE NEGOTIATIONS

- 9.1 There are obvious benefits to the criminal justice system resulting from a plea of guilty. The earlier a plea of guilty is entered, the greater will be the benefits. An early plea of guilty will maximise the benefits to the victim and the community.
- 9.2 Negotiations between the parties are encouraged and may occur at any stage in the court process. Charge negotiations must be based on principle and reason, not on expedience or convenience alone. Submissions that a charge should be discontinued or reduced should be assessed against the test set out in Part 2 of the ODPP Prosecution Policy (The Decision to Prosecute).
- 9.3 All submissions from defence should be made in writing. Any submissions from defence must be dealt with within 7 days. A written record of any charge negotiation must be kept, no matter the outcome.
- 9.4 A negotiated plea of guilty may be considered if the public interest is satisfied, taking into account the following matters:
- a) whether the alternative charge adequately reflects the essential criminality;
 - b) whether the evidence is deficient in some material way;



- c) the saving of cost and time weighed against the likely outcome of a trial;
- d) saving a witness, particularly a victim or other vulnerable witness, from the stress of testifying in a trial;
- e) the views of the police or other referring agency;
- f) the staleness of the alleged offence or age of the file; and
- g) the views of the victim, where those views are available and if it is appropriate to take those views into account.

9.5 A negotiated plea of guilty will normally not be appropriate where:

- a) its acceptance would produce a distortion of the facts and create an artificial basis for sentencing;
- b) its acceptance would render inadmissible facts essential to establishing the criminality of the conduct;
- c) the offender intimates that he or she is not guilty of the offence; or
- d) an offender will avoid a mandatory term.

9.6 In all cases, the views of the victim and the investigating officer must be sought. Those views must be recorded on the file and made available to the Director (or the Attorney-General in the Director's absence) when making the decision. The views of the victim and the investigating officer are



important but not determinative in deciding whether to accept a negotiated plea of guilty.

- 9.7 Only the Director (or the Attorney-General in consultation with the Deputy Director, in the Director's absence) may approve a negotiated plea of guilty. In cases which are serious or potentially contentious, or involving the death of any person, no acceptance of any plea offer to lesser or fewer charges shall occur without the consent of the Director.
- 9.8 A statement of agreed facts must be settled before a negotiated plea is accepted.
- 9.9 Where the appropriate review has occurred, documented on the file and the plea is approved, a prosecutor may accept a negotiated plea of guilty.
- 9.10 When a plea is offered by a person in a case involving multiple accused, consideration must be given to the consequences of the acceptance of the plea for the case against the remaining accused.



10. DISCONTINUING PROSECUTIONS

- 10.1 Every decision to discontinue a prosecution or to substantially alter charges will be made by the Director (or the Attorney-General in the Director's absence). There are 2 mechanisms by which a prosecution can be discontinued:
- a) High Court proceedings are discontinued by entering a *nolle prosequi*: see section 68 of the Criminal Procedure Code.
 - b) Magistrates Court prosecutions are discontinued by withdrawal of the complaint: see section 190 of the Criminal Procedure Code.
- 10.2 The effect of entering a *nolle prosequi* in the High Court is that charges can be re-laid if the prosecution decides to latter continue with the matter. For withdrawal of a complaint in the Magistrates Court, the Magistrate has a discretion to discharge or acquit the accused. An acquittal precludes the complaint from being re-laid. If the accused is discharged, the prosecution may be recommenced if circumstances or evidence has changed and statutory limitation periods have not expired.
- 10.3 All current cases must be continually reviewed. New evidence or information may become available which makes it no longer appropriate for the prosecution to proceed.



- 10.4 In all cases, the views of the victim and the investigating officer must be sought. Those views must be recorded on the file and made available to the Director (or Attorney-General) when making the decision. The views of the victim and the investigating officer are important but not determinative in deciding whether to accept a negotiated plea of guilty.
- 10.5 When the prosecutor seeks to discontinue a prosecution, a memorandum must be completed and referred to the Director (or Attorney-General). The memorandum must include:
- a) the charges laid by the informant and/or the charges on which the accused has been committed for trial;
 - b) a copy of any defence application or request;
 - c) a summary of the facts of the case sufficient to permit a proper consideration of the request;
 - d) the views of the investigating officer and the victim and/or a note as to attempts made to obtain those views; and
 - e) the prosecutor's recommendation supported by reasons.
- 10.6 The Director (or Attorney-General) will decide whether it is desirable to discontinue a prosecution: see section 91(4) of the Constitution. After a decision has been made to discontinue a prosecution, the prosecutor must



notify the investigating officer, the complainant, defence counsel and the court of the decision as soon as practicable.

10.7 The decision to discontinue is final unless:

- a) significant fresh evidence has been produced that was not previously available at the time the decision was made;
- b) the decision was affected by fraud; or
- c) the decision was based on a mistake of law or fact; and
- d) in all the circumstances it is in the interests of justice that the decision be reversed.

Retrials

10.8 Where a conviction has been quashed on appeal and a re-trial ordered, the prosecutor on appeal should promptly consider whether a re-trial is appropriate or viable. Relevant factors include:

- a) why the Court of Appeal or High Court ordered a re-trial;
- b) whether the situation is likely to arise again;
- c) the attitude of the complainant;
- d) the seriousness of the offence; and
- e) the cost of re-trial (to the community and the accused).



11. REASONS FOR DECISIONS

- 11.1 Reasons for decisions made in the course of prosecutions may be disclosed by the Director to persons outside of the ODPP. The disclosure of reasons for prosecution decisions is consistent with the open and accountable operations of the ODPP.
- 11.2 Reasons will only be given when the inquirer has a legitimate interest in the matter and it is otherwise appropriate to do so. A legitimate interest includes the interest of the media in the open dispensing of justice where proceedings have been public.
- 11.3 Reasons for not prosecuting must be given to the victims of crime.
- 11.4 Reasons will not be given in any case where to do so would cause unjustifiable harm to a victim, a witness or an accused or would significantly prejudice the administration of justice.



12. SENTENCING

12.1 The prosecutor has an active role to play in the sentencing process.

12.2 It is the duty of the prosecutor to make submissions on sentence to:

- a) inform the court of all relevant circumstances of the case. This will always include a careful presentation of the crown facts.
- b) provide an appropriate level of assistance on the sentencing range. The prosecutor must be aware of any legal limitations on sentence, the maximum sentence, whether the court has jurisdiction to impose any particular sentence, and any regular “tariffs” or guideline cases prior to sentencing. This must be brought to the attention of the sentencing court to help it to arrive at a just and proper sentence.
- c) inform the court of any relevant authorities and legislation relevant to the appropriate sentence;
- d) assist the court to avoid appealable error. If it appears there is a real possibility that the court may make a sentencing order that would be inappropriate and not within a proper exercise of the sentencing discretion, then the prosecutor must make submissions on that issue – particularly where a custodial sentence is appropriate and the court is contemplating a non-custodial penalty.
- e) fairly test the opposing case as required.



- 12.3 The prosecutor has a duty to do all that can reasonably be done to ensure that the court acts only on truthful information. Vigilance is required not just in the presentation of the crown case but also in the approach taken to the defence case. Opinions, their underlying assumptions and factual allegations, should be scrutinised for reliability and relevance.
- 12.4 When matters advanced in mitigation can be proven wrong, it is the duty of the prosecutor to inform the defence accordingly. If the defence persist, it becomes the responsibility of the prosecutor to invite the court to put the defence to proof of the disputed material and if necessary to hear rebutting evidence.
- 12.5 Cooperation by convicted persons with law enforcement agencies should be appropriately acknowledged and, if necessary, tested at the time of sentencing.
- 12.6 The prosecutor must ensure that any antecedents is current as at the date of sentence. The prosecutor must inform the court of the offender's criminal history and any facts of entries within the criminal history which may affect the assessment of sentence, whether mitigating or aggravating in character.
- 12.7 Customary reconciliation will be a factor relevant in the exercise of a court's sentencing powers. In such cases, the prosecutor must confirm that compensation has been paid or reconciliation made. This is particularly



important for serious offences when defence urge substantial leniency based on customary law or reconciliation. The prosecutor must ensure that all information before the court is accurate. This may require cross-examination of witnesses or the calling of evidence from a suitably qualified person.

- 12.8 The prosecutor should not in any way fetter the discretion of the Director to appeal against the inadequacy of a sentence (including by informing the court or defence whether or not the Director would, or would be likely to, appeal, or whether or not a sentence imposed is regarded as appropriate and adequate). The Director's instructions may be sought in advance in exceptional cases.



13. IMMUNITIES

- 13.1 Generally, an accomplice should be prosecuted regardless of whether he or she is to be called as a prosecution witness. An accomplice who pleads guilty and agrees to testify against a co-offender may receive a sentencing discount for that cooperation. There will be cases, however, where the accomplice cannot be prosecuted. The issue of immunity most commonly arises where there is no evidence admissible against the accomplice, but he or she has provided an induced statement against the accused.
- 13.2 The Director has the power to grant immunity from prosecution.
- 13.3 The immunity will usually be in the form of an undertaking (not to use the witness's evidence in a prosecution against the witness, or to use that evidence to obtain other evidence against the witness). The immunity may also be an indemnity (complete protection for nominated offences). Protection in either form will be dependent upon the witness giving truthful evidence. It is a last resort only to be pursued when the interests of justice require it.
- 13.4 Any application should be through the Director (or the Attorney-General in consultation with the Deputy Director, in the Director's absence).



13.5 Factors to be taken into account when considering whether immunity should be sought are:

- a) the culpability of the witness;
- b) is the witness seeking immunity significantly less culpable than the accused?
- c) is the evidence considered necessary to secure the conviction of the accused?
- d) whether or not that evidence is available from another source;
- e) the strength of the prosecution case without the evidence;
- f) the extent to which the prosecution case will be strengthened by the evidence;
- g) the extent to which weaknesses in the case will be overcome by the evidence;
- h) is the witness willing to give evidence without immunity?
- i) the witness's reliability and credibility. Can their evidence be corroborated?
- j) the strength of the case against the witness seeking immunity;
- k) if the witness was prosecuted and gave evidence the real risk of personal safety if serving a term of imprisonment; and
- l) if it is in the interests of justice that the witness not be prosecuted so as to enable him or her to give evidence against the accused.



13.6 The witness statement must exist in some form before an application for immunity is made. The application can only be considered in respect of completed criminal conduct. Any form of immunity granted does not operate to cover future conduct.

13.7 The application must summarise:

- a) the witness' attitude to testifying without immunity;
- b) the witness' attitude to testifying with immunity;
- c) the existing prosecution case against the accused (without immunity for the witness);
- d) the evidence which the witness is capable of giving (including the significance of that evidence and independent support for its reliability);
- e) the involvement and culpability of the proposed witness;
- f) public interest issues: including the comparative seriousness of the offending as between the accused and the witness; whether the witness could and should be prosecuted (e.g. what is the quality of the evidence admissible against the witness and the strength of any prosecution case against him or her); and
- g) reasons why the applicant believes that the application should be granted.



13.8 Where immunity is provided to a witness, the terms of the undertaking or indemnity should be disclosed to the defence.



14. ADVICE TO EXTERNAL AGENCIES

- 14.1 The ODPP prosecutes and the police and other external agencies investigate. The RSIPF or another agency may seek the advice of the ODPP on the decision to prosecute in a particular case. A full brief of evidence must accompany each request.
- 14.2 The ODPP may advise investigators in relation to the sufficiency of evidence to support of nominated charges and the appropriateness of charges, including the public interest factors. The ODPP will not provide advice in relation to operational issues, the conduct of investigations or the exercise of police or agency powers.
- 14.3 The final recommendation will be:
- a) that the institution of criminal charges is recommended and the external agency should proceed to charge the accused person; or
 - b) that there is further investigation required before proceedings should be instituted; or
 - c) that the institution of criminal charges is not recommended.
- 14.4 The ODPP will provide its advice within 28 days. However, if the advice is required urgently all attempts will be made to complete the advice in a shorter period.



- 14.5 All advice must be approved by the Director (or the Attorney-General in consultation with the Deputy Director, in the Director's absence).
- 14.6 The finalised advice will be communicated by letter to the relevant person or agency seeking the advice. A brief statement of reasons may be provided. The prosecutor should follow up with the external agency within 14 days to ensure that the advice has been acted on.
- 14.7 Where there is insufficient material to enable a decision to be made, a request for additional material may be made. In such matters, the brief of evidence will be returned to the relevant person or agency with a letter requesting what additional material is required.
- 14.8 The advice is subject to legal professional privilege. Neither the opinion nor detailed reasons for the opinion will be disclosed to persons outside the ODPP without the prior consent of the Director.



15. UNREPRESENTED ACCUSED

- 15.1 A prosecutor must take particular care when dealing with an unrepresented accused. There is an added duty of fairness and the prosecution must keep the accused properly informed of the prosecution case. At the same time the prosecution must avoid becoming personally involved.
- 15.2 Staff should seek to avoid contact with an unrepresented accused unless accompanied by a witness.
- 15.3 Full notes should be promptly made in respect of:
- any oral communication;
 - all information and materials provided to the accused; and
 - any information or material provided by the accused.
- 15.4 The prosecutor should not advise the accused about legal issues, evidentiary issues or the conduct of the defence. But the prosecutor should be alert to the judge's duty to do what is necessary to ensure that the unrepresented accused has a fair trial.
- 15.5 Any admissions made to ODPP staff or any communication of concern should be recorded and mentioned in open court as soon as possible.



15.6 For any vulnerable witnesses, the prosecutor should ask the court to intervene and make an order for the witnesses to be cross examined by a lawyer or court official to avoid the unrepresented accused from cross examining the witness: see section 42 of the Evidence Act 2009.



16. PRIVATE PROSECUTIONS

- 16.1 Not all prosecutions are initiated by police officers or other officials acting in the course of their public duty. The right of a private individual to institute a prosecution is a valuable constitutional safeguard. Nevertheless, the right is open to abuse and to the intrusion of improper personal or other motives.
- 16.2 The Director may take over a matter pursuant to section 91(4) of the Constitution. The object of having a Director of Public Prosecutions is to ensure manifest integrity, neutrality and consistency in the making of prosecutorial decisions and the conduct of prosecutions.
- 16.3 Proceedings may be taken over if:
- a) the investigating police officer so requests and there is a sound basis for doing so;
 - b) there is no reasonable prospect of conviction;
 - c) they appear to be frivolous or vexatious or brought for an inappropriate ulterior purpose;
 - d) they appear to have arisen out of a conflict of a predominantly civil nature and/or a civil legal remedy may be available;
 - e) they have been brought contrary to advice or a decision by the Director not to proceed;



- f) they have been instituted by Police or a private person and there appears to be a conflict of interest or the risk of unfairness arising from their conduct of the prosecution; and
- g) the public interest requires it, having regard (for example) to the gravity of the offence, its connection with another offence being prosecuted by the ODPP and all the surrounding circumstances.

16.4 The Director is to be provided with an assessment as to whether to take over the private prosecution. If time reasonably permits prior to taking over the prosecution, the Director will make a decision about the future course of the proceedings (for example, to continue or discontinue the proceedings).

16.5 If a decision is made to take over a private prosecution, the prosecutor is to inform the court and the complainant before the next court appearance. The mere act of appearing before a court in a prosecution or proceeding (including an appeal) in respect of an offence will constitute the taking over of that matter by the Director: see section 72 of the Criminal Procedure Code.



17. PROSECUTION APPEALS

17.1 Prosecution appeals are and ought to be rare, as an exception to the general conduct of the administration of criminal justice they should be brought to enable the courts to establish and maintain adequate standards of punishment for crime, to enable errors to be corrected and to correct sentences that are so disproportionate to the seriousness of the crime as to lead to a loss of confidence in the administration of criminal justice.

17.2 If an appeal is to be instituted, it must be done promptly:

- An appeal from a Magistrates Court decision to the High Court is to be lodged within 14 days: see section 285(1) of the Criminal Procedure Code.
- An appeal from a High Court decision to the Court of Appeal is to be filed within 30 days: see section 26 of the Court of Appeal Act.

Appeals against acquittals

17.3 The Director has the power to appeal an acquittal. However, this power will only be exercised in special or exceptional circumstances and in accordance with the law.



- 17.4 In making a decision to appeal an acquittal the Prosecutor must identify an error of law and balance that against the constitutional right of a person not to be retried for an offence of which they have been acquitted.
- 17.5 If a decision to acquit is considered to be appealable, a report should be provided promptly to the Director for determination of whether or not an appeal will be instituted.

Appeals against sentence

- 17.6 In every case, the prosecutor must assess the sufficiency of the sentence imposed. If it is considered to be appealable or it is a matter likely to attract significant public interest, a report should be provided promptly to the Director for determination of whether or not an appeal will be instituted.
- 17.7 In determining whether or not to appeal against a sentence imposed by a judge or magistrate, the Director will have regard to the following matters:
- a) whether or not the sentencer made a material error of law or fact, misunderstood or misapplied proper sentencing principles, or wrongly assessed or omitted to consider some salient feature of the evidence, apparent from the remarks on sentence.
 - b) manifest inadequacy of the sentence which may imply an error of principle by the sentencer.



- c) the range of sentences (having regard to official statistics and comparable cases) legitimately open to the sentencer on the facts.
- d) the conduct of the proceedings at first instance, including the prosecution's opportunity to be heard and the conduct of the case.
- e) the appeal court's residual discretion not to intervene, even if the sentence is considered too lenient, and/or
- f) whether the appeal is considered likely to succeed.

17.8 In addition to the above matters, prosecutors should be aware that:

- a) the appellate court will intervene only where it is clear that the sentencer has made a material error of fact or law or has imposed a sentence that is manifestly inadequate (which in the exercise of discretion may still not be sufficient cause);
- b) the appellate court will take into account the advantages enjoyed by the sentencer which are denied to it;
- c) the appellate court will not be concerned whether or not it would have found the facts differently, but will consider whether or not it was open to the sentencer to find the facts as he or she did; and
- d) apparent leniency or inadequacy alone may not be enough to justify appellate correction.



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