

# **PROSECUTION POLICY**

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## PREFACE

Crime cannot be allowed to undermine the constitutional democracy in South Africa. Therefore, at the highest level, the objectives of the National Prosecuting Authority are to contribute to a better life for all by ensuring justice in our society so that people can live in freedom and security.

In order to contribute to the freedom and security of the community, the National Prosecuting Authority needs to contribute to the reduction in crime and to a culture of civic morality and thereby enhancing public confidence in the criminal justice system.

Furthermore, the National Prosecuting Authority must treat its customers, which include victims, witnesses and complainants, in accordance with the Bill of Rights and ensure access to the prosecuting service.

The National Prosecuting Authority is part of the bigger criminal justice system and therefore needs to enhance cooperation within such broader system.

This Prosecution Policy is aimed at promoting the considered exercise of authority by prosecutors and contributing to the fair and even-handed administration of the criminal laws.

This Policy is the end result of a process of intense consultation amongst all prosecutors in the country. It was also circulated to a number of criminal justice organisations, government departments, academic institutions and community organisations. The wealth of their combined knowledge and experience has helped significantly to shape the contents of this document.

This Prosecution Policy was revised in 2006 after a country-wide consultation process. It was reviewed again in 2010 and amended in June 2013.

## 1. INTRODUCTION

Section 179 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as "the Constitution"), read with sections 2 and 4 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (hereinafter referred to as "the NPA Act"), provides for a single National Prosecuting Authority ("the NPA"), consisting of—

- the National Director of Public Prosecutions ("the National Director"), who is the head of the NPA;
- Deputy National Directors of Public Prosecutions;
- Directors of Public Prosecutions;
- Deputy Directors of Public Prosecutions; and
- Prosecutors.

As an organ of state the NPA must give effect to the laws of the country; as an instrument of

justice it must, in accordance with its constitutional obligation, exercise its prosecutorial functions independently without fear, favour or prejudice.

The NPA has the power and responsibility to institute and conduct criminal proceedings on behalf of the State and to carry out any necessary functions incidental thereto.

The Constitution requires the National Director to determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, a "*prosecution policy which must be observed in the prosecution process*". The Policy is binding on the NPA.

The NPA Act also requires that the *United Nations Guidelines on the Role of Prosecutors* should be observed.

The NPA Act required that the first Prosecution Policy be tabled in Parliament. Amendments to the Policy must be included in the National Director's annual report to the Minister, which report must be tabled in Parliament.

The NPA is accountable to Parliament and ultimately to the people it serves. Every prosecutor is accountable to the National Director who, in turn, is responsible for the performance of the NPA.

The law gives a discretion to the NPA and individual prosecutors with regard to how they perform their functions, exercise their powers and carry out their duties. This discretion must, however, be exercised according to the law and within the spirit of the Constitution.

## **2. PURPOSE OF POLICY PROVISIONS**

The aim of this Prosecution Policy is to set out, with due regard to the law, the way in which the NPA and individual prosecutors should exercise their discretion.

The purpose of this Prosecution Policy is, therefore, to guide prosecutors in the way they should exercise their powers, carry out their duties and perform their functions. This will serve to make the prosecution process more fair, transparent, consistent and predictable.

By promoting greater consistency in prosecutorial practices nationally, these policy provisions will contribute to better training of prosecutors and better coordination of investigative and prosecutorial processes between departments.

Since the Prosecution Policy is a public document, it will also inform the public about the principles governing the prosecution process and so enhance public confidence.

These principles have been written in general terms to give direction rather than to prescribe. They are meant to ensure consistency by preventing unnecessary disparity, without sacrificing the flexibility that is often required to respond fairly and effectively to local

conditions.

### **3. ROLE OF PROSECUTOR**

Prosecutors must at all times act in the interest of the community and not necessarily in accordance with the wishes of the community.

The prosecutor's primary function is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based upon the evidence presented. At the same time, prosecutors represent the community in criminal trials. In this capacity, they should ensure that the interests of victims and witnesses are promoted, without negating their obligation to act in a balanced and honest manner.

The prosecutor has a discretion to make decisions which affect the criminal process. This discretion can be exercised at specific stages of the process, for example—

- the decision whether or not to institute criminal proceedings against an accused person;
- the decision whether or not to withdraw charges or stop the prosecution;
- the decision whether or not to oppose an application for bail or release by an accused person who is in custody following arrest;
- the decision about which crimes to charge an accused person with and in which court the prosecution should be instituted;
- the decision whether or not to enter into a plea or sentence agreement;
- the decision whether or not the case should be diverted;
- the decision whether or not to accept a plea of guilty tendered by an accused person;
- the decision about which evidence to present during the trial;
- the decision about which evidence to present during sentence proceedings, in the event of a conviction; and
- the decision whether or not to appeal to a higher court in connection with a question of law, an inappropriate sentence or the improper granting of bail, or to seek review of proceedings.

A member of the NPA must serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law. They should not allow their judgment to be influenced by factors such as their personal views regarding the nature of the offence or the race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth of the victim, witnesses or the offender.

Prosecutors must be courteous and professional when dealing with members of the public or other people working in the criminal justice system.

## A. General

The process of establishing whether or not to prosecute usually starts when the police present a docket to the prosecutor. This often happens after the suspect has been arrested. The case needs to be studied to make sure that it is properly investigated.

The prosecutor must consider whether to—

- request the police to investigate the case further;
- institute a prosecution;
- enter into a plea or sentence agreement;
- decline to prosecute and to opt for pre-trial diversion or other non-criminal resolution; or
- decline to prosecute without taking any other action.

The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused persons and their families. A wrong decision may also undermine the community's confidence in the prosecution system and the criminal justice system as a whole.

Resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy of prosecution.

In deciding whether or not to institute criminal proceedings against an accused person, prosecutors must assess whether there is sufficient and admissible evidence to provide a **reasonable prospect of a successful prosecution**. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued.

This assessment may be difficult, because it is never certain whether or not a prosecution will succeed. In borderline cases, prosecutors should probe deeper than the surface of written statements.

Where the prospects of success are difficult to assess, prosecutors must consult with prospective witnesses in order to evaluate their reliability. The version or the defence of an accused person must also be considered, before a decision is made.

This test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution. However, prosecutors should not make unfounded assumptions about the potential credibility of witnesses.

The review of a case is a continuing process. Prosecutors must take into account changing circumstances and fresh facts, which may come to light after an initial decision to prosecute or not to prosecute has been made.

This may occur after having heard and considered the version of the accused person and representations made on his or her behalf. Prosecutors may therefore withdraw charges before the accused person has pleaded in spite of an initial decision to institute a prosecution.

## **B. Factors to be considered when evaluating evidence**

When evaluating the evidence, prosecutors must take into account all relevant factors, including—

### ***How strong is the case for the State?***

- Is the evidence strong enough to prove all the elements of an offence?
- Is the evidential material sufficient to meet other issues in dispute?

### ***Will the evidence be admissible?***

- Will the evidence be excluded, because of the way in which it was acquired or because it is irrelevant or because of some other reason?

### ***Will the state witnesses be credible?***

- What sort of impression is the witness likely to make?
- Are there any matters, which might properly be put by the defence to attack the credibility of the witness?
- If there are contradictions in the accounts of witnesses, do they go beyond the ordinary and expected, thus materially weakening the prosecution case?

### ***Will the evidence be reliable?***

- If, for example, the identity of the alleged offender is likely to be an issue, will the evidence of those who purport to identify him or her be regarded as honest and reliable?

### ***Is the evidence available?***

- Are the necessary witnesses available, competent, willing and, if necessary, compellable to testify, including those who are out of the country?

### ***How strong is the case for the defence?***

- Is the probable defence of the accused person likely to lead to his or her acquittal in the light of the facts of the case?

## **C. Prosecution in the public interest**

Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise.

There is no rule in law stating that all the provable cases brought to the attention of the NPA must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice.

When considering whether or not it will be in the public interest to prosecute, prosecutors must consider all relevant factors, including:

***The nature and seriousness of the offence:***

- The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused person and the victim.
- The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.
- The impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public.
- The likely outcome, in the event of a conviction, having regard to sentencing options available to the court.

***The interests of the victim and the broader community:***

- The attitude of the victim of the offence towards a prosecution and the potential effects of discontinuing it. Care must be taken when considering this factor, since public interest may demand that certain crimes should be prosecuted - regardless of whether or not a complainant wishes to proceed.
- The need for individual and general deterrence, and the necessity of maintaining public confidence in the criminal justice system.
- Prosecution priorities as determined from time to time, the likely length and expense of a trial and whether or not a prosecution would be deemed counter-productive.

***The circumstances of the offender:***

- The previous convictions of the accused person, his or her criminal history, background, culpability and personal circumstances, as well as other mitigating or aggravating factors.
- Whether or not the accused person has admitted guilt, shown repentance, made restitution or expressed a willingness to co-operate with the authorities in the investigation or prosecution of others. (*In this regard the degree of culpability of the accused person and the extent to which reliable evidence from the said accused person is considered necessary to secure a conviction against others will be crucial*).
- Whether the objectives of criminal justice would be better served by implementing non-criminal alternatives to prosecution.
- Whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused person in

the delay.

The relevance of these factors and the weight to be attached to them will depend upon the particular circumstances of each case.

#### **D. Prosecution of corruption of foreign public officials**

The prosecution of offences in respect of corrupt activities relating to foreign public officials shall be subject to the abovementioned principles and considerations: Provided that the decision-making process shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

It is important that the prosecution process is seen to be transparent and that justice is seen to be done.

### **4. CASE REVIEW**

#### **A. Stopping of proceedings**

Criminal proceedings may sometimes be stopped after a plea has already been entered. This would normally only occur when it becomes clear during the course of the trial that it would be impossible for the State to prove its case or where other exceptional circumstances have arisen making the continuation of the prosecution undesirable.

If a prosecution is stopped, an accused person will be acquitted and may not be charged again on the same set of facts. A prosecutor may therefore not stop a prosecution, unless the Director of Public Prosecutions concerned, or his or her delegate, has consented thereto. Such decisions should therefore be made with circumspection.

#### **B. Restarting a prosecution**

People should be able to rely on and accept decisions made by members of the NPA. Normally, when a suspect or an accused person is informed that there will not be a prosecution or that charges have been withdrawn, that should be the end of the matter.

There may, however, be special reasons why a prosecutor will review a particular case and restart the prosecution. These include—

- an indication that the initial decision was clearly wrong and should not be allowed to stand;
- an instance where a case has not been proceeded with in order to allow the police to gather and collate further evidence, in which case the prosecutor should normally have

- informed the accused person that the prosecution might well start again; and
- a situation where a prosecution has not been proceeded with due to the lack of evidence, but where sufficient incriminating evidence has since come to light.

### **C. Consent to prosecution**

A number of statutes require that a prosecution for an offence under a particular law may not be commenced or proceeded with unless the consent of a Director of Public Prosecutions or the National Director has been obtained.

The inclusion of such requirements in legislation is intended to ensure that prosecutions are not brought in inappropriate circumstances.

Other reasons for these requirements may involve the use of the criminal law in sensitive or controversial areas where important considerations of public policy should be taken into account.

Similarly, rules of practice require that certain matters be referred to a Director of Public Prosecutions or the National Director before a prosecution is proceeded with.

As a matter of policy, it is important that certain decisions are made at the appropriate level of responsibility to ensure consistency and accountability in decision-making.

## **5. FORUM OF TRIAL, DETERMINATION OF CHARGES AND ACCEPTANCE OF PLEAS**

### **A. Forum of trial**

The law directs and policy considerations suggest that certain types or categories of prosecutions sometimes be conducted at specified jurisdictional levels.

In practice this results in certain types of cases being heard in the District Court, some in the Regional Court and others in the High Court.

In terms of certain legislation and rules of practice, the instruction of a Director of Public Prosecutions is required to determine the forum in which the trial should proceed.

In determining whether or not a case is appropriate for hearing in the High Court, the following factors, *inter alia*, must be taken into account:

- The nature and complexity of the case and its seriousness in the circumstances.
- The adequacy of sentencing provisions in the lower courts and whether a conviction in the High Court carries a greater deterrent effect.
- Any specific legal provision providing for or any implied legislative preference for a

- particular forum of trial.
- Any delay, cost or adverse effect that witnesses may have to incur if the case is heard in a particular Court.
- The desirability of a speedy resolution and disposal of some prosecutions in available lower courts, aimed at reducing widespread criminal activity.

The decision regarding the court in which to prosecute an accused person is determined by the complexity and seriousness of an offence, and the need for the NPA to guard against making decisions that will bring the criminal justice system into disrepute.

Where the probable sentence may be one of life imprisonment, the matter should be referred to the Director of Public Prosecutions concerned for a decision whether or not to institute the prosecution in the High Court.

## **B. Determination of charges**

The process by which charges are selected must be compatible with the interests of justice.

Prosecutors must decide upon, and draw up charges based on, available evidence, which evidence—

- adequately reflects the nature, extent and seriousness of the criminal conduct and which can reasonably be expected to result in a conviction;
- provides the court with an appropriate basis for sentence; and
- enables the case to be presented in a clear and simple way.

This means that prosecutors may not necessarily proceed with the most serious charge possible.

Additional or alternative charges may be justified by the available evidence and where such charges will significantly enhance the likelihood of a conviction of an accused person or co-accused.

However, the bringing of unnecessary charges should, in principle, be avoided, because it may not only complicate or prolong trials, but also amount to an excessive and potentially unfair exercise of power.

Prosecutors should therefore not formulate more charges than are necessary just to encourage an accused person to plead guilty to some of the charges. Similarly, a more serious charge should not be proceeded with as part of a strategy to obtain a guilty plea on a less serious one.

## **C. Acceptance of pleas**

An offer by the defence of a plea of guilty on fewer charges or on a lesser charge may be acceptable, provided that—

- the charges to be proceeded with readily reflect the seriousness and extent of the criminal conduct of an accused person;
- the plea to be accepted is compatible with the evidential strength of the prosecution case;
- those charges provide an adequate basis for a suitable sentence, taking into account all the circumstances of the case; and
- where appropriate, the views of the complainant and the police, as well as the interests of justice, including the need to avoid a protracted trial, have been taken into account.

## **6. TRIAL PROCESS AND RELATED MATTERS**

Prosecutors work in an adversarial context and seek to have the prosecution sustained. Cases must therefore be presented fearlessly, vigorously and skilfully.

At the same time, prosecutors must present the facts of a case to a court fairly. They must disclose information favourable to the defence (*even though it may be adverse to the prosecution case*) and, where necessary, assist in putting the version of an unrepresented accused person before court.

This notion also applies to bail proceedings. On the one hand, prosecutors should aim to ensure that persons accused of serious crimes are kept in custody in order to protect the community and to uphold the interests of justice. On the other hand, prosecutors should not oppose the release from custody of an accused person if the interests of justice permit.

Prosecutors must show sensitivity and understanding to victims and witnesses and assist in providing them with protection where necessary. In suitable cases the prosecutor must advise the victim of the possibility of being compensated for the harm suffered as a result of the crime.

As far as it is practicable and necessary, prosecutors must consult with victims and witnesses before the trial begins. They must assist them by giving them appropriate and useful information on the trial process and reasons for postponements and findings of the court, where necessary.

Prosecutors are not allowed to participate in public discussion of cases pending before the court, because this may infringe the rule against comment on pending cases and may violate the privacy of those involved.

During the sentencing phase of a criminal case, prosecutors must assist the court by ensuring that the relevant facts are fully and accurately brought to its attention.

Prosecutors must also make appropriate recommendations with a view to realizing the general purposes of sentence. These include the need for retribution, the deterrence of further criminal conduct, the protection of the public from dangerous criminals and the rehabilitation

of offenders.

The NPA must give special attention to the effective and speedy disposal of cases identified as priority matters.

Prosecutors should specialize in the prosecution of certain offences where desirable and practicable.

The NPA should, as far as possible, make its senior trial prosecutors available to conduct the most difficult cases.

## **7. CO-OPERATION AND INTERACTION WITH POLICE AND OTHER CONSTITUENT AGENCIES**

Effective co-operation with the police and other investigating agencies from the outset is essential to the efficacy of the prosecution process. If a case is not efficiently prepared initially, it is less likely to lead to a successful prosecution or result in a conviction.

The decision to start an investigation into possible or alleged criminal conduct ordinarily rests with the police. The NPA is usually not involved in such decisions although it may be called upon to provide legal advice and policy guidance.

In major or very complex investigations, such an involvement may occur at an early stage and be of a fairly continuous nature. If necessary, specific instructions should be issued to the police with which they must comply.

In practice, prosecutors sometimes refer complaints of criminal conduct to the police for investigation. In such instances, they will supervise, direct and co-ordinate criminal investigations.

Prosecutors have the responsibility under the NPA Act to determine whether a prosecution, once started, should proceed.

Such decisions are made independently, but prosecutors must consult with the police and other interest groups where required.

It is therefore desirable, wherever practicable, that the police refer matters to prosecutors before a prosecution is instituted. In most cases suspected offenders are arrested and charged before the police can consult with prosecutors.

However, in cases where difficult questions of fact or law are likely to arise, it is desirable that the police consult the prosecutors before arresting suspected persons.

With regard to the investigation and prosecution of crime, the relationship between prosecutors and police officials should be one of efficient and close cooperation, with mutual

respect for the distinct functions and operational independence of each profession.

Prosecutors should cooperate with other departments and agencies such as Correctional Services, Welfare, lawyers' organisations, non-governmental organisations and other public institutions, to streamline procedures and to enhance the quality of service provided to the criminal justice system.

## **8. PROSECUTORIAL POLICY AND DIRECTIVES RELATING TO SPECIFIED MATTERS**

The National Director may supplement or amend this Policy to determine prosecutorial policy and directives in respect of specific matters, for example, in respect of new legislation and matters of national interest.

## **9. CONCLUSION**

The NPA is a public, representative service, which should be effective and respected. Prosecutors must adhere to the highest ethical and professional standards in prosecuting crime and must conduct themselves in a manner, which will maintain, promote and defend the interests of justice.

This Prosecution Policy is designed to make sure that everyone knows the principles that prosecutors apply when they do their work.

Applying these principles consistently will help those involved in the criminal justice system to treat victims fairly and prosecute offenders effectively.

This Prosecution Policy is not an end in itself.

The challenge, which faces the NPA, is to implement this Policy in a manner that will increase the sense of security of all people in South Africa.