OFFICE OF THE PUBLIC PROSECUTOR

PROSECUTION POLICY

Attorney-General's Department

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OFFICE OF THE PUBLIC PROSECUTOR

VISION

A just and peaceful society.

MISSION

To deliver timely, independent, fair, efficient and effective prosecution and related services to the people of Papua New Guinea.

CORE VALUES & PRINCIPLES

Independence

To make decisions independently of investigating agencies and the government, according to the *Constitution*.

Fairness & Equality

To exercise all duties and responsibilities without fear or favour. All persons are equal before the law. All decisions will be impartial, based on an independent assessment of the available evidence and the public interest, in accordance with the Prosecution Policy of the Office.

Transparency & Accountability

To ensure transparency and accountability in the provision of prosecution and related services.

Excellence

To strive for excellence in the provision of prosecution services in accordance with its core values and principles, in an efficient and timely manner, so as to promote justice for victims, witnesses, accused persons and the public.

Fred M Tomo
Acting Secretary & Attorney-General
Sir Buri Kidu Haus
Waigani NCD

FOREWORD

The Office of the Public Prosecutor plays a key role in the criminal justice system of this country. It has long been recognised that fair, effective and open prosecution is essential to maintaining the rule of law and achieving a just and peaceful society for all Papua New Guineans.

I therefore commend the Public Prosecutor for issuing this Policy.

In doing so he has set out the time honoured principles upon which decisions are made in the prosecution process. This Policy will act as a guide to his officers in the performance of their duties and promote the fair and consistent treatment of matters within his Office. The Policy will also inform all persons affected by prosecution decisions, including victims, accused persons, witnesses, and the public in general, of the principles by which such decisions are made.

FRED M TOMO
ACTING SECRETARY & ATTORNEY-GENERAL

INTRODUCTION BY THE PUBLIC PROSECUTOR

The goal of the Office of the Public Prosecutor has always been to provide effective, independent, impartial, efficient and timely prosecution and related services to the people of Papua New Guinea.

To achieve this there must be some principles that the institution must believe in that will influence or guide its performance.

It is in this connection that the prosecution policy has been developed into a document form to guide prosecutors in carrying out their prosecution function.

It also provides other government institutions, civil society and the general public some information about how prosecutors and the Office of the Public Prosecutor go about in processing their prosecutorial responsibilities for purposes of maintaining and promoting good governance, transparency, accountability and uniformity.

I have every confidence and trust that this policy will be fully utilized by my officers and staff and interested persons in the performance and furtherance of the prosecution function.

MR CHRONOX MANEK
PUBLIC PROSECUTOR

1 PURPOSE OF PROSECUTION POLICY

Fair, effective and open prosecution is essential to maintaining the rule of law and achieving a just and peaceful society. The purpose of this Policy is to outline the principles upon which decisions are made by this Office in the institution and conduct of prosecutions.

In doing so the Policy aims to assist officers within the Public Prosecutor's Office in the assessment and conduct of individual matters.

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

Furthermore, in accordance with the obligations of transparency and accountability, the publication of this Policy is intended to inform persons affected by decisions made by this Office, including the public generally, of the principles upon which such decisions are made.

2 HISTORY OF THE OFFICE

For some years prior to 1956/57 the then Department of Law was headed by the "Crown Law Officer", a position subsequently changed to "Secretary for Law". Directly under the Secretary came the position of Deputy Crown Law Officer, and below and responsible to the Deputy were three Grade 1 legal officers, responsible for Drafting; Land Conveyancing and Advisings; and Prosecutions respectively.

Between 1956 and 1957 there was a reorganisation of the Department and this removed the position of Deputy. In the new organisation there were, immediately below the Secretary for Law, three Assistant Secretaries responsible for Advising; Drafting; and Prosecutions.

In 1961 there was a further reorganisation. This resulted in the Assistant Secretary (Advisings) becoming the Crown Solicitor. The prosecution function was then incorporated into his area of responsibility so that the Chief Crown Prosecutor came to be subordinated to the Crown Solicitor. That arrangement continued until Independence.

Thus, immediately prior to Independence, the prosecuting function of the State was performed by the Prosecutions Section of the Department of Law. The section was headed by a Chief Crown Prosecutor who was responsible to and controlled by the Crown Solicitor and, through him, the Secretary for Law.

The status and functions of the "Crown Law Officer" were vested in the Secretary so that the exercise of the prosecution discretion was ultimately his responsibility.

Upon Independence in September 1975 the position changed significantly with the creation of the position of Public Prosecutor as a Constitutional Office-Holder.

3 THE OFFICE OF THE PUBLIC PROSECUTOR

3.1 The Office of the Public Prosecutor is established by s 176 of the *Constitution*.

3.2 The Public Prosecutor is empowered by s 177 of the *Constitution* to perform the following functions:

a) in accordance with an Act of the Parliament and the Rules of Court of the Supreme Court and the National Court, to control the exercise and performance of the prosecution function of the State (including appeals and the refusal to initiate and the discontinuance of prosecutions) before the Supreme Court and the National Court, and before other Courts as provided by or under Acts of the Parliament; and

b) to bring or decline to bring proceedings under Division III.2 (*leadership code*) of the *Constitution.*

3.3 Pursuant to s 177(6) of the *Constitution*, additional functions are provided to the Public Prosecutor by the *Public Prosecutor (Office and Functions) Act*, 1977.

3.4 Section 4(1) of the Act provides that the Public Prosecutor:

(a) shall control the Office; and

(b) is administratively responsible for the efficient performance of the functions of the Office; and

(c) shall control and exercise the prosecution function of the State; and

(d) may, and shall when requested to do so by the relevant person or body, advise:
- (i) the State or any statutory authority or instrumentality of the State; and
- (ii) the Minister; and
- (iii) Departmental Head of the Department responsible for National Justice Administration; and
- (iv) the State Solicitor; and
- (v) the Law Reform Commission; and
- (vi) any other person or body declared by the Minister, by notice in the National Gazette, to be a person or body to which this section applies,

on matters related to or concerning the commission of offences against any law; and

(e) shall provide Counsel:
- (i) to prosecute persons charged with any criminal offence at their trial before the National Court; and

(ii) to appear on behalf of the State in any criminal appeal before the National or Supreme Court; and
(iii) to appear before the National Court or Supreme Court in any proceeding relating to a criminal matter in which the State has an interest; and

(f) may, in his absolute discretion, provide Counsel, to appear for and on behalf of the State, in any other proceeding before the National Court or Supreme Court in which the State has an interest; and

(g) shall, in his absolute discretion, give consent or refuse consent, to proceed with the prosecution of any criminal offence where his consent is by law required; and

(ga) may, in his absolute discretion, elect the method of proceeding under Section 420 of the *Criminal Code* 1974, including the withdrawal of an information; and

(h) may, in his absolute discretion, provide assistance, either by provision of legal representation or otherwise, where:
(i) it is requested by the State; or
(ii) in his opinion, it is necessary to do so in the interests of justice, or in the public interest,

in the prosecution of offences or the conduct of committal proceedings before any court other than the National Court or the Supreme Court; and

(i) may advise the National Executive Council, through the Minister, to exercise its power under Section 151(2) (*grant of pardon, etc.*) of the *Constitution* to advise the Head of State to grant pardons, free or conditional, to accomplices who give evidence leading to the conviction of principal offenders.

3.5 Section 5 of the Act provides that the Public Prosecutor may grant immunity from prosecution, either absolute or conditional, to any person in relation to an offence with which the person could otherwise be charged.

3.6 In the performance of these functions the Public Prosecutor is not subject to any direction or control by any person or authority: s 176(3)(a) *Constitution*. This is, however, subject to the following exceptions:

a) Pursuant to s 176(3)(b) of the *Constitution*, whereby the Head of State, acting with, and in accordance with, the advice of the National Executive Council, may give a direction to the Public Prosecutor on any matter that might prejudice the security, defence or international relations of Papua New Guinea (including Papua New Guinea's relations with the Government of any other country or with any international organisation).

In this regard s 176(4) provides that the Prime Minister shall table in the National Parliament any direction to the Public Prosecutor at the next sitting of the Parliament after the direction is given unless, after consultation with the Leader of the Opposition, he considers its tabling is likely to prejudice the security, defence or international relations of Papua New Guinea.

b) Schedule 1.19 of the *Constitution*, which states that where a Constitutional Law provides that a person or institution is not subject to control or direction, or otherwise refers to the independence of a person or institution, that provision does not affect:

i) control or direction by a court; or
ii) the regulation, by or under a Constitutional Law or an Act of Parliament, of the exercise or performance of the powers, functions, duties or responsibilities of the person or institution; or
iii) the exercise of jurisdiction under Division III.2 (*leadership code*), Subdivision VIII.1.B (*the Auditor-General*), or Subdivision VIII.1.C (*the Public Accounts Committee*)

and does not constitute an appropriation of, or authority to expend, funds.

3.7 As a Constitutional Office-Holder the Public Prosecutor is protected by the safeguards and subject to the responsibilities applicable to such Office-Holders.

3.8 As for his officers, s 13 of the *Organic Law on the Guarantee of the Rights and Independence of Constitutional Office-Holders*, provides that:

"An officer whilst acting on the instructions and on behalf of a Constitutional Office-Holder in the performance of that Office-Holder's constitutional functions is not subject to direction or control in the exercise of those functions by any person other than the Constitutional Office-Holder."

3.9 The Public Prosecutor is also one of the "Law Officers of Papua New Guinea", the other law officers being the Principal Legal Advisor to the National Executive Council and the Public Solicitor: s 156 the *Constitution*.

4 INDICTMENT FOLLOWING COMMITTAL

4.1 Section 524 of the *Criminal Code*, 1974 provides that indictments may only be presented in the National Court pursuant to sections 525 and 526 of the Code.

4.2 Following committal in the District Court, all depositions, statements and other documents taken in the proceedings are remitted to the Public Prosecutor pursuant to s 118 of the *District Courts Act*. Exhibits are delivered to the National Court.

4.3 S 525 of the *Criminal Code* provides that where a person is committed for trial or sentence for an indictable offence, the Public Prosecutor or a State Prosecutor shall consider the evidence and may:

a) reduce into writing in an indictment a charge of any offence that the evidence appears to him to warrant; or

b) decline to lay a charge.

4.4 The indictment may be presented to the National Court by the Public Prosecutor or any State Prosecutor.

5 EX OFFICIO INDICTMENTS

5.1 S 526 of the *Criminal Code* provides that where a court of summary jurisdiction has refused to commit a person for trial for an indictable offence, the Public Prosecutor may consider the evidence contained in the depositions taken before the court, and any other relevant evidence, and draft an indictment in relation to any offence which the evidence appears to warrant. (Note that there is no longer a power to indict without a committal hearing.)

5.2 The purpose of a committal hearing is to filter out those cases where there is insufficient evidence to proceed to trial. However, the result of a committal hearing has never been regarded as binding on the prosecuting authority. Nevertheless a decision to proceed by way of ex officio indictment is a serious one. Accordingly, an ex officio indictment should only proceed where the Public Prosecutor is satisfied that:

a) the magistrate erred in declining to commit; and/or

b) fresh evidence has since become available, and if the evidence had been available at the time of the committal proceeding, the defendant would have been committed for trial,

ie, applying the Prosecution Policy there is a reasonable prospect of obtaining a conviction and prosecution is in the public interest.

5.3 Only the Public Prosecutor has power to sign such an indictment. However, the indictment may be presented to the National Court by the Public Prosecutor or a State Prosecutor.

5.4 Pursuant to s 526(3) of the Code, where the Public Prosecutor prepares such an indictment, he shall cause to be served on the accused person or his lawyer:

a) copies of the depositions taken at the committal proceedings; and

b) copies of statements taken from witnesses whom the prosecution intends to call at the trial

within such time before the commencement of the trial as is reasonable in order to allow the accused person to prepare his defence.

6 THE DECISION TO PROSECUTE

6.1 The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender, and the community at large to ensure that the right decision is made.

6.2 It is not the rule that suspected criminal offences must automatically be the subject of criminal prosecution. The first consideration is always whether the evidence which is available, and admissible, is such that a court is likely to convict. If there is such evidence, the next question is whether prosecution is in the public interest.

6.3 Every case is unique and must be considered on its own facts and merits. While it is not possible to outline a rigid formula, the following principles should be applied when exercising the discretion whether or not to prosecute.

STAGE 1: Is there a Reasonable Prospect of Conviction?

6.4 The first stage requires an assessment of the evidence. Firstly, there must be sufficient evidence to prove a prima facie case.

6.5 The existence of a bare prima facie, case, however, is not sufficient to justify the institution or continuation of a prosecution. A prosecution should only proceed in relation to a charge for which there is a reasonable prospect of securing a conviction. This is an objective test, which will only be satisfied where it is considered that a judge hearing the matter, properly directed in accordance with the law, is more likely than not to convict the accused of the charge alleged.

6.6 In determining this issue it is necessary to evaluate the admissibility and reliability of evidence and the strength of the prosecution case when presented in court. It is also necessary to consider the effect of the case likely to be run by the defence.

6.7 In doing so regard should be had to the following, non-exhaustive, list of matters:

Is the evidence admissible?

a) Is it likely that the evidence will be excluded by the court bearing in mind the principles of admissibility at common law and under statute? For example:

- Is the evidence in admissible form? Is documentary and other evidence produced in compliance with applicable provisions under the Evidence Act?

- Has confession evidence, identification evidence or evidence seized under warrant been properly obtained?

The possibility that any evidence might be excluded should be taken into account and, if it is crucial to the case, may substantially affect the decision whether or not to proceed with the prosecution.

Is the evidence reliable?

b) If the case depends in part on admissions by the defendant, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the defendant?

c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the defendant, or may be otherwise unreliable? Has a witness a motive for telling less than the whole truth?

d) Are there matters which might properly be put to a witness by the defence to attack his or her credibility, for example a previous conviction?

e) What sort of impression is the witness likely to make? How is the witness likely to stand up to cross-examination?

f) If there is any conflict between witnesses is it of such an extent that it would materially weaken the case?

g) If there is a lack of conflict between witnesses, is there anything which causes suspicion that a false story may have been concocted?

h) Are any child witnesses likely to be able to give sworn evidence?

i) If identity is likely to be an issue how cogent and reliable is the evidence?

j) Are all the necessary witnesses available and competent to give evidence, including any witnesses who may be overseas?

k) Has the defendant given any explanation? Is a court likely to find it credible in light of the evidence as a whole? Does it support an innocent explanation? Does the defendant have a defence in law?

l) Is there further evidence which investigators should be asked to seek out which may support or detract from the prosecution case?

STAGE 2: Is Prosecution required in the Public Interest?

6.8 Once it has been determined that there is a reasonable prospect of conviction, consideration must be given to whether, by virtue of the offence itself or the circumstances of its commission, a prosecution is required in the public interest. The public interest is ultimately the dominant consideration.

6.9 The following is a non-exhaustive list of factors that may be relevant to a consideration of this issue:

a) the seriousness or, conversely, the triviality of the alleged offence;

b) the obsolescence or obscurity of the law;

c) the likely length and expense of a trial;

d) the likely sentence;

e) whether the consequences of any resulting conviction would be unduly harsh or oppressive;

f) the difficulty in detecting such an offence;

g) the prevalence of the offence and the need for deterrence, both personal and general;

h) whether confiscation or reparation is likely to result from the prosecution;

i) the availability and efficacy of alternatives to prosecution (NB defendants must not avoid prosecution merely because they pay compensation);

j) the age of the offence, and whether or not delay has been caused by the defendant or the prosecution;

k) any mitigating or aggravating circumstances;

l) whether the offence involves corruption or other abuse of trust or authority;

m) whether the offence was committed against a person serving the public, eg a police officer, prison officer, health worker;

n) the youth, age, intelligence, physical health or mental health of the defendant, victim or witness;

o) the culpability or role of the defendant;

p) the defendant's criminal history;

q) the attitude of the victim;

r) whether the defendant is willing to co-operate in the investigation or prosecution of others, or the extent to which the defendant has already done so;

s) the effect on the public, public order or public confidence of such an offence; and

t) the need to maintain public confidence in State institutions including the Parliament and courts.

6.10 As a general rule, the more serious an offence the more likely it is that a prosecution should proceed. While there may be public interest factors which tend away from prosecution, in the great majority of cases where there is a reasonable prospect of conviction the matter should proceed, unless those factors clearly outweigh the public interest in favour of prosecution. Such factors should, however, be put before the sentencing court for consideration.

6.11 A decision whether or not to prosecute must clearly not be influenced by:

a) the race, religion, sex, nationality, tribal group or political associations, activities or beliefs of the alleged offender or any other person involved;

b) personal feelings concerning the alleged offender or the victim;

c) possible political advantage or disadvantage to the government of the day or any political group or party; or

d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

7 PROSECUTION OF JUVENILES

7.1 The prosecution of a juvenile is a severe step which may have serious and long term consequences for the defendant. However, prosecution should not be avoided simply because of the alleged offender's age. In this country juveniles are responsible for many of the more serious offences. In deciding whether or not prosecution of a juvenile is warranted, consideration should be had to the public interest matters identified in paragraph 6.9 above, and in particular to:

a) the seriousness of the alleged offence;

b) the age and apparent maturity and mental capacity of the juvenile;

c) the alternatives to prosecution, and their appropriateness;

d) the juvenile's circumstances, including prospects of rehabilitation, family or community supervision; and

e) the juvenile's antecedents.

8 DECLARATION THAT A CHARGE WILL NOT BE LAID

8.1 As discussed above, s 525 of the *Criminal Code* provides that where a person is committed for trial or sentence the Public Prosecutor or a State Prosecutor shall consider the evidence and may prepare an indictment or decline to lay a charge.

8.2 Where, having assessed the matter in accordance with the Prosecution Policy, the Public Prosecutor or a State Prosecutor declines to lay a charge, he or she shall, pursuant to s 525(3) of the Code, as soon as practicable:

a) sign a declaration to that effect;

b) cause the original declaration to be filed in the National Court; and

c) deliver a duplicate of the declaration to the person committed:

i. if the person is in custody – by sending it by post or messenger to the person having custody of him; or
ii. if the person is not in custody – by delivering it to him personally or by sending it to him by post to his last-known address.

8.3 Note that Section 525 (4) of the Code stipulates that upon receipt of such a declaration any person having custody of the person named therein shall immediately release him/her from custody in relation to the charge to which the declaration relates.

9 SELECTION OF CHARGES

9.1 Prosecution should proceed in relation to a charge which:

a) reflects the nature and extent of the criminal conduct disclosed by the evidence; and

b) provides the court with an appropriate basis for sentence.

9.2 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.

9.3 Under no circumstances should more charges than necessary be laid with the purpose of encouraging the defendant to plead guilty to some of the charges. Similarly, a more serious charge should not be laid in order to encourage the defendant to plead guilty to a less serious one.

10 INDICTABLE OFFENCES TRIABLE SUMMARILY

10.1 Section 420 of the *Criminal Code* provides for a number of indictable offences identified in Schedule 2 of the Code to be tried summarily before a Principal or Senior Magistrate (formerly known as a "Grade V Magistrate") of the District Court.

10.2 Pursuant to s 4(1)(ga) of the *Public Prosecutor (Office and Functions) Act, 1977* the Public Prosecutor has absolute discretion to decide whether those offences should be dealt with summarily or on indictment, or whether an information should be withdrawn.

10.3 As a general rule matters will proceed by way of indictment where the Public Prosecutor is of the view that the seriousness of the offence is such that it warrants hearing and sentence by the National Court.

10.4 While the seriousness of the offence and the likely sentence on indictment will be of paramount concern, in some cases it may also be appropriate to have regard to:

a) the greater deterrent effect of a conviction obtained on indictment;

b) the delay, if any, associated with proceeding on indictment and the likely effect thereof on the victim, witnesses, or defendant;

c) the desirability of early resolution, possibly occasioned by proceeding summarily, to deter future offences.

10.5 Only the Public Prosecutor, or his delegate, may sign an election to proceed summarily, and only he may consent to the withdrawal of information before a Principal or Senior Magistrate.

10.6 Pursuant to s 219(4) of the *District Courts Act* the Public Prosecutor may appeal to the National Court against any sentence of the District Court in relation to an indictable offence dealt with summarily.

11 IMMUNITY FROM PROSECUTION

11.1 S 5 of the *Public Prosecutor (Office and Functions) Act, 1977* provides that the Public Prosecutor may grant immunity to a person from prosecution, either conditional or absolute, in relation to an offence with which the person could otherwise be charged, where he is of the opinion that it is in the interests of justice to do so.

11.2 Where such an immunity is granted, the person shall not:

a) where the grant of immunity is absolute, be charged before any court with that offence; or

b) where the grant is conditional, be charged before any court with that offence unless the Public Prosecutor has first certified in writing that the person has breached the conditions of the grant of immunity.

11.3 This section does not prevent a person who has been granted immunity in relation to an offence being charged with any other offence.

11.4 In principle the criminal justice system should operate without the need to grant concession to any person who has participated in an alleged offence in order to secure their evidence in the prosecution of others.

11.5 However, unless the accomplice has been dealt with in respect of his or her own participation in the criminal activity with the defendant, he or she will be in a position to claim privilege against self-incrimination in respect of the very matters the prosecution wishes to adduce into evidence.

11.6 In the usual course an accomplice should be prosecuted irrespective of whether or not he or she is to be called as witness. Upon pleading guilty an accomplice who is prepared to co-operate in the prosecution of another can expect the prosecution to make submissions that they should receive an appropriate reduction in sentence.

11.7 In some circumstances, however, it may be necessary in the interests of justice to grant an indemnity in order to secure the accomplice's testimony in the prosecution of another.

11.8 An indemnity under s 5 will only be granted as a last resort when the following conditions are met:

a) the evidence that the accomplice can give is necessary to secure the conviction of the defendant, and that evidence is not available from other sources; and

b) the accomplice can reasonably be regarded as significantly less culpable than the defendant.

11.9 Where an accomplice receives any concession from the prosecution in order to secure his or her evidence, whether as to choice of charge or the prosecution's position on sentence or grant of immunity, the terms of the agreement between the prosecution and the accomplice should be disclosed to the court.

12 PLEA BARGAINING

12.1 In some instances a defendant may wish to plead guilty to a less serious charge than the one alleged, or to some but not all of the charges alleged. The defendant may wish to have all other charges dropped or wish to have other charges taken into account on sentence without proceeding to conviction.

12.2 In any case a guilty plea must only be accepted where it is in the public interest and where the charges:

a) are supported by the evidence;

b) properly reflect the criminality of the conduct; and

c) provide an adequate basis for sentence.

12.3 In determining whether or not to accept a proposal by the defendant, regard should also be had to the following matters:

a) whether the defendant is willing to co-operate in the investigation or prosecution of others, or the extent that he/she has already done so;

b) the desirability of early and certain resolution of the matter;

c) the strength of the prosecution case;

d) the complexity and likely length of a trial;

e) the defendant's criminal history;

f) whether or not restitution has or will be made;

g) the views of the investigating agency and the victim.

12.4 In some instances a defendant may indicate that he or she will plead guilty provided the prosecution will not object to a submission by the defendant that the sentence fall within a nominated range. The prosecution may agree to such a submission but only where the penalty or range of sentence nominated is within the appropriate range given the nature and circumstances of the offence.

13 NOLLE PROSEQUI

13.1 The Public Prosecutor or a State Prosecutor may at any time inform the National Court that an indictment pending in the Court will not be further proceeded with by filing with or presenting to the Court a document to that effect, known as a "nolle prosequi", pursuant to s 527 of the *Criminal Code*.

13.2 Upon the nolle prosequis being filed or presented the person named in it is to be immediately discharged from further prosecution on the indictment to which it relates. However, the nolle does not entitle the accused to an acquittal and fresh proceedings may subsequently be brought for the same offence.

13.3 No nolle prosequi is to be filed without the express consent of the Public Prosecutor or his delegate. The decision is ultimately one for the Public Prosecutor, however, where possible the views of the investigating agency will be taken into account.

13.4 Where a decision has been made not to proceed with a trial on a particular indictment that decision will not be reversed unless:

a) the decision was made by fraud or mistake of fact;

b) significant fresh evidence has become available; or

c) the case is stopped so that the prosecution may obtain evidence that is likely to become available. In such a case the prosecution should inform the defendant that the prosecution may well start again.

14 OFFERING NO EVIDENCE

14.1 In some rare instances where an indictment has been presented it may be appropriate for the State to offer no evidence. This does entitle the accused to an acquittal and should normally only be used where for example at trial a defence can clearly be established, or where evidence upon which the prosecution relies is no longer available.

15 SENTENCING

15.1 On sentence the prosecution should assist the court by identifying:

a) whether there are other matters to be taken into account on sentence under s 603 of the *Criminal Code*;

b) the maximum penalty prescribed for the relevant offence;

c) relevant sentencing principles;

d) the appropriate range of sentence;

e) the offender's antecedents;

f) the age of the offender;

g) any victim impact statements;

h) the seriousness of the offence, ie its nature and circumstances:

- any aggravating or mitigating facts
- the degree of participation of the offender
- the need for general and/or personal deterrence
- the impact of the offence on the victim, the public or public confidence;

i) any assistance given to the police by the offender;

j) whether restitution has occurred or whether the Criminal Compensation Act would apply;

k) whether an order for restriction of movement is appropriate.

15.2 The prosecution should oppose any assertion made by the defendant in relation to the facts of the offence upon which the defendant has been found, or is pleading, guilty, or to any matter in mitigation, that is inaccurate, misleading or unsubstantiated. If necessary the prosecution should ask the court to hear evidence to determine the facts upon which sentence should take place.

16 DEATH PENALTY

16.1 The death penalty was re-introduced into the *Criminal Code* by section 2 of the *Criminal Code (Amendment) Act* 1991.

16.2 It is a matter for the Public Prosecutor whether or not to seek the death penalty. In accordance with the Supreme Court's comments in *Manu Kovi v The State* (2005) SC 789, the Public Prosecutor will seek the death penalty only in cases he or she considers are of the worst kind.

16.3 In this regard the Public Prosecutor will have regard to *Steven Loke Ume & Ors v The State*, SCRA 10 of 1997, SC 836, 19 May 2006 in which the Supreme Court suggested that the death penalty may be considered appropriate in the following types of cases:

a) the killing of a child, a young or old person, or a person under some disability needing protection;

b) the killing of a person in authority or responsibility in the community providing invaluable community service, whether for free or fee who are killed in the course of carrying out their duties or for reasons to do with the performance of their duties, eg policeman, correctional officer, government officer, school teacher, church worker, company director or manager;

c) killing of a leader in government or the community, for political reasons;

d) killing of a person in the course of committing other crimes perpetrated on the victim or other persons such as rape, robbery, theft, etc;

e) killing for hire;

f) killing of two or more persons in the single act or series of acts;

g) offence is committed by a prisoner in detention or custody serving sentence for another serious offence of violence;

h) the prisoner has prior conviction(s) for murder offences.

16.4 The Public Prosecutor recognises, however, that in deciding whether or not to seek the death penalty, each case will depend upon its own facts and circumstances.

17 PROSECUTION APPEALS AGAINST SENTENCE

17.1 It is generally accepted that prosecution appeals should not be allowed to unduly circumscribe the sentencing discretion of judges. However, the Public Prosecutor will exercise his right to appeal where it is in the public interest to do so to maintain consistent and adequate standards of sentencing, ie where:

a) an identifiable error has been made; or

b) a sentence is clearly unreasonable given the nature and/or circumstances of the offence.

17.2 Prosecution appeals against sentence should be instituted without unnecessary delay.

18 INTERVENTION IN A PRIVATE PROSECUTION

18.1 Despite s 524 of the *Criminal Code* any person may by leave of the National Court present an information (rather than an indictment) against another person for an indictable offence not punishable by death, pursuant to s 616 of the Code.

18.2 The Public Prosecutor takes the view that his powers under the *Constitution* and the *Public Prosecutor (Office and Functions) Act* enable him to intervene in private prosecution where it is in the public interest to do so, either to proceed with the prosecution or discontinue it (except where to do so would be an abuse of process).

19 LEADERSHIP FUNCTION

19.1 As discussed, in addition to performing the prosecution function of the State, the Public Prosecutor is empowered by s 177(1)(b) of the *Constitution* to bring or decline to bring proceedings under Division III.2 (*leadership code*) of the *Constitution*.

19.2 Matters are referred to the Public Prosecutor pursuant to s 27 of the *Organic Law on the Duties and Responsibilities of Leaders* (OLDRL). Pursuant to s 27(2) of the OLDRL, if the Public Prosecutor is satisfied that the matter should be proceeded with, he shall refer the matter, together with a statement of the Ombudsman Commission, to the appropriate tribunal.

19.3 In determining whether to refer a matter the Public Prosecutor will consider firstly whether there is sufficient cogent and credible evidence of misconduct in office. Further, the Public Prosecutor will consider whether referral is in the public interest.

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