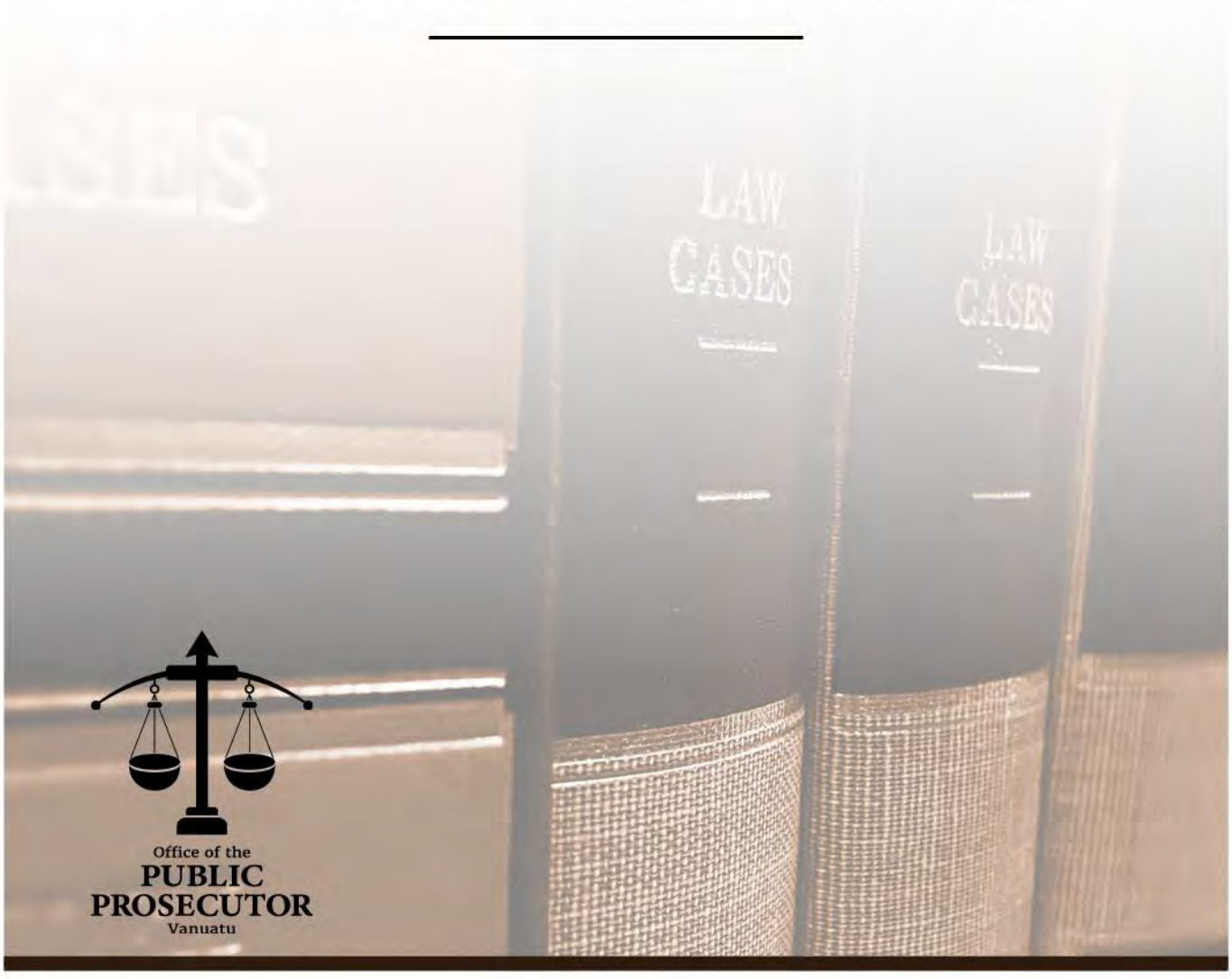
# PROSECUTION GUIDELINES

## FOR THE REPUBLIC OF VANUATU




Office of the
PUBLIC
PROSECUTOR
Vanuatu

# Foreword

The Office of the Public Prosecutor Prosecution Guideline aims to consolidate a number of policies, directions and documents created since the *Public Prosecutors Act* came into force in 2003.

The Guidelines will for the first time be available to the public and prosecutors alike on the Office of the Public Prosecutors website. This will have the advantage of making it more accessible than ever before and save resources by using the e-publication platform.

This Guideline sets out the criteria governing this decision and serves three principle purposes. The first is to provide Prosecutors with the necessary tools to prosecute matters effectively and fairly. The second is to promote consistency in the making of the various decisions which arise in relation to the institution and conduct of prosecutions. The third is to inform the public of the principles upon which the Office of the Public Prosecutor performs its Constitutional functions, and actions taken in its name.

These guidelines are based on internationally accepted standards. They are freely and publicly available and should be read and applied in conjunction with other instruments published by the Office of the Public Prosecutor that affect the conduct of prosecutions.

I am pleased to publish the Prosecution Guideline for Vanuatu Prosecutors.

Josaia Naigulevu

PUBLIC PROSECUTOR

# 1. The Prosecution Guideline.

The Prosecution Guideline 2018 aims to consolidate a number of policies, directions and documents created since the *Public Prosecutors Act* came into force in 2003, they include:

a) Office of the Public Prosecutor (OPP) Prosecution Policy of 2003.[1]
b) OPP Prosecution Code of 2017.[2]
c) OPP Code of Ethics of 2017.[3]

The 2018 Guideline recognises all of these documents and while much of the guidance in these documents remains relevant today, to the extent that they are inconsistent with this guideline and the other guidelines and manuals referenced the 2018 Guideline will prevail.

Throughout the Guideline there will be references to a number of key Prosecution Guides and Manuals they are:

a) The Family Violence Prosecution Guideline.
b) The Young Offenders Prosecution Guideline.
c) The Prosecution of Sexual Offences Guideline.
d) The Proceeds of Crime Prosecution Manual.
e) The Proceeds of Crime and Asset Management Manual.

These manuals, when finalised, should always be consulted when prosecuting crimes dealt with specifically by a Guideline or Manual.

The Guidelines will serve as a guide to all prosecutors, including police or summary prosecutors and prosecutors from agencies with prosecutorial power. The Guidelines are also aimed at informing the community about actions taken in the name of the Public Prosecutor.

[1] Annexure H
[2] Annexure J
[3] Annexure G

# 2. The Office of the Public Prosecutor (OPP).

The Public Prosecutor is appointed under Article 55 of the Constitution of the Republic of Vanuatu (the Constitution). Article 55 states:

> *The function of prosecution shall vest in the Public Prosecutor, who shall be appointed by the President of the Republic on the advice of the Judicial Services Commission. He shall not be subject to the direction or control of any other person or body in the exercise of his functions*.

The Office of the Public Prosecutor (OPP) was created by the *Public Prosecutor Act 2003*. Under section 3 of the Act the OPP is to:

> *Prepare and conduct effectively, economically and efficiently on behalf of the Public Prosecutor any prosecution, other legal proceeding or matter in which the public prosecutor is involved.*

Cases are prepared and conducted by lawyers employed by the OPP. In some cases, private counsel will be briefed, however, at all times legal practitioners act on behalf of the Public Prosecutor. They are also subject to general directions and guidelines as published or gazetted.

Staff of the OPP carry out their duties in compliance with the Rules of Etiquette and Conduct of Legal Practitioners Order[4] , the OPP Code of Ethics 2017[5]and the Standards of Professional Responsibility and Statement of Essential Duties and Rights of Prosecutors as set out by the International Association of Prosecutors[6].

# 3. The Role and Duties of the Public Prosecutor.

The Public Prosecutor prosecutes in accordance with Article 55 of the Constitution and is appointed under the *Public Prosecutor Act 2003*. He or she is appointed by the President and is responsible to the Attorney General in relation to the exercise of the functions of the Office but is not subject to their direction or control, the Public Prosecutor acts independently of the government and political influence.

The functions of the Public Prosecutor are set out in section 8 of the *Public Prosecutor Act 2003*, they include:

a) To institute, prepare and conduct preliminary inquiries, the prosecution of any offences in any court and appeals in relation to prosecutions.
b) To institute and conduct on behalf of the state proceeds of crime matters.
c) To conduct extradition and mutual assistance proceedings.

[4] No. 106 of 2011
[5] Annexure G
[6] Annexure B

d) To decide to discontinue prosecutions.
e) Provide advice to police in relation to investigations, proposed prosecutions and prosecutions.
f) Prosecute breaches of the Leadership Code.

In exercising these functions, the Public Prosecutor must:

a) Act fairly.
b) Act in the interests of justice.
c) Consider the needs and concerns of victims of crime.
d) Consider the need for the conduct of prosecutions to be effective, economic and efficient.

Chapter 2 of the Constitution enshrines individual rights and freedoms. The Public Prosecutor and all staff of the OPP must be mindful of the principles underlying Chapter 2 and their purpose as they conduct their work. In particular, they are responsible for respecting the right of the security of the person, protection of the law and the right to a fair hearing.

# 4. The Duty to be Fair.

The Public Prosecutor Act requires that the Public Prosecutor exercise his or her functions in a manner that is fair and just. The Constitution requires that hearings must be fair and that the Public Prosecutor will act impartially and fairly according to law. This will involve prosecutors informing the court of authorities or interpretation of the law which may be appropriate in the circumstances of the case, even when it is unfavourable to the prosecution case.

In fairness, the prosecution must disclose all evidence that it becomes aware of, or could be relevant[7] to the case. Further the prosecution must put all evidence it relies on in the presentation of the prosecution case and must not first adduce evidence in cross examination. The Prosecution cannot change its case theory after its case is closed.

A prosecutor must assist the court to find the truth based on the facts, evidence and law. A prosecutor must never seek to persuade a decision maker to a point of view by introducing bias or emotion against the accused.

The prosecution owes a duty of fairness to the community on whose behalf they prosecute.

The community's interest is twofold:

1. That those who are guilty are bought to justice.
2. That those who are innocent are not wrongly convicted.

To maintain the right in the interests of justice the prosecution has a right to be treated fairly. This may mean, for example that an adjournment must be sought when insufficient notice is given by defence.

[7] Clause 1.2(1)(a) Prosecutor Code of Ethics

# 5. The Decision to Prosecute.

The decision to prosecute is ultimately that of the Public Prosecutor or his or her delegate. The decision to prosecute is a discretionary one and will involve the consideration of a number of factors.

These factors are part of a two stage[8] process:

1. Does the evidence offer a reasonable prospect of conviction?
2. Is it in the public interest to proceed?

The decision to prosecute must be made impartially and without the control of any other person or body.

## 5.1 SUFFICIENT EVIDENCE

A prosecution should not be started, whether after summons or arrest, or continued unless there is reliable evidence, admissible in a court of law, that a criminal offence was committed by the accused person. The evidence must support each element of the offence and must provide reasonable prospects of a conviction. If the evidence is not of sufficient strength, any prosecution would be unfair to the accused and a waste of public funds.

Unless a prosecutor can view or be reliably informed of the existence of that evidence they MUST NOT under any circumstances place an information before the Court unless the matter falls under the 'minimum evidence test' and is approved by the Public Prosecutor[9].

In deciding whether there are reasonable prospects of a conviction, there must be an evaluation of the strength of the prosecution case, bearing in mind that the prosecution must prove all elements beyond reasonable doubt. The following matters must be considered:

a) The availability, competence and compellability of witnesses and their likely impression on the court.
b) Any conflicting statements by any material witnesses.
c) The admissibility of evidence including any alleged confession.
d) Any defence that has been advised by the accused or is obvious on the facts.

## 5.2 PUBLIC INTEREST

If a prosecutor forms the view that there are reasonable prospects of a conviction, he or she, must then consider whether it is in the public interest to proceed. In many cases the public interest is served by the deterrent effect of a prosecution and in many cases mitigating factors are most appropriately dealt with by a sentencing court. The more serious an offence the more likely it will be in the public interest to proceed.

Nevertheless, the Public Prosecutor is vested with significant discretion and in appropriate cases must give serious consideration as to whether it is in the public interest to proceed. These discretionary factors may include:

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[8] See Part 3, Prosecutors Code Gazette Notice No. 13 of 2017 (Annexure J)
[9] See Part 3, Prosecutors Code Gazette Notice No. 13 of 2017 (Annexure J)

a) The level of seriousness or triviality of the alleged offence, or whether or not it is of a technical nature only.
b) The existence of any mitigating or aggravating factors.
c) The youth, age, physical or mental health or special vulnerability of the alleged offender or any necessary witness.
d) Any previous criminal history.
e) The time since an offence was committed and any delay.
f) The degree of culpability of the offender in connection with the offence.
g) The prevalence of the alleged offence and the need for either personal or general deterrence.
h) The attitude of the victim of the alleged offence to a prosecution.
i) The length and expense of a hearing or trial.
j) The likely sentence in the event of a conviction.
k) The necessity to maintain public confidence in the Office, Parliament and the Courts.
l) The effect on public order and morale.

The list is not exhaustive and the significance of these factors, and others, will depend on the individual circumstances of a case.

### 5.3 IMPARTIALITY

A decision to prosecute or not to prosecute must be based upon the evidence, the law and these guidelines. A decision to prosecute MUST NEVER be influenced by:

a) Race, religion, sex, national origin or political views.
b) Personal feelings of the prosecutor concerning the offender or the victim.
c) Possible political advantage or disadvantage to the government or any political group or party.
d) The possible effect the decision will have on the personal or professional circumstances of those responsible for the prosecution.
e) Threats or inducements.

# 6. The Decision to Prosecute Particular Cases.

### 6.1 CHILD OFFENDERS

The Government of Vanuatu has ratified the Convention of the Rights of the Child (CROC)[10], the Public Prosecutor recognises that special considerations apply to a young offender when they come before courts. The welfare and rehabilitation of a child defendant will be carefully considered.

Consistent with CROC, a child under the age of 10 cannot be prosecuted in Vanuatu. There is little specific legislation in Vanuatu relating to young offenders, as such the prosecutors must always keep in mind the CROC and the OPP Young Offenders Prosecution Guideline and be guided by them when making decisions.

[10] See Annexure C

In relation to child defendants between 10 and 14 years old, when considering the evidence relating to the elements of the offence the prosecution will need to rebut the presumption that the child was not capable of "being able to distinguish between right and wrong and that he did so in respect to the offence with which he is charged"[11]. The prosecution will need to form the view that there are reasonable prospects of proving the additional element that the child knew the conduct relating to the offence was wrong. This may be proven by the seriousness of the offence or earlier criminal conduct and or earlier dealings with police.

### *6.1.2 Decision to prosecute young offenders (juveniles)*

In summary there are five steps to decide whether to prosecute a child:

a) Confirm that the child is over 10 years old.

b) If the child is between 10 and 14 years confirm there is evidence to show that the child understood what he was doing was criminally wrong.

c) Confirm the child is between 14 and 18 years and if so apply the decision to prosecute test

d) Does the evidence offer a reasonable prospect of conviction?

e) Is it in the public interest to proceed?

When making a decision and providing an opinion to the Public Prosecutor; prosecutors should use the decision process out in Annexure S.

If the child is over 10 years and they understood that what they were doing was criminally wrong and there is sufficient evidence the public interest factors should be considered with particular attention to:

a) The seriousness of the alleged offences, a serious offence or serial offending will generally require a prosecution.
b) Whether the child is a first offender or is alleged to have committed a minor offence, generally the public interest is in not prosecuting juveniles in this category.
c) The age, apparent maturity and mental capacity of the juvenile.
d) The available options to prosecution.
e) The likely sentence outcome upon conviction.
f) The child's family circumstances, particularly whether the child's parents or guardians are able or willing to exercise effective control over the child.

At all times the OPP Young Offender Prosecution Guideline must be followed.

## 6.2 Mental Illness

A person who is known to be significantly mentally disordered should not be prosecuted for trivial offences which pose no threat to the community.

However, 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:-

[11] Section 17(1) Penal Code

a) Details of previous and present offences.
b) The nature of the defendant's condition.
c) The likelihood of re-offending
d) The capacity of the court to refer the person to a health practitioner or facility[12].

In rare cases, continuation of the prosecution may so seriously aggravate a defendant's mental health that this outweighs factors in favour of the prosecution. It would normally be for the person's legal representative to establish this to the satisfaction of the prosecution.

Mental health issues should be brought to the Public Prosecutors attention as soon as possible. The Public Prosecutors discretion to refer to the court to determine insanity or diminished responsibility will more likely be exercised in cases where:

a) The defence are relying upon expert reports describing insanity [13] ,diminished responsibility[14] at the time of the offence, or
b) There is otherwise significant evidence of unsoundness of mind or unfitness for trial.

If there is doubt as to the accused mental capacity the Public Prosecutor will be more likely to refer the matter to the court for determination.

If a significant issue about the accused's capacity to be tried arises during the trial, the prosecutor should seek an adjournment for the purpose of obtaining an independent assessment.

## 6.3 Prosecution of Corporations

As a general rule the reference in an Act to a person includes a reference to a corporation as well as an individual. Consequently, a corporation may be liable for any criminal offence except those that by their very nature cannot be committed by a corporate entity, for example, sexual offences.

When considering the prosecution of corporations the prosecutor must consider whether to charge a corporation with an offence, instead of, or as well as an individual.

The enforcement of the law against corporate offenders, where appropriate, will have a deterrent effect, protect the public and support ethical business practices. When prosecuting corporations, where appropriate, prosecution will capture the full range of criminality of the offending, but should not be used in substitution for the prosecution of criminally culpable individuals such as directors, officers, employees or shareholder. Prosecuting such individuals will provide a strong deterrent against future corporate wrongdoing.

As a general rule it is best practice to have all connected offenders – corporate and individual prosecuted together.

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

[12] Section 58ZE Penal Code
[13] Section 20 Penal Code
[14] Section 24 Penal Code

may be appropriate when a corporation has ceased to exist, or is in administration, liquidation or receivership.

When considering whether the prosecution of a corporation is in the public interest, the above public interest factors will be relevant, in addition the following non-exhaustive factors may be relevant. The weight accorded to them will depend of the individual circumstances of the case:

a) The history of similar conduct or the lack of such a history.
b) Whether the corporation had been previously subject to warnings, sanctions or criminal charges and had nevertheless failed to take action to prevent future unlawful conduct, or had continued to engage in the conduct.
c) Whether the corporations directors or high level management engaged in the conduct or permitted the commission of the alleged offence.
d) The failure of corporation to create or maintain a corporate culture requiring compliance with the law, or conversely, the existence of a genuinely proactive and effective corporate culture encouraging compliance.
e) Failure to report wrongdoing within a reasonable time after the offending became known.
f) An existing genuinely proactive approach adopted by the corporate management team involving self-reporting and remedial actions, including the compensation of victims.
g) The availability of alternative civil or regulatory remedies.
h) Whether the offending represents actions of isolated individuals or was part of a corporate culture.
i) If the offending is not recent in nature, whether the corporation in its current form is effectively a different body to that which committed the offences.

# 7. Nomination and Institution of Charges.

In many cases the evidence will disclose conduct which constitutes an offence against several different laws.

## 7.1 INSTITUTION OF PROCEEDINGS

### *7.1.1 BY CHARGE OR COMPLAINT*

Section 34 of the *Criminal Procedure Code (CPC)* sets out two ways of commencing a proceeding. They are:

i) By formal charge preferred by the Public Prosecutor[15] or
ii) By complaint given orally by a complainant to a judicial officer.

In almost all cases a proceeding will be commenced by the preferment of a formal charge in the form of an information by the OPP. It would be extremely rare to commence a proceeding by complaint. It is noted that section 35 CPC states that the formal charge "shall be deemed to be a complaint for the purposes of this Code", this statement does not require that a complainant must be identified to

[15] Section 34 and 35(2) Criminal Procedure Code

commence a proceeding, but simply that a reference to compliant in the CPC is a reference to the formal charge preferred by the OPP.

It should be emphasised that a charge will be laid or a matter investigated because there is admissible evidence upon which either police or prosecutors can rely, this includes direct evidence and inferential evidence. The Public Prosecutor requires evidence to lay a charge and commence a prosecution and does not require what has been referred to as a 'complaint' statement when that statement is given by a person who provides no admissible evidence. For example, the father of a victim if a sexual offence who is not a witness and is requesting police investigate in the form of a 'complaint' statement. In these circumstances, the 'complaint' statements have no evidential value, are not admissible and are not required by law.

## 7.2 PARTICULARISATION OF CHARGES

All information provided to the Court must comply with section 71 of the CPC. This provision reflects the common law and provides a charge or information must contain:

1. A statement of the specific offence; and
2. A statement of the particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

The particulars are provided under the heading 'particulars' on the information and they must include sufficient legal details so that the accused will know what is alleged against them. As such the particulars must include the details in relation to the elements of the offence, places and dates as best as can be provided by the prosecution[16]. The information should also be accompanied by a summary of facts. The summary of facts should be provided and contain the precise details in relation to the prosecution case before they are required to plead.

The following example suffices the requirements of section 71 CPC:

> *Domestic Violence Offence – contrary to section 10(1) and 4(1)(d) Family Protection Act*
>
> *Particulars*
>
> *Bob Citizen, on 25 January 2018 at Port Vila you did commit an act of domestic violence against your spouse Emma Citizen when you stalked her by following her and making persistent telephone calls to her place of work so that it would cause her apprehension or fear.*

The example addresses the elements of the offence and for accuracy includes the date and time. The summary of facts, in this caseshould set out details of the persistent calls and the time and places where the victim was followed.

[16] See *Johnson v Miller (1937) 59 CLR 467* where it was said that the defendant was entitled to the particulars of the act and matter or thing alleged as the foundation of the charge

## 7.3 CHOICE OF CHARGES

In many cases the evidence will disclose conduct which constitutes an offence against several different laws. Care must be taken to choose charges which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will enable the court to impose a sentence consistent with the gravity of the conduct. It will not normally be appropriate to charge a person with a number of offences in respect of the one act but in some circumstances it may be necessary to lay charges in the alternative.

The charges laid will usually be the most serious available on the evidence.

However, it is necessary to make an overall appraisal of such factors as the strength of the evidence, the probable lines of defense to a particular charge and whether or not the case needs to be or should be heard in the Supreme Court . Such an appraisal may sometimes lead to the conclusion that it would be appropriate to proceed with some other charge or charges.

## 7.4 REPRESENTATIVE CHARGES

In some cases, a prosecutor may consider that a representative charge is more appropriate. A representative charge is a charge that consists of a number of offences combined or 'rolled' into a single charge. Representative charges are used in two main situations:

a) A charge may be representative if multiple offences of the same type are alleged to have been committed in similar circumstances and the offences are committed over a period of time, and the nature and circumstances of the offences make it unreasonable for the complainant to particularise dates or other details of the offences, for example, in the case sexual offences against children, or
b) The defendant has agreed to plead guilty to a number of charges and it is in the interests of justice to sentence them on a single representative charge.

Representative charges must include particulars of the offences for which the charge is representative (for example, particulars of values, amounts or quantities) and the dates on or between which the offending is alleged to have occurred. The Court may, in the interests of justice, order a representative charge be amended or divided into two or more charges, or that two or more charges be amalgamated into a representative charge.

## 7.5 CONSPIRACY CHARGES

There is a particular need for restraint in relation to conspiracy charges. Whenever possible, substantive charges should be laid reflecting the offences actually committed as a consequence of the alleged conspiracy. However, there are occasions when a conspiracy charge is the only one which is adequate and appropriate on the available evidence. Where conspiracy charges are laid against a number of accused jointly it is important to give due consideration to any risk that a joint trial may be unduly complex or lengthy or may otherwise cause unfairness to one or more of the accused.

Under no circumstances should charges be laid with the intention of providing scope for subsequent charge negotiation.

Only the Public Prosecutor can authorise the laying of a conspiracy charge.

## 7.6 MODE OF TRIAL

Summary disposition usually provides the fastest and most efficient disposition of justice. In relation to some indictable offences, the prosecution has the power to elect whether those matters are dealt with summarily[17]. Criminal offences with a penalty of imprisonment of more than 2 years and not exceeding 10 years can be dealt with summarily on application or at the Magistrate's discretion. Prosecutors will consider the prosecutions position and advise the court at first mention whether they have formed the view as to whether the matter should be heard by the Supreme Court or the Magistrates Court. It is however, noted that the Public Prosecutors general position is that any offences involving children (as victims or offenders), sexual offences or domestic violence offences involving repeat offending or significant violence are more appropriately dealt with in the Supreme Court.

# 8. Ex- Officio Indictments.

An ex officio indictment or ex officio count in an indictment is a bill of indictment for an offence in respect of which there has been no preliminary investigation (committal) for trial. An ex-officio charge is laid directly with the Supreme Court and should not be considered normal practice.

Section 9 of the *Public Prosecutors Act* sets out when a charge or ex-officio indictment can be laid in the Supreme Court. They are:

a) When the person to be charged consents to the charge being laid ex-officio.[18]
b) When a Magistrate does not commit a matter for trial the same or related charges may be laid in the Supreme Court ex- officio.[19]
c) When a person has been committed for trial in respect of offence/s and other charges based on the same evidence may be laid ex-officio.[20]
d) If the Public Prosecutor considers it appropriate to do so he or she may lay a charge in the Supreme Court ex-officio.

However, the approval of the Public Prosecutor should be sought to lay any ex-officio indictment or count in respect of any offence that is substantially different in nature or seriousness from an offence considered at preliminary inquiry or if no preliminary inquiry has taken place. An ex-officio count may be used for a truly alternative count to a committal charge without the Public Prosecutors permission.

A decision whether or not to proceed by way of ex officio indictment or count where no preliminary inquiry has taken place should be made by the Public Prosecutor and should be made at least one month of the matter arising or being referred to the OPP for consideration. The alleged offender must be advised of the direction given.

Where a charge is to be reduced in scope or severity from the preliminary inquiry charge, the police case officer and the victim should be consulted. Where the police case officer or the victim objects to

[17] Section 14 Judicial Services Act
[18] Section 9(1) Public Prosecutors Act
[19] Section 9(2) Public Prosecutors Act
[20] Section 9(3) Public Prosecutors Act

the proposed reduced charge, the Public Prosecutor must be consulted. A written record must be made of all consultations described above.

The alleged offender in each case must be kept informed. Where appropriate the alleged offender should be given the opportunity of making representations when consideration is being given to an ex officio indictment or count against him or her.

# 9. Defence Submissions or Representations.

The prosecutor should conduct themselves in the following manner in dealing with defence submissions or representations.

a) Any representation by defence should be dealt with quickly;
b) Defence should be asked to put all representations in writing;
c) A response to representations should be in writing;

Representations by defence that a charge should be negotiated should be considered using factors set out below under 'charge negotiation'.

# 10. Charge Negotiation.

Charge negotiation involves negotiations between the defence and the prosecution in relation to the charges to be proceeded with. It should not be confused with the concept of 'plea bargaining' which does not exist at law in Vanuatu. Such negotiations may result in the accused pleading guilty to a fewer number of charges, or to a less serious charge or charges. In some cases it may involve agreement about the content of the statement of facts to be put before the court.

There are benefits to the criminal justice system from a plea of guilty. The earlier it is achieved, the greater will be the benefits to the accused, the victim, witnesses and the community.

Negotiations between the defence and the prosecution are encouraged. They may occur at any stage and may be initiated by the prosecution or the defence. Charge negotiations must be based on principle and reason and be in accordance with this guideline and the principles contained in any other 2018 guidelines such as the OPP Family Violence Prosecution Guideline or the Proceeds of Crime Manual.

## 10.1 Charge Negotiation Principles

A plea of guilty may be accepted by the Prosecution if the public interest is satisfied on consideration of the following matters:

a) Whether the plea reasonably reflects the essential criminality of the conduct and provides an adequate basis for sentencing.
b) Whether it will save a witness, particularly a victim or other vulnerable witness from the stress of testifying in a trial.
c) The desirability of prompt and certain finalisation of the case.
d) The need to avoid delay in the finalisation of other pending cases.

e) The time and expense involved in a trial and any appeal proceedings.
f) Any deficiencies in the available evidence.
g) In cases where there has been a financial loss to any person, whether the defendant has made restitution or arrangements for restitution.
h) The views of the police or other referring agency, and
i) The views of the victim, where those views are available and if it is appropriate to take those views into account.
j) Whether custom reconciliation has taken place and the benefit, both emotionally and financially, the victim and the community has received.

## 10.2 PROHIBITED PLEAS DURING PLEA NEGOTIATION

A plea of guilty will not be accepted if:

a) It does not adequately reflect the criminality of the offending conduct, or
b) It would require the prosecution to distort evidence or create an artificial basis for sentencing, or
c) The accused maintains his or her evidence.

## 10.3 SCOPE FOR CHARGE NEGOTIATIONS

Each case will depend on its own facts, but negotiation may be appropriate in the following cases:

a) Where the prosecution has to choose between a number of appropriate alternative charges. This occurs when the one episode of criminal conduct may constitute a number of overlapping but alternative charges;.

b) Where new reliable evidence reduces the strength of the prosecution case; or

c) Where the accused offers to plead to a specific count or an alternative count in an indictment and to give evidence against a co-offender.

The acceptability of this will depend upon the importance of such evidence to the Crown case, and more importantly, its credibility in light of corroboration and the level of culpability of the accused as against the co-offenders;

## 10.4 SENTENCING AND CHARGE NEGOTIATION

Sentencing of offenders is a matter for the court. It is not to be the subject of agreement or purported agreement between the prosecution and defence.

## 10.5 AUTHORISATION TO ACCEPT A PLEA

In cases of homicide, attempted homicide, sexual offences, serious fraud, corruption, bribery or special sensitivity, notoriety or complexity; an offer should not be accepted without consultation with the Public Prosecutor. The consultation must be recorded by file note.

In less serious cases the decision to accept an offer may be made after consultation with the Deputy Public Prosecutor or Principle State Prosecutor. The consultation must be recorded by file note.

## 10.6 CONSULTATION

In all cases, before any decision is made, the views of the investigating officer and the victim or the victim's relatives, should be sought and recorded by file note. (See below decision not to prosecute)

Those views must be considered but may not be determinative. It is the public, rather than an individual interest, which must be served.

### *10.6.1 FILE NOTES TO BE MAINTAINED*

Any offer by the defence, the supporting argument and the date it was made should be clearly noted on both the paper file and the electronic file held on the case management system.

The decision and the reasons for it should also be recorded and signed.

# 11. Disclosure.

The prosecution is under a continuing obligation to make full disclosure to the accused in a timely manner of all material known to the prosecution which can reasonably be seen by the prosecution:

a) To be relevant or possibly relevant to an issue in the case.
b) To raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use, or
c) To hold out a real as opposed to fanciful prospect of providing a lead to evidence which goes to either of the previous two matters.

The prosecution 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 or representation of any kind 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, tribunal or Royal Commission 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.

The prosecution must fulfil its duty of disclosure as soon as reasonably practicable.

The prosecution's duty of disclosure continues throughout the prosecution process and any subsequent appeal.

In fulfilling its disclosure obligations, the prosecution must have regard to the protection of the privacy of victims and other witnesses. The prosecution will not disclose the address or telephone number of any person unless that information is relevant to a fact in issue and disclosure is not likely to present a risk to the safety of any person.

The prosecution may refuse to disclose material on the grounds of public interest immunity or legal professional privilege.

Legal professional privilege will ordinarily be claimed against the production of any document in the nature of an internal OPP advice or opinion. Legal professional privilege will not be claimed in respect of any record of a statement by a witness that is inconsistent with that witness's previous statement or adds to it significantly, including any statement made in conference and any victim impact statement, provided the disclosure of such records serves a legitimate forensic purpose.

The duty on the prosecution to disclose material to the accused imposes an obligation on the police and other investigative agencies to notify the prosecution of the existence and location of all such material. If required, in addition to providing the brief of evidence, the police or other investigative agency shall certify that the prosecution has been notified of the existence of all such material.

# 12. Opinion and Case Review.

All prosecutions commence with a review of the brief of evidence and the writing of an opinion[21] which is ultimately considered by the Public Prosecutor[22]. This is the first review of the case.

All current cases must be continually reviewed. This means ongoing assessment of the evidence as to, the appropriate charge and requests for further investigation.

Conferences with witnesses are an important part of the review process. Matters have to be considered in a practical way upon the available evidence.

In summary all cases should be reviewed at the following points and documentation updated:

a) Writing of summary of facts and information, review of available evidence.
b) Upon receipt of full brief, review all evidence and update summary of facts and charges.
c) After Preliminary Investigation (if applicable) – review, update and file new information and summary of facts in the Supreme Court.
d) Upon receipt of any new evidence review and update summary of facts and information as required.

If upon review of the case additional evidence arises or a prosecutor forms a different view; they must discuss this with a Principle State Prosecutor or the Public Prosecutor as soon as possible.

[21] Annexures N and O, Public Prosecutors Guide on Opinion Writing and Practice Direction
[22] See Annexure N Public Prosecutors Direction no. 1 of 2017 (Notice no. 14 of 2017)

# 13. Undertaking Not to Prosecute (Indemnity).

The Public Prosecutor has a power under the Public Prosecutors Act[23] to grant an indemnity from prosecution to certain offenders willing and able to give evidence that may incriminate themselves. This indemnity protects the person from being prosecuted for a specified offence or in respect of specified acts or omissions. Where an indemnity has been granted, no proceedings may subsequently be instituted in respect of the offence or specified conduct. The grant of indemnity may be given subject to such conditions (if any) as the Public Prosecutor considers appropriate.

## 13.1 General Principles relating to the grant of indemnity

Any grant of indemnity from prosecution is subject to the condition that the recipient of the undertaking will give evidence as and when called to do so, and that any evidence the person is called upon to give will be given truthfully, accurately and on the basis that the person will withhold nothing of relevance.

In principle it is desirable that the criminal justice system should operate without the need to grant any concessions to persons who have participated in the commission of offences, or who have guilty knowledge of their commission. It is a grave step to grant, in effect, immunity from prosecution to someone apparently guilty of a serious offence. However, it has long been recognised that exceptional cases do arise in which the interests of justice demand that such a course be pursued.

As a general rule, an accomplice should be prosecuted irrespective of whether he or she is to be called as a witness, subject of course to the usual evidentiary and public interest considerations being satisfied.

For example, in the following scenario there would be no need for an indemnity. *An accomplice is tried and convicted or acquitted with respect to the offences in issue; the accomplice will then be a compellable witness for the prosecution, without the need for the issuing of an indemnity.* Upon pleading guilty; the accomplice who is prepared to co-operate in the prosecution of another can expect to receive a substantial reduction in the sentence that would otherwise have been appropriate.

The central issue in deciding whether to grant an indemnity is whether it is in the overall interests of justice that the opportunity to prosecute the person in respect of his or her own involvement in the crime in question should be foregone in order to secure that person's testimony in the prosecution of another. The factors to be considered include:

(a) The importance of the evidence which may be obtained as a result of the undertaking.

(b) The extent of the criminal involvement of the person seeking the undertaking compared with that of the accused.

[23] Section 9(7)(a)-(b)

(c) Whether the person seeking the undertaking has given a full and frank statement of his or her prospective evidence, including an acknowledgement of his or her own role in the offences in issue.

(d) The character, credibility and previous criminal record of the person concerned.

(e) whether any inducement has been offered to the person to give the evidence sought, and

(f) Whether there is any other means of obtaining the evidence in question such as whether it can be obtained from another source.

Requests for consideration of the granting of an indemnity will normally come from a defence representative or from police.

## 13.2 DEFENCE APPROACH OPP FOR INDEMNITY

Where defence approach the OPP in relation to an offer for the defendant to be treated as a prosecution witness after charges have been laid, the OPP should refer to matter to the police for the conducting an induced interview or statement. The police should then make an assessment and provide a recommendation to the OPP on whether, from their perspective, the person is likely to be of more value as a witness for the prosecution than a defendant. Ultimately, the decision will remain that of the Public Prosecutor.

If the request comes from a legal representative, the request must be addressed to the Public Prosecutor. The Public Prosecutor will then ask Police to investigate as required in order for the decision whether to grant indemnity to be based on independent investigation.

## 13.3 POLICE IDENTIFY PARTICIPANT AS WITNESS

In the course of an investigation the police may identify a participant in the criminal activity under investigation as a person who, from the perspective of the police, is likely to be of more value as a witness for the prosecution than a defendant.

Where such a request is made by Police, the Public Prosecutor should be provided with:

a) A full copy of the brief of evidence against the principal offender.
b) The evidence of the witness's offending to allow the Public Prosecutor to identify what conduct the witness seeks indemnity from Prosecution.
c) Statement from the witness seeking indemnification outlining the evidence they can provide.
d) A comprehensive report referring to each of the standard indemnity criteria, as listed above.

Given that a grant of indemnity will rarely be given, investigators should consult with the Public Prosecutor as soon as practicable.

### 13.4 RECORDS TO BE MADE OF INDEMNITY GRANTED OR REFUSED

A file note must be made of all conversations had with legal representatives of the person seeking indemnity from Prosecution and stored on the Case Management System. The file note must address the criteria set out above.

### 13.5 DISCLOSURE

Where an accomplice receives any concession from the Public Prosecutor in order to secure his or her evidence, the terms of the agreement or understanding between the prosecution and the accomplice must be disclosed to the court and to the defence.

### 13.6 INDUCED STATEMENTS

An induced statement should be taken in relation to a witness who is or is likely to be considered for the granting of an undertaking of indemnity under the *Public Prosecutor Act 2003.* A precedent for the induced statement is found at annexure K of the Guideline.

## 14. Letters of Comfort.

Occasionally a potential witness may be reluctant to testify or speak to investigators. A letter of comfort is a mechanism that may be used to facilitate a person's co-operation with investigators with a view to obtaining a statement and having that person testify in the prosecution.

A letter of comfort is a representation by the OPP which, based on the information then available, the OPP does not propose to prosecute a person for conduct related to a proposed or already instituted prosecution against others.

The issuing of a letter of comfort does not involve the exercise of any statutory function or power under Vanuatu Law. It is advice that the person WILL NOT be prosecuted because, on the information available, the person HAS NOT committed any offence related to the conduct that is the subject of the prosecution. In this way the letter of comfort differs significantly from an indemnity.

It is inappropriate to issue a letter of comfort where there is information that the person has committed an offence involving matters linked with the prosecution. In that case, the ordinary principles and practices for the giving of undertakings of indemnity should be applied.

A proposal to issue a letter of comfort can be settled by a Principle State Prosecutor. The forming of an opinion that a person has not committed an offence is part of the day to day work of lawyers in the OPP, and no statutory function or power is involved.

The Principle State Prosecutor heading the relevant area is the appropriate level to sign letters of comfort.

A letter of comfort should not amount to a de facto undertaking of indemnity and should not be expressed in terms of any of the undertakings under the Act.

The form of individual letters might differ depending on the particular matter, but an example of the matters that should be covered is set out in Annexure L.

# 15. The Court Process.

## 15.1 BAIL

When a person is arrested without a warrant or is in custody on remand they can apply for bail. If they have not been charged with an offence that carries a maximum penalty of life imprisonment they will be bought before the Magistrates Court. For those who have been charged with a life imprisonment offence they can apply for bail in the Supreme Court[24]

The presumption of innocence, the prosecution burden of proof, the right to persons of liberty and freedom creates a presumption of an entitlement to bail. There are a number of exceptions to that entitlement to bail and the prosecution may oppose a person being granted bail. A judge or magistrate after hearing the submissions of prosecution and defence and considering the law may decide to remand a person in custody or release them to comply with conditions.

Prosecutors are to comply with the following guidelines when dealing with bail applications.

The common law is that an accused person is presumed to be innocent and therefore there is a general presumption that an accused person should be granted bail, with the onus being on the prosecution to show that a person should not be granted bail. The common law has identified a number of factors that the Court should take into account when deciding whether to grant bail, they include:

a) The probability or otherwise of the accused appearing at the trial. In connection with this, there are three subsidiary factors;
    I. seriousness of the crime
    II. probability of conviction
    III. severity of the punishment that may be imposed.
b) Ties with his family.
c) Character and antecedents.
d) The likelihood of interference with witnesses.
e) Whether the prosecution opposes the application.
f) Whether a refusal of bail would prejudice the preparation of his defence.
g) The delay before trial.
h) The protection of the public.

Prosecutors need to carefully consider whether the general public or specific individuals would be at risk if the person in custody is granted bail. If prosecutors are of the view that the person poses a significant risk to the safety of the public or specific individuals then the bail application should be opposed. Prosecutors can use the bail decision form to assist in this process[25]

If a prosecutor is of the view that a bail application should not be opposed he or she should write a file note detailing the reasons why. When the charge is homicide, aggravated sexual offences or another charge where a complainant has suffered life-threatening injuries, consent should be obtained from the Public Prosecutor.

[24] Section 60 Criminal Procedure Code
[25] Annexure Q – Bail decision matrix and opposition form

Where a bail application is not to be opposed clear, brief, written reasons should be made in order to provide a record as to why the decision not to oppose bail was made.

Where it is likely that bail would be granted, careful consideration will need to be given to determine which of the following conditions are required:

a) A residential condition.
b) A curfew condition.
c) A reporting to police condition.[26]
d) A condition that the applicant does not approach or contact, directly or indirectly, the complainant or other specified persons, including witnesses.
e) A condition that the applicant does not leave the island.
f) A condition that the applicant surrender to the registrar his or her passport.
g) A condition that the applicant not assault, threaten, harass or intimidate the complainant.

The appropriate conditions would be dependent on the circumstances of the case.

Information concerning the outcome of bail applications should be promptly relayed to any concerned persons, e.g. police and complainants.

When considering bail in relations to young offender, alleged sexual offender or alleged perpetrators of family violence the relevant guideline should be referred to and followed.

## 15.2 SUMMONS

A person can be bought to court to be charged by either arrest with or without a warrant[27] or by the issue of a summons[28]. If, however, the prosecutor has information that indicates it is a serious matter requiring the accused to be arrested and or the accused whereabouts are unknown the prosecutor will seek a warrant for the accused arrest[29].

## 15.3 PRELIMINARY INVESTIGATION

Any offence that is to be tried in the Supreme Court should be subject to a preliminary inquiry by a Senior Magistrate in the Magistrates Court [30]. This is sometimes called a committal for trial. The prosecution provides a brief of evidence to the court, during the preliminary investigation if the Magistrate forms the view that a 'prima facie' case is established the matter will be committed to the Supreme Court[31].

[26] See annexure O – Practice Direction relating to reporting conditions
[27] Arrest without warrant section 12 Criminal Procedure Code
[28] See Annexure O – Practice Direction on issue of summons
[29] Section 36 Criminal Procedure Code sets out the choice to be made by the prosecutor as to whether to seek a warrant or summons
[30] See annexure O – Practice Direction on Filing and preliminary Investigation
[31] Section 145(2) Criminal Procedure Code

*In the case of Uyor v Public Prosecutor [2018] VUCA 41*

> *13. A committing Magistrate is not determining the guilt of an accused person or conducting a trial. She or he assesses the evidence and decides whether there is a prima facie case.*
>
> *14. The term 'prima facie case' is used in most common law countries and it simply means whether at first sight and on the face of the available evidence, without investigation, there is a case to be answered…….*

If on the evidence available to the Court the Senior Magistrate determines that there is a prima facie case the matter will be committed to the Supreme Court for trial.

## 15.4 THE TRIAL

If a person is charged and enters a plea of not guilty their matter will be listed for trial. Trials take place in both the Magistrates Court and the Supreme Court and the process is set out in Part 9 of the CPC. During the trial it is the prosecutor's responsibility to prove the offence beyond reasonable doubt and the accused has no obligation to prove anything.

A trial in the Magistrates Court takes place before a Magistrate and a trial in the Supreme Court takes place before a Judge.

## 15.5 OPENING ADDRESS

The prosecution is required to make an opening address[32]. During the opening address the prosecution will state the case against the accused and identify the evidence the prosecution has to prove the case against the accused, this is often called the 'case theory'. The accused is not required to make an opening address.

The prosecution cannot change their 'case theory' once they have opened.

## 15.6 NO CASE SUBMISSION

At the close of the prosecution case the Magistrate or Judge will need to satisfy themselves that the prosecution has presented evidence to the Court that is capable of proving each element of the offences.

In the Magistrates Court, if the Magistrate finds that a 'prima facie' case has not been made out against the accused, they must acquit the accused[33]. If there is a prima facie case, the matter will proceed to the defence case.

In the Supreme Court, at the close of the prosecution case, if the Judge finds that "as a matter of law that there is no evidence on which the accused person could be convicted" then a finding of not guilty will be entered and the accused will be acquitted. However, if the Judge finds that there is evidence upon which the accused can be convicted it will proceed to the defence case.

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[32] Section 161 Criminal procedure Code
[33] Section 135 Criminal Procedure Code

# 16. Sentence of Offenders.

## 16.1 Prosecutors' role in sentencing

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

This requires that the prosecutor must not seek to persuade the court to impose a vindictive sentence or one based on personal reasons. A prosecutor must always seek to put before the court submission that are in the interest of the community and:

a) Must correct any error made by the opponent in address on sentence.
b) Must inform the court of any relevant authority or legislation bearing on the appropriate sentence.
c) Must assist the court to avoid appealable error on the issue of sentence.
d) May submit that a custodial or non-custodial sentence is appropriate, and
e) May inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant appellate authority.

In pursuing this last requirement, a prosecutor should:

a) Adequately present the facts.
b) Ensure that the court is not proceeding upon any error of law or fact.
c) Provide assistance on the facts or law as required.
d) Fairly test the opposing case as required.
e) Refer to relevant official statistics and comparable cases and the sentencing options available.

If it appears that there is a real possibility the court may make a sentencing order that would be inappropriate and not within a proper exercise of the sentencing discretion, the prosecution must make submissions on that issue. Particularly if, where a custodial sentence is appropriate, the court is contemplating a non-custodial penalty.

It is a judicial officer's duty to find and apply the law and that responsibility is not circumscribed by the conduct of legal representatives. Any understanding between the prosecution and defence as to submissions that will be made on sentence does not bind the judge or magistrate.

A prosecutor should not in any way fetter the discretion of the Public Prosecutor to appeal against the inadequacy of a sentence (including by informing the court or an opponent whether or not the Public Prosecutor would, or would be likely to, appeal, or whether or not a sentence imposed is regarded as appropriate and adequate). The Public Prosecutors instructions may be sought in advance in exceptional cases.

## 16.2 Facts on Sentence

A prosecutor should draw to the attention of the court what are submitted to be the facts that were found at trial or the agreed facts between both prosecution and defence. An agreed set of facts are the facts that the accused will be sentenced upon and must contain all of the information the prosecution relies.

The agreed facts should not contain information relating to offences that the accused is not being sentenced upon. The facts should also contain information that supports all the elements of the offences charged.

## 16.3 Relevant Sentence Principles

The prosecutor should also advise the court of the relevant principles that should be applied and what has been done in other (more or less) comparable cases. The prosecutor may also make a submission on the sentence; however, the final decision will be that of the Judge or Magistrate. 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, the prosecutor should make submissions on that issue. This will be particularly so if, where a custodial sentence is appropriate, the court is contemplating a non-custodial penalty, or where a conviction is appropriate, the court is contemplating a non- conviction order.

## 16.3 Disputed facts

Where facts are asserted on behalf of an accused which are contrary to the prosecutor's instructions or understanding, the prosecutor should press for a trial of the disputed issues, if the resolution of such disputed facts is in the interests of justice or is material to sentence.

## 16.4 Assistance to authorities

Co-operation by convicted persons with law enforcement agencies should be appropriately acknowledged and, if necessary, tested at the time of sentencing. Assistance to authorities is NOT providing a statement that admits the sentence. If the offender enters a plea of guilty, the discount provided should recognise the offender's remorse and the utility of the plea that encompasses this aspect of assistance. To provide a discount for both an early plea and providing a statement admitting the offence should not occur as it would have the effect of providing two discounts for the same mitigating factor.

On no occasion will it be appropriate for material such as police testimony as to an accused's assistance to authorities to be handed directly to the court by police without prosecution knowledge. In most cases, such material should be given to the prosecutor and tendered to the court by the prosecutor at the prosecutor's discretion. However, in some sensitive matters where open disclosure of assistance may affect the safety of any individual it may be more appropriate to provide such a letter to the court in chambers.

## 16.5 An unrepresented accused at sentence

Where an offender is unrepresented, the prosecutor should, as far as practicable, assist the court by putting all known relevant matters before the court, including such matters as may amount to mitigation (see below 'unrepresented accused).

## 16.6 Defence Disclosure on Sentence

Prosecutors should insist that defence disclose all documents they wish to rely on at least two days before sentence. At plea prosecutors should seek an order to this effect. Unless copies of all documents to be tendered by the defence on sentence are lodged with the OPP at least two clear working days before the hearing of the matter by the court, the prosecution may make an application for an adjournment for the sentence hearing to be re-listed before the same magistrate or judge.

If an adjournment is not granted, the prosecution will indicate to the court that it has not been possible to test the material and therefore it is the prosecution's submission that the court should give it less weight.

Where copies of defence documents have been supplied in advance to the prosecution, the OPP will advise the defence in writing at least 24 hours before the hearing of the matter if the authors of any defence documents are required for cross-examination.

Where the defence documents are not supplied in advance, the prosecution will retain copies of those tendered on the prosecution file and in specific cases or at random will seek verification of those documents after the hearing.

# 17. Customary law.

The role of customary settlement may be significant on sentence. This is emphasised in the Public Prosecutors Policy of 2003 as outlined below. [34]

> *"It is to be noted that in the case of serious crimes, including rape, incest and other serious offences including offences against Public Order, a customary settlement is relevant in determining the quantum or length of any sentence, but not relevant in exercising the discretion to prosecute."*

This is consistent with the Penal Code that allows for the courts to promote reconciliation in criminal proceedings[35] and the Constitution[36].

Customary law is not however, relevant to a Prosecutors exercise of their discretion to prosecute.

# 18. Discontinuing a Prosecution.

Every decision to discontinue a prosecution or substantially alter charges will be made by the Public Prosecutor. There are two mechanisms by which a prosecution can be discontinued:

1. Withdrawal of the charge pursuant to section 129 CPC
2. Nolle Prosequi pursuant to section 29 CPC

The effect of the withdrawal is that the charges can be re-laid before the court if the prosecution decides to later continue with the matters, while once a *nolle prosequi* is filed and the charge dismissed by the Court the prosecution is barred from laying that charge again.

[34] Section 2, page 12 of the Public Prosecutors Policy at Annexure H
[35] Section 38 Penal Code Act
[36] Section 51 Constitution of the Republic of Vanuatu

## 18.1 WITHDRAWAL

A decision to withdraw a charge must be done in consultation with the Public Prosecutor and a file note must be made of that consultation and the outcome of the consultation.

Factors to consider when withdrawing a charge include the following:

a) Is withdrawing the charge in the interest of justice and the community?
b) Whether it is in the public interest not to either proceed or file a *nolle prosequi*.
c) Will the defendant, witnesses or the complainant suffer from any unreasonable hardship because the matter is withdrawn?
d) Whether there will be significant delay before the charge is re-laid.
e) If the charge is one of family violence the considerations below at chapter 26 and the withdrawal form at annexure R.

There are many reasons why a charge will need to be withdrawn, however a charge must NOT be withdrawn merely for convenience.

## 18.2 NOLLE PROSEQUI

The decision not to prosecute, or to enter a *nolle prosequi*, may be made on the sufficiency of evidence, the public interest or both.

A *nolle prosequi* should normally be entered prior to the commencement of a trial. Once a trial has commenced it is appropriate that the trial end by verdict or direction of the Judge.

Prior to making a final decision to discontinue a prosecution the prosecutor must provide a memorandum to the Public Prosecutor. The prosecutor must consult with and consider the views of any victims of family violence or sexual offences who are contactable and the police investigator. Victims of other offences will be consulted as appropriate. The views of the victims and police must be provided to the Public Prosecutor and they will form part of the decision making process, however, these views are not determinative of the outcome.

A decision by the Public Prosecutor to discontinue a prosecution is final unless (prior the dismissal of the charge by the court):

a) There is fresh evidence favouring a reversal of the decision that was not available at the time the decision to discontinue was made.
b) The decision was affected by fraud.
c) There was a material error of law of fact that would lead to a substantial miscarriage of justice.
d) In all the circumstances it is in the interests of justice to review the decision.

## 18.3 Consultation with Police

The allocated prosecutor must advise the case officer whenever the OPP is considering whether or not to discontinue a prosecution or to substantially reduce charges.

The case officer should be consulted on relevant matters, including deficiencies in evidence or any matters raised by defence. The case officer's views should be sought and recorded prior to any decision. The purpose of the consultation is to ensure that any final decision takes account of all relevant facts. A record of the consultation should be included in the file closing summary.

If neither the case officer nor their supervisor is available for consultation within a reasonable time, the attempts to make contact should be recorded. After a decision is made, the prosecutor must notify the case officer by email as soon as possible.

## 18.4 Consultation with victims

The allocated prosecutor must also seek the views of any victim whenever any serious consideration is given to discontinuing a prosecution for violent or sexual offences.

Where the victim does not want the prosecution to proceed and the offence is relatively minor, the discretion will usually favour discontinuance. However, the more serious the injury, the greater the public interest in proceeding. Care must also be taken to ensure that a victim's reluctance to give evidence in a prosecution has not come from intimidation or fear.

Any prosecutor dealing with a domestic violence or sexual offence must have read and will follow the requirements of the Family Violence and Sexual offence prosecution guidelines.

# 19. Reasons for decisions

The Public Prosecutor is not required by law to give reasons for decisions made during the course of a prosecution and decisions made by the Public Prosecutor are not reviewable administrative decision.

However, the disclosure of reasons is generally consistent with the open and accountable operations of the OPP and reasons for decisions made during the court of a prosecution may be disclosed by the Public Prosecutor to persons outside of the OPP.

In considering whether reasons will be provided the Public Prosecutor will consider the following:

1. Whether the person requesting reasons has a legitimate interest in the matter such that it is appropriate to provide reasons to them, for example a victim of crime.
2. Whether the giving of reasons would cause harm to any person, including the defendant.

Reasons will NOT be given in any case where it would cause unjustifiable harm to a victim, witness or defendant or significantly affect the administration of justice.

# 20. Expert witnesses

An Expert Witness is a witness who provides to the Court a statement of opinion on any admissible matter calling for expertise by the witness and is qualified to give such an opinion. The duty of an expert witness is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise. This is a duty owed to the court and overrides any obligation to the party from whom the expert is receiving instructions[37] [38]. Any expert opinion, or report obtained by the prosecution will be disclosed to defence representatives. If the prosecutor has any concerns relating to this disclosure such as the safety or privacy of the complainant or subject of the report, the prosecutor will seek court guidance on the manner of disclosure. The most often used experts witnesses are forensic or medical witnesses such as pathologists, biologists and doctors. These professionals have their own professional standards to apply and should be asked about this by prosecutors and the courts.

A prosecutor will always provide terms of reference setting out a requirement for the expert to set out their qualifications and experience and answer questions relevant to the question being determined by the Court. The prosecutor will also require that an expert understand and sign a written undertaking that they will be fair and impartial[39].

# 21. The Public Prosecutor and Investigative Agencies.

The Public Prosecutor prosecutes and the police (and some other agencies) investigate. The Public Prosecutor has no investigative function and no power to direct police or other agencies in their investigations.

The Public Prosecutor does not act or appear on behalf of any person (other than the Republic) and investigative agencies are not clients of the Public Prosecutor. The Public Prosecutor may advise investigators in relation to sufficiency of evidence to support nominated charges and the appropriateness of charges; but not in relation to operational issues, the conduct of investigations or the exercise of police or agency powers. Unless the matter is urgent, any advice given to such persons may only be done formally and on behalf of the Public Prosecutor. Guidelines on the giving of advice to police and other investigative agencies are in Annexure F.

## 21.1 ADVICE TO AND CONSULTATION WITH POLICE

A function of the Public Prosecutor is give advice to members of the Vanuatu Police Force and any other investigators in relation to investigations and proposed prosecutions or prosecutions[40]. In addition to advice the Public Prosecutor also has the power to assist in the obtaining of search

[37] R v Harris and others [2005] EWCA Crim. 1980.
[38] Section 84 Rules of Etiquette and Conduct of Legal Practitioners Order No. 106 of 2011
[39] The standard undertaking is at Annexure E
[40] Section 8(1)(g) *Public Prosecutor Act*

warrants[41]. It is worth noting that these functions are advisory only, made to assist police with their decision making processes.

Police seeking advice from the Public Prosecutor must do so in accordance with the OPP Advice to Police (and other investigative agencies) policy. This requires that in all but the most urgent situations, the police should make the request in writing and provide the Public Prosecutor with all relevant information in order to complete the advice. This should as a minimum include a request including the following:

a) The advice sought.
b) Proposed charges.
c) Outline of facts.
d) Any key statements.

## 21.2 Other Investigative Agencies

Some agencies, such as Customs, Immigration and Internal Revenue have the power to both investigate and prosecute. In practice most of these agencies investigate and then refer briefs to the Office of the Public Prosecutor to be dealt with by prosecutors who specialise in this area. The interaction between these agencies and the OPP are regulated by a Memorandum of Understanding (MOU) between the Agency and the OPP. Investigators and prosecutors working in this area must follow the requirements of the relevant MOU when investigating or prosecuting these matters.

# 22. Taking over Private Prosecutions.

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. Further, there may be considerations of public policy why a private prosecution, although instituted in good faith, should not, or at least should not be allowed to remain in private hands. Consequently, section 10 of the *Public Prosecutor Act* enables the Public Prosecutor to take over the conduct of prosecutions initiated by another person. Thereafter the prosecution may be continued or brought an end.

Subsection 10(2) of the *Public Prosecutors Act* enables the Public Prosecutor to seek police assistance in investigating the matter. These provisions enable a full assessment to be made of the prosecution case before any decision is made or, alternatively, after the matter has been taken over.

Given the large range of circumstances which may give rise to a private prosecution it is impracticable to lay down inflexible rules as to the manner in which the discretion will be exercised. In general, however, a private prosecutor will be permitted to retain the conduct of the proceedings unless:

a) There is insufficient evidence to justify the continuation of the prosecution, that is to say, there is no reasonable prospect of a conviction being secured on the available evidence.

[41] Section 8(1)(h) *Public Prosecutor Act*

b) The prosecution is not in the public interest.
c) There are reasons for suspecting that the decision to institute a private prosecution was actuated by improper motives or otherwise constituted an abuse of the prosecution process, or
d) It would not be in the interests of justice for the conduct of the prosecution to remain within the discretion of a private individual having regard to the gravity of the offence and all the surrounding circumstances.

A private prosecution that is instituted to circumvent an earlier decision of the Public Prosecutor must not proceed with a prosecution for the same offence. It will usually be appropriate for the OPP to take over the prosecution with a view to bringing it to an end.

# 23. Prosecution of Young Offenders.

The OPP recognises that young offenders or juveniles, offenders under 18 years should be treated differently to adult offenders. All prosecutions of young offenders must be in accordance with the Young Offender Prosecution Guideline.

The prosecution of juveniles should be regarded as a severe step and only be commenced if the prosecutor has determined there is a reasonable chance of gaining a conviction and there is a public interest in commencing the prosecution. The Prosecution Policy of 2003 sets out the following which remains current in the consideration of young defendants.

> *Special considerations apply to the prosecution of juveniles. Prosecution of a young should always be regarded as a severe step, and generally speaking a much stronger case can be made for methods of disposal which fall short of prosecution unless the seriousness of the alleged offence or the circumstances of the young offender concerned dictate otherwise. In this regard, ordinarily the public interest will not require the prosecution of a young offender who is a first offender in circumstances where the alleged offence is not serious.*[42]

In deciding whether or not the public interest warrants the prosecution of a young offender; regard should be had to the factors set out above that appear to be relevant, but particularly related to:

a) The seriousness of the alleged offence.
b) The age and apparent maturity and mental capacity of the juvenile.
c) The available alternatives to prosecution, such as a caution, and their efficacy.
d) The sentencing options available to the relevant Court if the matter were to be prosecuted.
e) The juvenile's family circumstances, particularly whether the parents of the young offender appear able and prepared to exercise effective discipline and control over the juvenile.

[42] Annexure H

f) The juvenile'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, and
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.

## 23.1 SENTENCING YOUNG OFFENDERS (JUVENILES)

The OPP recognises that one of the primary considerations when sentencing young offenders should be rehabilitation. However, there will still be times when serious offending warrants a term of imprisonment. The *Penal Code* recognises this should be a last resort when no other method of punishment is appropriate.

*IMPRISONMENT OF MINORS*

***54****. (1) A person under 16 years of age is not to be sentenced to imprisonment unless no other method of punishment is appropriate.*

*(2) If a person under the age of 16 years of age is sentenced to imprisonment the Court must give its reasons for doing so.*

Prosecutors will act consistently with the *Penal Code* and not ask for a young person to be imprisoned unless they have consulted a Principle State Prosecutor and no other method of punishment is suitable.

When considering sentences for young offenders, the following may be considered:

a) Discharge without conviction.[43]
b) Fine, although this may not be appropriate unless the young offender is in employment.
c) Power to be called up for sentence.[44]
d) Probation.[45]
e) Suspended sentence with supervision.

### *23.1.2 PROSECUTORS ROLE IN SENTENCING YOUNG OFFENDERS (JUVENILES)*

Generally, a prosecutor should bring the following to the courts attention during the sentencing process:

a) Information about the effect the sentence will have on the child (both positive and negative).
b) Any underlying factors contributing to offending behaviour.
c) The young offenders personal circumstances, in particular, any mental health problems or learning difficulties, any very early use of drugs or alcohol, whether the child has grown up in a violent or abusive household.

[43] Section 43 Penal Code
[44] Section 42 Penal Code
[45] Section 45 Penal Code

d) Any issues that that child may have in communicating or understanding what is happening in court.

### *23.1 3 THE CULPABILITY OF THE YOUNG OFFENDER*

The sentence must be commensurate with the seriousness of the offence. In considering the seriousness of any offence, the court should consider the 'culpability' in committing the offence and any harm the offence caused, or was intended to cause.

In *Leona &Ors [2018] 18 VUCA* the Court considered how a offender under 16 years and convicted of a serious sexual offence should be dealt with. They concluded that the principles in CROC relating to the imprisonment of people under 18 years were applicable, specifically that children should be imprisoned separately from adults and that any sentence should be for the shortest possible time. However, they noted that:

> *These principles must always however be balanced against the seriousness of the crime actually committed by the young person* [46]

A prosecutor should keep in mind that there are some factors linked to the young offenders age and maturity that reduce their 'culpability', in sentencing prosecutors may argue the extent to which culpability was reduced, however the following are factors generally accepted to reduce the culpability of young offenders:

a) Children and young people are not fully developed and are not fully mature.

b) Some children act impulsively or whether they may be easily influenced by others.

c) Some children due to their age and immaturity may not have the ability to fully understand the distress and pain they caused the victims of their crimes.

More generally when considering culpability, the prosecutor should put the following information before the court:

a) The extent to which the offence was planned.
b) The role of the young offender, was the child with a group or alone.
c) The level of force used to commit the offence.
d) The awareness the young offender had of their actions and its possible consequences.
e) Any mental health, emotional and developmental issues the young offender may have that affects their understanding the effect of the crimes.
f) Repetition of offending.

[46] Leona & Ors [2018] 18 VUCA

# 24. Offences involving vulnerable victims.

The OPP recognises that children, victims of sexual offences and domestic violence are vulnerable witnesses. They may suffer from anxiety; have trouble remembering long ago events; and/or struggle with complex lines of questioning. Adult victims and witnesses of these offences can also be particularly prone to anxiety, intimidation and self-doubt which can influence their ability to provide reliable evidence. These issues have the potential to negatively impact on the ability of the criminal justice system to ensure that justice is done in the prosecution of offences involving these vulnerable witnesses and victims.

The OPP has in place two key policies that recognise that prosecutors have a special duty to these vulnerable witnesses. The Family Violence Prosecution Guideline and the Prosecution of Sexual Offences Guideline, both of these guidelines incorporate best practices as set out in the Pacific Islands Law Officers Network General Principles for obtaining best evidence from vulnerable witnesses[47]. In doing so, the OPP seeks to ensure that the criminal process does no further harm to the person and that their safety is prioritised while ensuring a fair trial for the accused. Maximising the ability of vulnerable witnesses to provide their best evidence and preventing their re-traumatization may also improve trust in the criminal court process, thereby increasing the likelihood of reporting of offences committed against these witnesses and victims.

## 24.1 Court Arrangements for Vulnerable Victims

Prosecutors will also make applications to the Courts for special arrangements to be put in in place for victims with a particular vulnerability who are required to give evidence. These arrangements will be sought in relation victims who are particularly vulnerable such as those with a cognitive impairment or an intellectual or physical disability that may affect their ability to give evidence in Court under normal circumstances.

The special arrangements that will be sought by prosecutors for witnesses in this category who are giving evidence include:

a) The suppression of the victims name and any information that may identify them.
b) Closing the court when the victim is giving evidence.
c) Using screens in the courtroom to ensure that the accused person is not visible.
d) Allowing a support person to be present when giving evidence.

While the prosecutor will ask the judge for any or all of these arrangements to be made, the judge will decide which arrangements will be made available in each individual case.

[47] An extract is found at Annexure M, the full document is annexed to the Prosecution of Sexual Offences Guideline

# 25. Prosecuting sexual offences.

A key aim of the OPP is to prosecute sex offences in a way that minimises the stress for victims and enhances their confidence in the justice system. The OPP will treat all victims of sexual offences in accordance with the prosecutors undertaking to victims under the Victim of Crime Charter.[48]

If there is evidence sufficient to support a prosecution it will almost always be in the public interest to prosecute sexual offences. The OPP does however, recognise that victims of sexual offences may have to give evidence in court of the most personal and traumatic nature and will always take the views of these victims into account when deciding whether to proceed with a prosecution.

A victim of a sexual offence can expect that:

a) The OPP will contact them within a week of the matter coming before the court.
b) That they will be advised of any changes in the progress of the prosecution such as extended delay, a plea of guilty or a plea of not guilty.
c) That if the matter goes to trial they will meet with a prosecutor no less than twice in preparation for the trial.

The OPP will also offer to refer a victim of a sexual offence to counselling services and facilitate services as required.

## 25.1 Court Arrangements for victims of sexual offences

Prosecutors will also make applications to the Courts for special arrangements to be put in in place for victims of sexual assault who are required to give evidence. These arrangements will be sought in relation to adult victims, child victims and victims with a cognitive impairment.

The special arrangements sought by for adult and child victims giving evidence include:

a) The suppression of the victims name and any information that may identify them
b) Closing the court when the victim is giving evidence
c) Using screens in the courtroom to ensure that the accused person is not visible
d) Allowing a support person to be present when giving evidence

While the prosecutor will ask the judge for any or all of these arrangements to be made, the judge will decide which arrangements will be made available in each individual case.

[48] Annexure D

# 26. Prosecuting Domestic Violence.

A key aim of the OPP is to prosecute family violence offences in a way that minimises the stress for victims and enhances their confidence in the justice system. The OPP will treat all victims of family violence offences in accordance with the prosecutors undertaking to victims under the victim of crime charter.[49]

The OPP is committed to reducing the incidence of family violence by providing a prosecution service that makes offenders accountable for their actions and ensures victims of domestic violence receive access to court orders that can offer assistance and protection.

The police and OPP both exercise a pro-prosecution policy in relation to domestic violence. The responsibility for prosecution rests solely with the prosecutor and while a prosecutor will always take the views and wishes of the victim into account the public interest will always be in proceeding to prosecution and making the offender accountable for their actions.

## 26.1 Sufficiency of Evidence in Family Violence Matters

The general considerations in relation to the question as to whether there is sufficient evidence to prosecute, however, the reality is that for matters of domestic violence obtaining the evidence may be more difficult than most cases as family violence often happens in private.

Concerns have been raised in the past that criminal justice agencies have not treated it as seriously as violence occurring in other contexts. Heavy reliance has been placed on the evidence from the victim of the violence without exploring the many other potential sources of evidence. As such prosecutors will review family violence matters and seek additional evidence from police if required.

### *26.1.1 Evidence to be considered in Family Violence matters*

Prosecutors will review the evidence provided by the Vanuatu Police Force bearing this in mind and shall encourage the pursuit by investigators of other sources of evidence including:

a) Admissions by the accused.
b) Admission made during custom reconciliation.
c) Witnesses who see the violence.
d) Friends, family or neighbours who may be aware of the history of the relevant relationship.
e) Observations of those who see the effect of the violence on the victim (including police).
f) Medical evidence.
g) Forensic material, including digital photographs, and
h) Police attendance request call records.

All the material provided by the police shall be assessed by the relevant prosecutor in determining whether or not there is sufficient admissible evidence to prosecute. If a brief of evidence is submitted where areas of investigation have not apparently been explored the prosecutor will consider the case and, if appropriate to do so, will advise the police of what further action is to be taken.

[49] Annexure D

If the victim has refused to provide a statement to the police and the OPP has received a report from the investigating officer to this effect the matter will be referred to a Principle State Prosecutor who will consider:

a) What evidence, other than the victim, is available?
b) Whether it is necessary to call the victim as a witness in order to prove the case, and / or
c) Whether or not there is evidentiary benefit in compelling the victim to give evidence.

In these matters the prosecutor must decide whether, absent the victim or with a possibly hostile witness, there will be sufficient evidence to prove the case. Prosecutors are encouraged to discuss evidentiary issues with their team leaders, colleagues and the Public Prosecutor.

### *26.1.2 PUBLIC INTEREST IN FAMILY VIOLENCE MATTERS*

If the assessment leads the prosecutor to conclude that there are reasonable prospects of a conviction, then prosecutors must apply the second test and consider whether it is in the interests of the public that the prosecution proceeds. There are many factors that may be relevant to that decision and they are detailed earlier in this Guideline, however, there are some factors that are specific to matters of family violence.

In the vast majority of family violence cases the interests of the public will only be served by the deterrent effect of an appropriate prosecution.

Common general public interest considerations are:

a) It is in the public interest to prosecute prevalent offences, domestic violence is prevalent.
b) Domestic violence is hidden and take place behind closed door making it more difficult to prosecute it, as such it is in the public interest to prosecute this type of matter.
c) Domestic violence often takes place in the family home or places where the victim should feel safe, this increases the public interest in prosecuting it.
d) Domestic violence has a tendency to escalate if unchecked; it is in the public interest to stop the escalation of domestic violence through prosecution.
e) Domestic violence is normally perpetrated against vulnerable people; it is in the public interest to protect this group.

## 26.2 REQUEST TO WITHDRAW A CHARGE IN FAMILY VIOLENCE MATTERS

It is acknowledged that requests for discontinuance or withdrawal of family violence matters by victims on the basis that they do not wish to give evidence against an alleged offender are more frequent than in any other type of matter.

**Prosecutors will remind victims throughout the prosecution process that victims do not own prosecutions and that it is not their responsibility – it is the responsibility of the OPP to carry on prosecutions on behalf of the community and all decisions will be made by the prosecutor. Victims cannot "press or drop" charges**.

The Public Prosecutors Policy 2003 outlines the considerations that need to take place when deciding to discontinue a prosecution in family and domestic violence matters.

*"Careful consideration should be given to any request by a victim that proceedings be discontinued. In sexual offences, particularly, such requests, properly considered and freely made, should be accorded*

*significant weight. It must be borne in mind; however, that the expressed wishes of victims may not coincide with the public interest and in such cases, particularly where there is other evidence implicating the accused or where the gravity of the alleged offence requires it, the public interest must prevail.* [50]

OPP prosecutors need to consider the gravity of the offending. The more serious the offending, the greater the public interest that the matter proceed, to protect the community from the offender and act as both a specific and general deterrent.

*In domestic violence offences, any request by the victim that proceedings be discontinued should be carefully considered. The needs, welfare and safety of the victim should be considered as relevant factors in determining where the overall public interest lies. It may be necessary to defer any decision on discontinuation until a thorough appraisal of all the circumstances of the case can be made.* [51]

## 26.3 DEALING WITH A REQUEST TO WITHDRAW THE CHARGES

The decision to compel a victim of crime to give evidence is a decision that must not be taken lightly. The decision may involve exposing the victim to the prospect of arrest (if he or she does not answer a summons or undertaking to appear), contempt proceedings (if they refuse to give evidence) or perjury of false swearing proceedings (if they choose to give false evidence).

Requests of this nature are made for numerous reasons. Some of the most common are:

a) The victim believes or fears that the alleged offender will go to gaol.
b) The victim does not want the alleged offender to get into trouble – just to get help.
c) The victim expresses love for the alleged offender and is committed to maintaining the relationship.
d) The alleged offender has promised, or the victim believes, that it will never happen again.
e) The victim believes or fears that their children to go without a parent.
f) The victim believes her/himself to be in some way responsible for the alleged offender's conduct (i.e. provocation etc.).
g) The victim fears reprisals by the alleged offender and/or his family.
h) The victim is dependent upon the alleged offender in some way e.g. Financial and material support, social/personal supports, cultural / religious allegiance, mutual obligation for childcare, and
i) The victim is frightened/daunted by the prosecution process.

In determining whether or not it is in the public interest to compel a victim to give evidence the relevant prosecutor shall have regard to this Guideline.

[50] Section 6 of the Public Prosecutor's Policy 2003
[51] Section 6 of the Public Prosecutor's Policy 2003

Other factors relevant to this determination are:

a) Whether or not this offence is part of a pattern of violent behaviour by the alleged offender.
b) Whether the victim has previously been the victim of family violence and has chosen previously to withdraw the complaint.
c) The history of the relationship between the alleged offender and the victim;
d) Whether or not in all the circumstance it would be fair to compel the victim of family violence to give evidence.
e) The reasons provided by the victim for the discontinuance request.
f) The nature, severity and frequency of any pattern of violent behaviour by the alleged offender, and
g) The criminal history of the alleged offender.

Each request for discontinuance will be considered on its merits and in accordance with the section below on withdrawal requests.

Although it is impossible to generalise, if physical violence is alleged, and the more serious the violence involved is, the more likely it is in the public interest to prosecute, even if a victim has requested that the proceedings be terminated.

Where the victim has not joined in a request for discontinuance, for example when a victim, parent or chief seek a discontinuance, the prosecutor will speak to the victim before a decision is made to discontinue any proceedings and take into account the victim's views.

Where a decision is taken to discontinue proceedings, the victim will be advised of the decision as soon as possible after it has been made.

### *26.3.1 WITHDRAWAL REQUEST PROCEDURE*

The OPP notes that research suggests that that victims of domestic violence are typically less able to co-operate, more susceptible to pressure or intimidation by the offender and less self-assured than victims of many other crimes. Offenders must not be permitted to use victims to protect themselves.

When a request for withdrawal is made a prosecutor must comply with the process as set out in the Family Violence withdrawal request form found at annexure R of this Guideline.

All prosecutors must attend training in relation to the prosecution of family violence and domestic matters and prosecute in accordance with the ***Family Violence Prosecution Guideline*** of the OPP.

# 27. Proceeds of crime.

The OPP takes primary role in implementing the Proceeds of Crime Act[52]. It works closely with other Vanuatu Law Enforcement Agencies to ensure compliance and enforcement of this act.

Prosecutors must consider confiscation of criminal assets as an issue from the outset in all cases – it is not a mere "optional add-on" to sentence proceedings or to the conduct of a prosecution. It may potentially be available in many types of cases, including for example drug offences, armed robberies, financial crime, bribery and "contract" killings or assaults. [53]

Prosecutors when preparing matters are required to address confiscation issues and, if confiscation action is considered appropriate, are required to act in accordance with the OPP Proceeds of Crime Manual and refer the matter to the relevant prosecutor commence proceedings.

Practice Direction 5 of 2016 must be considered and suitable cases identified by all prosecutors as part of the process of managing cases, before the matter is handed over to and applications drawn up by the Asset recovery team.

# 28. Appeals.

## 28.1 APPEALS AGAINST ACQUITTALS

The Public Prosecutor 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.

In making a decision to appeal an acquittal the Public Prosecutor must identify and 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[54].

## 28.2 APPEALS AGAINST SENTENCES

The prosecutor in any case conducted by the OPP should assess any sentence imposed. If it is considered to be appealable or possibly so, or it is a matter likely to attract significant public interest, an opinion should be provided promptly to the Public Prosecutor for determination of whether or not an appeal will be instituted. [55]

In determining whether or not to appeal against a sentence imposed by a judge or magistrate, the Public Prosecutor 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.

[52] Section 5 Proceeds of Crime Act 2002
[53] See annexure P practice direction relating to the making of seizure orders
[54] Constitution of the Republic of Vanuatu, section 5(2)(h)
[55] Annexure N – Standard in Opinion Writing

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 opens 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.

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

a) 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;
b) 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);
c) The appellate court will take into account the advantages enjoyed by the sentencer which are denied to it;
d) 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;
e) Apparent leniency or inadequacy alone may not be enough to justify appellate correction; and
f) If an appeal is to be instituted, it must be done promptly.

# 29. Retrials

Where the Court of Appeal or the Supreme Court has remitted a matter for retrial, consideration should be given to whether or not a retrial will commence. Factors to be considered include:

a) Whether or not the case continues to fulfil the test for the decision to prosecute.
b) The cost of a retrial to the community and to the accused person.
c) The views of any victim of crime involved.

Any decision to commence the retrial after remittance must be made by the Public Prosecutor.

# 30. Witnesses.

## 30.1 Witness Selection

Prior to the trial beginning, it is essential to look at the prosecution witness list and make a decision as to which witnesses the prosecution will call.

Section 1.3 of the Public Prosecutor's *Code of Practice and Ethics* deals with witnesses and who a prosecutor ***must*** call during the running of their case.

*1.3 Witnesses*

*(1) Subject to subclause (2), a prosecutor **must** call as part of the prosecution's case a witness if:*

> *(a) the testimony of the witness is admissible and necessary for the presentation of the whole picture; or*
>
> *(b) the testimony of the witness provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue; or*
>
> *(c) the testimony or statements of the witness were used in the course of any preliminary hearings; or*
>
> *(d) a statement from the witness has been obtained in the preparation or conduct of the prosecution's case*

The *Code of Practice and Ethics* places an obligation on prosecutors to call all witnesses who are necessary for the presentation of the whole picture. This will sometimes mean having to call a witness who does not assist the prosecution case. This ensures fairness to the Accused and prevents a prosecutor from refusing to call a witness for tactical reasons only, such as the desire to cross examine the witness.

> However, there are times when a prosecutor is not obliged to call a witness. These are also outlined in the *Code of Practice and Ethics.*

*(2) The prosecutor is not obliged to call a witness if:*

> *(a) the opponent consents to the prosecutor not calling the witness; or*
>
> *(b) the only matter with respect to which the witness can give admissible evidence has been dealt with by an admission on behalf of the accused; or*
>
> *(c) the prosecutor believes on reasonable grounds that the administration of justice in the case would be harmed by calling the witness to establish a particular point already adequately established by another witness; or*
>
> *(d) the prosecutor believes on reasonable grounds that the testimony of the witness in unreliable*

Pre-trial discussions with defence are encouraged. Look at the 'facts in issue' and determine which witnesses are vital to the case. There is no advantage in calling multiple witnesses to provide evidence

about a fact that is not in issue. The unnecessary repetition of evidence that is not vital to the prosecution case can make a trial last longer than required and cloud the important issues.

Importantly, if a prosecutor forms a view that witnesses are not required the CPC requires that at least 7 days notice is given to defence that the witness will not be called [56].

> *Example 1: In an assault case where the Accused has admitted during his police interview that he struck the victim, the first point of proof for this (or any) charge, identity, would not require the calling of any witnesses whose sole purpose is to prove this element. Identity has been proved by the admission in the interview and section 2 (b) of the Code of Practice and Ethics (above) would apply.*
>
> *Example 2: The prosecutor has spoken to a witness who he knows to be a friend of the accused. During pre-trial preparation, the prosecutor speaks to this witness who declares he is not willing to tell the truth during the trial and "will say anything", to ensure the Accused is acquitted. A prosecutor would need to disclose this statement to the accused lawyer and then, subject to certain conditions, may not be obliged to call this witness pursuant to section 2 (d) of the Code of Practice and Ethics (above). If this situation arises the Public Prosecutor should be consulted.*

Sections (3) to (6) of the *Code of Practice and Ethics* place other obligations on the prosecutor if they choose not to call a witness. They are listed below.

> *(3) In deciding whether the testimony of a witness is unreliable, the prosecutor must use appropriate techniques such as conferring with the witness and satisfying himself or herself of the capability of the witness to give relevant and truthful evidence.*
>
> *(4) The prosecutor must inform the opponent as soon as practicable of the identity of a witness if the prosecutor intends not to call the witness on any ground referred to in subclause (2) together with the grounds on which the prosecutor has reached that decision.*
>
> *(6) Despite subclause (2), the prosecutor must call a witness if the opponent requests the prosecutor to do so for the purpose of permitting the opponent to cross-examine that witness.*

[56] Section 162 CPC

## 30.2 WITNESS PREPARATION

### *30.1.2 CIVILIAN WITNESSES*

A prosecutor plays a vital role in trying to obtain the best evidence from the witnesses you call during a trial. Most civilian witnesses will be unfamiliar with the court process and procedure, hence they will usually be nervous and in some cases terrified of the experience. In some instances, the offence may have been committed months or even years before the matter comes to court and their memory of events may have faded, adding to their anxiety.

In general, the first step in witness preparation is to meet the witness *before* the trial begins. A witness should expect the following will be discussed:

a) Explain the court process and where they fit into it.
b) Explain what will happen in court and who the main people are.
c) Gain a clearer picture of what oral evidence they will give during the trial by asking them to recount.
d) If the witness does not have a copy of their statement, a copy will be provided and read to them if required.

A witness will not be told what they should be saying in the witness box but be asked to tell the truth and restrict their answers to what they saw, heard or did.

### *30.1.4 POLICE WITNESSES*

Police witnesses will usually play a part in every criminal trial and in some cases, like traffic matters, they may often be the only witness. Prosecutors should speak to police witnesses prior to trial.

## 30.2 INCONSISTENCY OF EVIDENCE

Mere inconsistency of the testimony of a witness with the prosecution case is not, of itself, grounds for refusing to call the witness. A decision not to call a witness otherwise reasonably to be expected to be called should be notified to the accused a reasonable time before the commencement of the trial, together with a general indication of the reason for the decision (e.g. the witness is not available or not accepted as a witness of truth). In some circumstances, the public interest may require that no reasons be given. Where practicable the prosecution should confer with the witness before making a decision not to call the witness.

## 30.3 DEFENCE PROVIDE A STATEMENT THAT IS UNFAVOURABLE TO PROSECUTION

If the defence provides a statement of a witness containing evidence that is unfavourable to the prosecution case, the material should be investigated by police. All statements, including those unfavourable to the prosecution, must be disclosed to defence.

## 30.4 UNAVAILABILITY OR UNWILLINGNESS TO GIVE EVIDENCE

The mere unwillingness or unavailability of a witness to testify is not ordinarily required to be disclosed unless the matter proceeds to a contested trial at which time it must be disclosed. If a witness indicates or puts in writing that their evidence is untrue this must be disclosed to defence, no matter what stage of the prosecution.

## 30.5 WITNESSES SUBJECT TO INDEMNITY

Any immunity (indemnity or undertaking) – granted or approved in principle – or inducement provided to a prosecution witness should be disclosed to the accused in advance of the trial. For details about the decision to grant indemnity and induced statements see the section on 'undertaking not to prosecute'.

## 30.6 EVIDENCE BY SPOUSE AND THE ACCUSED

### *30.6.1 COMPETENT AND COMPELLABLE*

Ordinarily, any person summonsed to attend court and give evidence must do so. This is outlined in Section 82 of the CPC, which holds that all witnesses are assumed to be competent witnesses.

There will, however, be some instances in which a witness in a criminal matter is not **'competent'** to give evidence. A witness is 'competent' if he or she can lawfully be called to give evidence.

However, not all material witnesses to a crime can be called to give evidence. For example, generally an accused is NOT competent to give evidence for *the prosecution*. This protects the right to silence of the Accused and prevents the prosecution from calling the Accused to give evidence[57].

### *30.6.2 EVIDENCE BY SPOUSE*

There is a common law rule that husband or wife cannot be compelled to give evidence against each other, however, for most offences the legislation has over ruled the common law. Section 34 of the Family Protection Act specifically stated that for any offence under that Act that a spouse may give evidence and is a compellable witness. Additionally, Section 89 of the Criminal Procedure Code states that charges involving injury to the wife or a child to the marriage, or any offences against morality are an exception to the common law rule that husband or wife cannot be compelled to give evidence against each other. That means that the husband or wife of the defendant can be compelled by the Court to give evidence and if you summons them they must answer the summons.

The common law rule now only applies if the spouse is required to give evidence in relation an offence that IS NOT one of domestic violence, morality or violence against women or children. For example, a spouse would not have to give evidence in relation to fraud unless section 89 CPC applied.

Example: The Accused has been charged with indecently assaulting his 12 year old daughter, pursuant to section 98 of the Penal Code. The mother of the victim is married to the accused and she witnessed the offence take place. She made a statement to police about the matter and is on the Prosecution Witness List. The Accused pleads not guilty and the matter goes to trial. The mother of the victim is compelled (must) give evidence in the trial because the Accused has been charged with an offence against morality AND the victim is the child of the suspect (Section 89 (2) (iii) applies).

[57] Section 89 Criminal Procedure Code

# 31. Vulnerable Witnesses.

## 31.1 CHILD WITNESSES

OPP prosecutors will treat children consistently with the Constitution of the Republic of Vanuatu and the United Nations Convention on the Rights of the Child . At the earliest opportunity, children must be referred to witness support or counselling support if possible.

Child witnesses under the age of 5 years must be met by the prosecutor within 3 weeks of charges being laid. If there is a witness assistant or court support person, they will attend the meeting. If any concerns regarding competency arise, the prosecutor must raise it immediately with the Public Prosecutor.

OPP prosecutors will ensure they are familiar with the law that relates to children giving evidence in Court. Specifically, they will seek orders in court to protect the child's privacy, dignity and to reduce the affect the court process will have on the child. The orders sought in all matters where children are witnesses will include:

a) The suppression of the child's name.
b) Closure of the court when they give evidence, and
c) In sexual and domestic violence offences screening defendants from their sight.

It is noted that while these orders will be sought that ultimately whether they are made will be the decision of the Court.

Children will meet the allocated prosecutor after the preliminary investigation and before plea. The purpose of the meeting is:

a) To familiarise the child with the prosecutor.
b) To explain what is going to happen and answer any questions.
c) If the child is a complainant, to explain to the child that the prosecutor is responsible for the Court process and not the child.
d) To assess any competence issues that may be raised and take action (not if a competence issue is raised, the prosecutor must address it immediately).

## 31.2 VULNERABLE ADULT WITNESSES

Witnesses who have a disability (e.g. Intellectual disability, physical disability, sensory disability or psychiatric disability) should be referred to an appropriate agency to assess their support needs and to determine any barriers to communication and/ or access that may require planning.

Prosecutors must, before the proceeding has begun, acquaint themselves with the needs of the vulnerable adult witness and to the extent possible adjust normal court processes to accommodate them so that they can give their best evidence.

Prosecutors should be prepared to make applications to the court for mechanisms that will assist the vulnerable witness (e.g.: closed court, screening or a support person).

## 32.3 CONFERENCES

Conferences allow prosecutors to obtain information from and about witnesses on evidentiary issues and providing relevant information about the proceedings to witnesses and the families of victims in matters involving a death.

In sexual offence matters victims should be informed of the requirement to recount the precise detail the sexual offence, including explicit acts of sexual intercourse and sexual penetration. It will also be explained to them that the reason is to enable the Prosecution to prove all of the elements of the offence.

Conferences should also be conducted for the purpose of informing victims of charge negotiations and to discuss and agreed summary of facts. Victims may prefer the presence of a support person when being conferenced, this should not be discouraged. However, prosecutors must ensure they do not conference the witness in the presence of another potential witness.

Early conferences are best practice and enable better outcomes, both in result and the victim's court experience. Early conferencing enables more effective screening of cases and more accurate disclosure of relevant material and enhances the professionalism of the OPP and the effectiveness of the criminal justice process.

# 32. Victims of crime.

## 32.1 UNDERTAKING TO VICTIMS

The OPP Prosecutors and Staff are not advocates for victims. However they do have a number of obligations to victims. These obligations arise out of the Constitutional commitment to the protection of vulnerable people and the requirement under the Public Prosecutor Act to "ensure that the prosecutorial system gives appropriate consideration to the concerns of Victims of Crime"[58].

The OPP has recognised this in the Victims Charter at annexure C, this charter is an undertaking by every person who works at the OPP to treat victims with courtesy, compassion, respect and dignity and to facilitate support for victims while in Court.

## 32.2 VICTIM EXPECTATIONS

Victims have no responsibility for the laying of charges or the prosecution of a matter. This decision is made by the prosecutor and ultimately the Public Prosecutor. Prosecutors will lay charges after making a decision to prosecute in accordance with the guidelines.

There is a common misconception that a police or prosecutors can only charge if there is a formal 'complaint'. This is not correct. Police can investigate and refer evidence to the prosecution who will decide whether to proceed to charge based on the evidence, not whether someone has lodged a formal complaint. [59] This is particularly for prosecutors to remember when a victim of an offence or complainant provide a statement purporting to withdraw the complaint against the accused as such a statement is not known at law.

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[58] Section 8 (2)(c) Public Prosecutors Act
[59] Section 34 and 35 Criminal Procedure Code

Prosecutors bear the responsibility of deciding to prosecute and also the responsibility to properly inform victims. All victims, whether witnesses or not, should appropriately and at an early stage of the proceedings have explained to them the prosecution process and their role in it. The allocated prosecutor is required to make contact with the victim and provide ongoing information about the progress of the case.

Victims of Crime (whether they have requested it or not) should be informed shortly after the first court mention of charges laid or reasons for not laying charges.

During the Court process a victim should be informed of:

a) Any decision to change, modify or not proceed with charges laid and any decision to accept a plea to a less serious charge.
b) The date and place of hearing of any charge laid, and
c) The outcome of proceedings, including appeal proceedings, and sentence imposed.

If possible, the victim will be referred to a witness assistant to assist the victim to access services of benefit to them.

The views of victims will be sought, considered and taken into account in making decision about prosecutions; but those views will not alone be determinative. It is the general public, not any private individual or community leader's interest that must be served. Views expressed will be recorded on the OPP file.

# 33. Victim impact statements.

Prosecutors have an obligation to ensure that "the prosecutorial system gives appropriate consideration to the concerns of the victims of crime. [60] This can be achieved through the management of victims in accordance with the prosecutors undertaking and the Victims Charter, however, the only manner in which a court can access and understand the manner in which a crime has impacted on a victim is through a victim impact statement.

A victim impact statement is evidence before the Court on sentence and should be formally tendered in the sentencing process.

Prosecutors should ensure that a victim impact statement does not contain material that is offensive, threatening or harassing. Such material and other inadmissible material (e.g. allegations of further criminal conduct not charged) is to be deleted before a statement is tendered.

Victims should be consulted as to changes that may be required to be made to their victim impact statements and be informed of the reasons for these changes. The question of the victim impact statement being read out in court should also be canvassed with the victim or immediate family member or other representative. A victim impact statement that has been duly received by a court may be read out in court, in part or in whole, by a victim to whom it relates or by a member of the

[60] Section 10(2)(c) Public Prosecutors Act

immediate family or other representative of the victim. If requested a prosecutor can read the victim impact statement to the Court after it is formally tendered.

Copies of statements should ordinarily be made available to offenders to read; however, offenders are not to retain copies of victim impact statements.

*Victim Impact Statement forms in Bislama, English and French can be found on the OPP website* and are also available through the OPP office, the VWC and Police.

# 34. Unrepresented accused.

Particular care must be exercised by a prosecutor in dealing with an accused person without legal representation. The basic requirement, while complying in all other respects with these guidelines, is to ensure that:

a) The accused person is properly informed of the prosecution case so as to be equipped to respond to it and
b) The prosecutor maintains an appropriate detachment from the accused person's interests.

Oral communications with an unrepresented accused person, so far as practicable, should be witnessed if face to face and promptly noted in all cases. A record should be maintained of all information and material provided to an unrepresented accused person. Prosecutors may also, where appropriate, communicate with the accused person through the court.

While a prosecutor has a duty of fairness to an accused person, it is not a prosecutor's function to advise an accused person about legal issues, evidence, inquiries and investigations that might be made, possible defences or the conduct of the defence. However, the prosecutor also has a duty to ensure that the trial judge gives appropriate assistance to the unrepresented accused person.

In relation to adult and child complainants of sexual assault and victims of domestic violence a prosecutor should ask the courts assistance to make an order for the witnesses to be cross examined by a lawyer or court official to avoid the unrepresented defendant cross examining these vulnerable witnesses /victims.

# 35. Confidentiality.

OPP recognises that it holds information of a confidential nature and recognises that all prosecutors have an obligation in respect of confidentiality and privacy.

Information about a case other than what is on the public record should not be released without authority from either the Public Prosecutor or Deputy Public Prosecutor subject to the following exceptions:-

a) The release of information to victims if after completion of the criminal matter seek to take civil action against a defendant.
b) The release of information to police as required or investigative, prosecution and consultative processes, and

c) The duty of full and early disclosure of the prosecution case to the defence.

This means that any request from individuals, other agencies or the media for information which is not a matter of public record should be referred to the Public Prosecutor.

Internal OPP documents or correspondence between prosecutors and others should not be released in any circumstances without prior approval from the Public Prosecutor

# 36. Media.

The Prosecutors Code of Ethics comprehensively addresses a prosecutors management of the media and media inquiries. The Code of Ethics states at annexure G in part 2 that:

*In proceedings in which the Deputy Public Prosecutor, Assistant Prosecutor, and State Prosecutors appear, they are appearing on behalf of the Public Prosecutor. As such there is a relationship akin to a lawyer-client relationship between the prosecutor (the lawyer) and the Public Prosecutor (the client). As such the prosecutor appearing in a particular matter must act in accordance with the following rules:*

a) *There is no general obligation to provide information to the media.*
b) *Consent from the Public Prosecutor must be obtained prior to providing information on the case in which the prosecutor is appearing.*
c) *It is permissible and appropriate if requested by the media for a prosecutor to give his or her name and indicate that the prosecution is being conducted by the Office of the Public Prosecutor.*
d) *It is <u>not</u> appropriate to discuss with the media the likely result of proceedings or the prospect of appellate proceedings being instituted, a matter being no billed or discontinued or an ex officio indictment being filed.*
e) *It is <u>not</u> appropriate to comment to the media on the correctness or otherwise of any determination of the court.*
f) *Prosecutors should abide by any ruling made by the Court to not publish the names of any persons concerned in a particular matter (e.g. where an order is made by a Court to prohibit the publication of names associated with a case to protect the reputation and otherwise of a victim of a serious sexual assault).*
g) *The names and addresses of victims and addresses of other witnesses who are to be or have been called should not be supplied to the media. Information given in open court (including names and addresses) may be confirmed. Care should also be taken in any case to ensure that the identities of witnesses such as prisoners, informers, and others who are giving evidence at some personal risk are kept confidential (so far as is possible) and are not disclosed to the media.*
h) *True copies of open exhibits (including photographs but excluding videotapes and audiotapes of recorded interviews, re-enactments, demonstrations and identifications) may be inspected by the media after being admitted as evidence (if convenient). Discretion should be exercised in relation to sensitive material (e.g. medical reports) or material produced under compulsion, where it may be more appropriate to direct inquiries to the court. Medical (including psychiatric and*

*psychological) reports on offenders and victims should generally not be made available to the media.*

i) *Upon charges being laid or the first court appearance of a defendant, the terms of the charge may be disclosed to the media subject to the various restrictions and provisions referred to above.*

j) *Statements, summaries, criminal histories, exhibits or copies (including documents, photographs, plans and the like) are not usually to be given or lent to the media.*

Disclosure of documentation or information, other than that permitted in accordance with the above guidelines, is not to occur unless approved by the Public Prosecutor or the Deputy Public Prosecutor.

# 37. Release of Information or Evidence.

Information held by the OPP in relation to an allegation of an offence is disclosable to the accused person and their representatives only. Information or evidence, whether it be part of a police brief or otherwise will not be released to a third party unless that person is a recognised expert witness or after consultation with police it is considered appropriate.

The police brief of evidence remains the property and responsibility of the police. As such any inquiries after a matter has been completed will be referred to police to deal with according to their own guidelines.

It is noted that all correspondence between police, experts or others related to the prosecution of a matter is privileged and legal professional privilege will normally be claimed over these documents.

# Annexure A: United Nations Guidelines on the Role of Prosecutors.

## UNITED NATIONS GUIDELINES ON THE ROLE OF PROSECUTORS

### Qualifications, Selection and Training

1. Persons selected as prosecutors shall be individuals of integrity and ability with appropriate training and qualifications.

2. States shall ensure that:

(a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;

(b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law. Status and Conditions of Service

3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.

4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal and other liability.

5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.

6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.

7. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.

### Freedom of Expression and Association

8. Prosecutors, like other citizens, are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.

9. Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status. Role in Criminal Proceedings

10. The office of prosecutor shall be strictly separated from judicial functions.

11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecutions and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest. 12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

13. In the performance of their duties, prosecutors shall:

(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

(c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;

(d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violation of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods or inform the court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

## Discretionary Functions

17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution. Alternatives to Prosecution

18. In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of the suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.

19. In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special consideration shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant young offenders laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary. Relations with Other Government Agencies or Institutions

20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

## Disciplinary Proceedings

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.

22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines. Observance of the Guidelines

23. Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.

24. Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

# Annexure B: International Association of Prosecutors Standards.

nternational Association of Prosecutors

## STANDARDS OF PROFESSIONAL RESPONSIBILITY and THE STATEMENT OF THE ESSENTIAL DUTIES AND RIGHTS OF PROSECUTORS

### 1. Professional Conduct

Prosecutors shall:

(a) at all times maintain the honour and dignity of their profession;

(b) always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession;

(c) at all times exercise the highest standards of integrity and care;

(d) keep themselves well-informed and abreast of relevant legal developments;

(e) strive to be, and to be seen to be, consistent, independent and impartial;

(f) always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial;

(g) always serve and protect the public interest;

(h) respect, protect and uphold the universal concept of human dignity and human rights.

### 2. Independence

2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.

2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be, transparent and consistent with lawful authority; and subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

### 3. Impartiality

Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall:

(a) carry out their functions impartially;

(b) remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;

(c) act with objectivity;

(d) have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

(e) in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;

(f) always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.

## 4. Role in criminal proceedings

4.1 Prosecutors shall perform their duties fairly, consistently and expeditiously.

4.2 Prosecutors shall perform an active role in criminal proceedings as follows:

(a) where authorised by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally;

(b) when supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights;

(c) when giving advice, they will take care to remain impartial and objective;

(d) in the institution of criminal proceedings, they will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence;

(e) throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence;

(f) when, under local law and practice, they exercise a supervisory function in relation to the implementation of court decisions or perform other non-prosecutorial functions, they will always act in the public interest.

4.3 Prosecutors shall, furthermore;

(a) preserve professional confidentiality;

(b) in accordance with local law and the requirements of a fair trial, consider the views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights; and similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible;

(c) safeguard the rights of the accused in co-operation with the court and other relevant agencies;

(d) disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial;

(e) examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;

(f) refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment;

(g) seek to ensure that appropriate action is taken against those responsible for using such methods; (h) in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate.

### 5. Co-operation

In order to ensure the fairness and effectiveness of prosecutions, prosecutors shall:

(a) co-operate with the police, the courts, the legal profession, defence counsel, public defenders and other government agencies, whether nationally or internationally; and

(b) render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual cooperation.

### 6. Empowerment

In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general, they should be entitled:

(a) to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability;

(b) together with their families, to be physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions;

(c) to reasonable conditions of service and adequate remuneration, commensurate with the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished;

(d) to reasonable and regulated tenure, pension and age of retirement subject to conditions of employment or election in particular cases;

(e) to recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures;

(f) to expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards;

(g) to objective evaluation and decisions in disciplinary hearings;

(h) to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status; and to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.

# Annexure C: Convention on the Rights of the Child Ratification Act (excerpt)

## UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (Excerpts)

### PART 1

### Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

### Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. Article 4 States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.

### Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

PART II

## Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

## Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

## Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardians(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

## Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

## Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings. 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

# Annexure D:  OPP Victim of Crime Charter.

## VICTIM OF CRIME CHARTER

The Office of the Public Prosecutor Undertaking to Victims of Crime

1. To treat victims with courtesy, compassion, respect and dignity. This will include, in some cases, seeking orders from the court to suppress names, ensuring the victim cannot see the accused in court and close the court to maintain the victims dignity.

2. To take into account and to treat a victim in a way that responds to their needs, for example obtaining support for children or people with disability during the court process.

3. To assist the return, as soon as possible, of a victims property which has been held as evidence. Where a victims property is not held by the OPP the victim will be directed to the police case officer.

4. To seek all necessary protection from violence and intimidation by a person accused of a crime against the victim, this includes:

    - seeking protective bail conditions from the court;
    - opposing bail because of the risk to the victim;
    - seeking suppression of the victims home address or contact details.

5. When a defendant has been convicted of an offence involving domestic violence and there is reason to believe that the victim remains at significant risk, the prosecutor will refer the concerns to police.

6. When a victim has suffered a loss that can be supported by documentation the prosecutor will seek a compensation or reparation order from the court at sentence.

7. To assist in protecting the victims privacy as far as possible and to take into account the victims welfare at all stages of the prosecution.

# Annexure E:  Expert Undertaking Form.

## Expert Witness Undertaking

1. As a proposed expert witness to the Supreme Court of the Republic of Vanuatu (the Court)

I, ……., hereby acknowledge and undertake the following:

i. I have a duty to assist the Court impartially on matters relevant to my area of expertise, and I will provide such assistance.
ii. In providing any report or evidence to the Court, I have a duty to the Court to give fair, objective and impartial evidence.
iii. My opinion is impartial in the sense that it reflects an objective assessment of the questions at hand.
iv. My opinion is independent in the sense that it is the product of my own independent judgment, uninfluenced by who has retained me or the outcome of the litigation.
v. My opinion is unbiased in the sense that it does not unfairly favour one party's position over another.

2. I understand the breadth and scope of these duties and am able and willing to carry them out.

3. I acknowledge that, if I am recognized as an expert by the Court, any evidence or opinion that I will give may be assessed and weighed accordingly by the Court in its deliberative processes.

| | |
|---|---|
| _____ | _____ |
| (Date) | (Signature of proposed expert witness) |

# Annexure F:  OPP Advice to Police Policy

## Office of the Public Prosecutor Advice to Police Policy

### General

Generally, all requests by police for advice, are to be answered in writing following a specific written request for such advice. Requests may include the following:

(a) the availability of criminal charges, involving:

(i) a question of the sufficiency of evidence;

(ii) a consideration of the admissibility of evidence; and/or

(iii) a view as to the appropriateness of preferring a particular charge or of proceeding in a particular court;

(b) the present state of law with respect to a certain subject matter (where this requires detailed evaluation);

(c) the merits of dealing with a matter summarily rather than on indictment, by means of preferring a less serious charge;

(d) the availability of an ex officio indictment or count;

(e) the discontinuance of indictable proceedings;

(f) matters relating to whether or not an individual is to be charged or the form of the proceedings and, if requested, the ultimate venue of any such proceedings;

There is no distinction to be drawn between formal and informal advice and provisional or conditional advice should not be given by prosecutor orally or in writing.

### The Provision of Advice

Advice will be provided to Police and other agencies with investigative powers in respect of prosecutions:

- that are strictly indictable (can only be heard in the Supreme Court);
- that involve allegations of child sexual assault;
- that are offences with a penalty between 2 and 10 years where the OPP is likely to elect to proceed on indictment (ask for the matter to be heard in the Supreme Court): but these matters must be referred to the OPP for a decision as to jurisdiction before advice will be provided.
- that involve allegations against a police officer
- that are requests for advice received from specialist investigative agencies

If the above advice is requested, advice as to the sufficiency of evidence or the appropriateness of charges may be given in the following circumstances:

(i) After a determination by the Officer in Charge of the relevant Crime Unit that there is sufficient evidence and;

(ii) The OPP receives sufficient material in admissible form to be able to provide the advice.

Where insufficient material is provided to allow a decision to be made, the OPP may request additional material before advice will be provided.

Advice as to the sufficiency of evidence will generally be provided within four weeks of receipt of the material referred to in (ii); however, where practicable and on the provision of reasons for urgency in the matter in question, a shorter period may be negotiated.

The advice will include reasons why charges are not recommended, the draft wording of charges recommended and requisitions for any additional material considered appropriate.

## Advice During the Course of an Investigation

The OPP may provide advice to police during an investigation into an indictable offence. Requests for this type of advice should be made in writing and endorsed by the Officer in Charge of the relevant Crime Unit, for example Family Protection Unit or the Criminal Investigations Division.

Advice will be given only as to:
(i) the admissibility of evidence already obtained by police (which may include advice as to whether such evidence is admissible, or whether it can be made admissible);

(ii) evidence that is likely to be obtained including its admissibility, how to make it admissible and legal provisions relevant to obtaining the evidence;

(iii) the legal implications of alternative or proposed courses described by police.

Applications for advice as to the admissibility of any evidence or the legal implications of alternatives proposed by police must provide sufficient information to enable the question to be answered. The application for advice will be considered by the OPP on the information provided and supporting documentation may be required to enable proper consideration.

The OPP will not direct police as to which choice should be made, but rather provide advice as to the legal limitations or consequences of a particular choice. The OPP will not advise the police to discontinue an investigation.

Advice during the course of an investigation will be provided within at least three working days.

## Matters to be referred to the Public Prosecutor or Deputy Public Prosecutor

The following requests for advice must be referred to the Public Prosecutor or Deputy unless such matters have been specifically delegated to other OPP officers:

a) whether or not a prosecution should proceed following a proposed international extradition;
b) whether or not an immunity (indemnity or undertaking) should be requested;
c) whether or not an appeal should be lodged
d) whether or not a police officer should be prosecuted for an indictable offence;
e) whether or not an ex officio indictment should be filed or an ex officio count included on an indictment;

f) matters of particular sensitivity, including allegations of corruption or serious misconduct by any public official and allegations of criminal conduct by persons in the practice of professions.

In cases of homicide (including intentional homicide or neglect causing death) or dangerous driving causing death, the recommendation is to be referred to the Public Prosecutor for final consideration.

### Urgent Advice

Should police seeking advice be unable to do so in writing because of the urgency of the request or other circumstances of the matter, this should not preclude or stop the giving of advice. In these circumstances oral advice should be given. The prosecutor is required to do the following:

- Make a file note of the oral request made of the OPP and the information upon which the advice is based.
- Make a file note of the advice given.
- Within 24 hours send an email to police stating the advice given and whether any follow up is required.

Requests for advice relating to matters of law which require a detailed evaluation or involve police or other investigative powers are to be referred to the Public Prosecutor

Note all of these documents should be created and stored in the Case Management System.

### General matters

- Where the main issue is the credibility of the complainant or another main witness, the papers are to include an assessment of the credibility of that person.
- Generally, the OPP will not interview witnesses for the purpose of giving advice as to the sufficiency of evidence or the appropriateness of charges.

### Police use of advice

Whether police follow the advice as to the sufficiency of evidence or the appropriateness of charges is a matter for them. It is also a matter for police whether they wish to inform any person of the terms of the advice given to them by the OPP. The OPP generally will not disclose to persons outside the OPP that police have sought advice or that advice has been provided and will not disclose in any case the terms of any advice provided.

# Annexure G:  OPP Code of Ethics (Gazette no.12 of 2017).

## OPP CODE OF ETHICS ( Gazette no. 12 of 2017)

### Foreword

This Code replaces a 'Code of Practice and Ethics' published in Gazette No 24 of 2014. This Code is perhaps more comprehensive, sets out in clear terms the standards of ethical and professional conduct for prosecutors in Vanuatu. It follows the models of Code of Conduct adopted in other jurisdictions, and offers prosecutors and other members of the Office staff a guideline about how they are expected to conduct themselves.

This Code of Ethics sets out five core principles, followed by statements of applications and in some cases, commentaries to clarify the principles. Where necessary, it attempts to illustrate these principles by reference to specific situations that might occur here.

These principles are based on universally accepted statements of prosecutorial ethics and standards of conduct contained in various instruments including the *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* promulgated by the International Association of Prosecutors (Appendix A).

It is my hope that this Code assists prosecutors understand the ethical standards and principles that may affect their professional and personal conduct and responsibilities during the course of their employment.

I am pleased to formally publish this Code of Ethics for Vanuatu prosecutors.

Josaia Naigulevu

PUBLIC PROSECUTOR

March 2016.

### PURPOSE AND SCOPE OF THE CODE

The principle object of this Code is to promote and enhance standards and principles that are necessary for the proper and independent function of the Office of the Public Prosecutor. The Code of Ethics sets out the minimum standards of conduct and practice expected of prosecutors working for, or on behalf of the office of the Public Prosecutor. It is intended to complement and not replace other professional codes that may also have a bearing on their conduct in their capacity as lawyers and public servants.

The Public Prosecutor requires his staff to adhere at all times to this Code. When he engages counsel, or a solicitor who is employed by him to prosecute on his behalf, the counsel, solicitor or authorised person must comply with this Code and consult him about the effect of the Code if necessary.

Any breach of the Code that constitutes also a breach of applicable standards of a professional body may be referred to that body for consideration.

The Code is intended to establish minimum standards of ethical conduct. It is designed to provide general but not exhaustive guidance to prosecutors, and to help secure and promote effective, impartial and fair prosecutions in all criminal trials. As a matter of general application, these fundamental principles are intended to assist inform all aspects of the prosecutor's work.

## Part 1

## 1. CORE PRINCIPLES

### 1 .1 Independence

Prosecutorial independence is an essential element of the rule of law and fair trial. It is critical that it be exemplified in both its individual and institutional dimensions.

*There are two types of independence, constitutional and institutional independence that can affect the discharge of prosecutorial functions. Of the two, the latter is perhaps the most critical one. It refers to the ability to make independent and impartial prosecutorial decisions free of inappropriate, external influences. The prosecutor must be able to make decisions after applying the law without fear or favour, and without regard to whether the decision will be popular when made. Any attempt to influence these decisions must be firmly rejected and avoided.*

Prosecutors must perform their functions in accordance with section 7 of the Public Prosecutors Act 2003 That section stipulates that the Public Prosecutor shall perform his functions independently. In doing so, he shall be free from any extraneous influences or interference, direct or indirect, from any person, body or authority.

The words in section 7(2) merely echo the protection originally given by Article 55 of the Constitution of the Republic of Vanuatu.

The independence of Deputy Public Prosecutors, Assistant Public Prosecutors and State Prosecutors is guaranteed by section 24 (1) Public Prosecutor Act 2003. That independence is only subject to directions given by the Public Prosecutor. This is set out in subsection (2).

Prosecutor and Staff members must refrain from doing anything that might potentially compromise this independence.

In particular, prosecutors and support staff must, *inter alia*:

(a) not seek from or act upon instructions given by anyone outside the Office;

(b) not allow themselves to be affected by any individual or sectional interests, or by any pressure from any State, or any international, intergovernmental or non-governmental organisation or the media. Where the size of the population is relatively small and society potentially polarised, and prosecutors inevitably exposed to family and community allegiances, these interests must be completely forsaken when making prosecutorial decisions.

(c) refrain from any activity likely to affect adversely the confidence of others in the independence or integrity of the Office, or which may potentially result in any suggestion that the independence of the Office has been compromised;

(d) refrain from occupying positions of responsibility in any political organisation; or directly participating in activities or publicly expressing views supporting such organisations;

(e) refrain from carrying out other occupations of a professional nature without the prior approval of the Public Prosecutor; and

(f) refrain from any activity likely to interfere with or prejudice the duties and functions of the Office.

Prosecutors and other staff confronted by any attempt by others to behave in a way that may violate their obligation of loyalty and independence, must promptly report it to the Public Prosecutor or the Deputy Prosecutor(s), and seek guidance from them about what they should do or how they might respond..

## 1.2 Integrity

Integrity is essential to the proper discharge of prosecutorial function.

*Integrity means honesty, soundness of character and uprightness. This requires developing and observing high standards of personal and professional conduct. The lack of integrity undermines public confidence in the prosecution office.*

Prosecutors shall:

a) at all times maintain the honour and dignity of their profession;

b) seek to conduct themselves professionally, in accordance with the law and the rules and ethics of the legal profession;

c) at all times exercise the highest standards of integrity and care, and ensure that their conduct is above reproach;

d) avoid impropriety and the appearance of impropriety and avoid situations that might reasonably give rise to the suspicion or appearance of favouritism or partiality;

e) desist from any conduct capable of compromising the integrity, fairness or independence of the Office of the Public Prosecutor, and in particular, subject to this Code, must not accept any gift, prize, loan, favour, inducement, hospitality or other benefit in relation to anything done or to be done or omitted to be done in connection with the performance of their duties.;

f) at all times act in accordance with any applicable duties under the Public Prosecutor Act;

g) not allow the prosecutor's family, social or other relationships to improperly influence his or her decision or conduct;

h) not use the prosecutor's position or use the prestige of the Office to advance their or others' private interests, nor convey or permit others to convey the impression that others are in a special position able to influence prosecutors;

i) not use or disclose confidential information acquired in their official capacity for any purpose unconnected with the performance of their duty;

j) carry out their functions honestly, fairly, objectively and without fear or favour, bias;

k) conduct themselves in such a way as to maintain public confidence in their professional integrity;

l) remain unaffected by individual or sectional interests, or public or media pressure, acting only in the public interest;

m) recuse themselves from any prosecution where they are unable to act impartially or where that may appear to be case to a reasonable observer. Such proceedings may include cases where:

i) the prosecutor has demonstrated actual bias or prejudice towards an accused, complainant or witness;

ii) the prosecutor previously served as counsel for the other party, or was a material witness in the prosecution;

iii) the prosecutor, or a member of the prosecutor's family, has an interest in the outcome of the prosecution;

n) bring to the attention of the Public Prosecutor any situation which might give rise to the perception that a conflict of interest exists or the prosecutor may not have acted impartially.

### 1.3 Propriety

Propriety and the appearance of propriety are essential to the performance of prosecutorial activities.

*Propriety means fitness, rightness and correctness of behaviour or morals. Propriety and the appearance of propriety, both professional and personal are essential features of the prosecutor's life. Improper conduct includes creating and acquiescing in any appearance of impropriety.*

A prosecutor should freely and willingly accept personal restrictions that might be viewed as burdensome by ordinary citizens. He or she should conduct himself or herself in a manner that is consistent with the dignity of the office. This may include restraint from frequenting public liquor bars, casinos and night clubs, and the regular or excessive consumption of alcohol and similar substances in public places.

A prosecutor, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising those rights and freedoms, the prosecutor should always seek to maintain and preserve the dignity of Office, and the public perception about its impartiality and independence.

A prosecutor shall not make improper statements to the press on any subject either within or beyond the scope of duty, and shall not engage in any public criticism of judges, magistrates or other judicial officers.

A prosecutor should be well informed and knowledgeable about his or her own personal, fiduciary and financial interests.

A prosecutor should not convey or permit others to convey the impression that anyone in a special position is capable of improperly influencing him or her in the performance of his/her prosecutorial functions.

During the course of a trial, a prosecutor must avoid socialising and associating with the accused person(s) and their families, and meeting or socialising with the adjudicating judicial officer in the absence of the defence counsel(s).

A prosecutor or a member of the staff shall not participate in any court proceeding other than his or her own, as a party, witness or deponent, where the proceeding is capable of bringing disrepute or embarrassment to the Office.

### 1.4 Fairness

Fairness is essential to the proper discharge of prosecutorial functions. It is essential not only to the decision itself, but also to the process by which a decision is made. A prosecutor must perform the prosecution functions without fear or favour.

*The duty of a prosecutor is to act fairly, to assist the court to arrive at the truth*.

a) a prosecutor has the duty to ensure that the prosecution case is presented properly and with fairness to the accused;
b) a prosecutor must ensure that he/she guided by and acts in accordance with appropriate rules of evidence and procedural rules, including those that pertain to evidence of questionable sources;
c) a prosecutor is entitled to firmly and vigorously urge the State view about a particular issue and to test and, if necessary, to attack the view put forward on behalf of the accused. However, if it is done, it must be done temperately and with restraint;
d) a prosecutor must never seek to persuade the Court to a point of view by introducing prejudice or emotion;
e) a prosecutor must not advance any argument that does not carry weight in his or her own mind or try to shut out any legal evidence that is important to the accused person's case or interest;
f) a prosecutor must inform and bring to the attention of the Court authorities or trial directions relevant to the case, even where they are unfavourable to the prosecution;
g) a prosecutor must disclose and offer all evidence relevant to the State's case during the presentation of the State's case. The State cannot split its case.
h) a prosecutor must respect for the presumption of innocence. In particular, prosecutors must never publicly express a personal opinion about the guilt of a person under investigation or the accused outside the context of proceedings before the Court
*i) The duty to act fairly occurs also throughout the pre-trial stages.*
j) a prosecutor must refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows may not result in a conviction;
k) a prosecutor must not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial rights or post-trial rights;

l) a prosecutor must make timely disclosure to the defence of all evidence or information known to the prosecutor that can have the effect of negating the guilt of an accused or mitigating the offence; and in connection with sentencing, disclose to the defence or the court all non-privileged mitigating information, except those that are the subject of protective orders;
m) a prosecutor must exercise reasonable care to prevent persons in the employ or under the control of the prosecutor from making extra-judicial statements.

### 1.5 Confidentiality

Prosecutors shall uphold the highest standard of confidentiality in the discharge of their duties, and actively exercise all care to ensure respect for the confidentiality of information.

They and other members of the staff must not disclose any privileged material or any material deemed confidential.

Confidentiality includes, *inter alia*:

a) full conformity with policies and procedures regarding confidentiality of correspondence, documents, proceedings, information and other matters obtained during the course of employment. Members of the Office shall pay particular attention to the provisions set out in the ***Prosecution Guideline*** and relevant Public Service code;
b) protecting the confidentiality of all intended prosecution trial materials from public exposure and scrutiny.
c) upholding the obligations stipulated in the undertaking contained in the Oath of Office;
d) vigilance regarding all communications that may potentially raise issues of confidentiality or potentially undermine the prosecution case, particularly communications with persons outside the Office and persons or parties interested in a prosecution;
e) immediate reporting of suspected breaches of confidentiality where they may represent a danger to the safety, well-being or privacy of other prosecutors, other staff members, victims, witnesses, persons under investigation, the accused and their families;
f) containment of such breaches by refraining from dissemination or discussion thereof; and
g) the secure maintenance and storage of any material obtained by prosecutors and other members of the staff during the course of their official functions.

These obligations shall not cease upon the conclusion of an officer's employment.

## Part 2

## 2. PROFESSIONAL RESPONSIBILITY

### 2.1 Responsibility

Prosecutors shall:

a) at all times uphold the rule of law, the integrity of the criminal justice system and the right to a fair trial;

b) at all times respect the fundamental right of equality of all persons before the law, and abstain from engaging in any wrongful discrimination;

c) recognise and understand diversities that exist in society and differences arising from race, colour, gender, religion, national origin, disability, age, marital status, and social and economic status and refrain from expressing by words or conduct prejudices against such differences, except when it becomes a proper and relevant legal issue in a proceeding, and as such become the subject of legitimate advocacy;

d) inform the Public Prosecutor about the commission of a criminal offence or improper conduct by a public official during the course of a criminal investigation or prosecution;

e) bring to the Public Prosecutor's attention any serious misconduct by a public official that may warrant censure and disciplinary measures;

f) give due attention to the prosecution of corruption, abuse of power, violations of human rights, violence against women and children, and other crimes recognised by international law, in particular when they are perpetrated by public officials.

### 2.2 Competence

Prosecutors shall take every reasonable step to maintain and enhance their knowledge, professional skills and personal qualities necessary for the proper performance of their duties, keeping themselves well-informed about important legal developments and taking full advantage of opportunities for training that become available to them.

*Prosecutors must ensure that they are acquainted with and able to apply the applicable law and practice when necessary. As officers of the Court, they are required to attend all proceedings where required to do so and be prepared to make researched and considered written or oral submissions that are of a high standard and able to assist the Court.*

### 2.3 Effective prosecution

In accordance with the Prosecutors Code and Prosecutor Guideline, prosecutors will ensure that they uphold standards of effective prosecution and:

a) act competently and diligently, make impartial judgments based on the evidence and the public interests when determining whether or not to proceed;

b) respect the rights of persons under investigation and accused persons, and ensure that proceedings are conducted in a fair manner;

c) refrain from prosecuting any person whom they believe to be innocent;

d) desist from proffering evidence obtained by means that violate the law and which casts doubt on the reliability and admissibility of the evidence, which may be antithetical to and potentially undermine the integrity of the proceedings

## 2.4 Expedition

A fundamental obligation of the prosecution is to assist in the timely and efficient administration of justice.

a) cases should be prepared for hearing as quickly as possible;
b) indictments should be finalised as quickly as possible;
c) indictments should be disclosed to the defence as soon as possible;
d) any amendment to an indictment should be made known to the defence as soon as possible;
e) as far as practicable, adjournment of any trial should be avoided by ensuring that prompt and careful attention is given to the form of the indictment, the availability of witnesses and exhibits, and any other matter that may potentially cause delay;

## 2.5 Conduct in Court

Without prejudice to the standards of conduct applicable to prosecutors, all prosecutors who appear in court must:

a) uphold the highest standards of integrity, confidentiality, fairness, honesty and truthfulness;
b) act fairly and in the interest of justice, and assist the Court in seeking a just decision;
c) ensure, to the best of their abilities, that a just verdict is reached at the end of the trial and not strive to attain a conviction at all costs;
d) conduct themselves in an honourable, professional, dignified and courteous manner towards all parties and participants in the proceedings, as well as witnesses giving testimony;
e) act with due deference to the authority of the Court;
f) not participate in any matter in which their impartiality might be questioned, and request the Public Prosecutor to excuse them as soon as it appears that their continued representation is likely to jeopardise the integrity of the prosecution case or the prosecutors ability to continue independently and effectively;
g) not deceive or knowingly mislead the Court, judge, counsel, or the Registry and take all necessary steps to correct an error or inaccuracy as soon as possible after it is discovered;
h) not present evidence knowing it to be false or inaccurate;
i) disclose all evidence that appear to support the innocence of a person under investigation or an accused person, or mitigate their guilt;
j) attend all Court appointed proceedings, and in time;
k) dress always in the appropriate suitable attire

Part 3

## 3. INDIVIDUAL CONDUCT

### 3.1 Conflict of interest

Prosecutors and support staff must avoid and refrain from any conduct which may be, directly or indirectly, in conflict with the discharge of their official duties or may compromise the independence and trust reposed in the Office. These conflicts may arise, *inter alia*, from:

a) personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the parties; and
b) circumstances in which prosecutors, support staff and members of their immediate families may appear to benefit, directly or indirectly, from association with any person, a body or activity connected to a prosecution.

Where a conflict of interest arises, whether financial or otherwise, prosecutors and support staff shall immediately disclose the conflict to the Public Prosecutor, who shall decide the next suitable course of action.

### 3.2 Non-acceptance of gifts, remunerations and favours

Prosecutors and support staff must not directly or indirectly accept any gift, advantage, privilege or reward that could reasonably be perceived as intended to influence the independent performance of their functions.

Acceptance of any honour, decoration, favour, gift or remuneration from any Government or from any non-governmental source shall require the prior approval of the Public Prosecutor.

Prosecutors shall not offer nor promise any favour, gift, remuneration or any other personal benefit to another party or to any third party with a view to causing him or her to perform, fail to perform or delay the performance of any official act. Similarly, no prosecutor or support staff shall either seek or accept any favour, gift, remuneration or any other personal benefit from another person or from any third party in exchange for performing, failing to perform or delaying the performance of an official act.

Unless otherwise authorised by the Public Prosecutor, prosecutors and support staff are not permitted to accept remuneration, fee, allowance or stipend from any external source for any publication, speaking engagement or other activity during the course of their employment as prosecutors.

### 3.3 Other forms of personal conduct

In an organisation like the OPP, honest adherence to workplace rules often help reinforce basic ethical values and norms of conduct. Accordingly, honest attendance at the work place during the specified working hours and the use of office resources such as vehicles for official use only are important in maintaining and strengthening a strong ethical culture in the work place. Late attendances, and absence from work in a day and absence over a significant period of time during the day must be declared and accounted for.

In addition, when procuring or seeking reimbursement of allowances or imprests, only the amount to be properly incurred must be sought. Any excessive payment or unspent sum must be surrendered or returned promptly in accordance with government's financial regulations.

Improper and unauthorised use of government resources is unacceptable. This includes the use of office vehicles and photo copying machines.

Prosecutors and support staff must seek to observe these rules.

## Application of the Code

This Code contains key principles intended to guide the conduct of prosecutors in the performance of their official functions.

Although it addresses many issues concerning ethics and appropriate conduct, it is by no means an exhaustive set of rules. Where the Code is silent, the spirit of the Code is to be applied.

Prosecutors should proactively seek to obtain advice from the Public Prosecutor about issues of personal concern or where there is some difficulty in determining whether an action is ethical or not.

## Compliance with the Code

Adherence to this Code is fundamental to the integrity and independence of prosecutorial decisions and services.

Breaches of the Code can be viewed seriously and may lead to appropriate actions being taken against the prosecutor or a member of the support staff.

## Entry into force

This Code shall come into force on the date of its publication by the Public Prosecutor.

Any proposal for amendments to this Code shall be referred to the Public Prosecutor.

## Publication

This Code is published in English, but at a later date will be translated into French and Bislama. It is published pursuant to section 29 of the Public Prosecutor Act 2003.

Appendix A : Standards of professional responsibility and statement of the essential duties and rights of prosecutors adopted by the International Association of Prosecutors on the twenty third day of April 1999

# Annexure H: OPP Prosecution Policy 2003

# OPP PROSECUTION POLICY 2003

## FOREWORD

The Office of the Public Prosecutor, in performing its Constitutional obligation, aims to meet that obligation fairly, in an accountable and transparent way, efficiently, and giving appropriate consideration to the concerns of victims of crime. The following Statement, entitled the *"Prosecution Policy of the Office of the Public Prosecutor"* is a publicly available document and in itself is aimed at meeting in some part those objectives by giving all citizens of the Republic of Vanuatu an opportunity to see for themselves what is the role of the Public Prosecutor in the criminal justice system and how that Constitutional Officeholder goes about performing his Constitutional responsibility to perform the function of prosecution.

The Statement does not attempt to cover all questions that can arise in the prosecution process and the role of the prosecutor in their determination. In general terms, a prosecutor must conduct himself or herself in a manner which will maintain, promote and defend the interests of justice, for in the final analysis the prosecutor is not a servant of government or individuals he or she is a servant of justice.

Nicholas Mirou

Public Prosecutor

## Prosecution Policy

### 1. Introduction

### Independence of the Office of the Public Prosecutor

The Constitution of the Republic of Vanuatu at Article 55 provides as follows:

> "The function of prosecution shall vest in the Public Prosecutor, who shall be appointed by the President of the Republic on the advice of the Judicial Service Commission. He shall not be the subject to the direction and control of any other person or body in the exercise of his functions."

The above Article provides that the office holder shall be completely independent from the rest of government.

The purpose of such "independence" is to ensure that the Public Prosecutor can ensure that the rule of law is applied to everyone, be they important government officials or simple subsistence farmers. The Public Prosecutor's role is to be fair independent and objective. The Public Prosecutor may not let his personal views of the ethnic or national origin, gender, religious beliefs, political views or sexual preference of an offender, victim or witness influence his decisions. The Pubic Prosecutor should also not be affected by improper or undue pressure from any source.

## Public Prosecutors Act No 7 of 2003

On 4 August 2003, the *Public Prosecutors Act (Act No.7 0f 2003*) commenced operation in Vanuatu. This is the first time since independence that an Act of Parliament has been passed that sets out the role and responsibilities of the Public Prosecutor. The purpose of the Act is to set out the manner of appointment of the Public Prosecutor and other prosecutors, and the roles and responsibilities of prosecutors. Up until the Act commenced, the role of the Public Prosecutor has been inferred by the procedural provisions of the *Criminal Procedure Code* [CAP 136].

The Act has ensured that there will be a separation of the investigative and prosecutorial functions in the criminal justice system. Once a prosecution has been commenced and referred to the Office of the Public Prosecutor, the decision whether to proceed with that prosecution is made by the Office of the Public Prosecutor independently of those who were responsible for the investigation.

## Objectives of the office of fairness, openness, accountability and efficiency

The Public Prosecutor's Office has the following objectives in the exercise of its functions:

a) *Fairness* - First in the sense that it brings to trial only those against whom there is an adequate and properly prepared case and who it is in the public interest should be prosecuted, and secondly in that it does not display arbitrary and inexplicable differences in the way that individual cases or classes of case are treated locally or nationally.
b) *Openness and accountability* - Those who make the decisions to prosecute or not can be called publicly to explain and justify their policies and actions as far as that is consistent with protecting the interests of suspects and accused.
c) *Efficiency* - it achieves the objects that are set for it with the minimum use of resources and the minimum delay.

In successfully pursing these objectives, the Office's overall objective is to ensure that there is public confidence in the criminal justice system, and that appropriate consideration is given to the victims of crime.

## Location of Offices

The Office of the Public Prosecutor has a main office at Port Vila and a branch office situated at Santo.

## Status of the Prosecution Policy of the Public Prosecutor

Section 11 of the *Public Prosecutors Act* enables the Public Prosecutor to issue directions or guidelines with respect to the prosecution of offences. The Prosecutions Policy is in effect a direction to all prosecutors to apply this policy in exercising prosecutorial discretions. Section 11(3) of the *Public Prosecutors Act* provides that such a direction is binding.

## Appointment of Prosecutors (Legal Officers)

The *Public Prosecutors Act* provides for the employment of legally qualified persons to appear on the Public Prosecutors behalf in Court and have carriage of particular prosecution cases. Section 20 of the *Public Prosecutors Act* provides for the appointment of a Deputy Public Prosecutor, who is to be a

legal practitioner with at least five (5) years experience. Section 21 provides for the appointment of Assistant Prosecutors. In relation to the Deputy Public Prosecutor and Assistant Public Prosecutors, their appointments are the subject of scrutiny by a panel including representatives from the private legal profession, State Law Office, the Public Solicitors Office and the Public Prosecutor's Office. The purpose of using such a panel is to ensure that the best candidate for any position is selected and to ensure the selection process is free from any personal bias.

### Appointment of State Prosecutors

Most cases that are prosecuted in the Magistrate's Court are prosecuted by specialist Police officers who are appointed by the Public Prosecutor as State Prosecutors. The power to appoint State Prosecutors is held by the Public Prosecutor as set out in section 22 of the *Public Prosecutors Act* and the Public Prosecutor in making such appointments must be satisfied that potential appointees have sufficient experience and ability to perform the role of a State Prosecutor and that they are persons of good character.

### Duties and Responsibilities of Prosecutors – Code of Practice and Ethics

Pursuant to section 29 of the *Public Prosecutors Act*, the Public Prosecutor, after consultation with the Law Society and the Law Council, has issued a *Code of Practice and Ethics for prosecutors*. This Code sets out ethical rules under which all prosecutors must act. The first rule is that a prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.

### Independence of Prosecutors

In recognition of the need for a prosecutor to be free from any influence and in recognition of the prosecutor's role as a minister of justice, the Public Prosecutors Act in section 24 provides as follows:

### 24 Independence of Prosecutors

The Deputy Public Prosecutor, Assistant Public Prosecutors and State Prosecutors must perform their functions independently and are not subject to the direction or control of any other person or body in the performance of their functions.

However, the Deputy Public Prosecutor, Assistant Public Prosecutors and State Prosecutors must perform their functions in accordance with the directions of the Public Prosecutor who is responsible for the due exercise of their functions.

## 2. The Decision to Prosecute

### How the system works

The Office of the Public Prosecutor prosecutes offences that are the subject of trials before the Supreme Court of Vanuatu. Offences that are the subject of trials before the Supreme Court of Vanuatu are the more serious offences, generally speaking being those carrying greater than two

years imprisonment as the maximum penalty (see section 14 *Judicial Services and Courts Act No 54 of 2000*).

The criminal justice system generally operates for a serious offence as follows:

1 a complaint concerning an alleged offence is made to a Police Officer;

2 the Police Officer conducts an investigation into the alleged offence, including arresting the defendant and giving him or her an opportunity to answer the allegation against him or her;

3 the Police officer prepares all the statements obtained during the investigation and forwards the file to the State Prosecutor's Office;

4 a State Prosecutor at the State Prosecutor's Office reads through the material and prepares a draft charge or complaint against the defendant and the file containing the draft charge or complaint is then checked by a senior Prosecutor at the Public Prosecutor's Office and the charge or complaint is finalized and forwarded to the Magistrate's Court;

5 the Magistrate's Court authorizes the arresting and charging of the defendant *(*section 143 of the *Criminal Procedure Code [CAP 136]);*

6 the defendant is brought before the Magistrate's Court and is the subject of a Preliminary Inquiry where all the evidence is tendered before a Senior Magistrate who then makes a determination as to whether there is a prima facie case against the defendant *(*section 145 of the *Criminal Procedure Code [CAP 136]);*

7 if there is a prima facie case found against the defendant, he or she is committed for trial to the Supreme Court *(*section 145, 146 of the *Criminal Procedure Code [CAP 136]);*

8 the prosecution file is then brought to the Office of the Public Prosecutor where the prosecution evidence is again considered by a senior prosecutor in the office and determinations made as to:

a) whether further evidence is required to be obtained by the Police;

b) the appropriate charge to be laid before the Supreme Court, keeping in mind the charge upon which he or she was committed for trial; and

c) whether a Supreme Court trial should take place (section 8 *Public Prosecutors Act)*.

9 the defendant is brought before the Supreme Court and a trial is conducted before a Justice of the Supreme Court where all the witnesses are called to give evidence and all the exhibits tendered for the prosecution and then for the defence and the Supreme Court Justice determines whether the case against the defendant is proved beyond a reasonable doubt (Part IX of the *Criminal Procedure Code [CAP 136]*);

10 if the case against the defendant is proved beyond a reasonable doubt, he or she is then sentenced for the crime that he or she has committed (Part IX and Part X of the *Criminal Procedure Code [CAP 136]*);

11 the defendant has a right to appeal against the conviction and or sentenced imposed to the Court of Appeal and the prosecution has a right to appeal against the leniency of the sentence that was imposed (Part XI of the *Criminal Procedure Code [CAP 136])*;

12 if the defendant or the prosecution appeals, the Court of Appeal then determines whether the conviction and sentence should be overturned or should be confirmed (Part XI of the *Criminal Procedure Code [CAP 136])*.

As is set out above, the prosecutor plays no part in the initial investigation of the matter, although where appropriate the prosecutor may give advice to the Police in relation to obtaining further evidence.

The Office of the Public Prosecutor's involvement commences at paragraph 4 above - where the charge drafted by the State Prosecutor is checked by a Senior prosecutor at the Office of the Public Prosecutor. The evidence is again scrutinized by the Office of the Public Prosecutor as set out in paragraph 8 above. In relation to office procedure where a prosecutor performing the roles in either 4 or 8 above determines that further evidence is to be sought by Police, or that the case should not proceed, the prosecutor must provide his or her recommendation on any action to be taken on the file back to a senior prosecutor for consideration.

The initial decision to be made by the Prosecutor is whether to prosecute.

## Criteria governing the decision to prosecute

Although by definition an Executive act, the decision to prosecute must be exercised in a quasi-judicial way. It is not the rule that suspected criminal offences must automatically be the subject of criminal prosecution. The dominant consideration in every case is whether *the offence itself or the circumstances of its commission* are of such a nature that it is in the public interest for a prosecution to be brought.

The first question however, for a prosecutor to ask himself or herself is *"is there enough evidence to justify putting this case before the Court?"* After answering this question, the prosecutor must then ask himself or herself whether a prosecution is required *in the public interest*. A detailed discussion on this aspect would be beyond the scope of this Statement. The ultimate decision whether or not to prosecute for any serious offence is constitutionally for the Public Prosecutor alone.

The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are to be employed to pursue with some vigor those cases worthy of prosecution.

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. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system.

The objectives of fairness and consistency as previously stated are of particular importance. However, fairness need not mean weakness and consistency need not mean rigidity. The criteria for the exercise of this discretion cannot be reduced to something akin to a mathematical formula; indeed it would be undesirable to attempt to do so. The breadth of the factors to be considered in exercising this discretion indicates a candid recognition of the need to tailor general principles to individual cases.

### Evidentiary test

The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution. A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the alleged offender.

When deciding whether the evidence is sufficient to justify the institution or continuation of a prosecution the existence of a bare prima facie case is not enough. Once it is established that there is a prima facie case it is then necessary to give consideration to the prospects of conviction. A prosecution should not proceed if there is no reasonable prospect of a conviction being secured.

The decision whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the alleged offender and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction.

This assessment may be a difficult one to make, and of course there can never be an assurance that a prosecution will succeed. Indeed it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and the useless expenditure of public funds.

When evaluating the evidence regard should be had to the following matters:

(a) Are there grounds for believing the evidence may be excluded bearing in mind the principles of admissibility at common law and under statute?

For example, prosecutors will wish to satisfy themselves that confession evidence has 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 institute or proceed with a prosecution.

(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?

(d) Has a witness a motive for telling less than the whole truth?

(e) Are there matters which might properly be put to a witness by the defence to attack his or her credibility?

(f) What sort of impression is the witness likely to make? How is the witness likely to stand up to cross-examination? Does the witness suffer from any physical or mental disability which is likely to affect his or her credibility?

(g) If there is conflict between eye witnesses, does it go beyond what one would expect and hence materially weaken the case?

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

(i) Are all the necessary witnesses available and competent to give evidence, including any who may be abroad?

(j) Where child witnesses are involved, are they likely to be able to give sworn evidence?

(k) If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the defendant?

(l) Where two or more defendants are charged together, is there a reasonable prospect of the proceedings being severed? If so, is the case sufficiently proved against each defendant should separate trials be ordered?

This list is not exhaustive, and of course the matters to be considered will depend upon the circumstances of each individual case, but it is introduced to indicate that, particularly in borderline cases, the prosecutor must be prepared to look beneath the surface of the statements.

### Public Interest test

Having satisfied himself or herself that the evidence is sufficient to justify the institution or continuation of a prosecution, the prosecutor must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued. It is not the rule that all offences brought to the attention of the authorities must be prosecuted.

The factors which can properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. While many public interest factors militate against a decision to proceed with a prosecution, there are public interest factors which operate in favour of proceeding with a prosecution (for example, the seriousness of the offence, the need for deterrence). In this regard, generally speaking the more serious the offence the less likely it will be that the public interest will not require that a prosecution be pursued.

Factors which may arise for consideration in determining whether the public interest requires a prosecution include:

(a) the seriousness or, conversely, the triviality of the alleged offence or that it is of a 'technical' nature only;

(b) any mitigating or aggravating circumstances;

(c) the youth, age, intelligence, physical health, mental health or special infirmity of the alleged offender, a witness or victim;

(d) the alleged offender's antecedents and background;

(e) the staleness of the alleged offence;

(f) the degree of culpability of the alleged offender in connection with the offence;

(g) the effect on public order and morale;

(h) the obsolescence or obscurity of the law;

(i) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;

(j) the availability and efficacy of any alternatives to prosecution;

(k) the prevalence of the alleged offence and the need for deterrence, both personal and general;

(l) whether the consequences of any resulting conviction would be unduly harsh and oppressive;

(m) whether the alleged offence is of considerable public concern;

(n) any entitlement of the government of the Republic of Vanuatu or other person or body to compensation, reparation or forfeiture if prosecution action is taken;

(o) the attitude of the victim of the alleged offence to a prosecution;

(p) the likely length and expense of a trial;

(q) 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;

(r) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;

(s) whether the alleged offence is triable only in the Supreme Court; and

(t) the necessity to maintain public confidence in such basic institutions as the Parliament and the courts.

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

As a matter of practical reality the proper decision in many cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. Although there may be mitigating factors present in a particular case, often the proper decision will be to proceed with a prosecution and for those factors to be put to the court at sentence in mitigation. Nevertheless,

where the alleged offence is not so serious as plainly to require prosecution the prosecutor should always apply his or her mind to whether the public interest requires a prosecution to be pursued.

In the case of some offences, the legislation provides an enforcement mechanism which is an alternative to prosecution. Examples are the Vanuatu National Provident Fund prosecution procedure under the *Vanuatu National Provident Fund Act [CAP 189]*. The fact that a mechanism of this kind is available does not necessarily mean that criminal proceedings should not be instituted. The alleged offence may be of such gravity that prosecution is the appropriate response.

However, in accordance with the above, the availability of an alternative enforcement mechanism is a relevant factor to be taken into account in determining whether the public interest requires a prosecution.

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

(a) the race, religion, sex, national origin 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 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.

### Prosecution of juveniles

Special considerations apply to the prosecution of juveniles. Prosecution of a juvenile should always be regarded as a severe step, and generally speaking a much stronger case can be made for methods of disposal which fall short of prosecution unless the seriousness of the alleged offence or the circumstances of the juvenile concerned dictate otherwise. In this regard, ordinarily the public interest will not require the prosecution of a juvenile who is a first offender in circumstances where the alleged offence is not serious.

In deciding whether or not the public interest warrants the prosecution of a juvenile regard should be had to such of the factors set out above as appear to be relevant, but particularly to:

(a) the seriousness of the alleged offence;

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

(c) the available alternatives to prosecution, such as a caution, and their efficacy;

(d) the sentencing options available to the relevant Court if the matter were to be prosecuted;

(e) the juvenile's family circumstances, particularly whether the parents of the juvenile appear able and prepared to exercise effective discipline and control over the juvenile;

(f) the juvenile's antecedents, including the circumstances of any previous caution the juvenile may have been given, and whether they are such as to indicate that a less formal disposal of the present matter would be inappropriate; and

(g) whether a prosecution would be likely to be harmful to the juvenile or be inappropriate, having regard to such matters as the personality of the juvenile and his or her family circumstances.

## Choice of charges

In many cases the evidence will disclose an offence against several different laws. Care must therefore be taken to choose a charge or charges which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will provide the court with an appropriate basis for sentence.

In the ordinary course the charge or charges laid or proceeded with will be the most serious disclosed by the evidence. Nevertheless, when account is taken of such matters as the strength of the available evidence, the probable lines of defence to a particular charge, and other considerations, it may be appropriate to lay or proceed with a charge which is not the most serious revealed by the evidence.

Under no circumstances should charges be laid with the intention of providing scope for subsequent charge-bargaining.

A choice of charge will not infrequently arise where the available evidence will support charges under both a provision of a specific Act and one or more of the offences of general application in the *Penal Code* [CAP 136]. Ordinarily the provisions of the specific Act rather than the general provisions of the Penal Code should be relied on unless to do so would not adequately reflect the nature of the criminal conduct disclosed by the evidence.

Charges should not be laid under the *Penal Code* or any other Act solely to avoid a time limit for a prosecution under a specific Act unless the conduct of the proposed defendant, or the circumstances in which the alleged offence was committed, contributed to the offence under the specific Act being out of time. In determining whether it would be appropriate to proceed under the *Penal Code* in such a case, it may also be necessary to have regard to any delay on the part of the responsible investigating agency in making enquiries in respect of the suspected breach and/or in referring the case to the Office of the Public Prosecutor.

## Customary Settlements and their place in criminal law

The *Criminal Procedure Code [CAP 136]* provides for a role for customary settlements in the criminal justice system as follows:

> PROMOTION OF RECONCILIATION
>
> 118. Notwithstanding the provisions of this Code or of any other law, the Supreme Court and the Magistrate's Court may in criminal causes promote reconciliation and encourage and facilitate the settlement in an amicable way, according to custom or otherwise, of any proceedings for an offence of a personal or private nature punishable by imprisonment for less than 7 years or by a fine only, on terms of payment of compensation or other terms

approved by such Court, and may thereupon order the proceedings to be stayed or terminated.

ACCOUNT TO BE TAKEN OF COMPENSATION BY CUSTOM

119. Upon the conviction of any person for a criminal offence, the court shall, in assessing the quantum of penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom and if such has not yet been determined, may, if he is satisfied that undue delay is unlikely to be thereby occasioned, postpone sentence for such purpose.

The Office of the Public Prosecutor abides by the principles enunciated in these provisions. It is to be noted that in the case of serious crimes, including rape, incest and other serious offences including offences against Public Order, a customary settlement is relevant in determining the quantum or length of any sentence, but not relevant in exercising the discretion to prosecute.

## 3. The institution and conduct of Public Prosecutions

As a general rule any person has the right at common law to institute a prosecution for a breach of the criminal law. Nevertheless, while that is the position in law, in practice all but a very small number of prosecutions are instituted by the Office of the Public Prosecutor.

The decision to initiate investigative action in relation to possible or alleged criminal conduct ordinarily rests with the department responsible for administering the relevant legislation. The Office of the Public Prosecutor is not usually involved in such decisions, although it may be called upon to provide legal advice or policy guidance. The Office of the Public Prosecutor may be consulted where, for example, there is doubt whether alleged misconduct constitutes a breach of the law.

The actual investigation is usually carried out by the Police except where the department or agency concerned has its own investigative arm. Generally speaking, the Office of the Public Prosecutor is not involved in investigations although from time to time it may be called upon to provide legal advice or policy guidance during the investigation stage. In major or very complex investigations such an involvement may occur at an early stage and be of a fairly continuous nature.

If as a result of the investigation an offence appears to have been committed the established practice is for a brief of evidence to be forwarded to the Office of the Public Prosecutor where it will be examined to determine whether a prosecution should be instituted and, if so, on what charge or charges.

By arrangement with the Office of the Public Prosecutor a few Government agencies may conduct their own prosecutions. These are generally high volume matters of minimal complexity (where, for example, pleas of guilty are common) and where prison sentences are rarely imposed (in many instances the maximum penalty involved is a fine). It is expected that those responsible for such prosecutions will observe these guidelines, and that they will consult the Office of the Public Prosecutor when difficult questions of fact or law arise.

If an investigation has disclosed sufficient evidence for prosecution but the department or agency concerned considers that the public interest does not require prosecution, or requires some action other than prosecution, the Office of the Public Prosecutor should still be consulted in any matter

which involves alleged offences of real gravity. The Office of the Public Prosecutor should also be consulted whenever a department or agency has any doubt about what course of action is most appropriate in the public interest.

In deciding whether or not a prosecution is to be instituted or continued and, if so, on what charge or charges, any views put forward by the Police, or the department responsible for the administration of the law in question, are carefully taken into account. Ultimately, however, the decision is to be made by the Public Prosecutor having regard to the considerations set out earlier.

### Leadership Code

Chapter 10 of the *Constitution of the Republic of Vanuatu* provides for a Leadership Code to govern the conduct of leaders of the people of Vanuatu. *The Leadership Code Act No.2 of 1998* gives effect to Chapter 10 of the *Constitution*. Chapter 10 of the *Constitution* and the associated Act place a high obligation on the leaders of the Republic of Vanuatu to obey the law and to act with integrity.

In relation to the *Leadership Code*, the Ombudsman must investigate and report on the conduct of a leader (other than the President). The report is then furnished to the Public Prosecutor who then must determine whether further investigation should be undertaken by the Police and whether there are sufficient grounds to prosecute the leader or any other person. The same test as applies in the determination of the decision to prosecute is applied in cases alleging breaches of the *Leadership Code* is applied as in deciding whether to prosecute under the general criminal law.

## 4. Control of prosecutions for an offence

### Introduction

Under the *Public Prosecutors Act*, the Public Prosecutor is given a supervisory role as to the prosecution of offences against the criminal law, and is empowered to intervene at any stage of a prosecution for an offence instituted by another.

### Intervention in a private prosecution

Section 10(1) of the Public Prosecutors Act provides “If a prosecution in respect of an offence has been instituted by a person other than the Public Prosecutor, the Public Prosecutor may take over and assume the conduct of the prosecution”.

The right of a private individual to institute a prosecution for a breach of the law has been said to be "a valuable constitutional safeguard against inertia or partiality on the part of authority" (per Lord Wilberforce in *Gouriet -v- Union of Post Office Workers* [1978] AC 435 at 477). Nevertheless, the right is open to abuse and to the intrusion of improper personal or other motives. Further, there may be considerations of public policy why a private prosecution, although instituted in good faith, should not proceed, or at the least should not be allowed to remain in private hands. The power under section 10 of the Act therefore constitutes an important safeguard against resort to this right in what may be broadly described as inappropriate circumstances.

The question whether the power under section 10 should be exercised to take over a private prosecution will usually arise at the instance of one or other of the parties to the prosecution, although clearly the Public Prosecutor may determine of his or her own motion that a private prosecution should not be allowed to proceed. Alternatively, some public authority, such as a

government department, may be concerned that to proceed with the prosecution would be contrary to the public interest and refer the matter to the Public Prosecutor

Where a question arises whether the power under section 10 should be exercised to intervene in a private prosecution, and the private prosecutor has indicated that he or she is opposed to such a course, the private prosecutor will be permitted to retain conduct of the prosecution unless one or more of the following applies:

(a) there is insufficient evidence to justify the continuation of the prosecution, that is to say, there is no reasonable prospect of a conviction being secured on the available evidence;

(b) there are reasonable grounds for suspecting that the decision to prosecute was actuated by improper personal or other motives, or otherwise constitutes an abuse of the prosecution process such that, even if the prosecution were to proceed it would not be appropriate to allow it to remain in the hands of the private prosecutor;

(c) to proceed with the prosecution would be contrary to the public interest - law enforcement is necessarily a discretionary process, and sometimes it is appropriate for subjective considerations of public policy, such as the preservation of order or the maintenance of international relations, to take precedence over strict law enforcement considerations; or

(d) the nature of the alleged offence, or the issues to be determined, are such that, even if the prosecution were to proceed, it would not be in the interests of justice for the prosecution to remain in private hands.

A private individual may institute a prosecution in circumstances where he or she disagrees with a previous decision of the Office of the Public Prosecutor. If, upon reviewing the case, it is considered the decision not to proceed with a prosecution was the proper one in all the circumstances, the appropriate course may be to take over the private prosecution with a view to discontinuing it.

In some cases the reason for intervening in the private prosecution will necessarily result in its discontinuance once the Public Prosecutor has assumed responsibility for it. In this regard, once the decision is made to take over responsibility for a private prosecution the same criteria should be applied at all stages of the proceeding as would be applied in any other prosecution being conducted by the Office of the Public Prosecutor.

If it is considered that it may be appropriate to intervene in a private prosecution, it may be necessary for the Office of the Public Prosecutor to request police assistance with enquiries before a final decision can be made whether or not to do so, and if so, whether or not to continue the prosecution.

## 5. Some other decisions in the prosecution process

### The calling of accomplices as witnesses for the prosecution

This section is concerned with the broad considerations involved in deciding whether to call an accomplice to give evidence in a particular matter and associated maters.

A decision whether to call an accomplice to give evidence for the prosecution frequently presents conflicting considerations calling for the exercise of careful judgment in the light of all the available

evidence. Inevitably, however, there will be instances where there is a weakness in the prosecution evidence that makes it desirable, or even imperative, to call an accomplice for the prosecution if that accomplice appears to be the only available source of the evidence needed to strengthen the weakness.

In conjunction with the question whether to call an accomplice the question may arise whether that accomplice should also be prosecuted. In this regard, unless the accomplice has been dealt with in respect of his or her own participation in the criminal activity the subject of the charge against the defendant, he or she will be in a position to claim the privilege against self-incrimination in respect of the very matter the prosecution wishes to adduce into evidence.

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

In the course of an investigation the police may identify a participant in the criminal activity under investigation as a person who is likely to be of more value as a prosecution witness than a defendant. Thereafter the investigation may be directed at constructing a case against the remaining participants based on the evidence it is expected this person will give. Unless for some reason it is not practicable to do so, the police should always seek advice from the office of the Public Prosecutor as to the appropriateness of such a course.

### Charge-negotiations

Charge-negotiations involve negotiations between the defence and the prosecution in relation to the charges to be proceeded with. Such negotiations may result in the defendant pleading guilty to fewer than all of the charges he or she is facing, or to a lesser charge or charges, with the remaining charges either not being proceeded with or taken into account without proceeding to conviction.

Charge-negotiations are to be distinguished from consultations with the trial judge as to the sentence the judge would be likely to impose in the event of the defendant pleading guilty to a criminal charge. Anything which suggests an arrangement in private between a judge and counsel in relation to the plea to be made or the sentence to be imposed must be studiously avoided. It is objectionable because it does not take place in public, it excludes the person most vitally concerned, namely the accused, it is embarrassing to the Prosecutor and it puts the judge in a false position which can only serve to weaken public confidence in the administration of justice. This document has earlier referred to the care that must be taken in choosing the charge or charges to be laid. Nevertheless, circumstances can change and new facts can come to light. Arrangements as to charge or charges and plea can be consistent with the requirements of justice subject to the following constraints:

(a) a charge-negotiation proposal should not be initiated by the prosecution; and

(b) such a proposal should not be entertained by the prosecution unless:

(i) the charges to be proceeded with bear a reasonable relationship to the nature of the criminal conduct of the accused;

(ii) those charges provide an adequate basis for an appropriate sentence in all the circumstances of the case; and

(iii) there is evidence to support the charges.

Any decision whether or not to agree to a proposal advanced by the defence, or to put a counter-proposal to the defence, must take into account all the circumstances of the case and other relevant considerations including:

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

(b) whether the sentence that is likely to be imposed if the charges are varied as proposed (taking into account such matters as whether the defendant is already serving a term of imprisonment) would be appropriate for the criminal conduct involved;

(c) the desirability of prompt and certain despatch of the case;

(d) the defendant's antecedents;

(e) the strength of the prosecution case;

(f) the likelihood of adverse consequences to witnesses;

(g) in cases where there has been a financial loss to the Republic of Vanuatu or any person, whether the defendant has made restitution or arrangements for restitution;

(h) the need to avoid delay in the despatch of other pending cases;

(i) the time and expense involved in a trial and any appeal proceedings;

(j) the view of the victim of the crime on the proposed charge negotiation; and

(k) the view of the referring agency (e.g. Police Service).

In no circumstances should the prosecution entertain a charge-negotiation proposal initiated by the defence if the defendant maintains his or her innocence with respect to a charge or charges to which the defendant has offered to plead guilty.

A proposal by the defence that a plea be accepted to a lesser number of charges or a lesser charge or charges may include a request that the prosecution not oppose a defence submission to the court at sentence that the penalty fall within a nominated range.

Alternatively, the defence may indicate that the defendant will plead guilty to an existing charge or charges if the prosecution will not oppose such a submission. It will not be objectionable for the prosecution to agree to such a request provided the penalty or range of sentence nominated is considered to be within acceptable limits to a proper exercise of the sentencing discretion.

### Proceeding to trial in the absence of a preliminary enquiry or in circumstances where the person was not committed to stand trial

To present an indictment in the absence of a preliminary inquiry (an “ex officio indictment”) must be regarded as constituting a significant departure from accepted practice. Given that the purpose of a preliminary inquiry is to filter out those cases where there is an insufficient basis for a defendant being placed on trial, to indict in the absence of a preliminary inquiry will deny the defendant the opportunity of securing a discharge before the magistrate. It will also deny the defendant the opportunity of testing the evidence of prosecution witnesses in cross-examination.

A decision to indict in the absence of a preliminary inquiry will only be justified if any disadvantage to the defendant that may thereby ensue will nevertheless not be such as to deny the defendant a fair trial. Further, such a decision will only be justified if there are strong and powerful grounds for so doing. Needless to say, an ex-officio indictment should not be presented in the absence of a preliminary inquiry unless the usual evidentiary and public interest considerations are satisfied.

It should be noted that where an ex-officio indictment is presented in the absence of a preliminary inquiry the defendant will be provided with all relevant witness statements and full details of the case which the prosecution will present at the trial.

On the other hand, a decision to indict notwithstanding the defendant was discharged at the preliminary inquiry will not constitute as great a departure from accepted practice. The result of a preliminary inquiry has never been regarded as binding on those who have the authority to indict. The magistrate may have erred in discharging the defendant, and in such a case the filing of an ex-officio indictment may be the only feasible way that that error can be corrected. Nevertheless, a decision to indict following a discharge at the preliminary inquiry should never be taken lightly. An ex-officio indictment should not be presented in such cases unless it can be confidently asserted that the magistrate erred 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 preliminary inquiry, the magistrate would have committed the defendant for trial.

### Prosecution appeals against sentence

It is important that prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform.

The proper role for prosecution appeals is to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience.

The prosecution's right to appeal against sentence should be exercised sparingly, and it is the policy of the Office of the Public Prosecutor not to institute such an appeal unless it can be asserted with some confidence that the appeal will be successful.

A prosecution appeal against sentence should also be instituted promptly, even where no time limit is imposed by the relevant legislation. Undue delay by the prosecution in the institution of an appeal may render oppressive the substitution of an increased sentence, and the appeal courts have indicated on numerous occasions that in such cases they will not intervene although the prosecution's appeal is otherwise meritorious.

Mention should also be made of the notion of “double jeopardy” and its application in the context of prosecution appeals against sentence. The expression "double jeopardy" is not always used with a single meaning. Sometimes it is used to refer to the pleas in bar of autrefois acquit and autrefois convict; sometimes it is used to encompass what is said to be a wider principle that no one should be "punished again for the same matter" *(Wemyss v Hopkins* (1875) LR 10 QB 378 at 381 per Blackburn J.). Further, "double jeopardy" is an expression that is employed in relation to several different stages of the criminal justice process: prosecution, conviction and punishment.

If there is a single rationale for the rule or rules that are described as the rule against double jeopardy, it is that described by Black J in *Green v United States* 355 US 184 at 187-188 (1957):

"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

The statutory conferral of a right of appeal by the prosecution against sentence infringes the traditional common law rule against double jeopardy in the administration of criminal justice in a manner comparable to a conferral of a prosecution right of appeal against a trial acquittal. As such, in most cases, because of the fact that the respondent to a prosecution appeal is subject to sentence proceedings twice, the sentence imposed in a successful prosecution appeal against sentence is often reduced in recognition of the infringement.

## Nolle Prosequi

Nolle Prosequi is a latin term for the voluntary withdrawal by the prosecutor of present proceedings on a criminal charge. The right to withdraw proceedings is provided for in section 29 of the *Criminal Procedure Code [CAP 136].* Section 29 provides that one a decision to withdraw the charge has been made by the prosecutor, the Court is to take that withdrawal as being equivalent to the defendant as having been acquitted of the offence. This means that a defendant after a nolle prosequi has been entered, he or she may not be prosecuted for the same allegation ever again.

It is the policy of the Office of the Public Prosecutor that the procedure should only be invoked where:

i) the defendant is unfit to stand trial because of some physical or mental incapacity;

ii) the Public Prosecutor is of the view that there is no reasonable prospect of conviction because of the lack of admissible evidence; or

iii) the Public Prosecutor determines that it is no longer in the public interest for the prosecution to continue.

Where a prosecutor is of the view that a nolle prosequi ought to be entered, he or she must provide the file with a memorandum containing that recommendation to the Public Prosecutor to make the determination.

Where a defendant fails to appear at Court when he or she has been served with a summons to appear, the appropriate course of action for a prosecutor is to seek a warrant for his or her arrest from the Court (see Public Prosecutor's Practice Direction 1 of 2003).

### Public Prosecutor offers no evidence

In some cases, it is determined to be appropriate for the prosecution to offer no evidence in relation to a particular charge when a matter is listed for trial. The consequence of offering no evidence is that the charge is dismissed and the defendant acquitted.

The type of case where it is appropriate for no evidence to be offered is where the prosecutor determines that there is a legitimate defence available to a defendant and that the available evidence discloses that there is a reasonable possibility that the defendant would not be convicted based on that defence. If a prosecutor is not certain whether a defence will be made out, the matter ought to proceed to trial with the Court to determine whether the defence is made out. When a prosecutor has any doubt as to what course to follow, advice must be sought from the Public Prosecutor. If a prosecutor is conducting a Court Tour and the Public Prosecutor cannot be contacted, the prosecutor ought to advise the Court that he or she undertakes to seek a direction as to whether a nolle prosequi ought to be entered from the Public Prosecutor upon his or her return to Port Vila and the defendant ought to be granted bail until that determination be made.

## 6 Victims of Crime

Prosecutors must, to the extent that it is relevant and practicable to do so, have regard to the rights of victims in addition to any other relevant matter.

Interested victims and relatives of victims, whether witnesses or not, should appropriately and at an early stage of proceedings have explained to them the prosecution process and their role in it. Prosecutors generally should initiate the giving of such information and should do so directly rather than through intermediaries.

In the case of a child witness the prosecutor is to ensure that the child is appropriately prepared for and supported in his or her appearance in court.

Special needs or conditions of all witnesses, victims and relatives of victims should be given careful consideration. Prosecutors should consider seeking the involvement of the Witness Assistance Service in their dealings with such persons.

Careful consideration should be given to any request by a victim that proceedings be discontinued. In sexual offences, particularly, such requests, properly considered and freely made, should be accorded significant weight. It must be borne in mind; however, that the expressed wishes of victims may not coincide with the public interest and in such cases, particularly where there is other evidence implicating the accused or where the gravity of the alleged offence requires it, the public interest must prevail.

In domestic violence offences, any request by the victim that proceedings be discontinued should be carefully considered. The needs, welfare and safety of the victim should be considered as relevant factors in determining where the overall public interest lies. It may be necessary to defer any decision on discontinuation until a thorough appraisal of all the circumstances of the case can be made.

## 7 Conclusion

This Statement does not attempt to cover all questions that can 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, for in the final analysis the prosecutor is not a servant of government or individuals he or she is a servant of justice.

At the same time it is important not to lose sight of the fact that prosecutors discharge their responsibilities in an adversarial context and seek to have the prosecution case sustained. Accordingly, while that case must at all times be presented to the court fairly and justly, the community is entitled to expect that it will also be presented fearlessly, vigorously and skillfully.

Office of the Public Prosecutor

September 2003

# Annexure J : OPP Prosecutors Code (Gazette.13 of 2017)

## OPP PROSECUTORS CODE (Gazette no. 13 of 2017)

### Foreword

The Office of the Public Prosecutor is committed to the highest ethical and professional standards. It is integral to the process that all prosecutors adopt and implement the same set of values and standards when evaluating the evidence in various pre-trial situations, and making the decision whether or not to prosecute.

This Prosecutors' Code sets out the criteria governing this decision and serves two principle purposes. The first is to promote consistency in the making of the various decisions which arise in relation to the institution and conduct of prosecutions. The second is to inform the public of the principles upon which the Office of the Public Prosecutor performs its Constitutional functions, and actions taken in its name.

These guidelines are based on internationally accepted standards. They are freely and publicly available and should be read and applied in conjunction with other instruments published by the Office of the Public Prosecutor that affect the conduct of prosecutions, including the Prosecution Standards, particularly the standard on Opinion Writing, the Prosecution Guidelines, and Practice Direction No 3 of 2016 .

I am pleased to publish the Prosecutors' Code for Vanuatu prosecutors.

Josaia Naigulevu

PUBLIC PROSECUTOR

### PART 1

### Introduction

1.1 The Public Prosecutor prosecutes on behalf of the State, which is the community, under the Public Prosecutor Act 2006. By convention, he or she is responsible only to the Parliament for the efficient exercise of the functions of the office, but otherwise acts independently of the government and of any political influence. The Public Prosecutor also acts independently of inappropriate individual or sectional interests in the community and of inappropriate influence by the media.

As Kirby P (as he then was) said in *Price v Ferris* (1994) 34 NSWLR 704 at p 707, the object of having a head of prosecution service is:

*"to ensure a high degree of independence in the vital task of making prosecution decisions and exercising prosecution discretions."*

It ensures that there is:

*"manifest independence in the conduct of the prosecution. It is to avoid the suspicion that important prosecutorial discretions will be exercised otherwise than on neutral grounds. It is to avoid the suspicion, and to answer the occasional allegation, that the prosecution may not be conducted with appropriate vigour."*

1.2 The Public Prosecutor's functions are carried out independently of the Courts.

*"Our courts do not purport to exercise control over the institution or continuation of criminal proceedings, save where it is necessary to do so to prevent an abuse of process or to ensure a fair trial."*

(Dawson and McHugh JJ in *Maxwell v The Queen* (1995) 184 CLR 501).

Cases are prepared and conducted by lawyers employed in the Office of the Public Prosecutor ("OPP") and summary prosecutors in the State Prosecutors Department ("SPD"). In the OPP, prosecutors are never briefed by private counsels. They are in complete carriage of the case once an investigation is completed. In all cases, prosecutors act on behalf of the Public Prosecutor. They are also subject to his or her general direction in the exercise of their professional functions, which direction may be given by way of published guidelines including the Prosecution Guidelines.

1.3 Pursuant to the *Public Prosecutors Act* 2006 the Public Prosecutor may delegate the exercise of particular functions.

Staff of the OPP and prosecutors also carry out their duties in compliance with the *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* promulgated by the International Association of Prosecutors.

## The role of the prosecutor

1.4 It has been said that a prosecutor is a "minister of justice". This is because of the role a prosecutor performs. The prosecutor's principal role is to assist the Court to arrive at the truth and to do justice between the community and the accused according to law and the dictates of fairness.

The objective of prosecution and the ethics of the prosecutor have been defined in several ways:

*"It is important to note that in a just society, the conviction of the guilty is in the public interest, as is the acquittal of the innocent."* (Mr Justice Li. Chief Justice, Hong Kong).

1.5 A prosecutor is not entitled to act as if he or she were representing private interests in a litigation. A prosecutor represents the public and the community and not any individual or sectional interest. A prosecutor acts independently, yet in the general public interest. The "public interest" ought to be understood in that context as an historical continuum: acknowledging debts to previous generations and obligations to future generations.

In carrying out that function:

*"it behoves him - Neither to indict, nor on trial to speak for conviction except upon credible evidence of guilt; nor to do even a little wrong for the sake of expediency, or to pique any person or please any power; not to be either gullible or suspicious, intolerant or over-pliant: in the firm and abiding mind to do right to all manner of people, to seek justice with care, understanding and good countenance."*

(per RR Kidston QC, former Senior Crown Prosecutor of New South Wales, in *"The Office of Crown Prosecutor (More Particularly in New South Wales)",* (1958) 32 ALJ 148).

1.6 Prosecution is a specialised and demanding role, the nature and features of which need to be clearly recognised and understood. It is a role that is not easily understood or assimilated by many legal practitioners schooled in an adversarial environment. It is essential that this role be carried out with the confidence of the community in whose name it is performed.

*"It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel has a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."*

(Rand J in the Supreme Court of Canada in *Boucher v The Queen* (1954) 110 CCC 263 at p 270).

1.7 In this country, that role is discharged in an environment where an adversarial approach is the approach taken in the courts. The observance of those canons of conduct is not incompatible with the adoption of an advocate's role. The advocacy must be conducted, however, temperately and with restraint.

1.8 The prosecutor represents the community generally at the trial of an accused person.

*"Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one."*

(Deane J in *Whitehorn v The Queen* (1983) 152 CLR 657 at pp 663-664).

Nevertheless, there will be occasions when the prosecutor will be entitled to firmly and vigorously urge the prosecution's view about a particular issue and to test, and if necessary to attack, that advanced on behalf of an accused person or evidence adduced by the defence. Adversarial tactics may need to be employed in one trial that may be out of place in another. A criminal trial is an accusatorial, adversarial procedure and the prosecutor will seek by all proper means provided by that process to secure the conviction of the perpetrator of the crime charged.

## PART 2

### The decision to charge

2.1 In all criminal cases conveyed to the OPP and SPD, prosecutors must decide whether a person should be charged with a criminal offence and, if so, what that offence should be. They make those decisions in accordance with this Code. The police apply the same principles in deciding whether to start criminal proceedings against a person in those cases for which they are responsible.

2.2 The police and other investigators are responsible for conducting enquiries into any alleged crime and for deciding how to deploy their resources. This includes decisions to start or continue an investigation and on the scope of the investigation. Prosecutors often advise the police and other investigators about possible lines of inquiry and evidential requirements, and assist with pre-charge procedures. In large scale investigations the prosecutor may be asked to advise on the overall investigation strategy, including decisions to refine or narrow the scope of the criminal conduct and the number of suspects under investigation. This is to assist the police and other investigators to complete the investigation within a reasonable period of time and to build the most effective prosecution case. However, prosecutors cannot direct the police or other investigators.

2.3 Prosecutors should identify and, where possible, seek to rectify evidential weaknesses, but, subject to the Minimum Evidence test (see part 4), they should swiftly stop cases which do not meet the evidential stage of the Code Test (see part 3) and which cannot be strengthened by further investigation, or where the public interest clearly does not require a prosecution (see part 3). Although prosecutors primarily consider the evidence and information supplied by the police and other investigators, the suspect or those acting on his or her behalf may also submit evidence or information to the prosecutor through the police or other investigators, prior to charge, to help inform the prosecutor's decision.

2.4 Prosecutors must only start or continue a prosecution when the case has passed both stages of the Code test (see section 3). The exception is when the Minimum Evidence test (see section 4) may be applied where it is proposed to apply to the court to keep the suspect in custody after charge, and the evidence required to apply the Code Test is not yet available or yet to be made available.

Prosecutors should not start or continue a prosecution which would be regarded by the courts as oppressive or unfair and an abuse of the Court's process.

2.4 Prosecutors review every case they receive from the police or other investigators. Review is a continuing process and prosecutors must take account of any change in circumstances that occurs as the case develops, including what becomes known of the defence case. Wherever possible, they should talk to the investigator when thinking about changing the charges or stopping the case. Prosecutors and investigators work closely together, but the final responsibility for the decision whether or not a case should go ahead rests with the OPP.

2.5 The prosecution process should be initiated or continued wherever it appears to be in the public interest. If it is not in the interests of the public that a prosecution should be initiated or continued then it should not be pursued. The scarce resources available for prosecution should be used to pursue, with appropriate vigour, cases worthy of prosecution and not wasted pursuing inappropriate cases.

## PART 3

## THE TESTS

### 1. The Code Test

3.1 The Code test involves two stages: (i) the evidential stage; followed by (ii) the public interest stage.

In most cases, prosecutors should only decide whether to prosecute after the investigation has been completed and after all the available evidence have been reviewed. However there will be cases where it is clear, prior to the collection and consideration of all the likely evidence, that the public interest does not require a prosecution. In these instances, prosecutors may decide that the case should not proceed further.

3.2 Prosecutors should only take such a decision when they are satisfied that the broad extent of the criminality has been determined and that they are able to make a fully informed assessment of the public interest. If prosecutors do not have sufficient information to take such a decision, the investigation should proceed and a decision taken later in accordance with the Code Test set out in this section.

## The Evidential Stage

3.3 Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect in relation to each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

3.4 Even a prima facie case is not enough. A decision by a Magistrate to commit a defendant for trial does not absolve the prosecution from its responsibility to independently evaluate the evidence. The test for the Magistrate is limited to whether there is a bare prima facie case. The prosecutor must go further to assess the quality and persuasive strength of the evidence as it is likely to be at trial

3.5 The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which he or she might rely. It means that an objective, impartial and reasonable Court or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty.

3.6 When deciding whether there is sufficient evidence to prosecute, prosecutors should ask themselves the following: Can the evidence be used in court? Prosecutors should consider whether there is any question concerning the admissibility of certain evidence. In doing so, prosecutors should assess the following matters:

a) the likelihood of that evidence being held as inadmissible by the court; and;

b) the importance of that evidence in relation to the evidence as a whole.

Is the evidence reliable? Prosecutors should consider whether there are any reasons to question the reliability of the evidence, including its accuracy or integrity. Is the evidence credible? Prosecutors should consider whether there are any reasons to doubt the credibility of the evidence.

## The Public Interest Stage

3.7 In every case where there is sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest. It has never been the rule that a prosecution will automatically take place once the evidential stage is met.

*"It has never been the rule in this country ... that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should ... prosecute 'wherever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest'. That is still the dominant consideration."*

(Sir Hartley Shawcross QC, UK Attorney General and former Nuremberg trial prosecutor, speaking in the House of Commons on 29 January 1951).

That statement applies equally to the position in Vanuatu. A prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour. In some cases the prosecutor may be satisfied that the public interest can be properly served by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal rather than bringing a prosecution.

3.8 When deciding the public interest, prosecutors should consider each of the questions set out below in paragraphs a) to g) so as to identify and determine the relevant public interest factors tending for and against prosecution. These factors, together with any other public interest factors set out in other guidance or policy issued by the Public Prosecutor, should enable prosecutors to form an overall assessment of the public interest.

The explanatory text below each question in paragraphs a) to g) provides guidance to prosecutors when addressing each particular question and determining whether it identifies public interest factors for or against prosecution. The questions identified are not exhaustive, and not all the questions may be relevant in every case. The weight to be attached to each of the questions, and the factors identified, will also vary according to the facts and merits of each case.

3.9 It is quite possible that one public interest factor alone may outweigh a number of other factors which tend in the opposite direction. Although there may be public interest factors tending against prosecution in a particular case, prosecutors should consider whether nonetheless a prosecution should go ahead and those factors put to the court for consideration when sentence is passed.

3.10 Prosecutors should consider each of the following questions:

a) How serious is the offence committed?

The more serious the offence, the more likely it is that a prosecution is required. When deciding the level of seriousness of the offence committed, prosecutors should include amongst the factors for consideration the suspect's culpability and the harm to the victim by asking themselves the questions at b) and c).

b) What is the level of culpability of the suspect?

The greater the suspect's level of culpability, the more likely it is that a prosecution is required. Culpability is likely to be determined by the suspect's level of involvement, the extent to which the offending was premeditated and/or planned, whether they have previous criminal convictions and/or out-of-court disposals and any offending whilst on bail or whilst subject to a court order, whether the offending was or is likely to be continued, repeated or escalated, and the suspect's age or maturity (see paragraph d) below for suspects under 15).

Prosecutors should also have regard when considering culpability as to whether the suspect is, or was at the time of the offence, suffering from any significant mental or physical ill health as in some circumstances this may mean that it is less likely that a prosecution is required. However, prosecutors will also need to consider how serious the offence was, whether it is likely to be repeated and the need to safeguard the public or those providing care to such persons.

c) What are the circumstances of and the harm caused to the victim?

The circumstances of the victim are highly relevant. The greater the vulnerability of the victim, the more likely it is that a prosecution is required. This includes where a position of trust or authority exists between the suspect and victim.

A prosecution is also more likely if the offence has been committed against a victim who was at the time a person serving the public. Prosecutors must also have regard to whether the offence was motivated by any form of discrimination against the victim's ethnic or national origin, gender, disability, age, religion or belief, sexual orientation or gender identity; or the suspect demonstrated hostility towards the victim based on any of those characteristics. The presence of any such motivation or hostility will mean that it is more likely that prosecution is required. In deciding whether a prosecution is required in the public interest, prosecutors should take into account the views expressed by the victim about the impact that the offence has had. In appropriate cases, this may also include the views of the victim's family.

Prosecutors also need to consider if a prosecution is likely to have an adverse effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence. If there is evidence that prosecution is likely to have an adverse impact on the victim's health it may make a prosecution less likely, taking into account the victim's views.

However, the OPP does not act for victims or their families in the same way as solicitors act for their clients, and prosecutors must form an overall view of the public interest.

d) Was the suspect under the age of 15 at the time of the offence?

The criminal justice system treats children and young people differently from adults and significant weight must be attached to the age of the suspect if they are a child or young person under 15. The best interests and welfare of the child or young person must be considered including whether a prosecution is likely to have an adverse impact on his or her future prospects that is disproportionate to the seriousness of the offending. Prosecutors must have regard to the principal aim of the youth justice system which is to prevent offending by children and young people. Prosecutors must also

have regard to the obligations arising under the *United Nations 1989 Convention on the Rights of the Child.*

As a starting point, the younger the suspect, the less likely it is that a prosecution is required. However, there may be circumstances which mean that notwithstanding the fact that the suspect is under 15, a prosecution is in the public interest. These include where the offence committed is serious, where the suspect's past record suggests that there are no suitable alternatives to prosecution, or where the absence of an admission means that out-of-court disposals which might have addressed the offending behaviour are not available.

e) What is the impact on the community?

The greater the impact of the offending on the community, the more likely it is that a prosecution is required. In considering this question, prosecutors should have regard to how community is an inclusive term and is not restricted to communities defined by location.

f) Is prosecution a proportionate response?

Prosecutors should also consider whether prosecution is proportionate to the likely outcome, and in so doing the following may be relevant to the case under consideration. The cost to the OPP and the wider criminal justice system, especially where it could be regarded as excessive when weighed against any likely penalty. (Prosecutors should not decide the public interest on the basis of this factor alone. It is essential that regard is also given to the public interest factors identified when considering the other questions in paragraphs a) to g), but cost is a relevant factor when making an overall assessment of the public interest.)

Cases should be capable of being prosecuted in a way that is consistent with principles of effective case management. For example, in a case involving multiple suspects, prosecution might be reserved for the main participants in order to avoid excessively long and complex proceedings.

g) Do sources of information require protecting?

In cases where public interest immunity does not apply, special care should be taken when proceeding with a prosecution where details may need to be made public that could harm sources of information, international relations or national security. It is essential that such cases are kept under continuing review.

3.11 In a number of jurisdictions, the following have been considered for some time the relevant public interest factors:-

(a) the level of seriousness or triviality of the alleged offence, or whether or not it is of a 'technical' nature only;

(b) the existence of any mitigating or aggravating circumstances;

(c) the youth, age, physical or mental health or special infirmity of the alleged offender or a necessary witness;

(d) the alleged offender's antecedents and background, including culture and ability to understand the English language;

(e) the staleness of the alleged offence;

(f) the degree of culpability of the alleged offender in connection with the offence;

(g) whether or not the prosecution would be perceived as counterproductive to the interests of justice;

(h) the availability and efficacy of any alternatives to prosecution;

(i) the prevalence of the alleged offence and the need for deterrence, either personal or general;

(j) whether or not the alleged offence is of minimal public concern;

(k) any entitlement or liability of a victim or other person to criminal compensation, reparation or forfeiture if prosecution action is taken;

(l) the attitude of the victim of the alleged offence to a prosecution;

(m) the likely length and expense of a trial;

(n) whether or not 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;

(o) the likely outcome in the event of a conviction considering the sentencing options available to the Court;

(p) whether the alleged offender elected to be tried on indictment rather than be dealt with summarily;

(q) whether or not a sentence has already been imposed on the offender which adequately reflects the criminality of the episode;

(r) whether or not the alleged offender has already been sentenced for a series of other offences and what likelihood there is of an additional penalty, having regard to the totality principle;

(s) the necessity to maintain public confidence in the Parliament and the Courts; and

(t) the effect on public order and morale.

There are obviously overlaps between the two. The utility of the latter can perhaps be its application as a quick, convenient summary.

## PART 4

## The Minimum Evidence Test

4.1 The Minimum Evidence test will only be applied where the suspect presents a substantial bail risk and not all the evidence is available at the time when he or she must be released from custody unless charged.

At the time when the Minimum Evidence test may be applied, prosecutors must determine whether the following conditions are met:

a) there is insufficient evidence currently available to apply the evidential stage of the Code test; and

c) there are reasonable grounds for believing that further evidence will become available within a reasonable time; and

d) the seriousness or the circumstances of the case justifies the making of an immediate charging decision; and

e) there are continuing substantial grounds to object to bail and in all the circumstances of the case it is proper to do so.

4.2 Where any of the above conditions is not met, the Minimum Evidence Test cannot be applied and the suspect cannot be charged. The custody officer must determine whether the person may continue to be detained or be released on bail, with or without conditions.

4.3 There are two parts to the evidential consideration of the Minimum Evidence test. The first part of the Minimum Evidence test is there reasonable suspicion? Prosecutors must be satisfied that there is at least a reasonable suspicion that the person to be charged has committed the offence. In determining this, prosecutors must consider the evidence then available. This may take the form of witness statements, material or other information, provided the prosecutor is satisfied that:

a) it is relevant; and

b) it is capable of being put into an admissible format for presentation in court; and

c) it would be used in the case.

4.4 If satisfied about this, the prosecutor should then consider the second part of the Minimum Evidence test. The second part of the Minimum Evidence test involves the question whether further evidence can be gathered to provide a realistic prospect of conviction? Prosecutors must be satisfied that there are reasonable grounds for believing that the continuing investigation will provide further evidence, within a reasonable period of time, so that all the evidence together is capable of establishing a realistic prospect of conviction in accordance with the Code Test. The further evidence must be identifiable and not merely speculative. In reaching this decision prosecutors must consider:

a) the nature, extent and admissibility of any likely further evidence and the impact it will have on the case;

b) the charges that all the evidence will support;

c) the reasons why the evidence is not already available;

d) the time required to obtain the further evidence and whether any consequential delay is reasonable in all the circumstances.

If both parts of the Minimum Evidence test are satisfied, prosecutors must apply the public interest stage of the Code Test based on the information available at that time.

## Reviewing the Minimum Evidence Test

4.5 A decision to charge under the Minimum Evidence test must be constantly reviewed. The evidence must be regularly assessed to ensure that the charge is still appropriate and that continued objection to bail is justified. The Code Test must be applied as soon as is reasonably practicable and in any event before the expiry of any applicable custody time limit.

## PART 5

## Other considerations

5.1 After a decision has been made to prosecute, the prosecutor may still be required to consider additional matters that will determine the ultimate shape of the charge. They include:

### A. Election: indictment or summarily.

Often this involves the exercise of discretion. Where the same criminal act could be charged either as a summary or an indictable offence, the summary offence should be preferred unless either:-

(a) The conduct could not be adequately punished other than as an indictable offence having regard to:-

i. the maximum penalty of the summary charge;

ii. the circumstances of the offence; and

iii. the antecedents of the offender; or

(b) There is some relevant connection between the commission of the offence and some other offence punishable only on indictment, which would allow the two offences to be tried together.

### B. Selection of charges.

Prosecutors should select charges which:

a. best reflects the seriousness of the offending;

b. gives the court adequate sentencing powers;

c. enables the case to be presented in a clear and simple way; and

d. adequately reflects the true criminality of the offender's conduct.

### C. Number of counts.

The prosecutor should not proceed with more charges than are necessary. He should not lay more charges than are necessary just to get the accused to plead guilty to a few. Similarly, he should not lay a more serious charge merely to encourage an accused person to plead guilty to a lesser offence.

## PART 6

## Miscellaneous

## Entry into force

6.1 This Code shall come into force on the date of its publication by the Public Prosecutor.

## Publication

6.2 This Code is published in English, but at a later date will be translated to French and Bislama. It is published pursuant to section 29 of the Public Prosecutor Act 2003.

# Annexure K: Precedent for Induced Statement

The following is a precedent for an induced statement in relation to a witness, who is or is likely to be considered for the granting of an undertaking under the Public Prosecutor Act 2003.

The jurat is in the form most commonly used by police and forms best practice.

The wording of the jurat will need to be varied if legislation is introduced setting out a different form.

The specific applicability of the wording of the reverse caution should be considered in each individual case and may need to be varied due to the circumstances of the particular witness.

*PRECEDENT*

1. This statement made by me accurately sets out the evidence that I would be prepared, if necessary, to give in court as a witness.

2. The statement is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I will be liable to prosecution if I have wilfully stated in it anything that I know to be false or do not believe to be true.

3. This statement is made on the basis that it will be used to support an application (if necessary) for an indemnity from prosecution for any offences disclosed from the Office of the Public Prosecutions for the purpose of me giving evidence in criminal proceedings in Australia.

4. This statement is also made on the basis that apart from the circumstances referred to in paragraph 2 above it will not be used in evidence in any criminal proceedings against me.

5. I also acknowledge that no assurances or guarantees have been given in relation to the grant of such an indemnity.

# Annexure L: Letter of Comfort Requirements

## OPP LETTER OF COMFORT REQUIREMENTS

A letter of Comfort should advise the recipient that:

a) the writer has been informed that he/she [the recipient] is to be called to give evidence at the trial of [name of accused] who has been charged with the offence of [description of offence];

b) the trial is listed to commence on [date];

c) the writer has been provided with a copy of his/her [the recipient's] statement made by him/her and signed on [date] containing the evidence that it is anticipated he/she will give;

d) a copy of that statement is attached to the letter;

e) on the basis that the evidence in this statement is true and that it fully discloses his/her involvement, this office does not intend to prosecute him/her in relation to his/her involvement as set out in that statement;

f) this assurance does not apply to any proceedings in respect of the falsity of any evidence that he/she may give in Court.

# Annexure M: PILON General Principles for obtaining the best evidence from vulnerable witnesses to SGBV offences (extract)

## PILON General Principles for obtaining the best evidence from vulnerable witnesses to SGBV offences (extract)

1. Dignity and Respect – Vulnerable witnesses should be treated in a compassionate and sensitive manner, so as not to increase any feelings of helplessness, shame or distress. The manner in which they are treated should take into account their personal situation and immediate needs, ensure that interference in their private life is minimised as far as possible and the person is treated in a way that is respectful and preserves their autonomy and physical, mental and moral integrity.

2. Best Information – Vulnerable witnesses should be informed promptly and fully about the availability and best ways of accessing any available support service, such as health, counselling or emergency financial and housing support. The procedures and processes of the criminal justice system should be explained clearly, including the timing and location of hearings and other relevant events, the person's role and the ways in which they might be asked to participate. They should be advised how decisions could be reviewed and the progress of the case, in particular the apprehension, arrest or release of the accused and any protective measures that might be available. Participation of vulnerable witnesses should be planned ahead of time, as much as possible, so they can be provided with certainty and a clear understanding of what to expect.

3. Coordinated assistance - Vulnerable witnesses should have access to services by professionals who are relevantly and adequately trained. Services should be linked up as much as possible to minimise the number of contacts with the justice system and times the vulnerable witness is required to recount the trauma. Service providers should ensure that, where possible, the person is provided with continuity of care. Assistance should be provided in a timely manner, in accordance with the needs and wishes of the person. Such assigned professionals should be aware of, and thereby make vulnerable witnesses aware of, alternative methods of giving evidence that can be sought or applied for by prosecution.

4. Safety – The safety of vulnerable witnesses should be protected at every stage of the criminal justice process. It is important that appropriate safeguards are put in place to reduce potential instances of intimidation, threats or harm to vulnerable witnesses and that direct contact with or questioning by alleged perpetrators is avoided. This includes steps to offer and facilitate alternative methods of giving evidence. Steps should also be taken to protect their safety after the conclusion of the proceedings, such as when the person is released following a period of incarceration.

5. Privacy – The privacy of vulnerable witnesses should be protected to the maximum extent possible, by restricting the disclosure of information that could identify the witness and by prohibiting the public and the media from the courtroom, where possible. Personal information should not be disclosed to others without the person's consent, unless necessary.

6. Non-discrimination – Vulnerable witnesses should not be discriminated against, irrespective of their race, colour, religion, beliefs, age, family status, culture, language, ethnicity, national or social origin, citizenship, gender, sexual orientation, political or other opinions, disability, status of birth, property or other condition. Professionals working in or with the criminal justice sector should be aware of individual differences that can impact a person's ability to fully participate in the criminal justice process.

7. Individual Expression – Vulnerable witnesses should be treated as autonomous individuals with their own needs, wishes, thoughts and feelings. Every effort should be made to enable them to give their evidence and tell their story in their own words. It is also important to allow the person to be able to freely express their concerns and views about the criminal justice process, including concerns regarding their involvement, ways in which they would like to contribute and how they feel about the outcome. Professionals should demonstrate that they have considered the person's views and concerns and explained reasons why they might not be able to be accommodated.

8. Victim Impact and Compensation Principle – Vulnerable witnesses, who are victims/survivors, should be assisted to make a victim impact statement, in the most appropriate way possible. Information about compensation or restitution for any harm suffered should be provided along with assistance in accessing such measures.

# Annexure N: OPP Standard in Opinion Writing

# OPP Standard in Opinion Writing

STRUCTURE OF OPINION STANDARD

1. Style
2. Size
3. References/footnoting
4. Authorities – cases and statutes
5. Format
6. Analysis
7. Gaps
8. Advice
9. Time limits
10. Language
11. Evidence – witnesses, ROI,
12. Function of advice

## INTRODUCTION

Fred Rodell, Dean of Yale Law School observed: *"There are two things wrong in most legal writing. One is style. The other is content."(* (1936) 23 Va.L.Rev, 38)

This Standard establishes guidelines and standards which legal officers must adhere to when writing legal opinions. It contains prescriptions relating to both style and content, and discusses the value of brevity and simplicity, correct grammatical structures, a purge on legalese and archaic usages, and the standard format. The Standard also serves as a set of transparent criterion against which the quality of all written legal opinions shall be evaluated.

## NATURE OF LEGAL OPINIONS

Often the nature of any writing will determine the style. In this case, the opinion is in the nature of predictive legal analysis which seeks to predict the outcome of a legal question by analysing the authorities governing the question and relevant facts that give rise to the legal question. It culminates with an advice or recommendation.

The majority of these opinions will involve charging decisions that examine the twin question whether there is sufficient evidence for a realistic prospect of conviction and if prosecution is required in the public interest. The answers to these questions will enable the Public Prosecutor to determine how he exercises his discretion to charge. The lesser proportion of opinions concern advices to the police

investigators about particular legal issues and in some cases the direction which the investigation should take.

## UTILITY OF ACCURATE AND TIMELY OPINIONS

The value and importance of accurate and timely opinions to the discharge of the Public Prosecutor's powers and the fair administration of criminal justice cannot be overstated. Where it is lacking, the exercise of the Public Prosecutor's discretion can be severely compromised.

## STRUCTURE

A good structure is critical. Generally the structure is a static consideration that will not vary greatly from one writer to another. However the experience seems to favour a rigid structure that focuses on careful and close analysis of the relevant laws and facts, and in particular how these laws apply to the facts. Without good analysis, a number of things may occur. These include the existence of gaps in the evidence that are not identified in time or at all; of issues and defences that are not identified early and consequently not adequately addressed through research and further investigations; and where the foregoing are considered together, the prospect of making inaccurate decisions is fairly high.

Accordingly, the structure must use the best possible form. A suitable type and size is essential. Whilst a serif-type is considered best for text, Arial now appears to be the standard. A sans serif type is suitable for headings because it directs the readers' eyes downward to the material following the heading. In terms of font size, size 12 is considered fairly standard.

## SUBSTANCE

The opinion must consist of a full and accurate discussion of the law and the evidence. Needless to say, the standard must be of a high quality. Further discussion on the point will be made later. At this point some comment need to be made about language, grammar and syntax.

Short, crisp sentences are far more effective. Each sentence should average no more than eighteen words. Long sentences are especially difficult when strung together. Readability should always be the goal. Sometimes a page limit can be of value. It will require you to refine your argument and write succinctly.

Use mainly the active voice for it is easier to understand. Unless it is necessary to use the passive form, active is the way people talk. Note for example the difference between "... he attempted to restrain him compared to "... an attempt was made to restrain him".

Do not use two or three or four words when one is sufficient and understandable.

Avoid parenthetical numerical. It can look silly and be irritating. Unless you are writing longhand or suspect that the numbers may be altered, avoid writing 'There were two (2) defendants and four (4) police officers present.

Avoid using unnecessary preambles. They can weaken the point you wish to introduce. Examples of these are:

- It is important to add that...
- It may be recalled that...

- In this regard it is of significance...
- It is interesting to note that...

Eschew legalese. The use of such as “hereinafter” and “aforesaid” do not add anything but wordiness and detract from readability. Cut out “such” as in “such application” when “the” or “that” work well. Use Latin sparingly.

Use quotations sparingly. Do not use lengthy quotations. A few lines may be adequate. Unless the case you a quoting from is exactly on the point, quote only the most relevant and persuasive part.

Avoid making the basic error of using the wrong tense, wrong gender and wrong spelling. It is perhaps more accurate to describe events that have occurred in the past in the past tense, and to stick with it throughout the opinion. He or his refer to the male gender; she and her to the female.

## WRITING THE OPINION

The following is the format that every legal opinion must now subscribe to.

### Purpose

This part provides the context and informs the reader the purpose for which the opinion has been sought. The purpose might be to evaluate the sufficiency of evidence, or clarify certain issues that the police may require in order to complete an investigation. The purpose, by its nature may dictate the manner in which the opinion is framed and the focus of attention. Consequently, an advice to the police about certain issues may not touch on all facts and the law. In that way, it differs from advice about the appropriate charge.

The writer must state in one sentence the offence which the State is alleging the accused has committed.

This part must also state the person seeking the advice and time within which the opinion is to be delivered. Reference to time limit would, if it were an ordinary file that sought an advice on the sufficiency of evidence, be subject to the moratorium that is discussed later in this Standard.

### Brief facts

The statement of facts must be brief. It should not contain all the details about what happened, but sufficient material to inform the reader what the case is about. Depending on the complexity of the evidence, the facts must be conveyed in no more than three sentences.

The other details, such as the observation of the circumstances in a homicide or assault case or the description of documents in a fraud matter can be weaved later into the analysis. These facts will provide the context.

Over-chronicling should be avoided. Stating the facts in a chronological order is helpful. The practice of citing and beginning each sentence with dates, such as “On March 24 1997 this happened, then on May 7 1998 this happened”, however can create confusion. It can obscure important facts that need to be remembered. In other words, tell what the case is about – only the material facts and why they are important.

## The Law and issues

The law must be clearly stated. Where a statute or number of statutes contain the offence alleged, and further provisions help amplify its meaning and application, these must be clearly stated. Where several offences or alternative offences are proposed, they must be explained accordingly. There may be in certain cases decisions by the courts which refine or clarify parts or the whole of those laws. In such cases, those cases must be cited and the relevant passages reproduced. Otherwise an explanation about the effect of the case can be offered instead.

The scope of exposition of the law may depend on the intended recipient of the opinion. In some cases, it may not be necessary to explain what might be considered to be basic principles of the law which are well known to the reader.

The issues must be isolated and identified. They must be expressed precisely as questions to be addressed by the investigation, or immediately before or during the trial, depending on the purpose of the opinion. These issues may be related to intrinsic elements of the prosecution case, as well as potential matters that may challenge the veracity and admissibility of its evidence, or which may undermine the prosecution case or a part of it. The latter may relate to an issue raised by the accused in his defence.

## Analysis

This part perhaps represents the most important part of the opinion. It involves the application of the law to the relevant evidence, and only the relevant evidence. What is not relevant should never be considered or form part of any discussion. It will never assist any analysis if irrelevant materials were introduced. It will only operate to obscure and detract from the real issues. The analysis must be accurate. It must allow the writer and the recipient to predict the correct outcome.

No analysis can ever be achieved by simply restating what each witness said in their police statement. This practice falls well below the standard expected of a lawyer. Anyone can rewrite statements, even a student. That practice does not often produce the accurate and full analysis sought and can be extremely time-wasting to both the writer and reader. Simplistic restatement of the facts is absolutely unnecessary. That practice must seize.

Perhaps the most effective approach to use is to develop the analysis according to the elements of each offence, identifying and discussing only the relevant evidence that go to prove each element from the police statements, and along the way consider the issues pertinent to each of the elements. In this way the writer ensures that no elements is overlooked. It also serves to identify the gaps in the evidence, that is shortfall in proving an element, and readily identifies what may need to be done in order to plug that gap. Where gaps are identified, the writer must be able to say whether these can be rectified by further investigation or taking of additional statements. In lesser situations where weaknesses are observed in relation to an element, consideration can be given to how the State's case can be strengthened by obtaining further statement from the same witness or another witness to clarify a point, or measures are taken to strengthen the evidence through processes like identity parades or photo-board identification. In some case it could simply be a matter of obtaining exhibits or key documentary evidence. Where such gaps are found and decisions made to close the gaps, these must be immediately communicated to the Police or the investigating authority, and a regular follow-up made.

In order to give a full opinion, the writer must consider all the materials that are available in the brief including the accused persons' record of interview, medical reports, exhibits and other documents in it.

Each element or subpart must ideally be sign-posted with appropriate headings so that the recipient tis able to follow logically the analysis of the case and the development of the State's argument.

### Conclusion

The conclusion must serve the purpose for which the opinion is rendered. It must be expressed in a concise way, informing the recipient about what to do or recommending the decision that can be taken. If a number of options were possible, then the best one must be identified and the reason for the choice given. If the favoured decision was subject to some other or future condition, those conditions must also be clearly stated.

This part must never be concluded without a concrete recommendation. Without one, the exercise of writing an opinion would have been a futile one.

## TIME LIMIT

Consistent with the Practice Direction that was issued last year, the time within which all opinions must be rendered is three weeks from the date when the file was allocated to the officer.

Extensions by the Public Prosecutor will only be given in deserving cases.

## CORE STANDARD

Opinions will be rendered in all files. There is no exception.

Issued July 2016

Josaia Naigulevu

PUBLIC PROSECUTOR

# Annexure O: Practice Directions No.1, 2, 3, 4 of 2016 (Filing, Bail, Summons and Opinions)

## See under ‘Resources’ tab

# Annexure P: Practice Direction 5 of 2016 (Confiscation and Seizure Orders)

# See under ‘Resources’ tab

# Annexure Q: Bail Decision Matrix

**JURISDICTION**

**PROSECUTION MATTERS TO CONSIDER**

1. ***Seriousness of the offence***
   - What are the charges?
     Max penalty …….
   - Is it on a family member?
   - Were there others present and saw offence such as children?
   - Are there any injuries?
   - Where weapons used and does the accused still have access to weapons?
   - Is this an offence so serious that bail should not be granted?

2. ***The strength of the prosecution case?***
   - Is there enough evidence on the file to prove all elements of the offence?
   - Are police investigations ongoing?

3. ***Is the accused likely to reoffend?***
   - Was the accused on bail/parole?
   - How long ago did the offence take place?
   - Does the accused have a Criminal History or is there police information of similar behaviour?
   - Is the victim vulnerable, that is, a child elderly, in a close relationship with the accused?
   - Was the accused affected by drugs or alcohol
     - If yes, will they continue to use them on bail

4. ***Is the accused likely to appear in Court if released on bail?***
   - Do they have a place to live?
   - Do they have any ties to the community? family, church etc
   - Have they previously failed to appear at court?
   - Is the accused likely to go to gaol if convicted
   - Is the case against the accused strong?

5. ***Is the accused likely to harass or threaten somebody*****?**
   - Does the accused have power over the victim or witnesses?
   - Has the accused tried to intimidate witnesses?

6. ***Victims views and concerns***
   - What are the victim's views, are they fearful?
   - Have they been a victim of this accused before?

7. ***Matters relating to the accused***
   - Does the accused have any physical or mental health issues?

**POSITION IN RELATION TO BAIL**

8. After considering all the factors ask yourself the following

***Question 1*** Is there a real risk that:

a) The accused will not attend court
b) The accused will reoffend/ the risk of further serious offending exists
c) The accused will intimidate or harass the victim or witnesses
d) The accused is a threat to community safety

If the answer is **yes** to any of the above **go to Q2**

***Question 2*** Can the risk/s be reduced to an acceptable level by bail conditions?

***If the answer is NO to Question 2***, then bail should **most likely be OPPOSED**

***If the answer is YES, to Question 2*** then bail should most likely **NOT BE OPPOSED**

## Bail Opposition Court Plan

Provide following information to court

- Facts of the offence and any previous convictions
- Views of the victim
- Reason for opposition based on matrix

# Annexure R: Family Violence Withdrawal Request Form

# FAMILY VIOLENCE WITHDRAWAL REQUEST FORM

| NAME OF MATTER | COURT FILE NUMBER |
|---|---|
| POLICE CASE OFFICER | PROSECUTOR |
| NAME OF COMPLAINANT | IS THE COMPLAINANT A CHILD (if yes D.O.B) |
| IS COMPLAINANT BEING SUPPORTED? IF YES BY WHO? | NAME OF DEFENDANT |

DATE/FORM OF WITHDRAWAL REQUEST (TICK BOX WHEN COMPLETE)

- IF IN WRITING ATTACH
- IF MADE VERBALLY PLEASE ATTACH YOUR NOTES
- IF MADE TO POLICE PLEASE ATTACH ANY CORRESPONDENCE

☐

PROSECUTOR MADE CONTACT WITH THE COMPLAINANT AFTER RECEIPT OF REQUEST: Yes/No

If no, explanation:

WRITTEN RECORD OF CONTACT OR ATTEMPTED CONTACT TO BE ATTACHED INCLUDING THE FOLLOWING INFORMATION:

- the reasons provided by the victim for requesting the charges be withdrawn;
- whether it appears that the views of the victim have been freely expressed and are not the result of threats, coercion, inducement or intimidation;

☐

| |
|---|
| THE PROSECUTOR HAS SPOKEN TO THE COMPLAINANT ABOUT THE FOLLOWING (WRITTEN RECORD INCLUDING RESPONSES TO BE ATTACHED)<br>• that the victim has been advised of the availability of services to provide victim support and protection;<br>• they have been given a pamphlet from the VWC and an offer has been made to make an appointment with VWC<br>• that the prosecution process, has been adequately explained to the victim;<br>☐ |

| | |
|---|---|
| THE PROSCUTOR HAS COMMUNICATED TO POLICE BY EMAIL AND PHONE ANY CONCERNS THE VICTIM HAS ABOUT SAFETY | Date of Communication |
| REQUEST TO POLICE TO INVESTIGATE WITHDRAWAL REQUEST MADE | Date of Request |

OPP prosecutors wishing to enter a "nolle prosequi" must file a memorandum with the 'withdrawal request report' attached to it, with the Public Prosecutor to make the determination whether this course of action is appropriate.

THIS DOCUMENT AND ATTACHMENTS MUST BE DISCLOSED TO DEFENCE. IT IS NOTED THAT LEGAL PROFESSIONAL PRIVELEGE IS CLAIMED OVER ANY OPINION OR RECOMMENDATION PROVIDED TO THE PUBLIC PROSECUTOR IN ANY FORM, WHETHER IT IS IN RELATION TO THIS FORM OR NOT.

I have accurately completed this form and carried out inquiries as required.

Signed:

PROSECUTOR

# Annexure S: Decision to Prosecute Young Offenders (Juveniles)

## Decision to Prosecute Young Offenders (Juveniles)

These factors should be considered when writing an opinion to the Public Prosecutor on a decision to prosecute relating to a person under 18 years.

### Step 1: Confirm that the child is over 10 years old.

The age of a child or young person is the first step in assessing whether to prosecute. In relation to children under 10 years, a prosecutor cannot prosecute children under the age of 10 because , at law, they are not capable of committing a crime[61]

### Step 2: If the Child is over the age of 10 but under 14

While there is a prohibition on prosecuting a child under 10 years, between the age of 10 and 14 the common law requires that the prosecution, and then later if charges are laid the Court, inquire into whether the young person was capable of understanding what they did was wrong. This is called a 'rebuttable presumption' . It is presumed the young person is not capable of knowing what he had done was wrong, but the prosecution can rebut that presumption with evidence. This is effectively an additional proof for the prosecution before a criminal matter can commence. The prosecution will need to prove "*by evidence that he was able to distinguish between right and wrong and that he did so with respect to the offence with which he is charged*"[62].

As such, the prosecution needs to prove beyond a reasonable doubt, that the child knew what he was doing was criminally wrong and not just 'naughty'.

The prosecutor should go through a process of analysis in determining this issue and provide the Public Prosecutor with an advice before deciding to lay an information on a child between the ages of 10 and 14 years. As a minimum when considering whether the young person knew their actions were criminally wrong, a prosecutor should consider and address in the advice to the Public Prosecutor:

- the age of the offender
- the severity of the offending
- the circumstances of the offending
- the child's responses to questions during their police interview
- any previous involvement with police for similar offending
- the child's criminal history

Example 1: An 11 year old is arrested for having sexual intercourse with his 8 year old sister. The child is arrested and interviewed by police during the interview he tells police he was playing family with his

[61] Section 17 Penal Code
[62] Section 17 Penal Code Act

sister. The child has had previous involvement with police when he was found to be stealing from shops. Factors to consider are that this is a serious offence, the young person during interview did not seem to understand that it was criminal (describing it as a game), he has had police involvement but for a different type of offence. These factors would all indicate that that the child did not know what he was doing was wrong and it may be difficult for the prosecution to rebut the presumption that he did not know what he was doing was wrong.

Example 2: a 13 year old young person is arrested after he stabs his mother, his mother later dies from the injury. The child has had no previous police involvement. During the police interview he tells police he has seen his father hit his mother and saw him threaten her with a knife, he said when he stabbed her he didn't mean to kill her. This is a serious offence, often the more serious the offence the more likely it is that the young person will know what he is doing is wrong. The child is 13 years. During interview the young person states he did not mean to kill his mother, this indicates he knew what he did was wrong. In this case the prosecution would likely be able to prove that the young person knew what he did was wrong.

Prosecutors should note that this is a threshold question in the process of deciding whether to prosecute these young offenders and must be considered before you go onto consider public interest.

### Step 3: Confirm the child is between 14 and 18 years and if so apply the decision to prosecute test

Confirm the age of the child. If there is any doubt as to the child age ensure that police obtain a birth certificate or a statement from the child mother to confirm their age.

### Step 4 : Does the evidence offer a reasonable prospect of conviction?

Section 11 of the *Public Prosecutors Act* enables the Public Prosecutor to issue directions or guidelines with respect to the prosecution of offences.

In 2017 the Public Prosecutor issued as a guideline the Prosecutors Code which sets out the approach to the decision to prosecute any matter. The decision to prosecute is a discretionary one and will involve the consideration of a number of factors. However, these factors can be reduced to a two stage[63] process:

1. Does the evidence offer a reasonable prospect of conviction? and

2. Is it in the public interest to proceed?

In addressing the first limb the prosecutor must assess all of the evidence on the brief and ensure that they can prove beyond reasonable doubt each element of the offence/s to be charged. If the young person is between 10 and 14 years there must also be evidence to prove beyond reasonable doubt that the young person knew what he/she was doing was criminally wrong.

### Step 4: Is it in the public interest to proceed?

In most cases involving the prosecution of young people, whether it is in the public interest to proceed will need to be considered in detail. The Prosecution Code is silent on the prosecution of people under 18 years, however the Prosecution Policy 2003 does contain direction in relation to young offenders (or juveniles) and notes as a general principle:

[63] See Part 3, Prosecutors Code Gazette Notice No. 13 of 2017

*Special considerations apply to the prosecution of juveniles. Prosecution of a juvenile should always be regarded as a severe step, and generally speaking a much stronger case can be made for methods of disposal which fall short of prosecution unless the seriousness of the alleged offence or the circumstances of the juvenile concerned dictate otherwise. In this regard, ordinarily the public interest will not require the prosecution of a juvenile who is a first offender in circumstances where the alleged offence is not serious.*

The 2003 policy outlines what factors a prosecutor should consider when determining whether prosecuting a young person is in the public interest, the list should be used as a guide and there may be additional factors to consider, such as the effect of the offence on the victim, however, it will always depend on the facts and circumstances of the case. When considering the public interest the following should be considered:

*(a)* the seriousness of the alleged offence;

(b) the age and apparent maturity and mental capacity of the young person;

(c) the available alternatives to prosecution, such as a caution, and their effectiveness/value;

(d) the sentencing options available to the relevant Court if the matter were to be prosecuted;

(e) the young person's family circumstances, particularly whether the parents of the young person appear able and prepared to exercise effective discipline and control over the young person;

(f) the young person's past history, including the circumstances of any previous caution the young person may have been given, and whether they are such as to indicate that a less formal disposal of the present matter would be inappropriate; and

(g) whether a prosecution would be likely to be harmful to the young person or be inappropriate, having regard to such matters as the personality of the young person and his or her family circumstances.