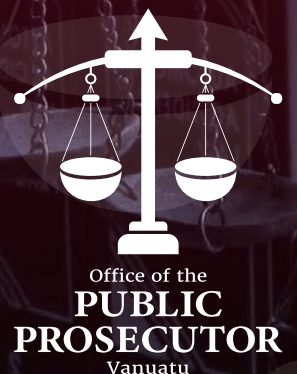


Office of the Public Prosecutor

PROSECUTORS' CODE



PROSECUTORS' CODE

Office of the Public Prosecutor

Vanuatu

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

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.

2.5 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.

2.6 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

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.

© Office of Public Prosecutor

