

DIRECTOR OF PUBLIC PROSECUTION'S GENERAL INSTRUCTIONS

NUMBER 1 OF 2020

Made at Nuku'alofa this 23rd day of March 2020

PROSECUTION CODE

I. INTRODUCTION

1. The aim of these guidelines is to have a professional and consistent approach to all criminal prosecutions.
2. These Guidelines are based on the UK Code for Crown Prosecutors.
3. The role of a Crown Prosecutor is twofold:
 - (1) Represent the Kingdom and the Community;
 - (2) Assist the Court as a representative of the community (quasi-judicial: objective, fair etc)
4. The Nature of the Role is:

“The independence of crown prosecutors is of fundamental constitutional importance. Casework decisions taken with fairness, impartiality and integrity help deliver justice for victims, witnesses, defendants and the public.” (UK Code for Crown Prosecutors)
5. The decision to prosecute an individual is a **serious step**. Fair and effective prosecution is essential to the maintenance of law and order. Even in a small case a prosecution has **serious implications** for all involved - victims, witnesses and defendants. The Crown Prosecutors apply these Guidelines so that it can make **fair and consistent decisions** about prosecutions.

6 These Guidelines helps the Crown Prosecutors to play its part in making sure that **justice is done**. It contains information that is important to police officers and others who work in the criminal justice system and to the general public. Police officers should apply the provisions of this Code whenever they are responsible for deciding whether to charge a person with an offence.

7 The Code is also designed to make sure that **everyone knows the principles** that the Crown applies when carrying out its work. By applying the same principles, everyone involved in the system is helping to treat victims, witnesses and defendants fairly, while prosecuting cases effectively.

II GENERAL PRINCIPLES

8 **Each case is unique** and must be considered on its own facts and merits. However, there are general principles that apply to the way in which Crown Prosecutors must approach every case.

9 Crown Prosecutors must be **fair, independent and objective**. They must not let any personal views about ethnic or national origin, disability, sex, religious beliefs, political views or the sexual orientation of the suspect, victims or witness influence their decisions. They must not be affected by improper or undue pressure from any source.

10 It is the duty of Crown Prosecutors to make sure that the **right person is prosecuted for the right offence**. In doing so, Crown Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.

11 Crown Prosecutors should **provide guidance and advice to investigators** throughout the investigative and prosecuting process. This may include lines of inquiry, evidential requirements and assistance in any pre-charge procedures. Crown Prosecutors will be proactive in identifying and, where possible, rectifying evidential deficiencies and in bringing to an early conclusion those cases that cannot be strengthened by further investigation.

12 It is the duty of Crown Prosecutors **to review, advise on and prosecute cases**, ensuring that the law is properly applied, that all relevant evidence is put before the court and that obligation of disclosure are complied with, in accordance with the principles set out in this Code.

III THE DECISION TO PROSECUTE

13 In most cases, Crown Prosecutors are **responsible for deciding whether a person should be charged with a criminal offence, and if so, what that offence should be**. Crown Prosecutors make these decisions in accordance with this Code and the Director of Public Prosecutions Guidance on Charging. In those cases where the police determine the charge, which are usually more minor and routine cases, they apply the same provisions.

14 Crown Prosecutors make charging decisions in accordance with the **Full Code Test** (see section 5 below), other than in those limited circumstances where the **Threshold Test** applies (see section 6 below).

15 The Threshold Test applies where the case is one in which it is proposed to keep the suspect in custody after charge, but the evidence required to apply the Full Code Test is not yet available.

16 Where a Crown Prosecutor makes a charging decision in accordance with the Threshold Test, the case must be reviewed in accordance with the Full Code Test as soon as reasonably practicable, taking into account the progress of the investigation.

IV REVIEW OF CASES FROM POLICE

17 Each case the Crown receives from the police is reviewed **to make sure that it is right to proceed with a prosecution**. Unless the Threshold Test applies, the Crown will only start or continue with a prosecution when the case has passed both stages of the Full Code Test.

18 Review is **a continuing process** and Crown Prosecutors must take account of any change in circumstances. Wherever possible, they should talk to the police first if they are thinking about

changing the charges or stopping the case. Crown Prosecutors should also tell the police if they believe that some additional evidence may strengthen the case. This gives the police the chance to provide more information that may affect the decision.

19 The office of the Director of Public Prosecutions and the police work closely together, but the **final responsibility** for the decision whether or not a charge or a case should go ahead rests with office of the Director of Public Prosecutions.

V THE FULL CODE TEST

20 The Full Code Test has two stages. The first stage is **consideration of the evidence**. If the case does not pass the evidential stage it must not go ahead no matter how important or serious it may be. If the case does pass the evidential stage, Crown Prosecutors must proceed to the second stage and decide **if a prosecution is needed in the public interest**. The evidential and public interest stages are explained below.

A The Evidential Test

21 Crown Prosecutors must be satisfied that there is enough evidence to provide a '**realistic prospect of conviction**' against each defendant on each charge. They must consider what the defence case may be, and how that is likely to affect the prosecution case.

22 A realistic prospect of conviction is an **objective test**. It means that a jury or bench of magistrates or judge hearing a case alone, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a separate test from the one that the criminal courts themselves must apply. A court should only convict if satisfied so that it is sure of a defendant's guilt.

23 When deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider **whether the evidence can be used and is reliable**. There will be many cases in which the evidence does not give any cause for concern. But there will also be cases in which the evidence

may not be as strong as it first appears. Crown Prosecutors must ask themselves the following questions:

Can the evidence be used in court?

- (1) Is it likely that the evidence will be excluded by the court? There are certain legal rules which might mean that evidence which seems relevant cannot be given at a trial. For example, is it likely that the evidence will be excluded because of the way in which it was gathered? If so, is there enough other evidence for a realistic prospect of conviction?

Is the evidence reliable?

- (2) Is there evidence which might support or detract from the reliability of a confession? Is the reliability affected by factors such as the defendant's age, intelligence or level of understanding?
- (3) What explanation has the defendant given? Is a court likely to find it credible in the light of the evidence as a whole? Does it support an innocent explanation?
- (4) If the identity of the defendant is likely to be questioned, is the evidence about this strong enough?
- (5) Is the witness's background likely to weaken the prosecution case? For example, does the witness have any motive that may affect his or her attitude to the case, or a relevant previous conviction?
- (6) Are there concerns over the accuracy or credibility of a witness? Are these concerns based on evidence or simply information with nothing to support it? Is there further evidence which the police should be asked to seek out which may support or detract from the account of the witness?

B THE PUBLIC INTEREST STAGE

24 In 1951, Lord Shawcross, who was Attorney General, made the classic statement on public interest, which has been supported by Attorneys General ever since:

"It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution". (House of Commons Debates, volume 483, column 681, 29 January 1951.)

- 25 The public interest must be **considered in each case where there is enough evidence to provide a realistic prospect of conviction**. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed. A prosecution will usually take place unless there are **public interest factors tending against prosecution** which clearly outweigh those tending in favour, or it appears more appropriate in all the circumstances of the case to divert the person from prosecution (see section 8 below).
- 26 Crown Prosecutors must **balance factors** for and against prosecution **carefully and fairly**. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the suspect. Some factors may increase the need to prosecute but others may suggest that another course of action would be better.
- 27 The following lists of some common public interest factors, both for and against prosecution, are not exhaustive. The factors that apply will depend on the facts in each case.
- 28 The more serious the offence, the more likely it is that a prosecution will be needed in the public interest. A prosecution is likely to be needed if:
- (1) a conviction is likely to result in a significant sentence;
 - (2) a conviction is likely to result in a confiscation or any other order;
 - (3) a weapon was used or violence was threatened during the commission of the offence;

- (4) the offence was committed against a person serving the public (for example, a police or prison officer, or a nurse);
- (5) the defendant was in a position of authority or trust;
- (6) the evidence shows that the defendant was a ringleader or an organiser of the offence;
- (7) there is evidence that the offence was premeditated;
- (8) there is evidence that the offence was carried out by a group;
- (9) the victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance;
- (10) the offence was committed in the presence of, or in close proximity to, a child;
- (11) the offence was motivated by any form of discrimination against the victim's ethnic or national origin, disability, sex, religious beliefs, political views or sexual orientation, or the suspect demonstrated hostility towards the victim based on any of those characteristics;
- (12) there is a marked difference between the actual or mental ages of the defendant and the victim, or if there is any element of corruption;
- (13) the defendant's previous convictions or cautions are relevant to the present offence;
- (14) the defendant is alleged to have committed the offence while under an order of the court;
- (15) there are grounds for believing that the offence is likely to be continued or repeated, for example, by a history of recurring conduct;
- (16) the offence, although not serious in itself, is widespread in the area where it was committed; or
- (17) a prosecution would have a significant positive impact on maintaining community confidence.

29 A prosecution is less likely to be needed if:

- (1) the court is likely to impose a nominal penalty;
- (2) the defendant has already been made the subject of a sentence and any further conviction would be unlikely to result in the imposition of an additional sentence

or order, unless the nature of the particular offence requires a prosecution or the defendant withdraws consent to have an offence taken into consideration during sentencing;

- (3) the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);
- (4) the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgment;
- (5) there has been a long delay between the offence taking place and the date of the trial, unless:
 - (i) the offence is serious;
 - (ii) the delay has been caused in part by the defendant;
 - (iii) the offence has only recently come to light; or
 - (iv) the complexity of the offence has meant that there has been a long investigation;
- (6) a prosecution is likely to have a bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence;
- (7) the defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is real possibility that it may be repeated. The Crown, where necessary, applies Mental Health Act guidelines about how to deal with mentally disordered offenders. Crown Prosecutors must balance the desirability of diverting a defendant who is suffering from significant mental or physical ill health with the need to safeguard the general public;
- (8) the defendant has put right the loss or harm that was caused (but defendants must not avoid prosecution or diversion solely because they pay compensation); or
- (9) details may be made public that could harm sources of information, international relations or national security;

30 The Crown prosecutes cases on **behalf of the public at large** and not just in the interests of any particular individual. However, when considering the public interest test Crown Prosecutors should always take into account the **consequences for the victim** of the

decision whether or not to prosecute, and any views expressed by the victim or the victim's family.

- 31 It is important that a victim is told about a decision which makes a significant difference to the case in which they are involved. Crown Prosecutors should ensure that they follow any agreed procedures.

VI THE THRESHOLD TEST

- 32 The Threshold Test requires Crown Prosecutors to decide **whether there is at least a reasonable suspicion that the suspect has committed an offence**, and if there is, whether it is in the public interest to charge that suspect.

- 33 The Threshold Test is applied to those cases in which it would **not be appropriate to release a suspect on bail after charge**, but the evidence to apply the Full Code Test is not yet available.

- 34 There are **statutory limits** that restrict the time a suspect may remain in police custody before a decision has to be made whether to charge or release the suspect. There will be cases where the suspect in custody presents a substantial bail risk if released, but much of the evidence may not be available at the time the charging decision has to be made. Crown Prosecutors will apply the Threshold Test to such cases for a limited period.

- 35 The evidential decision in each case will require consideration of a number of factors including:

- (i) the evidence available at the time;
- (ii) the likelihood and nature of further evidence being obtained;
- (iii) the reasonableness for believing that evidence will become available;
- (iv) the time it will take to gather that evidence and the steps being taken to do so;
- (v) the impact the expected evidence will have on the case;
- (vi) the charges that the evidence will support.

36 The public interest means the same as under the Full Code Test, but will be based on the information available at the time of charge which will often be limited.

37 A decision to charge and withhold bail must be **kept under review**. The evidence gathered must be regularly assessed to ensure the charge is still appropriate and that continued objection to bail is justified. The Full Code Test must be applied as soon as reasonably practicable.

VII SELECTION OF CHARGES

38 Crown Prosecutors should select charges which:

- (1) reflect the seriousness and extent of the offending;
- (2) give the court adequate powers to sentence and impose appropriate post-conviction orders; and
- (3) enable the case to be presented in a clear and simple way.

39 This means that Crown Prosecutors may not always choose or continue with the most serious charge where there is a choice

40 Crown Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one.

41 Crown Prosecutors should not change the charge simply because of the decision made by the court or the defendant about where the case will be heard.

VIII ACCEPTING GUILTY PLEAS

- 42 Defendants may want to plead guilty to some, but not all, of the charges. Alternatively, they may want to plead guilty to a different, possibly less serious, charge because they are admitting only part of the crime. Crown Prosecutors should only accept the defendant's plea **if they think the court is able to pass a sentence that matches the seriousness of the offending**, particularly where there are aggravating features. Crown Prosecutors must **never accept a guilty plea just because it is convenient**.
- 43 In considering whether the pleas offered are acceptable, Crown Prosecutors should ensure that the interests of the victim and, where possible, any views expressed by the victim or victim's family, are taken into account when deciding whether it is in the public interest to accept the plea. However, the decision rests with the Crown Prosecutor.
- 44 It must be **made clear to the court on what basis** any plea is advanced and accepted. In cases where a defendant pleads guilty to the charges but on the basis of facts that are different from the prosecution case, and where this may significantly affect sentence, the court should be invited to hear evidence to determine what happened, and then sentence on that basis.
- 45 Where a defendant has previously indicated that he or she will ask the court to take an offence into consideration when sentencing, but then declines to admit that offence at court, Crown Prosecutors will consider whether a prosecution is required for that offence. Crown Prosecutors should explain to the defence advocate and the court that the prosecution of **that offence may be subject to further review**.
- 46 Particular care must be taken when considering pleas which would enable the defendant to avoid the imposition of a mandatory minimum sentence. When pleas are offered, Crown Prosecutors must bear in mind the fact that ancillary orders can be made with some offences but not with others.

IX PROSECUTOR'S ROLE IN SENTENCING

- 47 In accordance with Practice Direction No.1 of 2017, it is the duty of Crown Prosecutors to provide assistance to the Court in matters of sentencing, which include:
- (i) informing the Court as to whether the accused has any (relevant) previous convictions;
 - (ii) presenting the Crown's views on what are the aggravating features of the case, and to what the Crown accepts as mitigating factors;
 - (iii) to inform the Court of any relevant legislation on the appropriate sentence;
 - (iv) bringing to the attention of the Court any guideline or comparable sentencing cases, with copies made available to the Court, and also to the accused or defence counsel, if required;
 - (v) to correct any error of fact or law made by the accused or defence counsel in his or her address to the Court in mitigation of sentencing;
 - (vi) to inform the Court of the Crown's view on whether a custodial or non-custodial sentence is appropriate, and also the Crown's view on a proper range of penalty by reference to relevant authorities;
 - (vii) to bring before the Court any appropriate compensation, forfeiture and restitution matters that may arise; and
 - (viii) any other matters that are relevant to sentence in order to assist the Court in imposing an appropriate sentence.
- 48 The Crown Prosecutor should challenge any assertion made by the defence in mitigation that is inaccurate, misleading or derogatory. If the defence persists in the assertion, and it appears relevant to the sentence, the court should be invited to hear evidence to determine the facts and sentence accordingly.



James Lutui
Director of Public Prosecutions