

DIRECTOR OF PUBLIC PROSECUTION'S GENERAL INSTRUCTIONS

NUMBER 1 OF 2022

Made at Nuku'alofa this 8th day of February 2022

CRIMINAL PROSECUTION PROCEDURES AND COMMITTAL OF INDICTABLE OFFENCES IN THE MAGISTRATES COURT

I PRELIMINARY

- 1 These General Instructions replaces the Director of Public Prosecutions General Instructions Number 2 of 2015 (Committal of Indictable Offences in the Magistrates Court) and Director of Public Prosecutions General Instructions Number 3 of 2015 (Criminal Prosecution Procedures).
- 2 All indictable offences shall not be tried summarily under section 35 of the Magistrate's Court Act, or by enhanced jurisdiction under section 36 of the Magistrate's Court, without the approval and in accordance with the criteria set out by the Director of Public Prosecutions.
- 3 These procedures apply when a person has been charged with an indictable offence and the Police Prosecution has received the Police docket from the Police Investigators.

II RESPONSIBILITY OF THE POLICE PROSECUTOR

- 4 The Police Prosecutor responsible for criminal prosecutions in a police station shall ensure that when he receives any investigation file for prosecution, such file shall contain the following documents:
 - (1) copy of the criminal summons;
 - (2) the criminal record of the accused from the Scene of Crime and Criminal Records Office;
 - (3) the completed police investigation diary;
 - (4) a list of witnesses, stating which of the Police witnesses is the Investigating Officer responsible for the investigation;

- (5) a fair summary of the statements of the prosecution witnesses (brief of evidence for all witnesses);
- (6) a list of all documentary and other exhibits, including where they are stored and secured;
- (7) the original copies of statements, preferably typed rather than hand written, from all relevant witnesses, whether their evidence is for or against the prosecution;
- (8) the original copy of the record of interview, written statement of charges and the voluntary statement of the accused;
- (9) the original copy of an arrest or search warrant;
- (10) the original copy of any search list;
- (11) the sketch maps of the scene of crime;
- (12) copies of any relevant excerpts from a police investigator's notebook;
- (13) the original copy from any experts, such as a medical report, drugs analyst report, armorers report, mechanical engineering report;
- (14) original copies or electronic copies of photographs taken by the Police photographer or another person;
- (15) original copy of any video footage, contained in a compact disc, USB flash, memory card or any other device that can contain video footage;
- (16) the relevant diaries, documenting the movement of exhibits;
- (17) a copy all Police reports in relation to search without warrants, seizures reports, seizure receipts and damage to property reports; and
- (18) any other relevant documents from the investigation for the prosecution.

5 On first mention of the matter before the Magistrates Court, the Police Prosecutor is to adjourn the matter for eight weeks. The Police Prosecutor must ensure that all issues arising from the investigation has been clarified and completed and ensure the matters mentioned in paragraph 4 above is obtained and complete.

6 Once the Police Prosecutor is satisfied that the police file is complete, the Police Prosecutor shall then deliver the police file to the Director of Public Prosecutions at least four weeks before the second mention of the matter in the Magistrate's Court.

III CRIMINAL BRIEF

- 7 Upon receipt by the Director of Public Prosecutions of the Police docket, it is to be placed in a red Office file, and is registered, recording the name(s) of the Accused Person(s), Criminal Summons Number(s) and Offence(s).
- 8 The file is then referred to the Director of Public Prosecutions to be assigned to a Crown Prosecutor.
- 9 The Director of Public Prosecutions then assigns the file to a Crown Prosecutor, and if appropriate, assign another Crown Prosecutor to junior on the file, and also records the date of receipt of the file, and shall direct such Crown Prosecutor to submit a criminal brief, in the form and style approved, by at least seven days before the next mention of the matter, recommending:
- (1) whether to prosecute the case based on the Full Code Test in the Prosecution Code (i.e. there is sufficient admissible evidence that is reliable and credible to create a reasonable prospect of a conviction, and there is a public interest to prosecute);
 - (2) whether to offer no evidence or enter nolle prosequi;
 - (3) what the appropriate charges should be;
 - (4) whether to prosecute the matter in the:
 - (i) summary jurisdiction, pursuant to section 35 of the Magistrate's Court;
 - (ii) enhanced jurisdiction of a Magistrate under section 36, after it is committed to the Supreme Court; or
 - (iii) in the Supreme Court; and
 - (5) the estimated length of trial.
- 10 The file is then returned to the Case Manager and Filing Registrar to register the assignment in the criminal database, and then enter a file note on the file and the shared office electronic calendar recording the date of assignment and referral to the Crown Prosecutor and the deadline to submit the criminal brief.
- 11 The Crown Prosecutor assigned the file must then enter a file note recording the date of receipt of the file, the deadline to submit the criminal brief, and also shall record

such deadline in his or her diary, and then commence preparing the criminal brief, as directed by the Director of Public Prosecutions.

- 12 If the Crown Prosecutor is of the view that the evidential test under the Full Code Test is not satisfied or aspects of the evidence needs to be clarified, or for any other reasonable ground, the Crown Prosecutor may recommend to the Director of Public Prosecutions that at the second mention of the matter in the Magistrates Court, an application be made for a second adjournment for a period of not more than 4 weeks.
- 13 The draft criminal brief must be provided by the Crown Prosecutor by email to the Director of Public Prosecutions by the deadline directed on the file.
- 14 The Director of Public Prosecutions will then consider the criminal brief and the Crown Prosecutor's recommendations, and if appropriate, approve it with instructions or directions to the Crown Prosecutor on how to progress the matter, and then return it by email to the Crown Prosecutor who must print a hard copy and insert into the file, and file note the date of approval and any instructions or directions issued by the Director of Public Prosecutions.
- 15 Before any recommendation is made by a Crown Prosecutor to the Director of Public Prosecutions to offer no evidence or enter nolle prosequi in totality, the Crown Prosecutor shall first inform the Investigating Officer that such recommendations will be made, so that the Investigating Officer has an opportunity to provide further evidence or present a case against offering no evidence or entering nolle prosequi, or agree with the recommendations. If the Investigating Officer obtains further evidence or presents a case against offering no evidence or entering nolle prosequi, the Crown Prosecutor must reconsider the Crown's position in the criminal brief and make the appropriate recommendation.
- 16 If the Director of Public Prosecutions decides to offer no evidence or enter nolle prosequi against all the charges laid against the Accused, and it is considered and approved by the Attorney General, the Crown Prosecutor must inform the complainant or family of deceased in homicide matters, and the Investigating Officer, before formally informing the Court.

17 The Crown Prosecutor must then prepare a draft notice to notify the relevant Court that the Crown intends to offer no evidence or enter nolle prosequi, which must be approved and signed by the Attorney General.

IV PRELIMINARY INQUIRY AND COMMITTAL, AND SUMMARY OF FACTS AND INDICTMENT

18 Upon the approval by the Director of Public Prosecutions of a recommendation to deal with the charges in the summary jurisdiction, pursuant to section 35 of the Magistrate’s Court Act, the Crown Prosecutor must inform the Accused, or his legal counsel, of the intention to deal with the matter summarily and seek the agreement of the Accused or his legal counsel.

19 The Crown Prosecutor must only agree with the Accused or his legal counsel to deal with a matter in the summary jurisdiction, pursuant to section 35 of the Magistrate’s Court Act, if the Accused is willing to plead guilty to the charges against him, unless otherwise instructed or directed in the approved criminal brief.

20 Upon the approval by the Director of Public Prosecutions of a recommendation to prosecute in the Enhanced Jurisdiction or the Supreme Court, the Director shall simultaneously direct the Crown Prosecutor to prepare the committal forms and the relevant evidence to be served on the Accused (“committal papers”), at the next mention of the matter before the Magistrates Courts.

21 The Crown Prosecutor must ensure that in accordance with section 32(3) of the Magistrates Court Act the committal papers contain a fair summary of the statements of all the prosecution witnesses, a copy of the list of all the exhibits he proposes to produce and a copy of all documentary exhibits he proposes to produce.

22 Once the committal papers are served the Crown Prosecutor must adjourn the matter for at least five days to allow the Magistrate to consider if the documents disclose that a sufficient case has been made out to put the accused upon his trial before the Supreme Court (“response date”).

- 23 Upon service of the committal papers the Duty Prosecutor must then enter a file note recording the date of service of the committal papers, and any other notices required by law to be served (eg Notices under section 36 of the Illicit Drugs Control Act), and the response date.
- 24 If the Magistrate considers, on the response date, that the documents disclose that a sufficient case has been made out to put the accused upon his trial before the Supreme Court, and commits the Accused to the Supreme Court, the Crown Prosecutor shall inform the Court of a date not less than four weeks from the date of committal for the Accused to appear before the Supreme Court.
- 25 Once a criminal matter is committed to the Supreme Court, the Crown Prosecutor assigned the file must commence preparing the draft summary of facts, indictment and indicative sentencing submissions for the file, to be submitted to the Director of Public Prosecutions for approval.
- 26 The draft summary of facts, indictment and indicative sentencing submissions must be provided by the Crown Prosecutor by email to the Director of Public Prosecutions by the date instructed on the file.
- 27 The Director of Public Prosecutions will then consider the summary of facts, indictment and indicative sentencing submissions, and if appropriate, approve them, and then return them by email to the Crown Prosecutor to print out the appropriate number of copies.
- 28 The Crown Prosecutor must ensure that the summary of facts, indictment and indicative sentencing submissions are filed in the Supreme Court and served on the Accused or the Legal Counsel of the Accused, if there is any, as soon as practicable and no later than within 14 days of the date of arraignment.
- 29 Once the summary of facts and indictment are served on the Accused or the Legal Counsel of the Accused, the Crown Prosecutor must ensure that a Certificate of Service is filed as soon as practicable, and no later than within 14 days of the date of arraignment.

V SUPREME COURT FILE

30 Once a matter has been committed to the Supreme Court, the committal papers and investigation file are to be placed in a pink Supreme Court criminal file, and is registered and allocated the CR number from the Supreme Court.

31 The file is then referred to the Director of Public Prosecutions. The Director of Public Prosecutions then assigns the file to the Crown Prosecutor(s) that dealt with the matter in the Preliminary Inquiry and Committal stage.

32 Once the summary of facts, indictment and indicative sentencing submissions are filed and served, the Crown Prosecutor must enter a file note to record the same.

VI FIRST MENTION: ARRAIGNMENT

33 The Case Manager and Filing Registrar receives a Notice of Hearing / Arraignment from the Supreme Court.

34 The Case Manager and Filing Registrar must bring up the file for the date of arraignment to be given to the Duty Prosecutor on the first day of the week in order for the Duty Prosecutor to prepare for the arraignment or mentions.

35 At the first mention in the Supreme Court, the facts and indictment must already have been filed and served and a certificate of service filed, and the Accused should be ready to plead and elect the mode of trial.

36 If the Accused needs time to consider his plea and election, the Court on its own initiative or by request of the Accused, adjourn the matter for a reasonable period to allow the Accused to consider his plea and election.

- 37 On arraignment, the Duty Prosecutor appears, and takes the arraignment, and must record in a file note the plea, election made by the Accused and any bail conditions imposed by the Supreme Court.
- 38 The matter is then adjourned to the next Call Over to fix the trial date for this matter.
- 39 The Duty Counsel then returns the file to the Case Manager and Filing Registrar to refer to the Director of Public Prosecutions to provide directions on how the file is progressed.
- 40 If the Director of Public Prosecutions had approved in the criminal brief for the particular matter, that it be dealt with in the Enhanced Jurisdiction, provided that the Accused had elected trial before Judge sitting alone, the Crown Prosecutor must seek the agreement of the Accused or counsel for the Accused to remit the matter to the Enhanced Jurisdiction. If an agreement has been obtained, the Duty Prosecutor may seek that the matter be remitted to the Enhanced Jurisdiction and set the date for the matter to be called before the Magistrate with enhanced jurisdiction.

VII SECOND MENTION: CALLOVER

- 39 Before the Call Over, the Case Manager and Filing Registrar must gather all the files for the Call Over, and refer them to the Director of Public Prosecutions so that they can fix the proposed trial date, back-up trial date and PTC date for the file.
- 40 At the Call Over, either the Director of Public Prosecutions or one of the senior Crown Prosecutors shall appear and fix the trial dates with the Supreme Court, based on the proposed trial and back-up trial dates.
- 41 After the trial dates are fixed, the files are returned to the Case Manager and Filing Registrar to register the dates for the back-up, trial and pre-trial conference, and with the direction of the Director of Public Prosecutions, the dates for Crown Prosecutors to start preparing for trial, and then produce a fixtures list to be sent to all Crown Prosecutors, and to the Police Prosecutors and Police Investigators, through the Police Commissioner.

42 Once the trial date has been set down, the Crown Prosecutor must as soon as practical and no later than within 14 days of the criminal case being set down for trial (whether as the actual or back-up fixture), subpoena all the Crown witnesses required for the trial.

VIII THIRD MENTION: PRE-TRIAL CONFERENCE

43 A month before the PTC, if a PTC date has been set down, the Case Manager and Filing Registrar must provide the file to the Crown Prosecutor to start preparing the file, if the Crown Prosecutor has not started preparations already.

44 The Crown Prosecutor must ensure all the witnesses and exhibits are available, and brief Crown witnesses in order to prepare them for giving evidence, or to clarify their evidence.

45 At the PTC, the Crown Prosecutor assigned the file, shall appear and inform the Supreme Court that the matter is ready for trial, unless there are reasonable grounds to request that the trial be vacated, and then re-called in the next Call Over, or another mention date to confirm the readiness of the matter for trial.

IX FOURTH MENTION: TRIAL

46 Before the trial, the Crown Prosecutor shall already have prepared the closing and opening addresses, and any arguments in relation to any legal issue that the Crown Prosecutor anticipates may be raised by the Accused or the Supreme Court judge.

47 The Crown Prosecutor shall prosecute the matter in the Supreme Court or the enhanced jurisdiction of the Magistrates Court in accordance with the required standards of a Crown Prosecutor under the Prosecution Code.

48 If the Accused is acquitted, and the Crown Prosecutor is of the opinion that there is a question of law arising at or in connection with the trial that should be referred to the Attorney General to be submitted to be determined by the Court of Appeal under

section 17D of the Court of Appeal Act, he shall submit within seven days of the verdict, a report in writing to the Director of Public Prosecutions.

49 If no appeal is to be made under section 17D of the Court of Appeal Act, the Crown Prosecutor shall prepare a report of the acquittal for the Director of Public Prosecutions to approve to be sent to the Police Commissioner within seven days of the verdict together with the police file, with a copy being sent to the Police Prosecution and Tonga Police Scene of Crime and Criminal Records Office. The Crown Prosecutor will then close the file.

50 If the Accused is convicted, the Crown Prosecutor shall determine the Crown's position as to bail, or seek directions from the Director of Public Prosecutions on bail, otherwise, refer bail to be determined by the Supreme Court. An appropriate sentencing date is to be set down, and for a date before such sentencing date for the Crown to file its sentencing submissions.

X SENTENCING

51 The Crown Prosecutor must prepare sentencing submissions in the form and style approved by the Director of Public Prosecutions and file it by the date set by the Supreme Court for the sentencing submissions to be filed.

52 The Crown Prosecutor assigned the file or Duty Prosecutor shall appear at the sentencing and make submissions as required and appropriate for the Crown.

53 After the sentence, the Crown Prosecutor shall enter in a file note the sentence imposed, and then return the file to the Case Manager and Filing Registrar to be referred to the Director of Public Prosecutions for further directions.

XI APPEALS

54 Upon being informed of the sentence imposed on the Accused, the Director of Public Prosecutions may either accept the sentence, or direct the Crown Prosecutor to provide an opinion, within seven days of the sentencing date, on whether the Crown

should appeal against the sentence imposed for being manifestly inadequate, under section 17B of the Court of Appeal Act.

- 55 If there is no appeal by the Crown against the sentence imposed on the Accused, the Crown Prosecutor shall prepare a report of the sentence for the Director of Public Prosecutions to approve to be sent to the Commanding Officer of the Police Station where the investigation file originated, within seven days of the sentencing date, together with the police file, with a copy being sent to the Police Commissioner, Police Prosecution, Tonga Police Scene of Crime and Criminal Records Office, Exhibits Office and any other relevant Police Unit or Government Agency. The Crown Prosecutor will then close the file.
- 56 If there is an appeal by the Crown against sentence, the Director of Public Prosecutions shall seek the approval of the Attorney General, and make directions regarding the lodging of a notice of appeal, application for stay of execution of sentence, and preparation of the appeal.
- 57 If there is any appeal against conviction or sentence or both by the Accused, or the Crown appeals against a point of law or the sentence, the Director of Public Prosecutions shall make directions as to preparations for the appeal.
- 58 At the conclusion of the appeal, the result shall be entered in a file note on the file, then registered, then reported to the Police Commissioner within seven days of the decision together with the police file, with a copy being sent to the Police Commissioner, Police Prosecution, Tonga Police Scene of Crime and Criminal Records Office, Exhibits Office and any other relevant Police Unit or Government Agency.

XII CLOSED FILES AND ARCHIVES

- 59 At the end of the case, the file is closed and referred to the Case Manager and Filing Registrar to register, then place in the closed files, then at the following year, the file is then archived in the office archives.