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AMENDMENT OF PROSECUTING POLICY TO PROVIDE FOR DIRECTIVES RELATING TO PROSECUTION OF CRIMINAL MATTERS ARISING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED BEFORE 11 MAY ~~2004~~ 1994: SECTION 179(5)(a) AND (b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 (ACT 108 OF 1996), READ WITH SECTIONS 21 AND 35 OF THE PROSECUTING AUTHORITY ACT, 1998 (ACT 32 OF 1998)

(WORDS UNDERLINED WITH A SOLID LINE INDICATE INSERTIONS IN THE EXISTING PROSECUTING POLICY)

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PREFACE

Crime cannot be allowed to undermine the constitutional democracy in South Africa. The efforts of the Prosecuting Authority should therefore be directed at reducing pervasive criminal activities. An efficient Prosecuting Authority will also enhance public confidence in the criminal justice system.

Prosecutors are the gatekeepers of the criminal law. They represent the public interest in the criminal justice process.

Effective and swift prosecution is essential to the maintenance of law and order within a human rights culture.

Offenders must know that they will be arrested, charged, detained where necessary, prosecuted, convicted and sentenced.

The Prosecution Policy is aimed at promoting the considered exercise of authority by prosecutors and contributing to the fair and even-handed administration of the criminal laws.

This Policy is the end result of a process of intense consultation amongst all prosecutors in the country. It has also been circulated to a number of criminal justice organizations, government departments, academic institutions and community organizations.

The wealth of their combined knowledge and experience has helped significantly to shape the contents of this document.

The Prosecuting Authority has the power and responsibility to institute and conduct criminal proceedings on behalf of the State and to carry out any necessary functions incidental thereto.

The Constitution requires the National Director of Public Prosecutions to determine, with the agreement of the Minister of Justice and after consulting the Directors of Public Prosecutions, a "*prosecution policy which must be observed in the prosecution process*".

This Prosecution Policy must be tabled in Parliament and is binding on the Prosecuting Authority. The *National Prosecuting Authority Act* also requires that the *United Nations* [illegible]
serves. Every prosecutor is accountable to the National Director who, in turn, is
which the Prosecuting Authority and individual prosecutors should exercise their discretion.

The purpose of this Prosecution Policy is, therefore, to guide prosecutors in the way they perform their functions, exercise their powers and carry out their duties. This will serve to make the prosecution process more fair, transparent, consistent and predictable.

By promoting greater consistency in prosecutorial practices nationally, these policy provisions will contribute to better training of prosecutors and better coordination of investigative and prosecutorial processes between departments.

Since the Prosecution Policy is a public document, it will also inform the public about the principles governing the prosecution process and so enhance public confidence.

These principles have been written in general terms to give direction rather than to prescribe. They are meant to ensure consistency by preventing unnecessary disparity, without sacrificing the flexibility that is often required to respond fairly and effectively to local conditions.

3. THE ROLE OF THE PROSECUTOR

Prosecutors must at all times act in the interest of the community and not necessarily in accordance with the wishes of the community.

The prosecutor's primary function is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based upon the evidence presented. At the same time, prosecutors represent the community in criminal trials. In this capacity, they should ensure that the interests of victims and witnesses are promoted, without negating their obligation to act in a balanced and honest manner.

The prosecutor has a discretion to make decisions which affect the criminal process. This discretion can be exercised at specific stages of the process, for example:

- the decision whether or not to institute criminal proceedings against an accused;
- the decision whether or not to withdraw charges or stop the prosecution;
- the decision whether or not to oppose an application for bail or release by an accused who is in custody following arrest;
- the decision about which crimes to charge an accused with and in which court the trial should proceed;
- the decision whether or not to accept a plea of guilty tendered by an accused;
- the decision about which evidence to present during the trial;
- the decision about which evidence to present during sentence proceedings, in the event of a conviction; and
- the decision whether or not to appeal to a higher court in connection with a question of law, an inappropriate sentence or the improper granting of bail, or to seek review of proceedings.

Members of the Prosecuting Authority must act impartially and in good faith. They should not allow their judgement to be influenced by factors such as their personal views regarding the nature of the offence or the race, ethnic or national origin, sex, religious beliefs, status, political views or sexual orientation of the victim, witnesses or the offender. Prosecutors must be courteous and professional when dealing with members of the public or other people working in the criminal justice system.

4. CRITERIA GOVERNING THE DECISION TO PROSECUTE

(a) General

The process of establishing whether or not to prosecute usually starts when the police present a docket to the prosecutor. This often happens after the suspect has been arrested. The case needs to be studied to make sure that it is properly investigated.

The prosecutor should consider whether to—

- request the police to investigate the case further;
- institute a prosecution;
- decline to prosecute and to opt for pre-trial diversion or other non-criminal resolution; or
- decline to prosecute without taking any other action.

The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused and their families. A wrong decision may also undermine the community's confidence in the prosecution system.

Resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy of prosecution.

In deciding whether or not to institute criminal proceedings against an accused, prosecutors should assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued.

This assessment may be difficult, because it is never certain whether or not a prosecution will succeed. In borderline cases, prosecutors should probe deeper than the surface of written statements.

Where the prospects of success are difficult to assess, prosecutors should consult with prospective witnesses in order to evaluate their reliability. The version or the defence of an accused must also be considered, before a decision is made.

This test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution. However, prosecutors should not make unfounded assumptions about the potential credibility of witnesses.
The review of a case is a continuing process. Prosecutors should take into account changing circumstances and fresh facts, which may come to light after an initial decision to prosecute has been made.

This may occur after having heard and considered the version of the accused and representations made on his or her behalf. Prosecutors may therefore withdraw charges before the accused has pleaded in spite of an initial decision to institute a prosecution.

(b) Factors to be considered when evaluating evidence

When evaluating the evidence prosecutors should take into account all relevant factors, including—

How strong is the case for the State?

X Is the evidence strong enough to prove all the elements of an offence?

X Is the evidential material sufficient to meet other issues in dispute?

Will the evidence be admissible?

- Will the evidence be excluded because of the way in which it was acquired or because it is irrelevant or because of some other reason?

Will the state witnesses be credible?

- What sort of impression is the witness likely to make?
- Are there any matters, which might properly be put by the defence to attack the credibility of the witness?
- If there are contradictions in the accounts of witnesses, do they go beyond the ordinary and expected, thus materially weakening the prosecution case?

Will the evidence be reliable?

- If, for example, the identity of the alleged offender is likely to be an issue, will the evidence of those who purport to identify him or her be regarded as honest and reliable?

Is the evidence available?

- Are the necessary witnesses available, competent, willing and, if necessary, compellable to testify, including those who are out of the country?

How strong is the case for the defence?

- Is the probable defence of the accused likely to lead to his or her acquittal in the light of the facts of the case?

(c) Prosecution in the public interest

Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise.

There is no rule in law, which states that all the provable cases brought to the attention of the Prosecuting Authority must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice.

When considering whether or not it will be in the public interest to prosecute, prosecutors should consider all relevant factors, including:

The nature and seriousness of the offence:

- The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused and the victim.
- The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.
- The economic impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public.
- The likely outcome in the event of a conviction, having regard to sentencing options available to the court.

The interests of the victim and the broader community:

- The attitude of the victim of the offence towards a prosecution and the potential effects of discontinuing it. Care should be taken when considering this factor, since public interest may demand that certain crimes should be prosecuted - regardless of a complainant's wish not to proceed.
- The need for individual and general deterrence, and the necessity of maintaining public confidence in the criminal justice system.
- Prosecution priorities as determined from time to time, the likely length and expense of a trial and whether or not a prosecution would be deemed counter-productive.

The circumstances of the offender:

- The previous convictions of the accused, his or her criminal history, background, culpability and personal circumstances, as well as other mitigating or aggravating factors.
- Whether the accused has admitted guilt, shown repentance, made restitution or expressed a willingness to co-operate with the authorities in the investigation or prosecution of others. (*In this regard the degree of culpability of the*

accused and the extent to which reliable evidence from the said accused is considered necessary to secure a conviction against others, will be crucial).

- Whether the objectives of criminal justice would be better served by implementing non-criminal alternatives to prosecution, particularly in the case of juvenile offenders and less serious matters.

- Whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused in the delay.

The relevance of these factors and the weight to be attached to them will depend upon the particular circumstances of each case.

It is important that the prosecution process is seen to be transparent and that justice is seen to be done.

5. CASE REVIEW

(a) Stopping of proceedings

Criminal proceedings may sometimes be stopped after a plea has already been entered. This would normally only occur when it becomes clear during the course of the trial that it would be impossible for the State to prove its case or where other exceptional circumstances have arisen which make the continuation of the prosecution undesirable.

If a prosecution is stopped, an accused will be acquitted and may not be charged again on the same set of facts. A prosecutor may therefore not stop a prosecution, unless the Director of Public Prosecutions or his or her delegate has consented thereto. Such decisions should therefore be made with circumspection.

(b) Restarting a prosecution

People should be able to rely on and accept decisions made by members of the Prosecuting Authority. Normally, when a suspect or an accused is informed that there will not be a prosecution or that charges have been withdrawn, that should be the end of the matter.

There may, however, be special reasons why a prosecutor will review a particular case and restart the prosecution. These include:

- an indication that the initial decision was clearly wrong and should not be allowed to stand;

- an instance where a case has not been proceeded with in order to allow the police to gather and collate more evidence, in which case the prosecutor should normally have informed the accused that the prosecution might well start again; and

- a situation where a prosecution has not been proceeded with due to the lack of

As a matter of policy, it is important that certain decisions are made at the appropriate level of responsibility to ensure consistency and accountability in decision-making.

6. FORUM OF TRIAL, DETERMINATION OF CHARGES AND ACCEPTANCE OF PLEAS

(a) Forum of trial

The law directs and policy considerations suggest that certain types of prosecutions sometimes be conducted at specified jurisdictional levels

the Regional Court and others in the High Court.

In terms of certain legislation and rules of practice, the instruction of a Director of Public

The decision regarding the court in which to prosecute an accused is determined by the complexity and seriousness of an offence, and the need for the Prosecuting Authority to guard against making decisions that will bring the law into disrepute.

(b) Determination of charges

The process by which charges are selected must be compatible with the interests of justice.

Prosecutors should decide upon, and draw up charges based on, available evidence which will—

- reflect adequately the nature, extent and seriousness of the criminal conduct and which can reasonably be expected to result in a conviction;
- provide the court with an appropriate basis for sentence; and
- enable the case to be presented in a clear and simple way.

This means that prosecutors may not necessarily proceed with the most serious charge possible.

Additional or alternative charges may be justified by the amount of evidence and where such charges will significantly enhance the likelihood of a conviction of an accused or co-accused.

However, the bringing of unnecessary charges should, in principle, be avoided because it may not only complicate or prolong trials, but also amount to an excessive and potentially unfair exercise of power.

Prosecutors should therefore not formulate more charges than are necessary just to encourage an accused to plead guilty to some. Similarly, a more serious charge should not be proceeded with as part of a strategy to obtain a guilty plea on a less serious one.

(c) Acceptance of pleas

An offer by the defence of a plea of guilty on fewer charges or on a lesser charge may be acceptable, provided that -

- the charges to be proceeded with readily reflect the seriousness and extent of the criminal conduct of an accused;
- the plea to be accepted is compatible with the evidential strength of the prosecution case;
- those charges provide an adequate basis for a suitable sentence, taking into account all the circumstances of the case; and
- where appropriate, the views of the complainant and the police as well as the interests of justice, including the need to avoid a protracted trial, have been taken into account.