

## **PROSECUTION POLICY AND DIRECTIVES RELATING TO PROSECUTION OF CRIMINAL MATTERS ARISING FROM CONFLICTS OF THE PAST**

1. In his statement to the National Houses of Parliament and the Nation on the occasion of the Tabling of the Report of the Truth and Reconciliation Commission on 15 April 2003 the President, when dealing with the "issue of amnesty", made it clear that there shall be no general amnesty. He argued that such an approach would fly in the face of the TRC process and detract from the principle of accountability which is vital, not only in dealing with the past, but also in the creation of a new ethos within our society.

2. However, the President did not stop there. He went further and stated in respect of any further process of amnesty, as follows:

"Yet we have to deal with the reality that many of the participants in the conflict of the past did not take part in the TRC process....This reality cannot be avoided. .."The President then concludes that Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human rights violations. Thus, any amnesty process, whether general, individualised or in any other form, has been categorically excluded by Government as a future option, not least because it would be unconstitutional.

3. The President then went on to explain Government's proposal as follows:

"We have therefore, left this matter in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work is continuing."; and

"However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation."; and

"...in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining the appropriate course of action."  
(Emphasis added)

4. It is important for the Prosecuting Authority to deal with these matters on a uniform basis in terms of specifically defined criteria.

5.1 In terms of section 179(1) of the Constitution of the Republic of South Africa, 1996, there is a single national prosecuting authority in the Republic consisting of a National Director of Public Prosecutions (NDPP), who is the head of the prosecuting authority, and Directors of Public Prosecutions and prosecutors.

5.2 In terms of section 179(2) of the Constitution the prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings. This means that the National Prosecuting Authority (NPA) is an independent constitutional institution and that the NDPP has full discretion regarding whether a particular prosecution should or should not be instituted.

5.3 Section 179(5)(a) of the Constitution provides that the NDPP must determine, with the concurrence of the Cabinet member responsible for the

administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process. To assist the prosecutors at arriving at a decision whether to prosecute or not, the NDPP has, in terms of the above provision, issued general criteria governing such a decision. These general Criteria are set out in paragraph 4 of the Prosecution Policy. These criteria could be defined as general policy guiding decision makers in arriving at informed decisions in the above regard. The question arises whether these guidelines are sufficient to assist the NDPP in arriving at decisions relating to offences which arise from conflicts of the past as contemplated by the President. The answer is no. Therefore, it is recommended that this process requires specific policy guidelines to facilitate the structured conclusion of the matter. It is therefore recommended that policy be determined in terms of section 179(5)(a) of the Constitution to deal with the matter under discussion.

6. Before dealing with the amendments to the Prosecution Policy, it is important to deal with the requirements for the determination for such Policy as required by section 179(5)(a) of the Constitution.

(a) In the first instance this provision requires that the Policy must be determined "with the concurrence of the Cabinet member responsible for the administration of justice". The amendments proposed by the NDPP were submitted and approved by the Minister for Justice and Constitutional Development. In view of the fact that the President requested the NPA to deal with the matter, the Minister also submitted the amendments and guidelines to Cabinet. Cabinet noted the amended Prosecution Policy.

(b) Secondly, section 179(5)(a) of the Constitution requires that the Prosecution Policy must be determined "after consultation with the Directors of Public Prosecutions". The amended Prosecution Policy was submitted to all Directors of

Public Prosecutions. All the Directors supported the amended Prosecution Policy.

7. It was decided to centralise all these case in the Office of the NDPP for the following reasons:

(a) A prosecution should not undermine nation building and it is therefore important that all these cases be synchronised in the Office of the NDPP in order to ensure that there is consistency in decision-making.

(b) The decision is consistent with the request of many DPPs to the NDPP, namely, that the National Office should take over these cases, because of the complexities implicit therein.

(c) As indicated in paragraph B4 of the amended Policy, the Priority Crimes Litigation Unit (PCLU) shall be responsible for overseeing the investigations and instituting prosecutions. Furthermore, senior designated officials of various departments and other components of the NPA must assist the PCLU in the execution of its duties. Since this Task Team will be based in Pretoria, it is desirable that the cases be centralised in the Office of the NDPP.

8. The Prosecution Policy is amended by the insertion of a new paragraph 8A. In terms of this amendment the NDPP may supplement or amend the Prosecution Policy so as to determine prosecutorial policy and directives in respect of specific matters, for example, in respect of new legislation and matters of national interest. In accordance with this amendment, the NDPP determined the criteria in Appendix A, relating to the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994.

9. Appendix A consists of three parts, namely, an introduction part (par A); the

procedural arrangements which must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past (par B); and the criteria governing the decision to prosecute or not to prosecute in cases relating to conflicts of the past (par C).

10. (a) Paragraph A1 sketches the background and motivation for the

amended Policy and guidelines.

(b) Paragraph A2 sets out the various factors to be taken into account in developing and applying the prosecuting policy, directives and guidelines. See subparagraphs (a) to (l).

(c) Paragraph A3 emphasises that Government did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President, include the application of—

\_ section 204 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), in terms of which a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution;

\_ section 105A of the Criminal Procedure Act, 1977, which makes provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA.

\_ the processes determined and set out in the current Prosecution Policy, and the fact that such processes would not indemnify a person from private

prosecution or civil liability. Therefore, if someone feels aggrieved regarding the process followed by the NPA, it can be tested in court.

11. Paragraphs A1 to 15 provide for the procedural arrangements which must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past. In summary the following process must be followed:

(a) A person who faces possible prosecution and who wishes to enter into arrangements with the NPA, must submit a written sworn affidavit or solemn affirmation to the NDPP containing such representations (par 1).

(b) The NDPP must confirm receipt of the affidavit or affirmation and may request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The Applicant may also *mero moto* submit a further written sworn affidavit or solemn affirmation to the NDPP containing representations (Par 2).

(c) All representations must contain a full disclosure of all the facts, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security (par 3).

(d) The PCLU in the Office of the NDPP is responsible for overseeing investigations and instituting prosecutions in all such matters (par 4).

(e) The regional DPPs must refer all prosecutions arising from the conflicts of the past, which were committed before 11 May 1994, and with which they are or may be seized, immediately to the Office of the NDPP (par 5).

(f) The PCLU shall be assisted in the execution of its duties by a senior

designated official of the National Intelligence Agency, the Detective Division of the South African Police Service, the Department of Justice & Constitutional Development and the Directorate of Special Operations (par 6).

(g) The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute (par 7). The NDPP must also be consulted in respect of and approve any offer to a perpetrator relating to the bestowing of the status of a section 204 witness and all section 105A plea and sentence agreements (par 8).

(h) The NDPP may obtain the views of any private or public person or institution, our intelligence agencies and the Commissioner of the South African Police Service, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision (par 9).

(i) A decision of the NDPP not to prosecute and the reasons for that decision must be made public and in accordance with section 179(6) of the Constitution, the NDPP must inform the Minister for Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this prosecuting policy relating to conflicts of the past (par 10 and 11).

12. Paragraphs C1 to C3 set out the criteria governing the decision to prosecute or not to prosecute in cases relating to conflicts of the past. In the first instance the alleged offence must have been committed on or before 11 May 1994 and secondly the NPA must ascertain whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA. If the answers to these questions are in the affirmative, the further criteria set out in paragraph C3 (a) to (j) must be applied. These criteria are in line with the criteria followed in the TRC process as well as the general criteria laid down for the prosecuting authority.

13. This amended Prosecution Policy came into effect on 1 December 2005.



**TABLE OF CONTENTS**  
**PROSECUTION POLICY**

**Preface**

1. **Introduction**
2. **Purpose of Policy Provisions**
3. **The Role of the Prosecutor**
4. **Criteria Governing the Decision to Prosecute**
  - (a) General
  - (b) Factors to be considered when evaluating evidence
  - (c) (Prosecution in the public interest)
5. **Case Review**
  - (a) Stopping of proceedings
  - (b) Restarting a prosecution
  - (c) Consent to prosecution
6. **Forum of Trial, Determination of Charges and Acceptance of Pleas**
7. **The Trial Process and Related Matters**
8. **Co-operation and Interaction with Police and Other Constituent Agencies**
- 8A. **Prosecutorial Policy and Directives relating to Specified Matters**
9. **Conclusion**

**Appendix A**

## **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.

## 1. INTRODUCTION

The Constitution of the Republic of South Africa provides for a single National Prosecuting Authority, consisting of—

- C the National Director of Public Prosecutions, who is the head of the Prosecuting Authority,
- C Deputy National Directors,
- C Directors,
- C Deputy Directors, and
- C Prosecutors.

As an organ of state the Prosecuting Authority must give effect to the laws of the country; as an instrument of justice it must exercise its functions without fear, favour or prejudice.

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 Guidelines on the Role of Prosecutors* should be observed.

The Prosecuting Authority is accountable to Parliament and ultimately to the people it serves. Every prosecutor is accountable to the National Director who, in turn, is responsible for the performance of the Prosecuting Authority.

The law gives a discretion to the Prosecuting Authority and individual prosecutors with regard to how they perform their functions, exercise their powers and carry out their duties. This discretion must, however, be exercised according to the law and within the spirit of the Constitution.

## 2. PURPOSE OF POLICY PROVISIONS

The aim of this Prosecution Policy is to set out, with due regard to the law, the way in 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:

- C the decision whether or not to institute criminal proceedings against an accused;
- C the decision whether or not to withdraw charges or stop the prosecution;
- C the decision whether or not to oppose an application for bail or release by an accused who is in custody following arrest;
- C the decision about which crimes to charge an accused with and in which court the trial should proceed;
- C the decision whether or not to accept a plea of guilty tendered by an accused;
- C the decision about which evidence to present during the trial;
- C the decision about which evidence to present during sentence proceedings, in the event of a conviction; and
- C 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?***

- C 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?***

- C What sort of impression is the witness likely to make?
- C Are there any matters, which might properly be put by the defence to attack the credibility of the witness?
- C 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?***

- C 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 evidence, but where sufficient incriminating evidence has since come to light.

A number of statutes provide that a prosecution for an offence under a particular law cannot be commenced or proceeded with unless the consent of a Director of Public Prosecutions has been obtained.

The inclusion of such requirements in legislation is intended to ensure that prosecutions are not brought in inappropriate circumstances.

Other reasons for these requirements may involve the use of the criminal law in sensitive or controversial areas where important considerations of public policy should be taken into account.

Similarly, rules of practice require that certain matters be referred to a Director of Public Prosecutions before a prosecution is proceeded with.

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.

In practice this results in certain types of cases being heard in the District Court, some in 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 Prosecutions is required to determine the forum in which the trial should proceed.

In determining whether or not a case is appropriate for hearing in the High Court, the following factors, *inter alia*, should be taken into account:

- the nature and complexity of the case and its seriousness in the circumstances;
- the adequacy of sentencing provisions in the lower courts and whether a conviction in the High Court carries a greater deterrent effect;
- any specific legal provision on, or any implied legislative preference for, a particular forum of trial;
- any delay, cost or adverse effect that witnesses may have to incur if the case is heard in the High Court; and
- the desirability of a speedy resolution and disposal of some prosecutions in available lower courts, aimed at reducing widespread criminal activity.

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.

## 7. THE TRIAL PROCESS AND RELATED MATTERS

Prosecutors work in an adversarial context and seek to have the prosecution sustained. Cases should therefore be presented fearlessly, vigorously and skilfully.

At the same time, prosecutors should present the facts of a case to a court fairly. They should disclose information favourable to the defence (*even though it may be adverse to the prosecution case*) and, where necessary, assist in putting the version of an unrepresented accused before court.

This notion also applies to bail proceedings. On the one hand, prosecutors should aim to ensure that persons accused of serious crimes are kept in custody in order to protect the community and to uphold the interests of justice. On the other hand, the prosecutor should not oppose the release from custody of an accused if the interests of justice permit.

Prosecutors should show sensitivity and understanding to victims and witnesses and should assist in providing them with protection where necessary. In suitable cases the prosecutor should advise the victim of the possibility of being compensated for the harm suffered as a result of the crime.

As far as it is practicable and necessary, prosecutors should consult with victims and witnesses before the trial begins. They should assist them by giving them appropriate and useful information on the trial process and reasons for postponements and findings of the court, where necessary.

Prosecutors are not allowed to participate in public discussion of cases still before the court because this may infringe the rule against comment on pending cases and may violate the privacy of those involved.

During the sentencing phase of a criminal case, prosecutors should assist the court by ensuring that the relevant facts are fully and accurately brought to its attention.

They should also make appropriate recommendations with a view to realizing the general purposes of sentence. These include the need for retribution, the deterrence of further criminal conduct, the protection of the public from dangerous criminals and the rehabilitation of offenders.

The Prosecuting Authority should give special attention to the effective and speedy disposal of cases identified as priority matters.

Prosecutors should specialize in the prosecution of certain offences where desirable and practicable.

The Prosecuting Authority should, as far as possible, make its senior trial prosecutors available to conduct the most difficult cases.

## **8. CO-OPERATION AND INTERACTION WITH POLICE AND OTHER CONSTITUENT AGENCIES**

Effective co-operation with the police and other investigating agencies from the outset is essential to the efficacy of the prosecution process. If a case is not efficiently prepared initially, it will less likely lead to a prosecution or result in a conviction.

The decision to start an investigation into possible or alleged criminal conduct ordinarily rests with the police. The Prosecuting Authority is usually not involved in such decisions although it may be called upon to provide legal advice and policy guidance.

In major or very complex investigations, such an involvement may occur at an early stage and be of a fairly continuous nature. If necessary, specific instructions should be issued to the police with which they must comply.

In practice, prosecutors sometimes refer complaints of criminal conduct to the police for investigation. In such instances, they will supervise, direct and co-ordinate criminal investigations.

Provision is made for Investigating Directors of the Prosecuting Authority to hold inquiries or preparatory investigations in respect of the commission of certain offences brought to their attention.

Prosecutors have the responsibility under the *National Prosecuting Authority Act* to determine whether a prosecution, once started, should proceed.

Such decisions are made independently, but prosecutors should consult the police and other interest groups where required.

It is therefore desirable, wherever practicable, that matters be referred to prosecutors by the police before a prosecution is instituted. In most cases suspected offenders are arrested and charged before the police can consult with prosecutors.

However, in cases where difficult questions of fact or law are likely to arise, it is desirable that the police consult the prosecutors before arresting suspected persons.

With regard to the investigation and prosecution of crime, the relationship between prosecutors and police officials should be one of efficient and close co-operation, with mutual respect for the distinct functions and operational independence of each profession.

Prosecutors should work together with other departments and agencies such as Correctional Services, Welfare, lawyers' organizations, non-governmental organisations and other public institutions, to streamline procedures and to enhance the quality of service provided to the criminal justice system.

## **8A. PROSECUTORIAL POLICY AND DIRECTIVES RELATING TO SPECIFIED MATTERS**

The National Director may supplement or amend this Policy to determine prosecutorial policy and directives in respect of specific matters, for example, in respect of new legislation and matters of national interest.

The Prosecutorial Policy and Directives, in Appendix A, relating to the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994, are hereby determined in terms of section 179(5) of the Constitution, with effect from 1 December 2005.

## **9. CONCLUSION**

The Prosecuting Authority is a public, representative service, which should be effective and respected. Prosecutors should adhere to the highest ethical and professional standards in prosecuting crime and should conduct themselves in a manner which will maintain, promote and defend the interests of justice.

This Prosecution Policy is designed to make sure that everyone knows the principles that prosecutors apply when they do their work.

Applying these principles consistently will help those involved in the criminal justice system to treat victims fairly and prosecute offenders effectively.

The Prosecution Policy is not an end in itself.

The challenge which faces the Prosecuting Authority is to implement this Policy in a manner that will increase the sense of security of all people in South Africa.

## APPENDIX A

### PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994

#### A. INTRODUCTION

1. In his statement to the National Houses of Parliament and the Nation, on 15 April 2003, President Thabo Mbeki, among others, gave Government's response to the final report of the Truth and Reconciliation Commission (TRC). The essential features of the response for the purpose of this new policy, are the following:
  - (a) It was recognized that not all persons who qualified for amnesty availed themselves of the TRC process, for a variety of reasons, ranging from incorrect advice (legally or politically) or undue influence to a deliberate rejection of the process.
  - (b) A continuation of the amnesty process of the TRC cannot be considered as this would constitute an infringement of the Constitution, especially as it would amount to a suspension of victims' rights and would fly in the face of the objectives of the TRC process. The question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.
  - (c) As part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearthing the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.
  - (d) Therefore, persons who had committed crimes, before 11 May 1994, which emanate from conflicts of the past, could enter into agreements with the prosecuting authority in accordance with existing legislation. This was stated in the context of the recognition of the need to gain a full understanding of the networks which operated at the relevant time since, in certain instances, these networks still operated and posed a threat to current security. Particular reference was made to un-recovered arms caches.
2. In view of the above, prosecuting policy, directives and guidelines are required to reflect and attach due weight to the following:
  - (a) The Human Rights culture which underscores the Constitution and the status accorded to victims in terms of the TRC and other legislation.
  - (b) The constitutional right to life.

- (c) The non-prescriptivity of the crime of murder.
  - (d) The recognition that the process of transformation to democracy recognized the need to create a mechanism where persons who had committed politically motivated crimes, linked to the conflicts of the past, could receive indemnity or amnesty from prosecution.
  - (e) The *dicta* of the Constitutional Court justifying the constitutionality of the above process, inter alia, on the basis that it did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused. (See *Azanian Peoples Organisation v The President of the RSA, 1996 (8) BCLR 1015 CC*).
  - (f) The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.
  - (g) Government's response to the final Report of the TRC as set out in paragraphs 1(a) to (d) above.
  - (h) The *dicta* of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See *The State v Wouter Basson CCT 30/03.*).
  - (i) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).
  - (j) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.
  - (k) The existing prosecuting policy and general directives or guidelines issued by the National Director of Public Prosecutions (NDPP) to assist prosecutors in arriving at a decision to prosecute or not.
  - (l) The terms and conditions under which the Amnesty Committee of the TRC could consider applications for amnesty and the criteria for granting of amnesty for gross violation of human rights.
3. Government did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President, include the following:
- (a) Section 204 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which provides that a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court

trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution.

(b) Section 105A of the Criminal Procedure Act, 1977, which makes provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA.

(c) Section 179(5) of the Constitution in terms of which the NDPP, among others—

(i) must determine, in consultation with the Minister and after consultation with the Directors of Public Prosecutions, prosecution policy to be observed in the prosecution process;

(ii) must issue policy directives to be observed in the prosecution process; and

(iii) may review a decision to prosecute or not to prosecute.

(d) The above process would not indemnify such a person from private prosecution or civil liability.

4. The NPA has a general discretion not to prosecute in cases where a *prima facie* case has been established and where it is of the view that such a prosecution would not be in the public interest. The factors to be considered include the following:

(a) The fact that the victim does not desire prosecution.

(b) The severity of the crime in question.

(c) The strength of the case.

(d) The cost of the prosecution weighed against the sentence likely to be imposed.

(e) The interests of the community and the public interest.

In the event of the NPA declining to prosecute in such an instance, such a person is not protected against a private prosecution.

5. Therefore, following Government's response, and the equality provisions in our Constitution and the equality legislation, and taking into account the above factors regarding the handling of cases arising from conflicts of the past, which were committed prior to 11 May 1994, it is important to deal with these matters on a rational, uniform, effective and reconciliatory basis in terms of specifically defined prosecutorial policies, directives and guidelines.



**B. PROCEDURAL ARRANGEMENTS WHICH MUST BE ADHERED TO IN THE PROSECUTION PROCESS IN RESPECT OF CRIMES ARISING FROM CONFLICTS OF THE PAST**

The following procedure must be strictly adhered to in respect of persons wanting to make representations to the NDPP, and in respect of those cases already received by the Office of the NDPP, relating to alleged offences arising from conflicts of the past and which were committed before 11 May 1994:

1. A person who faces possible prosecution and who wishes to enter into arrangements with the NPA, as contemplated in paragraph A1 above (the Applicant), must submit a written sworn affidavit or solemn affirmation to the NDPP containing such representations.
2. The NDPP must confirm receipt of the affidavit or affirmation and may request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The Applicant may also *mero moto* submit a further written sworn affidavit or solemn affirmation to the NDPP containing representations.
3. All such representations must contain a full disclosure of all the facts, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security.
4. The Priority Crimes Litigation Unit (PCLU) in the Office of the NDPP shall be responsible for overseeing investigations and instituting prosecutions in all such matters.
5. The regional Directors of Public Prosecutions must refer all prosecutions arising from the conflicts of the past, which were committed before 11 May 1994, and with which they are or may be seized, immediately to the Office of the NDPP.
6. The PCLU shall be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:
  - (a) The National Intelligence Agency.
  - (b) The Detective Division of the South African Police Service.
  - (c) The Department of Justice & Constitutional Development.
  - (d) The Directorate of Special Operations.
7. The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute.

8. The NDPP must also be consulted in respect of and approve any offer to a perpetrator relating to the bestowing of the status of a section 204 witness and all section 105A plea and sentence agreements.
9. The NDPP may obtain the views of any private or public person or institution, our intelligence agencies and the Commissioner of the South African Police Service, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision.
10. A decision of the NDPP not to prosecute and the reasons for that decision must be made public.
11. In accordance with section 179 (6) of the Constitution, the NDPP must inform the Minister for Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this prosecuting policy relating to conflicts of the past.
12. The NDPP may make public statements on any matter arising from this policy relating to conflicts of the past, where such statements are necessary in the interests of good governance and transparency, but only after informing the Minister for Justice and Constitutional Development thereof.
13. The institution of any prosecution in terms of this policy relating to conflicts of the past would not deprive the accused from making further representations to the NDPP requesting the NDPP to withdraw the charges against him or her. These representations would be considered according to the NPA prosecuting policy, directives, guidelines and established practice. The victims must, as far as reasonably possible, be consulted in any such further process and be informed, should the accused's representations be successful.
14. The NDPP may provide for any additional procedures.
15. All state agencies, in particular those dealing with the prosecution of alleged offenders and those responsible for the investigation of offences, must be requested not to use any information obtained from an alleged accused person during this process in any subsequent criminal trial against such a person. Whatever the response of such agencies may be to this request, the NPA records that its policy in this regard is not to make use of such information at any stage of the prosecuting process, especially not to present it in evidence in any subsequent criminal trial against such person.

**C. CRITERIA GOVERNING THE DECISION TO PROSECUTE OR NOT TO PROSECUTE IN CASES RELATING TO CONFLICTS OF THE PAST**

Apart from the general criteria set out in paragraph 4 of the Prosecuting Policy of the NPA, the following criteria are determined for the prosecution of cases arising from conflicts of the past:

1. The alleged offence must have been committed on or before 11 May 1994.
2. Whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA.
3. If the answers to paragraphs 1 and 2 above are in the affirmative, then the further criteria in paragraphs (a) to (j) hereunder, must, **in a balanced** way, be applied by the NDPP before reaching a decision whether to prosecute or not:
  - (a) Whether the alleged offender has made a full disclosure of all relevant facts, factors or circumstances to the alleged act, omission or offence.
  - (b) Whether the alleged act, omission or offence is an act associated with a political objective committed in the course of conflicts of the past. In reaching a decision in this regard the following factors must be considered:
    - (i) The motive of the person who committed the act, commission or offence.
    - (ii) The object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals.
    - (iii) Whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, agent or a supporter.
    - (iv) The relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued, but does not include any act, omission or offence committed—
      - (aa) for personal gain; or
      - (bb) out of personal malice, ill-will or spite, directed against the victim of the act or offence committed.

- (c) The degree of co-operation on the part of the alleged offender, including the alleged offenders endeavours to expose—
- (i) the truth of the conflicts of the past, including the location of the remains of victims; or
  - (ii) possible clandestine operations during the past years of conflict, including exposure of networks that operated or are operating against the people, especially if such networks still pose a real or latent danger against our democracy.
- (d) The personal circumstances of the alleged offender, in particular—
- (i) whether the ill-health of or other humanitarian consideration relating to the alleged offender may justify the non-prosecution of the case;
  - (ii) the credibility of the alleged offender;
  - (iii) the alleged offender's sensitivity to the need for restitution;
  - (iv) the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation;
  - (v) renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender; and
  - (vi) the degree of indoctrination to which the alleged offender was subjected.
- (e) Whether the offence in question is serious.
- (f) The extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society.
- (g) Whether the prosecution may lead to the further or renewed traumatising of victims and conflicts in areas where reconciliation has already taken place.
- (h) If relevant, the alleged offender's role during the TRC process, namely, in respect of co-operation, full disclosure and assisting the process in general.
- (i) Consideration of any views obtained for purposes of reaching a decision.
- (j) Any further criteria, which might be deemed necessary by the prosecuting authority for reaching a decision.