

### Message from the DPP

The decision whether or not to prosecute an individual is a most important one. It is vital for the suspect, the victim and the community as a whole.

Each and every person brought before the criminal courts should know the principles that will be applied in deciding whether a case will be brought or continued against him/her and that those principles will be applied regardless of their associations, family connections, wealth, or any other personal factor.

Great care must always be taken by those who decide these issues, recognising that incorrect decisions may ruin lives and undermine confidence in the criminal justice system. Accordingly, a decision to prosecute should only be taken after all the evidence and the relevant circumstances have been considered properly.

This Code establishes a two-stage test in deciding whether a prosecution should be initiated.

- First, there must be sufficient evidence to provide a realistic prospect of conviction.
- If this test is satisfied, a determination will then be made as to whether a prosecution is in the public interest. If it is, the prosecution will be commenced.

These two tests will be applied throughout the duration of a case, because circumstances can change.

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The decision to prosecute will be the product of careful consideration to ensure that the principles set out are vigorously applied. It is only by doing so that we can ensure that the interests of justice are properly met.

I am grateful to all those who helped with the introduction of this Code, in particular the input from the Head of the Guyana Project Office of the United Nations Office on Drugs and Crime. Importantly, though, this is a Guyanese Code, made by the Office of the DPP for Guyanese prosecutors.

I commend the introduction and application of this Code, which I hope will be considered not only by lawyers and law enforcement officers, but also by members of the public. It makes clear the basis upon which decisions in criminal cases will be made. It is an invaluable tool for ensuring that proper criteria are considered in every case and, very importantly, those same criteria are *seen* to be considered, fairly and consistently.

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## The Code for Prosecutors - Guyana

### 1 Introduction

- 1.1 The Office of the Director of Public Prosecutions is the principal public prosecution authority for Guyana and it is headed by the Director of Public Prosecutions ("DPP").

Article 187 of the Constitution states:

"The Director of Public Prosecutions (referred to in this article as "The Director") shall have power in any case in which he or she considers it desirable to do so-

(a) to institute and undertake criminal proceedings against any person before any court, other than a court-martial, in respect of any offence against the law of Guyana;

(b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority, and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or her or any other person or authority."<sup>1</sup>

- 1.2 The DPP has decided that the issuance of a Code for Prosecutors ('the Code') is necessary. It will

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<sup>1</sup> The Office of the DPP is created at Article 116 of the Constitution

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improve consistency in decision-making amongst prosecutors, giving them guidance on general principles to be applied when making decisions about prosecutions.

- 1.3 The Code will also make clear to the public the basis on which sometimes very difficult decisions are made. We hope that the Code will help the public to understand what prosecutors do, how they make their decisions, and the level of service that the DPP is committed to providing in key aspects of work.
- 1.4 In the Code, the term “prosecutors” is used to describe attorneys-at-law who exercise their powers in accordance with the instructions issued by the DPP; Police Officers designated by the Commissioner of Police; any person authorised by the laws of Guyana to prosecute, and any person authorised by the DPP to prosecute in any court.
- 1.5 In the Code, the term:
  - “suspect” is used to describe a person who is under suspicion of having committed a criminal offence but who has not been charged;
  - “defendant” is used to describe someone who has been charged or summonsed;

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- "offender" is used to describe someone who has admitted guilt to a court, or been found guilty after trial;
- "appellant" is used to describe a person appealing a conviction and/or sentence.

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### 2 Application of the Code

- 2.1 The Code reflects the aspiration and practices of prosecutors who adhere to the (1999) Standards of the International Association of Prosecutors.
- 2.2 When an attorney-at-law is engaged as a prosecutor, his prime duty is not to seek to convict, but to place the facts dispassionately before the court and to see that justice is done through a fair trial upon the merits of the case.
- 2.3 A prosecuting attorney-at-law has a personal duty to introduce into evidence in any proceedings only those statements which he honestly believes are freely made and obtained without the use of torture or other cruel, inhuman or degrading treatment or punishment. If there is any doubt, the prosecutor must reject the statement. Full reasons for doing so must be recorded.<sup>2</sup>
- 2.4 It is the expectation that all prosecutions in Guyana will be conducted in accordance with the guidelines set out in the Code.

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<sup>2</sup> Legal Practitioners Act, Chapter 4:01, Fourth Schedule, Rule XVIII (2)

### 3 The Role and the Ethics of the Prosecutor

- 3.1 The decision to prosecute is a serious step that affects suspects, victims, witnesses and the public at large and must be undertaken with the utmost care.
- 3.2 It is the duty of prosecutors to make sure that the right person is prosecuted for the right offence and to bring offenders to justice wherever possible. Casework decisions taken fairly, impartially and with integrity help to secure justice for victims, witnesses, suspects, defendants and the public.
- 3.3 Prosecutors must ensure that the law is properly applied; that relevant evidence is put before the court; and that obligations of disclosure are complied with.
- 3.4 The prosecutor should:
- Ensure that the prosecution case is firmly and fairly put
  - Vigorously, but courteously, challenge the defence case
  - Avoid submissions of fact or law that are not soundly based
  - Prevent prejudice or emotion from playing any part in the conduct of the case
  - Reveal the existence of material that may assist the accused

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- Invite the court to stop proceedings if the point is reached at which there is no longer a reasonable prospect of conviction

3.5 The prosecutor acts independently, yet in the public interest. The prosecutor should present a case on the basis of evidence which is credible and cogent. He or she should not express a personal opinion as to the guilt or innocence of the accused, or as to the credibility of a witness.

3.6 A decision whether to prosecute must NOT be influenced by:

- The personal feelings of the prosecutor concerning the offence, the suspect or the victim
- The possible effect on the personal or professional circumstances of those responsible for the prosecution or otherwise involved in its conduct
- The race, national or ethnic origin, religion, sex, gender, financial circumstances, or political associations, activities or beliefs of the suspect or any other person involved
- Possible political advantage or disadvantage to the government or any political party, group or individual.

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- 3.7 The duty of the prosecutor is not to obtain a conviction at all costs, but to ensure the court has before it all relevant evidence concerning the alleged crime(s). When an attorney-at-law is engaged as a prosecutor, his prime duty is not to seek to convict, but to place the facts dispassionately before the court, and to see that justice is done through a fair trial upon the merits of the case.<sup>3</sup>

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<sup>3</sup> Legal Practitioners Act, Chapter 4:01, Fourth Schedule, Rule VII (13))

### 4 The Prosecutor and the Investigator

4.1 The functions of the prosecutor, the police and other investigators are separate and distinct. The prosecutor decides if a prosecution should be pursued and, if so, on what terms. He or she acts independently of those responsible for the investigation. While the prosecutor may consider the views of the investigator where appropriate, it is the responsibility of the prosecutor to decide whether or not to proceed.

4.2 Nonetheless, it is important to recognise that the roles of the prosecutor and the investigator are interdependent, and they need to work in partnership to enforce the law. The prosecutor may request further investigation along additional lines of inquiry which are relevant to the decision-making process. The prosecutor may also advise the investigator on the conduct of cases. This includes advice concerning:

- What criminal charges are warranted
- Whether there is sufficient evidence to support a charge
- The admissibility (or otherwise) of evidence
- The present state of the law
- Whether a case should be tried summarily or on indictment
- The disclosure of evidence

## 5 The Decision Whether to Prosecute

- 5.1 In more serious or complex cases, prosecutors decide whether a person should be charged with a criminal offence and, if so, what that offence should be. They make their decisions in accordance with the tests contained in this Code. The police apply the same principles in deciding whether to start criminal proceedings against a person in those cases for which they are responsible.
- 5.2 The police and other investigators are responsible for conducting enquiries into any alleged crime and for deciding how to deploy their resources. This includes decisions to start or continue an investigation and the scope of the investigation. Prosecutors often advise the police and other investigators about possible lines of inquiry and evidential requirements and assist with pre-charge procedures.
- 5.3 In large scale investigations, the prosecutor may be asked to advise on the overall investigation strategy, including decisions to refine or narrow the scope of the criminal conduct and the number of suspects under investigation. This is to assist the police and other investigators to complete the investigation within a reasonable period of time and to build the most effective prosecution case.

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- 5.4 Prosecutors should identify and, where possible, seek to rectify evidential weaknesses, but, subject to the Threshold Test (see section 7), they should swiftly stop cases which do not meet the evidential stage of the Full Code Test (see section 6) and which cannot be strengthened by further investigation, or where the public interest clearly does not require a prosecution. Although prosecutors primarily consider the evidence and information supplied by the police and other investigators, the suspect or those acting on his or her behalf may also submit evidence or information to the prosecutor via the police or other investigators, prior to charge, to help inform the prosecutor's decision.
- 5.5 Prosecutors must only start or continue a prosecution when the case has passed both stages of the Full Code Test (see section 6). The exception is when the Threshold Test (see section 7) may be applied where it is proposed to apply to the court to keep the suspect in custody after charge, and the evidence required to apply the Full Code Test is not yet available.
- 5.6 Prosecutors should not start or continue a prosecution which would be regarded by the courts as oppressive or unfair, and possibly an abuse of the court's process.

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- 5.7 Prosecutors review every case they receive from the police or other investigators. Review is a continuing process and prosecutors must take account of any change in circumstances that occurs as the case develops, including what becomes known of the defence case. Wherever possible, they should talk to the investigator when thinking about changing the charges or stopping the case. Prosecutors and investigators work closely together, but the final responsibility for the decision whether or not a case should go ahead rests with the DPP.

## 6 The Full Code Test

6.1 The Full Code Test has two stages:

- (i) **the evidential stage**; followed by
- (ii) **the public interest stage**.

6.2 In most cases, prosecutors should only decide whether to prosecute after the investigation has been completed and after all the available evidence has been reviewed. However, there will be cases where it is clear, prior to the collection and consideration of all the likely evidence, that the public interest does not require a prosecution. In these instances, prosecutors may decide that the case should not proceed further.

6.3 Prosecutors should only take such a decision when they are satisfied that the broad extent of the criminality has been determined, and that they are able to make a fully informed assessment of the public interest. If prosecutors do not have sufficient information to take such a decision, the investigation should proceed and a decision taken later in accordance with the Full Code Test set out in this section.

### The Evidential Stage

- 6.4 Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.
- 6.5 The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect, or those acting on his or her behalf, has put forward or on which he or she might rely.
- 6.6 When deciding whether there is sufficient evidence to prosecute, prosecutors should ask themselves the following:

#### **Can the evidence be used in court?**

Prosecutors should consider whether there is any question over the admissibility of certain evidence. In doing so, prosecutors should assess:

- (a) the likelihood of that evidence being held as inadmissible by the court; and

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(b) the importance of that evidence in relation to the evidence supporting the case as a whole.

### **Is the evidence reliable?**

Prosecutors should consider whether there are any reasons to question the reliability of the evidence, including its accuracy or integrity.

### **Is the evidence credible?**

Prosecutors should consider whether there are any reasons to doubt the credibility of the evidence.

## **The Public Interest Stage**

- 6.7 In every case where there is sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest.
- 6.8 Prosecutions do not automatically take place once the evidential stage is met. A prosecution will *usually* take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour.
- 6.9 When considering the public interest, prosecutors should attempt to answer each of the questions set out below (in paragraphs 6.12 (a) to (g)) so as to identify and determine the relevant public interest

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factors tending for and against prosecution. These factors, together with any public interest factors set out in relevant guidance or policy issued by the DPP, should enable prosecutors to form an overall assessment of the public interest.

- 6.10 The explanatory text below each question (in paragraphs 6.12 (a) to (g)) provides guidance to prosecutors when addressing each particular question and determining whether it identifies public interest factors for or against prosecution. The questions identified are not exhaustive, and not all the questions may be relevant in every case. The weight to be attached to each of the questions, and the factors identified, will also vary according to the facts and merits of each case.
- 6.11 It is quite possible that one public interest factor alone may outweigh a number of other factors which tend in the opposite direction. Although there may be public interest factors tending against prosecution in a particular case, prosecutors should consider whether nonetheless a prosecution should go ahead and those factors put to the court for consideration when sentence is passed.

6.12 Prosecutors should consider each of the following questions:

**(a) How serious is the offence committed?**

The more serious the offence, the more likely it is that a prosecution is required.

When deciding the level of seriousness of the offence committed, prosecutors should include amongst the factors for consideration the suspect's culpability and the harm to the victim by asking themselves the questions at (b) and (c).

**(b) What is the level of culpability of the suspect?**

The greater the suspect's level of culpability, the more likely it is that a prosecution is required.

Culpability is likely to be determined by the suspect's level of involvement; the extent to which the offending was premeditated and/or planned; whether they have previous criminal convictions and any offending while on bail or whilst subject to a court order; whether the offending was or is likely to be continued, repeated or escalated; and the suspect's age or maturity (see paragraph (d) below for suspects under 18).

Prosecutors should also have regard when considering culpability as to whether the suspect is, or was at the time of the offence, suffering from any

significant mental or physical ill health, as in some circumstances this may mean that it is less likely that a prosecution is required. However, prosecutors will also need to consider how serious the offence was, whether it is likely to be repeated and the need to safeguard the public or those providing care to such persons.

### **(c) What are the circumstances of and the harm caused to the victim?**

The circumstances of the victim are highly relevant. The greater the vulnerability of the victim, the more likely it is that a prosecution is required. This includes where a position of trust or authority exists between the suspect and victim.

A prosecution is also more likely if the offence has been committed against a victim who was at the time a person serving the public.

Prosecutors must also have regard to whether the offence was motivated by any form of discrimination against the victim's race, ethnic or national origin, sex or gender, disability, financial circumstances, age, religion or belief, or the suspect demonstrated hostility towards the victim based on any of those characteristics. The presence of any such motivation or hostility will mean that it is more likely that prosecution is required.

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In deciding whether a prosecution is required in the public interest, prosecutors should take into account the views expressed by the victim about the impact that the offence has had. In appropriate cases, this may also include the views of the victim's family.

Prosecutors may also consider whether the victim wishes to proceed with the matter.

Prosecutors also need to consider if a prosecution is likely to have an adverse effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence. If there is evidence that prosecution is likely to have an adverse impact on the victim's health it may make a prosecution less likely, taking into account the victim's views.

It is important to recognise that the DPP does not act for victims or their families in the same way as counsel acts for their clients. Prosecutors instead must form an overall view of the public interest and the interests of justice.

### **(d) Was the suspect under the age of 18 at the time of the offence?**

The criminal justice system treats children and young people differently from adults and significant weight must be attached to the age of the suspect if they are a child or young person under 18. The best interests and welfare of the child or young person

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must be considered including whether a prosecution is likely to have an adverse impact on his or her future prospects that is disproportionate to the seriousness of the offending. Prosecutors must also have regard to the obligations arising under the Constitution, the Protection of Children Act, Chapter 46:06, Juvenile Offenders Act, Chapter 10:03, all other legislation pertaining to the rights of children and young persons and the United Nations 1989 Convention on the Rights of the Child.<sup>4</sup>

As a starting point, the younger the suspect, the less likely it is that a prosecution is required.

However, there may be circumstances which mean that notwithstanding the fact that the suspect is under 18, a prosecution is in the public interest. These include where the offence committed is serious, where the suspect's past record suggests that there are no suitable alternatives to prosecution, or where the absence of an admission means that out-of-court disposals which might have addressed the offending behaviour are not available.

### (e) What is the impact on the community?

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<sup>4</sup> Guyana ratified the UN Convention on the Rights of the Child in 1991.

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The greater the impact of the offending on the community, the more likely it is that a prosecution is required. In considering this question, prosecutors should have regard to how 'community' is an inclusive term and is not restricted to communities defined by location.

### (f) Is prosecution a proportionate response?

Prosecutors should also consider whether prosecution is proportionate to the likely outcome, and in so doing the following may be relevant to the case under consideration:

- The cost to the DPP and the wider criminal justice system, especially where it could be regarded as excessive when weighed against any likely penalty. (Prosecutors should not decide the public interest *on the basis of this factor alone*. It is essential that regard is also given to the public interest factors identified when considering the other questions in paragraphs 6.12 (a) to (g), but cost is a relevant factor when making an overall assessment of the public interest.)
- Cases should be capable of being prosecuted in a way that is consistent with principles of effective case management. For example, in a case involving multiple suspects, prosecution might be reserved for the main participants in

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order to avoid excessively long and complex proceedings.

### **(g) Do sources of information require protection?**

Special care must be taken when proceeding with a prosecution where details may need to be made public that could harm confidential sources of information, international relations or national security. It is essential that such cases are kept under continuing review.

## **7. The Threshold Test**

- 7.1** The Threshold Test may only be applied when the suspect presents a substantial bail risk and not all the evidence is available at the time when he or she must be released from custody unless charged.

### **When the Threshold Test must be applied**

- 7.2** Prosecutors must determine whether the following conditions are met:
- (a) there is insufficient evidence currently available to apply the evidential stage of the Full Code Test; and
  - (b) there are reasonable grounds for believing that further evidence will become available within a reasonable period; and
  - (c) the seriousness of the circumstances of the case justifies the making of an immediate charging decision; and
  - (d) there are continuing substantial grounds to object to bail and in all the circumstances of the case it is proper to do so.
- 7.3** Where any of the above conditions is not met, the Threshold Test cannot be applied and the suspect cannot be charged. The officer in the case must determine whether the person may continue to be detained or be released on bail (with or without conditions).

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- 7.4 There are two parts to the evidential consideration of the Threshold Test.

### **Part 1 – Is there a reasonable ground for suspicion?**

- 7.5 Prosecutors must be satisfied that there are reasonable grounds for suspecting that the person to be charged has committed the offence.
- 7.6 In determining this, prosecutors must consider the evidence then available. This may take the form of witness statements, material or other information, provided the prosecutor is satisfied that:
- (a) it is relevant; and
  - (b) it is capable of being put into an admissible format for presentation in court; and
  - (c) it would be used in the case.
- 7.7 If satisfied on this the prosecutor should then consider the second part of the Threshold Test.

### **Part 2 – Can further evidence be gathered to provide a realistic prospect of conviction?**

- 7.8 Prosecutors must be satisfied that there are reasonable grounds for believing that the continuing investigations will provide further evidence, within a reasonable period of time, so that all the evidence together is capable of establishing a realistic prospect of conviction in accordance with the Full Code Test.

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- 7.9 The further evidence must be identifiable and not merely speculative.
- 7.10 In reaching this decision, prosecutors must consider;
- (a) the nature, extent and admissibility of any likely further evidence and the impact it will have on the case;
  - (b) the charges that all the evidence will support;
  - (c) the reasons why the evidence is not already available;
  - (d) the time required to obtain the further evidence and whether any consequential delay is reasonable in all the circumstances.
- 7.11 If both parts of the Threshold Test are satisfied, prosecutors must apply the public interest stage of the Full Code Test based on the information available at that time.

### Reviewing the Threshold Test

- 7.12 A decision to charge under the Threshold Test must be kept under review. The evidence must be regularly assessed to ensure that the charge is still appropriate and that continued objection to bail is justified. The Full Code Test must be applied as soon as is reasonably practicable and in any event before the expiry of any applicable custody time limit.

**8. Selection of Charges**

- 8.1 Prosecutors should select charges which:
- (a) reflect the seriousness and extent of the offending supported by the evidence; and
  - (b) give the court adequate powers to sentence and impose appropriate post-conviction orders; and
  - (c) enable the case to be presented in a clear and simple way.
- 8.2 This means that, where there is a choice, prosecutors may not always choose or continue with the most serious charge.
- 8.3 Prosecutors should not proceed with more charges than are necessary in order to encourage a defendant to plead guilty to a few. In the same way, a prosecutor should not proceed with a more serious charge in order to encourage a defendant to plead guilty to a less serious charge.
- 8.4 After charge, prosecutors must take account of any relevant change in circumstances as the case progresses.

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### 9. Concluding Remarks

- 9.1 The Code is designed to ensure that prosecutors make reasoned decisions. The public is entitled to know what criteria prosecutors use when making decisions. This transparency enables the community to have confidence in the Office of the DPP to ensure that justice is accessible for all.
- 9.2 With the Code in the public domain, the way prosecutions are decided and conducted will be clear. The criminal justice system will be sensitive to the needs of witnesses and victims and ensure that defendants are treated appropriately.
- 9.3 Through a consistent and principled approach to prosecution policy and conduct, prosecutors will advance the rule of law and successfully contribute to public confidence in the criminal justice system of the Co-operative Republic of Guyana.

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