



Africa Criminal Justice Reform
Organisation pour la Réforme de la Justice Pénale en Afrique
Organização para a Reforma da Justiça Criminal em África



National Prosecuting Authority

Transparency and Accountability

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Interrelationship

- **Transparency, Accountability, Independence**
- **Independence** is an essential feature of the proper exercise of prosecutorial discretion. Independence requires that justice be dispensed without ‘fear, favour or prejudice.’
- Independence cannot exist alone: it must co-exist with **accountability**.
- Transparency is required to ensure accountability: if no-one is **seen** to be held **accountable** for the exercise of prosecutorial discretion, how can the public ever have any assurance that decisions are not tainted or improper?

Transparency in high-profile corruption

- Widest possible lawful public access to information on the activities of prosecutors
- Especially true when it comes to a “truly sustainable and successful fight against corruption”
- In SA institutions of criminal justice also captured during state capture
- Any failure to be transparent about the institution, progress, and decisions on corruption prosecutions is likely further to undermine trust
- *‘Transparency in the exercise of prosecutors’ functions is a key component of the rule of law, one of the important guarantees of a fair trial, and necessary for ensuring public confidence and trust.*
- *Indeed, a positive image of the prosecution service forms an important element of public trust in the proper functioning of the justice system’*

Situations calling for NPA comment

- Information about an investigation is already in the public domain.
- The NPA has been publicly called upon to respond to an issue or undertake an investigation or prosecution.
- Comment is necessary in order to maintain public confidence that the NPA is fulfilling its responsibility by investigating and prosecuting issues of public concern.
- Comment is necessary for investigation purposes, for example, in order to encourage witnesses to come forward.
- Making a statement could prevent widespread misconduct, or allay public concern.

Summary

- “As a matter of principle, prosecution services should provide appropriate information to the media and to the public at all stages of their activities as regards fighting corruption including through their websites. At the same time, this should be done with due respect for legal provisions concerning the protection of personal data, privacy, dignity, the presumption of innocence, ethical rules of relations with other participants in the proceedings, as well as legal provisions precluding or restricting disclosure of certain information, particularly where required to ensure the security and consistency of the investigation”

Possible limits on transparency

- To protect the right to privacy of an accused, so that their reputation is not damaged unnecessarily through the public knowledge of an investigation or prosecution
- To protect legal professional privilege, also known as attorney-client privilege
- To protect witnesses and potential witnesses, whose identity may need to be protected if details of an investigation or prosecution are revealed. Whistle-blowers in particular may be at risk of being targeted not only by the accused person but by broader sympathisers with either the accused or the presumed political affiliation of the accused
- To protect evidence; potential accused persons who are alerted to an investigation or prosecution via public knowledge may seek to destroy evidence which may implicate them
- To abide by ethical rules relating to the parties to a case and the disclosure of information.

Testing limits or constraints

- Presumption of innocence?
 - UNHRC says it is permissible for authorities to inform the public of the name of a suspect, as long as the person is not publicly declared guilty
- Attorney-client or Legal Professional Privilege
- Criminal and civil defamation?
- Malicious prosecution?
- Protection of witnesses
- Protection of evidence

Transparency on decisions

- Investigations under NPA control in public domain
 - When it is in the public interest
 - Statement on conclusion of investigation
- The decision not to prosecute
 - Give reasons, based on previously articulated policy
- The decision to prosecute
 - Should NOT be publicised until action taken
 - Arrest not the only method of securing attendance in court
 - Need not provide detailed reasons
- Outcomes
 - Explaining court decisions

Conclusion 1

- No good comes from permitting government officials to perform their duties in secret.
- Officials who have become accustomed to operating without accountability are loath to relinquish the power that comes from conducting their business without public scrutiny.
- When public officials resist efforts to shine a light on their activities, there is often something to hide.
- Public scrutiny is often a prerequisite for changing harmful, entrenched practices

Accountability

Explaining decisions → TRANSPARENCY

Taking corrective action → TAKING RESPONSIBILITY

Accountability and the Minister

- The Minister also exerts “final responsibility” over the NPA.
- Is this accountability of and to the Minister inimical to independence?
 - In democracies political actors must determine prosecution priorities.
 - It is usually seen as political interference to intervene directly in specific cases, before they are concluded.
- The NPA must act independently,
 - it is accountable **after the fact** on its independent decision-making to the Minister, Parliament, as well as to the general public, and must comply with the law and lawful orders of court, and prosecutorial policy.
- It is in being transparently accountable, that independence is demonstrated

Clarity and Transparency

- Clear rules must exist.
- The exercise of any discretion cannot be capricious or arbitrary
- It must be principled
 - Based on sound and reasonable known criteria and rules.
 - Policies and directives must be clear and known
- Accountability originates in the basing of decisions in sound and reasonable criteria.
- Explanations are easy to provide when decisions are made in terms of applicable criteria which are clear and publicly available.
 - Reference can simply be made to application of the policy and directives.
- Unprincipled decisions are difficult to explain.

Types of accountability

- Internal accountability
 - Up the chain of command to the NDPP
- Accountability to Parliament
 - Annual Reports
 - Persons awaiting trial
- Public accountability
 - On matters in the public domain
 - To persons with an interest in the matter

Accountability for decisions

- The decision to prosecute or not
 - Special accountability owed to investigators and victims – reasons
 - Accountability to the broader public in noteworthy cases – reasons
- The limits of public accountability
 - Assess privacy, fair trial
 - Explaining in detail decisions in every case not required
 - Reference to directives may be sufficient, unless situation complex or delicate
 - Factual information can be provided
 - Explaining policies
 - Explaining court decisions
 - Case should not be argued outside the courtroom

Conclusion 2

- Public accountability is crucial to demonstrating and achieving independence.
- Accountability through public transparency can achieve the level of prosecutorial independence and accountability required to ensure that the public has confidence in the decisions being made.
- Without trust, the criminal justice system cannot function adequately.