



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS



DIVERSION GUIDELINES AND EXPLANATORY NOTES

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DIVERSION POLICY GUIDELINES AND EXPLANATORY NOTES

Acknowledgements

The Diversion Policy Guidelines and Explanatory Notes have been developed in pursuant to the Diversion Policy, National Prosecution Policy, Article 159 of the Constitution of Kenya and International Legal Framework that emphasizes the use of diversion as an alternative to prosecution.

On behalf of the Office of the Director of Public Prosecutions (ODPP), I acknowledge the contribution of our internal and external stakeholders for their valuable input throughout the process; their views, critique and contributions enriched the development of these Guidelines.

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Last but not least, may I make special mention of the critical role and unwavering dedication of the members of the ODPP Diversion Task Force, led by the Chairperson, Mr. Jacob Ondari (DDPP), Ms. Grace Murungi (SADPP), Ms. Irene Maina (SPPC), Mr. Eddie Kaddebe (PPC), Ms. Jemimah Aluda (PPC), Ms. Linda Ndambiri (SPC), Ms. Carol Sigei (PC), Ms. Naomi Atina (PC), Ms. Angela Kinyanjui and Mr. Charles Rono, for bringing these Guidelines to completion.

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It is my hope that these Guidelines will contribute immensely to imploring alternatives to prosecution thus ensuring effective, efficient and expeditious dispensation of justice to the people of this great nation.

NOORDIN HAJI, CBS, OGW
DIRECTOR OF PUBLIC PROSECUTIONS

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Foreword

The Office of the Director of Public Prosecutions (ODPP) has developed a Diversion Policy – a first for Kenya. Diversion enables prosecutors to divert cases from the court process and allow matters to be settled out of court, on merit and through agreed structures.

Diversion is meant to give offenders a second chance in life, assisting them to reintegrate into the community, and reduce the risks of re-offending. Diversion also ensures that individuals avoid a criminal record but nonetheless atone for their mistakes.

The Diversion Policy Guidelines and Explanatory Notes are intended for Public Prosecutors and should be read alongside the Policy document. They contain information on important factors and practical steps that need to be used to implement the Policy, along with a sample Diversion Agreement and checklist.

Criminal practice in Kenya has long focused on retributive justice with an emphasis on punishing offenders for their crimes. Modern-day criminal law practice has shifted from this approach, instead focusing on restitution, restoration and reintegration.

Through diversion, ODPP is better able to deal with case backlog in Kenya’s judicial system, reduce overcrowding in the prisons and enhance reconciliation by allowing victims and offenders to settle cases out of court. Thus, the Diversion Policy and its Guidelines and Explanatory Notes are important means of operationalizing Article 159 of the Constitution of Kenya 2010.

I am grateful to the members of the ODPP Diversion Task Force who have worked tirelessly and meticulously in developing the Diversion Policy Guidelines and Explanatory Notes. Similarly, I express my singular and institutional gratitude to our international partners and to all agencies who have contributed to the success of this publication. I expect this spirit of inter-agency cooperation to guide us in the dissemination and implementation of the Diversion Policy.

I hope this document proves to be a practical, daily-use guide, not only for prosecutors, but also for judicial officers handling criminal cases and for other actors in Kenya’s criminal justice system.



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DIRECTOR OF PUBLIC PROSECUTIONS

Introduction

1. This document contains guidelines and explanatory notes on the Diversion Policy Office of the Director of Public Prosecutions (ODPP).
2. The Diversion Policy Guidelines and Explanatory Notes are intended for Public Prosecutors. They are an aid to the interpretation of the operation provisions contained in Chapters Two and Four of the ODPP Diversion Policy and should be read alongside the Diversion Policy document.
3. The Guidelines contain information on important factors and practical steps that need to be used by Public Prosecutors to implement the Diversion Policy.
4. Public Prosecutors shall comply with the principles set out in the Guidelines, the National Prosecution Policy (NPC), the General Prosecution Guidelines (GPP) and all other guidelines issued from time to time by the Director of Public Prosecutions (DPP).
5. The definitions contained in the ODPP Diversion Policy apply to the Diversion Guidelines.
6. Review of the Guidelines will remain an ongoing process reflecting legislative, procedural or policy changes in the Diversion Policy.

Guideline on Diversion Policy Clause 2.1 – Who decides if a case should be diverted?

7. Diversion, for the purposes of this policy, is offered at the sole discretion of the responsible Public Prosecutor, or any other persons exercising the DPP's delegated powers.

Guideline on Diversion Policy Clause 2.2 – Why does the DPP make decisions on diversion?

8. The Office of the Director of Public Prosecutions Act 2013 empowers Public Prosecutors to conduct criminal proceedings for the Government. The DPP can formulate and review Public Prosecution Policy, including the Diversion Policy. These prosecutorial powers must be exercised independently, without interference.

Guideline on Diversion Policy Clause 2.3 – Who can request for Diversion?

9. Every Public Prosecutor is required to consider whether a case is suitable for diversion. Public Prosecutors must advise every offender (and, in the case of children or vulnerable persons, his or her representative) of the possibility of diversion.
10. Any interested party may make a request to the Public Prosecutor that an offender be considered for diversion including:
 - a. An offender or his/her representative
 - b. A child offender through this/her representative
 - c. A children's officer
 - d. The police
 - e. A Judicial officer
 - f. The victim or the victim's representative.
11. For example, individuals or representatives of organisations, with knowledge of the character and circumstances of the offender, are often in a good position to assist the prosecution with information on whether diversion is a suitable option for an offender. Other stakeholders in the criminal justice process with information about the offender or the offending, may request diversion on behalf of the offender.
12. Third party requests for diversion will become more common practice once the public and other stakeholders become more familiar with the concept of diversion.

Guideline on Diversion Policy Clause 2.4 – How can a request be made?

13. Diversion requests can be made orally or in writing. Public Prosecutors should be flexible and should consider all requests that are made. Public Prosecutors should keep a record on the file of who made the request, the date and how it was made.

Guideline on Diversion Policy Clause 2.5 – When can Diversion be considered?

14. Diversion can be considered at any time after arrest.
15. As the Public Prosecutor frequently does not see the offender before court, the police should be requested to flag important information when the Police Files are delivered to the prosecutor. 'The quick look checklist' would include the basic information required for diversion to be considered and includes any or all of following:
 - a. The name of the offender
 - b. The age of the offender – or a best guess if that is not clear
 - c. Whether the offender is obviously vulnerable
 - d. Whether the offender has previous convictions
 - e. Whether any effort has been made to repair the harm done by the offending.

Guideline on Diversion Policy Clauses 2.6 and 2.18 – Diversion before a charge is laid

16. Public Prosecutors are to give priority to pre-charge decisions on diversion where possible. Post-charge decisions on diversion should only be used in cases where there are exceptional circumstances.
17. In accordance with the usual process, within 24 hours of arrest, the police will register the Police file at the Police Registry. The investigating officer will then give the Police file to the Public Prosecutor.
18. The Public Prosecutor will review the charge sheet and assess whether the evidence on the file is sufficient to meet the elements of the offence.
19. The Public Prosecutor must evaluate whether the evidence that can be adduced in court is sufficient to provide a reasonable prospect for conviction. If so, the Evidential Test for prosecution is met.¹
20. 'A reasonable prospect of conviction' exists if, in relation to an identifiable individual, there is credible evidence, which the prosecution can adduce before a court, and upon which evidence an impartial court properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence.
21. If there is insufficient evidence to support a charge, the Public Prosecutor can consider whether the 'Threshold test' applies. The evidence available at the time of the offender's first appearance may not support a realistic prospect of conviction, but could be available at trial. For example, expert evidence is unlikely to be available at the time of arraignment but would be available before trial.
22. Once a Public Prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of conviction, the next consideration is whether prosecution is in the public interest. This is called the Public Interest Test.² It is not the rule that all offences for which there is sufficient evidence must be prosecuted. The prosecutor must exercise discretion as to whether there is a public interest in the case being prosecuted.

1 Chapter 4, clauses 4 to 10 of the General Prosecution Guidelines

2 Chapter 4, clauses 11 to 16 of the General Prosecution Guidelines

23. At that point the Prosecutor will decide whether, in principle, a charge could be laid or not. If the Public Prosecutor decides to charge, in principle, diversion can be considered as an alternative to prosecution.
24. If an offender is in custody and decision on diversion is made, after the charge is registered but before a charge is filed in court, the Public Prosecutor will apply to the court for an extension of time to explore diversion.³ The Public Prosecutor will seek a future date for mention. Once diversion is completed, the prosecutor will apply to have the charge withdrawn.
25. If the offender is not in custody the Public Prosecutor can file the charge at any time and does not face restrictive time constraints.
26. When deciding whether to prosecute or divert an offender or to apply one of the other ODP policies such as plea bargaining, the key question should always be whether the conduct warrants the intervention of the criminal process or whether diversion should be offered in the interests of justice to provide a fair solution to the victim, society and the offender.

Guideline on Diversion Policy Clauses 2.7 and 2.18 – Diversion after a charge is laid

27. The Diversion Policy requires a Public Prosecutor to review both the charges and the charging decision on an ongoing basis.⁴
28. Post-charge decisions on diversion should only be used in cases where there are exceptional circumstances or to clear the backlog of cases that are already before the court and are suitable for diversion.
29. There are various factors that contribute to backlog. Some are outside the control of the Public Prosecutor. This process is to be implemented as the exception to the rule. Nevertheless it will be important in instances where it becomes clear that diversion is appropriate on the basis that a person is vulnerable.
30. The post-charge criminal procedure to be followed in such cases.
31. If a decision on diversion is made after the charge is filed in court, the Public Prosecutor will apply to defer the plea and seek a future date for mention.
32. Once diversion is completed, the Public Prosecutor will apply to have the charge withdrawn.

EXPLANATORY NOTE

General Prosecution Guidelines Chapter 5, Clauses 12 and 13 – Review of Charges

12. Granted that the investigative process does not end with the submission of the investigation case file to the DPP and the circumstances of the case may change from time to time, there is need for constant review of not only the charges but also the decision to charge.
13. In reviewing charges, a Public Prosecutor should consider whether:
 - a. Any of the charges should be amended to bring them into conformity with the evidence available
 - b. Other charges should be added
 - c. Any charges should be withdrawn.

Guideline on Diversion Policy Clause 2.8 – Diversion Categories

33. The Public Prosecutor must consider every offender's eligibility for diversion. Each case must be decided on its merits. offenders fall into four categories:

³ Article 49(1)(f) and (h) Constitution of Kenya 2010

⁴ Chapter 5 clauses 12 and 13 (Review of Charges) of the General Prosecution Guidelines

A. Category One: Diversion for adult offenders and petty offences

34. Public Prosecutors have a mandatory obligation to consider diversion for adult offenders who are alleged to have committed petty offences.

B. Category Two: Diversion for Children

EXPLANATORY NOTE

Child defined

“Child” is defined in Article 260 of the Constitution of Kenya 2010. “Child” means an individual who has not attained the age of eighteen years.

This definition is consistent with the definition of a child in Article One of the United Nations Convention on the Rights of a Child.

Article One – Definition of a child

“For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”

35. The General Prosecution Guidelines require Public Prosecutors to consider diversion as an option in all criminal cases involving children. This is a mandatory obligation. This obligation applies irrespective of the nature of the offence. The ‘Exceptional Circumstances’ guidelines may apply if the offence is serious.

36. If a Public Prosecutor is not certain whether a child is under 18 years of age, and there is no other proof of age, the matter may still be considered for diversion. The first step will be to send the person for an age assessment.

i. Children and petty offences

37. The Public Prosecutor can make the decision on whether diversion is available where a child is charged with a petty offence.

ii. Children and felony offences

38. The ‘exceptional circumstances’ test will be applied where a child is charged with a felony.
39. The General Prosecution Guidelines contain a direction to Public Prosecutors that children should not be prosecuted where suitable diversion program are available.⁵ Prosecution must be the option of last resort. The Public Prosecutor must have considered other ways of disposing of cases against children unless the seriousness of the offence or the circumstances of the child concerned dictate otherwise.⁶
40. When making a decision on diversion, a Public Prosecutor may consider the following factors among others:
- a. The age
 - b. Apparent maturity level
 - c. Apparent mental capacity of the child
 - d. Alternatives to prosecution options available to the court
 - e. Whether the parents or guardian(s) of the child are able and prepared to exercise effective control over the child
 - f. The child’s antecedents, including the circumstances of any previous record the child may have been given.⁷

⁵ General Prosecution Policy Clause 18(i)

⁶ General Prosecution Policy Clause 20

⁷ General Prosecution Policy Clause 21

41. Reports may be required on these issues.

iii. Diversion options for children

42. All diversion options are available for children, depending on the nature of the offence. Other appropriate options may also be available.

43. Reports may be required before diversion options can be finalised.

C. Category Three: Diversions for vulnerable persons

EXPLANATORY NOTE

Vulnerable person defined

A 'vulnerable person' means a person who, due to age, gender, disability or other special characteristics, may require the provision of special justice and support. This includes:

- a. Persons with a physical challenge or disability
- b. Persons with a mental disorder
- c. Persons with a mental impairment
- d. Women or men in abusive situations
- e. Elderly person(s)
- f. A person with an underlying issue of drug or alcohol addiction.

A person may show obvious signs of vulnerability. A physical disability may be very obvious on an objective level. If not, a Public Prosecutor can seek verification from a reliable source. Evidence of vulnerability may be required in more complex cases.

44. Public Prosecutors have a mandatory obligation to consider diversion for vulnerable persons irrespective of the nature of the offence.

45. Children are dealt with separately by the policy.

i. Vulnerable people and petty offences

46. The Public Prosecutor can make the decision on whether diversion is available where a vulnerable person is charged with a petty offence.

ii. Vulnerable people and felony offences

47. The 'exceptional circumstances test' will be applied where a vulnerable person is charged with a felony.

D. Category Four: 'Exceptional Circumstance Test' in felony cases

48. In the following category of cases, diversion is only available if the Public Prosecutor is satisfied, after consultation with this/her supervisor or the DPP, that exceptional circumstances exist:

- a. The offence is a felony
- b. The offender is a repeat offender, or has a significant criminal record
- c. The offender has previously received diversion
- d. A mandatory or minimum penalty has been imposed by Parliament.

49. Where the offence requires the DPP's consent (i.e. is a special category offence) only the DPP can make a decision on diversion.

50. 'Exceptional circumstances' must be determined on a case-by-case basis and can include factors relating to:
- a. The circumstances of the offending. They may include cases where the offence is serious but the facts, or level of participation diminish the seriousness of the offence
 - b. The personal circumstances of the offender and, in particular, the where the effect of a conviction is out of all proportion to the seriousness of the offence
 - c. The views of the victim and investigating officer, particularly where they consent to diversion being imposed.

EXPLANATORY NOTE

Diversion For Second Offences

Diversion may be granted if the offences is a second or subsequent offence and:

- a. The offence was committed as a result of a genuine mistake or misunderstanding, or
- b. There has been a long delay between the commission of the offence and the trial
- c. The offences are unrelated.

Diversion will not be available where:

- a. The offence is serious
- b. The delay can largely be attributed to the offender
- d. The offence has only recently come to light
- e. The complexity of the offence has necessitated a long investigation
- f. New investigative techniques have been used to re-examine previously unresolved crimes and, as a result, an offender has been identified.

Guideline on Diversion Policy Clause 2.9 – When is eligibility for Diversion considered?

51. The offender's eligibility for diversion is considered once a Public Prosecutor determines the following factors:

EXPLANATORY NOTE

Serious Offences

Diversion on charges of murder, robbery and rape and special category offences will be rare.

- a. There is sufficient evidence to support the charge. The Evidential Test or the Threshold Test in the Prosecution Guidelines must be satisfied,
- b. It is in the public interest to prosecute the case. The Public Interest Test in the Prosecution Guidelines must be satisfied,
- c. Information is available about the offender, including:
 - i. Age
 - ii. Male/Female
 - iii. Fixed abode/bail surety/custody
 - iv. Previous criminal record
 - v. Vulnerability.
- d. Special circumstances exist (For example, where the offence was committed as a result of a genuine mistake or misunderstanding; there has been a long delay between the commission of the offence and the trial).

Guideline on Diversion Policy Clause 2.10 – The Decision On Diversion: Factors To Be Taken Into Account

EXPLANATORY NOTE

Approach to exercise of prosecutorial discretion and decision-making

- a. All decisions on diversion are potentially susceptible to judicial review. Prosecutors should approach all decisions on diversion on the basis that they may be tested in the courts. The prosecutor must act rationally, proportionately and impartially. Each case should be considered on its own merits.
- b. Where there is more than one offender, different disposal options may be justified for different offenders within a single case. The background and circumstances of different offenders can vary greatly, as can their degree of involvement. Each offender should be considered on his/her own merits. The reason for differentiation must be recorded and capable of explanation. Where prosecution is directed against some, but not all offenders, the court should be made aware of the diversionary disposals.

A. Mandatory And Discretionary Factors

52. This section sets out a non-exhaustive list of factors that are to be considered by a Public Prosecutor when making a decision on diversion. Some factors are mandatory considerations. They are the same as the criteria for the Public Interest Test in the National Prosecution Policy (NPP) and the General Prosecution Guidelines (GPG). The Public Prosecutor can also consider additional discretionary factors as long as they are not inconsistent with the NPP and GPG.

B. Offender-focused criteria

i. The Diversion Interview

53. The Public Prosecutor must evaluate whether diversion is an appropriate option for each individual Offender. If so, s/he will interview the Offender (the Diversion Interview) to explain what diversion involves, to obtain more information on the circumstances that led to the offending, and to confirm that the offender will acknowledge guilt or accept responsibility for the offending. If the offender is a child, the child's guardian or representative and/or a children's officer shall also need to be present.
54. The Public Prosecutor will also discuss or propose suitable and available diversion options or programmes with the offender. In simple case involving low level offending, a Public Prosecutor may make an immediate decision on suitable conditions for the Diversion Agreement. In more complex cases, the Public Prosecutor may need to confer with multi-agency counter parts and other stakeholders to discuss suitable diversion conditions, the availability of programmes and resources, and to arrange suitable diversion programme and options.
55. If the Public Prosecutor cannot make a decision on diversion or the diversion options immediately, the decision can be deferred to another date.

C. Offence-focused criteria

i. Mandatory and discretionary considerations

56. The mandatory factors listed below, in favour of and against diversion, are international best practice in criminal diversion cases.

Mandatory considerations: Factors weighing against diversion, include, but are not limited to, the following:

- The seriousness of the offence i.e. where a conviction is likely to result in a significant penalty including any confiscation order or disqualifications
- Where the offender was in a position of authority or trust and the offence is an abuse of that position
- Where the offender was a ring-leader or an organizer of the offence
- Where the offence was pre-meditated
- Where the offence was carried out by a group
- Where the offence was carried out pursuant to a plan in pursuit of organised crime
- Where the offence involved the possession or use of a firearm, imitation firearm or other weapon such as a knife
- Where the offence is genocide, war crimes and crimes against humanity
- Where the offence is prevalent
- Where the offence has resulted in serious financial loss to the individual, corporate person or society
- Where the offence was committed against a person performing a public duty
- Where the witness or their family has suffered threats, personal attack, damage or disturbance
- Where the victim are persons of a vulnerable group and persons with mental disability
- Where the offence is of economic crimes and corruption
- Where the Offender has previous convictions/ records or diversionary disposals which are relevant
- Where the offender is alleged to have committed the offence while on bail or bond, on probation or subject to a suspended sentence or a conditional discharge

Mandatory considerations: Factors weighing in favour of diversion, include, but are not limited to, the following:

- Whether there is a possibility that the offender will co-operate with the law enforcement and benefit from the diversion program;
- Whether there is sufficient evidence;
- Whether the offender is a first offender;
- Where the offence is a misdemeanor (however serious offences may be considered in exceptional circumstances);
- Where the offender has accepted full responsibility of the offence;
- Where the offender agrees to the terms of the diversion;
- Where the court is likely to impose a very small or nominal penalty or sentence;
- Where there has been a long passage of time between an offence taking place and the likely date of trial unless:
 - The offence is serious;
 - Delay has been caused in part by the offender;
 - The offence has only recently come to light; or
 - The complexity of the offence has resulted in a lengthy investigation;
- Where prosecution is likely to have a detrimental effect on the physical or mental health of a victim or witness;
- Where the offender was at the time of the offence or trial suffering from significant mental illness;
- Where the offender has restituted the victim for the loss or harm that was caused and was remorseful;
- The impact of the diversion on the community;
- Though not binding, consider recommendations of the law enforcement agency and the victim.

57. Discretionary considerations listed below, in favour of and against diversion, are to be taken into account. Other factors may also be relevant and should also be considered.

Discretionary factors weighing in favour of diversion may be considered provided they are not inconsistent with the NPP or GPG. These could include, but are not limited to the following:

- Whether there are ways of dealing with these matters other than diversion [e.g. administrative action, amnesty and immunity, plea bargain];
- It may be appropriate to consider diversion for an offender who has received diversion before, has historical convictions or had previous unrelated convictions;
- Other relevant factors.

Discretionary factors weighing against diversion may be considered provided they are not inconsistent with the National Prosecution Policy or General Prosecution Guidelines. These could include, but are not limited to the following:

- There are grounds for believing that the offence is likely to be continued or repeated, for example where there is a history of recurring conduct;
- Other charges are pending.;
- The Offender's response was disproportionate to a perceived threat;
- Other relevant factors.

58. Where the Public Prosecutor is unsure whether or not to offer diversion to offenders with previous convictions, the prosecutor can seek direction from his/her supervisor if necessary.

ii. Victim's views

59. Not all crimes involve an identifiable victim. If the victim is the complainant, the victim's views on diversion, and their reasons for those views, should always be considered before making a final decision on diversion. The victim's views can also be sought on the conditions available for diversion.

EXPLANATORY NOTE

Victims

The law recognizes that special arrangements may be in the victims' best interests in criminal cases, including:

- a. Court approved counselling and reconciliation programs are available in domestic violence cases.⁸
- b. Reconciliation, restorative justice or other redress are recognised as means of promoting the dignity of victims.⁹

A Public Prosecutor may decide that a restorative justice process is a suitable way to balance the needs of the victim and/or community. The victim's view will be sought to find out if s/he is willing to meet the offender.

Where the victim, or offender, is a child the views of the parent or guardian should be sought. If restorative justice is proposed, the consent of the parent will be required so that the process can be supervised. A restorative justice meeting will enable the victim to explain the impact of the offense on them and learn more about the reasons for commission of crime.

60. It is important that the Public Prosecutor informs or keeps the victim updated during the diversion process. A Public Prosecutor may wish to have a discussion with the victim on the proposed diversion conditions. The Public Prosecutor shall carefully explain the advantages of diversion to the victim so they can express an informed view. However, a Public Prosecutor is not bound by the victim's views.
61. The Public Prosecutor must evaluate all of the relevant information to decide whether the offender should be prosecuted or offered diversion.

iii. Investigating Officer's views

62. A Public Prosecutor shall consult the investigating officer and consider his/her views. However, a Public Prosecutor is not bound by the investigating officer's views. A prosecutor must evaluate all relevant information to decide whether the offender should be prosecuted or offered diversion.

EXPLANATORY NOTE

Consultation with Police

The reason why consultation is important is that the investigating officer may have additional information that is not included in the police file, or may know the offender.

Guideline on Diversion Policy Clauses 2.11 and 2.12 – Options for Diversion and Selecting diversion options

i. Selecting options for offenders

63. A Public Prosecutor may select from a menu of diversion options.

⁸ Section 15 Protection Against Domestic Violence Act 2015. Article 50 (9) of the Constitution 2010 requires Parliament to enact legislation providing for the protection, rights and welfare of victims of offences.

⁹ Sections 3(b)(iii) and 15(1)(2) of the Victim Protection Act 2014.

EXPLANATORY NOTE

Additional options may be available

Public Prosecutors should be alert to other options that may become available in future.

64. Reports and additional information may be required before diversion options can be finalised. Where possible, objective criteria should be relied upon to determine appropriate levels of compensation if that is the option selected. A Public Prosecutor must be satisfied that they have sufficient information to make a decision on the options available. A Public Prosecutor will be required to justify all decisions on diversion.

i. Criteria for selecting Diversion options for children

65. Where the subject of diversion is a child, the diversion option must be proportionate to the circumstances of the offence, and must take into account:
- a. The child's cultural, religious and linguistic background
 - b. The child's educational level, cognitive ability and domestic and environmental circumstances
 - c. The proportionality of the option recommended, or selected to the circumstances of the child, the nature of the offence and the interests of society
 - d. The child's age and developmental needs
 - e. The best interests of this child.

EXPLANATORY NOTE

Proportionality

If the gravity of the offence is low, a simpler diversion option can be chosen. If the offence or circumstances of the offence are serious, the diversion option may be more severe.

iii. Diversion Options

66. A range of Diversion options are available. Some are simple. Others are more complex and resource intensive. They may require more time to complete. Some require professional treatment, stakeholder participation, multi-agency participation, or coordination and mobilisation of resources from State and non-State actors.
67. Diversion options include:
- a. A formal caution administered by the prosecutor with or without conditions
 - b. An unconditional oral or written apology to a specified person or persons or institution
 - c. Reparation to the victim for emotional harm [cash or kind]
 - d. Compensation to the victim [cash or kind]
 - e. Restitution by paying compensation of any expenses incurred by the victim [cash or kind]
 - f. Affordable, symbolic restitution to a specified person(s), group of persons or community, charity or welfare organisation or institution
 - g. Attending a mentorship session
 - h. Attending a community-based counselling session [vocational, church, school]
 - i. A voluntary activity providing a service to the community
 - j. Provision of some service or benefit to a specified victim or victims
 - k. Religious instruction
 - l. Completing or regularising administrative procedures for regulatory offences (such as obtaining a visa or license)

- m. Training options
 - n. Referral to an addiction treatment or related programme
 - o. Referral to vocational training
 - p. Referral to a counselling programme that might help the offender deal with personal issues including (but not limited to):
 - i. Alcohol and drug counselling
 - ii. Anger management
 - iii. Financial and budgeting advice
 - iv. Child welfare
 - v. Family or relationship counselling
 - vi. Counselling for unresolved personal issues (e.g. grief, sexual abuse)
 - q. Maintaining employment or attending school for children
 - r. Placement under supervision of the children's officer. The supervision order will include certain conditions to be met by the offender e.g good behaviour by the offender and avoiding bad company
 - s. Administrative action
 - t. A restorative justice meeting with the victim for reconciliation or apology
 - u. Community service under the supervision or control of an organisation, institution, or specified person
 - v. Referral to a therapeutic program
 - w. Referral to a supervised mental health care/treatment
 - x. Referral to an education programme.
68. All diversion options are available for all offenders. The option selected must be proportionate to the offence. The following options are not available for a felony offence either separately or in combination:
- a. A formal caution
 - b. Oral or written apology

EXPLANATORY NOTE

Diversion Options

The Diversion Policy anticipates that some of these options may not be immediately available. Some options and program will be developed and implemented over time.

69. If a suitable diversion option or combination of options is not available then diversion will not be appropriate.

iv. Minimum standards for Diversion

70. Minimum standards are applicable to diversion options. Diversion objectives and options must be structured so as to strike a balance between the public interest, being sensitive to the circumstances of the victim, and address the circumstances of the offender. Diversion options should not be punitive. No exploitative, harmful or hazardous options are permitted. The physical and mental health of the offender cannot be jeopardized by the diversion option.
71. Where diversion is offered to children it must be appropriate to the age and maturity of the child and may not interfere with the child's schooling.
72. The conditions of diversion must be achievable. Diversion options should not be structured to exclude those persons who lack financial or other resources and should be easily accessible.

73. Where possible diversion program should impart useful skills. All diversion programmes should include an element, which assists the offender to come to terms with, or demonstrates that the offender has insight into the reasons for his/her offending and the impact of that behaviour.
74. Diversion program should be structured in way that is suitable to be used in a variety of circumstances and for a variety of offences so that outcomes and effectiveness are measurable, can be implemented nationally, and can include participation for the caregivers for children and other vulnerable groups.
75. Diversion will not proceed if suitable diversion options are not available.

Guideline on Diversion Policy Clause 2.13 – The Diversion Agreement

76. The only parties to the Diversion Agreement are the ODPP and the offender or his or her legal representative. Other participants in the diversion process will not be party to that agreement, although they may have reporting and certification functions.
77. The Diversion Agreement will focus on bringing about a change in the offender's behaviour, preventing re-offending and making reparation to the victim or community as appropriate.
78. A number of conditions and diversion options can be included in the Diversion Agreement, as long as they achieve the objectives of diversion.
79. The Public Prosecutor must explain the diversion process to the offender, the terms and conditions of the agreement, and the consequences if the conditions are not met (i.e. the case will be referred back to court for prosecution). If the offender is a child, and has a legal representative, that representative shall ensure that the conditions of diversion have been explained to the child. The Public Prosecutor should ascertain that the child understands.
80. The offender must freely and voluntarily give consent in writing to diversion and shall agree to participate in the diversion option, even if the offender is a child. The offender, and/or his/her representative, must agree to the conditions before the diversion agreement can be finalised and signed.
81. If the offender fails to meet the terms of the Diversion Agreement, exceptions may be granted by the Public Prosecutor, if there is a reasonable explanation.
82. The Diversion Agreement is a standard form document. It can be adapted to the circumstances of each case. If significant variations are required, Public Prosecutors should speak to their supervisors in appropriate cases.

Guideline on Diversion Policy Clause 2.14 – What happens if a suitable programme for diversion is not available?

83. Every effort should be made to ensure that suitable candidates receive diversion. All diversion options should be carefully considered before a decision is made not to offer diversion to a candidate. Public Prosecutors should consider combining a number of alternative options in preference to refusing diversion for a suitable candidate.

Guideline on Diversion Policy Clause 2.15 – Timeframe for Diversion

84. The timeframe for diversion will depend on the diversion option chosen. It should be completed within a reasonable time. The timeframe will be in the Diversion Agreement. The period will depend on:
 - a. The offender's rehabilitation needs
 - b. The seriousness of the offence
 - c. Or other conditions the police, children officer and the probation officers deems appropriate.

85. The Public Prosecutor reserves the right to terminate the offender's supervision based upon any violation of the terms and conditions. The police, or the children officer or program provider will inform the prosecutor of the violation who will in turn terminate the diversion option and inform the offender.
86. The decision to vary or terminate the offender's supervision in diversion can be reviewed upon notice of an irregularity as to the correctness, legality or propriety of the facts presented.
87. In case of termination of the diversion programme an alternative should be sought. If no suitable alternatives are available, the prosecution case will continue to logical conclusion through the criminal justice process.

Guideline on Diversion Policy Clause 2.16 – Completion of Diversion

88. The Public Prosecutor must certify that s/he is satisfied that the offender has completed his/her diversion requirements. Certification in a prescribed form will be annexed to the Diversion Agreement. It can be modified if circumstances require.
89. If the diversion candidate has made every effort to complete the conditions of diversion but has been prevented from doing so through no fault of their own, alternative option(s) can be offered.
90. A 'No Further Police Action' letter will be sent/handed to the police.

Guideline on Diversion Policy Clause 2.17 – Coordination with other prosecution policies

91. Public Prosecutors should consider whether the case before them is more suited to any of the other ODPP criminal justice policies.
92. There is a potential interface between the Diversion Policy, plea bargaining and other Alternative Justice System. The Public Prosecutors must ensure that all of the options have been carefully considered.

Guideline on Diversion Policy Clause 2.18 – Criminal Procedure

93. If a decision on diversion is made before a charge is filed in court, the Public Prosecutor will apply to the Court to extend time to defer the laying of the charge.
94. If a decision on diversion is made after the charge is filed in court, the Public Prosecutor shall seek to defer the plea.
95. If the case is deferred and the parties do not agree on diversion, the matter should proceed to its logical conclusion through the courts.
96. Once diversion is completed, the Public Prosecutor shall apply to have the charge withdrawn.

Guideline on Diversion Policy Clause 3.19 – Bail and Bond

97. If the offender is in custody, and an extension of time is granted or a plea deferred, the Public Prosecutor may ask for bail, where appropriate, and request that the court impose lenient bail terms or free bond, so that diversion can be explored.

Guideline on Diversion Policy Clause 3.20 – Confidentiality

98. Diversion records will remain on the prosecution, court and Police Files but only for official use in the administration of the justice system. The Diversion Agreement is negotiated on a 'Without Prejudice Basis'. The information will not be available to members of the public or be improperly used to prejudice the offender in future.

Guideline on Diversion Policy Clause 3.21 – Reasons and record of decisions on Diversion

99. Public Prosecutors shall keep a record of their decisions on diversion and the reasons for them.¹⁰
100. Decisions on diversion may be susceptible to judicial review. Proper records of decisions, and the reasons for them, must be kept.

EXPLANATORY NOTE

Reasons for Decisions

Some Public Prosecutors have expressed concern that, initially, their decisions on diversion may be viewed as improper until the diversion philosophy becomes embedded into the criminal justice system. A clear record with carefully thought out reasons reduces this risk.

The General Prosecution Guidelines require prosecutors to give reasons for their decisions:

Where Public Prosecutors are requested by complainants, family members of deceased persons, Offender or his/her legal representatives to furnish reasons for the exercise of their prosecutorial discretion, in the interest of transparency, and in the general spirit of fair administrative action, the reasons should be given in writing.

101. The reasons for and against diversion should be recorded and placed on the offender's file. The offender should be advised of the decision and the reasons for it.
102. The offender and victim will be informed of the Public Prosecutor's decision in writing or orally if there are barriers to communication.

Guideline on Diversion Policy Clause 3.22 – Review of decisions

103. If the offender wishes to seek a review of a Public Prosecutor's decision to refuse diversion, the Prosecutor will send the file to his/her supervisor or the DPP.
104. The supervisor or DPP will reconsider the matter. If s/he is satisfied that the matter is suitable for diversion the DPP or supervisor will direct that diversion be explored. The offender and the victim will be advised of that decision. A written record confirming that this advice has been given shall be placed on the prosecutor's file.

Guideline on Diversion Policy Clauses 4.1 – Register of Diversion cases

105. A register of diverted cases will be kept by the DPP for reporting purposes.

Guideline on Diversion Policy Clauses 4.2 to 4.6 – Monitoring And Evaluation – Financing

106. The DPP will establish a system of monitoring and evaluation of the effectiveness of the Diversion Policy through routine data collection support and supervision.

10 Clause 31 General Prosecution Guidelines



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

DIVERSION AGREEMENT

Particulars of Alleged Offence

This Agreement is made on the.....day of.....20..... between (name of accused or suspect), of the one part and the Office of The Director of Public Prosecutions of the second part; in relation to.....(Provide full case citation if the matter has already been registered in court) investigations relating to the offence ofwhere it is alleged that you have committed an offence(s) against the state on or about the.....(dd/mm/yy).

After an investigation of the offense(s) and conduct of background check, it appears that the interests of the Republic, and your own, will best be served by not currently charging you.

Therefore, on the authority of the Director of Public Prosecutions, prosecution in this matter for said violation(s) will be diverted in accordance with the Diversion Policy and Guidelines, provided you abide by the conditions set out in Part A of this Agreement:

Part A: Undertaking by the Suspect

I (suspect) in appreciation of the terms proposed in this Diversion Agreement give an undertaking as follows; that

1. I shall report to the diversion officer on basis at a predetermined time set by the counsellor (or equivalent officer).
2. I shall refrain from violation of any law. I acknowledge that in the event of a criminal arrest while on the diversion program, the ODPP will have the option of terminating the program and instituting the charges that form the basis of this Diversion Agreement and/or any other offence that may result from my subsequent arrest.
3. I shall attend a counselling program listed below and cooperate, attend all scheduled appointments, and attend any referrals my counsellor recommends.
4. I shall immediately inform the (relevant officer) of any change in residence or employment.
5. I will co-operate in providing any information requested through the diversion program. I will promptly and truthfully answer all inquiries directed to me by the court or the diversion officer, and allow the diversion officer to visit my home, place of employment, or elsewhere, and I will comply with all instructions he or she may give.
6. I will abide by all or any of the following special conditions (please provide the appropriate and available diversion options):

Part B: Undertaking by the ODP

7. The ODP during the period of diversion, retains the right to revoke or modify the conditions as set out in this Diversion Agreement by:

- Adjusting the period of diversion (as may be informed by prevailing circumstances) (insert period)
- Prosecuting you for the offense(s) that are the subject of this diversion if you violate any of the stipulated conditions
- Voiding this agreement should it be determined that the suspect/accused has a prior record of adult criminal conviction(s), or criminal involvement, or that the suspect/accused has given false information.

If the suspect/accused complies with these conditions during the period of diversion no criminal prosecution on this charge(s) will be instituted. If charges have already been instituted, they will be terminated or withdrawn without prejudice upon compliance with these conditions during and throughout the period of diversion.

This Agreement in whole or in part shall not be used to the detriment of the suspect/accused in a court of law or tribunal in the event he/she is charged after the failure of the program.

Reason wherefore by signing this Agreement, the accused/suspect acknowledges that s/he enters this agreement voluntarily and that the above has been explained fully and he/she understands all conditions of this Agreement and the consequences of not complying with them. Where the accused person/ suspect has an advocate on record signing this agreement verifies that he/she has consulted sufficiently with them and signs this agreement in full knowledge of my rights and waiver thereof.

.....
Accused / Suspect

.....
Date

.....
Diversion Officer

.....
Date

.....
Prosecution Counsel

.....
Date

.....
Defence Counsel/ Advocate
for the Accused/Suspect

.....
Date



ODPP – DIVERSION CHECKLIST

Diversion Case Number	Court	Date	Prosecutors Name	Date of Arrest
Suspect's Name: Phone Number: Representative: Phone Number:	Police Registry #	Court Registry #	Investigating Officer	Police Station
Suspect of Fixed abode <input type="checkbox"/> Yes <input type="checkbox"/> No	Address:	<input type="checkbox"/> Adult <input type="checkbox"/> Child (Up to 18 years)	D.O.B. _____ Age: _____	<input type="checkbox"/> Male <input type="checkbox"/> Female
Student <input type="checkbox"/> Yes <input type="checkbox"/> No Occupation:	Co-accused <input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> 1st offence <input type="checkbox"/> 1 or more previous convictions Reasons _____	Nationality <input type="checkbox"/> Kenyan <input type="checkbox"/> Other _____	Referral for diversion to be considered? <input type="checkbox"/> Yes <input type="checkbox"/> No Referring party:
Particulars of charge(s) OR	<input type="checkbox"/> Misdemeanour <input type="checkbox"/> Felony	<input type="checkbox"/> DPP consent required to charge <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Special category offence <input type="checkbox"/> Foreigner	Special circumstances <input type="checkbox"/> Vulnerable person <input type="checkbox"/> Mitigating circumstances	Nominal penalty likely <input type="checkbox"/> Yes <input type="checkbox"/> No
Why is suspect in custody?	Has suspect been offered bail or bond? <input type="checkbox"/> Yes <input type="checkbox"/> No	What is amount of surety or bond? KES _____	Can suspect afford to pay bail or bond? <input type="checkbox"/> Yes <input type="checkbox"/> No	Reason why is prosecutor not applying for Court bail:
Victimless crime <input type="checkbox"/> Yes <input type="checkbox"/> No Victim's name: Victim's representative:	<input type="checkbox"/> Adult <input type="checkbox"/> Male <input type="checkbox"/> Child <input type="checkbox"/> Female	D.O.B. _____ Age: _____	Nationality <input type="checkbox"/> Kenyan <input type="checkbox"/> Other _____	Suspect accepts responsibility <input type="checkbox"/> Yes <input type="checkbox"/> No
<input type="checkbox"/> National Prosecution Policy considered <input type="checkbox"/> General Prosecution Guidelines considered	Evidential Test <input type="checkbox"/> Satisfied <input type="checkbox"/> Not satisfied	Public Interest Test <input type="checkbox"/> Satisfied <input type="checkbox"/> Not satisfied	Charge <input type="checkbox"/> Recommended <input type="checkbox"/> Not Recommended	Other prosecution policies <input type="checkbox"/> Plea bargain <input type="checkbox"/> AJS <input type="checkbox"/> ADR <input type="checkbox"/> Other

All mitigating circumstances considered as per policy guidelines <input type="checkbox"/> Yes <input type="checkbox"/> No Other factors:	All aggravating circumstances considered as per policy guidelines <input type="checkbox"/> Yes <input type="checkbox"/> No Other factors:
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Diversion interview with suspect <input type="checkbox"/> Yes <input type="checkbox"/> No Diversion interview – relatives <input type="checkbox"/> Yes <input type="checkbox"/> No	Victim consulted on: <input type="checkbox"/> Diversion <input type="checkbox"/> Diversion conditions <input type="checkbox"/> Consent <input type="checkbox"/> Yes <input type="checkbox"/> No	Appropriate and proportionate diversion options available <input type="checkbox"/> Yes <input type="checkbox"/> No	Diversion recommended <input type="checkbox"/> Yes <input type="checkbox"/> No Defendant advised <input type="checkbox"/> Victim advised <input type="checkbox"/> Other
---	--	---	---

Diversion Agreement attached <input type="checkbox"/> Yes <input type="checkbox"/> No Diversion options:	<input type="checkbox"/> Pre-charge diversion <input type="checkbox"/> Post-charge diversion Review requested <input type="checkbox"/> Yes <input type="checkbox"/> No	Timeframe for diversion: Case referred <input type="checkbox"/> Yes <input type="checkbox"/> No Due date for review	Diversion completed <input type="checkbox"/> Yes <input type="checkbox"/> No Outcome of review: Diversion <input type="checkbox"/> Recommended <input type="checkbox"/> Not recommended
Suspect advised of review of decision to decline diversion or conditions <input type="checkbox"/> Yes <input type="checkbox"/> No	Review requested <input type="checkbox"/> Yes <input type="checkbox"/> No	Case referred <input type="checkbox"/> Yes <input type="checkbox"/> No Due date for review	Diversion certified <input type="checkbox"/> Yes <input type="checkbox"/> No Defendant advised <input type="checkbox"/> Victim advised
Suspect advised of review of decision not to certify completion <input type="checkbox"/> Yes <input type="checkbox"/> No	Review requested <input type="checkbox"/> Yes <input type="checkbox"/> No	Case referred <input type="checkbox"/> Yes <input type="checkbox"/> No Due date for review	Outcome of review: Certification <input type="checkbox"/> Recommended <input type="checkbox"/> Not recommended Defendant advised <input type="checkbox"/> Victim advised

Other comments:



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