



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

# DIVERSION POLICY

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OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

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# DIVERSION POLICY

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## ACKNOWLEDGEMENTS

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

I acknowledge the invaluable contribution of our internal and external stakeholders for their valuable input throughout the process; their views, critique and contributions enriched the development of the Diversion Policy.

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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 this Policy to completion.

To all those who contributed either directly or indirectly to the successful preparation of the Diversion Policy, I hope to have you all on board for the implementation process.

It is my hope that this Diversion Policy 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

Criminal practice in Kenya has long focused on retributive justice with an emphasis on punishing offenders for their crime. Modern-day criminal law practice has shifted from this approach, instead focusing on restitution, restoration and reintegration. Punishment for offences must consider the impact of the punishment on both the individual and society.

The previous approach of subjecting all cases to trial has resulted in a serious backlog of cases and an increase in the number of suspects held in custody in the course of their trial. Significant resources are expended to sustain people in custody, including those unable to meet the bail terms set. This is made worse for misdemeanors. These resources could be directed elsewhere if options other than prosecution are considered.

It is in this regard that the Office of the Director of Public Prosecutions (ODPP) has developed this Diversion Policy – a first for Kenya. This Policy 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 provide an option for an offender and give them a second chance in life. Diversion also ensures that individuals avoid a criminal record but nonetheless atone for their mistakes.

This Policy provides for various options, such as simply issuing an apology or compensating for the loss. More complex diversion options include rehabilitation and counselling services for offenders.

Through diversion, ODPP is better able to deal with case backlog in our judicial system, reduce overcrowding in the prisons and enhance reconciliation by allowing victims and offenders to settle cases out of court. Thus, this Policy is an important means of operationalizing Article 159 of the Constitution of Kenya 2010.

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

I am grateful to the members of the ODPP Diversion Task Force who have worked tirelessly and meticulously in developing this Policy. 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 this Policy.



**NOORDIN HAJI, CBS, OGW**  
**DIRECTOR OF PUBLIC PROSECUTIONS**

## DEFINITIONS

The following definitions apply to this policy:

<b>ADR</b>	(Alternative Dispute Resolution) means an informal and non-adversarial process where an impartial, objective and neutral third party encourages, assists and facilitates resolution of a dispute between two or more parties but does not include attempts made by a judicial officer, to settle a dispute within the course of related judicial proceedings.
<b>Child</b>	means an individual who has not attained the age of 18 years. 'Children' has a corresponding meaning.
<b>Compensation</b>	means an award granted to a victim who has suffered economic or emotional loss, damage of property, or physical injury or harm as a result of an offence after a claim has been justified.
<b>Consent</b>	means an agreement between two parties to the same thing in the same sense or where parties concur with a proposal.
<b>Constitution</b>	means the Constitution of Kenya 2010.
<b>Diversion</b>	for the purposes of this policy, means a process for resolving criminal cases without resort to full judicial proceedings. Diversion can take the form of a simple caution or warning, an apology to the victim, payment for damage done, or it may involve referral to a structured diversion Programme, restorative justice process or similar scheme. This enables offenders to be dealt with by non-judicial bodies and thereby avoiding the negative effects of formal judicial proceedings, a criminal conviction and a criminal record.
<b>Intellectual impairment</b>	includes, without limitation, circumstances where a person has certain limitations in intellectual functions such as communicating, or taking care of him or herself, or has significantly sub-average general intelligence or has impaired social skills.
<b>Legal Representative</b>	means a person who oversees the legal affairs of another or who represents or stands in the place of another under authority recognised by law.
<b>Investigating Officer</b>	means a police officer, or any other person formally mandated by statute, who is in charge of a criminal investigation.
<b>Investigative Agency</b>	includes the National Police Service, Ethics and Anti-Corruption Commission, Kenya National Commission on Human Rights, Commission on Administration of Justice, Independent Police Oversight Authority, Kenya Revenue Authority, Anti-Counterfeit Agency or any other Government entity mandated with criminal investigation under any written law.
<b>Mental disorder</b>	in relation to any person, means an abnormal state of mind (whether of a continuous or an intermittent nature), characterized by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it poses a serious danger to the health or safety of that person or of others; or seriously diminishes the capacity of that person to take care of himself or herself. Mentally disordered, in relation to any such person, has a corresponding meaning.
<b>Offence</b>	means an act, attempt or omission punishable by law, and includes a regulatory offence.
<b>Offender</b>	for the purpose of this policy, means a suspect, subject, accused person or any other person who has been arrested for a criminal offence mentioned here of transgression.
<b>Retributive Justice</b>	means a system of criminal justice based on the punishment of offenders rather than on rehabilitation.
<b>Persons with disabilities</b>	for the purpose of this policy, includes persons who have long-term physical, mental, intellectual or sensory impairments which may hinder their full and effective participation in society on an equal basis with others.
<b>Public Prosecutor</b>	for the purpose of this policy, has the meaning assigned in the Office of the Director of Public Prosecutors Act 2013 and includes any other person exercising delegated powers of the DPP under Article 157(9) of the Constitution.



<b>Restitution</b>	means the act of restoring the victim, to the extent possible, to the same position they were in prior to the offence, which resulted in loss or injury.
<b>Restorative justice</b>	includes, without limitation, any of the following: <ul style="list-style-type: none"><li>(a) The promotion of reconciliation, restitution and responsibility through the involvement of the offender, the victim, their parents (if the victim and offender are children), and their communities.</li><li>(b) A systematic legal response to victims or to the immediate community that emphasizes healing the injuries resulting from the offence.</li></ul>
<b>Rights of victims</b>	means any rights to which a victim is entitled under the Constitution or any other written law.
<b>Traditional justice</b>	means a method of resolving a dispute or disagreement through traditional cultural justice mechanisms.
<b>Vulnerable person</b>	means a person who, due to age, gender, disability or other special characteristics, may require the provision of special justice and support.
<b>Victim</b>	means any natural person or legal entity that suffers injury, loss or damage as a consequence of an offence.

## LIST OF ACRONYMS, TITLES AND ABBREVIATIONS

The following abbreviations will be used for the purposes of this policy:

<b>ADR</b>	Alternative Dispute Resolution
<b>AJS</b>	Alternative Justice System
<b>CSO</b>	Civil Society Organisation
<b>CUC</b>	Court Users Committee
<b>DPP</b>	Director of Public Prosecutions
<b>GPG</b>	General Prosecution Guidelines
<b>KPS</b>	Kenya Prison Service
<b>NCAJ</b>	National Council on Administration of Justice
<b>NPP</b>	National Prosecution Policy
<b>ODPP</b>	Office of the Director of Public Prosecutions
<b>TDRM</b>	Traditional Dispute Resolution Mechanisms
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNCRC</b>	United Nations Convention on the Rights of the Child
<b>UNICEF</b>	United Nations Children's Fund

## CHAPTER ONE – BACKGROUND INFORMATION

### 1.1 Introduction

1. The Constitution endorses alternatives to criminal prosecution and encourages outcomes in criminal cases other than imprisonment. The Constitution moves from a retributive to restorative criminal justice model. It promotes reconciliation, mediation and traditional dispute resolution mechanisms, and recognises that justice should be administered without undue regard to procedural technicalities.
2. Diversion offers an alternative to criminal prosecution. Diversion, as a concept, was introduced in 2015 by the National Prosecution Policy (NPP):

#### a) Alternatives to trial

Speedy disposal of matters in the justice system is a critical component to enhancing access to justice. In the same breath, considerable resources are saved by exploring alternatives to prosecutions, such as plea negotiation and agreement, diversion, and alternative and traditional dispute resolution mechanisms.

#### b) Diversion

In contemplating alternatives to trial, due consideration should be given to waiving prosecution, discontinuing proceedings, either conditionally or unconditionally, or diverting cases from the formal justice system. This should be done with full respect for the rights of the suspects and the victims.

Diversion is encouraged particularly in cases of children in conflict with the law. It is premised on the principle of the best interests of the child, and the need to rehabilitate such children and avoid their stigmatization and adverse effects of custodial sentence.

3. This policy amplifies the NPP and expounds on the details of the diversion process contained in the General Prosecution Guidelines 2015 (GPG). It is intended to demystify diversion, so that Public Prosecutors, stakeholders in the criminal justice system and members of the public have a better understanding of the process.
4. The Diversion Policy establishes a national standard for diversion to ensure that diversion is implemented in a consistent and fair way for all diversion cases. It describes the manner in which prosecutorial decision-making on diversion will be undertaken. It explains how prosecutorial discretion should be exercised, and sets out how a clear, rational and principled examination of the public interest forms the basis of all decisions on diversion.
5. This policy should be read alongside, and supplemental to the NPP and GPG except where it is otherwise stated.

### 1.2 What is Diversion?

6. Diversion is a means of resolving criminal cases without resort to full judicial proceedings. Diversion allows for the quick disposal of criminal matters, in appropriate cases, while providing benefits for the victim and the public.
7. Diversion offers a second chance to offenders who accept responsibility for their offending, who are young, vulnerable, or where special circumstances apply. The process of diversion acknowledges that while anyone can make a mistake, a person should not be condemned for life if there are mitigating circumstances.
8. The conditions of diversion seek to address the harm caused by the crimes committed, by promoting restorative justice. Diversion can take the form of a simple caution or warning, an apology to the victim, payment for damage done, or it may involve referral to a structured diversion programme, restorative justice process or similar scheme.
9. Diversion also seeks to address the lasting stigma that attaches to a criminal conviction and incarceration. It enables offenders to be dealt with by non-judicial bodies and thereby avoiding the negative effects of formal judicial proceedings. An offender who successfully completes a diversion process will not be convicted and will not have a criminal record.

### 1.3 Objectives of the Diversion Policy

10. The broad objective of the Diversion Policy is to enhance access to justice by providing alternatives to prosecution that are accessible to an offender and are visible and accountable to victims and the community.
11. The specific objective of the Diversion Policy is to:
  - a. Develop a structural framework for the implementation, evaluation and monitoring of the diversion process.
  - b. Establish a national standard for diversion cases to ensure that all cases are dealt with in a consistent and fair way.
  - c. Reduce barriers to the efficient disposal of criminal matters and the levels of incarceration.
  - d. Identify specialised processes, tools and programmes for diversion to address the real causes of criminal behaviour and reduce the risks of reoffending.
  - e. Promote rehabilitation, reintegration and reconciliation within the community to repair the effects of the harm done.

### 1.4 Guiding principles for Diversion

12. Diversion is guided by the following key principles:
  - a. Acceptance of responsibility
  - b. Accountability to the victim
  - c. Restitution, rehabilitation and reintegration
  - d. Transparency
  - e. Public interest, confidence, safety and wellbeing

### 1.5 Rationale for the Diversion Policy - problem statement and situational analysis

13. Criminal cases should be handled effectively and efficiently on an equal basis. The Constitution recognises the principle that access to justice should be affordable, accessible and available. These principles are key pillars of a fair criminal justice system. However, there are institutional barriers to achieving these objectives. This Diversion Policy aims to give practical effect to the provisions of the Constitution and to remove institutional barriers. These institutional challenges are set out below.

#### 1.5.1 Case backlogs in the courts

14. The Kenyan court system has a backlog of cases. Research indicates that 70% of cases processed through the Kenyan criminal justice system are classified as petty offences. They are either economically driven (such as theft or lack of business licenses) or are a form of social disturbance such as drunk and disorderly behaviour or loitering. As a result of weak institutional capacity, citizens encounter difficulties resolving disputes.

#### 1.5.2 Limited prosecution resources

15. Prosecution resources, including human and operational resources, are limited. Prosecutors are responsible for extensive cause lists on a daily basis.

#### 1.5.3 Overcrowded prisons

16. Kenya faces an acute prison congestion problem. The Kenya Prison Service (KPS) has the institutional capacity to handle 26,687 inmates. Prolonged pre-trial detention greatly contributes to the current overcrowding situation in prisons. The Kenyan prison population as at mid 2019 is 52,769 inmates. Of these, pre-trial detainees were 21,207, that constitute 40.2% whereas juveniles were 748, representing 1.4%. Therefore, this figure represents a 197.7% occupancy level in the 129 penal institutions.
17. Prisons lack the capacity to handle inmates and detainees in their facilities. Conditions are poor. The KPS human and financial resources are stretched despite various efforts to increase prison capacity and initiatives to reduce congestion.
18. There are no adequate remand facilities to keep children separate from adults. It is internationally recognised that exposing an inexperienced offender, and particularly a child, to other prisoners may propagate further

illegal conduct and a criminal lifestyle.

19. There is an urgent need to decongest the prison system. Diversion provides a practical solution to reducing the number of remandees in custody, while also achieving broader justice-based goals for victims and the community.

#### **1.5.4 Probation and Aftercare Service**

20. Kenya has a Probation and Aftercare Service that provides a foundation for the development of alternatives to imprisonment to facilitate the social reintegration of offenders.
21. Community-based sanctions not only provide alternatives to imprisonment, they also offer a proven way to facilitate the social reintegration of offenders and reduce recidivism.

### **1.6 Diversion is international best practice**

22. Diversion is best practice in criminal justice processes. Diversion Programmes have been widely implemented around the world. In Africa, diversion schemes for children in conflict with the law have been adopted by other countries including Botswana, Malawi, Nigeria, South Africa and Uganda.
23. There is international recognition of the many benefits diversion offers criminal justice systems. The courts are able to dispose of cases. Diversion reduces the caseload of justice agencies. Diversion provides an opportunity for the offender's family, the victims and their families, and the community to participate in the disposition of cases. Resources are allocated to activities designed to address the causes of reoffending. Diversion assists the offender to reintegrate into the community and reduces the risks of reoffending.

### **1.7 Diversion is incorporated into Kenyan Law**

24. Kenya has ratified various international and regional instruments that directly promote the implementation of diversion, or practices similar to diversion, as alternatives to prosecution.
25. These include the United Nations Convention on the Rights of the Child (UNCRC); the United Nations Declaration of the Rights of a Child 1959; the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules); the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh guidelines); the United Nations Guidelines on the Role of the Prosecutor (the Havana guidelines); the African Charter on the Rights and Welfare of the Child; the Ouagadougou Plan of Action Adopted on Accelerating Prisons and Penal Reforms in Africa.
26. Under the Constitution, the general rules of international law form part of the law of Kenya. Treaties become part of Kenyan law once they are ratified. These international instruments, the Constitution and national legislation, place a responsibility on the Government of Kenya to take the necessary steps to ensure that alternatives to prosecution are available.
27. Further information on these international, regional and domestic instruments is set out in Schedule A (*refer to the table on page 13*).

### **1.8 Diversion in Kenya**

28. Diversion is not a new concept in Kenya. Police and prosecutors have applied diversion informally for many years. Cases are frequently resolved at Police Stations. In addition, the National Cohesion and Integration Commission has a statutory mandate to implement diversion in the form of a conciliation agreement for prosecutions involving hate speech.
29. In 2001, a diversion programme for children in conflict with the law was piloted. Resourcing and structural barriers inhibited the full-scale implementation of the process. Diversion programmes for children currently operate in Karatina and Othaya in Central Kenya.
30. The prevailing public expectation is that only courts deliver justice, and that punishment is the only suitable outcome for a criminal offence. The Diversion Policy may take some time to be accepted as the norm. However, in most countries diversion becomes accepted practice once the community understands the value of rehabilitating the transgressor through positive steps such as making amends, attending constructive courses and offering service to the community.

## CHAPTER TWO – THE DIVERSION PROCESS

### 2.1 Who decides if a case should be diverted?

31. Public Prosecutors, and prosecutors exercising delegated authority, determine whether a person is eligible for diversion or not.

### 2.2 Why does the DPP make decisions on Diversion?

32. The DPP exercises State powers of prosecution in Kenya.<sup>1</sup>
33. The ODPP Act empowers Public Prosecutors (and other persons exercising the DPP's delegated powers) to conduct criminal proceedings for the Government. The DPP may also formulate and review the Public Prosecution Policy.<sup>2</sup>
34. The DPP's prosecutorial powers must be exercised independently. This independence is a closely guarded constitutional principle.<sup>3</sup>
35. A Public Prosecutor carries out prosecutorial functions as a 'Minister of Justice'. The primary duty of a Public Prosecutor is to assist the court to arrive at a just decision and not merely to secure a conviction.<sup>4</sup>
36. Public Prosecutors are required to comply with all of the guidelines and instructions issued by the DPP for the conduct of criminal cases.<sup>5</sup> This includes the requirement to consider alternatives to criminal prosecution, such as diversion.<sup>6</sup>

### 2.3 Who can request for Diversion?

37. Any interested party may make a request to the Public Prosecutor that an offender be considered for diversion including:
- An offender or their representative
  - A child offender through their representative
  - A Children's Officer
  - The police
  - A Judicial Officer
  - The victim or the victim's representative.

### 2.4 How is a request for Diversion made?

38. The Public Prosecutor will automatically consider whether the diversion eligibility criteria are met in appropriate cases. Requests for diversion can be made either orally or in writing to the prosecutor.

### 2.5 When can Diversion be considered?

39. The Prosecutor should make a decision on diversion as early as possible after the offender has been arrested. Diversion can be considered at any time from arrest to the close of the prosecution case. A decision on diversion can be made either before or after a charge is laid. Diversion is not available after the close of the prosecution case.

### 2.6 Diversion before a charge is laid

40. A Public Prosecutor can consider diversion before a charge is laid.

### 2.7 Diversion after a charge is laid

1 Article 157(6) of the Constitution and sections 23 to 25 ODPP Act 2013  
 2 Sections 5(1)(c) ODPP Act 2013  
 3 Article 157(10) of the Constitution as read with Section 6 ODPP Act  
 4 Clauses 15 and 19 of the General Prosecution Guidelines  
 5 Clause 6 of the General Prosecution Guidelines  
 6 Clause 4.1(i) of the National Prosecution Guidelines; Clauses 22 to 31 of the General Prosecution Guidelines

41. A Public Prosecutor who has decided not to divert a case before a charge is laid, can reconsider that decision when, or after, the charge is laid, whether or not more information is made available. A Public Prosecutor can offer diversion at any point up to the close of the prosecution case.
42. Diversion at sentencing stage does not fall under this policy. Clause 30 of the GPG recognises that there is a separate statutory mechanism available under ss 4(1) and 9 of the Probation of Offenders Act.

## 2.8 Diversion Categories

43. The Public Prosecutor must consider every offender's potential eligibility for diversion. Each case must be decided on its merits. For the purposes of this policy, offenders fall into four categories:
  - a. Adult offenders who are alleged to have committed petty offenses.
  - b. All child offenders irrespective of the nature of the offence.
  - c. Vulnerable persons irrespective of the nature of the offence.
  - d. Cases involving felony offences where exceptional circumstances exist.<sup>7</sup>

## 2.9 When is eligibility for Diversion considered?

44. An offender's eligibility for diversion is considered once a prosecutor determines that:
  - a. There is sufficient evidence to support the charge.
  - b. There are public policy reasons to initiate a prosecution.
  - c. An offender has made a clear and reliable admission that s/he committed the offence.

## 2.10 The decision on Diversion: factors to be taken into account

45. The factors to be taken into account when a Public Prosecutor makes a decision on diversion fall into two broad categories:<sup>8</sup>
  - a. Offender-focused criteria including:
    - The circumstances of the offender.
    - Whether the impact of a conviction on the offender would be disproportionate to the offending.
  - b. Offence-focused criteria including:
    - The seriousness of the offence type.
    - The circumstances of the offending.
    - The victim's views on diversion and diversion options.
    - The investigating officer's views on diversion and diversion options.

## 2.11 Options for Diversion

46. There are a number of diversion options available. They may range from a simple apology to full-scale therapeutic programmes and supervision. A Public Prosecutor has the discretion as to which option or combination of options is selected and may consult with programme providers as required.

## 2.12 Selecting Diversion options

47. The diversion conditions set by a Public Prosecutor must be reasonable, achievable in the timeframe and proportionate to the circumstances of the offence. In so deciding, the Public Prosecutor will take into account the nature of the charge, the individual circumstances of the offender, the views of the victim and of the investigating officer.

### OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

#### Our Mandate

To institute and undertake prosecution of criminal matters and all other aspects incidental thereto

#### Our Vision

A just, fair, independent and quality public prosecution service

#### Our Mission

To provide impartial, effective and efficient prosecution services to all Kenyans

#### Core Values:

- Transparency
- Integrity
- Accountability
- Professionalism
- Independence
- Teamwork

<sup>7</sup> Clause 25 GPG

<sup>8</sup> Clauses 25 and 27 GPG

48. A Public Prosecutor may select from a menu of diversion options. Prosecutors should be alert to other options that may become available in future.
49. Additional information may be required before diversion options can be finalised. Specialist and other reports may be sought before diversion options can be finalised. A Public Prosecutor must be satisfied that s/he has sufficient information to make a decision on the options available. Where possible, objective criteria should be relied upon to determine appropriate levels of compensation. A Public Prosecutor will be required to justify all decisions on diversion.

### 2.13 The Diversion Memorandum Agreement

50. During or after the Diversion Interview, the Public Prosecutor will prepare a written diversion agreement (the Diversion Agreement). This will set out the conditions of diversion and confirm that the offender accepts responsibility for the offence. The offender must voluntarily agree to participate in diversion. Both parties (or their representatives) shall sign the Diversion Agreement.
51. Where the offender is a child, the diversion arrangements will depend on the capacity of the child to understand the diversion process. It must be symbolic of acceptance of responsibility.

### 2.14 What happens if a suitable Programme for Diversion is not available?

52. If a suitable diversion option or programme is not available, diversion cannot be offered to an offender. All diversion options should be carefully considered, separately and in combination, before diversion is declined.

### 2.15 Timeframe for Diversion

53. The length of the diversion process will vary depending on the programmes selected. Most diversion matters should be capable of completion within a reasonable time.

### 2.16 Completion of Diversion

54. The offender is responsible for ensuring the terms and conditions of the agreement are met. The Prosecutor will require evidence of completion. The Public Prosecutor will provide a completion certificate once all conditions of the Diversion Agreement are completed to his/her satisfaction. The matter will be referred back to court. Proceedings can be terminated if the matter has been registered in court.<sup>9</sup> Where the matter has not been registered in court, the Police File will be closed.
55. If an offender does not successfully complete the diversion conditions, the Public Prosecutor will not certify completion. The matter will be referred back to court. The criminal proceedings will continue to sentencing, or to trial if the guilty plea is terminated.

### 2.17 Interplay with other prosecution policies

56. The ODPP may develop other policies about the conduct of criminal proceedings including policies on Plea Bargaining and Alternative Dispute Resolution. These should also be considered. The most appropriate option should be selected, depending on the circumstances of the case.

### 2.18 Criminal Procedure

#### i. Pre-charge decision on Diversion

57. If an offender is in custody, and a Public Prosecutor decides to divert an offender after the charge is registered but before it is filed in Court, the Public Prosecutor will apply to the court for an extension of time to explore diversion.<sup>10</sup> The Public Prosecutor will seek a future date for mention. Once diversion is completed, the prosecutor will apply to have the charge withdrawn.
58. If the offender is not in custody, the Public Prosecutor can file the charge at any time.

<sup>9</sup> Clause 29 of the GPG

<sup>10</sup> Article 49(1)(f) and (h) Constitution



## ii. Post charge Diversion

59. If a Public Prosecutor makes a decision to divert an offender after a charge is filed in court, the Public Prosecutor will apply to defer the plea and seek a future date for mention.
60. Once diversion is completed, the Public Prosecutor will apply to have the charge withdrawn.

### 2.19 Bail and Bond

61. If an 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 imposes lenient bail terms or free bond, so that diversion can be explored.

### 2.20 Confidentiality

62. Diversion records will remain with the prosecution, court and Police Files but only for official use in the administration of the justice system. They will not be available to members of the public.

### 2.21 Reasons and record of decisions on Diversion

63. Public Prosecutors shall keep a record of their decisions and reasons for diversion.

### 2.22 Review of the decision

64. Where an offender is dissatisfied with the decision of a prosecutor s/he may apply to ODPP.

## CHAPTER THREE – STAKEHOLDERS

65. A number of stakeholders will have roles and responsibilities for different aspects of the diversion system. Where necessary, a Public Prosecutor should consult with the stakeholders who may have an interest in the case. This information can be taken into account when a decision about diversion is being considered. This may include the prosecutor, investigative agency, an offender, the court, victim, the police, and prospective diversion service provider.
66. Suitable mechanisms should be developed to facilitate and ensure effective linkages between the DPP and service providers responsible for diversion conditions and programmes, including branches of the criminal justice system, social development and governmental and non-governmental welfare agencies in such fields as health, housing, education and labour, along with the mass media.

### 3.1 Stakeholder mapping

67. Numerous stakeholders will be involved in the implementation of the diversion programme at different times. Stakeholder involvement may change over time as the effectiveness of programme is assessed, and new ideas are tested.
68. The table set out below maps the key activities required for diversion to be implemented successfully and the stakeholders that may play a part in that activity.

Activity	Stakeholders
Conducting investigations including collecting evidence	Investigative Agencies, such as the Ethics and Anti-Corruption Commission, the Commission on the Administration of Justice, the Kenya Revenue Authority, the Anti-Counterfeit Agency, Law enforcement agencies, ODPP,
Decision to divert	ODPP,
Participation in criminal court processes – deferral/taking pleas, adjournment, bail and bond, and disposal of cases	Judiciary, ODPP, Probation, KPS, Investigative Agencies, Law enforcement agencies, Victims representatives,
Attending to consequential legal issues (e.g. on retention of fingerprints.	Judiciary, ODPP, Defence Counsel, Investigative Agencies, Law enforcement agencies,
Consultation with and reporting to the victim	ODPP, Law enforcement agencies, victims representatives, Medical and health practitioners,
Providing input into the decision on diversion	ODPP, An offender and their representatives, victims and victims representatives, Investigative agencies, Law enforcement agencies,
Recommendations on diversion options	ODPP, An offender and their representatives, victims and victims representatives, Law enforcement agencies, Diversion service providers (religious organisations, probation, community, education sector, alternative dispute resolution sector, traditional justice sector, Childrens Department, civil society),
Providing security for an offender and the victim in a case	Law enforcement agencies, Witness protection agency, Community actors (Nyamakumi/Community policing), Department of Childrens Services,
Reporting to the ODPP	Law enforcement agencies, Investigative agencies, Diversion service providers, Victims and victims representatives, Childrens Department.
Tendering for Diversion Service Providers	ODPP, Development partners.
Providing diversions programmes (mentorship, counseling, vocational training, rehabilitation, conciliation, reintegration and other diversion processes)	Diversion service providers, Probation and Aftercare Service (Probation), Development Partners, ADR services, TJR, Childrens Department, other children's services, health and mental health services, other agencies, persons or organisations or non-state actors identified by the ODPP).
Participating in the development of curricula for diversion options	Diversion service providers, Probation, Development Partners, Civil society.

Supervision of diversion conditions	Diversion service providers, ODPP,
Confirming an offender's compliance with diversion programmes	Diversion service providers, ODPP,
Identifying suitable cases/candidates for diversion with a view to decongest remand homes	KPS, Probation, ODPP, Community, defence counsel, Judiciary, Law enforcement agencies, Civil society, Department of Childrens Services, An Offender or their representatives.
Supervise diversion programmes for the remandees	Correctional facilities, Probation, Investigative agencies, law enforcement agencies, Diversion service providers.
Provide funding for diversion programmes	Civil society, Government, County governments, Development Partners.
Record keeping of diversion candidates	ODPP, Law enforcement agencies, Service providers, Probation, Judiciary, Department of Children's Services.
Technical assistance providers	Development Partners.
Assisting in reintegration of the an offender into the society	Community, Probation, Religious organisations, Community actors (Nyumba kumi/Community policing), Local Administration, Department of Children's Services.
Reporting, evaluation, monitoring	ODPP, Diversion service providers, National Council on the Administration of Justice.
Publicity	Media

## CHAPTER FOUR – RECORD KEEPING, MONITORING, EVALUATION, REPORTING, REVIEW AND FINANCES

69. Record keeping, monitoring, evaluation, reporting, review and finances are critical for assessing the diverse range of interventions being implemented. They are also tools for identifying and documenting successful programmes and approaches, and tracking the progress of the projects being undertaken. It is essential, for credibility and longevity, that the Diversion Policy is implemented transparently and that the successes and shortcomings can be identified and built upon.
70. The Public Prosecutor shall keep records of the diversion process. The details are contained in the Prosecution Guidelines on Diversion.

### 4.1 Register of Diversion cases

71. All decisions, reasons and outcomes on diversion matters will be recorded in the prosecutor's file. The purpose of record keeping is to maintain a register of persons whose matters are diverted from the formal criminal justice system.

### 4.2 Diversion Records

72. Diversion records will comprise:
- a. The Diversion Check List for Prosecutors. This will be prepared as a booklet of printed, pre-numbered, carbon copy forms for each prosecutor (like a receipt book).
  - b. The Diversion Agreement.

### 4.3 Monitoring, evaluation and review

73. Monitoring, evaluation and review are critical for assessing the wide range of interventions being implemented. They are also tools for identifying and documenting successful programmes and approaches and for tracking progress. It is essential, for credibility and longevity, that the Diversions Policy is implemented transparently.
74. The DPP will establish a system of monitoring and evaluation of the effectiveness of the Diversion Policy.

### 4.4 Supervision and monitoring of the individual prosecutorial decisions and diversion cases

75. The Director of Public Prosecutions will monitor the implementation of the policy through routine data collection and support supervision.

### 4.5 ODPP Diversion Policy Review

76. The Diversion Policy will be reviewed from time to time as determined by the DPP.

### 4.6 Financing

77. The National Government shall finance implementation of diversion services under this policy. It is anticipated that county governments may be called upon to provide financial assistance, complemented by development partners, private sector and civil society organizations. In particular, the policy proposes the establishment of a diversion fund as a depository for monies appropriated by the National Assembly and proceeds generated from resource mobilisation. It is the responsibility of the National Government to facilitate the implementation of the Diversion Policy.

## SCHEDULE A – SUMMARY OF THE LEGAL FRAMEWORK FOR DIVERSION

### A.1 Introduction

1. Kenya has ratified various international and regional instruments that directly promote the implementation of diversion, or practices similar to diversion, as alternatives to prosecution.
2. Under the Constitution, the general rules of international law form part of the law of Kenya.<sup>11</sup> Treaties become part of Kenyan law once they are ratified.<sup>12</sup>

### A.2 International and regional instruments on Diversion for practices

3. The relevant international and regional instruments on alternative measures to imprisonment are set out below.
4. The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) promote the use of non-custodial measures as alternatives to imprisonments and encourage the development of new non-custodial measures.<sup>13</sup> The Tokyo Rules promote greater community involvement in the management of criminal justice cases including the treatment of offenders, and a sense of responsibility among offenders towards society.<sup>14</sup>
5. The United Nations Guidelines on the Role of the Prosecutor promote alternatives to prosecution.<sup>15</sup> This includes diverting criminal cases from the formal justice system and fully exploring the possibility of adopting diversion schemes to alleviate excessive court loads, to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as avoiding the possible adverse effects of imprisonment. These guidelines also encourage the need for special consideration to be given to cases involving juveniles.<sup>16</sup>
6. The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) are supplemental to the Tokyo Rules and promote non-custodial arrangements for women prisoners.<sup>17</sup>
7. The Ouagadougou Plan of Action Adopted on Accelerating Prisons and Penal Reforms in Africa recommends diversion as a strategy for preventing people from coming into the prison system in cases of minor offences.<sup>18</sup> Particular attention is paid to young offenders and people with mental health or addiction problems.<sup>19</sup>

### A.3 The Constitution and National legislation on diversion

8. The concept of diversion is incorporated into The Constitution of Kenya 2010, legislation and policy.

#### A.3.1 The Constitution

9. The Constitution:
  - a. Promotes alternative forms of dispute resolution including reconciliation, mediation and traditional dispute resolution mechanisms.<sup>20</sup>
  - b. Recognises that justice should be administered without undue regard to procedural technicalities.<sup>21</sup>
  - c. Authorises the DPP, in exercising the State powers of prosecution, to discontinue criminal proceedings at any stage before judgment is delivered.<sup>22</sup>
  - d. Requires the DPP to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.<sup>23</sup>
10. National legislation recognises that it is in the public interest to encourage reconciliation, rather than criminal proceedings, in appropriate cases:

11 Article 2(5) Constitution

12 Article 2(6) Constitution

13 Tokyo Rules Adopted by UNGA Resolution 45/110 of 14th December 1990

14 Rules 1.1, 1.2 and 2.4

15 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

16 Articles 18 and 19

17 The Bangkok Rules (adopted by UNGA Resolution 65/229 of 21st December 2010).

18 Adopted by the African Commission on Human and Peoples' Rights on 20th November 2003 ACHPR /Resolution 64 (XXXIV) 03

19 Article 1(a)

20 Article 159(2)(c) Constitution

21 Article 159 (2) (d) Constitution

22 Article 157(6)(c) Constitution

23 Article 157(11) Constitution

- a. Proceedings can be discontinued to prevent abuse of process and to protect the public interest.<sup>24</sup>
- b. Court proceedings can be stayed or terminated if a court approved amicable settlement of proceedings for common assault or other non-aggravated petty offenses.<sup>25</sup>
- c. Criminal complaints can be withdrawn and/or an offender acquitted if sufficient grounds exist.<sup>26</sup>
- d. A diversion scheme is available through the probation system for offences triable by a subordinate court. If the court is of the view that the charge is proved, no conviction will be entered.<sup>27</sup>
- e. An offender charged with hate speech can enter into a binding conciliation agreement (similar to diversion) instead of continuing with criminal proceeding.<sup>28</sup>

#### A.4. National Policy on Diversion

11. In 2015, the National Prosecution Policy and General Prosecution Guidelines introduced diversion as an alternative to prosecution.

#### A.5. Special provision for children

##### A.5.1 International and regional instruments on diversion for children

12. Kenya has ratified various international and regional instruments on the treatment of children who are in conflict with the law. These include instruments that specifically promote diversion.
13. Article 40(3)(b) of the United Nations Convention on the Rights of the Child (UNCRC) advocates measures for dealing with child offenders without resorting to judicial proceedings.<sup>29</sup>
14. The United Nations Declaration of the Rights of the Child 1959 highlights childrens' need for special care and protection, including appropriate legal protection.<sup>30</sup>
15. Rule 11 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) advocates diversion for children.<sup>31</sup>
16. Clause 58 of the United Nations National Guidelines for the prevention of Juvenile Delinquency (the Riyadh guidelines), advocate that, to the maximum extent possible, programmes and referral possibilities for the diversion of young persons from the justice system should be implemented.<sup>32</sup>
17. In Article 17(1) of the African Charter on the Rights and Welfare of the Child, provides that every child in conflict with the law has the right to special treatment.<sup>33</sup>
18. Article 14(a) of the Guidelines for Action on Children in the Criminal Justice System recommend a comprehensive child-centred juvenile justice process.<sup>34</sup>

##### A.5.2 The Constitution and National instruments on diversion for children

19. The Constitution and national legislation on the rights of the child provide for the following:
  - a. The best interests of the child are of paramount importance in every matter concerning the child.<sup>35</sup>
  - b. Children should only be detained as a measure of last resort.<sup>36</sup>
  - c. The best interests of the child are a primary consideration in legal proceedings.<sup>37</sup>
  - d. The Children Act has different methods for dealing with child offenders, after a criminal trial and guilty verdict, that are consistent with the philosophy of diversion including:
    - Absolute or conditional discharge.<sup>38</sup>

24 Section 25 Office of the Director of Public Prosecutions Act 2013 (ODPP Act)

25 Section 176 Criminal Procedure Code [Ch 75] (CPC)

26 Section 204 CPC

27 Sections 4(1) and 9 Probation of Offenders Act 1943

28 Sections 13, 49 and 52 of the National Cohesion and Integration Commission Act 2008

29 Ratified by Kenya on 30 July 1990 (see [https://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN](https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN)).

30 Declaration of the Rights of the Child (1959), Proclaimed by the General Assembly, resolution 1386 (XIV), A/RES/14/1386, 20 November 1959

31 Beijing Rules Adopted by UNGA Resolution 40/33 of 29th November 1985

32 The Riyadh Guidelines, Adopted and proclaimed by the UNGA Resolution 45/113 of 14th December 1990

33 Ratified by Kenya on 10/08/2000 (see <http://www.achpr.org/instruments/child/ratification/>)

34 Recommended by ECOSOC Resolution. 1997/30 of 21st July 1997

35 Articles 53 (2) Constitution

36 Article 53 (1)(f) Constitution

37 Sections 4(2) and (3) Children Act 2001.

38 Section 191 (1)(a and (b) Children Act and section 35(1) Penal Code

- Placing the child under a probation order<sup>39</sup>
- Placing the child in the care of a qualified counsellor, educational institution, vocational training programme, or mental health treatment programme.<sup>40</sup>

20. The General Prosecution Policy gives special recognition to the importance of Diversion Programmes for children.<sup>41</sup>

## A.6 Special provision for mentally challenged people

21. The law makes provision for special treatment for vulnerable people in criminal cases:
- a. Proceedings against a person with a mental disorder requires the consent of the DPP.<sup>42</sup>
  - b. The DPP can discontinue proceedings or discharge and release an offender, although charges can be relaid.<sup>43</sup>
22. Clauses 32 and 33 of the General Prosecution Guidelines make special provision for the prosecution of persons with mental disabilities:
32. From time to time persons suffering from a mental illness, intellectual impairment or some other psychological problem are charged with criminal offences. It is often not appropriate for these matters to be prosecuted through the ordinary criminal justice process because the alleged offender may be incapable of understanding the charges or the procedures involved or cannot give instructions. The Criminal Procedure Code provides a special procedure for dealing with such cases.
  33. Under section 162 of the Criminal Procedure Code, the court has a duty to inquire where it has reason to believe that an offender is of unsound mind and thus incapable of making his or her defense. However this does not stop the Public Prosecutor from moving the court to order such an inquiry where there is reason to believe that an offender is suffering from mental illness.

## A.7 Persons with disabilities

23. Kenya Ratified the United Nations Convention on the Rights of Persons with Disabilities on 19 May 2008. Article 1 promotes, protects and ensures the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

## A.8 Victims of crime

24. The law recognises that special arrangements may be in the victims' best interests in criminal cases, including:
- a. Court approved counselling and reconciliation programmes in domestic violence cases.<sup>44</sup>
  - b. Reconciliation, restorative justice or other forms of redress are recognised as means of promoting the dignity of victims.<sup>45</sup>
25. Article 7 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted by United Nations General Assembly Resolution 40/34 of 29th November 1985) promotes the use of informal mechanisms for the resolution of disputes, including mediation, and customary justice or indigenous practices, where appropriate to facilitate conciliation and redress for victims. Article 8 promotes make fair restitution to victims.

<sup>39</sup> Section 191(1)(c) Children Act

<sup>40</sup> Section 191(1)(c)(h)(i) and 192 Children Act

<sup>41</sup> Clauses 24, 27(c), 28 and 29.

<sup>42</sup> Section 42(5) Mental Health Act 1989

<sup>43</sup> Section 163 CPC

<sup>44</sup> Section 15 Protection Against Domestic Violence Act 2015. Article 50 (9) Constitution requires Parliament to enact legislation providing for the protection, rights and welfare of victims of offences.

<sup>45</sup> Sections 3(b)(iii) and 15(1)(2) Victim Protection Act 2014.













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