

## EXPLAINING PROSECUTION DECISIONS IN IRELAND

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In this short paper I propose to outline how the prosecution service in Ireland is for the first time contemplating giving reasons to victims and the family of deceased victims for decisions not to prosecute. I should say at the outset that one is conscious that the giving of reasons to victims is now standard practice in most prosecution services in the world, although this was by no means always the case. When our then Director of Public Prosecutions Eamonn Barnes made a public statement on the issue in 1983 in the context of a decision to withdraw a murder charge in a particular case the practice of not giving reasons was I believe the norm. Indeed, I am aware that the factors identified by the then Director in his public statement have in the past been relied on in other jurisdictions to justify the continuation of a policy of not giving reasons.

In this paper I propose to explain the current policy, examine how the Irish courts have addressed the issue when the matter has come before them, set out the background to the re-assessment of the policy and finally to set out the current state of the assessment process. The paper is short because most of the issues I discuss have been addressed in a detailed Discussion Paper which the Director published in January this year. For those who might wish to look at the issue in greater detail, the paper is available on our website: [www.dppireland.ie](http://www.dppireland.ie).

The current practice is not to give reasons for decisions not to prosecute<sup>1</sup>, save in a case where a duty to explain the decision not to prosecute arises from the decision of the European Court of Human Rights in *Jordan v United Kingdom*.<sup>2</sup> In that case the ECHR decided that a duty to explain to a deceased's family a decision not to prosecute can arise in a case where the deceased was killed by the use of lethal force by agents of the state. In fact, the Office has not been required to date to explain a decision not to prosecute in circumstances identified in that case. The reality therefore is that in this jurisdiction decisions not to prosecute are not explained to victims or their families at present.

The justification for this policy was as I say explained in the statement made by the then Director in 1983. The full statement is quoted in the

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<sup>1</sup> For completeness I should state that reasons are of course given to the police or other investigative agency.

<sup>2</sup> (2003) 37 EHRR 52.

Discussion Paper.<sup>3</sup> The first difficulty identified in it is that there will always be some cases where a reason cannot be given without doing harm. The most usual example cited is where the giving of the reason would result in the identification of a police informant. If reasons are not given in all cases, the statement says “wrong conclusions will inevitably be drawn in relation to those cases where the reasons are refused, resulting in either unjust implications regarding the guilt of the suspect or former accused, or suspicions of malpractice, or both.”

The second difficulty identified in the statement is that the decision not to prosecute often has little or no relevance to the to the issue of guilt or innocence. It can result from the non-availability of some vital proof, perhaps of a technical nature. “To announce that such a factor was the sole reason for non-prosecution would amount to conviction without trial in the public estimation, and to depriving the person involved of the protection afforded by the careful analytical examination in open Court of the case against him which judicial procedure affords.”

The third difficulty identified was the possible harm caused to third parties by the giving of reasons. An example given was where “certain types of aberration become apparent in an intended witness”.

There is no doubt that these difficulties are real ones and the Discussion Paper and the subsequent assessment process have sought to identify ways of ameliorating them. Indeed, the 1983 statement did go on to say that “if some method can be devised whereby the Director could, without doing injustice, inform the public of the reasons for his decisions, he will very willingly put it into operation”. The reference to informing the public should be noted. This in a sense is a separate issue to that of informing a victim, although there will be some cases where the reason given to a victim may be made known to the to public through its publication in the press or other media. However, in this paper I will concentrate on the question of informing a victim or a deceased’s family.

The Office of Director of Public Prosecutions was established under statute in 1974.<sup>4</sup> The Attorney General was the chief public prosecutor before that date. The policy of not giving reasons reflects the practice of Attorneys General prior of the Office of Director being established. As the Director is independent of Government in the discharge of his duties,<sup>5</sup>

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<sup>3</sup> At pp. 11 and 12.

<sup>4</sup> Prosecution of Offences Act 1974

<sup>5</sup> Section 2(5) of the Act of 1974 states that the “Director shall be independent in the performance of his functions”.

any change in the policy of not giving reasons would be a matter for the Director, unless the Oireachtas (the Irish Parliament) were to legislate for such a policy. The policy might of course have been subject to change if the judiciary had decided the Director had a duty to give reasons. However, in a number of cases where the Director's powers were challenged in the courts it was decided that the Director could be challenged in relation to a decision not to prosecute only in the most limited of circumstances. The relevant jurisprudence is analysed in the Discussion Paper<sup>6</sup>. Challenges to the reasoning behind prosecutorial decision making have arisen in three ways: in relation to decisions by the Director to refer a case to the non-jury Special Criminal Court,<sup>7</sup> in the context of questioning by complainants or their families of decisions not to prosecute<sup>8</sup> and, in one somewhat bizarre case, where the complaint that there had been no prosecution was made by the suspect himself.<sup>9</sup> The case law can be summarised in this way. Decisions of the Director are not immune from challenge but the Applicant must establish that the decision was motivated by *mala fides* or represented the application of an incorrect policy<sup>10</sup>. In reality of course this is a very high threshold for the person challenging the decision to meet, as the person will not have access to the file and will therefore not know the precise reasoning behind the decision.

There is one area, not directly related to the question of giving of reasons, where the judiciary have been more willing to, as it were, second-guess prosecution decision-making. For many years the Office has had a policy of permitting complainants to seek a review of a decision not to prosecute. In cases where a decision not to prosecute has been reversed following such a review there is a line of authority that allows the courts to prohibit the proceedings in certain circumstances. This is a matter which is also addressed in the Discussion Paper.<sup>11</sup>

In circumstances where there is no pressure from the courts to change the policy of not giving reasons the question may be posed as to why the

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<sup>6</sup> Chapter 2.

<sup>7</sup> The circumstances in which a case can be sent to the Special Criminal Court are set out in sections 45, 46 and 47 of the Offences Against the State Act 1939.

<sup>8</sup> In *H v DPP* [1994] 2 IR 589, the Applicant was the mother of a child in relation to whom an allegation of child sexual abuse had been made.

<sup>9</sup> *State (McCormack) v Curran* [1987] ILRM 225. The Applicant wanted to avoid trial in Northern Ireland by requiring the Director to prosecute him in this jurisdiction. The offences he faced in Northern Ireland took place in this jurisdiction but were prosecuted in Northern Ireland under legislation having extra-territorial effect. Although the circumstances giving rise to the challenge were unusual, the reasoning of the court in that case has been cited in many subsequent cases.

<sup>10</sup> An example might be a policy of the Director not to prosecute certain classes of serious cases.

<sup>11</sup> Chapter 2. Please also see a paper delivered at our Prosecutors Conference this year by Micheal P O'Higgins B.L. which is also posted on our website under Publications/Public Statements.

policy needs to be examined at all. The principal reason is that the Director is conscious that the practice of most other jurisdictions has moved away from a position of not giving reasons. In that context it is appropriate that a policy which can engender public controversy should be the subject of a root and branch examination by the Office. There is the additional factor that because of the *Jordan*<sup>12</sup> decision there is now a limited class of cases where reasons will have to be provided.

The Director decided to publish a detailed Discussion Paper and then to invite submissions from interested parties. When the paper was published at the end of January 2008 there was also extensive media coverage of the issue and the Director and others gave media interviews. The response of media commentators has generally been very positive and nuanced. There seems to have been an appreciation that the issue involves the balancing of a number of competing interests and that in particular the giving of reasons should not interfere with a suspect's right to his good name.

Over 80 submissions were received, some from individuals while others from organisations, including victims groups, the Law Society and the Irish Council for Civil Liberties. As part of the consultation process there were internal seminars. In early April there was an open Discussion Forum chaired by Judge Catherine McGuinness<sup>13</sup> where representatives of victims groups and legal practitioners (amongst others) debated the issue. The debate revolved around a number of questions posed in the Discussion Paper. These are as follows:

- Should the current policy be changed?
- If so, should reasons be given only to those with a direct interest, the victims of crime or their relations?
- Should reasons also be given to the public at large?
- If reasons are given, should they be general or detailed?
- Should they be given in all cases, or in only certain categories of serious cases? If so, which?
- How can reasons be given without encroaching on the constitutional right to one's good name and the presumption of innocence?
- Should the communication of reasons attract legal privilege?
- How should cases where a reason cannot be given without injustice be dealt with?

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<sup>12</sup> *supra* n. 2

<sup>13</sup> President of the Law Reform Commission and former member of the Irish Supreme Court.

- By whom and by what means should reasons be communicated?

I do not propose to address all of these questions in this paper, particularly as the Director has not announced the results of the deliberative process. However, I think that if the policy is changed two issues will be vital. First, in what classes of cases will reasons be given. Secondly, the method by which the reasons will be communicated. In both of those issues the question of resources will play a not insignificant part. I should explain that in this jurisdiction the decision whether or not to prosecute is made by a lawyer in the Director of Public Prosecutions Office in only the most serious of cases. In the vast majority of the cases prosecuted in our courts in the Director's name the decision to prosecute has been made by the Garda Siochana (Irish police force). Even in the cases referred to the Office there is a division of function between those who make the decision and those who implement the decision in court. The decision makers are those lawyers attached to our Directing Division in Dublin. About a third of the cases referred to the Directing Division will result in a decision not to prosecute. Within our current resources it simply would not be possible to require that in all of those cases the reasons for the decision not to prosecute would be communicated to a victim or a deceased's family.

The second issue raises both the question of the method of communication (letter or meeting) and the personnel to be used (actual decision maker or specialist unit). As part of the assessment process we have looked at the experience of other prosecution services on the question of giving reasons. Indeed, an Appendix to our Discussion Paper sets out the practice of the prosecution services in the United Kingdom, Australia, The Netherlands, Canada and some other jurisdictions. As a result of that consultation process it is clear that the advantages of explaining the decision not to prosecute at a meeting with the complainant or deceased's family are very considerable. However, there are resource implications of furnishing reasons at such meetings. I do not think it would be possible with our present resources to provide for such meetings, at least in the short term.

If reasons are provided in written form the way in which any correspondence is framed is of course of great importance. The Office has been able to examine how this is done in other jurisdictions and has indeed been provided with precedent letters used in some countries (with all personal details omitted). There are a number of challenges. First, to set the decision in its proper context and for example to emphasise the heavy burden on the prosecution of proving its case beyond a reasonable

doubt. Secondly, to provide enough detail about the actual decision to allow the recipient a sufficient insight into the reason for the decision without infringing the rights of the suspect or witnesses. Thirdly, to communicate in a clear and sympathetic way.

In the vast majority of cases the decision not to prosecute is based on an assessment by the prosecutor that there is not sufficient evidence to justify a prosecution. Although our system permits the prosecutor to decide not to prosecute on the basis that the public interest does not require a prosecution even where there is sufficient evidence to justify a prosecution<sup>14</sup>, most cases are decided on a sufficiency of evidence basis. This in turn involves assessment of such questions as admissibility of evidence and the weight to be attached to the evidence. Communicating such matters in a clear yet convincing way will not always be easy. However, a successful implementation of a policy of giving reasons should help to de-mystify a process which some victims and their families now find difficult to understand.

When the Director concludes his deliberations the results will of course be posted on our website.

Barry Donoghue,  
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<sup>14</sup> See Chapter 4 of Guidelines for Prosecutors on the Office's website.