7th ANNUAL NATIONAL PROSECUTORS' CONFERENCE

SATURDAY, 13 MAY 2006
DUBLIN CASTLE CONFERENCE CENTRE

James Hamilton
Director of Public Prosecutions

Opening Remarks

Let me begin by welcoming you all to our 7th Annual National Prosecutors Conference.

We were saddened during the year by the death of our colleague Brian Neilan, State Solicitor for Roscommon, and I would like to express my condolences to his family and my appreciation for his service over the years.

The papers at this year's half-day conference all concern the reform of the criminal justice system. Two of the papers concentrate on reforms which have taken place or are taking place in this State and in Northern Ireland. Two of the others are concerned with matters which may need further assessment and reform in the future.

Firstly I would like to welcome Sir Alasdair Fraser, QC, the Director of Public Prosecutions for Northern Ireland. Sir Alasdair is a familiar face to most of you. He has been a good friend to this Office and to me personally over the years. He has shouldered the difficult burden of presiding over a prosecution service in a divided society for the past 17 years. Those of us who appreciate that it is difficult enough to be a prosecutor in a relatively homogenous society have all the more admiration for manner in which Sir Alasdair and his staff have undertaken their responsibilities in the particular circumstances of Northern Ireland.

Since last year his Office has been transformed into the Public Prosecution Service. This is no mere change of name for the Public Prosecution Service now assume responsibility for all prosecutions in Northern Ireland including all of those which were formerly conducted by the police. This has involved an enormous transformation of the Office which now employs a total of 580 staff including 170 lawyers. Sir Alasdair Fraser will be addressing us later and telling us about these developments and what the future holds for prosecution in Northern Ireland.

To return to our own jurisdiction, Barry Donoghue, the Deputy Director of Public Prosecutions, will be addressing us on the subject of the Criminal Law (Insanity) Act 2006 which will become law on 1 June next. This law represents a very important reform and one which I have no hesitation in welcoming. The substitution of the verdict of not guilty by reason of insanity for the old verdict of guilty but insane is long overdue. The introduction into Irish law of the limited defence of diminished responsibility will enable the development of our law of homicide along more rational lines in the future.

Most of the substance of our criminal law can now be found in statutes that have been passed since 1980, many of them following Law Reform Commission recommendations which have examined a variety of options. It is important that so much of our law is expressed in modern statutes. Recently I recall a commentator on the media saying that we had had 40 criminal statutes in the last 20 years and that this had not solved the crime problem, as if to suggest this has had somehow been a wasted effort. This I think is to miss the point completely. Where the substantive law is expressed in modern statutes which have been passed following an extensive consultation process and a deliberate choice of legal policy there is less likely to be legal difficulty over the law's meaning. On the other hand, when we operate with

outdated and unclear laws these have a tendency to lead to legal complexity and to make it harder to convict the criminal. This, regrettably, is still the case in a small number of areas such as contempt of court and perjury where the applicable laws are very old and in many respects not very clear. In this connection I would appeal yet again for follow up action on the Law Reform Commission's report on contempt of court which was issued in September 1994.

Eanna Mulloy, SC, will speak to us about similar fact evidence. This is a very complex subject and I will not attempt to summarize what Eanna is going to say to us. His general conclusion that the approach of our courts in this area is due for reassessment is one which I would endorse. There may be some indications of an increased willingness on the part of the courts to allow similar fact evidence to go to juries and if this is so it would be very welcome.

Paul Anthony McDermott's paper arises out of a remark he made on the radio some time ago when he was explaining some point of law to a popular audience. This is always a difficult task but one at which Paul Anthony excels. He was, I recall, asked whether he thought the particular law was fair to the prosecution and he indicated that there was a logic to it but that he was quite happy on some other occasion to give examples of places where the law was unfairly loaded against the prosecution. As a result of this comment I invited him to put his mind to assembling a number of such examples and he has responded to this challenge with enthusiasm. I think anyone listening to what he will say to us will have no hesitation in saying that certain important aspects of the laws of evidence are now seriously loaded against the prosecution in a manner which gives an unfair advantage to the defence.

Many people may ask how this have come about? What people do not understand, however, is the way in which the process of judge-made law operates. The judges do not set the agenda. Courts only make decisions in the cases which are brought before them. Defendants have full rights of appeal in every case. It is therefore possible for the defence to raise particular legal arguments time and again on appeal. However, if the defence eventually win a particular legal argument, the court can only change the law back again if a suitable case comes before it. But since the prosecution have no rights of appeal to the appeal courts (except in relation to sentence reviews), how are these cases to come back to the appeal courts for reassessment? The answer is that in some cases they never do, and it will be in the interests of the defence not to raise the issue. Effectively the defence sets the reform agenda for judge-made law.

This is why I sometimes feel that criminal law in Ireland can be like a game of football with very peculiar rules. The prosecution can score as many goals as they like but the game goes on. As soon as the defence score a goal the game is over and the defence are declared the winner.

That is why I very much welcome the fact that the Criminal Justice Bill at present before the Oireachtas includes a proposal to confer a limited right of appeal on the prosecution. The proposal is for an appeal on a without prejudice basis. It will enable us to get certain important legal issues clarified or looked at again.

Of Paul Anthony McDermott's list of matters which should be looked at again much the most important in my view is the exclusionary rule as defined by the Supreme

Court 20 years ago in *Kenny's* case. Since this case was decided it has been binding on every other court in Ireland but the point has never come back before the Supreme Court again. The logic of this rule is to exclude evidence obtained in breach of constitutional right, even if that breach was an innocent one and due to a mistake which could have been made good at the time. It is, of course, easy to see a certain logic to the approach which was designed to ensure that the Garda Síochána and other state agencies operate in strict compliance with the law. However, the method of ensuring compliance with the law is a classic example of what is called "cutting off your nose to spite your face". The difficulty is that when probative evidence of this sort is excluded it is not the Garda Síochána who suffer but the people of Ireland as a whole and the victims of crime. It is interesting that when the exclusionary rule in its present form was developed by the courts no mention was made in the case law of the rights of victims or of the duty of the state to protect those rights through the operation of the criminal justice system. This is an area which has been developed by the judgments of the Court of Human Rights in Strasbourg since then. I believe the exclusionary rule is ripe for reassessment by our courts now that the European Convention on Human Rights is part of domestic law.

Before I conclude I would like to refer to the way in which the Court of Criminal Appeal is set up. This is the highest court of appeal for most criminal cases. The court is a three judge court composed of one Supreme Court and two High Court judges. These are selected on a rotating basis. The problem with this is that it is difficult for an appellate court to develop a consistent body of case law if the composition of the court is not stable. The Minister for Justice, Equality & Law Reform recently stated his intention to address this problem, and I would strongly support any move to bring a greater permanence to that court.

Finally I want to take this opportunity of paying tribute to all of you for your hard work during the year. I would like to thank in particular my own staff, in the directing and solicitors division, and in the administrative division of the Office. I would also like to thank the State Solicitors who have given us such good service during the year. Finally I want to thank the many agencies who deal with us and come in contact with us on a daily basis, in particular the members of the Garda Síochána, but also the other agencies which I will not mention by name as they are quite numerous. Without this cooperation the work of this Office would be very difficult and I look forward to continued cooperation and working together over the next 12 months in order to achieve our common goal of improving the effectiveness of the criminal justice system.