

**James Hamilton, Director of Public Prosecutions**  
**Opening Remarks at 12<sup>th</sup> Annual National Prosecutors' Conference**  
**28 May 2011**

Attorney General, Members of the Judiciary, Fellow Prosecutors, ladies and gentlemen,

It gives me great pleasure to welcome you to our annual national prosecutors' conference, the twelfth occasion on which this event has taken place.

This year's conference will focus on two principal themes. The first is psychiatry and the criminal law with particular reference to the Criminal Law (Insanity) Act 2006, of which we now have five years experience. Our distinguished speakers are Prof. Harry Kennedy, Executive Director of the Central Mental Hospital and Mr. Domhnall Murray of this office. Our second theme is that of complex fraud, on which I have asked two leading criminal practitioners, Mr. Shane Murphy S.C. and Mr. Patrick McGrath, B.L., to present papers. I want to give a warm welcome to all four speakers and to thank them in advance for what I believe will be informative and stimulating contributions.

Given the current investigations taking place in relation to certain allegations of "white collar" crime I am constrained in what I might say about this topic, and obviously I have to refrain from any comment which could prejudice any case which might be brought. In particular, I will not comment on the substance of the allegations being investigated.

I do, however, think it timely for me to make some general remarks as I believe there are some current misunderstandings about what is happening.

Firstly, in our system investigators investigate and prosecutors decide whether to prosecute. The prosecutor does not direct the investigation, and, except in minor cases delegated to them, the investigators do not decide whether to prosecute. Only the prosecutor has this function.

Our system is an adversarial one, where the prosecutor presents the case, the accused defends, and the judge and jury decide on the issues of law and fact which are in dispute. The judge's function is that of adjudication between the parties in contrast to inquisitorial systems where a judge supervises the work of the prosecutor.

I said I would not comment on the substance of the various investigations related to Anglo Irish Bank, and other than discussing process and making some remarks which would be relevant to any complex case I do not propose to say more than that this investigation has been unusual in one important respect. Normally a file is not sent to our office until an investigation is complete, at which point we start to consider the case and make a prosecution decision. Sometimes the decision cannot be made without further information or investigation.

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Because of the complex and extensive nature of this investigation, it was agreed between me, the Garda authorities, and the Director of Corporate Enforcement, that files might be sent to my Office in advance of completion of the investigation so that our consideration of the case could begin even as the investigation continued with a view to speeding up the final decision. My office over the last few months has received a number of voluminous and carefully prepared files from both the Garda Bureau of Fraud Investigation and the Office of the Director of Corporate Enforcement. We have been working our way through them with the assistance of the counsel whom I have engaged. It is, however, important to note that, in all but one of the separate modules of this investigation, investigations are not complete and indeed the evidence of important witnesses has still to be taken. I should add that it is not possible nor was it ever envisaged that my office would take a final decision on whether to bring any prosecutions in this case until all the important evidence is gathered .

In an adversarial system the choice of what charges to prosecute is a function for the prosecutor alone. It is not a judicial function. In selecting offences care must be taken not to overwhelm a jury by a trial which is longer and more complicated than necessary. This judgment is for the prosecutor to make. This is a further reason not to take decisions to prosecute before all the important and relevant evidence is known.

I would like to take this opportunity to welcome the decision of the Minister for Justice and Equality to introduce a new Criminal Justice Bill in the Oireachtas. Until now it has been a surprising omission in Irish law that potential witnesses cannot be compelled to cooperate with an investigation, even where they themselves are not suspected of or accused of any wrongdoing. In this regard the power of an Irish criminal investigator is considerably weaker than that of a tribunal of enquiry. The new legislation will plug this gap.

I want to say a little about resources. When the scale of this investigation became apparent, before the last election, I sought additional resources for my Office from the Department of Finance. I was given a small but significant additional number of lawyers on short-term contract. I indicated that depending on how the case developed I might need further resources. I wish to say that when I have sought resources in the past I have always found the Department of Finance and the Government of the day willing to engage with my requests and while I have not always received everything I looked for I have always encountered an understanding that the provision of a functioning criminal justice system is not an optional extra. I am sure that will remain the position and I wish to make it clear that the fact a prosecution decision has not yet been taken is not due to any question of lack of resources, and that while the resources of the office are fairly stretched I have to date been able to allocate sufficient resources

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to deal with this case. If the situation changes in the future and I need additional resources I will not be slow to ask for them.

I want to turn now to another subject of great interest to me, the project to change the policy of my Office from a refusal ever to give a reason for a prosecution decision to a willingness to give reasons where possible.

In October 2008 I announced a change in policy on the giving of reasons for prosecutorial decisions not to prosecute.

The policy was introduced on a pilot basis whereby reasons for a decision not to prosecute in a case involving a death are given to the family or household of a victim at their request. Prior to this change in policy, reasons for decisions not to prosecute were given to the Garda Síochána or State Solicitor but were not made public.

The policy applies to decisions not to prosecute, or to discontinue a prosecution made in respect of offences involving a death where the alleged offence occurred on or after 22 October 2008. The policy change was confined to alleged offences where a death has occurred including:

- murder
- manslaughter
- infanticide
- fatalities in the workplace
- fatal road traffic accidents

I originally anticipated that this pilot policy would operate until 1 January 2010 and that during this time a comprehensive evaluation of the policy would be undertaken with a view to ascertaining the viability of the project, particularly within the context of severely restricted resources, and the potential to extend the policy to other serious cases including sexual crimes.

However, because of the lapse of time between the occurrence of an incident and the eventual decision not to prosecute, the numbers of requests received within this initial evaluation period were too few to allow a meaningful analysis of the project. For this reason I decided to extend the pilot phase of the policy so as to allow the Office the opportunity to deal with a sufficient number of requests to carry out a more comprehensive evaluation process.

To date we have received requests for reasons for prosecution decisions in 19 fatal cases, of which 14 were fatal road traffic accidents. In 10 cases detailed reasons have been given. In addition, in line with Office policy, on receipt of a request for reasons for the decision not to prosecute, each case was thoroughly

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reviewed by a different lawyer from the original decision maker. In many instances this review was undertaken by the Director, Deputy Director or Head of the Directing Division. In each of the 10 cases the original decision not to prosecute was upheld and the detailed reasons for same explained to the deceased's next of kin.

In three of the four cases where the giving of detailed reasons was declined, cases arising from the death were before the courts. In effect these requests for reasons were not for a decision not to prosecute, but rather, a request to explain why particular charges were being pursued in preference to more serious charges. In each of these cases it was explained to the family or household member of the deceased that the Office could not comment while the matter was ongoing before the courts as to do so could prejudice the pending prosecution. In each such instance the Office offered to resume communication after the conclusion of the matter.

In the fourth case where reasons were refused the matter was still actively being investigated by An Garda Siochana and thus we considered, in view of the possibility of further evidence coming to light which might affect the initial decision not to prosecute, that it would be inappropriate to comment on the case at that time.

At this time five other cases are still pending.

In seeking to evaluate both the operation of this policy to date and the potential for expansion to include other serious offences, first and foremost I am mindful of the fact that these 19 cases represent to the families of each deceased a very personal tragedy.

Nineteen is not an insignificant number and I hope that the operation of this policy has given a degree of comfort to those bereaved families.

I am sure there is a degree of impatience that to date we have not moved beyond the pilot scheme to give reasons in other areas of crime.

The original evaluation project in my opinion has been a success in that we have not yet encountered any cases where we could not explain our reasons, other than where it was inappropriate to do so as cases were pending. While the number of requests has been less than expected each case is unique and important to the dead person's family and friends. The policy of giving reasons in fatal cases will therefore continue.

What we have learned is that giving reasons is extremely time consuming. In effect each request for reasons becomes in practice a request for a review and a

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second and more senior person has to read the file with care in order to clearly express the reason. Time-consuming is of course resource-consuming.

We are now in the process of examining how we might extend this project to decisions concerning other serious crimes, notably sexual crimes. This involves an evaluation by us of how much information it would be possible or appropriate to give in such cases as well as examining how to find the necessary resources. Following this evaluation I wish if possible to extend the project to sexual offences, almost certainly on a phased basis. I am not yet in a position to put a definite date on when we will be able to do this.

In conclusion, while the completion of this project is slower than I had ever expected, I believe that its further development is inevitable given time, once we accept that the principal obstacle to its attainment is a problem of resources and not a problem of principle.

Finally I want to thank all our staff, as well as our state solicitors and the counsel who work on our cases, for their cooperation and understanding despite our current difficulties. I also want to thank the various persons and agencies with whom we have professional dealings, including the Garda Síochána, other investigative bodies, the Courts Service, the Forensic Science Laboratory, the Medical Bureau of Road Safety, the Office of the Attorney General, the Law Reform Commission, support organizations for the victims of crime, the Department of Justice and other Government and State agencies, as well as the citizens who are affected by our services.

Thank you for coming today and I wish all of you a fruitful and an enjoyable conference.