Office of the Director of Public Prosecutions
Oifig an Stiúrthóra Ionchúiseamh Poiblí

REPORT

ON

PROSECUTION POLICY ON THE GIVING OF REASONS FOR DECISIONS

22 October 2008

Office of the Director of Public Prosecutions
14-16 Merrion Street
Dublin 2.

Tel: +353 (0)1 678 9222
Fax: +353 (0)1 661 0915
Web: www.dppireland.ie

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CONTENTS

1. Introduction. 2

2. Launch of the reasons project 4

3. An overview of the written responses to the specific questions raised in the consultation 6

4. Consultation process 16

5. A synopsis of the debate at the seminar held in Dublin Castle on 10 April 2008 18

6. Conclusion 25

APPENDIX: Policy on the giving of reasons for decisions not to prosecute. 27

INTRODUCTION

Historically it has been the policy of the Office of the Director of Public Prosecutions not to give reasons for decisions not to bring or maintain a prosecution, other than to the Garda Síochána. This policy at times has led to controversy, particularly as some victims of crimes have felt aggrieved because they were not told the reasons for decisions not to commence or maintain a prosecution.

At one time this practice of not giving reasons either to victims or to the public at large was in line with the practice in most, if not all, common law states. However, in the recent past the practice has changed in many of those common law jurisdictions, including Australia, Canada, England and Wales, and Northern Ireland, as has the practice in Scotland. In most of the major common law jurisdictions reasons are given to victims, where possible, even though those reasons may not in all cases be detailed and may not be given to the public at large. Furthermore, despite the belief that if reasons were given in one case they would have to be given in all, it has proved possible in other jurisdictions to implement a policy to give reasons to victims where possible, while reserving the right to withhold them where a reason could not be given without infringing the rights of the suspect or of a third party.

The current Director of Public Prosecutions (DPP) has stated that he has long felt, like his predecessor, that if a method of giving reasons to victims without doing injustice to others could be devised then, in the interests of fairness to victims, he should attempt to do so. For this reason he decided to undertake a review of the policies and practices in other like jurisdictions and to follow up with a wide ranging consultation on the whole question of giving reasons.

The review of the policies and practices of other like jurisdictions included an extensive consultation with our neighbouring jurisdictions as well as with common law jurisdictions as far away as Australia. In 2005 a delegation comprising the Director, the Deputy Director, the Chief Prosecution Solicitor and other members of the senior management team, including a member of the Office's research unit, visited the Crown Prosecution Service (CPS) in London where they were briefed on what was then the relatively new policy of the CPS on the giving of reasons. The Director and the Deputy Director visited the Crown Office and Procurator Fiscal Service in Scotland in 2006. In addition, efforts were made to gather the extensive combined experience from fellow members of the International Association of Prosecutors (IAP), many of whom come from jurisdictions which have in recent times made their prosecutorial decisions amenable to greater scrutiny.

These aspects of the research and evaluation process on the giving of reasons for prosecutorial decisions were the backdrop against which the national consultation process commenced at the beginning of this year, which consisted of, firstly, the publication of a 'Discussion Paper on Prosecution Policy on the Giving of Reasons for Decisions' together with an invitation to interested parties to submit their views in writing. The Office of the DPP then held a number of seminars, involving both staff and various invited interested parties, including members of the legal profession, Gardaí, and representatives of victims organisations, at which the key issues that would be involved in any change in the current policy were discussed.

The following report summarises what has happened in the 'Reasons Project' to date. It includes an overview of the public and internal consultation processes undertaken and an analysis of the submissions received and the views expressed. It covers the background to the consultation, a summary of the responses to the consultation, a snapshot of the written responses to the specific questions raised in the consultation and a synopsis of the public debate at the seminar in Dublin Castle on 10 April 2008, all of which critically informed and influenced the decision to alter the existing policy on the giving of reasons. Finally, the policy change announced by the Director of Public Prosecutions on 22 October 2008, is outlined in the conclusion of this report, the revised policy is annexed to this report at Appendix 1.

2 LAUNCH OF THE REASONS PROJECT

The launch of the public consultation

On 28 January 2008, the Director of Public Prosecutions (DPP) launched the public consultation element of the Reasons Project, entitled 'A Discussion Paper on Prosecution Policy on the Giving of Reasons for Decisions'. The discussion document was made available on the website (www.dppireland.ie) and in hard copy.

The document gave an outline of the existing policy. It stressed the very significant potential for the creation of injustice that might accompany any departure from the existing policy and sought to explore means by which the current policy could be altered without risking the creation of new injustices. To that end, the consultation process sought to stimulate debate by giving an overview of the practice and policies now being adopted in a number of similar jurisdictions and posed nine specific questions which respondents were invited to address in their submissions. The consultation period ran until 10 March 2008, during which 82 written submissions were received. A breakdown of respondents can be found on page 5.

An overview of the media coverage

The launch of this consultation process was accompanied by extensive media coverage, including television, radio and print.

RTE Radio and Television covered the story as their lead item throughout the day of the launch as did all the major media outlets. The Director undertook a number of interviews on RTE, Today FM and TV3. In addition the Chief Prosecution Solicitor, Claire Loftus and the Deputy Head of the Prosecution Policy Unit, Rebecca Coen, gave radio interviews, the latter on Radio na Gaeltachta.

A number of leading legal correspondents entered into wide ranging debates on the benefits and potential pitfalls of giving reasons for prosecutorial decisions. The consultation initiative was generally welcomed in the media coverage. The complexity of the issues under examination was generally acknowledged both by supporters of the status quo and advocates for change. One contributor spoke of "a whole descending hierarchy of ways in which this [issue] could be addressed"[1] as well as the issues of by whom, and in what manner, information ought to be received. As Mary Wilson[2] succinctly put it to the Director: "at the

1 Tony Williams (solicitor) speaking on the Breakfast Show on Newstalk, 28 January 2008.

2 Drivetime on RTE Radio 1 with Mary Wilson, 28 January 2008.

end of the day you've got to arrive at a situation where you preserve the rights of accused people, witnesses in cases, and also show respect to victims".

A summary of the written responses

In total 82 responses to the consultation paper were received. These respondents can be divided into ten categories as follows:

Summary of Respondents		
Category of Respondent	Number	% of Total
Members of the Public	24	29%
Victims / Family Member of Victims	20	24.5%
Victims' Organisations (some of whom had a very focused remit related to a particular type of offence, such as families of victims of homicide and the Rape Crisis Centres)	11	13.5%
Individual Lawyers	5	6%
Academics	1	1.2%
Media	1	1.2%
Human Rights Organisation	1	1.2%
Victims of Alleged False Complaint	2	2%
Criminal Justice Agencies (including: An Garda Síochána; the Garda Síochána Omdudsman Commission; the former Commonwealth of Australia and Tasmanian DPP)	7	8.5%
Others (including: the Law Society of Ireland, the Information Commissioner; the Health & Safety Authority; the National Counselling Service for Adults with a History of Childhood Abuse; and the Department of Enterprise, Trade & Employment)	10	12%
Total	82	

The careful consideration given to the complex range of issues expressed within these submissions and indeed during the internal and public seminars, demonstrates the great effort that individuals and organisations expended on the question of the giving of reasons.

We are particularly aware that victims and the family members of victims were, in many instances, recounting the most personal and painful of events and we are grateful to those who, having been directly affected by a personal loss, told us the effects of our current policy on them in such circumstances. The following gives a representative overview and analysis of the responses we received.

3 AN OVERVIEW OF THE WRITTEN RESPONSES TO THE SPECIFIC QUESTIONS RAISED IN THE CONSULTATION

The inclusion of the following excerpts is intended to show a representative sample of the views expressed by respondents.[3] Their inclusion is not intended to suggest that such views are approved of or shared by the Office of the DPP, nor is their selection intended to suggest that such approaches are to be adopted in any proposed policy change.

1. Should the current policy be changed?

On the question of 'whether or not reasons ought to be given?' the overwhelming bulk of the submissions received were in favour of the giving of reasons in some form.

The following excerpts from submissions received gives a representative overview of the arguments advanced in favour of reforming the existing policy:

> "I welcome the move by the DPP to undertake a review of the policy of not providing reasons to families of victims for decisions taken in criminal matters. However, I would argue that this issue should not be considered in isolation but viewed in the context of a dedicated service provided by the Office of the Director of Public Prosecutions to victims of crime, their families and prosecution witnesses in criminal matters."[4]

> "We believe the current policy should be changed, as so many families of homicide victims are left in limbo when they do not know the reasons why a prosecution does not take place following the tragic death of their loved ones. Such families are incapable of getting on with their lives, they are stuck in time, always questioning themselves around what happened to their loved ones and 10, 15, 20 years later are still traumatised and feel a sense of injustice that they will never know why the person(s) they think is responsible for the death of their loved one will never be brought to justice."[5]

There was however strong opposition to changing the current policy voiced by a minority of submissions, principally from members of the legal professions and organisations representing those professions. The following excerpts are representative of the arguments advanced by them:

3 The relevant permissions were gained from all respondents for the authority to reproduce excerpts from their submissions for this publication.

4 Source: Dr. Debby Lynch, College Lecturer Department of Applied Social Studies, University College Cork.

5 Source AdVIC.

> "On a practical level it will become impossible to fairly prosecute offences if victims of crime believe they have a general right of influence over the decisions and actions of the DPP."[6]

> "The policy should not be changed because of the potential implications on the presumption of innocence. A temptation could arise to prosecute in improper cases, rather than attract the obligation to give reasons. The Office of the DPP enjoys full public confidence, we do not believe that the relatively limited category of cases in which the Director directs no prosecution where a prosecution has been expected, would justify the changes proposed."[7]

> "Despite my views that there should be strong mechanisms for keeping complainants informed of dates and decisions at all stages of the process, I am wary of the idea of explaining the reasons for a decision not to prosecute. I am not so much opposed to the idea as wary of it, and wondering whether it is possible to devise ways in which communication of reasons can be made both (a) meaningful to the complainant and (b) fair to the suspect."[8]

2. If so, should reasons be given only to those with a direct interest, the victims of crime or their relations?

The questions of to whom, in what circumstances, in what degree of detail those reasons ought to be given, are of course more complex issues and naturally enough we received a broader spread of opinion on these topics.

The question of 'legitimacy of interest' was addressed by many of the submissions received and consideration of the interests of greater 'transparency and accountability' was a feature common to many:

> "We believe that the publication of the discussion paper on 'reasons for decisions' by the Office marks a historic move forward by the Office of the DPP. We believe that if the Office were to put in place a system for providing reasons for non-prosecution to victims of crime or other injured parties it could increase confidence within the criminal justice system. In addition, it would increase accountability and transparency within the Office."[9]

6 Source: A State Solicitor.

7 Source: The Law Society.

8 Source: A practising barrister.

9 Source: One in Four

However, many of the submissions recognised the need for caution with respect to the "delicate balancing act"[10] that would be required to ensure fairness and protection to all parties involved. This was highlighted by victims' organisations and civil liberty groups alike, who firmly acknowledged the primacy of the protection of the presumption of innocence.

> "We agree that at a minimum, the case [of *Jordan v. United Kingdom*[11]] appears to be the authority for the proposition that Article 2 of the European Convention on Human Rights (ECHR), in cases concerning the use of lethal force by agents of the State, requires that the reasons for a decision not to prosecute in a case should be provided to the family of a deceased person".[12]

> "Entitlement to receive the reasons: In most cases it would be appropriate for Gardaí to receive information about the prosecution case. Victims should receive information unless there are compelling reasons to the contrary. In other words, there should be a legal presumption in favour of the giving of reasons."[13]

3. Should reasons also be given to the public at large?

In the main there appeared to be no pressing appetite for reasons to be placed in the public domain. Submissions recognized the primacy of the interests of victims and their families to know reasons - not the press or the public more generally. Again, the 'legitimacy of interest' principle was operative. However, a number of submissions referred to 'exceptional circumstances' where it might be deemed appropriate to place certain information in the public domain.

The following view from an agency providing support to families following homicide encapsulates the general view discernible in a majority of the submissions that it would be undesirable for such reasons to be in the broader public realm.

> "We believe the DPP should not give his reasons to the public at large so that victims, witnesses and persons under investigation should not be subjected to the risk of trial by media. Considerations of confidentiality, the privacy and reputation of witnesses and the accused's presumption of innocence are relevant in this regard."[14]

10 Source: submission from the Garda Síochána Ombudsman Commission.

11 *Jordan v. United Kingdom* (2003) 37 EHRR 52 (see n.17 below).

12 *ibid.*

13 Source: submission from the Irish Council for Civil Liberties (ICCL).

14 Source: AdVIC.

The following excerpt is representative of the minority or 'exceptional circumstances' view:

> "In appropriate cases, information could be made available to the public. Such circumstances could arise where an injustice would be created or public confidence in the criminal justice system damaged were the information not to be put in the public domain."[15]

At the same time, submissions received recognised that once reasons are given to individuals there is no effective means to prevent them being put into the public domain if those individuals choose to do so.

4. If reasons are given, should they be general or detailed?

Many submissions warned of the dangers of issuing reasons so very general in character as to be meaningless. In particular some victim organisations spoke of the potential harm that generalised reasons might inflict. There was however a recognition in many submissions of the link between the level of detail and the risk that a detailed reason might adversely affect the interests of justice (for example, by revealing the identity of a police source) or more generally, the rights of suspects to the presumption of innocence and their good name. Respondents acknowledged the undesirability of a 'one size fits all' approach and thus many recommended that each case be looked at on its own merits.

> "The amount of information that is imparted will depend upon the circumstances of the case. However, the DPP should employ an overarching policy that the information given is as detailed as possible. The amount of detail given to the Gardaí may differ from that furnished to the victim; however, this may be justified on the grounds of the effective administration of justice and security considerations. If so, these reasoned grounds should be recorded, and subject to review by a senior official in the DPP's Office, and independent oversight."[16]

5. Should reasons be given in all cases, or only in certain categories of serious cases? If so, which?

Most of the submissions received advocated a blanket policy of giving reasons in all cases. Many respondents highlighted the difficulty of determining seriousness by reference to a particular offence or class of offences. Others, most notably

15 Source: ICCL.

16 *ibid.*.

special interest groups, argued for inclusion of their category of victim based on a criterion of seriousness. These included victim interest groups whose particular concern is with homicide or rape.

There was however a discernible consensus that where death had occurred in the context of involvement by agents of the State, for example, by Gardaí or Prison Officers (not simply confined to cases covered by the *Jordan*[17] decision), that reasons ought to be given in all such cases.

The training and resource implications of such a broad policy change clearly informed the thinking of a number of respondents as evidenced in the following excerpt:

> **Need for staff training:** "It is essential that staff who assume this responsibility within the DPP's office receive proper training to enable them to communicate respectfully and sensitively with victims. They need to be aware of the impact of crime on victims and especially of the possible traumatic effects to victims of a decision not to prosecute. They need to understand the possible reactions of victims at such a time, and to know how to respond effectively and sympathetically in these circumstances."[18]
>
> "Reasons should be given in all cases, more serious cases initially to allow for gradual training of staff."[19]

6. How can reasons be given without encroaching on the Constitutional right to one's good name and the presumption of innocence?

Interestingly we received a number of submissions from persons who felt that the policy of not giving reasons for decisions had adversely impacted on them in

17 *Jordan v. United Kingdom* (2003) 37 EHRR 52. In *Jordan* the European Court of Human Rights held that the failure of the DPP of Northern Ireland to give reasons as to why a prosecution was not brought against members of the security services who had killed a member of the public by use of force constituted a violation of Article 2 of the European Convention on Human Rights (ECHR) on the right to life. The case appears to be authority for the proposition that Article 2 of the ECHR, in cases concerning the use of lethal force by agents of the state, requires that the reasons for a decision not to prosecute in a case should be provided to the family of a deceased person. The issue is not discussed in any depth in the judgment and there appears to be no consideration of the implications of the giving of reasons for the Convention rights of other parties, such as the suspect or witnesses. Further, the degree of detail or specificity of the reasons to be given is not discussed.

18 Source: Crime Victims Helpline.

19 Source: Mary Flaherty, CARI Foundation.

circumstances where they maintained they had been falsely accused of a crime. Far from preserving their constitutionally protected right to their good name, they maintained that the policy failed them insofar as it deprived them of a full vindication of their good name and, further, offered no 'closure' on the matter.

More generally the views expressed in submissions on this point accepted that where it was not possible to give reasons without encroachment on to the constitutional right to one's good name then one ought not to do so.

> "A victim's right to information is served by the giving of reasons for a decision not to prosecute. Such a practice should not interfere with a suspect's right to the presumption of innocence or his/her right to a good name. Essential in this respect is a system of adjudication operated on a
>
> case-by-case basis which is supported by adequate oversight (both internal and external). This aim can be achieved by utilising an appropriate framework for giving reasons to victims which includes adequate safeguards to protect the rights of suspects."[20]

One respondent proposed a mechanism whereby the individual privacy interest and constitutional rights of parties could be respected and yet the 'public interest' could be satisfied in respect of releasing material into the wider realm:

> "We recommend that comprehensive analysis, and the publication of case studies, be undertaken in such a way as to enhance transparency, yet protect the identity of the parties involved."[21]

7. Should the communication of reasons attract legal privilege?

The law concerning qualified privilege was described by Parke B. in *Toogood v. Spyring*[22] in the following terms:

> "In general an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another, and the law considers such publication as malicious, unless it is fairly made by a person in discharge of some public or private duty whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords it a qualified defence

20 Source: ICCL

21 Source: Rape Crisis Network Ireland.

22 [18340 ICM & R 81].

> depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society."

There was broad support for the notion that privilege ought to attach to reasons for decisions. It was suggested by many that even without statutory protection qualified privilege might provide sufficient immunity. Victims' groups in particular noted the importance of such protection to encourage the giving of frank and detailed reasons.

> "Reasons should attract absolute legal privilege and this should enjoy a statutory footing."[23]

A more cautious view as to the sufficiency of protection that would be afforded by the operation of qualified privilege was expressed, in particular by members of the legal profession, who felt a statutory regime would be necessary:

> **Immunity** - "I would suggest that although the communication of reasons to complainants might well already be privileged by common law defence of qualified privilege in the law of defamation, it would be better to have a statutory system that clearly defines the limits of what may be communicated and to whom, without fear of any legal repercussion of any kind. Also the question of communicating information to the public (e.g. press release) is very unclear under such qualified privilege at common law. The question of repetition of the information by others to others should probably also be addressed: e.g. where the complainant goes to the media or public representatives, and they repeat in the public domain information that was communicated to the complainant by the DPP. I would think these matters should be clarified by statute as the whole situation is a novel one in our system."[24]

In pursuance of a considered view on this matter a senior counsel's opinion was sought on the adequacy of the existing law on qualified privilege. The advice was to the effect that:

a) The Office of the DPP should seek to ensure that statements made in any given case do not defame either parties being enquired into or witnesses;

b) Even if statements were made which adversely affected the reputation of others, there is a substantial likelihood that any action could be met with the defence of justification (i.e. that the statements are true);

23 Source: Support After Crime Services.

24 Source: a practising member of the Bar.

c) Qualified privilege is likely to attach to statements made to interested individuals as to the reasons for non-prosecution;

d) Qualified privilege is unlikely to attach to public statements relating to the same subject matter.

e) It is difficult to see why either form of communication should require to be protected by absolute privilege.

f) Fair and accurate reporting of a statement by the Director could by statutory amendment be made the subject of qualified privilege. However, currently such protection would not cover the original statement if that was defamatory of any person.

8. How should cases where a reason cannot be given without injustice be dealt with?

Some suggested setting out in the broadest terms the operative derogations from the general policy. Others felt the risk of injustice was a compelling reason not to depart from the current policy.

Many submissions acknowledged circumstances where information about the rationale for a decision should not be given, as was pointed out in the 'Discussion Paper on Prosecution Policy on the Giving of Reasons for Decisions':

> "Where it could cast doubt on the innocence of a suspect without him/her having the benefit of the trial process, this could happen where the suspect is not named but is "readily identifiable" given the circumstances of the case. Where it could indicate that the testimony of certain witnesses was not reliable or persuasive. Where to do so could prejudice further action being taken in the case or for the protection of Garda sources."[25]

9. By whom and by what means should reasons be communicated?

There were a range of responses to these questions as reflected in the representative excerpts reproduced below. A common thread through the submissions was the desirability of having a legally qualified person presenting the information. Many respondents recommended offering face-to–face meetings if requested.

25 *Discussion Paper on Prosecution Policy on the Giving of Reasons for Decisions*, Office of the Director of Public Prosecutions, January 2008.

> "The DPP should write to all victims in cases where the prosecutor alters the charges or where a decision is taken not to proceed with a prosecution. This would mean that the victims and their families could deal directly with the person who makes the decision on the case rather than receiving the information from the Gardaí that a decision had been made not to prosecute.
>
> Under such a 'new scheme' of providing information to victims, the prosecutor responsible for making the decision not to prosecute in a case has the responsibility of drafting and issuing letters to the victim(s) in the case. They would also be a direct point of contact for any response or query that the Office may receive from the victim. Therefore, the decision would be explained to the victim or the family member who would then have a better understanding of why the particular decision was made. The prosecutor would meet with the victims or their family."[26]
>
> "Establish a dedicated victims unit within the DPP's Office. This should be staffed by people who are legally knowledgeable as well as trained in communicating and empathising with victims"[27]
>
> "We propose that a dedicated unit should be set up to communicate reasons by a standard letter to parties with a direct interest as well as through the website of the Office of the DPP. Persons who seek private audiences with a representative of the Office of the DPP to talk about the decision not to prosecute should be facilitated."[28]

Dr Debby Lynch of University College Cork who had worked in the Witness Assistance Service (WAS) in the Office of the Director of Public Prosecutions in Sydney, New South Wales, Australia, shared some of the features of this dedicated witness service and recommended it as a model through which the 'reasons project' might be operated here in our jurisdiction:

> "In many respects WAS became the public persona of the DPP, [it] worked proactively to engage with victims of crime, their families and witnesses appearing in court matters prosecuted by the Office of the DPP (NSW).
>
> Social workers worked collaboratively with legal colleagues in offices adjacent to the central criminal courts, providing information to victims and their families and witnesses through the stages of the prosecution process.

26 Source: Dublin Rape Crisis Centre.

27 Source: ICCL.

28 Source: Michael Staines, Solicitor, and Tanya Moeller, Trainee Solicitor.

Initially this involved putting victims and their families in direct contact with the DPP solicitor handling the case. Later, it could be liasing with the solicitor to provide families with information about the stage of the case within the court system, explaining the terminology used to families and raising their awareness of the complexity of issues in the prosecution process such as evidentiary matters.

What was most significant to this process was the early contact with families in relation to the criminal matter which could help prepare them for a range of outcomes at different stages of the criminal justice process.

The work also involved informing families if a decision was made not to proceed with the prosecution of the accused person and giving the reasons for this decision if requested. Reasons were provided to the immediate family members by the DPP solicitor involved in the matter in the presence of the WAS officer who had previous contact with family. Reasons given were as specific as possible within the context of DPP policy in the jurisdiction (whereby significant consideration was given to the integrity of the criminal justice process).

For me, the significance of a Witness Assistance Service is that it is a part of the DPP and can act as the interface between the legal system and the public. Through its collaborative approach, actions of the DPP become more visible and accountable, public confidence in the prosecution process is maintained and the public profile of the Office is enhanced. This is possible without jeopardising the legal process but fulfilling the entitlement of all accused persons to a fair trial and achieving the deepest aspirations of our criminal justice system. And in this way we can achieve a wider notion of justice for victims of crime and for society."[29]

29 Source: Dr Debby Lynch, University College Cork.

4 CONSULTATION PROCESS

Internal Consultation

In addition to the external element of the consultation process, the Office consulted widely with its own legal staff. Two internal seminars were held at which all legal staff had an opportunity to debate the issues raised by any potential change in Office policy on the giving of reasons.

This internal examination provided very useful perspectives coming as they did from the lawyers who would be involved in the implementation of any proposed policy changes. Further, many of the lawyers present from the Solicitors Division were able to offer practical suggestions from their experience of being at court on a daily basis with witnesses and victims of crime and indeed the family members of deceased victims. Their observations on matters relating to communicating with victims and witnesses were particularly useful.

The issue of resources was brought into sharp focus during these internal discussions, in particular staff training needs and the additional time required to implement such a policy. This in turn could have implications for the time taken to do other work. As with the public debate there was an evident understanding of both the complexity of the issues involved and an appreciation of the needs of victims and their families. There was also a discernible call for a cautious and incremental approach to be taken to a policy change of this magnitude in light of the potential increased workload that would undoubtedly be created and the need for this not to result in a backlog in the prosecutorial process on directing and maintaining prosecutions. It was universally agreed that any such policy change would be difficult to manage within existing resources.

Public Debate

Following the deadline for the receipt of submissions, a representative group of interested parties were invited to a seminar to engage in a debate of the issues. The event was attended by 72 delegates. Amongst those attending were:

- **Victims' Groups**, including: Victim Support; The Federation for Victim Assistance; The Dublin Rape Crisis Centre; AdVIC (support for families after homicide); Support after Crime; CARI; Amen; Courts Support Service; and the Rape Crisis Network Ireland;

- **Special Interest Groups** including: St. Clare's Unit, Children's University Hospital, Temple Street; St. Louise's Unit, Our Lady's Children's Hospital, Crumlin; Irish Council for Civil Liberties; Irish Human Rights Commission; the Office of the Omdudsman for Children;

- **Lawyers and Lawyers Representative Bodies** including: the Law Society and the Bar Council; individual members of the Law Library; practising solicitors, academic lawyers; representatives from An Garda Síochána; the Garda Ombudsman; the DPP for Northern Ireland and members of his staff from the Public Prosecution Service Northern Ireland; the Law Reform Commission; the Department of Justice, Equality and Law Reform; and staff from the Office of the DPP.

The event was chaired by the Honourable Mrs. Justice Catherine McGuinness, President of the Law Reform Commission, and speakers included:

- Mr. James Hamilton, Director of Public Prosecutions
- Mr. Jim McHugh, Chairman, Commission for the Support of Victims of Crime
- Ms. Sue Moody, Deputy Head of the Policy Division of the Crown Office and Procurator Fiscal Service, Scotland
- Mr. Barry Hancock, formerly of the Crown Prosecution Service, England and Wales, and former General Counsel of the International Association of Prosecutors

5 A SYNOPSIS OF THE DEBATE AT THE SEMINAR HELD IN DUBLIN CASTLE ON 10 APRIL 2008

As outlined earlier, as part of the public element of this consultation process a representative group of interested parties were invited to a seminar to engage in a debate of the issues. The event was chaired by Mrs Justice Catherine McGuinness. There was a wide ranging debate during which a discernable division of opinion developed between members of the legal professions and their representative bodies who, almost universally, recommended a continuation of the present policy of not giving reasons and victim organisations and members of the public who advocated a change in the policy. In order to stimulate as open a debate as possible attendees were assured that their views would not be personally attributed to them in any format, including this publication. However, the following excerpts from the speakers' presentations gives a contextual backdrop against which the debate occurred.

MR. JAMES HAMILTON, Director of Public Prosecutions:

Perhaps I should just indicate some of my own thinking to date. Now, obviously we have not arrived at final conclusions and will not until the consultation process has finished. But I would not have started this process if I did not think that we should move in this direction. I must say my firm belief is that it is something we ought to do if we can for the simple reason that you should treat people the way you would like to be treated yourself.

I very much think that if I were in the position of being a victim of a crime, I would like to get as much information as I could.

So the only real issues I think we are concerned with are whether this can be done and how. My predecessor always made it clear that if there was a way that could be found to give reasons to victims without injustice, he would gladly do it. Again, this is set out in the paper. We have looked carefully at the experience in other jurisdictions where they have gone down this route to varying degrees. I hope you found some of that experience of interest.

My own inclination, and this accords I think with most of the written submissions that we have received, would be not to go beyond giving reasons to victims (or next of kin in cases of fatal cases) and not to go down the route of giving reasons to the public at large except for very good particular reasons. I am not ruling out that there might be cases where questions of public confidence in the legal system might dictate that reasons should be given to the wider public but I would not see that as the norm. Now again, I am open to persuasion on these points.

Quite a number of people said you should give reasons in every case. My own inclination is to think that, simply for reasons of practicality, it might be unwise to start by doing that. It seems to me that perhaps we should be going down

the route of starting with the more serious cases such as fatal cases, and cases involving serious violence, and then perhaps expanding out to other types of cases if that were successful and if resources permitted it. But again, I am open to persuasion on those views and I would be particularly interested in hearing from you.

MR. JIM MCHUGH, Chairman, Commission for the Support of Victims of Crime:

As many of you are aware, this Commission was established three years ago by the then Minister for Justice, Equality and Law Reform. It has two main tasks. The first is to devise an appropriate framework for the support of victims of crime into the future and the second to disperse funding to support victims of crime.

'It is imperative that any proposed change should be fully debated and considered so as to ensure, insofar as it is possible, that the correct balance is struck between the rights of a victim and other competing interests. In this regard I am pleased to see that the DPP has chosen to consult with such a broad audience. It is important to consider the perspective of the victim in this debate. Where a decision has been taken by the DPP not to prosecute or maintain a prosecution, the victim can often feel great distress, frustration and a sense of helplessness. By providing reasons to victims in a clear and timely fashion, it can greatly reduce their sense of victimhood. Should the current policy be changed? Yes, it should. There is an increased awareness in Ireland that public bodies must be accountable and transparent in their dealings with members of the public. The Freedom of Information Act and Ethics in Public Office Act have led the general trend in Ireland towards greater accountability in public administration. A policy of giving reasons for decisions would enhance the perception of fairness, transparency and objectivity of the decision-making process.

Should reasons be given only to those with a direct interest, the victims of crime or their relatives? Generally speaking, reasons should be provided only to those with a direct interest, in other words the victim or in cases of a fatality the next of kin.

Should reasons also be given to the public at large? I cannot envisage a situation where it would be necessary in all circumstances to provide reasons to the public at large. However, in cases of grave public interest and importance, it may be desirable to have the reasons made public.

If reasons are to be given, should they be in general or detailed? The information provided should contain sufficient detail for the victim to have a clear appreciation of the reasons for not proceeding or maintaining a prosecution.

By and large statements of a general nature are unlikely to meet the needs or expectations of a victim. In circumstances where the giving of reasons may impinge on issues relating to national security, then it follows that in those circumstances the security of the State is paramount. In all such circumstances a clear and unambiguous explanation should be provided to a victim so they fully appreciate the DPP's position in the matter.

How can reasons be given without encroaching on the constitutional right to one's good name and the presumption of innocence? All individuals, including a defendant, have a constitutional right to their good name and the presumption of innocence. In most cases the identity of a suspect will not come into the public arena. However, where this is not the case, the risk of prejudice increases. It is imperative that no information is provided, in terms of giving reasons, that would prejudice these rights. The presumption of innocence is paramount and must be protected.

Should the communication of reasons attach legal privilege? Regarding the issue of whether privilege should attach to the communication of reasons, my view is that, in the absence of legal privilege, the DPP is less likely to provide detailed reasons and more likely to provide general ones. From the victim's viewpoint it is desirable that he or she has a full appreciation and understanding of the reasons given. It therefore follows that communication of reasons should attach to legal privilege.

How should cases where reasons cannot be given without injustice be dealt with? Reasons should never be given where an injustice would be likely to ensue. In these cases the victim should be afforded the opportunity of meeting a representative from the DPP's office for the purpose of providing an explanation as to why reasons cannot be given. So I think communication in that regard is very important.

By whom and by what means should reasons be communicated? Generally speaking, reasons should be communicated to victims by way of letter which should explain in layman's terms the reasons for the decisions taken. In exceptional circumstances a request by a victim to meet with an officer from the DPP's office seeking clarification of a decision should be given sympathetic consideration. In those cases it is my view that the most appropriate person to meet the victim is a senior figure in the office other than the person who actually made the decision. This lends more objectivity to the process.

MR. BARRY HANCOCK, formerly of the Crown Prosecution Service, England and Wales, and former General Counsel of the International Association of Prosecutors:

First, should reasons be given in all cases? Logically, if reasons are going to be given, there should be no differentiation in the overall approach between simple cases and more serious cases. Of course the key is that the level of detail will differ.

Now, what level of detail should be given? Will it be the same in all cases? I suggest that the level of detail should depend on a range of factors which will include the seriousness of the offence, the impact on the victim, and the level of public awareness.

Crucially there is the question of whether reasons should be given on demand or automatically? Although it is not entirely clear from the research, a number of submissions seem to indicate that the favoured approach is to give reasons in reaction to requests from victims. Now, although in a perfect world we may wish to be consistent and provide a 'Rolls Royce' service, I suggest that in times in which the good use of resources is so important, the provision of reasons on request would be as far as one would wish to go.

What form should the communication take? In simple cases no doubt a letter would be appropriate. Where the issues are more complicated a meeting, as has been mentioned by the last speaker, would be necessary.

Both approaches have their problems. Standard letter syndrome has its dangers and meetings require expertise. Discussions with Danish colleagues indicate that no letter explaining the reason(s) for the decision not to prosecute goes out to victims from their office without a second opinion being taken inside the office. Other jurisdictions have invested heavily in training.

Now, who should give the victim the information? There seems to be two approaches to this issue.

The response can either come from the prosecutor who made the decision or a specially trained member of staff. The Dutch who have made enormous strides in dealing with victims over recent years have a prosecutor in each office who is responsible for victims' issues and he or she is supported by specialist administrative staff. However, if a meeting is needed, the prosecutor responsible for the decision or even a more senior prosecutor may conduct the interview.

What then are the training implications? Whoever gives the information will require a significant amount of training. This is probably the most resource-intensive part of the process. The discussion document highlights a number of problems which can arise with making explanations. I trust we can leave the libel issue aside here. That should be covered by legislation. But can I stress that the important thing is to get it right first time.

None of these issues is insurmountable but it is easy to imagine that moving in the direction of giving reasons is an uncomfortable way to go and we should not wish to rush along it. May I suggest that the way is inevitable and that it is for you to find a method which is appropriate for the Office and for the citizens of the country.

In conclusion I propose that there is an inevitability about the way in which you must go. What is important is that whatever you do is done in a controlled and thought-out manner so that the needs of the victim and the needs of the Office are fairly balanced and that public confidence can be maintained in the procedures.

MS. SUE MOODY, Deputy Head of the Policy Division of the Crown Office and Procurator Fiscal Service, Scotland:

I would like to talk briefly about the background to the change which was introduced into Scotland in 2005. Traditionally no reasons were given. In fact there is a wonderful letter which talks about "we are giving reasons why we can't give reasons", which as you can imagine was greeted very positively when it was sent out to victims. To be fair, that was part of a culture which I think existed in many prosecution services, of what some people would say was detachment and which others would say was secrecy, where the decisions that the prosecution service made were not the subject of openness and were not divulged to anyone.

Before giving you the details of the new arrangements introduced in 2005 there are a few aspects of the Scottish system that I think are relevant to our discussions today. Within the [Scottish] prosecution service we have a Victim Information and Advice Service which has been set up specifically to provide information and advice to certain victims and witnesses in more serious cases. That was introduced in 2002.

Traditionally prosecution staff meet most witnesses in person when the case is being prepared for prosecution before a jury and this is very useful in establishing contact and explaining what may happen in the case. This part of the process is called 'precognition'.

Our prosecutors in court now try and see vulnerable witnesses before the proceedings where this is practicable and with due regard for any concerns the defence may have about 'coaching' witnesses. This is quite a change. This is particularly important in more serious cases. In the High Court, that being our highest court, prosecutors in that court will usually try and introduce themselves and the defence advocates to vulnerable prosecution witnesses, particularly the complainer, before the trial begins. Now, that has to be done carefully because, clearly, we do not want to prejudice the rights of the accused. But that is something which has evolved over time and I think can be very useful in terms of informing and assisting victims and witnesses.

Now, I think it's fair to say we would like to do more of this but sometimes it is difficult for purely practical reasons to arrange such meetings. But it is certainly something that is very important. I think that ties in with an openness and a desire, where possible, to provide information, advice and explanations.

Now, to describe briefly our policy and practice on giving reasons.

In death cases it is mandatory (and that goes back over some time) to provide the bereaved relatives with the reasons why decisions have been taken in relation to the investigation of their family member's death. In relation to domestic abuse, which sadly forms a very substantial part of our case load, in racially motivated offences, sexual offences, offences involving children and other vulnerable victims, we recommend to prosecutors that they provide reasons pro-actively on a range of decisions, including a decision not to proceed, a decision to accept a reduced plea and a decision to drop proceedings that have already started. And because these cases are the ones that are referred to the Victim Information and Advice Service anyway, we have a mechanism for doing that. In all other cases we will provide reasons on request but we do not provide reasons automatically in every case.

So how does this work? What happens is that in some cases we already have contact with the victim or the bereaved family. In those cases we will be providing them with information about the case on an ongoing basis. What the Victim Information and Advice Officer will do is to advise them that if they want to find out about the reasons for a decision they should write in. The reason for that is because we want to be sure that the explanation given is provided by a legally qualified member of staff and that it is done by the person who is closest to the decision. So in these cases we will provide the information, mainly by letter, but we will also offer a meeting in the cases that I have already outlined. Our policy is still developing. We are setting it in the context of a new development which is called "meeting the needs of victims and witnesses" which we will be launching later this year. It will give victims, witnesses and nearest

relatives a clear idea of the commitments we already make to them and will provide our staff with the tools to ensure that they deliver these commitments.

There are three factors that I think are essential in the successful implementation of effective arrangements regarding giving reasons for decisions. First, there is an issue about cultural change. We have had to go through quite a painful process in the Scottish prosecution service over the last eight years. We have had some significant cases where we have been the subject of sometimes unjustifiable criticism. We have had to look very carefully at all our practices and we have been the subject of intense public scrutiny, which has not always been pleasant as you can understand.

Cultural change is extremely important. My impression, and this is not intended to be pejorative, is that lawyers tend to be very, very careful about what they say, quite rightly. But sometimes you can actually say more than you think you can or you can say it in a way which maintains all the things that you would want to maintain but provides something for the victim to be able to help them move on, which is what we all want to do if we possibly can.

There is a really vital need to be aware of the end user, to use rather a horrible term. That brings me on to my second point, which is about communication. I am sure I probably do not have to say this to the audience here, but it is extremely important that we communicate to victims and witnesses in an accessible way. And quite frankly, some of the letters I saw when I first joined the Fiscal Service six years ago should never have been sent to anybody except a specialist criminal lawyer, such as "the case has been deserted pro loco et tempore". What does that mean? It means the case has been abandoned for the time being; it may be resurrected. Sometimes lawyers are so used to talking jargon that they forget that other people do not understand and I think there is a real need to look at accessible information.

The third one is resourcing. Giving reasons is not cost neutral. Apart from the training element there are also issues about prosecutors spending time in meetings. There are issues about the wider community engagement. It is time consuming. It requires care and thought. You cannot just put a junior prosecutor into a situation of talking to a nearest relative about the death of their loved one without giving them guidance and support.

6 CONCLUSION

Following this extensive consultation process, which included researching the current practice in many like jurisdictions, carrying out a careful analysis of the views expressed in the 82 submissions received in the public consultation process as well as listening to the multitude of opinions expressed during the internal and public seminars, the Director of Public Prosecutions has decided to change the Office's policy of not giving reasons to victims of crime for decisions not to prosecute.

At the outset of this review process the Director stated that he was:

> "particularly mindful of the need to embrace greater accountability in public administration whilst balancing the very significant potential for the creation of injustice which could be caused by a too far reaching departure from the current policy as well as the resource and training implications of a policy change."

The Director considered whether he should introduce change gradually, beginning with a particular type of case, or instead opt for an all embracing change, introducing a policy of giving reasons in all cases with immediate effect. The Director formed the view that the gradual approach is the better one and that a policy change is more likely to succeed if one does not try to do too much all at once. A gradual approach also makes it easier to fine-tune the implementation of the new policy in the light of experience in operating it.

The Director also formed the view that initially the policy would apply to cases where a death has been caused. These include some of the most serious offences dealt with by the Office including murder and manslaughter. In such circumstances bereaved families have frequently expressed their need to fully understand the circumstances leading to the death and moreover understand the decision making process that determines whether anyone will be held accountable in a criminal trial. The Director is well aware that bereaved families feel a particularly acute need to ensure that everything that can be done has been done. Of course this is true in respect of all victims of serious crime. However, in the case of victims who can no longer speak on their own behalf this is a particularly heavy burden borne by the family and friends of the deceased.

The operation of the new policy will be monitored and evaluated carefully by senior management. A key element of the evaluation will involve analysing the resources and training issues involved in extending the policy to other serious crimes including sexual offences. We will be liaising closely with the Garda authorities who maintain contact with victims. We will also liaise with victim organisations to obtain feedback from them.

The new policy will operate in respect of cases involving a death where the alleged offence takes place on or after today's date (22 October 2008).

It will be the policy of the Office of the DPP to give the reason for decisions not to prosecute, or to discontinue a prosecution on request, in writing, to parties closely connected with the deceased, where it is possible to do so without creating an injustice for other persons. Mindful of the very many submissions which stressed the dangers of issuing reasons so very general in character as to be meaningless, in particular from victim organisations who spoke of the potential harm that too generalised reasons might inflict, it is the intention of the Office of the DPP to provide, where possible, reasons in sufficient detail so as to enable the interested party to understand why the decision was made. However, reasons will not be given where this would expose a potential witness or another person to injustice, or would reveal the identity or existence of confidential sources or confidential methods or procedures of law enforcement. It is expected that in the large majority of cases it will be possible to give a reason.

It was recognised by many of the respondents to the public consultation process that such a broad policy change has training and resource implications. The proposed policy change will take effect as and when files are received in fatal cases where a decision not to prosecute is taken. This will allow time for staff training and the development of detailed internal policy guidance as well as allowing for necessary IT changes to be implemented. Reasons will not be given for decisions in cases where an offence was committed before 22 October 2008. To attempt to give reasons for decisions already made would require substantial additional resources which are not available.

Following a careful evaluation of this pilot policy change, and subject to the availability of sufficient resources, the Director anticipates that there will be scope to expand the policy to other serious cases, including sexual crimes. He acknowledges however that it will be difficult to manage even the relatively confined category of cases covered by the pilot project within existing resources. Whilst his preferred choice would have been the formation of a small dedicated unit in the Office to handle the giving of reasons to members of the public, the recent public service budgetary restrictions are such that the Office does not have, and is unlikely to have, the additional resources which would be necessary to resource such a unit in the foreseeable future. This presents a significant challenge as it will require the Office to absorb the additional workload within what are already stretched resources. However, the Director believes that the importance of this project is such that the Office should begin the policy change within current resources.

APPENDIX: Policy on the Giving of Reasons for Decisions Not to Prosecute

It is the intention of the Office of the Director of Public Prosecutions to pilot a policy change on the giving of reasons for decisions not to prosecute. The policy will operate on the following basis:

1. The policy change will be confined to alleged offences where a death has occurred including:

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

2. Reasons for decisions not to prosecute, or to discontinue a prosecution, will be given on request to parties closely connected with the deceased, such as:

    - members of the deceased's family or household;
    - their legal or medical advisers; or
    - social workers acting on their behalf

3. Reasons will be given only in circumstances where it is possible to do so without creating an injustice. This would include situations where the giving of a reason would:

    - expose potential witnesses or other persons to injustice such as by taking their good name;
    - reveal the identity or existence of confidential sources or confidential methods or procedures of law enforcement; or
    - have an adverse effect on law enforcement.

4. The reason given should where possible be sufficiently detailed to enable the interested party to understand why the decision was taken.

5. The policy will apply 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.

6. Reasons for decisions will be communicated to interested parties in writing. It is not proposed within the scope of this pilot policy change to offer face-to-face meetings with interested parties. Persons who come within the scope of paragraph 2 above and who want to know the reason for a decision not to prosecute or to discontinue a prosecution should write to the Director of Public Prosecutions, 14-16 Upper Merrion Street, Dublin 2.

7. The Office of the DPP anticipates this policy will operate at least until 1 January 2010. A comprehensive evaluation of the policy will be undertaken during that period. Subject to a satisfactory evaluation of the operation of the policy consideration will be given to extending the policy to other serious cases including sexual crimes.

8. It is important to note that this new policy is in addition to, and leaves unaltered, the long-standing rights of victims and their families to:

- request the DPP to review a prosecutorial decision
- meet with the prosecution team before a trial
- request the DPP to seek a review of an unduly lenient sentence

22 October 2008