Office of the
Oifig an

Director of Public Prosecutions
Stiúrthóra Ionchúiseamh Poiblí

DISCUSSION PAPER

ON

PROSECUTION POLICY ON THE GIVING OF REASONS FOR DECISIONS

CONTENTS

FOREWORD

The policy of the Director of Public Prosecutions not to give reasons for decisions to bring or maintain a prosecution, other than to the Garda Síochána, has often led to controversy. In particular, victims of crimes who have complained to the authorities have felt aggrieved because they are not told the reasons for decisions not to prosecute.

In 1983 my predecessor, Eamonn Barnes, issued a press statement dealing with his refusal to explain a decision to discontinue the prosecution of a particular charge. His statement contains the following passage:-

> "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. From time to time his Office is subject to criticism arising from its inability to respond to enquiries from interested parties such as the victim of a crime or the family of such a victim. Unfortunately, the Director is unaware of any method in which reasons can be given without, in many cases, doing injustice."

At that time the practice in Ireland 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. Since then, however, the practice in many of the common law jurisdictions, including Australia, Canada, England and Wales, Northern Ireland and Scotland, has changed, so that in most common law jurisdictions reasons are given to victims, 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 have a practice whereby reasons will be given 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.

I have long felt, like my 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, I should attempt to do so. For this reason I felt it would be useful to publish this discussion paper which, among other matters, sets out the developments in other jurisdictions since the Director's policy was articulated in

1983. The discussion paper is accompanied by a brief executive summary of the principal issues raised in the paper.

In publishing this paper it is my intention to stimulate debate, consult widely and listen to submissions from a broad spectrum of citizens and members of the public generally who have an interest in the desirability or otherwise of changing the current policy of this Office not to give reasons for prosecution decisions.

The discussion paper seeks to give the reader an understanding of the work of the Office, an understanding of the background and context within which the current policy developed and the thinking underlying that policy. It aims also to explain the thinking behind proposals to change that policy in the light of the movement towards greater accountability in public administration and to provide an overview of how other jurisdictions have developed policy in this area. While examining the possible scope for change, the paper also outlines the very significant potential for the creation of injustice which could be caused by a departure from the current policy and to enquire whether there are means by which the current policy could be changed without risking such outcomes. My Office is committed to working with interested parties towards a shared understanding of these difficulties as well as seeking collaborative approaches to the solutions required.

I am therefore seeking the public's response to the paper generally and in particular to invite a response to the following questions:

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

It is the intention following receipt of submissions to consider carefully the views expressed before deciding how best to proceed.

Any views expressed may be referred to or published by this Office, in full or in part, in a final analysis of all submissions received. However, individuals will not be identified by name and views will be attributed by reference to general categories of persons only e.g. a victim of crime, a member of the public, etc.

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Office of the Director of Public Prosecutions,
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Dublin 2.

to reach the Office not later than **Monday 10 March 2008.**

James Hamilton
Director of Public Prosecutions
January 2008

EXECUTIVE SUMMARY

1. The work of the Office of the Director of Public Prosecutions

The principal function undertaken by the Office of the DPP is the conduct of all criminal prosecutions which are serious enough to be tried before a jury. A key part of this function is the initial decision whether to prosecute. In the discussion paper we are primarily concerned with that decision, in particular when it is exercised by deciding not to prosecute. The Office has been given complete independence in the performance of its duties so that it can carry them out effectively and free from improper influence. This independence carries with it a heavy responsibility requiring that it be exercised to the highest possible standards of fairness and justice. Justice must not only be done but be seen to be done, and the prosecutor should not only be fair and just but be seen to be fair and just. The current policy of not giving reasons for decisions may seem to be at odds with this and with the idea of transparency and accountability in public administration. However, as outlined in Chapter 3, in considering possible changes to the existing policy great care must be taken to ensure that reforms aimed at increasing accountability and transparency to victims of crime are not brought about at the cost of causing unfairness and injustice to others.

2. The policy not to give reasons in its context

The policy of not giving reasons for decisions is of long standing. Even before the establishment of the Office of the DPP reasons were not given for prosecutorial decisions. However there is not now, nor has there ever been, an opposition to the giving of reasons for its own sake. The policy was based on practical considerations designed to ensure fairness and respect for the rights of accused persons, complainants and witnesses.

This is clear from the statement made in 1983 by the then Director in which he acknowledged 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."[1]

The current Director, too, has indicated his willingness, if a suitable mechanism can be found, to alter the current practice. It is the identification of an appropriate mechanism to achieve that change that poses difficulties.

1 Statement to the press issued by the Director of Public Prosecutions, 22 July 1983 reproduced in part in paragraph 1.3 of this discussion paper.

There is a willingness to embrace change if this can be brought about without injustice. This is supported by a number of factors. These include:

- A case decided in 2003 by the European Court on Human Rights[2] requires reasons for decisions not to prosecute to be given to the relatives of a deceased person killed by the use of lethal force by agents of the state.
- Countries with similar legal systems to ours have confronted the same problem and changed their practice. An overview of the various approaches adopted in these countries is outlined in the Appendix to the paper.
- The increasing recognition that it is desirable where possible that victims should be informed of the reasoning behind decisions which can profoundly affect their lives.
- The recognition that public confidence in the fairness of the criminal justice system is enhanced if the public are made aware of the reasons for prosecution decisions.

3. Change and possible pitfalls

In Chapter 3 the case for change is considered with particular emphasis on the constitutional rights of the parties affected by the criminal process. In essence the argument against changing the current policy as well as the argument for caution concerning any possible change is grounded in the fear that a number of unintended, negative outcomes could flow from giving reasons for decisions, notably:

a) Giving specific, rather than broad 'general' reasons, has the potential in some cases to cast doubt on the innocence of persons who are merely suspected of committing a crime. Such persons are, of course, entitled to their good name until such time as they are actually convicted of a criminal offence. Giving reasons in some cases could violate the presumption of innocence, which is a cornerstone of our legal system, and could create significant injustice. There needs to be careful consideration of the balance between the interest in disclosure to the injured party, and perhaps also the wider public, and the need to protect reputation and the presumption of innocence. There is also a need to carefully balance other societal interests. For example, it is important to avoid prejudice to other

2 *Jordan v United Kingdom* (2003) 37 EHRR 52

proceedings.

b) Giving reasons could erode the standing or reputation of a witness, including the complainant. For example, to say a witness was not thought to be reliable would have the potential for serious psychological consequences as well as attacking the witnesses' right to his or her good name, particularly if the implication was that the witness was not merely incorrect but telling a deliberate untruth. Article 40.3.2° of the Constitution requires the State to protect and vindicate the good name of every citizen.

c) The tension between 'competing interests' also arises when balancing the requirements of transparency and accountability in our prosecutorial process with the needs of national security and the duty on the State to vindicate and protect the life and person of every citizen guaranteed by Article 40.3.2° of the Constitution of Ireland. This could, for example, be compromised by revealing the identity or perhaps even the existence of a Garda informant.

d) In addition to these difficulties there are practical questions which would need to be examined in the event of any change in policy. These include the risk of increased delay in the criminal process, extra resources which could be needed by the Office, and the need for training. Reform would pose questions about how to communicate decisions to complainants. Would it be desirable or practicable to have the decision maker communicate directly? What should be covered? Should the public as well as the complainant be entitled to hear reasons? The principal practical questions on which the view of the public would be particularly welcome are set out in the Director's Foreword and at part 5 of this executive summary.

4. The opportunities offered by reform

Whilst acknowledging the need to consider limitations to any reform of the current policy, the discussion paper goes on to set out the case for reform. Reform has not only the potential to increase public confidence in a key organisation within the criminal justice system but also has the potential to improve clarity and enhance understanding of prosecutorial decision making.

5. Questions for consideration

The paper examines a number of approaches which could be considered, including:

- Minimal modification to the original policy so as to incorporate the requirements of the European Convention on Human Rights. Such an approach would require reasons to be given to the relatives of a person who dies because of the actions of a State agent. This option would represent the current policy.
- Giving reasons only in relation to a category of pre-defined offences. For example, should reasons be given in rape and murder cases only; in all cases involving violent offences; or in all cases where harm results regardless of gravity?
- A broader approach would involve giving detailed reasons where possible across a wide range of cases and, in circumstances where that was not possible, giving more generalised reasons. No reason at all would be given in cases where any sort of statement as to reasons would or would be likely to prejudice an important interest. Clearly this represents a more extensive approach and could be characterised as a 'general' reasons for decisions policy.

The following specific questions also require to be addressed:-

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

6. Consultation

In conclusion, the Director of Public Prosecutions invites interested members of the public to give their views on the issues canvassed in the discussion paper. He would particularly welcome views on the questions set out in part 5 of this executive summary.

It is the intention following receipt of submissions to consider carefully the views expressed before deciding how best to proceed.

Any views expressed may be referred to or published by this Office, in full or in part, in a final analysis of all submissions received. However, individuals will not be identified by name and views will be attributed by reference to general categories of persons only e.g. a victim of crime, a member of the public, etc.

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INTRODUCTION

1.1 The Office of the Director of Public Prosecutions was established by the Prosecution of Offences Act, 1974. The principal function conferred on the Director under the Act is the direction and supervision of public prosecutions and related criminal matters. The majority of criminal cases dealt with by the Office of the Director of Public Prosecutions are received from the Garda Síochána, the primary national investigating agency. However, some cases are also referred to the Office by specialised agencies with investigative powers including the Revenue Commissioners, Government departments, the Health & Safety Authority, the Competition Authority, the Director of Corporate Enforcement, Garda Síochána Ombudsman Commission and local authorities.

1.2 The independence of the Director of Public Prosecutions is a key value of the Office. The Prosecution of Offences Act, 1974 specifically states that the Director "shall be independent in the performance of his functions". Section 6 of the 1974 Act ensures the protection of this independence by obliging the Director and his officers to refuse to entertain a communication or representation if it constitutes an improper interference in the discharge of their functions. One of the main functions of the Office is deciding whether or not to prosecute in a criminal case. To date the approach that has prevailed in Ireland both before and after the establishment of the Office of the Director of Public Prosecutions in 1974, has been *not* to give reasons for a decision not to prosecute, except privately to the Gardaí or other investigating authorities. This issue has on occasion been contentious and in 1983 the position of the Office of the Director of Public Prosecutions was set out in the following statement to the press:

> "The Director of Public Prosecutions refers to recent calls for a statement by him of the reasons which led to the entry of a *nolle prosequi* in a particular case. The Director considers that he is precluded from issuing such a statement in a case. The factors hereinafter referred to, and particularly the examples given, are of general application and should not be regarded as having any particular application to the case in which the *nolle prosequi* was entered.
>
> It was the invariable practice, for a very long time before the establishment of the Office of the Director of Public Prosecutions, to refrain from giving reasons for decisions not to institute or proceed with criminal prosecutions. The Director has continued that practice. There is a coercive reason for it. If reasons are given in one or more cases, they must be given in all. Otherwise, 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. If on the other hand reasons are given in all cases, and those reasons are more than bland generalities, the unjust consequences are even more obvious and likely. In a minority of cases, the reasons would result in no damage to a reputation or other injustice to any individual. In the majority, such a result would be difficult or impossible to avoid. The reason for non-prosecution often has little or no relevance to the issue of guilt or innocence. It may be, and often is, the non-availability of a particular proof, perhaps purely technical, but nevertheless essential to establish the case. It may be the sudden death or departure abroad of an essential witness. 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. In other cases, the publication of the particular reasons for non-prosecution could cause unnecessary pain and damage to persons other than the suspect, where certain types of aberration become apparent in an intended witness.

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. From time to time his Office is subject to criticism arising from its inability to respond to enquiries from interested parties such as the victim of a crime or the family of such victim. Unfortunately, the Director is unaware of any method in which reasons can be given without, in many cases, doing injustice. He considers that any departure by him from the firmly established practice would be improper, in the absence of a specific requirement to that effect imposed on him by law. It would also be fraught with very serious legal consequences."[3]

1.3 In the Annual Report 1998, the matter of giving reasons for decisions not to prosecute was again discussed. The Office reiterated the above position adding:

"There is very little which can usefully be added to it [referring to the 1983 statement]. It may however be important to remind the reader that the statement reflects considerations of natural justice precluding the Director and his Office from giving reasons. It is not merely a policy to which exceptions could be made as thought appropriate. Further, it is not a rule invented or formulated by the Director or his Office. It long pre-dated both. It has been upheld as correct by the Supreme Court in *H v Director of Public Prosecutions* [1994] 2 IR 589.

3 Statement to Press issued by the Director of Public Prosecutions, 22 July 1983, reproduced in Office of the Director of Public Prosecutions *Annual Report 1998*, Dublin, 1999, Appendix 7.

> Officers issuing directions from the Director's Office do however give reasons for the decisions to the Garda Síochána or other reporting agency. Such reasons may be largely unnecessary when the decision is to prosecute. They are important however if the decision is not to prosecute, particularly if that decision does not accord with a recommendation made by the Garda Síochána. . . Apart from any other consideration, the practice protects the Office and the officers concerned from any suggestion of malpractice or *mala fide*s. It can also from time to time be of great assistance to the Garda Síochána or other agency in relation to future cases. In addition reasons would also be given without question to the Attorney General should he request them or to any other public agency having a functional interest in them such as a relevant Government Department . . . "[4]

1.4 It is clear from the 1983 statement that the Office has not been opposed in principle to giving reasons for not prosecuting, but that it was considered that the practical effect of giving reasons could lead to injustice. Two main concerns were identified as possible negative consequences of giving public reasons:

- To give a specific reason, as opposed to a 'bland generality' (such as, for example, that the evidence did not permit a prosecution), could in many cases cast doubt on the innocence of a person and thereby violate the presumption of innocence that can only be displaced by a trial in due course of law in open court where an accused is equally represented;
- Giving reasons could damage or prejudice the good name or reputation of a potential witness, for example, by stating that a witness was not thought to be reliable.

1.5 Different considerations have applied where reasons are given confidentially to persons working within the Garda Síochána or some other agency of the State, whose work involves them in the case in some way. In this context, as indicated above, the policy has been to give reasons. This policy has been seen as necessary to give an indication to other officials as to how future cases should be handled. It also protects the Office from any suspicion of improper practice or *mala fide*s by ensuring accountability, albeit privately, within the context of cooperation among state agencies and officials.

4 Office of the Director of Public Prosecutions *Annual Report 1998,* at p. 22.

2 REASONS FOR DECISIONS – CONTEXT & BACKGROUND

2.1 As mentioned in Chapter 1, it has been the long-standing policy of the Director of Public Prosecutions (DPP) and, before the establishment of the Office of the Director of Public Prosecutions in 1975,[5] of the Office of the Attorney General, not to give reasons in public for a decision to prosecute or not to prosecute in particular cases.[6] In the event that a prosecution is initiated, the reasons will become apparent in the course of proceedings. Although reasons are provided to An Garda Síochána or other investigative agency in cases where a prosecution is not brought, there has been a general policy of not giving reasons either to complainants or the families of deceased persons. On occasions, for example, when a high-profile criminal investigation fails to result in a prosecution, the reasons for the latter have become a matter of public debate. In that context, the Office's policy of not giving reasons has sometimes been the subject of controversy or criticism.

EUROPEAN COURT OF HUMAN RIGHTS

2.2 The issue of the giving of reasons for a decision of the public prosecuting authorities not to proceed with a prosecution was considered by the European Court of Human Rights in the case of *Jordan v United Kingdom*.[7] This decision puts in issue the general compatibility with the European Convention on Human Rights[8] of a blanket policy of not giving reasons for not prosecuting. The applicant contended, inter alia, that a 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 used lethal force against a member of the public, constituted a violation of Article 2 of the European Convention on Human Rights (ECHR) on the right to life.[9]

5 Following the enactment of the Prosecution of Offences Act 1974.

6 *supra*, n. 3.

7 (2003) 37 EHRR 52.

8 Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series No. 5; 213 United Nations Treaty Series 221, as supplemented by subsequent protocols.

9 Article 2 of the ECHR provides:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or prevent the escape of a person lawfully

The Court first made a number of general observations on the effect of Article 2:

> "The obligation to protect the right to life under Art. 2 of the Convention, read in conjunction with the State's general duty under Art.1 of the Convention "to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. . . The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible... there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory." [10]

2.3 On the specific point of whether or not the Northern Ireland DPP was required under Article 2 to give reasons for a decision not to prosecute, the Court concluded as follows:

> "The court recalls that the DPP is an independent legal officer charged with the responsibility to decide whether to bring prosecutions in respect of any possible criminal offences committed by a police officer. He is not required to give reasons for any decision not to prosecute and in this case he did not do so. No challenge by way of judicial review exists to require him to give reasons in Northern Ireland, though it may be noted that in England and Wales, where the inquest jury may still reach verdicts of unlawful death, the courts have required the DPP to reconsider a decision not to prosecute in the light of such a verdict, and will review whether those reasons are sufficient. This possibility does not exist in Northern Ireland where the inquest jury is no longer permitted to issue verdicts concerning the lawfulness or otherwise of the death.
>
> The Court does not doubt the independence of the DPP. However, where the police investigation procedure is itself open to doubts of a lack of independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision-making. Where no reasons are given in a controversial incident involving the lethal use of force, this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision.

detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

10 *supra*, n. 7, at pp. 86-88.

> In this case, Pearse Jordan was shot and killed while unarmed. It is a situation which, to borrow the words of the domestic courts, cries out for an explanation. The applicant was however not informed of why the shooting was regarded as not disclosing a criminal offence or as not meriting a prosecution of the officer concerned. There was no reasoned decision available to reassure a concerned public that the rule of law had been respected. This cannot be regarded as compatible with the requirements of Art.2, unless that information was forthcoming in some other way. This however is not the case."[11]

2.4 At a minimum 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. Admittedly 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.

2.5 Irrespective of any future clarification of the position in *Jordan,* the decision clearly puts in issue the general compatibility with the ECHR of a blanket policy for not giving reasons for not prosecuting. In that context, it seems appropriate that this review is being undertaken.

2.6 The *Jordan* decision has even more significance in Ireland now in the light of the enactment and coming into effect of the European Convention on Human Rights Act 2003. The Act requires that all organs of the State shall, subject to any statutory provisions or any rule of law, perform their functions in a manner compatible with the State's obligations under the Convention[12] and that courts shall interpret Irish laws, in so far as possible, in a manner consistent with the Convention.[13]

JUDICIAL REVIEW

2.7 Judicial Review allows the High Court to perform a supervisory function to ensure public bodies act in accordance with the law and uphold the law

11 *ibid.*, at pp. 91-92.

12 European Convention on Human Rights Act 2003, section 3.

13 *ibid.*, section 2.

in public administration. In performing the judicial review function[14] the High Court is not concerned with the merits of decisions of public bodies or tribunals. Generally, a judicial review by the High Court of a decision of a public body is concerned with the fairness of the *procedures* and the presence of a valid *jurisdiction*, and not with the merits of a public body's decision. As well as procedure and jurisdiction, a further but very narrow basis for a judicial review that does go to the merits of a decision, is rationality. A decision of a public body may be struck out in judicial review on the grounds that it was irrational.[15] This, however, is a very limited ground of review and rarely arises. In effect, for a challenge on grounds of rationality to succeed, the decision of the public body would have to be so unreasonable that no rational person could have made it. Even where the decision is found to be defective, the High Court does not substitute its own decision on the merits; rather it is for the body in question, if appropriate, to reconsider the decision, this time in accordance with correct procedures and legal principles.

Judicial Review of decisions of the DPP

2.8 In general, the courts have been wary of reviewing the decisions of the DPP regardless of whether the issue is the decision to prosecute or the decision not to prosecute. In practice, it is usually the decision not to prosecute that is likely to prove most controversial. The decision to prosecute is always open to the ultimate review, the trial process itself. Within that process, a prosecution may be terminated in a variety of ways: by dismissal of a charge by the trial court on the grounds that there is not a sufficient case to put the accused on trial, which dismissal may be made at a hearing at any time after the return for trial;[16] by the granting of a direction by the judge to the jury to acquit following the close of the prosecution case at trial on the grounds that the defence has no case to answer; or ultimately by the decision of the jury to acquit on the merits.

14 See generally Hogan and Morgan, *Administrative Law in Ireland,* 3rd ed. (Dublin, Round Hall Sweet and Maxwell, 1998); Bradley, *Judicial Review* (Dublin, Round Hall, 2000); De Blacam, *Judicial Review* (London, Butterworths, 2001).

15 More recently, the proportionality of a decision has emerged as a ground for judicial review, although some commentators suggest that this is a reformulation of the concept of rationality. See generally, Hogan & Morgan, *op cit*, at pp. 655 - 663; Bradley, op cit, at pp. 637-669; J. Jowell & A. Lester, 'Proportionality: Neither Novel Nor Dangerous', in J. Jowell & D. Oliver, (eds), *New Directions in Judicial Review*, London, 1988, pp. 51-72.

16 Section 4E, Criminal Procedure Act 1967, as inserted by section 9 of the Criminal Procedure Act 1999.

Furthermore, judicial review may be used to prevent or delay a trial taking place on the grounds of some procedural unfairness, such as undue delay, the risk of an unfair trial by reason of prejudicial media comment, or the failure to comply with a requirement to disclose evidence. Judicial review actions, which have as their object to prevent or delay a trial, are beyond the scope of this paper, which is confined to challenges to the decision not to prosecute.

2.9 The leading case on the review of a decision not to prosecute is *State (McCormack) v Curran,*[17] where the applicant sought to compel his prosecution in this jurisdiction, thereby preventing his prosecution in Northern Ireland.

Finlay C.J. stated:

> "In regard to the DPP I reject also the submission that he has only got a discretion as to whether to prosecute or not to prosecute in any particular case related exclusively to the probative value of the evidence before him. Again, I am satisfied that there are many other factors which may be appropriate and proper for him to take into consideration... If, of course, it can be demonstrated that [the DPP] reaches a decision *mala fide* or influenced by an improper motive or improper policy then his decision would be reviewable by a court.[18]

2.10 The presence of *mala fides* or of an improper motive or policy in the making of a prosecution decision were the two main grounds identified by Finlay C.J. on which the courts may review a decision of the DPP, although he expressly stated that this was not an exhaustive statement of the grounds for review in the context of decisions of the DPP. The rationality of a decision to prosecute or not as a ground for reviewing the decision was alluded to by Walsh J. in the same case, where he observed:

> "... there is nothing before the court from which it could reasonably be inferred that the opinion was either perverse or inspired by improper motives ..."[19]

2.11 The more recent decision of the Supreme Court in *Eviston v Director of Public Prosecutions*[20] indicates that the breach or absence of fair procedures

17 [1987] ILRM 225.

18 *ibid.,* at 237.

19 *ibid.*, at 238.

20 [2002] 3 IR 260.

may provide an additional ground for review of a decision of the DPP. The precise scope of this development has yet to be fully determined. In *Eviston*, the DPP reviewed an initial decision not to prosecute for a road traffic offence, in a case in which the suspect had lost control of her car and collided with another car resulting in the death of the driver of the other vehicle. This initial decision not to prosecute had been conveyed to the suspect and the family of the deceased. After an internal review prompted by a representation to the DPP made by the father of the deceased, the decision not to prosecute was changed and the suspect was notified that she would in fact be prosecuted. The Supreme Court upheld the decision of the High Court quashing the decision to prosecute. It held that although the DPP was entitled to review an earlier decision not to prosecute and arrive at a different conclusion, in circumstances where a suspect is informed of a decision not to prosecute, it would be unfair to prosecute where no new evidence had emerged.

Keane C.J. held:

> "Viewing the matter objectively, and leaving aside every element of sympathy for the applicant, I am forced to the conclusion that in circumstances where the DPP candidly acknowledges that there was no new evidence before him when the decision was reviewed, the applicant was not afforded the fair procedures to which, in all the circumstances, she was entitled. It follows that the requirements of the Constitution and the law will not be upheld if the appeal of the DPP in the present case were to succeed."[21]

2.12 Although the Chief Justice expressly stated that the DPP was in general entitled to reverse a decision where no new evidence emerged,[22] it appears that on the facts of the case, the absence of any new evidence combined with the fact that the suspect was informed of the decision not to prosecute (without having been informed of the possibility of a reversal of the prosecutorial decision) rendered the decision of the Director to prosecute subject to review.

2.13 It is also worth reiterating that the effect of judicial review proceedings in the High Court, where relief is granted to annul a decision by a public body, is to require that public body to retake the decision in accordance with the correct legal principles (unless the decision to annul is because the public body does not have jurisdiction in the first place). The High Court

21 *ibid.*, at 299.

22 *ibid.*, at 298.

does not retake the decision of the public body, in this case the decision of the DPP. In a hypothetical scenario, if the High Court did hold that a decision of the DPP was vitiated by *mala fides*, it would then fall to the DPP to reconsider the decision in accordance with proper principles and procedures.

Review of decisions of the DPP to grant a certificate pursuant to Offences Against the State legislation

2.14 A more restrictive approach to judicial review prevails where the DPP, pursuant to the Offences Against the State Act, 1939, decides to refer a case for trial to the Special Criminal Court. The courts have on a number of occasions[23] refused to review a decision of the DPP to certify an offence as unsuitable for trial in the ordinary courts. In *Savage v Director of Public Prosecutions*[24], Finlay P. outlined the rationale for this approach:

> "... If the contention made on behalf of the plaintiffs in this case was correct and if the opinion of the DPP necessary for a certificate issued by him pursuant to s. 46 sub-s. 2 of the Act of 1939 were reviewable by a court then upon a prima facie case being established in pleadings by any person returned for trial pursuant to such a certificate that some of the matters of which the section demands should be the opinion of the DPP were not true, or that the opinion was one which was based on false information or an erroneous inference from facts established or made known to the DPP, it would be necessary for the director in order to uphold the certificate he issued and for the Special Criminal Court to have jurisdiction over the case which on

23 See *Savage v Director of Public Prosecutions* [1982] ILRM 385; *O'Reilly and Judge v Director of Public Prosecutions* [1984] ILRM 224. See also *Kavanagh v Ireland* [1996] 1 IR 321, at 339, where Laffoy J. stated: "The Director's certificate under s. 47, sub-s. 2, in my view, belongs to a limited category of decisions which the Supreme Court, on policy grounds, has held to be reviewable only to a limited extent and, accordingly, in my view, on the authority of *State (McCormack) v Curran* [1987] ILRM. 225 and *H. v Director of Public Prosecutions* [1994] 2 IR 589 the Director's certificate is not reviewable in the absence of *mala fides* on the part of the Director or that he was influenced by an improper motive or improper policy". (*Kavanagh* concerned an application to quash a certificate for trial in the Special Criminal Court issued by the Director pursuant to the 1939 Act in relation to offences which were non-subversive offences). The applicant was unsuccessful, the High Court holding that the applicant had failed to establish *mala fides* or an improper policy or motive in the issuance of the certificate. The Supreme Court upheld the decision of the High Court. In subsequent proceedings the U.N. Human Rights Committee was of the view that Mr. Kavanagh's trial was not in conformity with Art. 26 of the International Covenant on Civil and Policital Rights. Communication No.819/1998, views of the Human Rights Committee dated 4 April 2001 (CCPR/C/71/D 1819/1998 26 April 2001).

24 [1982] ILRM 385.

his certificate has been sent forward for trial by it to reveal in open court in litigation at the instance of the accused himself all the information, knowledge and facts upon which he informed his opinion. This would obviously, as a practical matter, entirely make impossible the operation of Part V of the Act of 1939 for the trial of any non-scheduled offence by the Special Criminal Court whilst it is established and in existence. The revealing of such information in open court under conditions under which persons are seeking to overthrow the established organs of the State would be a security impossibility and to interpret s. 46 sub-s. 2 of the Act of 1939 so as to make that necessary would be to vitiate the entire of that subsection."[25]

The giving of reasons by the DPP

2.15 The Supreme Court has endorsed the existing policy of the DPP not to give reasons for a decision not to bring a prosecution. In *H v Director of Public Prosecutions*,[26] O'Flaherty J. accepted the arguments advanced that compelling the DPP to give reasons would be unjust.[27] These arguments were set out in the following passage of the judgment:

> "Before us Mr Haugh S.C. submits that this is a correct rationale [i.e. the approach in *McCormack v Curran*, at 237] and that there will often be good and cogent reasons why the Director of Public Prosecutions should decide not to prosecute and where it would be inappropriate that his reasons should be brought into the public arena. He instances some self-evident examples such as where, though there might be a strong suspicion of guilt on the part of an accused, the proof of guilt would simply not be forthcoming and, therefore, it would be very wrong for the Director of Public Prosecutions to make a statement to the effect that while he suspected someone was guilty of an offence he could not hope to sustain a conviction. Furthermore, he submits that in any event it is not appropriate for the Director of Public Prosecutions to respond to an allegation - which is stated in general terms, and without any proof – that Mr. M is a police informer and that that is the reason why the director is not disposed to bring a prosecution against him. Mr. Haugh points out that in every jurisdiction no responsible prosecuting authority will ever disclose the sources of their information because if they disclose the identity of a particular source they must do so on all occasions."[28]

2.16 The above passage appears to identify two essential reasons why a policy of giving reasons should not be adopted, (a) because it would have to be

25 *ibid.,* at 389.

26 [1994] 2 IR 589.

27 *ibid.*, at 601-602.

28 *ibid.*

applied to all cases and could result in imputations of criminality against a person where there was insufficient evidence to sustain a conviction and (b) because it could undermine the confidentiality of Garda sources. O'Flaherty J. concluded:

> "The stance taken by the Director of Public Prosecutions is that he should not, in general, give reasons in any individual case as to why he has not brought a prosecution because if he does so in one case he must be expected to do so in all cases. I would uphold this position as being a correct one."[29]

2.17 O'Flaherty J. went on in his judgment in *H* to link the absence of an obligation on the part of the DPP to give reasons with the limited scope for judicial review of the decisions of the DPP. Taking *International Fishing Vessels Limited v The Minister for the Marine*[30] as an example, where the High Court had held that the Minister was obliged to give reasons for granting or not granting a fishing licence, O'Flaherty J. contrasted the approach in relation to the DPP with that in relation to a Minister by noting that the Minister's decision was reviewable by a court and, accordingly, a refusal to give reasons for a decision placed a serious obstacle in the way of judicial review.[31] O'Flaherty J. went on to observe:

> "It would seem then that as the duty to give reasons stems from a need to facilitate full judicial review, the limited intervention available in the context of the decisions of the Director obviates the necessity to disclose reasons."[32]

2.18 The comments of Finlay C.J. in the earlier case of *McCormack* are further authority for the view that the DPP is not obliged to give reasons:[33]

> "Secondly, I am satisfied that the facts appearing from the affidavit and documents do not exclude the reasonable possibility of a proper and valid decision by the DPP not to prosecute the appellant within this jurisdiction and that that being so he cannot be called upon to explain his decision or to give reasons for it nor the sources of the information on which it was based."[34]

29 *ibid.*, at 603.

30 [1989] IR 149.

31 [1994] 2 IR 589, 601-602.

32 *ibid.*, at 603.

33 These comments appear to be *obiter,* since the case did not turn on whether the DPP can be compelled to give reasons, however, the question of judicial review in general could be argued to be necessarily tied up with the issue of giving reasons, since, if reasons are not required to be given, potential for judicial review is much more limited.

34 [1987] ILRM 225.

The giving of reasons by the DPP for the entry of a *nolle prosequi*

2.19 There is less authority on the more specific question of whether the DPP should be obliged to give reasons for entering a *nolle prosequi*, that is for withdrawing a prosecution after it has been initiated, although the reasoning behind the general refusal to give reasons, endorsed by the courts, might be thought equally applicable to this specific situation. On the other hand, it might be argued that the fact that the DPP has decided to initiate a prosecution creates an onus to explain a reversal of the decision in order to ensure confidence in the administration of justice, which could be undermined if it appeared that conflicting decisions were taken at different times in relation to the same matter for no apparent or obvious reasons. At least two Irish decisions seem to implicitly address the issue of the giving of reasons for a *nolle prosequi*, while some authorities from England and Wales explicitly states that the DPP is not obliged to give reasons to a court for entering a *nolle prosequi.*

2.20 Ryan & Magee observe:

> "The fiat of *nolle prosequi* was originally exercisable only by the Attorney General but since 1974 it is now exercised by the Director in relation to those cases for which he has responsibility. . . Historically this fiat was a prerogative matter, and hence the English courts consistently refused to exercise any judicial control over its operation [*R v Allen* 1 B & S 850, *R v Comptroller of Patents* [1899] 1 QB 909]. Article 49 of the Constitution transferred prerogative power to the People for exercise by the Government. It would appear that this did not change the view of the Irish courts in relation to the absolute and irresistible nature of the fiat."[35]

2.21 The authors go on to cite *State (Killian) v Attorney General,*[36] in which the Supreme Court refused to issue an order of mandamus compelling the Attorney General to bring a prosecution. Maguire C.J. stated that the issue in the case "was whether this Court can interfere with the Attorney General in the exercise of his power of determining whether a prosecution shall go on or not."[37] Maguire C.J. concluded, after a brief review of some general authorities on whether the courts (as opposed to a prosecutor)

35 E. Ryan & P. Magee, *The Irish Criminal Process*, Dublin, 1983, p. 76.

36 92 ILTR 182.

37 *ibid.*, at 183.

could order fresh proceedings where a *nolle prosequi* had been entered (the authorities establish that the courts cannot do so) that:

> "…it would be unjustifiable for this court to do what is asked, namely, to interfere with the Attorney General by ordering him to prosecute, particularly when he has made it clear that he does not consider that he ought to do so."[38]

2.22 In *State (O'Callaghan) v Ó hUadhaigh,*[39] the main issue was whether fresh proceedings could be brought when a *nolle prosequi* had been entered. Finlay P. confirmed an order of prohibition preventing the bringing of fresh proceedings, but this was confined to the facts of the case[40] and other authorities establish that a *nolle prosequi* does not, in general, bar fresh proceedings.[41] In any event, in *State (O'Callaghan) v Ó hUadhaigh*[42] Finlay P. stated *obiter* that:

> "It can be argued plausibly that in addition to this specific statutory power the DPP has the same right as any other litigant before the Courts of not proceeding with a case."[43]

2.23 As there is no general duty on a litigant to justify to a court the withdrawal of proceedings, this comment seems to support the view that the DPP is similarly not obliged to do so.[44] Notwithstanding the above authority, the Director has stated that, in exceptional circumstances, he may consider it appropriate to give reasons of a procedural or administrative nature for entering a *nolle prosequi*.[45]

38 *ibid.*, at 184.

39 [1977] IR 42.

40 Three indictments relating to a series of different offences had been preferred against the accused, but when the trial eventually took place, the trial judge held that he had jurisdiction to try the first, single-count indictment only. The accused had by that time spent six months in custody on remand. Counsel for the DPP entered a *nolle prosequi* and indicated that the accused would be re-arrested and charged with the same offences. Finlay P. decided that to allow this course of action would be to enable the prosecution to avoid an adverse ruling by using a *nolle prosequi* as a tactic to institute fresh proceedings, setting the period of custody on remand at naught.

41 See for example *State (Walsh) v Lennon* [1942] IR 112; *Kelly v Director of Public Prosecutions* [1997] 1 ILRM 69. See also the discussion in Walsh, D., *Criminal Procedure*, Dublin, Thomson Round Hall, 2002, pp. 814-817.

42 *supra* n.39.

43 *ibid.*, at 51.

44 See Ryan & Magee, *op cit*, p. 264.

45 "In exceptional circumstances reasons of a procedural and/or administrative nature

Other discussion of the issue: Fifteenth Report of the Dáil Select Committee on Crime, Lawlessness and Vandalism

2.24 The accountability of the DPP was considered by the former Dáil Select Committee on Crime, Lawlessness and Vandalism in its fifteenth report *The Prosecution of Offences*, published in early 1987.[46] The report may be viewed in the context of what the Committee described as:

> "... the growing volume of public disquiet being expressed about the operation and the efficiency of the system for prosecuting offences. In particular, there was widespread public concern about certain decisions taken by the Director of Public Prosecutions not to prosecute in certain instances ...There has been major and growing concern about the procedures involved in prosecuting certain criminal cases. This concern has centred around the question of decisions taken by the Director of Public Prosecutions not to prosecute cases."[47]

2.25 As well as examining the operation of the Office of the DPP, the Committee also examined the role of the Garda Síochána in prosecuting offences.

2.26 The Committee made a number of findings on the specific issue of accountability of the DPP, coming to the conclusion that:

> "There is... a clear need to provide a procedure whereby the decisions of the DPP may be reviewed. In reaching this conclusion, the Committee is not questioning the appropriateness of any decisions taken by the DPP. What is urgently required is a procedure whereby the public can be assured that not only is justice being done, but that the public is satisfied that this is in fact the position."[48]

2.27 The Committee observed that a similar practice to that in Ireland was at that time being followed in a number of other jurisdictions, namely England and Wales, Scotland and Australia. It also noted that the procedure for consultations between the DPP and the Attorney General provided for in

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would be given to a court where they form the basis of a decision to discontinue proceedings": Office of the Director of Public Prosecutions *Annual Report 1999*, Dublin, 2000, p. 17.

46 Fifteenth Report of the Select Committee on Crime, Lawlessness and Vandalism: The Prosecution of Offences (PL 4703), discussed in Casey, *The Irish Law Officers,* Dublin, Round Hall Sweet and Maxwell, 1996, p. 265 *et seq*.

47 Fifteenth Report of the Select Committee on Crime, Lawlessness and Vandalism: The Prosecution of Offences (PL 4703) at 1.1 and 1.2.

48 *ibid.,* at paragraph 3.4.

section 2(6) of the Prosecution of Offences Act 1974 did not impair the independence of the DPP and suggested that some mechanism could be established whereby the public could be satisfied that the decisions of the DPP are not beyond scrutiny.[49] The Committee went on to propose three possible approaches that could address the issue.

2.28 First, the Committee outlined a procedure whereby the Attorney General could consult with the DPP in relation to decisions not to prosecute that were controversial.[50] The Attorney General could examine the file on which the decision of the DPP was based. Although it would be for the DPP to make a final decision, under this proposal it would be open to the Attorney General to announce that after full consultation and discussion, the decision was taken on the basis of legal criteria with which he or she disagreed. The Committee noted that somewhat similar procedures existed in the UK and in Australia where parliamentary questions may be put to the Attorney General (who is usually a member of Parliament in those jurisdictions) in relation to particular decisions not to prosecute.

2.29 The second proposal outlined by the Committee was for some avenue of scrutiny of decision of the DPP not to prosecute by the executive or legislature.[51] The Committee noted that any such scrutiny by the executive would seem to defeat the purpose of establishing an independent Office of the DPP. However, the Committee suggested it might be possible to establish a procedure whereby a committee of the Oireachtas could make inquiries of the DPP or the Attorney General in relation to controversial decisions not to prosecute. The Committee noted that such a procedure would require very careful consideration before it could be implemented.

2.30 The third proposal considered was for a system whereby a person aggrieved by a decision not to prosecute would be permitted to seek judicial review of the decision.[52] The Committee stated that it was favourably disposed to this proposal, although it noted that it had been suggested that there might be constitutional objections to it. The Committee was of the view that it would require legal advice on this issue.

49 *ibid.,* at paragraphs 3.7-3.10.

50 *ibid.*, at paragraph 3.10.

51 *ibid.*

52 *ibid.*

2.31 Finally, the Committee recommended that the first proposal outlined above should be adopted.[53] It is clear, however, that this recommendation was never implemented, and the practice of the Office of the DPP on the matter of giving reasons for not prosecuting remained the same after the Committee published its report. One explanation for this may have been that the practical operation of such a proposal may have been untenable. The impact that any future developments in this area could have is discussed in detail in later chapters.

53 *ibid.*, at paragraph 3.11.

3 REVISION OF THE CURRENT POLICY NOT TO GIVE REASONS

Legal basis for change of practice of the Office of the DPP in relation to giving reasons for not prosecuting

3.1 The current practice of not giving reasons for decisions is not governed by any statutory provision and no authority exists that would prevent the Office from modifying its policy on this matter. However there are potential legal implications of a change in policy. This chapter examines the main legal interests that would arise in the context of a change in policy and attempts to assess the impact of any change that may occur.

3.2 One of the main arguments in favour of a change in policy is that transparency and accountability in the administration of justice is better served by the provision of reasons, thereby avoiding any suspicion of bad practice or *mala fides* in the making of prosecutorial decisions. It can also be argued that confidence in the fairness of the prosecution system is enhanced when victims, officials within the system, and the general public have a fuller understanding of why a decision is made. Victims, their relatives and loved ones have a personal interest in seeing that justice is done in the particular case, and at a more general level the community can be said to have an interest in ensuring that there is accountability in the administration of the rule of law. Adopting a policy through which the Office would be more publicly accountable could provide reassurance that decisions are taken after a full and comprehensive consideration of all the factors in each case.

Legal issues arising from the giving of reasons for not prosecuting

3.3 When considering any change in current policy six key issues have to be taken into account:

a) The protection of the good name of suspects;

b) The protection of the good name of witnesses;

c) The possibility that future developments in a case may be prejudiced by the publication of sensitive material;

d) The protection of police sources;

e) Whether privilege ought to attach to statements made by the DPP as to reasons for not prosecuting, and

f) Whether specific legal considerations apply in relation to the entry of a *nolle prosequi*.

These considerations are assessed below in greater detail. The issues of transparency, accountability and increased efficiency in decision-making are also briefly examined.

The protection of the good name of suspects

3.4 One of the main arguments against the provision of reasons for not prosecuting in any form is that to do so could cast doubt on the innocence of a suspect without the individual having the benefit of the protections afforded by the trial process. This could arise even in cases in which a suspect is not named but is readily identifiable given the circumstances of the case. A suspect could be prejudiced even if the people who were in a position to draw an inference as to the likely suspect were relatively few in number.[54] There are two possible legal arguments against the release of such a statement on this basis alone: the protection of a person's good name and the presumption of innocence.

Constitutional and European Convention protection for good name

3.5 A person's good name is protected both by the Constitution under Article 40.3.2°, at common law, and by the tort of defamation. The connection

54 In defamation the issue of the identification of the defamed party occasionally arises. It suffices that the person be reasonably capable of being identified by at least one person for defamation to be established. The Law Reform Commission has noted: "It is an essential element of the tort of defamation that the plaintiff was identified in the statement complained of. The plaintiff must satisfy the judge that he is reasonably capable of being identified from the statement. He must then satisfy the jury that he was in fact the person referred to. In most cases, the plaintiff is named; however, in others extrinsic evidence may be necessary… At common law the test of identification does not take into account the intention of the defamer…In some cases, the plaintiff may establish that he was indirectly identified and defamed, although he was not referred to in any sense in the alleged libel", *Consultation Paper on the Civil Law of Defamation*, Dublin, 1991, pp. 22-24. In *Berry v Irish Times* [1973] IR 368, McLoughlin J. defined defamation as a publication that tends to injure reputation in the minds of right-thinking people and said: "It does not mean all such people but only some such people, perhaps even only one, because if a plaintiff loses the respect for his reputation of some or even one right-thinking person he suffers some injury" (at 380). It is also worth noting that the allegedly defamatory material must be communicated or published to a person or persons other than the party claiming to have been defamed.

between the general law of defamation and the constitutional right to one's good name has been made in a number of cases.[55]

Protection afforded the presumption of innocence

3.6 The presumption of innocence is protected at common law, by the Constitution (Article 40.3.2°) and by the ECHR (Article 6(2))[56]. It was confirmed in *Hardy v Ireland*[57] that the presumption of innocence has constitutional status and forms part of the constitutional requirement of a trial in due course of law guaranteed by Article 38.1. The Courts have also identified the presumption of innocence as an aspect of the right to a person's good name. In *The State (O'Rourke and White) v Martin*[58] Gannon J. stated that every person tried on a criminal charge had "in the protection of his good name and his livelihood the benefits of the presumption of innocence. . ."[59] The presumption of innocence is of particular importance in the criminal process as it is inextricably linked with safeguarding a person's liberty from detention.[60] Given that a decision not to prosecute may be reviewed at a later stage, for instance where new evidence comes to light, the importance of the presumption of innocence must be borne in mind notwithstanding that the suspect is not immediately exposed to the prospect of deprivation of liberty.

State's duty to prevent the infringement of personal rights

3.7 It is worth noting that case law establishes that the State and its organs have an overriding duty to prevent the infringement of personal rights; their duty is not confined to vindicating those rights after the fact of their infringement.[61] It is also of note that the standard of proof on a plaintiff in a constitutional case and in common law defamation proceedings is the

55 Hogan and Whyte, *Kelly: The Irish Constitution*, 4th ed, 2003, pp. 1411-1412. Among the cases cited and discussed are *Barrett v Independent Newspapers Ltd* [1986] IR 13; *Kennedy v Hearne* [1988] IR 481; *Hunter v Gerald Duckworth and Co Ltd* [2000] 1 IR 510; *Burke v Central Independent Television plc* [1994] 2 IR 61.

56 Breaches of the European Convention on Human Rights now give rise to a remedy in damages pursuant to the European Convention on Human Rights Act 2003.

57 [1994] 2 IR 550 (per Hederman J., at 564-565).

58 [1984] ILRM 333.

59 *ibid.*, at 338.

60 Walsh, *Criminal Procedure*, Dublin, 2002, p. 729.

61 For example *ESB v Gormley* [1985] IR 129, at 151; Hogan and Whyte, *op cit*, p. 1296.

normal civil standard, i.e. on the balance of probabilities; in contrast, in any criminal proceedings the prosecution must establish its case beyond a reasonable doubt.

The protection of the good name of witnesses

3.8 Revealing reasons for decisions not to prosecute could jeopardise the credibility and good name of identifiable witnesses, and accordingly could expose the Office of the DPP to actions in defamation where individuals are identifiable in the absence of a statutorily-provided privilege.

3.9 It may be possible to provide a reasonably adequate statement of reasons for not prosecuting without revealing information which could identify witnesses whose evidence is considered to be doubtful or unpersuasive. However, care would have to be taken to ensure that the rights of witnesses were borne in mind and protected.

The possibility that future developments in a case may be prejudiced by the publication of sensitive material

3.10 The release of any statement of reason for decisions not to prosecute or any statement relating to a prosecutorial decision would have to ensure that the information contained in the statement did not prejudice further action being taken in a case.

The protection of police sources and of other interested parties

3.11 The law recognises that in certain circumstances it may be necessary to protect police sources.[62] The courts have also refused to review decisions of the DPP as to the issuance of a certificate pursuant to Offences Against the State legislation (the effect of which is to require a defendant to be tried before the Special Criminal Court), on the basis that the security of the State could be compromised if potentially sensitive material relevant to such a decision were to be revealed in open court.

3.12 Judges will occasionally examine material themselves or accept assurances from prosecution counsel as to the need to protect sources.[63] The courts

63 An example of the latter arose in the prosecution of Catherine Nevin for the murder of her husband. See *DPP v Nevin*, unreported, Court of Criminal Appeal, 14 March 2003.

also may refuse to provide material to a defendant in order to protect sources (subject to an exception where such disclosure is necessary to establish the innocence of an accused).

3.13 Similar considerations may also arise in relation other parties, who may not be police sources as such, but who nonetheless could be compromised in some way by the release of information concerning their involvement in a case.

Privilege

3.14 The question arises as to whether privilege would attach to statements made by the DPP revealing reasons for not prosecuting. In certain circumstances privilege can provide immunity from liability in defamation.

3.15 There are two types of privilege[64] which might apply in this context: absolute and qualified. In its report entitled *The Prosecution of Offences*, the Dáil Select Committee on Crime, Lawlessness and Vandalism suggested that if a policy of giving reasons for not prosecuting were to be introduced, statements of reasons would have to be protected by absolute privilege.[65] The Law Reform Commission has outlined the law on absolute privilege in the following terms:

> "Absolute privilege protects statements in situations in which the law considers that absolute freedom of communication is so essential that no action in defamation should be allowed, regardless of the truth of the statement or the motive of the speaker. In such cases, the speaker is totally immune from liability, even if he published the words with full knowledge of their falsity and with the express intention of injuring the plaintiff. Malice is therefore irrelevant to the defence of absolute liability. A study of the defence focuses on the occasions on which such privilege is said to exist."[66]

3.16 Absolute privilege applies, for example, to statements by the President[67]; to statements made during parliamentary proceedings and to official

64 See McDonald, *Irish Law of Defamation*, 2nd ed, Dublin, 1989, pp. 117-208; McMahon and Binchy, *Law of Torts*, 3rd ed, Dublin, 2000, pp. 920-942; Price and Duodu, *Defamation Law, Procedure and Practice*, 3rd ed, London, 2004.

65 PL 4703 (1987), at 3.6.

66 Law Reform Commission, *Consultation Paper on the Civil Law of Defamation*, Dublin, 1991, p. 75.

67 Article 13.8.1° of the Constitution.

Oireachtas publications[68]; to statements made in the course of judicial proceedings[69]; and to communication between a solicitor and a client[70].

Qualified privilege might also be applied to statements of reasons for not prosecuting. The essential difference between absolute and qualified privilege is that malice defeats qualified privilege. Two criteria apply at common law to determine the existence of qualified privilege: whether there existed a social, legal or moral duty or interest to make the statement over which privilege is claimed; and whether there was a duty or interest on the part of the person to whom the statement is made to receive it.

3.17 *McMahon and Binchy* state:

> "It is impossible to enumerate fully the occasions recognised by law as attracting qualified privilege. Nor would it be desirable to do so, as such a list might give the wrong impression that the list is closed. This is not the case and new occasions will undoubtedly arise in the future to which the law will be willing to attach privilege."[71]

3.18 It is possible that statements of reasons for not prosecuting could be held to be privileged at common law. In the absence of a legal obstacle an argument could be made out that the Director of Public Prosecutions has a compelling interest in communicating the reasons for not prosecuting to victims of crime and perhaps more generally to the public or media.

3.19 The enactment of a statutory provision according privilege to statements of reasons for decisions not to prosecute would address the issue.[72] It seems clear that any such statutory provision, be it granting absolute or qualified privilege, would require careful and considered drafting to address the competing policy and constitutional concerns that arise in relation to the public interest.

68 Article 15.12 of the Constitution and see Law Reform Commission, *op cit*, pp. 75-76.

69 *ibid.*, pp. 77-80.

70 *ibid.*, p. 87.

71 McMahon and Binchy, *Law of Torts*, 3rd ed, Dublin, 2000, para. 34.163.

72 Section 24 of the Defamation Act 1961 already provides qualified privilege to a number of situations, including to the reporting of proceedings in foreign legislatures; to the reporting of proceedings in international organisations of which the State is a member; and to the contemporaneous reporting by the media of judicial proceedings. See *ibid*, p. 928-942, for a discussion of the relationship between the common law qualified privilege applicable to judicial proceedings and the protection afforded by s. 24 of the 1961 Act.

3.20 It may be noted that in many cases the giving of a reason in general terms is unlikely to damage a legally protected interest. For example to say that a prosecution is not brought due to "insufficiency of evidence" would not do so. Whereas giving detailed reasons would be more likely to encroach upon a legally protected right. To say that a case did not proceed because a particular witness had died or was too ill to testify might imply that but for that fact there would have been a case against a particular suspect.

The specific context of entry of a *nolle prosequi*

3.21 Whether different considerations would apply in the context of entry of a *nolle prosequi* (the discontinuance of existing proceedings by motion of the prosecution) should also be considered. It may be that in such cases, it will be evident from the course of the proceedings why the prosecution is being discontinued. Nonetheless, in some cases there may be an expectation that reasons for the entry of a *nolle prosequi* should be provided. For instance the unexplained entry of a *nolle prosequi* might lead to speculation that there is an improper motive for its entry, such as coercion from criminal figures, the prosecution succumbing to media pressure or the striking of a questionable 'deal' with the defence.

3.22 Further, if on discovery that the accused did not or could not have committed the offence(s) charged, it may be that the accused would continue to be tainted with suspicion if reasons were not given for the entry of a *nolle prosequi*. In such circumstances it might be thought by others that the reason for the discontinuance of the prosecution did not relate to the substance or merits of the matter, but rather was due to the absence of a technical proof.

Transparency and accountability in public administration

3.23 The provision of reasons for decisions not to prosecute may be viewed as being consistent with a general trend toward greater accountability in public administration in Ireland, exemplified in part by the enactment of the Freedom of Information Act 1997 and the Ethics in Public Office Act 1995. It is also consistent with a line of decisions of the courts on the obligations of public bodies in light of the requirements of constitutional justice. As the Law Reform Commission has noted:

> "Prior to the entry into force of the Freedom of Information Act 1997, a wide doctrine requiring administrative bodies to give reasons for their decisions had been deduced from the notion of constitutional justice. Decisions such as

The State (Creedon) v Criminal Injuries Compensation Tribunal [[1988] IR 51] and *International Fishing Vessels Ltd v Minister for Marine* [[1989] IR 149] had brought Irish jurisprudence to a level where nearly all tribunals or public bodies could be asked to provide at least some kind of explanation for their decisions, at any rate where judicial review proceedings were in prospect."[73]

Incentive for Increased Efficiency in Prosecutorial Decision-Making

3.24 Closely related to the more general issue of accountability and transparency is the argument that a policy of giving reasons for decisions would enhance the fairness and efficiency with which prosecutorial decisions are made, in that prosecutors may be more anxious to ensure that decisions are seen to be fair if a greater range of people are granted access to the reasons for the decision. If a prosecutor knows that the reason for the decision will be made known to the injured party then he or she will be particularly careful to set out the reason clearly and logically in a manner which can be defended. That is not to say that under existing arrangements reasons are not taken very carefully and set out clearly and logically (although not given to the injured party) but the knowledge that those reasons may be contested is likely to bring an added sharpness to the process.

3.25 At first sight, it might appear that if there was a change in policy there should be no objection in principle to releasing information about cases decided in the past. However, to revisit old files would require very substantial resources and the work would be very time consuming. To examine an old file with a view to seeing how it had been dealt with would require that it be read with as much care as a current file, but without in most cases having the advantage of background knowledge such as knowing what discussions or telephone conversations might have taken place. Many of the key persons, both lawyers and investigators, as well as suspects and witnesses, may no longer be available. The number of files involved is potentially very large, as roughly one-third of all files received result in a decision not to prosecute.

CONCLUSIONS

3.26 Three main issues arise when considering the implications of a change in policy in favour of giving reasons:

73 Law Reform Commission. *Report on Penalties for Minor Offences*, Dublin, 2003, pp. 43-44.

a) The constitutional and other legal protection afforded to a person's good name are likely (at least in some cases) to make it difficult to give effective statements of reasons;

b) Particular problems may arise in relation to cases where the identity of a suspect has become a matter of public knowledge;

c) There may be slightly more room to give reasons for the entry of a *nolle prosequi* than for those given for not prosecuting in the first instance, though this is not fully clear from the existing caselaw.

3.27 It is clear that detailed or comprehensive statements of reasons for not prosecuting could in some cases cast doubt on a suspect's innocence and also on the credibility and good name of witnesses. The difficulties that arise in this regard should not be underestimated, especially if the evidence against the suspect amounts to no more than a certain level of suspicion. If the facts giving rise to the suspicion were to be made known to the complainant, or the deceased's family and were thereafter to become publicly known, great damage could be done to a suspect who enjoys the presumption of innocence in circumstances where there is no testing of the factual basis of the suspicion in a court of law. However it may be possible for the Office to adopt a policy of giving general reasons in most cases. It may be desirable for such a policy to be given legislative backing. In terms of a possible specific legislative basis for such a policy, a number of points seem relevant:

- While a statute-based approach would not *per se* immunise any change of policy from constitutional challenge, it would give a new practice added weight and support.
- It would be clear that cases were treated according to settled criteria, thereby allaying any criticism that determinations to give reasons or not were the product of an ad hoc administrative procedure that was lacking in transparency.
- While it may be desirable, it seems that the Office would not be precluded from changing its policy and that this may be done without legislative changes, other than perhaps to put the protection of absolute privilege on a statutory footing.

4 REASONS FOR DECISIONS: POSSIBLE APPROACHES

4.1 There are a variety of approaches to the question of whether reasons for decisions should be given, and if so how this should be done. The principal questions that arise are as follows:

a) Whether reasons should be given to any parties other than the Garda Síochána or other investigating agency.[74]

b) If so, to whom. The range includes all or any of the following: injured parties; relatives of injured parties (especially of deceased injured parties); the general public; the Court (in cases where a prosecution is discontinued).

c) In what cases should reasons be given? The range includes: all cases, all serious cases, all serious cases involving personal violence, or a specific list of cases, for example homicide, rape offences, or serious offences involving personal violence carrying a particular penalty. Finally, it could be provided that reasons would be given only if requested.

d) How detailed should the reason be? The options are many and include: general reasons only (for example insufficient evidence or no public interest to prosecute), general reasons in the first instance with an option to provide more specific reasons on request, specific reasons where possible in every case.

e) Who should convey the reason to the injured party or the relatives? The principal options are: the Garda dealing with the case, the lawyer dealing with the case, or an employee of the DPP whose function is to communicate reasons to injured parties.

f) How should reasons be given? Options include: by written communication, at a face-to-face meeting, or initially in writing with an option for the injured party to request a meeting.

g) How should cases where detailed reasons cannot be given without compromising another person's interest be dealt with? The principal options are to decline to give a reason in such cases, or, if possible, to give a reason in very general terms if this can be done without damage to the other person's interests.

74 At a minimum it seems necessary, in order to comply with our obligations under the European Convention on Human Rights, to give reasons in the circumstances identified in *Jordan*, see footnote 5, (2003) 37 EHRR 52.

h) When should reasons be given to the wider public? The options include: in every case, never, or in cases where there is a public interest in making a reason public (for example, to allay public disquiet or suspicion).

4.2 Clearly, various combinations of the possible answers to these questions can be adopted, thus the variety of possible models is quite large. It is intended below to discuss a number of possible models but it needs to be borne in mind that these models are not exhaustive.

4.3 In the majority of jurisdictions surveyed, the type of information being provided can also be influenced by whom it is being provided to. Generally, the information is first provided to the police, then to the victim(s), to the Court (if there are relevant proceedings in being)[75] and possibly to the media and other interested parties. Typically, the police are given the most detailed information. Further, the mechanics of how to give reasons may vary, and this aspect is considered in more detail in chapter 5 on implications for staffing and resources.[76]

4.4 In this chapter the broad implications of the potential models by which reasons could be given are examined.

4.5 The perspective of the victim must also be considered in any discussion of the giving of reasons for decisions. Being the victim of a crime, whether directly or indirectly, can have a considerable impact on a person's life, be it physical, psychological or both. Where a prosecution is not brought, the fact that no reasons are given for that decision can contribute to feelings of distress, frustration and helplessness for those who have already suffered as a result of crime. If it is feasible for the prosecuting authorities to

75 As virtually all criminal proceedings are in open court to which the media have access, where, for example, reasons are given for entering a *nolle prosequi,* providing a statement in court in effect is to make the information available simultaneously to the media.

76 For example, as discussed in the Appendix, the Crown Prosecution Service (CPS) in England and Wales has recently remodelled their policy and practice in relation to the provision of reasons for decisions. As part of the new scheme, the CPS has adopted three different approaches to the provision of reasons for decisions: a standard model, whereby the prosecutor who made the decision is responsible for all written and face-to-face contact with victims/interested parties in relation to the giving of reasons; a victim information bureau model, whereby a dedicated unit is primarily responsible for liasing and communicating with victims/interested parties; and a hybrid model, whereby both the prosecutor responsible for the prosecutorial decision and a dedicated liaison officer are involved in contact with victims/interested parties.

provide victims with reasons for decisions not to prosecute, victims might be better able to understand the way in which the criminal justice system operates, and the legal reasoning behind the decision taken in the case in which they are involved. However, it should also be acknowledged that the giving of reasons for a decision not to prosecute may cause further distress to a victim of crime, particularly if the victim perceives the reason given as casting aspersions on the credibility of his or her account of events.

MODELS OF PRACTICE

Retaining existing policy of not giving reasons

4.6 The main advantages of the current approach of the Office of the DPP, not to give any statement of reasons for not prosecuting in any case, are as follows:

a) No imputations are made as to the innocence or character of potential suspects, thereby preventing a breach by the Office of the constitutional and common law protection afforded an individual's good name;

b) No imputations are made as to the character or credibility of witnesses, thereby similarly preventing a breach by the Office of the constitutional and common law protection of an individual's good name in that context;

c) Other interests, such as the protection of police sources and the avoidance of any prejudice to future developments in the same case or in other cases, are not compromised;

d) The same practice is applied in all cases, thereby helping to ensure that a perception of unfairly discriminatory treatment is not created;

e) The resources of the Office of the DPP are not put under additional strain as would likely be the case if statements of reasons had to be prepared.

4.7 While the risk to a person's good name potentially associated with the giving of reasons has been clearly identified, the failure to give reasons for not prosecuting may also taint a person's good name in certain circumstances. This problem arises chiefly where identifying information concerning an arrested or accused person is already in the public domain. Even where no prosecution is brought, the fact that an individual has

been placed under suspicion can have a lingering effect on the public's perception of the guilt or innocence of that individual. In such a case, where no reasons are given for the decision not to prosecute, there may exist, however speculative and unfair, the suspicion that the failure to prosecute did not relate to the merits of the matter, but was due to a technicality in the law or, was motivated by impropriety or bias on the part of the Gardaí or the Director of Public Prosecutions.

4.8 Finally, arising from the decision of the European Court of Human Rights in *Jordan v United Kingdom,*[77] it is clear that, at least in relation to the use of lethal force by agents of the State, a failure by the prosecution authorities to provide reasons for not prosecuting violates the right to life as guaranteed by Article 2 of the European Convention on Human Rights.[78] In addition to responsibilities under international law, the State is now obliged by the European Convention of Human Rights Act 2003 to adhere to the requirements of the Convention.

Retaining the current policy, subject to a limited number of exceptions, under which reasons would be given only to the relatives of those who die because of the actions of a State agent

4.9 This model would represent a minimal change to the practice which has existed until now and would satisfy the requirements of Article 2 of the European Convention as set out in the *Jordan* case. As the number of cases in which a death is caused by agents of the State is small, such a change of policy would not significantly affect the existing resources of the Office. However, difficulties already identified in relation to the giving of reasons generally, could also arise in this limited category.

Giving reasons only in relation to serious, pre-defined categories of cases, such as murder, sexual offence cases, or other cases involving serious violence, insofar as this can be done without compromising other legally protected interests, such as the interests of suspects, victims or witnesses

4.10 This approach would represent a more substantial change to the current policy. Although the giving of reasons would be confined to predetermined

77 (2003) 37 EHRR 52.

78 European Treaty Series No. 5, 213 United Nations Treaty Series 222, as supplemented by subsequent protocols.

categories of cases, such as murder or sexual assault, this would represent a significant proportion of the overall work of the Office. Although the category of case in which reasons would be given would be pre-defined under this model, the Office could retain a discretion to release limited reasons or to withhold reasons in certain circumstances in order to protect other interests such as those of victims, suspects, witnesses, or informants. Similarly, the Office could limit the information provided in order to reduce the potential for prejudice to future investigations.

4.11 It may not be possible to provide a very detailed or satisfactory statement of reasons without compromising the interests identified above. In such cases, victims and other interested parties would be asked to accept on faith the decision of the Office in the matter.

4.12 The predetermination of the categories of cases for which information was to be provided might also prove problematic. While a number of obvious categories come to mind, such as cases of murder and sexual assault, there may be difficulty in deciding which categories to include. For example, what the law considers to be relatively minor offences can cause very significant harm in their conduct and consequences. Accordingly many cases in which a victim has been significantly affected could be excluded under this model. Difficulties may also arise in determining which cases require a greater level of detail to be given, as there are subjective elements in the determination of the seriousness and impact of offences.

A more flexible multi-tiered approach whereby detailed reasons are provided in cases where it is possible to do so, more generalised reasons are given in those cases where the provision of detailed reasons could compromise or prejudice an important interest, and no reasons are provided in cases where any sort of statement (whether general or relatively detailed) would or could compromise or prejudice an important interest

4.13 This approach would afford a much greater degree of flexibility, and would allow the Office the latitude to decide on a case-by-case basis the files in which detailed reasons ought to be provided, and to identify the files in which competing legal interests are in issue, and to respond accordingly. It would allow for discretion to be exercised in relation to summary offences and would not limit the scope for the giving of reasons to a small category of pre-defined offences.

4.14 However, the resource implications pertaining to the implementation of this model could be onerous. Under this model there would be no predefined category of case in which the Office would commit itself to a general policy of providing reasons and the decision whether to give such reasons would have to be made in almost every case involving harm to an individual.

Giving reasons in all cases of indictable offences insofar as this can be done without compromising other legally protected interests, such as the interests of suspects, victims or witnesses

4.15 Similar general considerations arise under this model, the distinction being the exclusion of all summary offences, regardless of the harm occasioned.

4.16 A possible difficulty under this model is that while, in general, indictable crime is the most serious and therefore the sort of crime in relation to which it is more desirable to give reasons where possible, it may sometimes be the case that some summary offences would justify giving reasons for not prosecuting. However, under this model, the Office would not give reasons in those summary cases where it might be thought desirable to give reasons.

Giving standard-format, generalised reasons in all cases

4.17 If the Office decided to give standardised reasons in all cases some of the main advantages of this approach would appear to be:

a) All cases would be treated on an equal footing;

b) The good name of suspects or witnesses are less likely to be affected than if detailed reasons were given;

c) Similarly, it would be less likely to compromise Garda sources or the future conduct of investigations;

d) A lesser burden would be placed on the time and resources of the Office than if other models of giving reasons were adopted.

4.18 A clear disadvantage of providing only generalised statements of reasons would be that the interested party might receive very little genuine information as to why a decision not to prosecute had been taken. If the reasons given were seen to amount to little more than bland generalities, such as that the admissible evidence was insufficient, the change to current

policy would, in real terms, be minimal and might do little to enhance the accountability and transparency of the decision making process of the Office or to assist victims or the general public in understanding the decisions of the Office.

Giving detailed reasons in all cases

4.19 The risks to third party interests or to police investigations would be likely to be most acute under this model. The main difficulties likely to arise would be:

a) The possibility that the reasons given could in effect amount to imputations as to the guilt or bad character of potential suspects;

b) The possibility that the reasons given could in effect amount to imputations as to the character or credibility of witnesses including the complainant;

c) Other interests could potentially be compromised, such as the protection of police sources and the avoidance of any prejudice to future developments in the same case or in other cases;

d) This model would be likely to involve a very significant extra demand on Office resources.

An advantage of this model is that all cases would be treated on an equal footing.

PUBLIC STATEMENTS

Some other issues which could arise:

a) If public statements of reasons are given, should they be given in court?

b) Are there categories of cases where the interests of justice would require a public statement, such as where evidence has come to light which points to the innocence of the suspect?

c) How would a new policy affect information given to the media – should a different policy apply to cases in which the identity of a suspect has already become a matter of public knowledge before a prosecutorial decision has been taken?

d) How detailed should public statements of reasons be?

These questions are considered below in turn:

If public statements of reasons are given, should they be given in court?

4.20 This arises chiefly with respect to the entry of a *nolle prosequi*, as there are in general no proceedings in being when there is no decision to prosecute in the first instance. The provision of reasons in court would formalise the process and open it to public scrutiny. Moreover it could be argued that as a matter of respect for the Court any information as to the discontinuance of proceedings currently before it ought to be formally put before the court first. This is also a convenient method of informing the wider public. However even if such a policy were introduced, there would be exceptional cases where a reason could not be given to a court, e.g. where it might reveal the identity of an informant.

4.21 The question of privilege is also relevant in this context.[79]

Are there categories of cases where the interests of justice would require a public statement, such as to the innocence of an accused?

4.22 Where the identity of an accused has entered the public arena and a decision has been made not to prosecute, the innocence of the accused may have been brought into question as a result of the initial investigation. In such cases there may be a valid argument in favour of the Office releasing a statement of reasons on why the decision was taken not to prosecute. For example, DNA evidence might show conclusively that a suspect was not in fact guilty of an offence. However, such a clear cut outcome would be very rare.

How would a new policy affect information given to the media – in this regard, should a different policy apply to cases in which the identity of a suspect has already become a matter of public knowledge before a prosecutorial decision has been taken?

4.23 The category of interested parties could include the media and special interest groups such as victims' organisations. In other jurisdictions where statements of reasons for decisions are provided to groups other than victims the standard practice appears to be that only very generalised statements are provided, especially to the media. For example, in Canada,

79 See chapter 3 above.

information is provided to the media, but only at the discretion of the prosecutor and it is only in very general terms. In the Netherlands, statements of reasons for not prosecuting are provided only to the media where the name of the accused has already been made public and the case has attracted considerable media attention. In Australia, the Commonwealth DPP generally does not publicise his reasons for decisions in the media but on the rare occasions when he does, only very short statements are provided. In Western Australia, the media are provided with the same statement that is given to the Court when the DPP enters a *nolle prosequi*. The Northern Territory of Australia DPP acknowledges that the media has a legitimate interest in the administration of justice and in cases where a person has been publicly committed for trial the prosecutor provides a very general statement to the media where a decision has been made not to proceed. In South Australia the DPP has adopted a practice of publicly giving only brief reasons to the extent that matters require.

How detailed should public statements of reasons be?

4.24 Although the objections in principle to giving reasons also apply where victims and other interested parties only are given reasons, they appear to be weaker than where reasons are given more generally to the public.

5 TRAINING & RESOURCE IMPLICATIONS

5.1 Any change in policy in relation to giving reasons for prosecutorial decisions would require careful consideration. Guidelines would have to be developed establishing the practical and ethical aspects of the procedures which would underpin the implementation of any new policy. Issues concerning staff training, resources and Office procedures for dealing with victims, relatives or interested parties would also have to be addressed and planned for.

5.2 If it is decided to change the policy questions then arise as to:

- How reasons would, in practical terms, be given;
- Who they would be given by;
- To whom reasons would be given;
- How detailed the reasons given should be.

5.3 If reasons are to be given the following must be borne in mind irrespective of the method ultimately adopted:

- The information imparted ought to be easily understood.
- Guidelines would have to be developed in order to ensure that communications with victims were tailored to meet their specific needs and those of their families.

5.4 The method of implementation would be dependent on the model adopted. Whether communications would have to be approved by the Director, whether the relevant officer could deal directly with the victim concerned, or whether a specialised unit would have to be established is in part dependent on the number of files in which reasons would be given, which in turn is dependent on whether a decision is taken to give reasons in serious cases only, in indictable cases only, or in all cases.

Depending on the foregoing, there are a number of available options and associated training and resource implications:

No change in current position - no information provided

5.5 If the current position is maintained and no additional information is provided no issues in relation to training and resources arise.

OPTION 1: Communication from decision-making directing officer

5.6 If this option were adopted officers communicating with victims would have to receive training in how to communicate with victims. Employing such a new initiative into the daily schedule of directing officers would involve a considerable amount of the resources and time of the officers, adding weight to an already heavy workload. It would also be necessary to supervise and approve all communications with victims to ensure adherence to Office policies and standards in all cases, which would also take time and resources and might require the recruitment of some additional staff.

OPTION 2: Establishment of a dedicated unit within the Office for communicating with victims

5.7 It would be necessary to recruit qualified personnel who were trained to deal with victims and had a legal qualification or experience of working in a legal environment and dealing with legal issues. It would be necessary to provide training to unit members on Office policy and also on any issues that they may be faced with within the Unit.

The establishment of a dedicated unit

5.8 There are a number of advantages to this approach including:

- Consistency;
- Scope for the employment of professional specialist staff;
- Keeping any additional workload on the Directing Division to a minimum.

5.9 Such a unit would contain trained personnel who would be responsible for all contact between victims and their families and the Office of the DPP, similar to the Victim Information Bureau in the Crown Prosecution Service. The establishment of a dedicated unit would ensure consistency. Members of the unit would also be trained in how to write letters in plain English and avoiding legal jargon. One of the main advantages of a dedicated unit would be that it would minimise the requirement for any additional work on the part of decision-makers, as they would be responsible only for checking the information that the unit provided to victims and would have no direct responsibility for communication with victims and their families.

Face-to-face meetings with decision-making officer or with a member of a dedicated unit within the Office

5.10 In the event that the Office decided to engage in face-to-face meetings with victims a number of factors would have to be considered. These include:

- the confidentiality of all parties concerned;
- co-ordination not only between various different units within the Office but also with outside parties such as the Garda Síochána;
- appropriate accommodation to facilitate meetings;
- whether all victims be required to travel to Dublin for meetings or could they be held in other venues?

6 FREEDOM OF INFORMATION OBLIGATIONS

6.1 The Freedom of Information Acts 1997[80] and 2003[81] assert the right of members of the public to obtain access to official information to the greatest extent possible consistent with the public interest and with the right to privacy of individuals. The Acts have established three new statutory rights:

- A legal right for each person to access particular government records following the making of a request;
- A legal right for each person to require amendment of official information relating to him / herself where it is incomplete, incorrect or misleading;
- A legal right to obtain reasons for administrative decisions affecting oneself.

6.2 Freedom of Information legislation allows members of the public to access information that is held by public bodies and is not routinely available to them through other sources. However, under the Acts access to certain types of information is subject to exemptions. The Acts do not apply to records held or created by the Director of Public Prosecutions or his Office other than a record concerning the general administration of the Office.[82] This means that files relating to criminal prosecutions and other legal matters are not accessible to the public. Consequently files relating to cases where a decision has been made not to prosecute are not accessible to the public under Freedom of Information legislation.

6.3 Apart from its Freedom of Information obligations, the Office of the Director of Public Prosecutions in Ireland makes information routinely available to the public in relation to the structure, functions and activities of the Office. This is done through the publication of its Annual Report, Strategy Statement, Guidelines for Prosecutors and information booklets on the Role of the DPP and Attending Court as a Witness, all of which are available directly from the Office and on the Office website www.dppireland.ie.

80 Freedom of Information Act 1997 (Principal Act). Effective in Ireland since 21st April 1998.

81 Freedom of Information (Amendment) Act 2003. Effective in Ireland since 11th April 2003.

82 Freedom of Information Act 1997, s. 46(1)(b).

APPENDIX
Prosecution Models of Other Jurisdictions

JURISDICTIONS SURVEYED

A.1 As part of this review, the practices of other jurisdictions in the giving of reasons for decisions were examined. Both common law and civil law systems were examined, in particular England and Wales, Northern Ireland, Scotland, Canada and Australia. The common law systems are, of course, closest to Irish legal culture, Ireland itself being within the common law tradition. Although it is clear that there are significant differences between the various common law jurisdictions, the substantive law, law of evidence and procedural law tend to be remarkably similar. One of the clear differences between the Irish legal system and other common law jurisdictions is the strong influence of Irish constitutional jurisprudence particularly in relation to criminal evidence and procedure. The closest parallels with the Irish prosecution system are to be found in Northern Ireland and to a lesser degree England and Wales, Australia and Canada.

A.2 Historically, the two broad traditions of the civil law and common law grew out of Roman law and English medieval law respectively,[83] and as they developed throughout the centuries there has been a clear convergence between the common law and civil law traditions in the area of criminal law. Numerous examples exist of cross-fertilisation and borrowing between the two traditions, one being the now universal concept of a public prosecutor which was adopted by common law jurisdictions from the civil law tradition[84]. In general terms, criminal trials of the common law tradition[85] are characterised by an adversarial process (which means

83 See generally, R.C. Van Caenegem, European Law in the Past and the Future: Unity and Diversity over Two Millennia, Cambridge, 2002.

84 J.D. Jackson, 'The Effect of Legal Culture and Proof in Decisions to Prosecute', 3 *Law Probability and Risk* 109 (2004), pp. 110-111; J.R. Spencer, 'The Place of Comparative Law in Shaping EU Criminal Law', Presentation delivered at *Conference on the Impact of EU Law on National Criminal Law and Practice* organised by the Office of the Director of Public Prosecutions, Ireland, and the Academy of European Law, Dublin, 12-13 June 2003. For comparison of the roles of prosecutors in civil and common law jurisdictions, see generally V. Langer, 'Public Interest in Civil Law, Socialist Law, and Common Law Systems: The Role of the Public Prosecutor', 36 *American Journal of Comparative Law* 279 (1988); J. Langbein, 'The Origins of Public Prosecution', 17 *American Journal of Legal History* 313 (1973); and J. Langbein, *The Origins of Adversary Criminal Trial*, Oxford, 2003.

85 For comparison and discussion of common law and civil law traditions in the criminal sphere, see M. Delmas-Marty & J.R. Spencer, (eds), *European Criminal Procedures,* Cambridge, 2002; P. Fennell, B. Swart, N. Jörg & C. Harding, (eds), *Criminal Justice in Europe: A Comparative Study,* Oxford, 1995; C. Van den Wyngaert, C. Gane, H.H. Kühne & F. McAuley, (eds), *Criminal Procedure Systems in the European Community*, London, 1993.

that the trial is essentially a 'contest' between the prosecution and the defence,[86] with a trial judge presiding over the proceedings in a neutral fashion) and by the relative importance of case precedents (as opposed to legislation) as a source of the criminal law. Conversely, the civil law tradition in criminal law favours the 'inquisitorial' trial in which the primary function of the judge is to direct the proceedings in order to arrive at the truth. Reflecting the active, truth-finding position of the judge, the role of defence counsel in a criminal trial in the civil law tradition is much more to assist the court in arriving at the truth than is the case in the common law tradition where defence counsel are charged with the primary task of testing any weaknesses in the prosecution case. Notwithstanding these distinctions, it is of course the case in both traditions that every person charged with a criminal offence is to be presumed innocent until proven guilty. A further distinction between civil and common law systems, in general and not just with respect to criminal law, is the pre-eminent importance of comprehensive legislative codes as sources of law. Much less emphasis is placed in the civil law tradition on judicial precedents as a source of law compared to the common law tradition. However, in most common law countries the bulk of criminal law is contained in statutes and many have now enacted codes, so this distinction is less marked today. In the area of criminal law, distinctions can be found between the common law and civil law traditions in areas such as the role of juries, the types of evidence that can be admitted in court and the role of lay judges. In the common law tradition, judges are usually appointed from the ranks of senior lawyers. This can be contrasted with the civil law tradition where a judge may begin his or her career as a judge straight from university, commencing in the lower courts.

86 The prosecution and defence in this context are sometimes said to enjoy 'equality of arms' with each other, a principle that finds expression in both the common law and civil law traditions (see for example M. Wasek-Wiaderek, *The Principle of Equality of Arms in Criminal Procedure under Article 6 of the ECHR and its Functions in Criminal Justice of Selected European Countries*, Leuven, 2000). However, there are limits to this adversarial conception of the role of defence and prosecution counsel in the common law system. It is also the case, for example, that the prosecution should not strive to secure a conviction at all costs, but should rather advocate the guilt of the accused only so far as the evidence reasonably and fairly warrants: see for example *R v Puddick* (1865) 4 F & F 497, at 499, where it was observed that prosecuting counsel "ought to regard themselves as ministers of justice, and not to struggle for a conviction".

A.3 A review of the US prosecution system was not carried out[87]. The status of many state prosecutors as elected officials, in contrast to the position of prosecutors in most other common law jurisdictions as appointed officers, suggests that US practice may not provide the most suitable parallel or comparator to potential Irish prosecutorial practice.

A.4 Of those jurisdictions surveyed, the information provided is for the most part broadly indicative of that jurisdiction's approach to the issue of giving reasons for prosecutorial decisions. It has not been possible for this study to provide a comprehensive or exhaustive account of the legal context and implications of the practice in each jurisdiction, for example, in relation to implications for freedom of information laws or in relation to all of the possible constitutional implications. The information provided offers an overall view of the approach in the jurisdictions surveyed. For some jurisdictions, by reason of their greater similarity with the Irish legal system and/or more readily available information, it has been possible to provide relatively fuller accounts of their practices. This appendix contains a brief summary of some of these jurisdictions, concentrating on Northern Ireland, England and Wales, Canada and Australia. A tabulated summary of jurisdictions reviewed can be found at the end of this appendix.

NORTHERN IRELAND

A.5 Traditionally, both Northern Ireland and England and Wales had similar approaches to Ireland concerning the giving of reasons for decisions. Recently the prosecution services in both jurisdictions have come under review and have reconsidered and developed their position in relation to this area.

A.6 The Office of the Director of Public Prosecutions in Northern Ireland, established by the Prosecution of Offences (Northern Ireland) Order 1972, its primary function being to consider facts and information contained in police investigation files and to reach decisions as to whether or not to prosecute. In 2005, that Office became the Public Prosecution Service for Northern Ireland (PPS), established by the commencement of the

87 For a brief overview, seefor example J.B. Jacobs, 'The Evolution of US Criminal Law', available online at http://usinfo.state.gov/journals/itdhr/0701/ijde/jacobs.htm Specifically on the US public prosecution system, see, generally, e.g. J. Vennard, 'Decisions to Prosecute: Screening Policies and Practices in the United States', *Criminal Law Review* 20 (1985); J.E. Jacoby, *The American Prosecutor: A Search for Identity*, Lexington, 1983; J.E. Jacoby, L.R. Mellon, E.C. Routledge & S. Turner, *Prosecutorial Decision-making: A National Study*, Washington D.C., 1982.

Justice (NI) Act 2002. The Justice (NI) Act defined the newly established Public Prosecution Service, its statutory duties and commitments and the legislative framework under which it was to provide its services. The establishment of the PPS followed from the recommendations made by the Criminal Justice Review Group[88] in March 2000. Recommendation 49 of the Review referred to the giving of reasons for decisions stating:

> "We recommend that, where information is sought by someone with a proper legitimate interest in a case on why there was no prosecution, or on why a prosecution has been abandoned, the prosecutor should seek to give as full an explanation as is possible without prejudicing the interests of justice or the public interest. It will be a matter for the prosecutor to consider carefully in the circumstances of each individual case whether reasons can be given in more than general terms and if so in how much detail, but the presumption should shift towards giving reasons where appropriate".

A.7 The policy of the PPS has developed over a number of years, to the point that reasons are now given for decisions not to prosecute, albeit in the most general terms. The propriety of applying this general policy is examined and reviewed in every case where a request for the provision of detailed reasons is made. In such cases the PPS considers what further information may reasonably be given balanced against factors which militate against providing detailed reasons, together with any other considerations which may seem material to the particular facts and circumstances of the case. It is this policy which was considered *In the Matter of an Application by David Adams for Judicial Review* and upheld to be lawful[89]. Judicial review was sought in relation to the decision of the PPS in relation to events that had occurred in February 1994. The Court considered the validity of the policy of the PPS and concluded that there was no duty on the PPS under the Prosecution of Offences (Northern Ireland) Order 1972 or at common law to give reasons for decisions. In the same year the issue arose at European level in *Jordan v United Kingdom*[90] where the European Court of Human Rights commented on the duty of the Northern Ireland DPP to give reasons for a decision not to prosecute in circumstances where an

88 Set up to examine the Northern Ireland Criminal Justice System as agreed under the Good Friday Agreement.

89 (2001) NI 1.

90 (2003) 37 E.H.R.R. 52.

individual had died as a result of the actions of state agents. The Court stated as follows:

> "The Court does not doubt the DPP's independence. However where the police investigation procedure is itself open to doubts of a lack of independence and is not amenable to scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision making. Where no reasons are given in a controversial incident involving the use of lethal force, this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision. Pearse Jordan was shot and killed while unarmed. This is a situation which cries out for an explanation. However the applicant was not informed why the shooting was regarded as not disclosing a criminal offence or as not meriting a prosecution of the officer concerned. There was no reasoned decision available to reassure a concerned public that the rule of law had been respected. This cannot be regarded as compatible with the requirements of Art. 2, unless that information was forthcoming in some other way. This however is not the case."

A.8 In response to this and other judgments of the European Court of Human Rights the position of the PPS in cases where death has been occasioned by the conduct of agents of the state was outlined by the Attorney General, Lord Goldsmith, in March 2002. In such cases, subject to compelling grounds for not giving reasons, including the Director's duties under the Human Rights Act 1998, the Director accepts that it will be in the public interest to reassure concerned public, including the families of victims, that the rule of law has been respected by the provision of a reasonable explanation. Addressing the House of Lords, Attorney General Lord Goldsmith said:

> "The Government are considering a package of measures which taken together, should meet the concerns expressed by the European Court of Human Rights in its judgments in a series of cases from Northern Ireland, including that of *Jordan v United Kingdom*. In furtherance of that objective, I have had a number of discussions with the Director of Public Prosecutions for Northern Ireland (the Director) regarding the giving of reasons when a decision is reached not to initiate or continue a prosecution. We have agreed that the following statement should issue:
>
> > *The policy of the Director in the matter of providing reasons for decisions not to initiate or continue prosecutions is to refrain from giving reasons other than in the most general terms. The Director recognises that the propriety of*

applying the general practice must be examined and reviewed in every case where a request for the provision of detailed reasons is made. This policy is based on a series of public interest considerations. It also reflects the duties owed by the Director to a range of parties as a public authority under section 6 of the Human Rights Act 1998. The lawfulness of the policy was upheld by the Northern Ireland Court of Appeal in Re Adams Application for Judicial Review (2001) NI 1. The Director, in consultation with the Attorney General has reviewed his policy in light of the judgments delivered by the European Court of Human Rights on the 4 May 2001 in a number of Northern Ireland cases, including the case of Jordan v United Kingdom. *Having done so, the Director recognises that there may be cases in the future which he would expect to be exceptional in nature, where an expectation will arise that a reasonable explanation will be given where death is, or may have been, occasioned by the conduct of agents of the State. Subject to compelling grounds for not giving reasons, including his duties under the Human Rights Act 1998, the Director accepts that in such cases it will be in the public interest to reassure a concerned public including the families of the victims, that the rule of law has been respected by the provision of a reasonable explanation. The Director will reach his decision as to the provision of reasons, and their extent, having weighed the applicability of public interest considerations material to the particular facts and circumstances of each individual case".*[91]

A.9 From 13 June 2005, which saw the formal publication of the Public Prosecution Service of Northern Ireland *Code for Prosecutors,*[92] the policy on the giving of reasons for decisions in cases where it is decided not to prosecute is as follows:

> "The policy of the Prosecution Service is to give reasons for decisions for no prosecution in all cases albeit in the most general terms. For example, in a case in which there is a technical defect, such as the unavailability of evidence to prove an essential aspect of the case, the Prosecution Service would normally indicate that it has concluded that there was insufficient evidence to afford a reasonable prospect of a conviction. In a case in which the evidence was sufficient but the decision was taken not to prosecute, for example, given the age and infirmity of the prospective defendant, the reason given would be that it was not in the public interest to prosecute.
>
> The propriety of applying this general policy is examined and reviewed in every case where a request for the provision of detailed reasons is made. In such cases, the Prosecution Service will consider what further information may reasonably be given balanced against the factors which militate against

91 1 March 2002, *Official Report, House of Lords*, column WA 259.

92 Available online at http://www.ppsni.gov.uk/site/default.asp?CATID=77.

providing detailed reasons together with any other considerations which seem material to the particular facts and circumstances of the case".[93]

The Public Prosecution Service further recognises that there may be cases in the future which they would expect to be exceptional in nature, where an expectation will arise that a reasonable explanation will be given where death is, or may have been, occasioned by the conduct of agents of the State. Subject to compelling grounds for not giving reasons, including their duties under the Human Rights Act 1998, the Public Prosecution Service accepts that in such cases it will be in the public interest to reassure a concerned public including the families of the victims, that the rule of law has been respected by the provision of a reasonable explanation. The Public Prosecution Service will reach its decision as to the provision of reasons, and their extent, having weighed the applicability of public interest considerations material to the particular facts and circumstances of each individual case.

ENGLAND AND WALES

A.10 Like Northern Ireland, issues have arisen within the Crown Prosecution Service (CPS) of England and Wales in recent years as to the ambit and extent of its policy on providing reasons when a decision not to prosecute has been taken. The CPS, as it currently operates, was established after the publication of the Report of the Royal Commission on Criminal Procedure (Philips Commission) in 1981[94]. The commission concluded that major changes needed to be implemented in the prosecution process. There was a wide variance in prosecution practices throughout England and Wales (where there is no single national police force but some 42 locally based forces). This led to the reorganisation of the service into a national prosecution service headed by a Director of Public Prosecutions under the overall superintendence of the Attorney General, and the introduction into law of the Prosecution of Offences Act 1985 which established the Crown Prosecution Service. After 1985, although no longer the authority responsible for prosecuting offences, the police continued to have responsibility for communicating with victims and their families when a decision was made by the CPS not to prosecute. An independent

93 Public Prosecution Service of Northern Ireland *Code for Prosecutors* at p.23, available online at http://www.ppsni.gov.uk/site/default.asp?CATID=77.

94 Royal Commission on Criminal Procedure: Report, HMSO, 1981.

review of the CPS in 1998 by Sir Iain Glidewell[95] recommended that the CPS should assume this responsibility and communicate decisions directly to victims. The Report also recommended that "where desired, an explanation to complainants / victims should take place in each CPS Area as soon as the resources of that area permits."[96] Similarly in the Stephen Lawrence Inquiry, Sir William MacPherson also recommended that in the prosecution of racist crimes the CPS should have contact with the victim or the victim's family and notify them personally of any decision taken to discontinue any prosecution, and ensure that such decisions are carefully and fully recorded in writing and where possible should be disclosed to a victim or a victim's family.[97]

A.11 In 1998 the CPS requested that HH Gerald Butler QC conduct a review into the prosecution decision-making process in relation to deaths in custody[98]. It concluded that the procedure for taking and confirming the decision not to prosecute was unsound in that it did not identify the person actually responsible for taking the decisions. There was also the view that although an erroneous decision not to prosecute can lead to more undesirable consequences for the public interest than erroneous decisions to prosecute, no prosecution should ever be brought unless there is a realistic prospect of a conviction. Collectively these reports led to a number of significant changes occurring in the CPS, particularly in relation to the provision of reasons to victims and their families for decisions not to prosecute. In May 2002, after the publication of the Butler Report, Attorney General Lord Goldsmith released a consultation paper on the topic of providing reasons for decisions and invited submissions from interested groups. The paper set out the policy of the DPP in this area and the reasoning behind it, outlining the concerns of the DPP in relation to the provision of reasons for decisions not to prosecute.

95 Sir Iain Glidewell, *The Review of the Crown Prosecution Service*, The Stationery Office, June 1998 (the Glidewell Report). Summary of The Main Report with Conclusions and Recommendations available online at http://www.archive.official-documents.co.uk/document/cm39/3972/3972.htm, http://www.archive.official-documents.co.uk/document/cm39/3972/contents.htm

96 *ibid.*, chapter 8, at paragraph 55.

97 The Stephen Lawrence Inquiry, Report of an Inquiry by Sir William Mac Pherson of Cluny, The Stationery Office, February 1999 (the Mac Pherson Report). Available online at http://www.archive.official-documents.co.uk/document/cm42/4262/sli-00.htm.

98 Inquiry into Crown Prosecution Service decision-making in relation to deaths in custody and related matters: 'The Butler Report', 1999.

Concerns raised were that the giving of reasons in one case could require reasons to be given in all cases; reasons which consisted of something more than generalities could lead to unjust consequences; where the reason provided was that there was a lack of evidence, this could lead to the conclusion that had they been available the individual would have been prosecuted; publication of reasons for not prosecuting could lead to unnecessary pain or damage to individuals other than the suspect. Finally, it was noted that some cases are not prosecuted on public interest grounds and publication of reasons in these cases could lead to unjust conclusions on the guilt or innocence of an individual.

A.12 Prior to the publication of the Attorney General's consultation paper and subsequent report the policy of the CPS in relation to the giving of reasons for decisions had come to the attention of the courts. In *R v DPP ex parte Manning,*[99] a case concerning a death in custody where the CPS had decided not to prosecute, Lord Bingham of Cornhill C.J. observed that there was no absolute obligation on the Director to give reasons for decisions not to prosecute. He noted that when making a decision on whether to prosecute or not the Director and his officials bring to the task experience and expertise that allow them to make an informed judgement of how a case against a defendant is likely to fare in the context of a criminal trial. The court quashed the decision of the CPS not to prosecute but also emphasised that the ruling of the court did not imply that the court was requiring the CPS to prosecute, rather it should reconsider in this instance its original decision not to prosecute. In 2000 the Report of the European Committee for the Prevention of Torture (CPT) relating to the United Kingdom observed that the confidence of the public in the manner in which decisions are reached regarding the prosecution of police officers would certainly be strengthened were the CPS obliged to give detailed reasons in cases where it was decided that no criminal proceedings should be brought. The CPT recommended that such a requirement be introduced in England and Wales[100].

99 *Regina v Director of Public Prosecutions, Ex parte Manning and another* [2001] QB 330-350

100 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Report to the United Kingdom Government CPT/inf [2000] 1. The visit of the Committee occurred in September 1997 and the Report was published on the 13th January 2000. At the time of publishing the Report the Committee acknowledged that the area of decisions to prosecute in death in custody cases was under review.

A.13 The Glidewell and MacPherson Reports provided the impetus for change and by 2001 the CPS had begun a phased introduction of its new practice of giving reasons for decisions in cases where a decision was made not to prosecute. This new policy was called the Direct Communications with Victims initiative (DCV) and by October 2002 was fully implemented in all 42 CPS areas.

Direct Communications with Victims (DCV)

A.14 Once the DCV initiative was implemented three key changes occurred in working practices within the CPS:

a) The CPS now had the responsibility for communicating any decision to drop or substantially alter a charge directly to the victim rather than via the police.

b) Any explanations of CPS decisions would provide as much detail as possible of the reasons for the decisions while bearing in mind the sensitive and important issues which may restrict to some extent the amount of information that can be given.

c) A meeting would be offered in cases involving a death, child abuse, sexual offences, racially / religiously aggravated offences or cases with a homophobic, transphobic or sexual orientation element and in cases in which the offence was aggravated by hostility based on disability. In other cases the decision-making lawyer will have the discretion to offer a meeting to a victim if it is considered appropriate in the circumstances of the case.

A.15 Since the introduction of the DCV scheme the policy of the CPS is to write to all victims in cases where the prosecutor alters the charges or where a decision is taken not to proceed with a prosecution. The aim of the service that the CPS now provides is that victims and their families deal directly with the person who makes the decision on the case rather than receiving the information second hand as was the policy when police officers were responsible for informing victims that a decision had been made not to prosecute.

A.16 The CPS operates three different models of providing its DCV service to victims: the Standard Model, a Victim Information Bureau Model and a Hybrid Model.

a) Under the **Standard Model** method 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 are also the direct point of contact for any response or query that the Office may receive from the victim.

b) Under the **Victim Information Bureau Model** of providing reasons a specialist group of staff known as caseworkers assume responsibility for drafting letters using prosecutor case notes and file endorsements. Before they are sent from the Office the letters are checked and signed by the prosecutor who is responsible for the decision not to prosecute. Any queries and responses by the victim are sent directly to the Unit rather than the decision-making prosecutor.

c) Under the **Hybrid Model** the decision-making prosecutor is responsible for drafting and issuing any letters to the victim(s), except in cases in which the victim retracts their evidence. When this occurs the letter is drafted by a caseworker and is checked and signed by the prosecutor responsible for making the decision not to prosecute. The caseworker then acts as the direct point of contact for any response or query that may be received from the victim.

A.17 In a CPS explanatory video on the implementation and operation of the new service[101] it was observed that initially many of the letters which were being sent out were overly legalistic. Special training was given to legal personnel so that when they were writing letters to victims' families they did not use overly legal language. The objective was to talk to the victims and their families as opposed to talking over them. It was emphasised that lawyers ought to bear in mind the people that they were dealing with when releasing information. It was envisaged that the police would inform the CPS of any difficulties or issues victims or their families may have which are not evident from the file so that these can be taken into consideration by the CPS when dealing with victims or their families. Training is provided to enable lawyers to effectively empathise with the victim and to try and consider how they would feel if they received a similar letter from the CPS.

A.18 In all of the models it is the decision-making prosecutor who meets with the victim and explains the decision and how it was arrived at. It is

101 This video was produced at the conclusion of the scoping / options, which was run after the pilot study prior to national implementation in order to identify best practice.

acknowledged that the victim may not be happy with the CPS or with the decision that the prosecutor has made but the overall aim of the DCV service is that once the decision is explained the victim or the family member will have a better understanding of why the particular decision was made. The prosecutor meets face to face with victims or their family. Initially there was concern that prosecutors might be faced with a victim who is upset, angry or even violent. Accordingly systems were put in place to ensure the safety of all concerned but there have been few such incidents and violent incidents are rare. The view has also been expressed that making a decision on whether or not to prosecute a case knowing that the decision will potentially have to be explained to the victim should sharpen the decision-making process.

SCOTLAND

A.19 In Scotland the policy of the Crown Office and Procurator Fiscal Service in relation to the giving of reasons for decisions has recently been revised and reasons are now given on a reactive basis, as well as on a proactive basis, in certain circumstances. Procurators Fiscal are instructed to be proactive in the provision of information in dealing with particular categories of offence. The proactive provision of reasons for decisions not to prosecute is a requirement in all deaths cases and recommended good practice in relation to domestic abuse, racially motivated offences, sexual offences, child victim cases and other cases involving particularly vulnerable victims. In cases where the prosecution authorities are already in contact with a victim or next of kin and are providing information about case progress, where a decision is reached:

- not to proceed with a case or a charge;
- to discontinue proceedings in a case or a charge;
- substantially to change a charge;
- or to accept a plea to a reduced charge,

it is policy that information to that effect should be provided upon request or in accordance with normal practice, with an additional statement that if the victim / next of kin wishes an explanation of the decision that he or she should contact the Procurator Fiscal. Where in the particular circumstances of a case the Procurator Fiscal considers that it would be helpful to volunteer the reason for a decision, that is permissible,

although the initial decision may have been communicated by a *Victims Information and Advice* (VIA) officer. In some cases it may be appropriate to offer a meeting for the purposes of providing an explanation. It is also recommended that in cases involving:

- fatalities;
- sexual offences;
- child abuse (neglect, physical assault, sexual abuse);
- racially motivated offences,

a meeting with the victim should normally be offered with a Procurator Fiscal of suitable seniority. This is not always necessary. In other cases an appropriately tailored letter will suffice.

Plea adjustment / negotiation

A.20 If a substantially reduced plea is taken, it is the policy of the Crown Office and Procurator Fiscal Service that the reasons for doing so should be provided. Similarly, if a case has been resolved by plea negotiation and pleas of not guilty have been accepted to charges involving certain victims then they should be provided with an explanation of the factors taken into account when adjusting pleas, such as:

- the available evidence against the accused;
- the distress and inconvenience a trial causes to the victim and other witnesses;
- the desirability of a certain outcome.

Circumstances in which reasons cannot be released

A.21 Despite a very open policy in relation to the giving of reasons for prosecutorial decisions, the Crown Office and Procurator Fiscal Service acknowledge that there may be occasions where information about reasons cannot be provided. Such occasions may arise where information has been received from a confidential source which would preclude the Procurator Fiscal from proceeding with a case, where releasing the reason would infringe the privacy of the accused or where ongoing proceedings might be prejudiced by the release of information.

Scottish policy on categories of individuals to whom reasons are released

A.22 The Crown Office and Procurator Fiscal Service takes the view that disclosure of reasons for decisions should only be made to victims of crime, or next of kin in cases that have resulted in a fatality. They should not be made publicly available by the Crown Office and Procurator Fiscal Service 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. Reasons for decisions are not provided to persons unconnected with cases under Scottish freedom of information legislation.[102]

AUSTRALIA

A.23 The Australian Constitution grants specific powers to the Commonwealth and vests residual powers in the respective States. The prosecution of federal offences is the responsibility of the Commonwealth Director of Public Prosecutions and criminal offences committed in each State and Territory are prosecuted by the Office of the DPP in each individual State. In 1990, a uniform prosecution policy was collectively adopted by the Commonwealth Director of Public Prosecutions and by the Directors of Public Prosecutions of all States and Territories in Australia.[103] During the 1980s the Directors of Public Prosecutions and heads of prosecuting agencies of all the Australian Jurisdictions[104] formulated a uniform 'reasonable prospects' test to replace the traditionally applied *prima facie*

102 Communication from the Crown Office and Procurator Fiscal Service to the Director of Public Prosecutions.

103 Submission of the Directors of Public Prosecutions of Australia to the Inquiry for Sexual Offence Matters, Research and Prevention, Crime and Misconduct Commissions, 4 November 2002. http://www.cmc.qld.gov.au/library/CMCWEBSITE/SOI_Sub2.pdf

104 Up until the late 1980's only two jurisdictions Victoria and the Commonwealth had officially established an Office of the Director of Public Prosecutions. Prosecutions were mainly conducted by the police before the summary courts and the Crown Law authorities only became involved in indictable matters once a committal order had been obtained. To date with the exception of the ODPP of the Commonwealth, ACT and NSW this appears to be still the practice in many jurisdictions, even though Offices of Directors of Public Prosecutions have been established they tend only to become involved in the prosecution of indictable offences leaving the responsibility for the prosecution of summary offences with the police.

test.[105] The 'reasonable prospects' test was adopted in 1989 by all States, Territories and the Commonwealth. In summary, the test provides that a prosecution should be brought only if there is a *prima facie* case with reasonable prospects of conviction and if the public interest requires the prosecution to be pursued. All of the individual Offices of the Directors of Public Prosecutions have published their own Prosecution Policy Guidelines incorporating this uniform test which, according to a submission to the Crime and Misconduct Commission in 2002, has allowed them "not only [to] establish uniformity across the Country but to provide a standard which was transparent and readily understood coupled with the obligation to report annually to Parliament, satisfying questions of accountability which might be raised following the establishment of officers which were independent of Government".

A.24 The adoption of a uniform approach in relation to the prosecution of criminal offences has been extended by most of the States to their individual approaches to the provision of reasons for not prosecuting. In most cases reasons for decisions not to prosecute will be given except where to do so would cause or give rise to further harm or serious embarrassment to a victim, a witness or the accused. Where the provision of reasons for not prosecuting could prejudice the administration of justice they are not provided.

A.25 Certain Australian states have introduced laws to provide victims of crime with information on the prosecution of cases concerning them. Under the Victims of Crime Act 1994 the Director of Public Prosecutions of Western Australia is obliged to inform victims about cases in which they are involved insofar as it is practicable.[106] Therefore in Western Australia, it would be contrary to law to maintain a practice of not giving reasons to victims of crime for a decision not to prosecute or to withdraw a

105 According to this submission "long experience of prosecuting before juries had by the mid 1980's shown that trials prosecuted on a prima facie case standard would always provide a predictable and unacceptable percentage of acquittals."

106 The Victims of Crime Act 1994 provides at s.3: "(1) Public officers and bodies are authorised to have regard to and apply the guidelines in Schedule 1 and they should do so to the extent that it is – (a) within or relevant to their functions to do so; and (b) practicable for them to do so." The Schedule to the Act entitled 'Guidelines as to How Victims Should be Treated' provides under clause 6 of the Guidelines that; "A victim who has so requested should be kept informed about (a) the progress of the investigation into the offence (except where to do so may jeopardise the investigation); (b) charges laid; (c) any bail application made by the offender; and (d) variations to the charges and the reasons for variations."

prosecution. Similarly, the South Australian Director of Public Prosecutions is required by law under the Victims of Crime Act 2001 to provide victims with reasons for a decision on the part of the prosecutor not to proceed with a charge[107] and is only exempted from this obligation where to do so would jeopardise an investigation.[108]

CANADA

A.26 Like Australia the approach to giving reasons for decisions not to prosecute in Canada varies among the different provinces and territories. Canada is a federal system and matters concerning Canada as a whole, including the criminal law, are regulated at a federal level. All provinces are subject to the Criminal Code of Canada.[109] However each has its own prosecution authority, so differences in prosecution practice do exist at provincial level.

A.27 The civil law of Quebec is based on French civil law, reflecting the historical role of France in first colonising the area. However Quebec is subject to the federal Criminal Code of Canada and Quebec's criminal law is governed by common law.[110]

A.28 Although the content of most criminal laws is determined at federal level and the enforcement and prosecution of most crimes is a matter for the provinces, a minority of offences are reserved for the federal courts and the federal prosecution authorities.[111] In general, the provincial courts are in, general, responsible for trying offences arising from provincial statutes and offences under the Criminal Code. Typically (except in Nova Scotia which has an independent DPP) the Attorney General in each province is both the chief prosecutor and the executive head of the Ministry of Justice. This was also the case at federal level. Until very recently the Canadian system did not have a wholly independent DPP at the federal

107 Victims of Crime Act 2001 s.8 (1)(e).

108 *ibid.,* at s.8 (3).

109 Available online at http://laws.justice.gc.ca/en/C-46/.

110 See for example, P.W. Hogg, *Constitutional Law of Canada*, 4th Edition, Ontario, 1997, *op cit*, pp. 35-36. When the territory now consisting of Ontario and Quebec was ceded to the UK in 1763, a Royal Proclamation imposed English law on the colony, which had previously been governed by French law. However, the Quebec Act 1774 reinstated French law in relation to non-criminal matters. Section 11 of the 1774 Act continued English criminal law in force in Quebec, which Hogg suggests was because French criminal law at that time was perceived to be too harsh - see p. 36.

111 See generally Department of Justice, *Federal Prosecution Service Review*, Ottawa, 2001.

level.[112] The Public Prosecution Service of Canada (PPSC) is a federal government organisation, created on December 12 2006, when Part 3 of the *Federal Accountability Act* received Royal Assent, bringing the *Director of Public Prosecutions Act* into force. The PPSC fulfils the responsibilities of the Attorney General of Canada in the discharge of his criminal law mandate by prosecuting criminal offences under federal jurisdiction. The PPSC assumes the role played within the Department of Justice Canada by the former Federal Prosecution Service (FPS) and takes on additional responsibilities for prosecuting new fraud and electoral offences. Unlike the FPS, which was part of the Department of Justice, the PPSC is an independent organisation, reporting to Parliament through the Attorney General of Canada. Although the formal separation of the prosecuting authority from other government agencies that exists in Ireland is not found in most of the Canadian provinces, the prosecution authorities do possess a high degree of operational independence.

A.29 In relation to the provision of reasons for decisions not to prosecute at federal level, the FPS published a comprehensive policy manual - the *Federal Prosecution Service Deskbook*.[113] While the PPSC is in the process of establishing its own guiding documents for the conduct of prosecutors, the FPS Deskbook continues to apply, with any modifications that the circumstances may require. The Deskbook contains a general statement on the importance of informing relevant government agencies of the reasons for a decision to not prosecute:

> "Where a decision is made not to institute proceedings, it is recommended that a record be kept of the reasons for that decision. Furthermore, counsel should be conscious of the need in appropriate cases to explain a decision not to prosecute to, for example, the investigative agency. Ensuring that affected parties understand the reason for the decision not to prosecute, and that those reasons reflect sensitivity to the investigative agency's mandate will foster better working relationships."[114]

A.30 Information may also be given to victims, although there is no specific requirement to do so, apart from a general recognition of the fact that "steps may be needed to maintain confidence in the administration of justice" given that victims may feel aggrieved at a decision not to

112 See http://www.ppsc.gc.ca/.

113 Ottawa, 2000. Available online at http://www.ppsc.gc.ca/eng/pub/fpsd-sfpg.html.

114 *ibid.*, p.V-15-6.

prosecute. The extent to which information should be given to victims is not addressed. This appears to be within the discretion of the prosecutor on the facts of each individual case. It is also recognised that it may be appropriate to give reasons to the media, ideally through open court, but no specific requirement is set out and whether or not to do so is within the discretion of the prosecutors.

A.31 In Nova Scotia, the practice is to explain the rationale for a decision not to prosecute both to investigating/police officers and to the victim. This approach is set out in the *Crown Attorney's Manual*:

> "The decision to discontinue a prosecution after a charge has been laid raises additional considerations. If a charge involves an identifiable victim, the prosecutor has a duty to ensure that the victim is made aware of the rationale for the decision, preferably before any public revelation of the decision is made (a withdrawal or the entering of a stay in court amounts to a public announcement of the decision). The greater the degree of threat, injury or financial loss to the victim, the greater the obligation on the prosecutor to keep the victim informed."[115]

A.32 It is apparent from the above passage that the informing of a victim of the reasons for a decision is seen as separate to the public disclosure of the reasons. The latter concern is addressed in a subsequent passage of the *Manual*:

> "In some cases, it is appropriate to place on the record in court brief reasons why a prosecution is being discontinued. This is particularly true when a case has attracted public attention, or there has been a committal for trial. In putting reasons on the public record, or in making a public statement, the prosecutor must be careful not to embarrass the accused or witnesses by disclosing information that will otherwise not be made public. Usually, a simple statement referring to public interest factors will suffice."[116]

A.33 The approach of the Nova Scotia DPP is to seek to balance transparency, in the interests of victims and the public, and privacy, in the interests of suspects. The Freedom of Information and Protection of Privacy Act 1993 (as amended) provides that the DPP "shall not refuse to disclose the reasons for a decision not to prosecute if the [person applying for the information] is aware of the investigation."[117] However, it also provides

115 *ibid.*

116 *ibid.*

117 Section 15(1).

that the DPP may refuse to reveal information in a broad range of circumstances that would adversely affect the administration of justice if released.[118] The Act appears, therefore, to leave the decision as to whether to reveal information within the discretion of the Director, albeit within the general context of recognising that information should be revealed where feasible or practicable. It is the current practice of the Office of the DPP in Nova Scotia to give only very general reasons pursuant to freedom of information provisions, such as "the evidence did not provide a realistic prospect of conviction."[119]

118 Section 15(1) and (2):

(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to:
(a) harm law enforcement;
(b) prejudice the defence of Canada or of any foreign state allied to or associated with Canada or harm the detection, prevention or suppression of espionage, sabotage or terrorism;
(c) harm the effectiveness of investigative techniques or procedures currently used, or likely to be used, in law enforcement;
(d) reveal the identity of a confidential source of law-enforcement information;
(e) endanger the life or physical safety of a law-enforcement officer or any other person;
(f) reveal any information relating to or used in the exercise of prosecutorial discretion;
(g) deprive a person of the right to a fair trial or impartial adjudication;
(h) reveal a record that has been confiscated from a person by a peace officer in accordance with an enactment;
(i) be detrimental to the proper custody, control or supervision of a person under lawful detention;
(j) facilitate the commission of an offence contrary to an enactment; or
(k) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

(2) The head of a public body may refuse to disclose information to an applicant if the information
(a) is in a law-enforcement record and the disclosure would be an offence pursuant to an enactment;
(b) is in a law-enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record; or
(c) is about the history, supervision or release of a person who is in custody or under supervision and the disclosure could reasonably be expected to harm the proper custody or supervision of that person.

119 Communication from the Assistant Deputy Attorney General (Criminal Law) of Canada to the Director of Public Prosecutions.

A.34 In summary, the DPP in Nova Scotia where possible gives specific reasons to victims (as well as other government officials) when a decision is made not to prosecute. The two main factors that might inhibit the release of information are the interests of an accused or suspect and the interests of witnesses. In relation to the public, the tendency is to give more brief or general reasons whether in open court, which is seen as preferable, or directly to the media. A similar position applies in the case of requests under freedom of information legislation, in that only very general reasons are given.

A.35 In British Columbia the Criminal Justice Branch of the Ministry of the Attorney General reviewed its *Crown Counsel Policy Manual* in 2005.[120] In relation to the giving of reasons for decisions not to prosecute there are two statutory provisions of note in the manual, together with guidelines based on same. The manual provides at p. 56 *et seq*:

> "Freedom of Information and Protection of Privacy Act 15(4):
>
> The head of a public body must not refuse, after a police investigation is completed, to disclose under this section the reasons for a decision not to prosecute
>
> a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or
>
> b) to any other member of the public, if the fact of the investigation was made public.
>
> Victims of Crime Act:
>
> 6 (1) Subject to the Young Offenders Act (Canada) and insofar as this does not prejudice an investigation or prosecution of an offence, justice system personnel must arrange, on request, for a victim to obtain information on the following matters relating to the offence:
>
> c) the reasons why a decision was made respecting charges."

The manual continues by setting out the guidelines to be followed in the issuing of reasons:

> "I. DRAFTING OF REPLIES
>
> 1. Identify each issue raised in the letter.
>
> 2. Ascertain the central or overriding concern.

120 http://www.ag.gov.bc.ca/public/criminal-justice/C.J.BPolicyManual.pdf

3. Ensure that the reply is focused on the central or overriding concern and responds to the other issues raised by the correspondent.

4. Attempt to explain without arguing – show compassion and understanding of the correspondent's position – emphasize balance and perspective.

5. If a matter is still before the court, it is generally inappropriate to comment on the issue.

6. Be helpful – go out of the way to identify appropriate remedies, options, and referrals to other agencies.

7. When reporting the fact of a conviction, state the conviction date, sentence date if different, and full details of any sentence imposed. Note the court location and level of court. However, be aware of the restrictions on the release of the name of any young person charged with an offence.

8. As appropriate, indicate that the complainant may contact a Regional or Deputy Regional Crown Counsel or some other person. Include the name, address and telephone number.

9. It may be appropriate, in the final paragraph, to thank the person for writing and express the hope that the comments of the writer will prove helpful.

10. Consider carefully the nature of the intended recipient and simplify phrases and legal terminology accordingly.

II. EDITING YOUR DRAFT

1. Review your draft against the guidelines above.

2. Consider whether any recommendations should be made about changes in policy, procedure, or the law. If so, prepare a separate memo. Assistance in drafting a letter may be requested from the Correspondence Unit at Headquarters."

A.36 A 1990 report published under the auspices of the Ministry of the Attorney General in British Columbia had concluded that:

> "Where a decision not to prosecute has been made, and the public, a victim or other significantly interested person is aware of the police investigation, it is in the public interest that the public, victim or other significantly interested person be given adequate reasons for the non-prosecution, by either the police or Crown Counsel."[121]

121 S. Owen, *Report of the Discretion to Prosecute Inquiry* ('the Owen Report'), Vancouver: BC Ministry of the Attorney General, 1990, p. 110, Recommendation no. 8(2).

This is consistent with the provisions outlined above in the Freedom of Information and Protection of Privacy Act and the Victims of Crime Act.[122]

CONCLUSION

A.37 As mentioned earlier, this Appendix is merely a summary of the approach of other jurisdictions to this complex issue. The approaches vary between jurisdictions but where jurisdictions have decided to adopt an approach of providing reasons for decisions not to prosecute it is clear that considerable efforts have been made to ensure that the administration of justice is not prejudiced.

122 Communication from the Assistant Deputy Attorney General (Criminal Law) of Canada to the Director of Public Prosecutions.

Jurisdiction	Policy on Giving Reasons for Decisions not to Prosecute
Northern Ireland	Policy is to give reasons for decisions for no prosecution in all cases albeit in the most general terms. This general policy is examined and reviewed in every case where a request for the provision of detailed reasons is made.
England & Wales	Overall policy in favour of providing reasons to victims for a decision not to prosecute. Reasons are provided by the Direct Communication with Victims Initiative through three models:- Standard Model: written response to victim by the prosecutor; Victim Information Bureau Model: A specialist unit provides written response to the victim; Hybrid Model: written response by decision-making prosecutor or the caseworker to the victim depending on the circumstances of the case.
Scotland	Reasons are given to victims or next of kin on a reactive basis as well as on a proactive basis in certain circumstances. In some cases a meeting is arranged with the victim for the purposes of providing reasons for a decision. In other cases an appropriately tailored letter is sent to the victims or next of kin.
Australia Commonwealth	Overall policy in favour of providing reasons for a decision not to prosecute except where to do so may prejudice the administration of justice or cause harm or serious embarrassment to a victim, witness or accused. Statements of reasons are usually in written form, very brief and normally no more than a page in length and include a history of the matter and a brief statement as to why the prosecution was not taken.
Australia Western Australia	Overall policy in favour of providing reasons for a decision not to prosecute. Reasons are provided to the police, victims, the Court and the media. The police are provided with the greatest level of information, victims are provided with somewhat more than is given to the Court and the media and other inquirers are provided with the least amount of information.
Australia Northern Territory	Overall policy in favour of providing reasons to those enquirers who have a legitimate interest in the matter.

Jurisdiction	Policy on Giving Reasons for Decisions not to Prosecute
Australia South Australia	Overall policy in favour of providing reasons for decisions not to prosecute but only after each case is assessed to establish whether it is acceptable to do so. The office has adopted a practice of giving reasons only to the extent that the case requires and along the lines that the prosecution is not either in the public interest or there is no reasonable prospect of conviction in accordance with prosecution policy and guidelines of the office. Only a brief explanation is provided and is not elucidated in any way by the Director or the Office.
Australia New South Wales	Overall policy of providing reasons for decisions not to prosecute, where appropriate. Reasons are only provided to inquirers who have a legitimate interest in the matter and where it is otherwise appropriate to do so. The media are considered to have a legitimate interest in the open dispensing of justice where previous proceedings have been made public. Reasons are not provided in cases where to do so would cause serious undue harm to a victim, a witness or an accused person or would significantly prejudice the administration of justice.
Australia Australian Capital Territory	Overall policy of providing reasons for decisions not to prosecute in cases where the Director has declined to proceed with a prosecution, where appropriate. Reasons are only provided to inquirers who have a legitimate interest in the matter and where it is otherwise appropriate to do so. The media are informed where a person has been publicly committed for trial. Reasons are only provided to inquirers who have a legitimate interest in the matter and where it is otherwise appropriate to do so. The media are informed where a person has been publicly committed for trial.
Canada Federal	General policy of informing relevant government agencies of the reasons for a decision not to prosecute. In certain circumstances victims may be given information on the reasons not to prosecute. The media may be given reasons not to prosecute, ideally this is to be done in open court but no specific requirement is set out. The giving of reasons for decisions is within the discretion of the prosecutor and will depend on the facts of each individual case.
Canada British Columbia	Policy is that where there is a decision not to prosecute and the public, a victim or other significantly interested person is aware of the police investigation it is in the public interest that they be given adequate reasons for the decision not to prosecute. Reasons are given either by the police or Crown Counsel.

Jurisdiction	Policy on Giving Reasons for Decisions not to Prosecute
Canada Nova Scotia	Policy is to explain the rationale for a decision not to prosecute both to investigating police officers and victims. Where there is a decision to discontinue a prosecution after a charge has been laid and there is an identifiable victim that victim must be made aware for the rationale for the decision before any public revelation of the decision. Where a decision is made to discontinue a prosecution in a case has attracted public attention and there has been a committal for trial, brief reasons for the decision to discontinue may be put on public record, usually by a simple statement referring to public interest factors. The prosecutor must be careful not to embarrass the accused or witnesses by disclosing information that would otherwise not be made public.
Sweden	No official policy to give reasons for decisions not to prosecute a case, however in practice reasons are usually provided. Reasons for decisions are usually provided to victims. Generally brief or general reasons are provided to victims although there is a policy of explaining decisions as fully as possible. In more high profile or complex cases the reasons tend to be more exhaustive.
The Netherlands	Official policy of giving reasons for decisions not to prosecute. Reasons for decisions are usually provided to victims of crime in cases where a decision is taken not to prosecute or where the suspect is subject to a transaction. Information is not provided to third parties or to the public however where the name of a suspect has become public the prosecution service will inform the media of a decision not to prosecute and the reasons for that decision. Reasons are usually provided to victims by letter but in very serious cases the prosecutor will speak to the victim personally.
Norway	Official policy of the prosecutor is to give reasons for a decision not to prosecute. Reasons for decisions are provided to victims and their families.
South Africa	Official policy that reasons for decisions to prosecute or not to prosecute are as a rule provided. Victims and their families are provided with the general principle underlying the decision not to prosecute in their case.