Office of the
Oifig an

Director of Public Prosecutions
Stiúrthóra Ionchúiseamh Poiblí

DISCUSSION PAPER

ON

PROSECUTION POLICY ON THE GIVING OF REASONS FOR DECISIONS

EXECUTIVE SUMMARY

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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

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

societal interests. For example, it is important to avoid prejudice to other 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.

Any views should be communicated as follows:

E-Mail: reasons.project@dppireland.ie

Post: **'REASONS PROJECT'**
Office of the Director of Public Prosecutions,
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to reach the Office not later than **Monday 10 March 2008.**