# Explanatory Memorandum on Role of Prosecution Counsel

This explanatory memorandum describes the role of prosecution counsel for prospective candidates and to detail the Director’s expectations of prosecution counsel instructed to act on her behalf to prosecute in criminal trials, appeals and other court applications. It should be noted that this document is not an exhaustive description of the role of prosecution counsel but is intended to provide an outline of the duties expected of prospective prosecutors. Criminal law and procedure is continually evolving and often modifies the role of the Director and consequently that of prosecution counsel. Therefore, this document does not purport to address all the issues that can arise in the prosecution process nor every aspect of the role of prosecution counsel.

The Guidelines for Prosecutors published by this Office set out the principles which guide the initiation and conduct of prosecutions in Ireland. Chapter 8 sets out the role of the prosecutor in Court. As a prosecutor you should also have regard to the Code of Ethics for Prosecutors set out in Chapter 3 of the Guidelines. Prosecutors retained by the Director are required to comply with the legal principles and ethical code set out in the Guidelines for Prosecutors. In addition, prosecution counsel are required to adhere to the professional standards of their profession. It is important that prosecution counsel follow the instructions of the Director and her professional officers.

The role of prosecution counsel when representing the Director of Public Prosecutions in criminal trials and appeals is set out below. As stated above it is not an exhaustive description of the role.

**PROSECUTING BEFORE THE CIRCUIT CRIMINAL COURT**

**Advice on Proofs**

The following is a non-exhaustive list of matters to which the Advice on Proofs should refer: -

1. Advice on Proofs should be provided within 6 weeks of being briefed and should address;
2. An outline of counsel’s understanding of the factual case history
3. Counsel’s view on the strength of the case
4. Identify any significant legal issues disclosed
5. List witnesses and exhibits required for the trial
6. Validity of the order sending accused forward for trial
7. Chain of Evidence and additional evidence to be served
8. Additional counts to the indictment
9. Severance of the indictment
10. Viability of the case based on the evidence to hand
11. Probity and admissibility of the evidence (see below)
12. Any special measures required by a victim or witness
13. Strategy for dealing with very large quantities of data, where applicable

**Advice on the Admissibility of Evidence**

1. Counsel should advise on the admissibility of evidence and should consider in particular;
2. Witnesses whose evidence should be admitted under section 21 of the Criminal Justice Act 1984
3. Expert evidence under section 34 of the Criminal Procedure Act 2010
4. Medical Certificates pursuant to Section 25 of the Non Fatal Offences against the Person Act 1997
5. Applications to admit witness statements under Section 16 of the Criminal Justice Act 2006
6. Documentary records pursuant to section 6 of the Criminal Evidence Act 1992
7. Applications to admit evidence pursuant to the Bankers Book of Evidence Acts
8. Forensic, fingerprint and identification evidence
9. CCTV footage, communication data and e-evidence gathered in the investigation
10. Video recorded evidence at trial pursuant to section 16 of the criminal Evidence Act 1992.

**Drafting of Evidential Certificates**

1. Counsel is required to draft the Certificates under section 6 of the Criminal Evidence Act 1992 and the Bankers Books Evidence Acts.

**Disclosure**

1. The prosecution has a duty to disclose all relevant material in its possession or within its power or procurement regardless of whether a request is received from a defence solicitor or not. Disclosure is dealt with by the Prosecution Solicitor and the Gardaí. Counsel’s views on disclosure may be sought by the Director. Counsel will be required to advise on disclosure sought from third parties and on redactions to third party material received. Requests to prosecution counsel for advices on disclosure issues should be addressed promptly. Advice on disclosure may require counsel to consider the following;
2. Relevancy of the material
3. Material held by non-parties
4. The application of Public Interest privilege
5. Issues relating to sensitive material where privacy interests exist
6. The principle of the ‘innocence at stake’ exception.

**Pre- trial hearings/court listings**

Counsel is required to attend and represent the Director in any Pre-Trial Hearings.

Counsel must be present for court appearances whenever required or notify the Prosecution Solicitor in good time that he/she will be unable to do so.

**Pre-trial Meetings**

1. Prosecution Counsel may be required to attend meetings with An Garda Síochána and the Prosecution Solicitors prior to trial. Counsel may be required, as appropriate to meet civilian and expert witnesses in some cases.

**Victims of Crime**

1. It is the policy of the Office of the DPP to ensure that victims of crime are treated in a respectful, sensitive and professional manner without discrimination of any kind.
2. Counsel are required to meet victims in sexual assault and other serious cases at least two weeks before the trial or whenever the complainant so requests, for the purpose of explaining in a general way the procedure involved in a criminal trial. This also applies to the family of deceased victims. Counsel are required to attend meetings with victims of other offences, where a meeting is requested.

**Criminal Justice (Victims of Crime) Act 2017**

1. Counsel should familiarise themselves with the Criminal Justice (Victims of Crime) Act 2017 and the Victims Directive 2012. Similarly, counsel should be familiar with Chapter 12 of the Guidelines for Prosecutors, the Victims section of our website and this Office’s policy on the giving of reasons and reviews.

Counsel in conjunction with the prosecuting solicitor and the Gardaí should ensure that

the victim is given a right to be heard at sentence.

Counsel should pro-actively consider in preparing for trial and in the course of a trial whether any special measures should be considered and whether any further steps can be taken to protect a victim from secondary and repeat victimisation.

**Ongoing assessment of case**

1. If counsel has concerns about any aspect of the directions given by the office, including the direction to prosecute, counsel should make contact with the office to discuss his/her concerns. If counsel has concerns about whether the Book of Evidence discloses a prima facie case this should be set out in writing.   
     
   **Handovers**
2. If counsel is unable to act in a case the Prosecution Solicitor should be notified. This office will decide who should be briefed in your place. Counsel should not hand over the brief to another counsel without the consent of the office. In urgent situations counsel can facilitate the office by ascertaining the availability of another counsel.

**Engagement with Defence Counsel**

1. Counsel is required to engage with defence counsel in relation to section 21 statements, outstanding disclosure, the editing of memos of interview and any other issues that may require the Court’s input as per the Practice Direction of the President of the Circuit Court, Pre-trial procedure, Dublin Circuit CC12 or similar practice direction outside of Dublin.

**Acceptance of a Plea**

1. This office decides on whether a plea to an offence is acceptable. This is to ensure a consistent approach throughout the country. Accordingly, the prosecuting counsel should, via the Prosecution Solicitor, contact the Directing Officer for a direction as to whether such a plea should be accepted or not. When doing so he or she should be aware of the investigating Garda’s view and that of the victim in the matter. The Directing Division should be advised of any offer of a plea as early as possible to allow sufficient time for consideration.

**Sentencing**

1. In accordance with current guidelines prosecution counsel should bring to the sentencing judge’s attention any relevant authority or legislation that may assist in determining the appropriate sentence. Following the decision of the Court of Appeal in DPP v. Z (18th March 2014) specific guidance as to where the Director considers that a sentence lies in the range of sentencing should only be offered in offences where the Court of Criminal Appeal or Court of Appeal have given guidance.

The Court has to date given specific guidance in relation to the following offences:

* Assault causing serious harm in DPP v. Adam Fitzgibbon,
* Section 27A of the Firearms Act in DPP v. Kieran Ryan,
* Burglary offences in DPP v. Casey,
* Manslaughter cases in DPP v. Mahon,
* Rape cases in DPP v. F.E.

In any such cases counsel should set out in writing their views as to where the particular offence falls on the range or band of sentencing as identified by the Court of Appeal or Supreme Court. The Directing Officer dealing with the case should then be consulted. The judgments in Ryan, Fitzgibbon, Casey, Mahon and F.E. should also be drawn to the attention of the Court.

Counsel should not offer any view as to the effect any mitigating factors put forward by defence counsel might have on where the offence lies in the range of sentencing.

If the Courts provide further similar guidance in relation to other offences in the future the same approach should be adopted.

**Advice following an Acquittal**

1. In the event of an acquittal either;
   1. A direction by the trial judge to acquit or
   2. A decision to exclude any important evidence

Counsel is required to provide a written account for the acquittal at the conclusion of

every case. Counsel is required to promptly advise, where applicable, on whether the

Director should appeal against such an acquittal to the Court of Appeal.

**Unduly Lenient Sentences**

1. In the event that either Prosecution Counsel or the Prosecution Solicitor considers a sentence imposed in a case to be unduly lenient, counsel is required to submit a report and opinion on sentencing in the court of trial within 5 days of sentence. The report should set out the evidence given at the sentencing hearing to include aggravating and mitigating factors and a reference to all reports submitted to the court.

**Appeal to the Court of Appeal**

1. The Director requires prosecution counsel who appeared in the original trial to prosecute the unduly lenient sentence appeal before the Court of Appeal and to deal with appeals against conviction and/or sentence. Counsel is required to prepare and furnish submissions to the Head of the Court of Appeal section for approval prior to filing with the Court of Appeal.

**Health & Safety Authority Prosecutions**

1. This Office provides representation in Health & Safety Prosecutions in the District Court as well as the Circuit Court. You will be expected to draft any summonses for offences and to advice on proofs in advance of the hearing in the District Court. You will also be required to attend a pre-trial consultation with the Inspectors from the Health & Safety Authority and to meet any injured parties / deceased families as may be involved.