Oifig an Stiúrthóra Ionchúiseamh Poibl´
Office of the Director of Public Prosecutions

Guidelines for Prosecutors

[5th Edition - December 2019]

These Guidelines are also available in the **Irish Language**

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What's New in the 5th Edition of the Guidelines?

This is the 5th edition of the 'Guidelines for Prosecutors'. The Guidelines were first published in 2001 with the aim of setting out in general terms principles to guide the initiation and conduct of prosecutions in Ireland. They are intended to give general guidance to prosecutors so that a fair, reasoned, and consistent policy underlies the prosecution process.

Article 30.3 of the Constitution of Ireland provides that all indictable crimes shall be prosecuted in the name of the People. Making the guidelines available will further contribute to an increased understanding of the prosecution process by the citizens on whose behalf prosecutions are brought.

The guidelines are available electronically on the Office website at www.dppireland.ie.

The Code of Ethics for Prosecutors in Chapter 3 is also available as a separate document on the website.

Review of the Guidelines for Prosecutors will remain an ongoing process reflecting legislative and procedural changes in the criminal justice system.

The text has been adapted in as far as possible by using gender-neutral descriptions as well as inclusive language for persons with disabilities; however, from time to time it is necessary to refer directly to terms deriving from past legislation which may not always reflect current accepted usage.

WHAT'S NEW IN THIS EDITION?

Individual chapters that have substantive changes include:

Chapter 9: Disclosure

Updated to include the court procedure for the disclosure of counselling records provided for by section 19A Criminal Evidence Act 1992 as inserted by section 39 Criminal Law (Sexual Offences) Act 2017, which took effect on 30 May 2018.

Chapter 11: Prosecution Appeals and Sentence Reviews

Restructured to reflect types of appeals and court jurisdictions and updated with recent case law.

Chapter 12: Rights of Victims of Crime

Updated and revised to reflect the provisions of the Criminal Justice (Victims of Crime) Act 2017, the Criminal Justice (Sexual Offences) Act 2017 and the Domestic Violence Act 2018. The provisions of these Acts took effect on various dates in 2017, 2018 and 2019.

Chapter 15: Confiscation, Forfeiture and Disqualification

Updated to reflect the provisions of S.I. No. 540 of 2017, the European Union (Freezing and Confiscation of Instrumentalities and Proceeds of Crime) Regulations 2017, which took effect on 28 November 2017.

Chapter 16: Communication with the Director of Public Prosecutions

Updated section on personal data to reflect legislative developments which took effect in 2018 in the area of data protection, namely the General Data Protection Regulation (GDPR), Directive 2016/680/EU and the Data Protection Act 2018.

1: Introduction

1.1 Fair and effective prosecution is essential to a properly functioning criminal justice system and to the maintenance of law and order. The individuals involved in a crime – the victim, the accused, and the witnesses – as well as society as a whole have an interest in the decision whether to prosecute and for what offence, and in the outcome of the prosecution.

1.2 Every case is unique and must be considered on its own merits. For this reason there is no simple formula which can be applied to give a simple answer to the questions the prosecutor has to face. But there are general principles which should underlie the approach to prosecution, even though the individual facts of each case will require the prosecutor to use judgment and discretion in their application.

1.3 The aim of these Guidelines for Prosecutors is to set out in general terms principles which should guide the initiation and conduct of prosecutions in Ireland. They are not intended to override any more specific directions which may exist in relation to any particular matter. They are intended to give general guidance to prosecutors on the factors to be taken into account at the different stages of a prosecution, so that a fair, reasoned and consistent policy underlies the prosecution process.

1.4 The Guidelines are not intended to and do not lay down any rule of law. Rules of law are made by the Oireachtas and the courts. To the extent that there are existing rules of law which govern prosecution policy, the guidelines are intended to reflect those rules. The guidelines are not issued pursuant to any statutory duty or power.

1.5 In the Guidelines the term 'prosecutor' is used to mean all or any of the following, depending on the context in which the word is used: the Director of Public Prosecutions (DPP) and the Director's officers in the Directing Division, Solicitors Division and Prosecution Support Services Division of the Office of the DPP; the local State Solicitors who provide a solicitor service in the areas outside Dublin; counsel who act for the Director on a case by case basis; and members of the Garda Síochána prosecuting on the Director's behalf. Solicitors and barristers are subject to the professional standards of their respective professions, and the guidelines are not intended to, nor could they, substitute for or detract from those standards. Insofar as they apply to prosecutors who act for, though are not employed by the Director, they are intended to set out the standards and conduct which the Director expects of those who act on the Director's behalf.

1.6 The application of the principles set out in the guidelines does not and cannot bind the Director of Public Prosecutions to follow any particular course in any individual case and does not fetter the Director, or the Director's officers, agents or counsel, in the proper exercise of any discretion conferred on any of them to consider any particular case or set of circumstances on its own merits.

1.7 The Guidelines do not purport to deal with all questions which can arise in the prosecution process nor with every aspect of the role of the prosecutor in their determination. The guidelines are intended as a working document which will require, in the light of circumstances, to be adjusted or elaborated. Accordingly, they will be kept under review and revised from time to time. The guidelines are intended to operate from the date of their publication. They do not necessarily reflect policies which operated at any prior date.

2: The Prosecution System in Ireland

2.1 The prosecution system in Ireland is not described or set out fully in any one document. It is grounded in the Constitution of Ireland and in statute law, notably the Prosecution of Offences Act 1974, which established the office of Director of Public Prosecutions. The prosecution system in Ireland has developed from common law tradition and many important practices and rules in Ireland have their basis in common law, that is, judge-made law.

2.2 Article 30.3 of the Constitution of Ireland provides as follows:

> "All crimes and offences prosecuted in any court constituted under Article 34 of this Constitution other than a court of summary jurisdiction shall be prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose."

2.3 Section 9(2) of the Criminal Justice (Administration) Act 1924 conferred on the Attorney General the power to conduct all prosecutions in any court of summary jurisdiction except those which were prosecuted by a Minister, Department of State or other person authorised by law.

2.4 The Prosecution of Offences Act 1974 established the Director of Public Prosecutions as an officer authorised in accordance with law to act for the purpose of prosecuting in the name of the People as provided for in Article 30.3 of the Constitution. Section 3(1) of the 1974 Act provides as follows:

> "Subject to the provisions of this Act, the Director shall perform all the functions capable of being performed in relation to criminal matters and in relation to election petitions and referendum petitions by the Attorney General immediately before the commencement of this section and references to the Attorney General in any statute or statutory instrument in force immediately before such commencement shall be construed accordingly."

2.5 The 1974 Act thereby conferred on the Director of Public Prosecutions the function of prosecuting both on indictment and summarily. All criminal prosecutions taken on indictment are taken in the name of the People and are prosecuted at the suit of the Director, except for a limited category of offences still prosecuted at the suit of the Attorney General.

2.6 Section 2(5) of the 1974 Act provides that the Director of Public Prosecutions shall be independent in the performance of the Director's functions. Section 6(1) of the 1974 Act underscores that independence by making it unlawful for persons – other than a victim of a crime, a family member of a victim of a crime, an accused person, a family member of an accused person, or a lawyer, doctor or social worker acting on behalf of a client – to communicate with the Director or the Director's officers for the purpose of influencing the making of certain decisions. They include decisions to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings, to apply for a review of sentence, to apply for a re-trial order, or to seek leave to appeal an acquittal. The effect and application of section 6(1) of the 1974 Act was extended by section 2 of the Criminal Justice Act 1993 and sections 21 and 29 of the Criminal Procedure Act 2010. More detailed information on communication with the Director of Public Prosecutions is found in Chapter 16: Communication with the Director of Public Prosecutions.

2.7 The Director of Public Prosecutions independently enforces the criminal law in the courts on behalf of the People of Ireland. To this end the Director directs and supervises public prosecutions on indictment in the courts and gives general direction and advice to the Garda Síochána in relation to summary cases and specific direction in such cases where requested. The Director decides whether to

charge people with criminal offences, and what the charges should be. The Office of the DPP defines its mission as being "to provide on behalf of the People of Ireland a prosecution service that is independent, fair and effective".

2.8 The Office of the DPP consists of three legal divisions, the Directing Division, the Solicitors Division and the Prosecution Support Services Division. There is also an Administration Division that provides the organisational, infrastructural, administrative and information services required by the Office. The Directing Division comprises a small number of professional officers, both barristers and solicitors, whose principal function is to make submissions to the Director and to take decisions in relation to the initiation or continuation of criminal prosecutions and to give ongoing instructions and directions to the Solicitors Division, local State Solicitors and counsel regarding the conduct of criminal proceedings.

2.9 The work of appearing for the Director of Public Prosecutions in court is carried out either by the full-time legal staff in the Solicitors Division who represent the Director in all courts in Dublin, or by the local State Solicitors in courts outside Dublin. The Solicitors Division is headed by the Chief Prosecution Solicitor who acts as solicitor to the Director. The Division consists of solicitors and legal executives whose responsibilities include:

- preparation of and conducting summary cases on behalf of the Director in all courts sitting in Dublin;
- implementation of directions from the Directing Division;
- preparation of books of evidence in indictable cases;
- briefing and instructing barristers nominated to conduct prosecutions;
- attending trials and reporting outcomes to the Directing Division;
- providing a liaison service to agencies and parties involved in the criminal process including victims and their families;
- consenting to certain cases being dealt with summarily rather than on indictment.

2.10 The Prosecution Support Services Division supports the criminal prosecution work in a number of areas as follows:

- International Law, including European arrest warrants, extradition and mutual legal assistance;
- Victims Liaison to meet the obligations of the Office of the DPP in respect of the rights, support and protection of victims under the Criminal Justice (Victims of Crime) Act 2017;
- Prosecution Policy and Research including knowledge and information management.

2.11 Criminal cases are divided into two types – indictable offences and summary offences.

(i) Indictable offences:

- are the more serious cases;
- are heard by a judge and jury in the Circuit Criminal Court or the Central Criminal Court;
- carry the most serious penalties if the court convicts the accused;
- can sometimes be dealt with in the Special Criminal Court by three judges sitting without a jury;
- are subject to appeal to the Court of Appeal.

(ii) Summary offences:

- are less serious offences;
- are heard by a judge without a jury in the District Court and on appeal in the Circuit Court;
- cannot be subject to a maximum prison sentence of more than 12 months for any one offence.

2.12 The conduct of trials on indictment is handled by counsel practising at the Bar who are engaged to represent the Director of Public Prosecutions on a case by case basis. Counsel prosecute in accordance with the Director's instructions.

2.13 Most summary prosecutions brought in the District Court are brought in the name of the Director of Public Prosecutions. In practice the great majority are presented by members of the Garda Síochána without specific reference to the Office of the DPP except in cases where the Garda Síochána are required to seek a direction from the Director (see paragraphs 7.4, 7.7 and 13.3) or where for some other reason they seek instructions. Under section 8 of the Garda Síochána Act 2005, members of the Garda Síochána who prosecute summarily in the course of their official duties must do so in the name of the Director of Public Prosecutions and must comply with any directions given by the Director, whether of a general or specific nature. The Director may assume the conduct of a prosecution instituted by a member of the Garda Síochána at any time. General directions governing the conduct of prosecutions in the name of the Director of Public Prosecutions are now issued by the Director and may be viewed on www.dppireland.ie. Those general directions outline the categories of cases in which the decision to institute or continue a prosecution lies solely with the Director, and those cases where the Garda Síochána have been delegated the authority to institute criminal proceedings without reference to the Office of the DPP.

2.14 The Director of Public Prosecutions has no investigative function. In the Irish criminal justice system, the investigation of criminal offences is the function of the Garda Síochána. In addition there are specialised investigating authorities in relation to certain particular categories of crime, including the Competition and Consumer Protection Commission in relation to offences against the Competition Acts; the investigation branch of the Revenue Commissioners in relation to revenue offences; the Health and Safety Authority in relation to offences relating to safety and welfare at work; and the Office of Director of Corporate Enforcement which deals with offences against company law. This list is not exhaustive. Complaints of criminal conduct made to the Director of Public Prosecutions cannot be investigated by the Director but are transmitted to the Garda Commissioner or to one of the other investigating authorities to take the appropriate decisions and action. While the Director has no investigative function, the Director and the Director's Office cooperate regularly with the Garda Síochána and the other investigating agencies during the course of criminal investigations, particularly in furnishing relevant legal and prosecutorial advice. The relationship between prosecutors and investigators is dealt with more fully in Chapter 7.

2.15 Many investigative agencies have the power to prosecute summarily without reference to the Director of Public Prosecutions. The sole power to prosecute on indictment rests with the Director (apart from a limited number of cases still dealt with by the Attorney General). When an offence is or may be sufficiently serious to be tried on indictment the investigator sends a file to the Office of the DPP. The decision whether to initiate or continue a criminal prosecution is made by the Director or one of the Director's professional officers who decide independently of those who were responsible for the investigation what, if any, charges to bring. In some cases, a summary prosecution may be directed. The question of summary prosecutions is dealt with in Chapter 13: Summary Trial.

3: Code of Ethics

Setting out standards of professional responsibility and essential duties of prosecutors

PURPOSE AND SCOPE OF THE CODE

3.1 The main aim of this Code of Ethics is to promote and enhance those standards and principles recognised as necessary for the proper and independent prosecution of offences. The Code of Ethics sets out the standards of conduct and practice expected of prosecutors working for, or on behalf of, the Director of Public Prosecutions. It is intended to supplement rather than to replace applicable professional codes governing the conduct of lawyers and civil and public servants. Where prosecutors are subject to the discipline of the General Council of the Bar of Ireland or of the Law Society of Ireland they are also obliged to act in accordance with the standards set by their respective professional body.

3.2 The Director of Public Prosecutions requires the Director's own staff to adhere at all times to the Code of Ethics. When the Director of Public Prosecutions engages counsel, or a solicitor who is employed by the Director to act on the Director's behalf, or authorises any person to prosecute in the Director's name, the Director expects that counsel, solicitor or authorised person to adhere to the Code and to consult the Director concerning any question of difficulty. Any breach of the Code which also constitutes a breach of applicable standards of a professional body may be referred to that body for consideration.

3.3 The Civil Service Code of Standards and Behaviour (published by the Standards in Public Office Commission on www.sipo.gov.ie) sets out the main principles which govern the behaviour of staff in a modern Civil Service. Prosecutors who are members of the Civil Service are obliged to act in accordance with that Code subject always to the statutory guarantee of the independence of the Director of Public Prosecutions and bearing in mind the status of officers of the Director as civil servants of the State rather than the Government.

3.4 The Code of Ethics is intended to establish minimum standards of ethical conduct. It is designed to provide general but not exhaustive guidance to prosecutors, formulated to assist in securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings. These fundamental duties should inform all aspects of the prosecutor's work.

INDEPENDENCE

3.5 Prosecutors shall carry out their functions in accordance with section 2(5) of the Prosecution of Offences Act 1974 which provides that the Director of Public Prosecutions shall be independent in the performance of the Director's functions. They shall exercise their functions free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

RESPONSIBILITY

3.6 Prosecutors shall:

a) at all times uphold the rule of law, the integrity of the criminal justice system and the right to a fair trial;

b) at all times respect the fundamental right of all human persons to be held equal before the law, and abstain from any wrongful discrimination;

c) be aware of, and understand, diversity in society and differences arising from various sources, including but not limited

to race, colour, gender, religion, national origin, disability, age, marital status, sexual orientation, and social and economic status and refrain from manifesting, by words or conduct, bias or prejudice based on such differences, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy;

d) In accordance with section 42 of the Irish Human Rights and Equality Commission Act 2014 to have regard in the performance of their functions as part of a public body to the need to eliminate discrimination, to promote equality and to protect human rights;

e) comply fully with the relevant requirements of the European Union Victims Directive 2012/29/EU and the Criminal Justice (Victims of Crime) Act 2017 as discussed in Chapter 12: The Rights of Victims of Crime;

f) inform the Director of any instances where a public official may have committed a criminal offence or acted improperly in the course of a criminal investigation or prosecution with a view to the Director referring the matter to the appropriate authorities to take any necessary action;

g) bring to the Director's attention any instance of which the prosecutor becomes aware where a public official may have engaged in other serious misbehaviour and it is appropriate that the Director should take or initiate action in the matter;

h) give due attention to the prosecution of crimes of corruption, abuse of power, violations of human rights and other crimes recognised by international law, in particular offences which may have been committed by public officials.

INTEGRITY

3.7 Prosecutors shall:

a) at all times maintain the honour and dignity of their profession;

b) always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession;

c) at all times exercise the highest standards of integrity and care and ensure that their conduct is above reproach;

d) avoid impropriety and the appearance of impropriety and avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality;

e) not, through their behaviour and conduct, compromise the actual, or the reasonably perceived, integrity, fairness or independence of the Office of the DPP and in particular must not accept any gift, prize, loan, favour, inducement, hospitality or other benefit in relation to anything done or to be done or omitted to be done in connection with the performance of their duties or which may be seen to compromise their integrity, fairness or independence. A prosecutor may, subject to law and to any legal requirements of public disclosure, receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit could not reasonably be perceived as intended to influence the prosecutor in the performance of the duties of the prosecutor or otherwise give rise to an appearance of partiality;

f) at all times act in accordance with any applicable duties under the Ethics in Public Office Acts 1995 and 2001;

g) not allow the prosecutor's family, social or other relationships improperly to influence the prosecutor's conduct as a prosecutor;

h) not use or lend the prestige of their position as prosecutors to advance their private interests or those of a member of their family or of anyone else, nor shall prosecutors convey or permit others to convey the impression that anyone is in a special position improperly to influence them in the performance of their duties;

i) not knowingly permit any person subject to the prosecutor's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with the duties or functions of the prosecutor;

j) not use or disclose confidential information acquired in their capacity as a prosecutor for any purpose unconnected with the performance of their duty or the needs of justice;

k) carry out their functions honestly, fairly, consistently, impartially and objectively and without fear, favour, bias or prejudice;

l) conduct themselves in such a way as to retain public confidence in their professional impartiality;

m) remain unaffected by individual or sectional interests and public or media pressure having regard only to the public interest;

n) disqualify themselves from participating in any prosecution in which they are unable to act impartially or in which it may appear to a reasonable observer that such is the case. Such proceedings include, but are not limited to, instances where:

- the prosecutor has actual bias or prejudice concerning an accused, victim or witness;
- the prosecutor previously served as a lawyer for another party, or was a material witness, in the prosecution;
- the prosecutor, or a member of the prosecutor's family, has an interest in the outcome of a prosecution;
- a person who is connected with the prosecutor, in the sense of section 2(2) of the Ethics in Public Office Act 1995, has an interest in the outcome of the prosecution of which the prosecutor has actual knowledge;

o) bring to the attention of the Director any circumstances which might reasonably lead a member of the public or party having an interest in a case to perceive any conflict of interest or lack of impartiality on the part of the prosecutor.

COMPETENCE

3.8 Prosecutors shall take reasonable steps to maintain and enhance their knowledge, skills and the personal qualities necessary for the proper performance of their duties, keeping themselves well-informed of relevant legal developments, including applicable human rights norms, taking advantage for this purpose of those training and other facilities which are available to them.

4: The Decision Whether to Prosecute

4.1 The decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. For victims and their families, a decision not to prosecute can be distressing. The victim, having made what is often a very difficult and sometimes traumatic decision to report a crime, may feel rejected and disbelieved.

4.2 It is therefore essential that the prosecution decision receives careful consideration. However, despite its important consequences for the individuals concerned, the decision is one which the prosecutor must make as objectively as possible.

4.3 Because of the importance of the prosecution decision and the need for objectivity the State has reserved to itself the right to prosecute in all except minor cases. In practice, almost all criminal prosecutions are brought by an arm of the State. In Ireland, by virtue of Article 30.3 of the Constitution and of the Prosecution of Offences Act 1974, all crimes and offences other than those prosecuted in courts of summary jurisdiction are brought in the name of the People and at the suit of the Director of Public Prosecutions, except for a limited category of offences still prosecuted at the suit of the Attorney General. In the case of indictable offences brought at the suit of the Director, the decision to prosecute or not to prosecute is taken by the Director personally or by an officer of the Director who is authorised to take such a decision. The situation in relation to summary offences is set out in Chapter 13: Summary Trial.

THE PUBLIC INTEREST

4.4 As in other common law systems, a fundamental consideration when deciding whether to prosecute is whether to do so would be in the public interest. A prosecution should be initiated or continued, subject to the available evidence disclosing a prima facie case, if it is in the public interest, and not otherwise.

4.5 There are many factors which may have to be considered in deciding whether a prosecution is in the public interest. Often the public interest will be clear but in some cases there will be public interest factors both for and against prosecution.

4.6 There is a clear public interest in ensuring that crime is prosecuted and that the wrongdoer is convicted and punished. It follows from this that it will generally be in the public interest to prosecute a crime where there is sufficient evidence to justify doing so, unless there is some countervailing public interest reason not to prosecute. In practice, the prosecutor approaches each case first by asking whether the evidence is sufficiently strong to justify prosecuting. If the answer to that question is 'no' then a prosecution will not be pursued. If the answer is 'yes' then before deciding to prosecute the prosecutor will ask whether the public interest favours a prosecution or if there is any public interest reason not to prosecute.

4.7 In assessing whether the public interest lies in commencing or continuing with a prosecution, a prosecutor should exercise particular care where there is information to suggest that the suspect is a victim of

crime. An example would be where it is suggested that the suspect is a victim of human trafficking. Such a person may be suspected of a range of offences from breaches of immigration law to offences related to prostitution. In a case in which there is credible information that a suspect is also a crime victim, the prosecutor should consider whether the public interest is served by a prosecution of the suspect.

4.8 Factors which should be considered in assessing whether to commence or continue with such a prosecution include: (i) the nature of the offence allegedly committed by the suspect; (ii) whether there is any information that coercion or duress was exercised against the suspect in the context of the alleged offence; (iii) where there are allegations that the suspect was subjected to duress – whether it is alleged that this included violence or threats of violence or the use of force, deceit or fraud, or an abuse of authority or exploitation of a position of vulnerability; and (iv) whether the suspect has cooperated with the authorities in relation to any offences believed to have been committed against the suspect.

THE STRENGTH OF THE EVIDENCE

4.9 A decision not to prosecute because the evidence is not sufficiently strong could be considered as an aspect of the consideration of the 'public interest'. It can be said that it is not in the public interest to use public resources on a prosecution case which has no reasonable prospect of success. Furthermore, if there was a very high rate of prosecutions resulting in acquittals this could undermine public confidence in the criminal justice system.

4.10 A prosecution should not be instituted unless there is a prima facie case against the suspect. By this is meant that there is admissible, relevant, credible and reliable evidence which is sufficient to establish that a criminal offence known to the law has been committed by the suspect. The evidence must be such that a jury, properly instructed on the relevant law, could conclude beyond a reasonable doubt that the accused was guilty of the offence charged.

4.11 In considering the strength of the evidence the existence of a bare prima facie case is not enough. Once it is established that there is a prima facie case it is then necessary to give consideration to the prospects of conviction. The prosecutor should not lay a charge where there is no reasonable prospect of securing a conviction before a reasonable jury or a judge in cases heard without a jury. The question of what is meant by a reasonable prospect of conviction is not capable of being answered by a precise mathematical formula. It is not the practice to operate a rule under which conviction would have to be regarded as more probable than acquittal. But it is clear that a prosecution should not be brought where the likelihood of a conviction is effectively non-existent. Where the likelihood of conviction is low, other factors, including the seriousness of the offence, may come into play in deciding whether to prosecute.

4.12 In evaluating the prospects of a conviction, the prosecutor has to assess the admissibility, relevance, sufficiency and strength of the evidence which will be presented at the trial. This involves going beyond a superficial decision as to whether a statement, or a group of statements, amounts to a prima facie case. The prosecutor must consider whether witnesses appear to be credible and reliable. Accusations of criminal wrongdoing can be unreliable for all sorts of reasons. They can be unfounded or inaccurate without being deliberately manufactured. They may be the result of human error or they can be made maliciously. Statements cannot therefore simply be accepted at face value and acted upon without considering their credibility. In evaluating the prospects of a conviction the prosecutor must remember that the onus is on the prosecution to satisfy the jury of the guilt of the accused beyond a reasonable doubt. This burden, which is higher than mere probability, must be borne in mind in considering whether to prosecute.

4.13 It is not sufficient if the evidence is likely to go no further than to show on a balance of probabilities that it was more likely than not that the suspect committed the offence but does not go so far as to establish guilt beyond a reasonable doubt. For this reason, it is important to know if there is independent

evidence which supports the complaint. This could be evidence from another witness, or forensic evidence such as fingerprints or DNA evidence from body tissue. This makes the case stronger than one based on one person's word against another. Even where the prosecutor accepts the victim's account, the evidence may simply not be strong enough to convince a jury beyond a reasonable doubt. The evaluation of prospects of conviction is a matter of judgment based on a prosecutor's experience. This assessment may be a difficult one to make, and of course there can never be an assurance that a prosecution will succeed. Indeed, it is inevitable that some will fail. However, this does not mean that only cases perceived as 'strong' should be prosecuted. The assessment of the prospects of conviction should also reflect the central role of the courts in the criminal justice system in determining guilt or innocence. A preconception on the part of the prosecutor as to views which may be held by a jury about the subject of the offence is not a material factor. The prosecution must assume that the jury will do its duty and act impartially.

4.14 It is not intended here, even if it were possible, to set out all the factors which the prosecutor must consider in evaluating the admissibility and strength of evidence. Each case is unique, and the variety of human experience and behaviour so great as to make a comprehensive list of all possible considerations which could arise impossible. Questions which arise may include the following:

a) Are there grounds for believing that evidence may be excluded, bearing in mind the principles of admissibility under the Constitution of Ireland, at common law and under statute? For example, has confession evidence been properly obtained? Has evidence obtained as a result of search or seizure been properly obtained?

b) If the case depends in whole or in part on admissions by the suspect, are there grounds for believing that the admissions may not be reliable considering all the circumstances of the case including the age, mental capacity, mental state and apparent understanding of the suspect? Are the admissions consistent with what can be objectively proved? Is there any reason why the suspect would make a false confession?

c) Does it appear that a witness is exaggerating, or has a faulty memory, or is either hostile or friendly to the accused, or may be unreliable for some reason? Did a witness have the opportunity to observe what he or she claims to have seen? Are there any other matters known to the prosecution which may significantly lessen the likelihood of acceptance of the testimony of a witness?

d) Has a witness been consistent in giving evidence? If not, can the inconsistencies be explained? Does the evidence tally with the behaviour of the witness?

e) Does a witness have a motive for telling an untruth or less than the whole truth?

f) Could the reliability of evidence be affected by the condition of the victim?

g) What sort of impression is a witness likely to make? How is the witness likely to stand up to cross-examination? Is the witness's background, including previous convictions likely to weaken the prosecution case?

h) If there is conflict between witnesses, does it go beyond what might be considered normal and hence materially weaken the case?

i) If, on the other hand, there is a lack of conflict between witnesses, is there anything which causes suspicion that a false story may have been concocted?

j) Are all the necessary witnesses available to give evidence, including any who may be abroad? In the case of witnesses who are abroad, the possibility should be considered of obtaining the evidence through a live television link pursuant to section 13 of the Criminal Evidence Act 1992, or by means of the issue of a letter of request under section 67 of the Criminal Justice (Mutual Assistance) Act 2008.

k) Are all the necessary witnesses competent to give evidence? If so, are

they compellable? If competent but not compellable, have they indicated their willingness to testify?

l) Where child witnesses are involved, are they likely to be able to give sworn evidence, or evidence in accordance with the criteria in section 27 of the Criminal Evidence Act 1992?; is their evidence in chief available by way of video recording in accordance with section 16 of the Criminal Evidence Act 1992?; how is the experience of a trial including cross-examination likely to affect them?; should the children's evidence be presented by way of live television link or with the assistance of an intermediary in accordance with sections 13 and 14 of the 1992 Act?

m) In relation to persons with an intellectual disability, are they capable of giving an intelligible account of events which are relevant to the proceedings so as to enable their evidence to be given pursuant to section 27 of the Criminal Evidence Act 1992?

n) If identification is likely to be an issue, how cogent and reliable is the evidence of those who claim to identify the accused?

o) Where there might otherwise be doubts concerning a particular piece of evidence, is there any independent evidence to support it?

p) If the suspect has given an explanation, is a court likely to find it credible in the light of the evidence as a whole? Does it support an innocent explanation?

q) Difficulty can arise where a witness has undergone treatment by hypnosis or other therapeutic process intended to assist the witness to remember events. The questions which may arise in such cases are beyond the scope of these guidelines other than to say that the evidence of such a witness should be evaluated with great care.

4.15 In assessing the evidence, the prosecutor should also have regard to any defences which are plainly open to, or have been indicated by, the accused.

4.16 The assessment of the credibility and reliability of evidence is ultimately a matter for the court. However, where there are grave and substantial concerns as to the reliability of essential evidence, criminal proceedings will not be appropriate.

4.17 The assessment of the evidence not only has to be made initially but needs to be reviewed at every stage of the proceedings. The investigator will be expected to express views on the evidence when referring the case to the prosecuting authorities. The solicitor dealing with the case should likewise express any views which the solicitor may have formed. The primary decision to charge will be made by the Director or one of the Director's officers in cases where the file is referred to the Director's Office. At this stage the Director or the Director's officer may request further investigative work from the investigating authorities. For example, this may include requesting the investigator to give an alleged offender an opportunity to answer or comment upon the substance of the allegations or a request for copies of relevant records, statements or other material not included on the file. A decision not to charge may not be final, particularly when the reason is a simple insufficiency of evidence. To postpone the bringing of proceedings due to lack of available evidence may be preferable to having proceedings fail because they are brought prematurely. When papers are sent to counsel he or she is also expected to consider the sufficiency of the evidence, as it is desirable that any problems in this regard be addressed as early as possible.

IS THERE A PUBLIC INTEREST REASON NOT TO PROSECUTE?

4.18 Once the prosecutor is satisfied that there is sufficient evidence to justify the institution or continuance of a prosecution, the next consideration is whether, in light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued. It is not the rule that all offences for which there is sufficient evidence must automatically be prosecuted.

4.19 The factors which may properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. As already stated, the interest in seeing the wrongdoer convicted and sentenced and crime punished is itself a public interest consideration. The more serious the offence, and the stronger the evidence to support it, the less likely that some other factor will outweigh that interest. The first factor to consider in assessing where the public interest lies is, therefore, the seriousness of the alleged offence and whether there are any aggravating or mitigating factors.

4.20 The following aggravating factors, which are not intended to be exhaustive, tend to increase the seriousness of the offence and if present will tend to increase the likelihood that the public interest requires a prosecution:

a) where a conviction is likely to result in a significant penalty;

b) where the Oireachtas has prescribed a mandatory penalty or other consequence of a conviction such as disqualification or forfeiture;

c) if the accused was in a position of authority or trust and the offence is an abuse of that position;

d) where the accused was a ringleader or an organiser of the offence;

e) where the offence was premeditated;

f) where the offence was carried out by a group;

g) where the offence was carried out pursuant to a plan in pursuit of organised crime;

h) where a weapon was used or violence threatened or the victim of the offence has been otherwise put in fear, or suffered personal attack, damage or disturbance. The more vulnerable the victim the greater the aggravation;

i) where there is a marked difference between the age or mental capacity of the accused and the victim, and the accused took advantage of this;

j) if there is any element of corruption;

k) where the accused has previous convictions or cautions which are relevant to the present offence;

l) if the accused is alleged to have committed the offence whilst on bail, on probation, or subject to a suspended sentence or an order binding the accused to keep the peace and be of good behaviour, or released on licence from a prison or a place of detention;

m) where there are grounds for believing that the offence is likely to be continued or repeated, for example, where there is a history of recurring conduct.

4.21 On the other hand, the following mitigating factors, if present, tend to reduce the seriousness of the offence and hence the likelihood of a prosecution being required in the public interest:

a) if the court is likely to impose a very small or nominal penalty;

b) where the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by an error of judgment;

c) where the offence is a first offence, if it is not of a serious nature and is unlikely to be repeated.

4.22 In addition to factors affecting the seriousness of an offence, other matters which may arise when considering whether the public interest requires a prosecution may include the following:

a) the availability of any alternatives to prosecution such as the Garda Síochána Adult Cautioning Scheme and also Youth Diversion;

b) the prevalence of offences of the nature of that alleged and the need for deterrence, both generally and in relation to the particular circumstances of the offender;

c) the need to maintain the rule of law and public confidence in the criminal justice system;

d) whether the consequences of a prosecution or a conviction would be disproportionately harsh or oppressive in the particular circumstances of the offender;

e) the attitude of the victim or the family of a victim of the alleged offence to a prosecution;

f) the likely effect on the victim or the family of a victim of a decision to prosecute or not to prosecute;

g) whether the likely length and expense of a trial would be disproportionate having regard to the seriousness of the alleged offence and the strength of the evidence;

h) whether the offender is willing to co-operate in the investigation or prosecution of other offenders, or has already done so;

i) if a sentence has already been imposed on the offender in relation to another matter – whether it is likely that an additional penalty would be imposed;

j) whether an offender who has admitted the offence has shown genuine remorse and a willingness to make amends;

k) whether the offence is of a purely technical nature;

l) whether a prosecution could put at risk confidential informants or matters of national security;

m) whether any circumstances exist that would prevent a fair trial from being conducted;

n) whether the offender is either very young or elderly or suffering from significant mental or physical incapacity. In such cases, however, other factors tending to indicate that the offence is serious or that there is a risk of the offence being repeated must be taken into account. Under no circumstances should a person be prosecuted solely to secure access to psychiatric treatment. In the case of young offenders, the provisions of section 18 of the Children Act 2001 and the provisions in relation to the Diversion Programme referred to in Part 4 of that Act must be considered. This is discussed in more detail in Chapter 5: Juvenile Diversion and the Prosecution of Children.

4.23 The relevance of these, and other factors, and the weight to be attached to them, will depend on the particular circumstances of each case. Fairness and consistency are of particular importance. However, fairness need not mean weakness and consistency need not mean rigidity. The criteria for the exercise of the discretion not to prosecute on public interest grounds cannot be reduced to something akin to a mathematical formula; indeed, it would be undesirable to attempt to do so. The breadth of the factors to be considered in exercising this discretion reflects the need to apply general principles to individual cases.

4.24 Where there are mitigating factors present in a particular case, the prosecutor should consider whether these are factors which should be taken into account by the sentencing court in the event of a conviction rather than factors which should lead to a decision not to prosecute. Nevertheless, where the alleged offence is not so serious as plainly to require prosecution, the prosecutor should consider whether the public interest requires a prosecution.

DELAY

4.25 The prosecutor should, in any case where there has been a long delay since the offence was committed, consider in light of the case law of the courts whether that delay is such that the case should not proceed. It is not the purpose of this paragraph to attempt to summarise the considerable volume of case law which now exists in relation to this matter, but among the considerations which may be relevant and which the prosecutor should bear in mind are the following:

a) whether any delay was caused or contributed to by the suspect;

b) whether the fact of the offence or of the suspect's responsibility for it has recently come to light;

c) where any delay was caused or contributed to by a long investigation, whether the length of the investigation was reasonable in the circumstances;

d) whether there is a real and serious risk of an unfair trial;

e) where the victim has delayed in reporting the offence, the age of the victim both when the offence was committed and when it was reported;

f) whether there is specific prejudice caused to the alleged offender by reason of any delay or lapse of time;

g) whether the suspect has admitted the offence.

FACTORS WHICH MAY APPLY WHERE THE EXTRADITION OF A SUSPECT TO FACE TRIAL WILL BE REQUIRED

4.26 The extradition of persons required to answer any charge of an offence or to serve a sentence imposed will involve restrictions on the requested person and expense to the State and to the country requested to extradite the person. Where an application for extradition is being considered, the prosecutor should also have regard to these factors in addition to assessing, in accordance with these guidelines, the prosecution case, the impact of any delay and the public interest.

4.27 In the case of serious offences it will generally be appropriate to proceed with such an application where there are reasonable prospects of conviction, in order to maintain confidence in the administration of the law and to deter offenders fleeing from justice.

ALTERING A PROSECUTION DECISION OR DISCONTINUING A PROSECUTION

4.28 In relation to decisions not to prosecute, review of such decisions is dealt with in Chapter 12.

4.29 Where a decision has been taken to commence criminal proceedings the prosecutor remains under a duty to ensure that the decision remains appropriate in the public interest. Where there is a change of circumstances or where the prosecutor receives new information it will be necessary to consider whether the prosecution should continue.

4.30 The approval of the Director or professional officer who directed the prosecution should be sought for any proposed withdrawal of charges or addition of new charges. Such communications should preferably be made via the Solicitors Division or the local State Solicitor dealing with the case. If due to time constraints direct contact with the professional officer is necessary, the Solicitors Division or the local State Solicitor should be fully informed of the outcome of the discussions. These should be committed to writing and forwarded to the Directing Division.

4.31 The independence of the Director does not mean that those who investigated the matter should be excluded from the decision-making process. In deciding whether or not a prosecution is to be instituted or continued and, if so, on what charge or charges, any views put forward by the investigator are carefully taken into account. If the prosecutor is considering changing the charges already preferred or stopping a case, the prosecutor should consider whether to consult with the investigator first, as the investigator may have relevant information or useful views. This gives the investigator an opportunity to provide more information that may affect the decision. Ultimately, however, the decision is made by the Director or the Director's professional officers having regard to the considerations set out in these guidelines.

4.32 Proceedings pending on indictment may be stayed by the entry of a *nolle prosequi*. A *nolle prosequi* may be entered only on the direction of the Director or a professional officer of the Director. There may occasionally be circumstances in which a *nolle prosequi* is the best means of halting proceedings which the prosecution considers ought not to be continued. The entry of a *nolle prosequi* stays the prosecution but does not in all circumstances operate as a bar to further proceedings and the accused may be re-indicted where this does not amount to an abuse of process.

4.33 If a jury fails to reach a verdict in a particular case or a trial otherwise does not proceed to a conclusion, consideration should be given to whether the public interest requires a

second or subsequent trial of the issue. That consideration should include an assessment of the likelihood that a jury on a retrial could deliver a verdict on the available evidence. Where a second jury disagrees the public interest would usually not require a third trial of the accused person but every case should be decided on its own merits.

4.34 In *Niall Byrne and David Byrne v. The Judges of the Dublin Circuit Court and the DPP* [2015] IESC 105, Charleton J., giving the judgment of the Supreme Court on 17 February 2015, stated that:

> "… while there is no working presumption that a third trial ought to be prohibited, it is also apparent that a point can come where further trials will be regarded as so oppressive as not to be in accordance with the constitutional guarantee of a criminal trial in due course of law in Article 38.1."
>
> "While a decision by the Director of Public Prosecutions to order a third criminal trial after juries have failed to agree a verdict on two prior occasions is at the extreme pole of prosecutorial discretion, it is not necessarily an abuse of process or an infringement of the right of the accused to a trial in due course of law."

Charleton J. further observed that "the role of the Director of Public Prosecutions in making such decisions should be respected" as based upon "a full view of the background circumstances, what may have gone wrong with the trial or trials beforehand, and the issue as to whether there remains a realistic prospect of conviction" and that the burden of proof rests with the accused "who seeks to challenge a decision to prosecute again and show that that decision is wrong".

4.35 Regarding retrials, each case is unique and must be considered on its own merits and in light of its particular facts and circumstances. Relevant factors to be considered in determining whether or not there should be a retrial include: (i) whether or not the jury was unable to agree, or, the trial ended for reasons other than a jury disagreement and, if so, at what stage and for what reasons; (ii) whether or not another jury would be in any better or worse position to reach a verdict. In the Byrne case, Charleton J. identified certain considerations as "central to whether there would be unfairness in trying an accused a third time after two prior jury disagreements on substantially the same evidence":

- the seriousness of the offence;
- whether the complexity of the case contributed to the jury being unable to agree;
- whether the evidence on its face is such that a reasonable prosecutor would regard the case as strong;
- whether there is evidence of oppression of an accused (through stress and anxiety which is proven) beyond what the normal course of a criminal trial entails;
- whether the defence by unfair means contributed to jury disagreements.

5: Juvenile Diversion and the Prosecution of Children

5.1 The long-term damage which can be done to a child because of an encounter with the criminal law early in life should not be underestimated. Prosecution of a child must be regarded as a severe measure with significant implications for the future development of the child concerned. The legislature has therefore imposed statutory restrictions on the bringing of criminal proceedings against certain children.

5.2 Section 52 of the Children Act 2001 provides that no child under 12 years of age can be charged with an offence. However, an exception is made by the section in the case of children aged 10 or 11 who are charged with murder, manslaughter, rape, rape under section 4 of the Criminal Law (Rape) (Amendment) Act 1990, or aggravated sexual assault. It also provides that the consent of the Director of Public Prosecutions is required to continue proceedings against a child under 14 years of age who is charged with an offence. Where the Director has issued such consent in accordance with section 52(4) of the Children Act 2001, it should be conveyed orally by the prosecutor to the court dealing with those proceedings and a note should be made of the court having been so informed.

5.3 Section 75 of the Children Act 2001 provides that the Children Court may deal summarily with a child charged with any indictable offence other than manslaughter or an offence required to be tried by the Central Criminal Court. That is so unless the child does not consent to summary disposal, or the judge is of the opinion that the offence is not a minor offence fit to be tried summarily, or not a minor offence fit to be dealt with summarily where the child wishes to plead guilty. The court must also take account of the child's age and level of maturity and any other factors it considers to be relevant. If the Director of Public Prosecutions has expressed a view as to whether the matter is suitable for summary disposal or not, the prosecutor ought to convey that view orally to the court. However, the question of accepting or refusing jurisdiction is solely for the Children Court to determine.

5.4 Whilst each situation must be assessed on its merits, frequently there will be a stronger case for dealing with the matter by some means other than prosecution, such as by way of caution. On the other hand, the seriousness of the alleged offence, harm to any victim and the conduct, character and general circumstances of the child concerned may require that prosecution be undertaken. The prosecutor should consider any representations made by the parents or guardians of a child concerning a possible prosecution. The prosecutor should consider the applicability of the disposal options available against each child suspect. It may be appropriate for different disposals to be applied to separate suspects within the same case.

5.5 The public interest will not normally require the prosecution of a child who is a first offender where the alleged offence is not a serious one. As a general rule, the younger the child is the less likely it may be that prosecution is the appropriate option to adopt. However, prosecutors should not refrain from prosecuting on account of the child's age alone. Reprimands and final warnings are intended to prevent re-offending and the fact that a further offence has occurred may indicate that attempts to divert the youth from the court system have not been effective.

5.6 The Juvenile Diversion Programme operated by the Garda Síochána was placed on a statutory footing with the commencement of Part 4 of the Children Act 2001. The

principle underlying the programme is found in section 18 of the 2001 Act which provides that unless the interests of society otherwise require, and subject to Part 4, children who have committed offences or behaved anti-socially and who accept responsibility for their criminal or anti-social behaviour must be considered for admission to a diversion programme. The programme is operated by the Garda Síochána under supervision of the Superintendent of the Garda Youth Diversion Office. At local level the programme is implemented by Garda Juvenile Liaison Officers who are trained in restorative justice principles and mediation skills.

5.7 In order for a juvenile to be eligible for caution under the Diversion Programme, the child must be above the age of criminal responsibility in accordance with section 52 of the Children Act 2001, be under 18 years of age, and accept responsibility for the alleged criminal or anti-social behaviour. The decision whether or not to divert under the 2001 Act is one for the Director of the Garda Youth Diversion Office and not for the Director of Public Prosecutions.

6: The Choice of Charge

6.1 The choice of charge is an important function that is generally within the exclusive domain of the prosecutor.

6.2 In many cases the evidence will disclose a number of possible offences. Care should be taken to ensure that the charge or charges adequately and appropriately reflect the seriousness of the criminal conduct for which there is evidence and will provide the court with an appropriate basis for sentence. In the ordinary course the charge or charges laid will be the most serious disclosed by the evidence. But there is no legal obligation to lay the most serious charge. Similar considerations apply to the choice of charge as relate to the decision to prosecute itself, as elaborated in Chapter 4, and there may be circumstances which justify preferring a lesser charge than the evidence would support.

6.3 The prosecutor must not 'over-charge'. Charges more serious than are justified by the evidence should not be preferred with the intention of encouraging the accused to plead guilty to a lesser charge. The prosecutor should prefer only charges which are justified by the facts as then known. In particular, the question of whether in a homicide case the appropriate charge is one of murder or manslaughter has to be given the most careful consideration.

6.4 Where possible the prosecutor should avoid preferring too many charges arising out of the same set of facts. Ideally the prosecutor should aim to select a single charge which adequately reflects the nature and extent of the criminal conduct but in any event the number of charges should be kept as low as is possible having regard to the principles already referred to. The prosecutor should consider selecting offences to be prosecuted which will enable the case to be presented in a clear and simple way. Where evidence discloses a large number of offences of a similar nature, the use of representative counts should be carefully considered. A multiplicity of charges can unnecessarily complicate the trial process. It is important to strike a balance between ensuring that the indictment is not overloaded and ensuring that the indictment adequately reflects the totality of the criminality involved in the case.

6.5 Where there are a large number of persons accused of offences arising from the same transaction or series of transactions or where an accused person is charged with a number of offences, the prosecutor should give careful consideration to whether the preferred outcome is joint or separate trials. The factors to be considered include the desirability of keeping trials as simple and short as possible, the need to present a clear, coherent and accurate account of what happened, and the desirability of being able to present all relevant and admissible evidence, including similar fact evidence.

6.6 Conspiracy charges are generally not appropriate where the conduct in question amounts to a substantive offence and there is sufficient reliable evidence to support a charge for that offence. But there are occasions when to bring a conspiracy charge is the only adequate and appropriate response on the available evidence. Where it is proposed to lay or proceed with conspiracy charges jointly against a number of accused, the prosecutor should be aware of the risk of the trial becoming unduly complex or lengthy.

6.7 In deciding on the appropriate charge, the Director of Public Prosecutions or the Director's officers should consider the views of the Garda Síochána, the solicitor, and counsel if instructed. In summary prosecutions the choice of charge will in most cases be made by a Garda officer, who should act in accordance with these general guidelines and in accordance with such directions as are issued from time to time by the Director, pursuant to section 8 of the Garda Síochána Act 2005. Questions relating to the respective role of the Garda Síochána

and the Director are dealt with in greater detail in Chapter 7: The Prosecutor and the Investigator.

6.8 Where an accused person has been detained in custody prior to the first court appearance, the prosecutor should, in addition to considering the charges to be presented to the court, also consider any continuing need to remand that person in custody. The prosecutor should only request that the court remands an accused person in custody where it is determined (having given due consideration to the nature and gravity of the alleged offence and any relevant criminal history of the accused and having considered the views of the Garda Síochána) that there is a risk of the accused:

a) absconding;

b) interfering with witnesses, evidence, or the course of justice generally;

c) if charged with a serious offence, committing a further serious offence which would form the basis for an objection to bail.

d) The Garda Síochána should consider whether there are any bail conditions which could sufficiently counter the risks identified by them in relation to the above grounds.

6.9 The prosecutor should consider seeking a revocation of bail where there is a serious breach of a condition attached to its grant.

7: The Prosecutor and the Investigator

7.1 The investigation and prosecution of offences are separate and distinct functions within the criminal justice system. The Director of Public Prosecutions as a general rule has no investigative function and no power to direct the Garda Síochána or other agencies in their investigations. The Director may advise investigators in relation to the sufficiency of evidence to support nominated charges and the appropriateness of charges or in relation to legal issues arising in the course of investigation. Whilst not responsible for the conduct of investigations, the Director is free to indicate what evidence would be required to sustain a prosecution.

7.2 Where the Director believes that a criminal offence may have been committed, then the matter may also be referred to the Garda Síochána or other investigating agency. Investigation is, however, a matter for the Garda Síochána or the investigating agency. Examples where such a request may be made include:

a) matters brought directly to the attention of the Director by an individual or statutory body alleging that a criminal offence has taken place;

b) matters brought to the attention of the Director by the courts, Tribunals of Inquiry or other public bodies which have arisen or come to their attention during the course of proceedings; and

c) matters arising from a review of evidence by a prosecutor which suggests that criminal offences other than those on which a direction has been sought may have been committed.

7.3 As a general rule requests for advice from the Director of Public Prosecutions by the Garda Síochána or other investigators should be made in writing. This includes advice in relation to:

a) what criminal charges are available;

b) whether there is sufficient evidence to support a charge;

c) the admissibility of evidence;

d) the most appropriate charge in the circumstances;

e) the present state of the law;

f) whether a matter should be disposed of summarily or on indictment;

g) cases stated or judicial review;

h) the disclosure of evidence;

i) any summary matter which the Garda Síochána propose discontinuing.

7.4 The Garda Síochána should where possible seek directions before charging all indictable cases or cases which are likely to be heard on indictment. Where an accused person is charged before directions are sought, paragraph 7.7 should be complied with.

7.5 The third General Direction issued by the Director is available on the Office website at www.dppireland.ie. Paragraph 2 of General Direction No. 3 provides that in the following cases a charge should not be preferred without the prior directions of the Office of the Director of Public Prosecutions:

a) An offence arising from an unlawful killing (including any case of murder, manslaughter, fatal road accident or

other fatal accident). Where the victim is deceased no other charge arising from the same incident should be preferred without prior directions. Likewise, where the victim is seriously injured and in danger of dying no charge should be preferred without prior directions.

b) An offence of causing serious harm contrary to section 4 of the Non-Fatal Offences Against the Person Act 1997.

(bb) An offence of threatening to kill or cause serious harm contrary to section 5 of the Non-Fatal Offences Against the Person Act 1997.

c) An offence under sections 51A, 52 or 53 of the Road Traffic Act 1961 which has resulted in serious injury being suffered by another road user.

d) An offence of a sexual nature.

e) An offence of assaulting a member of the Garda Síochána, unless the charge is sanctioned by a member of the Garda Síochána of the rank of Inspector or higher.

f) Cases involving allegations against members of the Garda Síochána other than minor road traffic cases. Directions should be sought from the Director of Public Prosecutions in any case raising a serious issue as to whether the driving of a Garda amounted either to dangerous driving or careless driving.

g) Harassment contrary to section 10 of the Non-Fatal Offences Against the Person Act 1997.

h) Endangerment contrary to section 13 of the Non-Fatal Offences Against the Person Act 1997.

(hh) Breach of the peace contrary to common law.

i) False imprisonment.

j) A terrorist offence and any offence related to terrorism including any offence under the Offences Against the State Acts 1939 to 1998.

k) Any case in which it is proposed to seek a trial in the Special Criminal Court.

l) An offence of possession of a firearm or ammunition other than possession without a certificate.

m) An offence under the Explosive Substances Act 1883.

n) Any allegation of assault arising from a sporting encounter.

o) An offence under the Official Secrets Act 1963.

p) Bribery and corruption.

q) An offence by an elected official or a public official alleged to have been committed in the course of carrying out official functions.

r) Genocide, war crimes, crimes against humanity, piracy and hijacking.

s) Cases in which it is provided by statute that proceedings may not be commenced or continued without the consent of the Director of Public Prosecutions.

7.6 Where the Garda Síochána have investigated a complaint in relation to any of the offences referred to in paragraph 7.5, if the Garda Síochána identify a suspect and there is evidence to support a prosecution, a file should be sent to the Office of the DPP for a decision whether to prosecute even where the Garda Síochána are not recommending a prosecution. However, where there is no evidence to support a prosecution, a file need not be sent.

7.7 Where a charge has been preferred without directions from the Office of the DPP, and the case is proceeding on indictment, directions should be sought prior to any sending forward for trial. The Director, or one of the Director's professional officers, will consider whether the prosecution should proceed or whether any of the charges should be amended, withdrawn, or other charges added.

7.8 The following matters must be referred by the Garda Síochána to the Office of the DPP for advice and, where appropriate, for directions in accordance with detailed instructions which have been issued to members of the force:

a) any case in which it is proposed to seek the accused's extradition;

b) whether or not an accomplice (or any suspect) should be granted immunity;

c) whether a judge of the District or Circuit Court should be asked to state a case;

d) whether a judicial review should be sought or defended;

e) any case in which the Director's sanction or approval is required for the commencement or continuance of proceedings;

f) matters of particular sensitivity or unusual public interest.

7.9 Arrangements are in place to ensure that one of the Director's officers is contactable by telephone outside office hours to deal with urgent cases. However, directions to charge should be given by telephone only in exceptional cases where for very good reason it is essential to charge a person before a written file can be prepared.

8: The Role of the Prosecutor in Court

8.1 The aim of the prosecutor is to ensure that a just verdict is reached at the end of the trial process and not to strive for a conviction at all costs. The purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a judge or jury what the prosecution considers to be admissible, relevant, credible and reliable evidence. Unless the prosecution has satisfied the judge or jury of the accused's guilt beyond all reasonable doubt the appropriate verdict is one of 'not guilty'.

8.2 The duty of the prosecutor to strive for a just verdict does not mean that the prosecutor ought not to prosecute the case vigorously. It is the prosecutor's duty to present the case fairly, but also skilfully and firmly, to seek to have the whole of the relevant and admissible evidence placed before the court, and to assist the court with submissions which are appropriate to the facts. The prosecutor will be entitled firmly and vigorously to urge the prosecution's view about a particular issue and to test, and where appropriate, to attack the case advanced on behalf of the accused.

8.3 A prosecutor must not argue any proposition of fact that is not an accurate and fair interpretation of the evidence or knowingly advance any proposition of law that does not accurately represent the law. If there is contrary authority to the propositions of law being put to the court by the prosecutor of which the prosecutor is aware, that authority must be brought to the court's attention.

8.4 A prosecutor should call, as part of the prosecution case, all admissible, relevant, credible and reliable evidence unless:

a) the defence consents to the evidence not being adduced;

b) a particular matter has been established by the calling of other evidence and there is no prejudice to the accused in not calling a particular witness;

c) a witness is unavailable.

8.5 The statement of a witness who the prosecution do not intend to call should not be included in the book of evidence. For example, there is no obligation to call evidence which the prosecutor does not consider credible or which is deemed not to be relevant: *DPP v. District Justice McMenamin and James McGinley* (Unreported, High Court, Barron J., 23 March 1996).

8.6 In the event that the prosecutor decides not to call a witness whose statement is contained in the book of evidence the defence should be informed as soon as reasonably practicable and, where possible and if the defence so requests, arrangements should be made to have the witness in court for the defence to use as part of its case. In the case of *DPP v. Special Criminal Court* [1999] 1 IR 60, the Supreme Court stated:

> "It is agreed on all sides that where the prosecution has a statement of a person who may be in a position to give material evidence, whom they do not want to call as a witness, they are under a duty to make that person available as a witness for the defence and in general, to make available any statements that he may have given. We understand that this is in fact the practice that has been in operation by the Office of the Director of Public Prosecutions for a very long time."

In *Paul O'Regan v. The DPP and District Judge MacGruairc* [2000] 2 ILRM 68 at 73, the Supreme Court recognised that "the general and well-accepted practice in this country is for the prosecution to call or tender for cross-examination all witnesses whose names are

included in the book of evidence." In *DPP v. Mark Lacy* [2005] 2 IR 241, the Court of Criminal Appeal acknowledged that general practice and stated further at 245 and 248:

a) "The court is satisfied that a discretion whether or not to call a witness does remain after a book of evidence is compiled. Firstly, the Director of Public Prosecutions retains his discretion as to the prosecution of the offence, including the calling of the witnesses. Secondly, prosecuting counsel retain a discretion as to how a prosecution will proceed, including as to the calling of witnesses. This discretion must be exercised fairly and in the interests of justice."

b) "However, if a witness included in the book of evidence is not called or tendered, then there should be good reasons why such a course is adopted."

c) "The trial judge has a discretion to intervene in the exercise of this discretion by the prosecuting counsel as to the calling of witnesses where the requirements of a fair and just trial require such an intervention."

8.7 In exercising the discretion not to call a witness whose statement is contained in the book of evidence, the prosecutor should have regard to the principles enunciated by Parker LCJ in *R v. Oliva* [1965] 3 All ER 116 at 122 which were adopted and applied by the Court of Criminal Appeal in *DPP v. Mark Lacy* [2005] 2 IR 241 at 246 "with the added consideration of the constitutional concept of due process" being "the constitutional guarantee of justice and fair procedures" found "at the root of every criminal trial in this jurisdiction":

> "Accordingly, as it seems to this court, the principles are plain. The prosecution must of course have in court the witness whose names are on the back of the indictment, but there is a wide discretion in the prosecution whether they should call them, either calling and examining them, or calling and tendering them for cross-examination. The prosecution do not, of course, put forward every witness as a witness of truth, but where the witness's evidence is capable of belief, then it is their duty, well recognised, that he should be called, even though the evidence that he is going to give is inconsistent with the case sought to be proved. Their discretion must be exercised in a manner which is calculated to further the interest of justice, and at the same time be fair to the defence. If the prosecution appears to be exercising that discretion improperly, it is open to the judge of trial to interfere and in his discretion in turn to invite the prosecution to call a particular witness, and if they refuse there is the ultimate sanction in the judge himself calling the witness."

The Court of Criminal Appeal in *Lacy* described the placing of names of the witnesses on the back of an indictment as similar to entering their names in the book of evidence in this jurisdiction.

8.8 Cross-examination of an accused as to credit or motive must be fairly conducted. Material put to an accused must be considered on reasonable grounds to be accurate and its use justified in the circumstances of the trial.

8.9 Care should be taken in opening a case to a jury to avoid statements that may lead to a discharge of the jury, where these are not necessary in order to open the case in a coherent and intelligible manner. Particular care should be exercised where the defence advises that the admission of evidence is to be challenged.

8.10 Ensuring the prosecution's right to equality of arms may require a prosecutor to seek an adjournment of a matter due to insufficient notice being given to the prosecution, or to allow a particular matter arising for the first time to be considered.

8.11 It is in the interests of justice that matters are brought to trial expeditiously. As far as practicable, adjournments after a trial has been allocated a hearing date should be avoided by prompt attention to the form of indictment, the availability of witnesses and any other matter which may cause delay.

8.12 The public, victims and witnesses may have expectations as to how the prosecutor should perform his or her functions which cannot be met. A prosecutor does not have a 'client' in the conventional sense and acts in the public interest. He or she is not the legal representative for victims of crime and does not act as their legal adviser. By virtue of the Constitution of Ireland and the Prosecution of Offences Act 1974, the Director of Public Prosecutions is authorised to commence and pursue prosecutions in the name of the People of Ireland. A crime is an offence against the People, against the whole of society, of which the particular victim is a part. In the criminal process it is the People who come to court to seek justice. A criminal trial is a contest between the People and the accused, and not between the victim and the accused. This does not, however, mean that the victim is to be left without access to such assistance and advice as the prosecuting lawyers representing the People may properly afford him or her. The obligations of prosecuting solicitors and counsel towards victims are set out more fully in Chapter 12: The Rights of Victims of Crime.

THE PROSECUTOR'S ROLE IN THE SENTENCING PROCESS

8.13 When appearing at a hearing in relation to sentence the prosecutor has the following duties:

a) to ensure that the court has before it all available evidence relevant to sentencing, whether or not that evidence is favourable to an accused person;

b) to ensure that the victim has the opportunity to exercise the right to be heard under Article 10 of the Victims Directive and, in particular, that the court has before it all available relevant evidence and appropriate submissions concerning the impact of the offence on the victim;

c) to ensure that the court has before it all relevant evidence available to the prosecution concerning the accused's circumstances, background, history, and previous convictions, if any, as well as any available evidence relevant to the circumstances in which the offence was committed which is likely to assist the court in determining the appropriate sentence;

d) to ensure that the court is aware of all sentencing options available to it under the law;

e) to refer the court to any relevant authority or legislation that may assist in determining the appropriate sentence;

f) to assist the court to avoid making any appealable error, and to draw the court's attention to any error of fact or law which the court may make when passing sentence.

8.14 The onus on the prosecutor in relation to sentence was considered in judgments of the Court of Criminal Appeal in *DPP v. Z* [2014] 2 ILRM 132, *DPP v. Kieran Ryan* [2014] 2 ILRM 98 and 435 and *DPP v. Adam Fitzgibbon* [2014] 2 ILRM 116 and 424. In light of those judgments, unless the Court of Criminal Appeal, the Court of Appeal or the Supreme Court has itself given guidance on the range or band of sentencing for particular offences or classes of offences, it is not appropriate for the prosecutor to submit to the sentencing court bands or ranges of sentencing.

8.15 As well as ensuring that the court is aware of all sentencing options open to it under the law, it is the prosecutor's duty to draw the court's attention to any issues which may arise concerning related matters such as confiscation, forfeiture, destruction, disposal, revocation, disqualification, compensation or restitution. Those issues are discussed in Chapter 15: Confiscation, Forfeiture and Disqualification.

8.16 Where there is a significant difference between the factual basis on which an accused pleads guilty and the case contended for by the prosecution, there is an adversarial role for the prosecution to seek to establish the facts upon which the court should base its sentence. Where the accused pleads guilty, it is the prosecutor's duty to ensure that the facts which are then placed before the court support each and every element of the charges laid which are necessary to

provide a sufficiently comprehensive factual basis for sentencing. Where the prosecution agrees not to rely on an aggravating factor no inconsistent material should be placed before the sentencing judge.

8.17 When the defence advances matters in mitigation which the prosecution can prove to be wrong, and which if accepted are likely to lead the court to proceed on a wrong basis, the prosecutor should first inform the defence that the matter advanced in mitigation is not accepted. If the defence persists it is the prosecutor's duty to invite the court to put the defence on proof of the disputed matter and if necessary to hear prosecution evidence in rebuttal. Co-operation by convicted persons with law enforcement agencies should be appropriately acknowledged or, as the case may be, disputed at the time of sentencing.

8.18 There is no obligation on prosecuting counsel to deal with every issue advanced in mitigation by the defence. However, where the defence advances matters in mitigation of which the prosecution has not been given prior notice or the truth of which the prosecution is not in a position to judge, the prosecutor should invite the court to insist on the matters in question being properly proved if the court intends to take them into account in mitigation. Where "a matter of some significance is urged in mitigation which the DPP considers is not properly a mitigating factor at all in accordance with the jurisprudence of the courts", there is an obligation on the DPP to deal with such matters at sentencing. Where the mitigation advanced by the defence does "not bear, in the light of the jurisprudence of the courts, any, or the asserted level of, mitigation", then prosecuting counsel "should address argument to that effect to the sentencing judge" – per Clarke J. in *DPP v. Adam Fitzgibbon* [2014] IECCA 25, para 6.5 et seq.

8.19 The prosecutor must not seek to persuade the court to impose an improper sentence nor should a sentence of a particular magnitude be advocated. However, the prosecutor may at the request of the court draw the court's attention to any relevant precedent.

9: Disclosure

GENERAL

9.1 The constitutional rights to a trial in due course of law and to fair procedures found in Articles 38.1 and 40.3 of the Constitution of Ireland place a duty on the prosecution to disclose to the defence all relevant evidence which is within its possession. That duty was stated by McCarthy J. in *DPP v. Tuite* [1983] 2 Frewen 175, as follows:

> "The Constitutional right to fair procedures demands that the prosecution be conducted fairly; it is the duty of the prosecution, whether adducing such evidence or not, where possible, to make available all relevant evidence, parol or otherwise, in its possession, so that if the prosecution does not adduce such evidence, the defence may, if it wishes, do so."

9.2 In *DPP v. Special Criminal Court* [1999] 1 IR 60, Carney J. (at p.76, in a passage subsequently approved by the Supreme Court at p.81) defined relevant material as evidence which "might help the defence case, help to disparage the prosecution case or give a lead to other evidence". Keane C.J. in *Michael McKevitt v. DPP* (Unreported, Supreme Court, 18 March 2003) stated that:

> "the prosecution are under a duty to disclose to the defence any material which may be relevant to the case which could either help the defence or damage the prosecution and that if there is such material which is in their possession they are under a constitutional duty to make that available to the defence."

9.3 The prosecution is therefore obliged to disclose to the defence all relevant evidence which is within its possession. A person charged with a criminal offence has a right to be furnished, firstly, with details of the prosecution evidence that is to be used at the trial, and secondly, with evidence in the prosecution's possession which the prosecution does not intend to use if that evidence could be relevant or could assist the defence. The extent of the duty to disclose is determined by concepts of constitutional justice, natural justice, fair procedures and due process of law as well as by statutory principles. The limits of this duty are not precisely delineated and depend upon the circumstances of each case. Further, the duty to disclose is an ongoing one and turns upon matters which are in issue at any time.

9.4 Article 6 of the European Convention on Human Rights also guarantees a person charged with a criminal offence the right to a fair trial and:

> "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him".

The Convention provides guidance concerning the minimum rights of accused persons as they are guaranteed throughout Europe and has been incorporated into Irish domestic law by the European Convention on Human Rights Act 2003.

9.5 The prosecutor's duty to disclose is subject also to the right of accused persons to information in criminal proceedings as conferred by European Union Directive 2012/13/EU of 22 May 2012. The date for transposition of the Directive was 2 June 2014. The rights in question include the right to information about the accusation under Article 6 and the right of access to the materials of the case under Article 7. As the Directive does not distinguish between proceedings on indictment or summary proceedings, the rights conferred by it apply equally to both types of criminal proceedings.

PROSECUTIONS ON INDICTMENT

The Book of Evidence

9.6 Where an offence is to be disposed of by trial on indictment, the prosecutor has a statutory duty pursuant to section 4B(1)(a) of the Criminal Procedure Act 1967, as inserted by section 9 of the Criminal Justice Act 1999, and amended by section 37 of the Criminal Procedure Act 2010, to serve on the accused certain documents which

set out the evidence intended to be adduced against the accused. Those documents are specified in section 4B(1)(b) of the 1967 Act and are usually referred to collectively as the book of evidence. This essentially comprises the evidence which the prosecutor intends to adduce at the trial of the accused. The following documents must be included in the book of evidence:

a) a statement of the charges against the accused;

b) a copy of any sworn information in writing upon which the proceedings were initiated;

c) a list of the witnesses the prosecutor proposes to call at the trial;

d) a statement of the evidence that is expected to be given by each of them;

e) a copy of any document containing information which it is proposed to give in evidence by virtue of Part II of the Criminal Evidence Act 1992;

f) where appropriate, a copy of a certificate under section 6(1) of the Criminal Evidence Act 1992; and

g) a list of the exhibits (if any).

9.7 In accordance with section 4B(1)(a) of the Criminal Procedure Act 1967, the prosecutor must serve the documents which comprise the book of evidence on the accused not later than 42 days from the date on which: (i) either the accused or the prosecutor do not consent to summary trial; or, (ii) the prosecutor elects for trial on indictment; or, (iii) jurisdiction is refused by the District Court Judge. The prosecutor may apply under section 4B(3) to extend the time for service of the book of evidence which application must be based upon good and sufficient grounds such as the complexity of the case, large number of witnesses, or other such reasons which may cause delay. The District Court Judge may only extend time if satisfied that there is good reason for doing so and that it would be in the interests of justice to do so. Because of the short time for service of the book of evidence it may be more convenient not to charge an accused until the book of evidence is prepared unless there is some reason why such a course of action would be inappropriate.

The High Court decision of Peart J. in *Joseph Farrell v Judge Geoffrey Browne & The Judges of the Circuit Court and the DPP* [2012] IEHC 54 established that the '42 day rule' applies only to hybrid offences triable either summarily or on indictment. No time limit applies for service of the book of evidence in respect of offences triable on indictment only.

Further evidence

9.8 Pursuant to section 4C of the Criminal Procedure Act 1967, if at any time after the accused is sent forward for trial the prosecutor proposes to adduce further evidence, or call additional witnesses, or if evidence has been taken by way of sworn deposition or by live television link, the prosecutor must serve the accused and furnish the trial court with the following additional documents where applicable:

a) a list of any further witnesses the prosecutor proposes to call at the trial;

b) a statement of the evidence that is expected to be given by each witness whose name appears on the list of further witnesses;

c) a statement of any further evidence there is expected to be given by any witness whose name appears on the list already served under section 4B(1)(c);

d) any notice of intention to give information contained in a document in evidence under section 7(1)(b) of the Criminal Evidence Act 1992 together with a copy of the document;

e) where appropriate, a copy of a certificate under section 6(1) of the Criminal Evidence Act 1992;

f) a copy of any deposition taken under section 4F;

g) a list of any further exhibits.

OBLIGATION BY THE PROSECUTION TO DISCLOSE MATERIAL NOT INTENDED TO BE USED AT THE TRIAL

9.9 There may also be other material of an evidentiary nature which the prosecution has decided not to use at trial. Some of this evidence may neither add to nor detract from the case against the accused, in which case it is not relevant and need not be disclosed. Other

evidence may undermine some aspect of the prosecution case or in some other way be of assistance to the defence.

9.10 In the ordinary course disclosure of evidence should be made, without a request, if the evidence is relevant. In this regard relevant evidence includes information which may reasonably be regarded as providing a lead to other information that might assist the accused in either attacking the prosecution case or making a positive case of its own. The following information should ordinarily be disclosed if relevant:

a) information not in statement form of which the prosecution is aware whether intended to be used by the prosecution or not and whether considered reliable or not;

b) in the case of material not in the possession or procurement of the prosecution but of which it is aware the existence of that material should be disclosed;

c) information regarding proposed prosecution witnesses which might reasonably be considered relevant to their credibility, such as criminal convictions, an adverse finding in other proceedings, relationship with a victim or another witness or any possible personal interest in the outcome of a case;

d) details of any physical or mental incapacity which may be relevant;

e) details of any immunity from prosecution provided to a witness with respect to involvement by that witness in criminal activities. Where a witness is admitted to a witness protection programme the fact of such an admission should be disclosed;

f) where the witness participated in the criminal activity the subject of the charges against the accused, whether the witness has been dealt with in respect of any involvement by that witness and, if so, whether the sentence imposed on the witness took into account any cooperation with law enforcement authorities in relation to the current matter;

g) statements not included in the book of evidence which could be of assistance to the defence;

h) the unedited version of statements prepared for inclusion in the book of evidence;

i) items not included in the list of exhibits in the book of evidence which could reasonably be of assistance to the defence;

j) sworn information and warrants where relevant;

k) particulars of the accused's prior convictions;

l) any prior inconsistent statements of witnesses whom the prosecution intend to call to give evidence;

m) copies of all electronically or mechanically recorded statements obtained from the accused;

n) copies of any photographs, plans, documents or other representations that might be tendered by the prosecution at trial or which, even though not intended to be so tendered, might reasonably be relevant to the defence. The defence should also be provided with reasonable access to inspect exhibits and, where it is practicable to do, photocopies or photographs of such exhibits;

o) where the prosecutor declines to call a witness whose statement is contained in the book of evidence, the defence should be given details of any material or statements which may be relevant and if requested the prosecution should make the witness available for the defence to call (see paragraphs 8.6 and 8.7 in Chapter 8: The Role of the Prosecutor in Court);

p) any other relevant document.

9.11 Where it is feasible to do so the defence should be provided with copies of relevant unused material. However, where that is not feasible (for example because of the large quantity of material involved) the defence should be provided with an opportunity to inspect it.

9.12 The investigating agency should, as early as possible:

- provide the Director's Office with copies of potentially disclosable material unless that is not feasible, for example, because of the bulk of the material. In such a case it may be necessary for arrangements to be made to

enable the prosecutor to view the material before such a decision can be made whether it has to be disclosed to the accused;

- inform the Director's Office of the existence of any material not included with the file that it considers is potentially relevant. In cases of doubt the investigating agency should err on the side of informing the Director's Office of the existence of the particular material;
- inform the Director's Office of the existence of any potentially disclosable material of which it is aware and which is in the possession of a non-party (that is, a person or body other than the prosecution or the investigating agency).

Material in the possession of non-parties

9.13 Following the decision of the Supreme Court in the case of *DPP v. Derek Sweeney* [2001] 4 IR 102, to the effect that the civil procedure known as 'third party discovery' has no application in criminal proceedings, accused persons cannot utilise this procedure to ensure production of material in the hands of non-parties.

9.14 This does not, however, have as a necessary consequence an erosion of the fair procedures to which the accused is entitled. The Director of Public Prosecutions has entered into Memoranda of Understanding with a number of agencies for the purpose of assisting in the process of disclosure. Where such agreements are in place, prosecutors should adhere to and follow the principles and procedures set out in those documents. Furthermore, section 4F of the Criminal Procedure Act 1967 provides for the possibility of taking evidence by way of sworn deposition in the District Court at any stage after the return for trial and it is open to the accused to ensure that any relevant records or notes in the possession of a witness are produced as part of those procedures.

DISCLOSURE OF COUNSELLING RECORDS

9.15 A procedure for the disclosure of a victim's counselling records in sexual offences cases has been available since 30 May 2018. The procedure is set out in section 19A of the Criminal Evidence Act 1992 as inserted by section 39 of the Criminal Law (Sexual Offences) Act 2017. Under this provision disclosure of counselling records of a victim is prohibited without the express consent of the victim or the leave of the court following a court order. The procedure applies to prosecutions in the Circuit Criminal Court and the Central Criminal Court only. It applies to prosecutions for an extensive list of sexual offences that are listed in the Schedule to the Sex Offenders Act 2001. These offences are set out in APPENDIX 1: Disclosure of Counselling Records.

9.16 The court procedure does not apply where the victim expressly consents to the disclosure of counselling records and, in accordance with section 19A(17) of the Criminal Evidence Act 1992, has waived their right to have a disclosure hearing. Where counselling records are being disclosed with the express consent of the victim, the Memoranda of Understanding that the DPP has entered into with a number of agencies for the purpose of assisting in the process of disclosure will apply and prosecutors will follow the principles and procedure in those documents.

9.17 The court procedure will apply where the victim does not consent to the disclosure of counselling records. The prosecution must notify the defence of the existence of such counselling records. The records will only then be disclosed if, after a court hearing, the court makes an order for disclosure. The court hearing will usually happen on the application of the defence to the court. Where the defence do not make an application for disclosure, the application can be made by the prosecution where the prosecutor believes it is in the interests of justice. The victim, any other person to whom the counselling record relates and the person who has possession or control of the counselling record must be notified in advance of the intention to make a disclosure application. These parties are entitled to appear and be heard at the hearing. The victim is entitled to have a lawyer appointed by the Legal Aid Board to put their position before the Court.

9.18 The court, taking into account the factors set out in section 19A(10) of the Criminal Evidence Act 1992, may order disclosure to the accused and the prosecutor where it is in the interests of justice to do so. The court must order disclosure to the accused where there would be a real risk of an unfair trial in the absence

of such disclosure. Where the court makes an order for disclosure, this order will set out to what extent and under what conditions the counselling record in question ought to be disclosed. The court may, in the interests of justice and to protect the right to privacy of any person to whom the counselling record relates, impose any condition it considers necessary on the disclosure of the record. Where disclosure of counselling records is considered by way of court procedure, neither the prosecution nor the defence may have seen the records and may only see them if a disclosure order is made by the court.

THE DUTY TO SEEK OUT, RETAIN AND PRESERVE EVIDENCE

9.19 A number of guiding principles can be derived from judgments of the High Court and Supreme Court in *Daniel Braddish v. DPP* [2001] 3 IR 127, *Robert Dunne v. DPP* [2002] 2 IR 305 and the line of cases which flow from those decisions. Those principles are set out in the paragraphs which follow.

9.20 Evidence relevant to guilt or innocence must, so far as necessary and practicable, be kept until the conclusion of a trial. This principle also applies to the preservation of articles which may give rise to the reasonable possibility of securing relevant evidence. The fact that evidence is not to be used by the prosecution does not justify its destruction or unavailability or the destruction of notes or records about it. Where the evidence gives rise to a reasonable possibility of rebutting the prosecution case it should be retained.

9.21 There is a duty to seek out evidence having a bearing on guilt or innocence. The obligation does not require the investigator to engage in disproportionate commitment of manpower or resources in an exhaustive search for every conceivable kind of evidence. The duty must be interpreted realistically on the facts of each case. The obligation to seek out and preserve evidence is to be reasonably interpreted and the relevance or potential relevance of the evidence needs to be considered. There is an obligation and responsibility on defence lawyers to seek material they consider relevant.

9.22 While observing the foregoing principles the Garda Síochána or other investigating agency must have regard to the rights of the owner of stolen goods. Where they possess evidence which it is not proposed to use at the trial and which they intend to return to the owner or otherwise dispose of, they should inform the accused of this fact beforehand so the defence may have the opportunity to examine the items before their return to the owner.

9.23 The defence should be afforded a reasonable amount of time in which to carry out such an inspection. A record should be retained of any communication with the accused or the accused's representatives inviting access to the item and the time limit allowed for such access should be recorded. Where the Garda Síochána have recovered stolen property used in criminal offences the main consideration is relevance to the offence which is being investigated. The item has to be considered with regard to the overall nature of the investigation. If a third party is seeking the return of the item, but no suspect has been identified, the question should be asked as to whether forensic examination, sampling or other tests need to be carried out beforehand to rebut any possible prejudice which may arise from the disposal of the item.

9.24 Where the Garda Síochána or another investigating agency is in doubt whether material should be retained they should seek the advice of the Director's Office.

LIMITATIONS ON THE DUTY TO DISCLOSE

9.25 The prosecution is under no obligation to disclose irrelevant material to the defence. If the material is irrelevant in the sense that it is not relied on by the prosecution and does not appear to assist the defence then it is neither appropriate nor necessary to disclose it. However, as a general guideline, if it is reasonably possible that something is relevant and if there is no other obstacle to disclosure, the balance is in favour of disclosure. It must be borne in mind that the prosecution may not be aware that a particular defence will be put forward by the accused. In cases of doubt concerning either relevance or a competing claim of privilege the prosecutor should consider seeking a ruling from the court.

9.26 The prosecution is not obliged to disclose:

- a confidential statement made by a Garda informant where such statement would identify the informant;
- the identity of a potential witness who has assisted the Garda Síochána without intending to be a witness and the prosecution has agreed not to call the person unless that person has evidence which would assist the defence.

9.27 In deciding whether to disclose material the prosecutor must also have regard to any other issues of the public interest which might arise. In such cases, however, the defence should be informed that material has been withheld on such grounds so as to enable the accused to seek a court ruling on the matter. Some relevant factors to be considered are:

a) whether the material is protected by legal professional privilege. The public policy which protects communications between lawyer and client extends to communications between the Director and the Director's professional officers, solicitors and counsel as to prosecutions by the Director which are in being or contemplated;

b) whether the material, if it became known, might facilitate the commission of other offences or alert a person to Garda investigations;

c) whether the material would be of assistance to criminals by revealing methods of detection or combating crime;

d) whether the material involves the security of the State;

e) where the circumstances require, a prosecutor may seek prior written assurances in respect of the material to be disclosed which confirm the following: that it is made available for the use of the accused's legal advisers only and no copies will be made without the prosecutor's prior consent (other than a copy for counsel who will be informed of the conditions upon which the material is furnished); that the original materials and any copies made thereof will be used only for the purposes of the criminal proceedings in question and they will be returned to the prosecutor and/or any electronic copies deleted at the conclusion of those proceedings.

9.28 The privileges or exemptions outlined at paragraphs 9.22 and 9.23 above are subject to the 'innocence at stake' exception where the disclosure of the material concerned or of the identity of the informant or witness is necessary or right because the evidence in question if believed could show the innocence of the accused. The basis for that exception was stated by Lord Esher M.R. in *Marks v. Beyfus* (1890) 25 QBD 494:

> "If upon the trial of a person the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the person's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail."

If the prosecution is nonetheless unable to disclose the material concerned then it may be necessary to discontinue the prosecution.

THE TIMING OF DISCLOSURE

9.29 As a general rule disclosure should be made sufficiently in advance of the trial to enable the accused to consider the material disclosed. Primary voluntary disclosure of all disclosable material then in the possession of the prosecution should be made at the time of the return for trial of the accused. Any further material subsequently coming into the possession of the prosecution or specifically requested by the defence should be disclosed in a timely fashion.

10: Pre-trial Discussions Concerning Pleas

10.1 The law recognises that a plea of guilty is a factor to be taken into account in mitigation of sentence. There are obvious benefits to the criminal justice system resulting from a plea of guilty. With regard to the interests of victims of crime, witnesses, the general public and others, those benefits include: avoidance of any adverse consequences or impact of having to testify at trial; prompt and certain resolution of criminal prosecutions; reduction of delay in resolving other pending cases; and consequent financial and cost savings.

10.2 Prosecutors may be approached by the defence seeking to discuss the charges to be proceeded with. Such an approach usually takes the form of the accused offering to plead guilty to fewer than all of the charges in the prosecution, or to a lesser charge or charges, with the remaining charges either not being proceeded with by entering a nolle prosequi or taken into consideration by the sentencing judge in imposing penalty but without proceeding to conviction. Entry of a nolle prosequi is discussed at paragraph 4.32 in Chapter 4. The taking of other offences into consideration is provided for by section 8 of the Criminal Justice Act 1951.

10.3 In cases where such offers to plead guilty are made, prosecutors will have due regard to Article 10 of the European Union Victims Directive 2012/29/EU, and section 5 of the Criminal Justice Act 1993 as amended by section 31 of the Criminal Justice (Victims of Crime) act 2017 under which victims of crime have a right to be heard during criminal proceedings and to provide evidence. That right encompasses the sentencing stage of criminal proceedings. In general, where no circumstances arise making it inappropriate to do so, the prosecutor should only agree to such offers to plead guilty on the basis that the remaining counts will be taken into consideration by the court in imposing penalty. While a conviction will not be recorded in relation to those remaining counts, the right of the victim to be heard and to provide evidence in relation to them will be preserved. The penalty imposed by the court should reflect the counts which are taken into consideration. An offence which carries certain consequential orders on conviction, such as disqualification from driving, cannot be taken into consideration under section 8 of the 1951 Act.

10.4 These guidelines refer in Chapter 6: The Choice of Charge to the care that must be taken in choosing the charge or charges to be laid. Nevertheless, circumstances can change between the original decision to charge and the trial. New facts relevant to the offence, the accused, the victim or witnesses can come to light. Evidence may no longer be available. In some instances, a different view of the case may be taken on further consideration.

10.5 Agreements as to charge or charges and plea must be consistent with the requirements of justice. A proposal from the defence to offer a plea to some charges or to a lesser charge or charges should not be entertained by the prosecutor unless:

a) the charge or charges which the defence indicate the accused will plead guilty to are appropriate having regard to the nature of the criminal conduct of the accused and the likely outcome of the case; and

b) there is evidence to support the charges.

10.6 A plea should not be accepted if to do so would distort the facts disclosed by the available evidence and result in an artificial basis for sentence.

10.7 There is a public interest in ensuring that offences are recorded as convictions. The acceptance of a plea where a number of offences have been charged should take into account such matters as the number and identity of individual victims, range of dates, value of property and whether there are aggravating factors specific to some of the offences. Where there are multiple offences relating to the one episode it may be appropriate to accept a plea to the principal offence where all the relevant facts are made known to the sentencing judge.

10.8 Any decision whether or not to agree to a proposal advanced by the defence should take into account all the circumstances of the case and in particular the following considerations when they are relevant:

a) the strength of the prosecution case;

b) whether the penalty that is likely to be imposed if the charges are varied as proposed (taking into account such matters as whether the accused is already serving a term of imprisonment) would be appropriate for the criminal conduct involved;

c) the desirability of prompt and certain resolution of the case;

d) the accused's background, history and previous convictions, if any;

e) the likelihood of adverse consequences to witnesses if the case is not disposed of on a plea, including the impact on a witness of having to give evidence;

f) the need to avoid delay in the resolution of other pending cases;

g) whether the accused is willing to co-operate in the investigation or prosecution of others, or the extent to which the accused has already done so;

h) in the case of offences against the person and other serious offences, the views of the victim or of others significantly affected – however, those views are not exclusively determinative as it is the public, and not any private individual or sectional interest that must be served;

i) the views of the investigating member of the Garda Síochána.

10.9 In no circumstances should the prosecutor entertain a proposal to plead guilty to a charge in respect of which the accused maintains his or her innocence.

10.10 In indictable cases or in summary cases where the consent of the Director to a prosecution is required or has been specifically given, any proposal to accept a plea to a lesser number of charges or to lesser charges than those preferred must always be referred to an officer of the Director of Public Prosecutions for a decision.

10.11 In most indictable cases, an accused can choose, in accordance with section 13(2)(b) of the Criminal Procedure Act 1967, to sign a plea of guilty and to be sent forward for sentence to the trial court. In such cases a Book of Evidence will not be required. An accused person can subsequently withdraw the written plea and plead not guilty to the charge in the court of trial. This option is not available for a small number of serious offences listed in section 13(1) of the Criminal Procedure Act 1967 including murder.

10.12 For an accused to be sent forward for sentence on foot of a signed plea of guilty, the District Court judge must be satisfied that the accused understands the nature of the offence and the facts alleged and the Director of Public Prosecutions must consent. The prosecutor should have regard to the fact that no further charges can be preferred in the trial court when an accused has been sent forward for sentence on foot of a signed plea of guilty.

10.13 Prosecution counsel should in no circumstances participate in or attend any private discussion between defence counsel and a trial judge concerning the penalty which might be imposed on an accused in the event of a plea of guilty to any or all of the counts. In the view of the Director, such a procedure, in the absence of any legislation authorising it, is of doubtful conformity with the requirement of Article 34.1 of the Constitution of Ireland that justice should be administered in public except in such special

and limited cases as may be prescribed by law. The Supreme Court, in the case of *DPP v. Frank Heeney* [2001] 1 IR 736 has expressed the view that such a procedure is undesirable and has approved its discontinuance by the Director.

10.14 There may exceptionally be circumstances in which it is desired by both the prosecution and the defence, in the interests of justice, to intimate certain matters to a trial judge in private. For example, there could be matters which if revealed in public could create a risk to the life or personal safety of an accused or some other person. In such a case counsel for the Director should seek and obtain specific instructions from the Office of the DPP to mention the matter to the judge in chambers.

11: Prosecution Appeals and Sentence Reviews

APPEALS FROM SUMMARY PROCEEDINGS

11.1 The prosecution has certain rights to bring an appeal or make applications, for example, in the event of an acquittal, where a re-trial is sought, or if a sentence is considered unduly lenient. The question of whether such appeals or applications can be brought must be considered urgently as very strict time limits may apply. Other than in the case of appeals by way of case stated or applications for judicial review, those rights granted to the prosecution do not in general apply in courts of summary jurisdiction.

11.2 It is the duty of any prosecutor appearing on behalf of the Director of Public Prosecutions, who is of the opinion that a court has erred in law and that one of the remedies referred to below in paragraph 11.4 or paragraphs 11.10 to 11.14 inclusive may be available to the Director, so to advise the Director as soon as possible.

CASE STATED ON A QUESTION OF LAW ARISING IN SUMMARY COURTS AND CIRCUIT COURT PROCEEDINGS

11.3 The following provisions allow for an application to be made to the High Court from summary proceedings. It should be noted that appeals by way of case stated are confined to the point of law at issue and are not a re-hearing.

a) under section 52 of the Courts (Supplemental Provisions) Act 1961 – any person who has been heard in District Court proceedings, including the prosecution and the defence, may request the judge to refer any question of law arising in the proceedings to the High Court for determination. Unless the request is considered frivolous, the District Court Judge must state a case. This procedure is known as a 'consultative case stated'.

b) under section 2 of the Summary Jurisdiction Act 1857 – any party to proceedings heard and determined by a District Court Judge, including the prosecution and the defence, may, if dissatisfied with the determination as being erroneous on a point of law, apply to the judge to state a case for the determination of the High Court.

11.4 Rule 15 of Order 102 of the District Court Rules 1997 provides that a judge of the District Court cannot refuse to state a case where the application or request is made by or under the direction of the Director of Public Prosecutions.

11.5 The following provisions govern Circuit Court applications:

a) under section 16 of the Courts of Justice Act 1947 – in accordance with the provisions of section 74 of the Court of Appeal Act 2014, any party in pending Circuit Court proceedings, including the prosecution and the defence, may request that a consultative case be stated on any question of law arising in the proceedings for determination by the Court of Appeal.

b) Order 62 of the Circuit Court Rules 2001 governs consultative cases stated by the Circuit Court to the Court of Appeal.

THE COURT OF APPEAL

11.6 The Court of Appeal was established in October 2014 pursuant to the 33rd Amendment to the Constitution and has appellate jurisdiction from all decisions of the Circuit Criminal Court, the Special Criminal

Court or the Central Criminal Court under Article 34 of the Constitution of Ireland. This includes preliminary, ancillary, or intermediate orders of trial courts. *DPP v DH* [2018] IESC 32. The Court of Appeal Act 2014 amends legislation to confer and transfer appellate jurisdiction to the Court of Appeal from the Supreme Court and the Court of Criminal Appeal.

11.7 There is a right of appeal for the accused based on the record of the trial court against conviction or sentence to the Court of Appeal. There is also provision for a 'miscarriage of justice' application based on new or newly discovered facts after those appeals are exhausted.

11.8 The prosecution has certain limited rights to bring an appeal or make applications, for example, where a sentence is considered unduly lenient, in the event of directed acquittal, or where a re-trial is sought upon discovery of new evidence. The question of whether such appeals or applications can be brought must be considered urgently as very strict time limits may apply.

11.9 It is the duty of any prosecutor appearing on behalf of the Director of Public Prosecutions, who is of the opinion that a trial court has erred in law and that one of the remedies referred to below may be available, to so advise the Director without delay.

REVIEW OF SENTENCES IMPOSED ON INDICTMENT

11.10 The Director may apply to the Court of Appeal for a review of sentences on conviction of a person on indictment which appear to the Director to be 'unduly lenient' in accordance with the provisions of section 2 of the Criminal Justice Act 1993.

11.11 In applications under section 2 of the 1993 Act, the onus lies on the Director to show that the sentence is not merely lenient but unduly so. Great weight is attached to the trial judge's reasons for imposing the sentence. Nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of the court in order to increase the sentence: *DPP v. Christopher Byrne* [1995] 1 ILRM 279. The Court of Appeal will not increase a sentence because of a mere disagreement with its severity.

11.12 It is a precondition to appellate interference with a sentence that the sentencing court committed an error of principle: *DPP v. George Redmond* [2001] 3 IR 390. A clear divergence from the norm may be an error on its own: *DPP v McCormack* [2000] 4 IR 356. Typical errors include the specific elements relating to the offender, or an error of principle in the way in which the trial judge approached sentencing. However, even if an error is identified, the court may not interfere with the sentence if it is one that was otherwise appropriate or it would be unjust to interfere: *People (DPP) v McCabe* [2005] IECCA 90.

11.13 The Director must complete the process of applying for a review of sentence within 28 days of the sentence, including lodging and service of the notice. It is essential that in all convictions on indictment that the solicitor and counsel representing the Director indicate when reporting to the Office of the DPP if, in their opinion, an issue arises as to whether the sentence passed was unduly lenient. If either solicitor or counsel takes that view, or believes the question is one that the Director ought properly to consider, then the Office of the DPP should be contacted at once.

11.14 As great weight attaches to the trial judge's reasons for the sentence imposed, it is essential that the Director is fully informed of those reasons in addition to receiving full details of the evidence before the court at the sentence hearing, if the question of seeking a review of sentence is referred to the Director. In all cases heard on indictment which result in conviction and sentence, counsel for the prosecution should take a careful note of the trial judge's reasoning for the sentence including, in particular, any mitigating factors which were taken into account.

11.15 The report from the solicitor and counsel should set out their view as to:

a) whether or not the judge made a material error of law, misunderstood or misapplied proper sentencing principles, or wrongly assessed or omitted to consider some salient feature of the evidence, as may be

apparent from the judge's remarks when passing sentence;

b) any inadequacy of the sentence which may imply an error of principle by the judge;

c) the range of sentences (having regard to comparable cases) legitimately open to the judge on the facts;

d) the conduct of the proceedings; and

e) the likelihood of an application for review being successful.

11.16 If the Court of Appeal grants the application and quashes the sentence, it will act as a sentencing court as of the date of re-sentencing: *People (DPP) v O'Leary* [2015] IECA 128. Any relevant circumstances that have transpired since the original sentence may be placed before the court to consider. For the prosecution this may include an updated Victim Impact Statement, if there has been any material development since the original statement, and updated Garda information.

APPLICATIONS FOR RE-TRIAL FOLLOWING ACQUITTAL ON INDICTMENT

11.17 The Director may apply to the Court of Appeal for a re-trial order in respect of a person tried on indictment and acquitted either at trial, or on appeal against conviction, or on appeal from such a decision on appeal, in accordance with the provisions of Part 3 of the Criminal Procedure Act 2010:

a) under section 8(3) – where it appears to the Director that:

b) there is new and compelling evidence against the person acquitted in relation to the relevant offence concerned; and

c) it is in the public interest to do so;

d) under section 9(3) – where the person acquitted or another person has been convicted of an offence against the administration of justice relating to the proceedings which resulted in the acquittal, thus tainting those proceedings and that acquittal, and where it appears to the Director that:

e) there is compelling evidence against the person acquitted; and

f) it is in the public interest to do so.

WITH PREJUDICE APPEALS ON QUESTION OF LAW

11.18 The Director may appeal on a question of law the acquittal of a person tried on indictment, in accordance with the provisions of section 23(1)(l) and Part 4 of the Criminal Procedure Act 2010, where it appears to the Director that:

a) a ruling was made by the trial court which erroneously excluded compelling evidence; or

b) a direction was given by the trial court directing the jury to find the person not guilty, where:

(i) the direction was wrong in law, and

(ii) the evidence adduced in the proceedings was evidence upon which a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned.

WITHOUT PREJUDICE APPEALS ON QUESTION OF LAW

11.19 Where a person tried on indictment is acquitted (whether in whole or in part of the indictment) the Director may, without prejudice to the verdict or decision in favour of the accused person, refer questions of law arising during the trial to the Court of Appeal for determination under section 34 of the Criminal Procedure Act 1967 (as amended).

11.20 There is technically no time limit on these referrals, and the proceedings should be anonymised. There is provision however for the accused to apply for legal aid.

APPLICATION FOR JUDICIAL REVIEW

11.21 Application for Judicial Review lies to the High Court against the orders of courts of local and limited jurisdiction (in practice this means trial courts other than the Central

Criminal Court) where those courts act in excess of jurisdiction. This remedy is not a general right of appeal. It does not lie to correct errors made within jurisdiction or to overrule findings of fact. Among the orders which may be sought are orders seeking: to compel a court under a duty to act to do so; to prohibit a court from embarking on an incorrect course of action; or to quash a decision of a court made in excess of its jurisdiction. Once a jury trial is embarked upon, the High Court is reluctant to intervene by way of judicial review.

THE SUPREME COURT

11.22 The appellate jurisdiction of the Supreme Court in all cases require it to be satisfied in accordance with Article 34 of the Constitution that:

a) the decision involves a matter of general public importance, or

b) in the interests of justice, it is necessary that there be an appeal to the Supreme Court.

11.23 The Supreme Court is not a court of correction, that position now falls to the Court of Appeal. Where the trial court has been in error in some material respect the constitutional regime now confers jurisdiction to correct any such error on the Court of Appeal: *BS v. DPP* [2017] IESCDET 134.

11.24 Appeal to the Supreme Court will be exceptional. To satisfy the test of general public importance it is necessary first that the point be stateable, and second that it should normally have the capacity to be applicable to cases other than that under consideration. The interests of justice is a residual category: *Quinn Insurance Ltd. v. Price Waterhouse Cooper* [2017] IESC 73.

11.25 Notwithstanding that ordinarily appeals to the Supreme Court are made from orders of the Court of Appeal, in 'exceptional' circumstances an appeal directly from the High Court to the Supreme Court may be made under the same threshold criteria (the so-called 'leap-frog appeal'). Article 34.5.4.

11.26 The Director may apply to appeal from orders of the Court of Appeal or the High Court under the provisions of Article 34. Very tight time frames apply within which to bring an application. If either solicitor or counsel takes the view that a judgment or order from the Court of Appeal or High Court meets the criteria to apply for leave to the Supreme Court, or believes the question is one which the Director ought properly to consider, then the Office of the DPP should be contacted at once.

12: The Rights of Victims of Crime

RIGHTS, SUPPORT AND PROTECTION OF VICTIMS OF CRIME

12.1 The purpose of this chapter is to set out the rights of victims of crime and their family members under the European Union Victims Directive 2012/29/EU and the Criminal Justice (Victims of Crime) Act 2017, as well as other measures for the rights, support and protection of victims of crime under existing law and prosecution policies. Further information is available in the Victims Charter on the Office website at www.dppireland.ie.

12.2 The Victims Directive came into effect on 16 November 2015. The legislation which transposed the Directive into Irish law is the Criminal Justice (Victims of Crime) Act 2017.

12.3 The Victims of Crime Act defines a 'victim' as:

a) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence;

b) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death.

12.4 Under the Victims of Crime Act, 'family members' of a deceased victim include:

a) the spouse, civil partner or cohabitant of the victim;

b) a child (meaning any person below 18 years of age) or step-child, grandchild, parent, grandparent, brother or sister, half-brother or half-sister, aunt, uncle, nephew or niece, and the dependants of the deceased person.

12.5 In cases where victims lack capacity to look after their own affairs, the prosecutor will treat family members of such persons as victims of crime.

12.6 A person who is under investigation for, or has been charged with, an offence in connection with the death of a deceased victim does not come within the definition of a family member of a deceased victim in the Victims of Crime Act and is not entitled to request a summary of reasons for a decision not to prosecute.

ROLE OF THE DPP AND THE GARDA SÍOCHÁNA

12.7 The Director of Public Prosecutions prosecutes cases on behalf of the People of Ireland and not just in the interests of any one individual. The Office of the DPP will have regard to any views expressed by a victim when deciding whether or not to prosecute or in relation to the acceptance of a plea of guilty to any lesser charge. Although the views and interests of the victim are important, they are not the only consideration when deciding whether or not to prosecute or when deciding to accept a plea of guilty. The Office of the DPP will communicate with victims in simple and accessible language whether orally or in writing, and will take into account the personal characteristics of the victim including any disability which may affect the ability of the victim to understand such communications, or to be understood.

12.8 The Garda Síochána also make prosecution decisions. They may institute and conduct prosecutions in the name of the Director of Public Prosecutions. They can only do so for offences specified in a General Direction from the Director of Public Prosecutions under section 8(4) of the Garda Síochána Act 2005.

12.9 When a Garda Superintendent decides not to prosecute a suspect following the investigation of an offence, victims may request a summary of reasons and a review of that decision from the Garda Síochána.

GIVING OF THE REASON BY DPP FOR DECISIONS NOT TO PROSECUTE

12.10 Under section 8 of the Victims of Crime Act, Victims may request a summary of the reason for the decision made not to prosecute a person for an alleged offence. This provision applies from the 27 November 2017. The Office of the DPP will also provide to a victim upon request a summary of the reason for a decision not to prosecute in respect of the following matters:

a) all of its decisions not to prosecute made on or after 16 November 2015; and

b) in relation to the death of a victim which occurred on or after 22 October 2008.

12.11 The Victims of Crime Act provides in section 11 that the Office of the DPP is not required to provide a summary of the reason for a decision not to prosecute where such disclosure could:

a) interfere with the investigation of an alleged offence; or

b) prejudice ongoing or future criminal proceedings in respect of an alleged offence; or

c) endanger the personal safety of any person; or

d) endanger the security of the State.

12.12 In the case of a victim who does not understand or speak English or Irish, the Office of the DPP will provide to the victim upon request a translation of the summary of the reason for a decision not to prosecute.

12.13 It is important to note that there are time limits within which a victim must request a summary of the reason. This is to ensure the fair and efficient administration of justice and to balance the rights of a victim with those of a suspect. In some cases, the time limits may be extended but only if there is a good reason and it is in the interests of justice to do so.

12.14 Requests for the reason for a decision not to prosecute should be in writing and addressed to:

Victims Liaison Unit
Office of the Director of Public Prosecutions
Infirmary Road
Dublin 7
D07 FHN8

Further information about the giving of reasons for decisions not to prosecute can be found on the Office website at www.dppireland.ie.

REVIEW BY DPP OF DECISIONS NOT TO PROSECUTE

12.15 A victim who is informed of a decision not to prosecute a person for an alleged offence, may within 28 days after receiving the information, submit a request to the Director of Public Prosecutions for a review of the decision concerned.

12.16 Where a victim has sought and been given a summary of the reason for the decision made not to prosecute, the Office of the DPP will carry out a review of the decision not to prosecute upon request from a victim who is dissatisfied with the summary of the reason provided for the decision not to prosecute.

Alternatively, where a victim has not sought a summary of the reason for the decision not to prosecute but wishes to have that decision reviewed, the Office of the DPP will upon request from the victim review the decision not to prosecute.

12.17 It is important to note the 28-day time limit set down by the Victims of Crime Act within which a victim must request a review of a decision not to prosecute. In some cases, the time limit may be extended but only if there is a good reason and it is in the interests of justice to do so.

12.18 Requests for reviews of decisions not to prosecute should be in writing and addressed to:

Victims Liaison Unit
Office of the Director of Public Prosecutions
Infirmary Road
Dublin 7
D07 FHN8

Further information about reviewing decisions not to prosecute can be found on the Office website at www.dppireland.ie.

12.19 The Office of the DPP will also give careful consideration to any request by a victim that proceedings be discontinued. It must be borne in mind, however, that the expressed wishes of victims may not coincide with the public interest and in such cases, particularly where there is other evidence implicating the

accused person or where the gravity of the alleged offence requires it, the public interest may require the continuation of a prosecution despite the victim's wish that it would be discontinued.

PROSECUTION APPEALS AND SENTENCE REVIEWS

12.20 The Director of Public Prosecutions will consider any communication received from victims of crime, or the family members of victims of crime who have died, are ill or otherwise incapacitated, in connection with powers granted by law to the Director to appeal or apply in respect of the matters set out in Chapter 11, on Prosecution Appeals and Sentence Reviews.

RESPONSIBILITIES OF PROSECUTORS TO VICTIMS IN CRIMINAL PROCEEDINGS

12.21 Prosecutors have the following responsibilities to victims of crime:

a) To communicate with victims in simple and accessible language, whether orally or in writing, taking into account in such communications the personal characteristics of the victim including any disability, which may affect the ability of the victim to understand or be understood.

b) To work with the Garda Síochána to ensure that the victim is kept fully informed of developments in relation to the criminal prosecution and proceedings which result from the victim's statement of complaint and reporting of the crime.

c) To update the investigating Gardaí, and through them the victim, on developments in relation to pre-trial applications, applications before the Superior Courts or appeals against conviction and/or sentence.

d) To arrange at the victim's request a pre-trial meeting between the victim and the prosecutor who is dealing with the case.

e) To explain to the victim the processes and procedures relating to the trial or hearing of criminal cases and answer any questions the victim may have about them. Generally, the prosecutor is not permitted to discuss evidence with witnesses or victims in advance of the hearing of a case. This is intended to prevent witnesses or victims being told what evidence to give or to avoid any suggestion that this has happened.

f) To deal with victims in a respectful, professional, non-discriminatory and impartial manner and with due regard to the personal circumstances, rights and dignity of victims.

g) To listen and consider the views of the victim. The victim is not, however, entitled to give instructions to the prosecutor concerning the conduct of the trial or hearing of the case.

h) To seek to protect the interests of victims to the best of their professional abilities consistent with their duty to the court and their duty to conduct the prosecution on behalf of the People. Prosecutors should have due regard to the likelihood that a victim of crime when called to testify may experience again the emotional and physical distress caused by the offence.

i) To keep the victim informed of what is happening during the course of the trial or hearing of the case, including any decision to change, modify or not proceed with charges laid against the accused and any decision to accept a plea of guilty to a less serious charge.

j) To work with the Garda Síochána and the Courts Service to ensure that the victim can understand and be understood in the criminal proceedings, including having regard to the following where applicable:

   a. the assessment of the victim carried out by the Garda Síochána under section 15 of the Criminal Justice (Victims of Crime) Act 2017 including the identification of any special measures required during the course of criminal proceedings

   b. Assistance by way of interpretation and/or translation in accordance with sections 22 to 25 of the Criminal Justice (Victims of Crime) Act 2017

k) To draw the court's attention in appropriate cases to the following powers: to make an order under section 6 of the Criminal

Justice Act 1993 requiring payment of compensation in respect of any personal injury or loss resulting from the offence (or any other offence that is taken into consideration by the court in determining sentence) to any person who has suffered such injury or loss; to make an order under section 56 of the Criminal Justice (Theft and Fraud Offences) Act 2001 for the restitution of property which was stolen where a person is convicted of an offence with reference to the theft (whether or not the stealing is the essential ingredient of the offence) or of any other offence where the theft offence is taken into consideration in determining sentence; and, pursuant to section 84 of the Criminal Justice (Mutual Assistance) Act 2008, to make a section 56 restitution order in relation to property which is outside the State.

l) To have due regard to Article 10 of the European Union Victims Directive 2012/29/EU under which victims of crime have a right to be heard during criminal proceedings and to provide evidence. This includes the right under section 5 of the Criminal Justice Act 1993 as amended by section 31 of the Criminal Justice (Victims of Crime) Act 2017 to be heard at the sentencing stage of criminal proceedings and the possibility, at the discretion of the court, to be heard at a bail application hearing in accordance with section 9A of the Bail Act 1997 as inserted by section 8 of the Criminal Justice Act 2017.

EFFECT OF OFFENCE ON VICTIM

12.22 The prosecutor will draw the provisions of section 5 of the Criminal Justice Act 1993 as amended by section 31 Criminal Justice (Victims of Crime) Act 2017 to the attention of a sentencing court and will furnish to that court any evidence or submission received concerning the effect of the offence on the victim, from the victim, or a family member of a victim who is deceased, ill or otherwise incapacitated as a result of the offence.

12.23 When imposing sentence on a person convicted of an offence, where a victim has suffered harm directly caused by the offence, including physical, mental or emotional harm, or economic loss, a sentencing court must take into account the effect of the offence on the victim. The court may, where necessary, receive evidence or submissions concerning any effect (whether long-term or otherwise) of the offence on the person in respect of whom the offence was committed. If the victim so requests, the court must hear the evidence of the victim as to the effect of the offence. Where the victim is a child under 14 years of age, a parent or guardian may give such evidence and in practice a parent or guardian can be permitted to give such evidence for children up to 18 years of age. Where the victim has died, is ill or is otherwise incapacitated as a result of the offence, a family member of that person may give evidence of the effect of the offence. In the case of a victim with a mental disorder, such evidence may be given by the person, or a family member, or a parent or guardian. A 'family member' is defined under section 5(6) of the Criminal Justice Act 1993 as amended by section 31 Criminal Justice (Victims of Crime) Act 2017, as:

a) a spouse, civil partner or cohabitant of the person;

b) a child (meaning a person under 18 years of age), step-child, grandchild, parent, grandparent, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece of the person;

c) a dependant of the person; or

d) any other person whom the court considers to have had a sufficiently close connection with the person.

12.24 Further information for victims of crime or their family members who have questions about victim impact evidence is available from a leaflet entitled 'Making a Victim Impact Statement' which is found on the Office of the DPP website at www.dppireland.ie

PROCEEDINGS OTHERWISE THAN IN PUBLIC

12.25 Where the nature or circumstances of the case are such that there is a need to protect the victim of the offence from secondary and repeat victimisation, intimidation or retaliation, and it would not be contrary to the

interests of justice in the case, the prosecutor will apply in accordance with section 19, where applicable, and section 20 of the Criminal Justice (Victims of Crime) Act 2017, to the judge conducting proceedings, for the exclusion of the public or any portion of the public, or any particular person or persons, from the court during such proceedings. In making such an application, the prosecutor will have regard to any specific protection needs identified where a victim of an alleged offence has been assessed under section 15 of the 2017 Act.

The prosecutor's application is without prejudice to the right to remain in court of: a parent, relative or friend of the victim; a support worker of the victim's choice; an appropriate person who has been appointed to accompany the victim; or a parent, relative or friend of an accused where the accused is not of full age. Officers of the court and bona fide representatives of the press are permitted to remain in court. Such applications do not affect the power of the court to exclude the public or any person from the court under any other enactment or rule of law, such as section 6 of the Criminal Law (Rape) Act 1981.

12.26 The prosecutor will apply under section 6 of the Criminal Law (Rape) Act 1981 to the judge conducting proceedings, for the exclusion from the court during the hearing of all persons except officers of the court, persons directly concerned in the proceedings, bona fide representatives of the Press and such other persons (if any) as the judge may in his or her discretion permit to remain. The prosecutor's application is without prejudice to the right to remain in court of a parent, relative, friend of the victim; a support worker of the victim's choice; or a parent, relative or friend of an accused where the accused is not of full age. Such applications can be made in respect of proceedings for a list of sexual offences as set out in the Criminal Law (Rape Act) 1981. This list does not include every sexual offence. For example, an application cannot be made under section 6 of the 1981 Act for the offence of sexual assault. The full list of offences to which section 6 applies are set out in APPENDIX 2: Proceedings Otherwise than in Public.

GIVING OF EVIDENCE BY LIVE TELEVISION LINK, THROUGH AN INTERMEDIARY AND PLACEMENT OF SCREENS

12.27 Provisions setting out the possibilities for evidence to be given in court by way of live television link, through an intermediary and with the use of screens or similar devices are set out in Part III of the Criminal Evidence Act 1992 as amended by the Criminal justice (Victims of Crime) Act 2017 and the Domestic Violence Act 2018. These possibilities apply in relation to proceedings for "relevant offences" listed in the Criminal Evidence Act 1992 as amended. Sexual offences (including sexual assault) and offences involving violence are included. The full list of "relevant offences" is set out in APPENDIX 3: Giving of Evidence by Live Television Link, Through an Intermediary and Placement of Screens.

12.28 The prosecutor will apply to the court under section 13, 14 or 14A of the Criminal Evidence Act 1992 as amended where it is considered appropriate to do so, to allow a victim of crime, who is a witness to give evidence through a live television link or with the assistance of an intermediary, or for the placement of a screen or other similar device, in an appropriate place, so as to prevent the victim from seeing the accused when giving evidence. In accordance with section 19 of the Criminal Justice (Victims of Crime) Act 2017, where applicable, in deciding whether to make such an application, the prosecutor will have regard to any specific protection needs identified where a victim of an alleged offence has been assessed under section 15 of the Criminal Justice (Victims of Crime) Act 2017.

EVIDENCE THROUGH TELEVISION LINK

12.29 Section 13 of the Criminal Evidence Act 1992 as amended provides that in proceedings that relate to a "relevant offence" a person (other than the accused) under 18 years of age may give evidence by live television link unless the judge sees good reason to the contrary. In any other case, a witness may give evidence by live television link with the leave of the judge.

Where the person giving evidence is the victim of an offence that is not a "relevant offence," the judge, under section 13(1A), may also allow the victim to give evidence by live television link.

EVIDENCE THROUGH INTERMEDIARY

12.30 Sections 14 and 19 of the Criminal Evidence Act 1992 as amended provide that in proceedings that relate to a "relevant offence," where a person who is under 18 years of age or has a mental disorder is giving evidence by way of live television link, the judge may, on the application of the prosecution or the accused, require that the questions posed should be asked through an intermediary, if satisfied, having regard to the age or mental condition of the witness, that this is required by the interests of justice. Such an intermediary shall be appointed by the court.

Where the person under 18 or with a mental disorder who is giving evidence by live television link is the victim of an offence that is not a "relevant offence," the judge, under section 14(1A), may also require that the questions posed should be asked through an intermediary, if satisfied that this is required by the interests of justice.

PLACEMENT OF SCREENS

12.31 Section 14A Criminal Evidence Act 1992 as amended provides that in proceedings instituted after 30 May 2018 that relate to a "relevant offence," where a person who is under 18 years of age is giving evidence other than by way of live television link, the judge may, on the application of the prosecution or the accused, direct that a screen or other similar device be positioned in an appropriate place, so as to prevent the witness from seeing the accused when giving evidence, unless the judge is satisfied that in all the circumstances of the case such a direction would be contrary to the interests of justice.

Where a person (under or over 18 years of age) giving evidence by live television link is the victim of an offence that is not a "relevant offence," the judge, under section 14A(2), may also direct that a screen or other similar device be positioned in an appropriate place, so as to prevent the witness from seeing the accused when giving evidence, if satisfied that this is required by the interests of justice.

12.32 Where a Judge is making a decision under sections 13(1A), 14 (1A) or 14A(2) in proceedings where the offence is not a "relevant offence," to make available to the victim of that offence one of the measures in section 13, 14 or 14A, the judge, in accordance with section 14AA, will have regard to the need to protect the victim from secondary and repeat victimisation, intimidation or retaliation, taking into account the nature and circumstances of the case, and the personal characteristics of the victim.

12.33 Where a victim of crime is a witness in criminal proceedings and is outside the State, the prosecutor will consider applying as appropriate under section 67 of the Criminal Justice (Mutual Assistance) Act 2008, or section 13 of the Criminal Evidence Act 1992 as amended, to allow the witness to give evidence by live television link from outside the State. It will be a matter for the judge hearing the application to decide whether the witness should be allowed to give such evidence in the circumstances. With regard to section 67 of the 2008 Act, the witness must be in a designated state and the judge must be satisfied that it is not desirable or practicable for the witness to give evidence in person.

QUESTIONING IN RESPECT OF PRIVATE LIFE OF VICTIM AND DISCLOSURE OF SENSITIVE MATERIAL

12.34 The prosecutor will have regard to the provisions of section 21 of the Criminal Justice (Victims of Crime) Act 2017. This section allows the court to give such directions as the court considers just and proper regarding any evidence adduced or sought be adduced and any question asked in cross-examination at the trial, which relates to the private life of the victim and is unrelated to the offence.

12.35 Recognising that much of the material that may be sought to be disclosed in criminal proceedings, in particular in proceedings for sexual offences, is of a private and often sensitive nature, the prosecutor will insofar as possible and within the confines of the legal responsibilities have regard to the privacy

interests of victims in relation to disclosure as set out in the Memoranda of Understanding concluded with a number of agencies for the purpose of assisting in the process of disclosure of sensitive material.

12.36 With regard to the court procedure for the disclosure of counselling records in accordance with section 19A Criminal Evidence Act 1992 as inserted by section 39 Criminal Law (Sexual Offences) Act 2017 as set out in **Chapter 9**, paragraphs 9.15 to 9.18, the prosecutor in the normal course will not have seen the counselling records in question and the decision on disclosure of such records will be for the court. However, the prosecutor will:

a) notify the victim of the prosecutor's intention to apply to the court for disclosure of a counselling record, where no such disclosure application has been made by the accused and the prosecutor believes it is in the interests of justice that a counselling record should be disclosed;

b) advise the victim of their entitlement and that of any person who has possession or control of the records to be heard in relation to an application for disclosure of counselling records and of the entitlement of the victim to be legally represented for that purpose during the application. The prosecutor will upon request by the victim contact the Legal Aid Board who will arrange for such legal representation;

c) apply to the court for the exclusion from the court, during the hearing of the application, of all persons except officers of the court and persons directly concerned in the proceedings and such other persons as the court may determine.

EVIDENCE IN RELATION TO SEXUAL EXPERIENCE

12.37 The Criminal Law (Rape) Act 1981, section 3, provides that evidence cannot be adduced or questions asked in cross examination about any sexual experience of the victim, other than that to which the charge relates, without the prior leave of the Court. This restriction applies in a prosecution for a 'sexual assault offence' as defined in the 1981 Act comprising a list of sexual offences including rape and sexual assault. The full list of offences to which this provision applies are set out in APPENDIX 4: Evidence in Relation to Sexual Experience.

The prosecutor will, in accordance with the provisions of sections 3, 4, 4A and 6(2) of the Criminal Law (Rape) Act 1981:

a) object to questions being asked of a witness and/or evidence being adduced by the accused about any sexual experience of the victim with any person, other than that to which the charge relates, where prior leave of the court has not been obtained;

b) notify the victim if the accused has given notice of intention to apply:

(i) under section 3 - to the trial judge - for leave to cross-examine the victim about any sexual experience of the victim with any person, other than that to which the charge relates; or

(ii) under section 4 - to the judge conducting proceedings under Part 1A of the Criminal Procedure Act 1967 relating to the dismissal of a charge of a sexual assault offence or the taking of a person's evidence by way of deposition in the case of a sexual assault offence – for leave to adduce evidence or ask a question which, if the proceedings were a trial as under section 3, could not be adduced or asked without leave of the trial judge.

c) advise the victim of the their entitlement to be heard in relation to the accused's application and to be legally represented for that purpose during the application (see paragraph 12.38 below) – the prosecutor will upon request by the victim contact the Legal Aid Board who will arrange for such legal representation;

d) apply to the trial judge for the exclusion from the court, during the hearing of the accused's application, of all persons except officers of the court and persons directly concerned in the proceedings – without prejudice to the right of a parent, relative or friend of the victim, or of the accused where the accused is not of full age, to remain in court.

e) oppose the accused's application if, in the view of the prosecutor, it would not be unfair to the accused to refuse to allow the evidence to be adduced or the question to be asked, having regard to the provisions of sections 3(2)(b) and 4(2) of the 1981 Act.

12.38 Whilst all proceedings for a 'sexual assault offence' attract the requirement to obtain leave of the court to ask questions of a witness and/or adduce evidence about the victim's sexual experience, the entitlement in section 4A of the Criminal Law (Rape) Act 1981 Act of a victim to be heard and legally represented during an application by an accused under section 3 or 4 of the Criminal Law (Rape) Act 1981 does not extend to every 'sexual assault offence' as defined in the 1981 Act. For example, the victim's entitlement does not include the offence of sexual assault. The full list of offences to which section 4A applies are set out in APPENDIX 5: Legal Representation Where Evidence in Relation to Sexual Experience is Adduced.

LEGAL ADVICE

12.39 Prosecutors will work with the Garda Síochána to ensure that victims in prosecutions for sexual offences are aware of their entitlement to free legal advice which is arranged by the Legal Aid Board in accordance with the provisions of section 26(3A) of the Civil Legal Aid Act 1995. This section lists the sexual offences in respect of which the victim is entitled to free legal advice. The entitlement does not extend to prosecutions for all sexual offences. For example, the offence of sexual assault is not included. The full list of offences for which free legal advice is available is set out in APPENDIX 6: Legal Advice.

12.40 A person who is identified as a suspected victim of a human trafficking offence is entitled to free legal advice which is arranged by the Legal Aid Board in accordance with the provisions of section 26(3B) of the Civil Legal Aid Act 1995. The entitlement applies whether or not a prosecution for the human trafficking offence has been instituted. Determinations as to whether there are reasonable grounds for believing a person is a victim of a human trafficking offence are made by the Garda Síochána under administrative arrangements for the protection of such victims.

FREEDOM OF INFORMATION

12.41 Information about requests to the Office of the DPP under the law on freedom of information can be found in Chapter 16: Communication with the Director of Public Prosecutions and on the Office website at www.dppireland.ie.

PERSONAL DATA

12.42 Information about how the Office of the DPP processes personal data under data protection law can be found in Chapter 16: Communication with the Director of Public Prosecutions.

COMPLAINTS

12.43 Prosecutors or members of the Director's staff who become aware of anyone wishing to make a complaint about services provided by the Office of the DPP which directly affected them will inform those persons of the Complaints Policy. Information on the Complaints Policy can be found in Chapter 16: Communication with the Director of Public Prosecutions and on the Office website at www.dppireland.ie.

12.44 Victims of crime, or family members of victims of crime who have died, are ill or otherwise incapacitated, who are dissatisfied with a decision not to prosecute may request a summary of the reasons for the decision or a review of the decision. That is a separate process to making a complaint about services provided by the Office of the DPP. Requests for reasons or review are discussed in paragraphs 12.10 to 12.19 above and further information can be found on the Office website at www.dppireland.ie.

13: Summary Trial

13.1 The great majority of cases dealt with in the District Court are commenced by the Garda Síochána without express reference to the Office of the DPP. Chapter 7 sets out the circumstances in which the Garda Síochána should seek a direction from the Office of the DPP before preferring charges in indictable cases or cases likely to be heard on indictment. The Garda Síochána are authorised to commence summary proceedings in the name of the Director of Public Prosecutions in cases other than those in which the Commissioner of An Garda Síochána or the Director has issued detailed instructions, directions or advices not to do so or to do so only after seeking a direction from the Office of the DPP.

13.2 Where the Director has issued either particular or general advices to the Garda Síochána, or directions under section 8 of the Garda Síochána Act 2005, the Garda Síochána must comply with those advices or directions. These guidelines are additional to any such advices and directions which are not intended to be superseded by the guidelines.

13.3 The Garda Síochána are in any case free to seek the specific directions of the Director even in a case of a summary nature where they have been authorised to prosecute in the Director's name without a specific direction.

13.4 The Garda Síochána when prosecuting under the authority delegated to them by the Director are expected to comply with the duties of prosecutors set out in these guidelines.

13.5 The statutory time limit for the commencement of summary proceedings in most cases is six months although longer statutory time limits are provided for in some cases.

ELECTION BETWEEN TRIAL ON INDICTMENT AND SUMMARY TRIAL AND CONSENT TO SUMMARY DISPOSAL

13.6 Apart from deciding on the appropriate charge or charges, it is also necessary, other than in relation to purely summary offences or offences which may be tried only on indictment, for the prosecutor to consider whether the prosecution should take place in the District Court or on indictment. Three possible types of case can arise:

a) Where the legislature has created offences which may be tried either summarily or on indictment without giving the accused an option in the choice of venue, then the decision on venue is for the prosecutor. Should the prosecutor's decision be to prosecute summarily that decision is subject to the judge of the District Court being satisfied that the offence is a minor one fit to be tried summarily;

b) A second type of case consists of those in which the accused has an option of being tried in the District Court or on indictment. In these cases the accused's option for summary trial is subject both to the judge's opinion that the offence is a minor one fit to be tried summarily and to the prosecutor's consent to summary disposal and the prosecutor must decide whether it is appropriate to give that consent. These cases include 'scheduled offences' within the meaning of section 2 of the Criminal Justice Act 1951, as well as some other statutory offences.

c) A third category of cases calling for the prosecutor's consideration relates to cases that can be dealt with under section 13 of the Criminal Procedure Act 1967 concerning indictable offences which may be disposed of in the District Court on a plea of guilty.

13.7 However, a category of grave offences, including murder and rape offences, can be dealt with only in the Central Criminal Court.

13.8 Summary trial is intended to provide the speediest disposition of justice. Prosecutors should have regard to the effect of any delay likely to arise from the choice of venue, any advantages (including deterrence) of a speedier resolution and whether delay would have a serious adverse effect on the victim of the offence or a witness. However, speed of disposal should only be one factor and the prosecutor should also have regard to the nature of the case and whether the circumstances make the alleged offence one of a serious character unfit to be dealt with summarily.

13.9 In deciding whether to elect for or consent to summary disposal, whether on a plea of guilty or otherwise, the main factor to be taken into account is whether the sentencing options open to the District Court would be adequate to deal with the alleged conduct complained of having regard to all the circumstances of the case and in particular the seriousness of the offence. In this regard the Director has in relation to certain types of offences given to members of the Garda Síochána and other investigating agencies a general consent or election to have such offences dealt with in the District Court without the necessity of first contacting the Office of the DPP or submitting a completed investigation file. An example of a case falling into this category is possession of controlled drugs for personal use. Even in those types of cases, however, the Garda Síochána should seek directions where the particular facts of the case, such as the multiplicity of such offences or the previous record of an accused or other aggravating circumstances, might suggest that the sentencing options available in the District Court would be inadequate.

14: Accomplice Evidence

14.1 A decision whether to call an accomplice to give evidence for the prosecution frequently presents conflicting considerations calling for the exercise of careful judgment in the light of all the available evidence. Inevitably, however, there will be instances where the only evidence available to the prosecution is that of an accomplice or where there would not be a sufficient case to bring a prosecution without the evidence of an accomplice. There may also be cases where the evidence of the accomplice, though not the only evidence or essential to the case, gives significant support to the prosecution.

14.2 In conjunction with considering whether to call an accomplice, the question may arise whether that accomplice should also be prosecuted. In this regard, unless the accomplice has been dealt with in respect of any participation by that accomplice in the criminal activity the subject of the charge against the accused, or granted an immunity from prosecution, the accomplice may be in a position to claim privilege against self-incrimination in respect of the very matter the prosecution wishes to adduce in evidence.

14.3 Usually any case against an accomplice should be finally disposed of before the accomplice is called to give evidence against other accused persons in respect of the same offence.

14.4 In some circumstances it may be prudent to grant concessions to people who have participated in alleged offences, in order to have their evidence available against others. Such concessions may include:

a) an indemnity against prosecution;

b) an acceptance of a plea of guilty to fewer charges or a lesser charge than might otherwise have been proceeded with, or an agreement to deal with the case or consent to its being dealt with in a summary manner.

14.5 An indemnity may be granted in respect of completed criminal conduct but can never be granted by the Director to cover future conduct.

14.6 Any decision to grant an indemnity or other concession is one for the Director. In determining that question and where the balance lies, account will be taken of the following matters:

a) the significance, credibility and reliability of the accomplice's testimony;

b) the degree of apparent involvement of the accomplice in the criminal activity in question compared with that of the accused against whom the accomplice is a witness;

c) the strength of the prosecution evidence against the accused without the evidence it is expected the accomplice can give and, if some charge or charges could be established against the accused without the accomplice's evidence, the extent to which those charges would adequately reflect the accused's apparent culpability;

d) the extent to which the prosecution's evidence is likely to be strengthened if the accomplice testifies and the significance and reliability of that testimony;

e) the possibility of the prosecution making its case other than by relying on the evidence the accomplice can give (for example, the likelihood of further investigations disclosing sufficient independent evidence to remedy any weakness in the case) or of the evidence being available from other sources;

f) whether or not the evidence that the accomplice can give is reasonably necessary to secure the conviction of the accused person;

g) whether there is or is likely to be sufficient admissible evidence to substantiate charges against the accomplice, and whether it would be in the public interest that the accomplice be prosecuted but for the preparedness of the accomplice to testify for the prosecution;

h) whether, if the accomplice were to be prosecuted and then testify, there is a real basis for believing that the personal safety of that accomplice would be at risk;

i) whether the accomplice agrees to be available to testify at any trial and to honestly answer all such questions as may be asked;

j) the character, credit and criminal record of the accomplice.

CARTEL IMMUNITY PROGRAMME

14.7 Special arrangements are in force concerning applications for immunity on behalf of offenders who have reported the activities of unlawful cartels in which they have participated. The Director of Public Prosecutions has agreed with the Competition and Consumer Protection Commission how to consider such applications and a published Cartel Immunity Programme sets out the policy of both the Director and the Commission and outlines the process through which parties must agree to cooperate in order to qualify for immunity. The Programme is published on the Director's website at www.dppireland.ie and on the website of the Competition and Consumer Protection Commission at www.ccpc.ie.

15: Confiscation, Forfeiture and Disqualification

15.1 In the course of conducting criminal prosecutions or related proceedings, whether during final disposal or at any other appropriate stage, prosecutors should ensure that courts are fully aware of any power or duty or discretion they have under legislative provisions concerning confiscation, seizure, detention, forfeiture, destruction, disposal, revocation or disqualification. While regard should be had to the rights of any innocent party who may be affected, orders should be sought by the prosecutor, where appropriate, to ensure that offenders do not profit from their criminal conduct and that property or funds associated with the commission of offences is subject to confiscation or forfeiture.

CONFISCATION UNDER PART II OF THE CRIMINAL JUSTICE ACT 1994

15.2 Confiscation is an issue to be considered and advised upon from the outset in all cases. It should not be regarded as a mere optional addition to sentence proceedings or to the conduct of a prosecution. The question of whether or not a confiscation application might be appropriate should be addressed by the investigator when preparing or submitting the file and should be considered by the professional officer dealing with the case when a prosecution is being directed. Part II of the Criminal Justice Act 1994 specifically provides for confiscation following conviction on indictment. It applies to drug trafficking and offences other than drug trafficking or the financing of terrorism. Additions to Part II of the Criminal Justice Act 1994 were made by Statutory Instrument 540 of 2017 European Union (Freezing and Confiscation of Instrumentalities and Proceeds of Crime) Regulations 2017, which took effect on 28 November 2017. Since that date in respect of 'relevant offences' listed in the 1994 Act, a confiscation application can be made not only in respect of the proceeds of the particular offence for which the offender has been convicted but also in respect of the proceeds of conduct constituting that offence (extended confiscation).

15.3 Where a person has been convicted on indictment and sentenced or otherwise dealt with in respect of an offence of drug trafficking, section 4 of the Criminal Justice Act 1994 requires the court to determine whether the person has benefited from drug trafficking. Section 8F of the Criminal Justice Act 1994 requires the court to also determine if the person has benefited from conduct constituting drug trafficking. If the court so determines, subject to the provisions of section 4 and section 8F, then it must make a confiscation order in the matter. The making of such determinations is mandatory unless, after preliminary inquiries, the court is satisfied that the amount, if any, which might be recovered would not justify making a confiscation order if, for example, the person has no means or assets. Section 5(4) of the Criminal Justice Act 1994 provides for a statutory presumption that any benefit accruing to the person in the six years before criminal proceedings are commenced against him was received in connection with drug trafficking carried on by him.

15.4 Where a person has been convicted on indictment and sentenced or otherwise dealt with in respect of an offence of financing terrorism, section 8A of the Criminal Justice Act 1994 gives discretion to the Director to apply for a confiscation order, and to the court to make such an order, if it is determined that the convicted person holds funds subject to confiscation.

15.5 Where a person has been convicted on indictment and sentenced or otherwise dealt with in respect of an offence other than drug

trafficking or financing terrorism, section 9 of the Criminal Justice Act 1994 gives discretion to the Director to apply for a confiscation order, and to the court to make such an order, if it is determined that the person has benefited from the offence for which he was convicted.

15.6 Where a person has been convicted on indictment and sentenced or otherwise dealt with in respect of a list of 'relevant offences' listed in the Criminal Justice Act 1994 as amended, section 8F of the Criminal Justice Act 1994 gives discretion to the Director to apply for a confiscation order, and to the court to make such order, if it is determined that the convicted person has benefited from the offence for which he was convicted or from conduct constituting that offence.

15.7 In determining any questions arising under the Criminal Justice Act 1994 as to whether a person has benefited from drug trafficking or financing terrorism or other offences, or as to the amount to be recovered in each case, the standard of proof required to determine those questions is the lower standard applicable to civil proceedings, i.e. the balance of probabilities, as provided in sections 4(6), 8A(6), 8F(8) and 9(7) of the 1994 Act.

15.8 Part III of the Criminal Justice Act 1994 provides for the enforcement of confiscation orders, the appointment of receivers in respect of realisable property, and the making of freezing and ancillary or variation orders which preserve property for possible future confiscation following conviction. Section 24 of the 1994 Act allows the Director of Public Prosecutions, in circumstances specified by section 23 of the 1994 Act, to apply to the High Court for freezing orders which prohibit persons from dealing with realisable property. The Office of the DPP should be consulted promptly if any such enforcement orders may be appropriate.

FORFEITURE OF DRUG TRAFFICKING MONEY IMPORTED OR EXPORTED IN CASH

15.9 Where reasonable grounds exist to suspect the importation or exportation of cash above a certain amount, which directly or indirectly represents the proceeds of crime, or is intended for use in connection with any criminal conduct, section 38 of the Criminal Justice Act 1994 authorises the Gardaí or Customs and Excise Officers to search persons for cash or to seize and detain cash. In the event that cash is seized and detained under section 38, a judge of the Circuit Court may order its forfeiture if the Director of Public Prosecutions applies for such an order under section 39 of the 1994 Act. The Circuit Court judge must be satisfied that the cash directly or indirectly represents the proceeds of crime or is intended by any person for use in connection with any criminal conduct. The standard of proof in such applications is the lower standard applicable to civil proceedings, i.e. the balance of probabilities, as provided in section 39(3) of the 1994 Act.

FORFEITURE FOR DRUGS OFFENCES

15.10 A forfeiture order under section 30(1) of the Misuse of Drugs Act 1977 may be made where a person is convicted of an offence under the Misuse of Drugs Act 1977, or a drug trafficking offence within the meaning of the Criminal Justice Act 1994. Forfeiture may be ordered of anything that the court is satisfied relates to the offence and it may be destroyed or dealt with in such other manner as the court thinks fit.

FORFEITURE OF PROPERTY LAWFULLY SEIZED

15.11 A forfeiture order under section 61(1) of the Criminal Justice Act 1994 may be made in respect of property which was lawfully seized from a person who has since been convicted of an offence, or which was in the convicted person's possession or control at the time of arrest or summons. The court which convicted must be satisfied that the property was used for the purpose of committing or facilitating the commission of any offence, or was intended to be used for that purpose, or the offence consisted of unlawful possession of property lawfully seized or in the possession or control of the convicted person at the time of arrest or summons. In relation to 'relevant offences' listed in the Criminal Justice Act 1994, a forfeiture order

under section 61(1) can be made for property that was used or intended to be used for the purpose of committing or facilitating the commission of any offence even where the property was not lawfully seized or in the possession of the convicted person at the time of arrest or summons.

FORFEITURE OF FIREARMS OR EXPLOSIVES

15.12 Under section 23 of the Firearms Act 1925, firearms, prohibited weapons, or ammunition may be forfeited or disposed of, and any firearm certificate held may be cancelled, by order of the court which convicted. This applies where any person is convicted of an offence under the 1925 Act, or of any crime in respect of which a sentence of imprisonment is imposed, or is ordered to enter into a bond to keep the peace or be of good behaviour which is conditional upon not possessing or carrying a firearm.

15.13 Under section 61(1A) of the Criminal Justice Act 1994, the court which convicted must order forfeiture of firearms or explosives in respect of persons convicted of offences under the following provisions unless there would be a serious risk of injustice if it made the order:

a) Explosive Substances Act 1883 – sections 3 or 4;

b) Firearms Act 1925 – section 15;

c) Firearms Act 1964 – section 27A;

d) Criminal Justice (Terrorist Offences) Act 2005 – section 6.

DISQUALIFICATION OF COMPANY DIRECTORS AND OTHERS

15.14 Section 839 of the Companies Act 2014 provides for automatic disqualification of persons convicted on indictment of any offence in relation to a company under the 2014 Act (or any other enactment as may be prescribed) or any offence involving fraud or dishonesty. Disqualification is for a period of 5 years after the date of conviction or for such other (shorter or longer) period as the court, on the application of the prosecutor or the convicted person, may order having regard to all the circumstances of the case. Such orders operate to disqualify the person from being appointed or acting as a director or other officer, statutory auditor, receiver, liquidator or examiner or being in any way, whether directly or indirectly, concerned or taking part in the promotion, formation or management of a company within the meaning of section 819(6) of the 2014 Act, or any friendly society within the meaning of the Friendly Societies Acts 1896 to 2014, or any society registered under the Industrial and Provident Societies Acts 1893 to 2014.

15.15 Section 842 of the Companies Act 2014 gives discretion to the court of its own motion to make disqualification orders in respect of company directors and certain other classes of person concerned with companies. The court may also make such orders on the application of those persons specified in section 844 of the 2014 Act including the Director of Public Prosecutions who may apply for disqualification orders under subsections (a) to (g) of section 842.

OTHER PROVISIONS

15.16 There are many other legislative and regulatory provisions for various forms of confiscation, seizure, detention, forfeiture, destruction, disposal, revocation or disqualification. They generally follow upon final disposal of criminal prosecutions but some may apply at other appropriate stages in criminal or related proceedings. A common example is disqualification for holding a driving licence. The following list of statutory provisions, while not comprehensive or exhaustive, is relevant and should be borne in mind by the prosecutor – it is intended only as an aide memoire and the specific legislation should be consulted in each case:

- Intoxicating Liquor Act 1927 – section 28 – the licence to sell intoxicating liquor by retail may be forfeit and if so no new licence will be granted.

- Offences Against the State Act 1939 – section 22 – all of the property of an organisation is forfeited if it is declared unlawful and an order is made for its suppression.

- Road Traffic Act 1961 – sections 26 and 27 – consequential or ancillary disqualification for holding a driving licence.

- Wildlife Act 1976 – section 76 – any specimen of fauna, flora, fossils, or minerals or any part, product or derivative of such a specimen or any firearm, trap, snare, net or any mechanically-propelled vehicle or any vessel or aircraft may be forfeited.

- Offences Against the State (Amendment) Act 1985 – section 2 – monies held by a bank and believed to belong to an unlawful organisation may be forfeited.

- Customs and Excise (Miscellaneous Provisions) Act 1988 – sections 6, 7 and 8 – detention, seizure and forfeiture of goods and vehicles, ships, boats, carriages or other conveyances, horses or other animals and things made use of, in cases of non-payment of import duty or contravention of any prohibition or restriction on importation or exportation.

- Video Recordings Act 1989 – section 28 – video recordings relating to offences under the Act may be forfeited and destroyed or otherwise disposed of.

- Firearms and Offensive Weapons Act 1990 – section 13 – weapons and other articles may be forfeited and destroyed or otherwise disposed of.

- Road Traffic Act 1994 – section 41 – detention, removal, storage and disposal of vehicles being driven while disqualified or without a driving licence, learner permit, insurance, road tax, NCT certificate, or certificate of roadworthiness.

- Child Trafficking and Pornography Act 1998 – section 8 – anything seized under section 7 of the 1998 Act, or anything shown to satisfaction of the court to relate to the offence, may be forfeited and destroyed or otherwise disposed of.

- Copyright and Related Rights Act 2000 – sections 145 and 264 – infringing or illicit copies, recordings, articles or devices may be forfeited to the copyright or rights owner, or destroyed or otherwise dealt with.

- Illegal Immigrants (Trafficking) Act 2000 – section 4 – forfeiture of any ship, boat, aircraft or mechanically propelled vehicle and associated equipment, fittings and furnishings.

- Planning and Development Act 2000 – section 97(21) – certain certificates granted by a planning authority may be revoked if obtained on foot of a statutory declaration or information or documentation which is false or misleading in a material respect or which is untrue.

- Industrial Designs Act 2001 – section 72 – infringing products or articles may be forfeited to the registered proprietor or destroyed or otherwise dealt with.

- Criminal Justice (Theft and Fraud Offences) Act 2001 – sections 15 and 50 – articles or things seized may be forfeited and destroyed, or disposed of, or otherwise dealt with.

- Road Traffic Act 2010 – section 60 – seizure of driving licence, or learner permit, or document purporting to be either of those, where driving whilst disqualified, or where it was fraudulently obtained, forged or altered.

- Animal Health and Welfare Act 2013 – sections 57 to 60 – with respect to animals, animal products, or animal feeds, disqualification from: owning; having any interest in; keeping; dealing in; having charge or control, directly or indirectly; working with; having charge or control of the slaughter, manufacture, importation, preparation, handling, storage, transport, exportation, distribution – seizure and detention upon disqualification of all animals owned or possessed or controlled – seizure and detention upon conviction and subsequent sale, disposal or destruction of all animals owned or kept – forfeiture of animals, animal product, animal feed, vessels, vehicles, aircraft, equipment or machinery.

- Taxi Regulation Act 2013 – section 30 – mandatory disqualification for holding a small public service vehicle driver licence if convicted of certain specified offences.

- Criminal Justice (Corruption of Offences) Act 2018 – section 17, 20 and 21 - forfeiture of any gift, consideration or advantage accepted or obtained in connection with certain offences under the Act or, in the alternative, the forfeiture of land, cash or other property of an equivalent value - forfeiture of any office, position or employment as a 'relevant Irish official' as defined in the Act and prohibitions for a period on seeking to occupy such office - seizure of suspected bribes - forfeiture of property where the court is satisfied on application by Director of Public Prosecutions, that it is a gift or consideration used or intended to be used for the purposes of certain offences under the Act, whether or not proceedings are brought against a person for an offence with which the gift or consideration concerned is connected.

16: Communication with the Director of Public Prosecutions

PERMITTED AND PROHIBITED COMMUNICATIONS

16.1 Section 6 of the Prosecution of Offences Act 1974 prohibits certain communications with the Director of Public Prosecutions and the Director's officers in relation to criminal proceedings. The effect of section 6 was extended by section 2 of the Criminal Justice Act 1993 and by sections 21 and 29 of the Criminal Procedure Act 2010.

16.2 The following persons are permitted by law to write to the Office of the DPP:

a) a victim of a crime;

b) a family member of a victim of a crime;

c) an accused person;

d) a family member of an accused person; or

e) a lawyer, doctor or social worker acting on behalf of a client.

A 'member of the family' means: wife, husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, half-sister, adopted family members, and includes a civil partner.

The address to write to is:

Office of the Director of Public Prosecutions
Infirmary Road
Dublin 7
D07 FHN8

16.3 It is against the law for anyone else to contact the Office of the DPP for the purpose of influencing the making of a decision to:

a) withdraw or not to start a prosecution – section 6(1) of the Prosecution of Offences Act 1974;

b) apply to the Court of Appeal for a review of sentence – section 2(4) of the Criminal Justice Act 1993;

c) apply to the Court of Appeal for a re-trial order in respect of a person tried on indictment and acquitted either at trial, or on appeal against conviction, or on appeal from such a decision on appeal, where it appears that new and compelling evidence against the person acquitted has become available and it is in the interests of justice to do so – sections 8(3) and 21 and Part 3 of the Criminal Procedure Act 2010;

d) apply to the Court of Appeal for a re-trial order following an acquittal which has become tainted by reason of the person acquitted or another person being convicted of an offence against the administration of justice relating to the proceedings which resulted in the acquittal, where it appears that there is compelling evidence against the person acquitted and it is in the public interest to do so – sections 9(3) and 21 and Part 3 of the Criminal Procedure Act 2010;

e) appeal on a question of law to the Court of Appeal the acquittal of a person tried on indictment, where it appears that the trial court erroneously excluded compelling evidence, or gave a direction to the jury to acquit which was wrong in law and there was evidence in the proceedings upon which a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt – sections 23(1)(I) and 29 of the Criminal Procedure Act 2010;

f) seek leave to appeal on a question of law to the Supreme Court under Article 34.5.4 of the Constitution the acquittal of a person tried on indictment in the Central Criminal Court, where it appears the trial court erroneously excluded compelling evidence, or gave a direction to the jury to acquit which was wrong in law and there was evidence in the proceedings upon which a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt – sections 23(1)(II) and 29 and Part 4 of the Criminal Procedure Act 2010; or

g) seek leave to appeal on a question of law to the Supreme Court under Article 34.5.3 of the Constitution a decision of the Court of Appeal not to order the re-trial of a person whose conviction on indictment was quashed on appeal, where it appears that a ruling was made during the hearing of the appeal which erroneously excluded compelling evidence – sections 23(2) and 29 and Part 4 of the Criminal Procedure Act 2010.

16.4 If a communication is deemed to be unlawful, the Director and the Director's officers are required by law not to entertain the communication further.

16.5 Furthermore, Kearns J. in *Linda Eviston v. DPP* [2002] 3 IR 260 at 279 referred to communications designed to persuade the Director to bring a prosecution as "injudicious and improper" if made by persons other than those who are permitted to write to the Office of the DPP (see paragraph 16.2 above). Communications deemed to be injudicious and improper are not entertained by the Director or the Director's officers.

DECISIONS NOT TO PROSECUTE

16.6 As set out in Chapter 12, victims of crime have a right to request reasons for decisions not to prosecute made by the Office of the DPP. They also have a right to request reviews of decisions not to prosecute.

16.7 The categories of persons who can make such requests are:

a) a victim of a crime;

b) a family member of a victim in a fatal case;

c) a solicitor acting on behalf of either of the above.

16.8 Requests for reasons and/or reviews in relation to decisions not to prosecute should be made in writing and addressed to:

Victims Liaison Unit
Office of the Director of Public Prosecutions
Infirmary Road
Dublin 7
D07 FHN8

Further information about making such requests is available in chapter 12 and on the Office website at www.dppireland.ie.

FREEDOM OF INFORMATION

16.9 The Freedom of Information Act 2014 asserts the right of members of the public to obtain access to official information to the greatest extent possible consistent with the public interest and the right to privacy of individuals.

16.10 The Office of the DPP makes information routinely available to the public in relation to its structure, functions and activities through the publication of its Annual Report, Strategy Statement and Statement of General Guidelines for Prosecutors. The Office will continue to expand the range of information available to the public through its website.

16.11 It is important for the public to be aware that under the Freedom of Information Act 2014 the records of the Office of the DPP are subject to the restriction provided for in section 42(f). Therefore, records held or created by the office, other than those relating to the general administration of the Office, are not accessible under the 2014 Act. This means that records concerning criminal case files are not accessible under the Freedom of Information Act 2014.

16.12 Requests under the Freedom of Information Act should be made in writing on the application form provided and addressed to:

Freedom of Information Officer
Office of the Director of Public Prosecutions
Infirmary Road
Dublin 7
D07 FHN8

Alternatively, completed application forms may be sent by e-mail to: foi@dppireland.ie.
The application form and further information about making such requests is available on the Office website at www.dppireland.ie.

PERSONAL DATA

16.13 The employees of the Office of the DPP and its agents are all subject to data protection law when processing personal data on behalf of the Office, and in particular when processing sensitive personal data. In dealing with its

core prosecution work, the Office is subject to Directive 680/2016/EU ('Directive') and Part 5 of the Data Protection Act 2018 ('Data Protection legislation'). The employees and agents of the office should be familiar with the data protection principles outlined in the Data Protection legislation which include keeping personal data safe and secure, ensuring personal data is processed lawfully and fairly, and only processing it for the purposes for which it was obtained.

16.14 The staff of the Office of the DPP and its agents should take particular care when they must remove personal data from the Office of the DPP for court attendance or meetings, ensuring that electronic data is only stored on encrypted hardware and that paper files are kept securely at all times. When transferring electronic personal data to other parties or storing it externally, they should ensure that the methods used are secure and compliant with data protection law. Where there is a personal data breach, or a suspicion that such a breach may have occurred, the Data Protection Officer of the Office of the DPP should be contacted immediately.

16.15 Data Protection legislation requires the Office of the DPP to retain a record of data processing activities, including a record of each category of personal data processed and of data subjects. The record must be made available to the Data Protection Commission on request.

16.16 The Office of the DPP processes personal data both under the General Data Protection Regulation (GDPR) and the Directive, the latter in relation to its core prosecution work. The GDPR applies to the processing of data in such areas as human resources and general administration. These Guidelines are concerned with the core prosecution work of the office. The lawful basis of processing data in this area of work is set out in the Prosecution of Offences Act 1974 and the Data Protection Acts 1988-2018.

16.17 Any person may make an application to the Office of the DPP for a copy of their personal data, as held by the Office, under Part 5 of the Data Protection Act 2018. Under Part 5, the right of access by the data subject may be restricted in certain situations, including where it will prejudice a prosecution or investigation or where the materials are privileged. Only the personal data of the person applying for their data can be provided, and all personal data of other parties must be redacted. There is no charge for making such a request but proof of identity will be required.

16.18 There is a general prohibition on the transfer of personal data outside of the European Union under Part 5 of the Data Protection Act 2018. Data can be transferred where there is an adequacy decision from the EU Commission that the third country (or international organisation) provides an adequate level of protection for personal data. If there is no adequacy decision in relation to the third country, section 98 of the Data Protection Act 2018 allows for the transfer of the data where there are appropriate safeguards with regard to the protection of personal data, and section 99 provides for derogations for specific situations. Any transfer of data to a third country must comply with the requirements of Chapter 5 of Part 5 of the Act.

COMPLAINTS

16.19 Anyone dissatisfied with a service provided by the Office of the DPP which directly affected them can make a complaint. This includes victims of crime, members of the judiciary, witnesses, members of the Garda Síochána, State Solicitors, barristers acting for the Director, members of the public, suppliers of goods and/or services, and offenders. The Complaints Policy does not cover dissatisfaction with decisions not to prosecute which are dealt with separately as set out in paragraphs 16.6 to 16.8 above.

16.20 Complaints should be made in writing and addressed to:

Communications Unit
Office of the Director of Public Prosecutions
Infirmary Road
Dublin 7
D07 FHN8

Further information about the Complaints Policy is available on the Office website at www.dppireland.ie.

APPENDICES

APPENDIX 1: Disclosure of Counselling Records

Offences to which section 19A of the Criminal Evidence Act 1992 as inserted by section 39 of the Criminal Law (Sexual Offences) Act 2017 applies (being the offences listed in the Schedule to the Sex Offenders Act 2001)

a) Rape;

b) Sexual assault (including the offences known as 'indecent assault upon a female person' and 'indecent assault upon a male person');

c) Aggravated sexual assault (within the meaning of section 3 of the Criminal Law (Rape) (Amendment) Act 1990);

d) Rape under section 4 of the Criminal Law (Rape) (Amendment) Act 1990;

e) An offence under section 1 or 2 of the Punishment of Incest Act 1908;

f) An offence under the Criminal Law (Sexual Offences) Act 2006;

g) An offence under section 61 or 62 of the Offences against the Person Act 1861;

h) An offence under section 3, 4 or 5 of the Criminal Law (Sexual Offences) Act 1993;

i) An offence under section 11 of the Criminal Law Amendment Act, 1885;

j) An offence under section 4 of the Criminal Law Amendment Act 1935;

k) An offence under section 3, 4, 4A, 5, 5A, or 6 of the Child Trafficking and Pornography Act, 1998;

l) An offence under the Criminal Law (Human Trafficking) Act 2008 in so far as the offence is committed for the purposes of the sexual exploitation of a person;

m) An offence under section 2 of the Sexual Offences (Jurisdiction) Act, 1996;

n) An offence under section 3, 4, 5, 6, 7, 8, 21 or 22 of the Criminal Law (Sexual Offences) Act 2017;

o) An offence consisting of attempting to commit an offence referred to above; aiding, abetting, counselling, procuring or inciting the commission of an offence referred to above; or conspiracy to commit an offence referred to above;

p) An offence under section 6 of the Criminal Law (Sexual Offences) Act 1993.

APPENDIX 2: Proceedings Otherwise than in Public

Offences to which section 6 of the Criminal Law (Rape) Act 1981 as substituted by section 11 of the Criminal Law (Rape) (Amendment) Act 1990 and as amended by section 29 of the Criminal Justice (Victims of Crime) Act 2017 applies

a) A "rape offence" within the meaning of section 1 of the Criminal Law (Rape) Act 1981 meaning:

   i) Rape;

   ii) Attempted rape;

   iii) Burglary with intent to commit rape;

   iv) Aiding, abetting, counselling or procuring rape, attempted rape or burglary with intent to commit rape;

   v) Incitement to rape;

   vi) Rape under section 4 of the Criminal Law (Rape) (Amendment) Act 1990;

   vii) Attempted rape under section 4;

   viii) Aiding, abetting, counselling or procuring rape under section 4 or attempted rape under section 4;

   ix) Incitement to rape under section 4;

   x) A sexual act with a child under 15 or 17 years of age contrary to section 2 or 3 of the Criminal Law (Sexual Offences) Act 2006 as substituted by sections 16 and 17 of the Criminal Law (Sexual Offences) Act 2017 – see section 6(3)(b) of the Criminal Law (Sexual Offences) Act 2006;

   xi) A sexual act with a child who has attained the age of 17 but not 18 by a person in authority contrary to section 3A of the Criminal Law (Sexual Offences) Act 2006 as inserted by section 18 of the Criminal Law (Sexual Offences) Act 2017 – see section 6(3)(b) of the Criminal Law (Sexual Offences) Act 2006;

   xii) Soliciting or importuning a child under 17 years of age for the purposes of a sexual act with a child under 15 or 17 or sexual assault, or a person who is mentally impaired for the purposes of sexual assault, contrary to section 6 of the Criminal Law (Sexual Offences) Act 1993 as substituted by section 2 of the Criminal Law (Sexual Offences) (Amendment) Act 2007 – see section 3(3)(b) of the Criminal Law (Sexual Offences) (Amendment) Act 2007.

b) Aggravated sexual assault;

c) Attempted aggravated sexual assault;

d) Aiding, abetting, counselling and procuring (b) or (c);

e) Incitement to aggravated sexual assault;

f) Conspiracy to commit any of the offences (a) – (e).

APPENDIX 3: Giving of Evidence by Live Television Link, Through an Intermediary and Placement of Screens

"Relevant offences" to which Part III of the Criminal Evidence Act 1992 as amended by section 30 of the Criminal Justice (Victims of Crime) Act 2017 and by section 44 of the Domestic Violence Act 2018 applies

a) A 'sexual offence' within the meaning of section 2 of the Criminal Evidence Act 1992 meaning:

   i) Rape;

   ii) Sexual assault (within the meaning of section 2 of the Criminal Law (Rape) (Amendment) Act 1990);

   iii) Aggravated sexual assault (within the meaning of section 3 of the Criminal Law (Rape) (Amendment) Act 1990);

   iv) Rape under section 4 of the Criminal Law (Rape) (Amendment) Act 1990;

   v) An offence under section 3 or 6 of the Criminal Law Amendment Act 1885;

   vi) An offence under section 5 or 6 of the Criminal Law (Sexual Offences) Act 1993;

   vii) An offence under section 1 or 2 of the Punishment of Incest Act 1908;

   viii) An offence under section 4A or 5A of the Child Trafficking Pornography Act 1998;

   ix) An offence under section 249 of the Children Act 2001;

   x) An offence under the Criminal Law (Sexual Offences) Act 2006;

   xi) An offence under section 3, 4, 5, 6, 7 or 8 of the Criminal Law (Sexual Offences) Act 2017.

b) an offence involving violence or the threat of violence to a person;

c) an offence under section 3, 4, 5 or 6 of the Child Trafficking and Pornography Act 1998;

d) an offence under section 2, 4, or 7 of the Criminal Law (Human Trafficking) Act 2008;

e) an offence under section 33, 38 or 39 of the Domestic Violence Act 2018;

f) an offence consisting of attempting or conspiring to commit, or of aiding or abetting, counselling, procuring or inciting the commission of, an offence in paragraph (a), (b), (c), (d) or (e) above.

APPENDIX 4: Evidence in Relation to Sexual Experience

Offences to which section 3 of the Criminal Law (Rape) Act 1981 as substituted by section 13 of the Criminal Law (Rape) (Amendment) Act 1990 and to which section 4 of the Criminal Law (Rape) Act 1981 as substituted by section 15 of the Criminal Justice Act 1999 apply

a) A "rape offence" within the meaning of section 1 of the Criminal Law (Rape) Act 1981 meaning:

   i) Rape;

   ii) Attempted rape;

   iii) Burglary with intent to commit rape;

   iv) Aiding, abetting, counselling or procuring rape, attempted rape or burglary with intent to commit rape;

   v) Incitement to rape;

   vi) Rape under section 4 of the Criminal Law (Rape) (Amendment) Act 1990;

   vii) Attempted rape under section 4;

   viii) Aiding, abetting, counselling or procuring rape under section 4 or attempted rape under section 4;

   ix) Incitement to rape under section 4;

   x) A sexual act with a child under 15 or 17 years of age contrary to section 2 or 3 of the Criminal Law (Sexual Offences) Act 2006 as substituted by sections 16 and 17 of the Criminal Law (Sexual Offences) Act 2017 – see section 6(3)(b) of the Criminal Law (Sexual Offences) Act 2006;

   xi) A sexual act with a child who has attained the age of 17 but not 18 by a person in authority contrary to section 3A of the Criminal Law (Sexual Offences) Act 2006 as inserted by section 18 of the Criminal Law (Sexual Offences) Act 2017 – see section 6(3)(b) of the Criminal Law (Sexual Offences) Act 2006;

   xii) Soliciting or importuning a child under 17 years of age for the purposes of a sexual act with a child under 15 or 17 or sexual assault, or a person who is mentally impaired for the purposes of sexual assault, contrary to section 6 of the Criminal Law (Sexual Offences) Act 1993 as substituted by section 2 of the Criminal Law (Sexual Offences) (Amendment) Act 2007 – see section 3(3)(b) of the Criminal Law (Sexual Offences) (Amendment) Act 2007.

b) Aggravated sexual assault;

c) Attempted aggravated sexual assault;

d) Sexual assault;

e) Attempted sexual assault;

f) Aiding, abetting, counselling and procuring (b) – (e);

g) Incitement to sexual assault or aggravated sexual assault;

h) Conspiracy to commit any of the offences (a) – (g).

APPENDIX 5: Legal Representation Where Evidence in Relation to Sexual Experience is Adduced

Offences to which section 4A of the Criminal Law (Rape) Act 1981 as inserted by section 34 of the Sex Offenders Act 2001 and as amended by section 6 of the Criminal Law (Sexual Offences) Act 2006 and by section 3 of the Criminal Law (Sexual Offences) (Amendment) Act 2007 applies

a) A "rape offence" within the meaning of section 1 of the Criminal Law (Rape) Act 1981 meaning:

   i) Rape;

   ii) Attempted rape;

   iii) Burglary with intent to commit rape;

   iv) Aiding, abetting, counselling or procuring rape, attempted rape or burglary with intent to commit rape;

   v) Incitement to rape;

   vi) Rape under section 4 of the Criminal Law (Rape) (Amendment) Act 1990;

   vii) Attempted rape under section 4;

   viii) Aiding, abetting, counselling or procuring rape under section 4 or attempted rape under section 4;

   ix) Incitement to rape under section 4;

   x) A sexual act with a child under 15 or 17 years of age contrary to section 2 or 3 of the Criminal Law (Sexual Offences) Act 2006 as substituted by sections 16 and 17 Criminal Law (Sexual Offences) Act 2017 – see section 6(3)(b) of the Criminal Law (Sexual Offences) Act 2006;

   xi) A sexual act with a child who has attained the age of 17 but not 18 by a person in authority contrary to section 3A of the Criminal Law (Sexual Offences) Act 2006 as inserted by section 18 of the Criminal Law (Sexual Offences) Act 2017 – see section 6(3)(b) of the Criminal Law (Sexual Offences) Act 2006;

   xii) Soliciting or importuning a child under 17 years of age for the purposes of a sexual act with a child under 15 or 17 or sexual assault, or a person who is mentally impaired for the purposes of sexual assault, contrary to section 6 of the Criminal Law (Sexual Offences) Act 1993 as substituted by section 2 of the Criminal Law (Sexual Offences) (Amendment) Act 2007 – see section 3(3)(b) of the Criminal Law (Sexual Offences) (Amendment) Act 2007.

b) Aggravated sexual assault;

c) Attempted aggravated sexual assault;

d) Aiding, abetting, counselling and procuring (a) or (b);

e) Incitement to aggravated sexual assault;

f) Conspiracy to commit any of the offences (a) – (e).

APPENDIX 6: Legal Advice

Offences to which section 26(3A) of the Civil Legal Aid Act 1995 as inserted by section 78 of the Civil Law (Miscellaneous Provisions) Act 2008 applies

a) Rape under common law;

b) Rape under section 2 of the Criminal Law (Rape) Act 1981;

c) Aggravated sexual assault under section 3 of the Criminal Law (Rape) (Amendment) Act 1990;

d) Rape under section 4 of the Criminal Law (Rape) (Amendment) Act 1990;

e) Soliciting or importuning a child under 17 years of age for the purposes of a sexual act with a child under 15 or 17 or sexual assault, or a person who is mentally impaired for the purposes of sexual assault, contrary to section 6 of the Criminal Law (Sexual Offences) Act 1993 as substituted by section 2 of the Criminal Law (Sexual Offences) (Amendment) Act 2007;

f) A sexual act with a child under 15 or 17 years of age contrary to section 2 or 3 of the Criminal Law (Sexual Offences) Act 2006 as substituted by sections 16 and 17 of the Criminal Law (Sexual Offences) Act 2017;

g) A sexual act with a child who has attained the age of 17 but not 18 by a person in authority, contrary to section 3A of the Criminal Law (Sexual Offences) Act 2006 as inserted by section 18 of the Criminal Law (Sexual Offences) Act 2017

h) Incest – contrary to section 1 or 2 of the Punishment of Incest Act 1908.