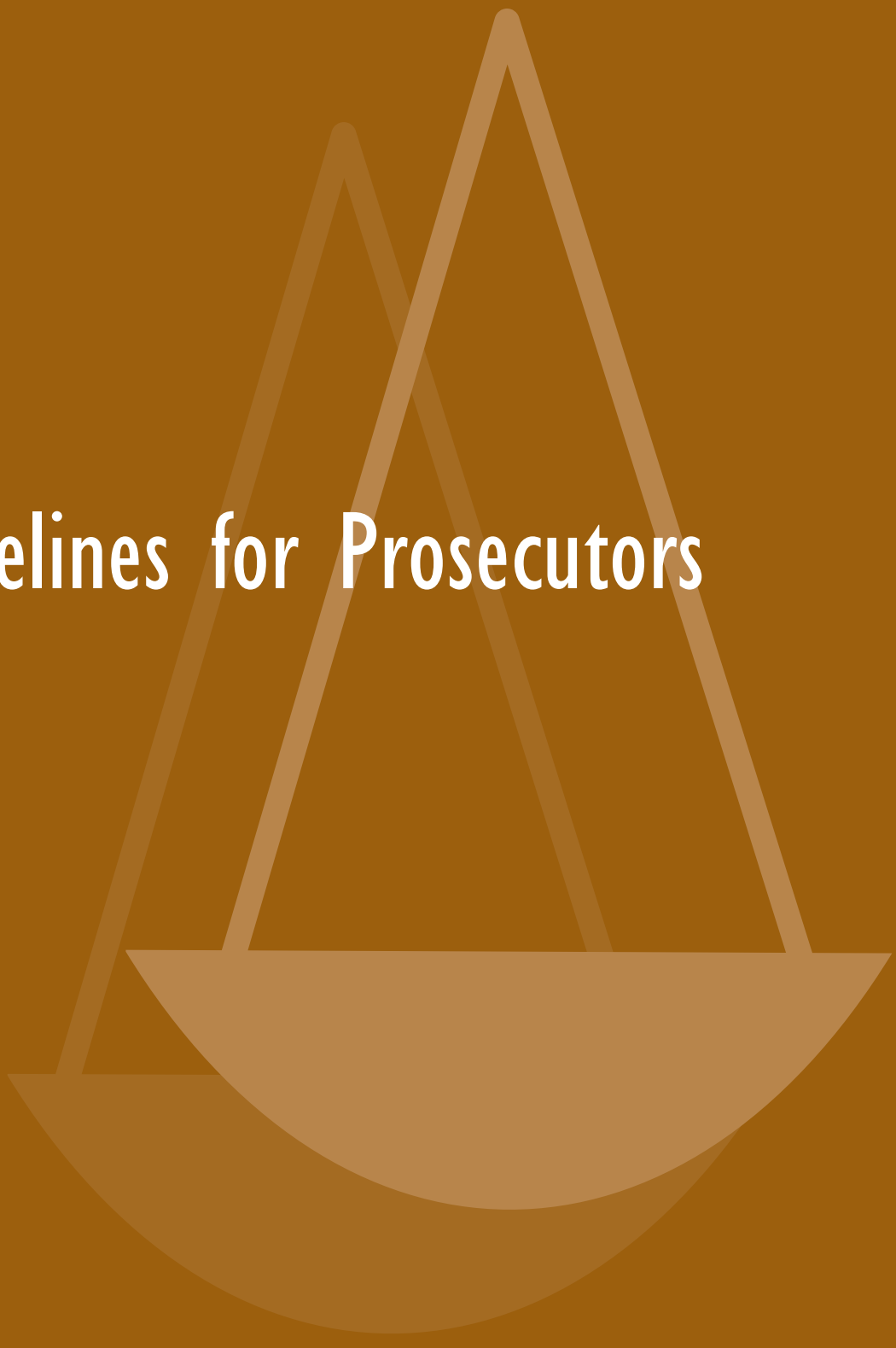
Guidelines for Prosecutors



Office of the
Oifig an

Director of Public Prosecutions
Stiúrthóra Ionchúiseamh Poiblí

Guidelines for Prosecutors

Office of the Director of Public Prosecutions

Foreword

The Guidelines for Prosecutors first published in 2001 aims to set out in general terms principles to guide the initiation and conduct of prosecutions in Ireland. It is intended to give general guidance to prosecutors so that a fair, reasoned, and consistent policy underlies the prosecution process.

The Guidelines for Prosecutors have now been substantially revised and the principal changes reflected in this revised edition are:

- the incorporation of a Code of Ethics for Prosecutors;
- more detailed guidelines relating to the disclosure of evidence;
- a new chapter setting out principles to be considered in relation to accomplice evidence and the granting of immunity from prosecution or other concessions; and
- new guidelines on forfeiture and confiscation of assets following conviction.

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

Article 30 of the Constitution of Ireland provides that all indictable crimes shall be prosecuted in the name of the People. I believe that making these revised 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 also available electronically on the Office website which can be accessed at www.dppireland.ie. The Code of Ethics for Prosecutors is also available as a separate document on the website.

James Hamilton
Director of Public Prosecutions

June 2006

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1 Introduction

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 and his professional officers, both in the Directing and Solicitors Division of his Office; 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 his behalf.

1.6 The application of the principles set out in the Guidelines does not and cannot bind the Director to follow any particular course in any individual case and does not fetter the Director of Public Prosecutions, his 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 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, 1937 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 shall be independent in the performance of his functions. Section 6 of the Act underscores that independence by making it unlawful for persons other than defendants or complainants in criminal proceedings, or persons likely to be defendants, or their legal or medical advisers, members of their family or social workers, to communicate with the Director or his officers for the purpose of influencing the making of a decision to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings.

2.7 The Director independently enforces the criminal law in the courts on behalf of the People of Ireland. To this end he 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 Director of Public Prosecutions has defined its mission as *"to provide on behalf of the People of Ireland a prosecution service that is independent, fair and effective"*.

2.8 The Office of the Director of Public Prosecutions consists of two legal divisions, the Directing Division and the Solicitors 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 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, assisting 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;
- consenting to certain cases being dealt with summarily rather than on indictment.

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

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 Criminal Appeal.

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.

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

2.12 Most summary prosecutions brought in the District Court are brought in the name of the Director. In practice the great majority are presented by officers of the Garda Síochána without specific reference to the Director's Office except in cases where the Garda Síochána are required to seek a direction from the Director (see paragraph 7.4, 7.7 and 13.3 below) 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 Garda at any time. Pending the bringing into force of this section summary prosecutions instituted by members of the Garda Síochána remain subject to general directions which have been issued by the Garda Commissioner following consultation with the Director. On the coming into force of the section general directions governing the conduct of prosecutions in his name will be issued by the Director. At time of writing it is expected that the section will be brought into force later in 2006.

2.13 Except for certain duties which arise under the Garda Síochána (Complaints) Act, 1986 where an investigation is being carried out into an alleged offence by a member of the Garda Síochána, 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 Authority 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 cannot be investigated by him but are transmitted to the Garda Commissioner or to one of the other investigation authorities to take the appropriate decisions and action. While the Director has no investigative function, he and his 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.

2.14 Many investigative agencies have the power to prosecute summarily without reference to the Director. The sole power to prosecute on indictment rests with the Director (apart from 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 Director. The decision whether to initiate or continue a criminal prosecution is made by the Director or one of his 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.

3 Code of Ethics

3 Code of Ethics:

setting out standards of professional responsibility & 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 public servants. Where prosecutors are subject to the discipline of the General Council of the Bar of Ireland or of the Incorporated 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 his own staff to adhere at all times to the Code. When the Director of Public Prosecutions engages counsel, or a solicitor who is employed by him to act on his behalf or authorises any person to prosecute in his name he expects that counsel, solicitor or authorised person to adhere to the Code and to consult him 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 (Circular 26/04) 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 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 his 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) 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;

(e) 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;

(f) 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 Director of Public Prosecutions 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 his or her duties 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 his or her duties or functions;

(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:

i) the prosecutor has actual bias or prejudice concerning an accused, complainant or witness;

ii) the prosecutor previously served as a lawyer for another party, or was a material witness, in the prosecution;

iii) the prosecutor, or a member of the prosecutor's family, has an interest in the outcome of a prosecution;

iv) 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 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 occasionally traumatic decision to report a crime, may feel rejected and disbelieved.

4.2 It is therefore essential that the prosecution decision receives careful consideration. But, 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 of the Constitution of Ireland 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.

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.

The Strength of the Evidence

4.7 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.

4.8 A prosecution should not be instituted unless there is a *prima facie* case against the suspect. By this is meant that there is admissible, substantial and reliable evidence 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.

4.9 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.

4.10 In evaluating the prospects of a conviction, the prosecutor has to assess the admissibility, 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 reliable and credible. 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.

4.11 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 complainant's story. 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 believes the victim's story 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.

4.12 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, intelligence, 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) Where the suspect was aged under 14 years at the time of the offence, is there evidence available to show that, at that time, he or she could distinguish right from wrong?

(d) 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?

(e) Has a witness been consistent in his or her evidence? If not, can the inconsistencies be explained? Does the evidence tally with the behaviour of the witness?

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

(g) Could the reliability of evidence be affected by physical or mental illness or infirmity?

(h) 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?

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

(j) 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?

(k) 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 of obtaining the evidence through a live television link, pursuant to section 28 of the Criminal Evidence Act, 1992 or by means of the issue of a letter of request, under the Criminal Justice Act, 1994 should be considered.

(l) 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?

(m) 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? How is the experience of a trial likely to affect them? In cases of sexual offences or offences involving violence, should the children's evidence be presented by way of video link in accordance with section 13 of the Act?

(n) In relation to mentally handicapped witnesses, 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?

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

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

(q) 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?

(r) 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.

4.13 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.

4.14 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.

4.15 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 prosecution authorities. The solicitor dealing with the case should likewise express any views he or she may have formed. The primary decision to charge will be made by the Director or one of his officers in cases where the file is referred to the Director's Office. At this stage the Director or his 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?

4.16 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 the 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.

4.17 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 punished 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.

4.18 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 a 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 actual or mental ages 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.

4.19 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.

4.20 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 and efficacy of any alternatives to prosecution;

(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 ill health or disability. 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 dealt with in more detail in Chapter 5 below.

4.21 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.

4.22 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

4.23 The prosecutor should, in any case where there has been a long delay since the offence was committed, consider in the 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) where there has been a delay in making a complaint, whether the complainant was emotionally and psychologically inhibited from or incapable of making the complaint, and, if so, to what extent and in what manner, and whether this was by reason of behaviour that could be attributed to the suspect, whether by overt actions or threats or a more subtle form of dominion or psychological control;

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

(h) whether the suspect has admitted the offence.

4.24 Where it is anticipated that judicial review proceedings are likely to be brought to prohibit a trial and where psychological evidence would be relevant to such proceedings the prosecutor may consider seeking a report from a psychologist before initiating proceedings.

Special Factors which may apply where the extradition of a suspect to face trial will be required

4.25 The extradition of persons required to answer any charge of an offence or to serve a sentence imposed will always involve expense to the State. In the case of serious offences it will generally be appropriate to incur that expense 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.

4.26 Where it is proposed to take steps to secure extradition, in addition to the assessment of the prosecution case in accordance with these guidelines, particular attention should be paid to the following factors:

(a) any delay after discovery of the suspected offender;

(b) the likely disposition following conviction;

(c) the nature and gravity of the offence or offences alleged against the fugitive.

Altering a prosecution decision or discontinuing a prosecution

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

4.28 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.

4.29 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 Chief Prosecution Solicitor or the local State Solicitor dealing with the case. If due to time constraints direct contact with the Professional Officer is necessary, the Chief Prosecution Solicitor or the local State Solicitor should be fully informed of the outcome of the discussions. These should be committed in writing and forwarded to the Directing Division.

4.30 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, he or she 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 his professional officers having regard to the considerations set out in these Guidelines.

4.31 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 professional officers 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.

4.32 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 as 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.

4.33 Relevant factors to be considered in determining whether or not there should be a retrial include:

- whether or not the jury was unable to agree or the trial ended for other reasons;
- whether or not another jury would be in any better or worse position to reach a verdict.

5 Juvenile Diversion and the Prosecution of Children

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 his or her life should not be underestimated and prosecution must be regarded as a severe measure with significant implications for the future development of the child concerned. Whilst each situation must be assessed on its merits, frequently there will be a stronger case for dealing with the situation 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.

5.2 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 correct 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.

5.3 Since 1 May 2002 the Juvenile Diversion Programme operated by the Garda Síochána has been placed on a statutory footing with the commencement of Part 4 of the Children Act, 2001. Section 18 of the Children Act, 2001 states that "*unless the interests of society otherwise require and subject to this Part, any child who has committed an offence and accepts responsibility for his criminal behaviour shall be considered for admission to a Diversion Programme.*" The programme is operated by the Garda Síochána under the supervision of the Superintendent, Community Relations Section. At local level the programme is implemented by Garda Juvenile Liaison Officers who are trained in restorative justice principles and mediation skills.

5.4 In order for a juvenile to be eligible for caution under the programme the offender must be above the age of criminal responsibility and under 18 years of age, and accept responsibility for his or her criminal behaviour.

5.5 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.

5.6 The prosecutor should consider any representations made by the parents or guardians of a child concerning a possible prosecution.

6 The Choice of Charge

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 defendant 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 or his 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, or pending the bringing into force of section 8 of the Garda Síochána Act 2005, by the Commissioner on the advice of the Director. Questions relating to the respective role of the Garda Síochána and the Director are dealt with in greater detail in Chapter 7.

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 of 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 person absconding;
- the accused person interfering with witnesses, evidence, or the course of justice generally;
- the accused person committing further serious offences which would form the basis for an objection to bail.

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 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 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. While the Director is not responsible for the conduct of investigations he 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 he may also refer the matter to the Garda Síochána. Investigation is, however, a matter for the Garda Síochána or the investigation agency. Examples where such a request may be made include:

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

(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 In the following cases a charge should not be preferred without the prior directions of the Office of the Director of Public Prosecutions:

(a) homicide;

(b) other cases involving a fatality, including fatal road traffic and workplace accidents;

(c) sexual offences;

(d) cases under the Official Secrets Act, 1963;

(e) offences which are scheduled under the Offences Against the State Acts, 1939 to 1998;

(f) terrorist offences and offences alleged to have been carried out by terrorists;

(g) any case in which it is proposed to seek a trial in the Special Criminal Court;

(h) bribery and corruption;

(i) cases involving serious allegations against members of the Garda Síochána;

(j) offences committed by public officials other than those of a very minor nature;

(k) genocide, war crimes, crimes against humanity, piracy and hijacking;

(l) cases in which it is provided by statute that proceedings may not be commenced without the consent of the Director.

7.6 Where the Garda Síochána receive a complaint in relation to any of the offences referred to in paragraph 7.5 and, having investigated the matter and having identified a suspect, do not consider a prosecution to be warranted, a file should nonetheless be sent to the Director for a decision whether to prosecute.

7.7 Where a charge has been preferred without the directions of the Director's Office, and the case is proceeding on indictment, directions should be sought prior to any sending forward for trial. The Director, or one of his 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 Director's Office 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 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 of proceedings;

(f) matters of particular sensitivity or unusual public interest.

7.9 Arrangements are in place to ensure that a member of the Director's staff 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 The Role of the Prosecutor in Court

8.1 The role of the prosecutor is a specialised and demanding one which is frequently misunderstood. 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.

8.2 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 credible evidence relevant to what is alleged to be a crime. 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".

8.3 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 skillfully 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.

8.4 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.

8.5 A prosecutor should call, as part of the prosecution case, all credible, relevant and admissible 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.

8.6 The prosecutor is not obliged to call evidence he or she does not consider to be credible, reliable and trustworthy: *The State (Director of Public Prosecutions) v. District Justice McMenamin*, (High Court, Barron J., 23 March 1996). The statement of a witness it is not intended to call for the prosecution should not be included in the book of evidence. 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.

8.7 In the case of *Ward v. Special Criminal Court* (1998 2 ILRM 493), 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".*

8.8 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 *Joseph Francis Oliva* (1965) 49 Cr.App. R. 298 at p.309 adopted and applied by the Court of Criminal Appeal in *The People v. Mark Lacy* (Denham J., 12 May 2005), together with the added consideration of the constitutional concept of due process which requires at its root, justice and fair procedures:

> *"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 appear to be exercising that discretion improperly, it is open to the judge of trial to interfere 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 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.

8.9 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.

8.10 Care should be taken in opening a case to a jury to avoid statements that may lead to a subsequent 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.

8.11 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.

8.12 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.

8.13 Under the Constitution and under 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 Prosecutor's Role in the Sentencing Process

8.14 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) in particular, to ensure that the court has before it all available relevant evidence and appropriate submissions concerning the impact of the offence on its victim, in accordance with the provisions of section 5 of the Criminal Justice Act, 1993, in respect of offences to which that provision applies;

(c) in addition, 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 the range of sentencing options available to it;

(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.

8.15 As well as ensuring that the court is aware of the range of sentencing options open to it, it is the prosecutor's duty to deal with any questions of forfeiture, compensation or restitution which may arise. This is further discussed in Chapter 15.

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.

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 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 is to take them into account in mitigation.

8.19 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.

8.20 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.

8.21 If the court seeks the views of the Director of Public Prosecutions as to whether he considers that a custodial sentence is required, the prosecutor should not express his or her own views in relation to the matter but rather the views of the Director. If the court seeks the Director's views counsel should offer to seek instructions on the question. It should be made clear to the court that in order to give instructions in such a case the Director would require sight of all relevant material before the court, including all reports and transcripts of relevant evidence, and adequate time to give a properly considered view.

9 Disclosure

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 *The People (Director of Public Prosecutions) v. Tuite* (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 *Director of Public Prosecutions 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".

> *"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"- McKevitt v. Director of Public Prosecutions* (Supreme Court, 18 March 2003, Keane C.J.).

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 5 of the European Convention of Human Rights also guarantees a person charged with a criminal offence the right to a fair hearing 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 precise scope of the duty to disclose differs as between cases which are triable summarily in the District Court and those triable on indictment and are discussed separately below at paragraph 9.6.

Summary Prosecutions

9.6 The scope of the duty of disclosure in summary prosecutions has been defined by the Supreme Court in *Director of Public Prosecutions v. Gary Doyle* [1994] 2 IR 286. In the light of that judgment the following principles should be observed by the prosecution:

(a) there is no general duty on the prosecution in a summary case to furnish in advance the statements of intended witnesses whether or not there is a request for them from the defence. However, if there is some reason arising from the particular circumstances of a case why advance disclosure of the details of the case, whether by furnishing statements or otherwise, is necessary in the interest of justice, this should be done whether or not there is a request;

(b) the test to be applied by a court on an application by the defence to be furnished pre-trial with the statements on which the prosecution case will proceed is whether "*in the interests of justice on the facts of the particular case*" this should be done (*Gary Doyle*'s case, at p.301). The requirements of justice must be considered in relation to the seriousness of the charge and the consequences for the accused. Very minor cases may not require that statements be furnished. Complexity of the case is also a factor. Amongst the matters which the Supreme Court in *Gary Doyle* identified as possibly relevant to the court's decision were:

> "*(a) the seriousness of the charge;*
>
> *(b) the importance of the statements or documents;*
>
> *(c) the fact that the accused has already been adequately informed of the nature and substance of the accusation;*
>
> *(d) the likelihood that there is no risk of injustice in failing to furnish the statements or documents in issue to the accused."*
>
> (*Gary Doyle*'s case, at p.302);

(c) in making a decision whether to furnish statements the prosecutor should have regard to the principles set out in *Gary Doyle*'s case and referred to above;

(d) a request for statements made by the defence should be considered in the context of the witnesses whom it is proposed to call at the trial and whether the *Gary Doyle* principles require disclosure. It is primarily a matter for the defence, when requesting statements in summary cases, to advance the reason or reasons why the accused considers that statements should be furnished. If the defence does not advance any adequate reason for disclosure, and the case does not appear to be one where the *Gary Doyle* principles require disclosure, then they need not be furnished without an order of the court;

(e) statements or information not intended to be tendered at a summary trial should be furnished to the defence where it is necessary in the interest of justice. This should be done with or without a request. This includes statements or information which, even if the prosecutor does not regard them as reliable, might reasonably be regarded as of assistance to the defence;

(f) while the *Gary Doyle* case arose from indictable offences which were being dealt with summarily, the principles set out in that case are applicable to all offences being tried summarily.

Prosecutions on Indictment

The Book of Evidence

9.7 Where an offence is to be disposed of by trial on indictment the prosecution has a statutory duty pursuant to sections 4B and 4C of the Criminal Procedure Act, 1967 as inserted by section 9 of the Criminal Justice Act, 1999, to furnish the accused with certain materials setting out the evidence intended to be adduced against the accused. The documents provided under section 4B are usually referred to collectively as the book of evidence. This essentially comprises the evidence which the prosecution intends to adduce at the trial. The following documents should 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 whom it is proposed 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 is proposed to be given in evidence by virtue of Part II of the Criminal Evidence Act, 1992;

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

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

9.8 These documents are required to be served on the accused person within 42 days of the accused's first appearance in the District Court. An application to extend this time period may be made which must be grounded on sufficient reasons such as complexity of the case, large number of witnesses, or other such reason which may cause delay. 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.

Further evidence

9.9 Pursuant to section 4C of the 1967 Act, as inserted by section 9 of the Criminal Justice Act, 1999, if the prosecutor proposes to call further evidence or additional witnesses or evidence has been taken on deposition, the prosecutor should serve the accused and furnish the court with the following applicable documents:

(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

9.10 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.

9.11 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 condition which may affect reliability;

(e) details of any immunity from prosecution provided to a witness with respect to his or her involvement 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 defendant, whether the witness has been dealt with in respect of his or her own involvement 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 paragraph 8.6 to 8.8);

(p) any other relevant document.

9.12 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.

9.13 The investigating agency should, as early as possible:

- 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 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 third party (that is, a person or body other than the prosecution or the investigating agency);
- 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).

Material in the possession of third parties

9.14 Following the decision of the Supreme Court in the case of *The People (Director of Public Prosecutions) v. Sweeney* (2001 4 IR 102), to the effect that the civil procedure known as 'third party discovery' has no application in criminal proceedings, defendants cannot utilise this procedure to ensure production of material in the hands of third parties.

9.15 This does not, however, have as a necessary consequence an erosion of the fair procedures to which the defendant is entitled. The following observations are relevant:

- the Criminal Justice Act, 1999 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;
- alternatively it is open to the accused to require witnesses to attend at the trial and produce any relevant documents by the issue of a *subpoena duces tecum*.

The duty to retain and preserve evidence

9.16 A number of principles can be determined from decisions of the High Court and Supreme Court in:

Director of Public Prosecutions v. Daniel Braddish (2001 3 IR 127);
Director of Public Prosecutions v. Robert Dunne (2002 2 IR 305);
Director of Public Prosecutions v. Bowes and McGrath (Supreme Court unreported 6 February 2003);
Director of Public Prosecutions v. Ian Connolly (High Court 15 May 2003); and
Michael Scully v. Director of Public Prosecutions, (unreported 21 November 2003).

The following guidelines are drafted in the light of these cases.

9.17 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.

9.18 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.

9.19 While observing the foregoing principles the Garda Síochána 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.

9.20 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.

9.21 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

9.22 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.

9.23 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.

9.24 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 his professional officers, solicitors and counsel as to prosecutions by him 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) whether disclosure of the document would lead to the publication of the names of others in respect of whom further investigative discussions are to take place or in respect of whom enquiries have been made in certain circumstances where all the parties involved have an entitlement to the presumption of innocence;

(f) where the circumstances require, a prosecutor may seek an undertaking that the material will not be disclosed to parties other than the accused's legal advisers and the accused.

9.25 The privileges or exemptions outlined at 9.23 and 9.24 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.

> *"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"* - Lord Esher MR in *Marks v. Beyfus* (1890 25 QBD 494).

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

The Timing of Disclosure

9.26 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

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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. Occasionally, the defence approach the prosecution 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 he or she is facing, or to a lesser charge or charges, with the remaining charges either not being proceeded with or taken into account by the sentencing judge without proceeding to conviction.

10.2 These Guidelines have earlier referred 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 cases a different view of the case may be taken on further consideration.

10.3 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 prosecution 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.

10.4 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.

10.5 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.

10.6 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. It is the public, not any private individual or sectional, interest that must be served;

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

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

10.8 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.

10.9 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 a defendant 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 *The People v. Heeney* (unreported, 5 April 2001) has expressed the view that such a procedure is undesirable and has approved its discontinuance by the Director.

10.10 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 a defendant or some other person. In such a case counsel for the Director should seek and obtain specific instructions from the Director's Office to mention the matter to the judge in chambers.

11 Prosecution Appeals and Sentence Reviews

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11.1 The prosecution has no right of appeal against an acquittal.

11.2 The prosecution has the following powers to appeal or seek a review of certain decisions of a trial court:

(a) sentence reviews under section 2 of the Criminal Justice Act, 1993. The Director may apply to the Court of Criminal Appeal for review of a sentence imposed by a court on conviction of a person following trial on indictment where it appears to the Director that the sentence was unduly lenient. This provision does not apply to convictions in courts of summary jurisdiction;

(b) under section 34 of the Criminal Procedure Act, 1967 where, on a question of law, a verdict in favour of an accused person is found by direction of a trial judge, the Director may refer the question of law to the Supreme Court for determination. A reference under section 34 is without prejudice to the verdict in favour of the accused. References under section 34 arise very rarely. It should be noted that the section covers a limited class of legal rulings against the prosecution. For example, section 34 does not entitle the Director to refer a question of law which leads to the exclusion of evidence, which in turn fatally weakens the prosecution case. Nor does it cover a misdirection of law by a trial judge to a jury which falls short of an express direction to find a verdict in favour of the accused;

(c) 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. It does not lie 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; seeking to prohibit a court from embarking on an incorrect course of action; or quashing 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;

(d) under section 52 of the Courts (Supplemental Provisions) Act, 1961 the prosecution as well as the defence may request the District Court to refer any question of law arising in the proceedings to the High Court for determination. This is known as a 'consultative case stated'. A similar provision permits of consultative cases stated from the Circuit Court to the Supreme Court;

(e) by section 2 of the Summary Jurisdiction Act, 1857, as amended and extended, any party, including the prosecution, may, following determination of proceedings by the District Court, if dissatisfied with the determination as being erroneous on a point of law, seek to appeal to the High Court by way of case stated. The appeal is not a re-hearing but is confined to the point of law at issue. Under Order 102, rule 15, of the District Court Rules, 1997, the judge of the District Court may not refuse to state a case where the case stated is sought by or under the direction of the Director of Public Prosecutions.

11.3 The accused has a full right of appeal by way of a complete re-hearing from the District Court to the Circuit Court, and a right of appeal based on a transcript of the evidence against conviction or sentence from the Circuit Criminal Court, the Special Criminal Court or the Central Criminal Court to the Court of Criminal Appeal. In some cases the accused may further appeal from the Court of Criminal Appeal to the Supreme Court. The defendant may also seek a judicial review or seek to have a case stated.

11.4 It is the duty of any prosecutor appearing on behalf of the Director, who is of opinion that a court has erred in law and that one of the remedies referred to in paragraphs 11.2(b), (c), (d) or (e) may be available to the Director so to advise the Director as soon as possible.

Sentence Reviews under Section 2 of the Criminal Justice Act, 1993

11.5 The Court of Criminal Appeal has held that in relation to sentence reviews the onus lies on the Director to show that the sentence is not merely lenient but unduly so. In such a review, great weight is attached to the trial judge's reasons for imposing the sentence. Since the finding must be one of undue leniency, 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: *Director of Public Prosecutions v. Byrne* (1995) 1 ILRM. There must have been an error of principle by the sentencing court to justify altering the sentence: *Director of Public Prosecutions v. Redmond*, Court of Criminal Appeal, 21 December 2000.

11.6 The Court of Criminal Appeal will not, therefore, increase a sentence because of a mere disagreement with its severity. It is necessary that there be a substantial departure from the accepted range of appropriate sentences for the offence committed in the circumstances of the case, including the specific elements relating to the offender, or an error of principle in the way in which the trial judge approached sentencing.

11.7 In order to ensure the effective and consistent application of the Director's power to seek a sentence review it is important that the solicitor and counsel representing the Director in all cases heard on indictment which result in conviction and sentence indicate when reporting to the Director whether, in their opinion, an issue arises as to whether the sentence passed was unduly lenient bearing in mind the short time limit of 28 days from and including the date the sentence is handed down during which the Director may seek a review. If either solicitor or counsel take the view that the sentence was unduly lenient or thinks the question is one which the Director ought properly consider, the Director's Office should be contacted at once.

11.8 As the Court of Criminal Appeal has held that great weight should be attached to the trial judge's reasons for the sentence imposed, it is therefore important that when deciding whether to seek a sentence review the Director is fully aware of those reasons as well as of the evidence before the court at the sentencing hearing. The solicitor dealing with the case should seek a transcript on becoming aware that the question of a review is being actively considered. In all cases 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 the trial court has taken into account.

11.9 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.

12 The Rights of Victims and Victims' Relatives

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12.1 In this chapter references to victims should be taken as referring also to the relatives of deceased victims or of victims who are children or are persons under a disability which prevents them looking after their own affairs.

12.2 The Director prosecutes cases on behalf of the People of Ireland and not just in the interests of any one individual. For this reason, although the views and interests of the victim are important, they cannot be the only consideration when deciding whether or not to prosecute. However, the Director will always take into account the consequences for the victim of the decision whether or not to prosecute or in relation to the acceptance of a plea and will consider any views expressed by the victim or the victim's family.

12.3 The Director of Public Prosecutions has given the following undertakings in relation to victims of crime:

(a) to have regard to any views expressed by victims of crime when making decisions in specific cases whether or not to prosecute;

(b) to examine any request from a victim of crime for a review of a decision not to prosecute and in appropriate cases to have an internal review of the decision carried out by an officer other than the one who first made the decision. In the light of the judgment of the Supreme Court in *Eviston v. Director of Public Prosecutions* (31 July 2002) the Director is entitled to review an earlier decision not to prosecute and to arrive at a different decision even in the absence of new evidence. The Director is required to apply fair procedures in the exercise of this function;

(c) to seek a review of sentences which he considers unduly lenient in accordance with the provisions of section 2 of the Criminal Justice Act, 1993 (see chapter 11).

12.4 The Director will also give careful consideration to any request, properly considered and freely made, 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 victims wish to discontinue.

12.5 The staff of the Director's Office do not meet victims of crime to discuss decisions. However, victims of crime may write to the Office if there is a point they wish to make about a particular decision.

12.6 When the Director of Public Prosecutions decides not to prosecute in a particular case, the reasons for the decisions are given to the local State Solicitor and the investigating Garda. It is the Director's policy not to disclose this information publicly. The policy may be justified on a number of grounds. If reasons are given in each case they must be given in all. In many cases the giving of reasons publicly would be tantamount to stigmatizing a person as a criminal without there having been a trial. The policy has been upheld by the Supreme Court in *H v. Director of Public Prosecutions* [1994] 2 IR 589 at p.603 as follows:

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

This policy has also been supported by the Select Committee on Crime, Lawlessness and Vandalism (15th Report, PI 4703 at paragraph 3.7).

12.7 The Director's policy not to give reasons publicly has been interpreted as precluding him from giving reasons to victims.

12.8 The Freedom of Information Act, 1997 provides a right of access only to records concerning the general administration of the Office (section 46(1)(b)). This means that under the Act there is no right of access to information from files relating to individual criminal cases.

12.9 The solicitor handling a criminal prosecution has the following responsibilities towards the victims of crime:

(a) to work with the Garda Síochána to ensure that the victim is kept fully informed of developments in relation to the prosecution of perpetrators of offences, especially those of a violent or sexual nature, including any decision to change, modify or not proceed with charges laid and any decision to accept a plea to a less serious charge, and including developments in relation to pre-trial applications, judicial reviews or decisions to grant bail or appeal against verdict or sentence;

(b) at the victim's request, to facilitate a pre-trial meeting between the victim and the solicitor and counsel dealing with the case to discuss the case. The purpose of such a meeting is to explain the trial process to the victim and answer any questions he or she may have. Solicitor and counsel do not discuss evidence with witnesses in advance of a case. There are strict rules which prevent barristers discussing in advance the actual evidence that victims will give. This is intended to prevent the witness being told what evidence to give or to avoid any suggestion that this has happened.

12.10 The solicitor and counsel dealing with the prosecution should endeavour at all times to treat a victim of crime with the utmost consideration and respect. While the victim is entitled to have his or her views heard and considered, the victim is not entitled to give instructions to the solicitor or counsel for the prosecution concerning the conduct of the trial. The victim should be dealt with in a sympathetic, constructive and reassuring manner and with due regard to his or her personal situation, rights and dignity. The solicitor should, so far as possible, explain to the victim, or have counsel explain, the court processes and procedures and should keep the victim informed of what is happening during the course of the trial. The solicitor and counsel should seek to protect the victim's interests as best they can consistently with their duty to the court and their duty to conduct the prosecution on behalf of the People and, in particular, must not include a witness's address in a statement unless it is material. A victim of crime when called to testify may need to relive the emotional and physical distress suffered from the offence. A prosecutor should pay due regard to this fact.

12.11 Any complaints by a victim concerning the manner in which he or she has been treated should be addressed to the Director of Public Prosecutions or the Chief Prosecution Solicitor directly.

12.12 The Garda Síochána have given a number of commitments to victims of crime, including the following:

(a) to ensure that the victim is kept informed about the progress of the investigation, including whether a suspect is charged or cautioned;

(b) to tell the victim whether the accused is in custody or on bail and the conditions attached to the bail;

(c) to inform the victim of the time, date and location of the court hearing of the charges against the accused;

(d) to explain the prosecution process involved and, if the victim is likely to be called as a witness, to provide information as to the help available for victims attending court;

(e) to explain the circumstances where a judge may ask for a Victim Impact Statement and arrange for its completion;

(f) to inform the victim of the final outcome of the trial;

(g) in cases involving serious trauma to a victim or family, to inform the victim of the imminent release of the offender, when the Garda Síochána have been notified of such release.

13 Summary Trial

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 Director. Chapter 7 sets out the circumstances in which the Garda Síochána should seek a direction from the Office of the Director 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 Director's name 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 Director of Public Prosecutions.

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 his name without a specific direction.

13.4 The Garda Síochána in deciding whether to prosecute in the Director's name and in presenting cases in court on the Director's behalf 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:

- 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.

- 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 agreement that the offence is a minor one fit to be tried summarily and to the prosecutor's consent and the prosecutor must decide whether it is appropriate to give that consent. These cases include 'scheduled offences' within the meaning of the Criminal Justice Act, 1951, as well as some other statutory offences.

- 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, as amended by section 10 of the Criminal Justice Act, 1999. This section deals with 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 investigation agencies a general consent or election to have such offences dealt with in the District Court without the necessity of first contacting his Office or submitting a completed investigation file. Examples of cases falling into this category are burglary in an unoccupied dwelling house or 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

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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 the question 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 his or her own participation in the criminal activity the subject of the charge against the defendant, or granted an immunity from prosecution, he or she may be in a position to claim privilege against self-incrimination in respect of the very matter the prosecution wishes to adduce into 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 defendant without the evidence it is expected the accomplice can give and, if some charge or charges could be established against the defendant without the accomplice's evidence, the extent to which those charges would adequately reflect the defendant'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 witness 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 his or her preparedness 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 his or her personal safety would be at risk;

(i) whether the person 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 Authority how to consider such applications and a published Cartel Immunity Programme sets out the policy of both the Director and the Authority 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 Authority at www.tca.ie.

15 Forfeiture, Confiscation and Disqualifications

15 Forfeiture, Confiscation and Disqualifications

15.1 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:

(a) an offender does not profit from his or her criminal conduct;

(b) property used in the commission of an offence is subject to forfeiture.

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 Criminal Justice Act, 1994 specifically provides for confiscation following conviction and applies to both drug trafficking and non-drug trafficking offences. Section 4 of that Act, as amended by section 25 of the Criminal Justice Act, 1999, requires the court to determine whether the accused has benefited from drug trafficking in cases where the accused has been convicted and sentenced (or otherwise dealt with in respect of a drug trafficking offence). The legislation also provides in section 9 for the Director to apply, in other cases, to the court to determine whether the accused has benefited from the offence for which he was convicted.

15.3 The amount to be confiscated will be:

- in the case of a drug trafficking offence, the amount assessed by the court to be the value of the defendant's proceeds of drug trafficking;
- In the case of a non-drug trafficking offence, subject to the provisions in the legislation, such amount as the court thinks fit.

15.4 The standard of proof required to determine these questions is the lower standard applicable to civil proceedings, i.e. the balance of probabilities.

15.5 That legislation also provides for restraining and ancillary orders which preserve property for possible future confiscation following conviction as well as for variation orders. The Director's Office should be consulted promptly if such orders may be appropriate. The question of whether or not a confiscation application might be appropriate should be addressed by the investigator when submitting the file and should be considered by the professional officer dealing with the case when a prosecution is being directed.

15.6 Provision is also made in other legislation for forfeiture and for revocation of, or disbarrment from holding licences and permits in given circumstances. The most common is disqualification from holding a driving licence. The following list of statutory provisions, while not exhaustive, is relevant and should be borne in mind by the prosecutor:

- section 23 Firearms Act, 1925 – certain firearms may be forfeit where a person is convicted of a firearms or certain other offences;
- section 28 Intoxicating Liquor Act, 1927 – the licence may be forfeit;
- section 10 Censorship of Publications Act, 1929 – prohibited publications may be confiscated;
- section 76 Wildlife Act, 1976, as amended by the Wildlife Act, 2000 – vehicles and firearms used to commit an offence may be forfeit;
- section 2 Offences Against the State (Amendment) Act, 1985 – monies believed to belong to unlawful organisations lodged in a bank may be seized;
- section 28 Video Recordings Act, 1989 – tapes may be forfeit;

- section 13 Firearms and Offensive Weapons Act, 1990 – weapons and other articles used in the commission of an offence may be seized;
- section 6 Criminal Justice Act, 1993 – a court may order compensation to be paid to victims as well as imposing a penalty;
- sections 38 and 39 Criminal Justice Act, 1994 – cash believed to be imported or exported from the State and believed to be associated with drug trafficking may be seized and forfeit;
- section 25 National Beef Assurance Scheme Act, 2000 – things used in the commission of an offence under the Act may be forfeit;
- section 145 and 264 Copyright and Related Matters Act, 2000 – infringing copies of books, articles and recordings, etc. may be forfeited to the copyright owner or destroyed;
- section 4 Illegal Immigrants (Trafficking) Act, 2000 – vehicles may be seized;
- section 97 Planning and Development Act, 2000 – where certain certificates conferring financial benefits are obtained fraudulently the benefit may be forfeit;
- section 7 Diseases of Animals Act, 2001 – where the offence relates to the spread of brucellosis or tuberculosis in animals, vehicles and premises involved may be forfeit;
- section 72 Industrial Design Act, 2001 – where a person is unlawfully in possession of an industrial design, infringing products or articles may be forfeited to the registered proprietor or destroyed;
- section 15 and section 50 Criminal Justice (Theft and Fraud Offences) Act, 2001 – confiscation of tools used for commission of burglary or other offences;
- section 41 Road Traffic Act, 1994, as amended – seizure and disposal of vehicles while driving without licence, tax or insurance;
- section 17 Offences Against the State (Amendment) Act, 1998 – forfeiture in cases of explosives and firearms offences;
- seizing of vehicles used for smuggling – section 6 Customs and Excise (Miscellaneous Provisions) Act, 1988.

The above list is not comprehensive. It is intended only as an *aide memoire* and reference should be had to the specific legislation in each case.

16 Communication with the Director of Public Prosecutions

16 Communication with the Director of Public Prosecutions

16.1 The following persons are permitted to write to the Director's Office:

- a victim of a crime;
- a family member of a victim of a crime;
- an accused person; or
- a family member of an accused person (as defined in section 6(2)(b) of the Prosecution of Offences Act, 1974, set out in paragraph 16.5 below.

16.2 The following persons can also write to the Director's Office on behalf of their clients:

- lawyers;
- doctors; and
- social workers.

16.3 It is against the law for anybody else to contact the Office of the Director of Public Prosecutions for the purpose of influencing a decision to withdraw or not to start a prosecution or for the purpose of influencing the making of a decision in relation to an application under section 2 of the Criminal Justice Act, 1993 to review a sentence.

16.4 The prosecutor is precluded, by virtue of section 6 of the Prosecution of Offences Act, 1974, or section 2(4) of the Criminal Justice Act, 1993 from considering such unlawful communications when considering a decision to prosecute or to seek a review of sentence on the grounds of undue leniency. The relevant sections are set out below:

Prosecution of Offences Act, 1974

6(1)(a) Subject to the provisions of this section it shall not be lawful to communicate with the Attorney General or an officer of the Attorney General, the Director or an officer of the Director, the Acting Director, a member of the Garda Síochána or a solicitor who acts on behalf of the Attorney General in his official capacity or the Director in his official capacity, for the purpose of influencing the making of a decision to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings.

(b) If a person referred to in paragraph (a) of this subsection becomes of opinion that a communication is in breach of that paragraph, it shall be the duty of the person not to entertain the communication further.

6(2)(a) This section does not apply to -

(i) communications made by a person who is a defendant or a complainant in criminal proceedings or believes that he is likely to be a defendant in criminal proceedings, or

(ii) communications made by a person involved in the matter either personally or as legal or medical adviser to a person involved in the matter or as a social worker or a member of the family of a person involved in the matter.

(b) *In this subsection "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, a person who is the subject of, or in whose favour there is made, an adoption order under the Adoption Acts, 1952 and 1964.*

Criminal Justice Act, 1993

2(4) *Section 6 of the Prosecution of Offences Act, 1974 (which prohibits certain communications in relation to criminal proceedings), shall apply, with any necessary modifications, to communications made to the persons mentioned in that section for the purpose of influencing the making of a decision in relation to an application under this section as it applies to such communications made for the purpose of making a decision to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings.*

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