

GUIDELINES ON PROSECUTION

The decision to charge and thereafter continue to prosecute an individual is a serious step. Fair and effective prosecution is essential to the maintenance of law and order. It is the duty of Prosecutors to ensure that the right person is prosecuted for the right offence and to bring offenders to justice wherever possible. Decisions taken fairly, impartially and with integrity help to deliver justice for victims, witnesses, suspects/accused persons and the public.

It is the duty of Prosecutors to review, to advise on and to prosecute cases. Prosecutors must ensure that the law is properly applied and that each case is considered on its own facts and on its own merits.

Prosecutors should identify and, where possible, seek to rectify evidential weaknesses, and discontinue those cases where the public interest clearly does not require a prosecution (see part 9B; pages 17-22).

When considering the institution or continuation of criminal proceedings the first question to be determined is the sufficiency of evidence. A prosecution should not be commenced or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by an identifiable person. The proper test is whether there is a reasonable prospect of a conviction should proceedings be instituted. This decision requires an evaluation of how strong the case is likely to be when presented at trial.

Prosecutors must ensure that they do not allow a prosecution to commence or continue, if to do so, would be seen by the Courts as oppressive or unfair, so as to amount to an abuse of the process of the Court as a matter of law.

Review is a continuing process and Prosecutors shall take account of any change in circumstances that occur as the case develops. Wherever possible, Prosecutors should interface with the police and other investigators at the earliest opportunity if they are considering amending the charges or terminating the prosecution.

9. The Full Two Stage Test

The decision with regard to the commencement or continuation of criminal proceedings is made following the application of the full two stage test to the evidence and circumstances of the case.

In most cases Prosecutors should only decide whether to prosecute after the investigation has been completed and after all the available evidence has been reviewed. However, there will be cases where it is clear, prior to the collection and consideration of all the likely evidence, that the public interest does not require a prosecution. In these rare instances, Prosecutors may decide that the case should not proceed further.

In another category of cases it will be equally clear that prior to the collection and consideration of the evidence, the public interest will require a prosecution, e.g. murder. The approach to such serious cases, where there is a higher than normal risk of absconding by the suspect pending such evidence collection, is to commence the prosecution on the basis that such evidence, is reasonably believed to exist and will be collected as quickly as possible when all of the material shall be subjected to the full two stage test. This will enable the suspect to be remanded into custody thus reducing the risk of the suspect absconding from the jurisdiction.

Prosecutors should only move to recommend a charge when they are satisfied that the broad extent of the criminality has been determined and that they are able to make a fully informed assessment of the public interest. If Prosecutors do not have sufficient information to take such a decision, the investigation should continue until as much information as it is possible to amass has been collected at which point the case should again be subjected to the two stage test.

Finally, Prosecutors must follow any guidance issued by the DPP to ensure that decisions in all cases are appropriate and correct and are reached following an agreed standard conduct.

9A. Stage One: The Evidential Stage

In order to conclude that criminal proceedings should be commenced or continued a Prosecutor must be satisfied that there is "a reasonable prospect of conviction" being secured in the case. This will exist if, in relation to an identifiable suspect, the evidence is credible and admissible, i.e. it will not be excluded under any of the rules of evidence - and is reliable, thus enabling a Jury properly directed in accordance with the law, Resident Magistrate, or Judge of the Supreme Court, to be satisfied beyond reasonable doubt that the suspect who is prosecuted has committed the criminal offence charged.

There must be sufficient evidence to provide a reasonable prospect of conviction against each suspect on each charge. A Prosecutor must consider what the defence case may be, and how it is likely to affect the prospects of conviction.

When deciding whether there is sufficient evidence to prosecute, Prosecutors must consider whether the evidence can be used and whether it is reliable. There will be many cases in which the evidence does not give any cause for concern. But there will also be cases in

which the evidence may not be as strong as it first appears. In particular, Prosecutors will need to consider the following issues:

- Can the evidence be used in Court?
- Is it likely that the evidence will be excluded by the Court?
- There are legal rules that might mean that evidence which seems relevant cannot be given at a trial. For example, is it likely that the evidence will be excluded because of the way in which it was obtained which might lead to a miscarriage of justice of the suspect/ accused. For example, where there is contamination of evidence, such as clothes from the victim being placed in the same evidence bag as the suspects' clothing enabling cross DNA and fibre contamination to occur.
- What explanation has the suspect/ accused given?
- Is a Court likely to find any explanation credible in the light of the evidence as a whole?
- Does the evidence support an innocent explanation?
- Is there evidence which might support or detract from the reliability of a confession?
- Was there any breach of any rules in obtaining the confession?
- Is the identification of the suspect likely to be questioned? Is the evidence of his or her identity strong enough?
- Are there concerns over the accuracy, reliability or credibility of the evidence of any witness?
- Is there further evidence which the police or other investigators should reasonably be asked to find which may support or undermine the account of the witness?
- Does any witness have any motive that may affect his or her attitude to the case?
- Is there any further evidence that could be obtained that would support the integrity of evidence already obtained?

Prosecutors should not ignore evidence because they are not sure that it can be used or is reliable. But they should look closely at it when deciding if there is a reasonable prospect of conviction. Some defects can be remedied by further investigation and evidence collection, others never can be. The Prosecutor must be mindful of the difference between these two states and identify which applies and act proportionately and in good time in response.

Following consideration of the evidential stage of the test, a consideration of the Public Interest Stage can be had.

9B. The Public Interest Stage

When the Prosecutor is satisfied that the evidential criteria are met a prosecution will usually take place unless the Prosecutor concludes there are public interest factors tending against prosecution which outweigh those tending in favour. The more serious the offence or the offender's record of criminal behaviour, the more likely it is that a prosecution will be required in the public interest. It may also be appropriate from time to time to reflect broader government policy directives and prosecute cases of certain offences regardless of public interest factors, such as during a zero tolerance campaign in respect of possession of drugs no matter how small the quantity concerned.

Assessing the public interest is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number. Each case must be considered on its own facts and on its own merits.

Prosecutors must decide the importance of each public interest factor in the circumstances of each case and go on to make an overall assessment. It is quite possible that one factor

alone may outweigh a number of other factors which tend in the opposite direction. Although there may be public interest factors tending against prosecution in a particular case, Prosecutors should consider whether nonetheless a prosecution should go ahead.

The absence of a factor does not necessarily mean that it should be taken as a factor tending in the opposite direction. For example, just because the offence was not "carried out by a group" does not transform the "factor tending in favour of a prosecution" into a "factor tending against prosecution". An individual can commit just as serious a crime as a group.

Some common public interest factors which should be considered when deciding on the most appropriate course of action to take are listed below. The following lists of public interest factors **are not exhaustive but are merely illustrative of the types of matters which may fall to be considered**, each case must be considered on its own facts and on its own merits.

A prosecution is more likely to be in the public interest if:

- A conviction is likely to result in a significant sentence;
- The offence involved the use of a weapon or the threat of violence;
- The offence was committed against public officers (for example, a nurse; a police or prison officer);
- The offence was repeated and ongoing over a significant period of time;
- There are grounds for believing that the offence is likely to be continued or repeated;
- The offence was committed by a public officer who was abusing his office;
- The offence was premeditated;
- The offence was carried out by a group;
- The offence was committed in the presence of, or in close proximity to, a child;

- The offence was motivated by any form of discrimination against the victim's ethnic or national origin, race, place of origin, social class, colour, religion, political opinions gender, age, belief, or the suspect demonstrated hostility towards the victim based on any of those characteristics;
- The offence was committed in order to facilitate a cover-up thereby attempting to or actually perverting the course of justice;
- The victim of the offence was in a vulnerable situation and the suspect/accused took advantage of this;
- There was an element of corruption or undue influence of the victim in the way the offence was committed;
- There was a marked difference in the ages of the suspect/accused and the victim and the suspect took advantage of this;
- There was a marked difference in the levels of understanding of the suspect/accused and the victim and the suspect took advantage of this;
- The suspect/accused was in a position of authority or trust and he or she took advantage of this;
- The suspect/accused was a ringleader or an organiser of the offence;
- The suspect/accused previous convictions are relevant to the present offence;
- The suspect/accused is alleged to have committed the offence in breach of an order of the court;
- A prosecution would have a significant positive impact on maintaining community confidence;
- The degree of culpability of the suspect/accused in connection with the offence was high;
- A failure to prosecute would have a profound effect upon public order and morale;

- The prevalence of the alleged offence and the need for deterrence, both personal and general is high;
- The attitude of the victim of the alleged offence to a prosecution and their desire for a prosecution in favour of any other disposal;
- The necessity to maintain public confidence in such basic institutions as the Parliament and the courts exists.

A prosecution is less likely to be required if:

- The Court is likely to impose a nominal penalty;
- The suspect/accused has been subject to any appropriate regulatory proceedings, or any punitive or relevant civil penalty which remains in place or which has been satisfactorily discharged, which adequately addresses the seriousness of the offending;
- The offence was committed as a result of a genuine mistake or misunderstanding;
- The loss or harm can be described as minor and was the result of a single incident; particularly if it was caused by a misjudgement;
- The law which is being used is obsolete or obscure;
- Whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
- There are available other and equally efficient alternatives to prosecution;
- Whether the alleged suspect/accused is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
- There has been a long delay between the offence taking place and the date of the trial, unless:
 - ❖ The offence is serious;
 - ❖ The offence has only recently come to light;

- ❖ The complexity of the offence has meant that there has been a long investigation; or new investigative techniques have been used to re-examine previously unsolved crimes and, as a result, a suspect/accused has been identified.
- ❖ Due to machinations by the suspect/ accused.
- A prosecution is likely to have an adverse effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence and the views of the victim about the effect of a prosecution on his or her physical or mental health;
- The suspect/accused played a minor role in the commission of the offence;
- The suspect/accused has put right the loss or harm that was caused (but a suspect must not avoid prosecution disposal solely because he or she pays compensation or repays the sum of money he or she unlawfully obtained);
- The suspect/ accused is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated. There must be a balance of a suspect's/accused's mental or physical ill health with the need to safeguard the public or those providing care services to such persons;
- A prosecution may require details to be made public that could harm sources of information, international relations or national security, the inability to comply with the obligations that the suspect has a fair trial in the absence of breaching national or an individuals' personal security;
- In deciding whether a prosecution is required in the public interest, Prosecutors should take into account any views expressed by the victim regarding the impact that the offence has had. In appropriate cases, for example, a case of homicide or where the victim is a child or an adult who lacks mental capacity, Prosecutors should take into account any views expressed by the victim's family.

However, the Prosecutor does not act for victims or their families in the same way a defence lawyer acts for his client, and Prosecutors must form an overall view, balancing some or all of the previous factors listed within the context of the particular case.