



Law Society of Ireland

LAW SOCIETY SUBMISSION TO DPP ON THE DISCUSSION PAPER ON THE GIVING OF REASONS FOR DECISIONS

The Law Society is pleased to respond to the invitation of the DPP for submissions in relation to the recent Discussion Paper.

The Law Society acknowledges that, from time to time, cases arise where a decision, usually not to prosecute, can be controversial, and can, on occasion, be surprising. While the Society recognises that in a contemporary framework of openness, the giving of reasons in every case would be an ideal, the DPP, by contrast, occupies a highly specialised and sensitive position and more subtle considerations must apply.

The Society also takes care to point out that much of the "public interest" in matters relating to criminal justice relate not to justifiable public interest in the operation of the criminal justice system itself, but is directed at prurient, all too frequently, media driven, issues relating to individual cases, and it is of course in relation to those individual cases that this submission is directed.

The Society is therefore pleased to contribute to an informed debate on whether or not the current policy of the Director should be changed. In 1983, the DPP issued a Press Statement in relation to his policy of not giving reasons, and the Society, notwithstanding changes in other jurisdictions, submits that the then stated policy holds good today.

Having said that, the Society acknowledges a thread of Strasbourg jurisprudence, relating to a quite specific and unique category of cases, and culminating in the case of *Jordan -v- UK*. *Jordan* is a logical development of previous cases and relates to quite unique sets of facts, wherein there is clear involvement of State agencies in the death of a



individual or individuals. The Society acknowledges that these are a unique and often controversial (and thankfully very rare) cluster of cases, and acknowledges Ireland's obligation under the European Convention to give reasons for decisions not to prosecute to the relatives of a deceased in such cases.

The Director has invited responses, specifically in relation to particular questions as follows:

Should the current policy be changed?

The Law Society is of the view that the policy should not be changed, because of the potential effect it would have on the concept of the presumption of innocence. In cases where a decision not to prosecute issues, and reasons for not so doing are made known, even in limited circumstances, it is all too easy for questions to be posed as to the integrity of the reputation of the proposed accused. If the DPP were permitted to give reasons, such reasons would have to be focussed and direct, as banalities would serve no-one, either the victim, family of the victim, or proposed accused. Reasons such as "insufficient evidence" might label proposed accused persons as criminals, or such explanations as "a lost exhibit", "death or unavailability of a witness" might easily imply guilt, with no venue or forum available to the proposed accused to ventilate the issues.

All of this is particularly relevant in today's changed circumstances where it is now not uncommon for newspapers to name suspects in ongoing criminal investigations.

It is accepted by all that the DPP does not decide not to prosecute without good reason, thus the giving of reasons (or not) will not alter any existing perception. The Law Society is not aware of any lack of confidence in the DPP arising from the inability to give reasons. In most cases where an apparent crime has been committed, and a direction not to prosecute issues, it will be apparent to all who have a legitimate interest in or knowledge of the case why there is no prosecution, and issuing of reasons will not further illuminate the issues. The DPP must be able to retain total objectivity and be able to make unpopular decisions either to prosecute or not prosecute without having to provide reasons, no doubt a first step to having to justify those reasons.



There would always be a concern that if a policy were adopted to give reasons for not prosecuting, a temptation would be created to prosecute even in improper cases, rather than attract the obligation to give reasons.

If so, should reasons be given to only those with a direct interest, the victims of crime or their relations?

In most cases, An Garda Siochana will liaise with the victim/family, and experience suggests that most victims/families are kept satisfactorily apprised on the ongoing investigation. As a consequence of this, it is, in the experience of the solicitors who have contributed to the Society's submission, a relatively rare event when a decision to prosecute (or not) comes as a surprise to the victim/family. The Society reiterates the view previously expressed that the office of the DPP enjoys full public confidence, and it does not believe that the relatively limited category of cases in which the Director directs no prosecution, a family having apparently expected one, would justify changing an established policy. The Society is wholly opposed to the dissemination of reasons to persons other than those with a direct interest.

Should reasons also be given to the public at large?

Since the Society has a principled position that not even the victim/family should be given reasons, it follows that reasons should not be given to the public at large. This is particularly so in any case where a suspect is either named or identifiable. The reputation of any suspect - and this is linked closely to the presumption of innocence which is a cornerstone of our system of criminal justice and is a constitutional entitlement - is all too easily put at hazard by publicity. A decision by the DPP not to prosecute is usually final. Any reasons that might be given that might suggest that there is some, but insufficient, evidence against a suspect, threatens those constitutional cornerstones outlined above.

Further, there are other aspects of the matter that must be considered. The Director has identified other legal issues arising in relation to this discussion which not only include the protection of the reputation of a suspect, but also the protection of the reputation of a witness. The DPP might, for example, if reasons were to be given in specific cases, feel constrained to suggest that a particular witness was for one reason or another thought to be unreliable. Witnesses are also citizens, and are equally entitled to the protection of their reputations for (different)



constitutional reasons. The Director has also identified the possibility of future developments in a case being prejudiced by the publication of sensitive material, and the protection of police sources. These are, in the view of the Society, entirely legitimate considerations, and quite self-evidently, the greater the extent to which information comes into the public domain, whether by giving of reasons or otherwise, the greater the potential threat that comes into being in respect of those considerations as well.

If reasons are given, should they be general or detailed?

It is clear from the Society's position that neither general nor detailed reasons should be given. However, for the record, the Society submits that the giving of detailed reasons, as opposed to general, presents a greater risk of harm to any and all aspects as previously outlined.

Should they be given in all cases, or only in certain categories of serious cases? If so, which?

This question is particularly indicative of the general position of the Society that the current policy is not only sound, but is in general a more prudent option.

Once the principle of having to give reasons is conceded, it becomes very difficult to impose practical, not to mention, theoretical, limits. Suppose, for example, that the Director opts to give reasons in cases of murder and rape. How is it possible to limit "murder", otherwise than by reference to all apparent homicides/unlawful killings. What is the difference, in principle, between acts of violence that kill a victim and those that maim? If it is decided to admit serious assaults to the category, what constitutes "serious"?

Likewise, it is not only theoretically, but practically, difficult to limit the category of cases of "rape" as many assaults which allege rape also constitute allegations of aggravated sexual assault, sexual assault, etc. Then there are additional cases in this category, such as incest-type cases or "statutory rape", which are also extremely serious and which, presumably, would be subsumed within the policy of giving reasons in rape cases.



In fact, it is difficult, in theory, to see a justification for giving reasons in particular categories of cases, albeit serious ones, and not to extend that policy to all cases. The Society's position is, as aforementioned, the reverse. Might not individuals involved in relatively minor "neighbour" disputes not be entitled to reasons for no prosecution, for example? The same would apply to the victims of relatively minor assaults, and all of the theoretical objections apply just as much to those cases as they do to the more serious ones.

How can reasons be given without encroaching on the constitutional rights to one's good name and the presumption of innocence?

As is clear from the Society's submissions, this is the ultimate cornerstone of the Society's objections, based as it is on pure constitutional considerations. The Society can imagine no means whereby reasons might be given without offending these principles, and in that regard the statement of the DPP in 1983 is entirely apposite.

Should the communication of reasons attract legal privilege?

It is clear that the Society is opposed to the giving of reasons generally. That being so it is otiose to address in detail this issue. However, the Society would adopt the position that communications, in good faith and without malice, from the Director of Public Prosecutions, should be privileged, and it may be necessary to legislate for this eventuality, should the DPP decide to amend his policy.

How should cases where a reason cannot be given without injustice, be dealt with?

This has been addressed above. It has been noted that the relationship between victim/family and An Garda Síochána is a continuing one, and in cases where there has been a perceived injustice (by virtue, that is, of not prosecuting), it should be possible for the Gardai to reassure concerned complainants that the evidence in the case was assessed by the highest authority, reassessed at deputy Director level if need be, and that a decision has been taken that a prosecution cannot be brought to meet the required legal onus and standard.

By whom and by what means should reasons be communicated again?



The Society is of the view that reasons should not be given but if it were to be decided that they should be, then An Garda Siochana would be the most appropriate body to pass on reasons to complainants.

Finally, the Director has referred to the specific context of a Nolle Prosequi in the Discussion Paper. In the paper, the Director canvasses the possibility of an individual's reputation being sullied if a Nolle is entered and no explanation is given. The Society is of the view that while this does represent a slightly more complex situation, nonetheless, the principle remains the same, and in its view, the giving of reasons is a sea change in policy to which it is opposed.

Criminal Law Committee
March 2008