The accountability of the Director of Public Prosecutions in Ireland

The topic I was asked to speak on is that of "Accountability and the Criminal Justice System". While it would be very tempting for me to hold forth on many of the interesting questions which could be encompassed by this title, ranging from whether we need a judicial council in Ireland with power to deal with minor matters falling short of the sort of judicial misbehavior that calls for removal from office, or with the whole question of the accountability generally of the two branches of the legal professions to the wider public. I propose to confine myself to speaking about the accountability of my own Office.

The Office of Director of Public Prosecutions was created by the Prosecution of Offences Act, 1974. In creating this Office, the Act followed a well worn path in that such an office had been created in England and Wales as far back as 1879 and in many other common law jurisdictions subsequently. However, the most striking feature of the Irish legislation was the degree of independence which was conferred on the Director and his officers and the total absence of political or other outside control.

The legislation to establish the Office of Director of Public Prosecutions was largely the brainchild of a reforming Attorney General, Declan Costello SC, who was also responsible during his term of office for the establishment of the Law Reform Commission. The Dáil debates on the legislation do not disclose that the establishment of the Office was prompted by any particular difficulty which had been encountered in any individual case. In introducing the legislation, the then Parliamentary Secretary to the Government, John Kelly TD[1], explained the purpose of the legislation as twofold, firstly, to ensure that the prosecution system "should not only be impartial but should be seen to be

[1] John Kelly T.D., as well as being a member of Parliament was a leading Irish legal scholar and the author of the leading Irish textbook on Constitutional Law. He served briefly as Attorney General in 1977. The term "T.D." means "Teachta Dála" and equates to member of parliament

so and that it should not only be free from outside influence but should be manifestly so" and secondly "to enable the Attorney General more effectively to discharge his primary function of giving legal advice to the Government and Government departments on matters of law and legal opinion".[2] In the latter regard, Ireland had recently become a member of the European Economic Community with the result that there had been a very large increase in the amount of government legal advisory work which the Attorney General was called upon to do.

There are a number of interesting aspects to the debate. The first, and perhaps to a modern eye the most curious, is that the main issue which appeared to exercise the deputies on both sides of the House was the question of political considerations in the briefing of barristers to act for the State. Happily, one of the effects of the establishment of the independent Office of the Director of Public Prosecutions is that considerations of what side of the political fence a barrister may be on have since then played no part whatsoever in the allocation of criminal work to act on behalf of the People in prosecuting crime before the court.

With regard to the question of independence and impartiality, in the course of the debate speakers from both sides of the House were at pains to emphasize that Attorneys General had not in the past allowed political considerations to interfere with decisions whether to prosecute, and that notwithstanding that every Attorney General was an office holder appointed by the Taoiseach of the day successive holders of that office had behaved with due impartiality in the fulfillment of their duty as prosecutor.

Nonetheless, there was a widespread acceptance on all sides that this had not necessarily been the public perception of how things operated. As Mr. Kelly put it "I do not accept that such considerations have, in practice, exercised any such influence. However, the fact that the office of Attorney

[2] Dail Debates, the 11 June 1974, Vo1 273, col 803

General has a political aspect gives rise to a danger that members of the public may harbour suspicions, however misconceived, on this score."[3]

In practice it seems that prior to 1975 it had been relatively common for members of the Oireachtas to make representations to the Attorney General in respect of their constituents who might be charged with offences. This seems to have been particularly the case in relation to road traffic offences which, in the culture of the time, would have been regarded by many people as not really criminal matters at all. While it may well have been the case that such representations were of no effect the fact that they continued to be made indicated that the general public seemed to have a belief in their possible usefulness.

A curious feature of the debate is the absence of any reference whatsoever in it to the arms trial which had taken place only four years previously, when the then Taoiseach, Jack Lynch, T.D., had dismissed three members of his Government from office, two of whom subsequently had prosecutions initiated against them for alleged conspiracy to import firearms. One of these ministers, Charles Haughey, T.D., was returned for trial, and was subsequently acquitted by a jury. In the case of Deputy Neil Blaney the District Court found there was insufficient evidence to return him for trial. While the Attorney General of the day behaved with unquestioned propriety and impartiality it must have been a difficult and even an invidious task for him to have had to bring a prosecution against two colleagues who had sat with him very recently at the cabinet table. At the very least it is difficult to believe that this experience would not have highlighted for many people the possible difficulties inherent in asking a political appointee of the Taoiseach to act as chief prosecutor. It is curious, however, that if such thoughts were present to any deputy's mind, and it is hard to believe that they were not, nobody at all thought it fit to mention them.

[3] ibid

The Independence of the Prosecutor

The Prosecution of Offences Act, 1974, creates a number of substantial guarantees for the independence of the Director of Public Prosecutions. Firstly, the Act expressly states that the Director shall be independent in the performance of his functions. Secondly, although the Director is appointed by the Government, the appointment may be made only from among those persons who are considered suitable for appointment by a committee consisting of the Chief Justice, the heads of the barristers and solicitors professions in Ireland, the permanent secretary to the Government and the permanent head of the Attorney General's Office. Thirdly, the Director can be removed from office by the Government only following consideration by them of a report of an inquiry into the physical or mental health or conduct of the Director carried out by a committee consisting of the Chief Justice, a High Court judge nominated by the Chief Justice and the Attorney General.

In addition, the Act makes it unlawful to communicate with the Director or his officers for the purposes of influencing the making of a decision to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings unless the person making the communication is a defendant or complainant in criminal proceedings or believes that he is likely to be a defendant, or is a person involved in the matter either personally or is a legal or medical advisor, a social worker or a member of the family of such an involved person. Noteworthy from the absence of people who are exempted in this manner is any mention of elected representatives. Although this provision was not supported by any criminal sanctions it has ended the practice which apparently existed before 1974 whereby politicians would make representations in relation to criminal proceedings. My Office has procedures in place to ensure that if such unlawful communications are received in the Office they are not seen either by me or by the officer who is dealing with the case. On the rare occasion when letters are sent to the Director in breach of this section the Office simply replies to the effect that by

virtue of the provisions of the Act the communication is an illegal one and under the Act cannot be entertained.

Finally, the Act provides that the Director of Public Prosecutions is to be a civil servant in the service of the State. From the Dáil debates at the time it is clear that the thinking behind this provision was to reinforce the independence of the Director given the strong guarantees of security of tenure held by senior office holders in the civil service.

Unlike the situation in some other jurisdictions, the 1974 Act did not confer on the Attorney General any power of superintendence of the Director of Public Prosecutions. Nor did it create a reporting relationship between the Attorney General and the Director. However, section 2(6) of the Act provides that "the Attorney General and the Director shall consult together from time to time in relation to matters pertaining to the functions of the Director."

Consultations regularly take place between Attorneys General and Directors. There are many reasons why such consultations are required. It is the practice to hold regular meetings in relation to individual cases in which both the Attorney General and the Director are named as defendants. It is generally possible for the Attorney General and the Director to agree a common approach to defending such actions and to engage a single team of counsel to act on behalf of both of them. Other reasons which might lead to a consultation might include discussions about the likely practical impact of a reforming measure in the criminal law on the Director's functions. There are also a number of matters in relation to which the Attorney General's consent to a criminal prosecution is required, such as prosecutions for breaches of the Official Secrets Act, 1963, and where such matters arise a consultation would be likely to take place. So far as cases in which the Attorney General is not directly involved, he does not have any power to give an instruction to the Director as to how the case should be dealt with. In my experience, and I believe in that of my predecessor, Attorneys General have been punctilious in

respecting the independence of the DPP and in avoiding any communication which might be regarded as being in the nature of an instruction as to how a particular matter should be handled.

The Accountability of the Director

The Director of Public Prosecutions is accountable in a number of ways for the performance of his functions, apart from the mechanism of consultation with the Attorney General. In the first place, his Office is accountable for the expenditure of public money through the normal governmental accounting procedures of the Dáil Committee of Public Accounts and the Comptroller and Auditor General, and since the establishment of the Office it has been the practice to appoint the Deputy Director, who is responsible for the management of the Office and who was envisaged by the Public Service Management Act, 1997, as being Head of the Office as Accounting Officer. The Freedom of Information Act, 1997, applies to the Office only in respect of records concerning the general administration of the Office. The purpose of this provision is, of course, to avoid the Freedom of Information Act being used in order to obtain details of individual cases. The Director, of course, remains subject to the normal rules of criminal disclosure in relation to individual cases.

The Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997, governs the compellability of witnesses before parliamentary committees and empowers such committees to summon witnesses to give evidence and to produce or make discovery documents. However, this Act does not apply to the Director of Public Prosecutions or his officers except where the committee is the Committee of Public Accounts. Evidence or the production of documents can be compelled only in relation to the general administration of the Office or in relation to statistics relevant to a matter referred to in a report of and published by the

Director of Public Prosecutions in relation to the activities generally of the Office.[4]

The Director and his officers are not, therefore, accountable to the Oireachtas or the public in respect of the reasons for particular prosecutorial decisions and until recently it was the policy of the Office never to give such reasons in public.

Despite the fact that the Oireachtas is not entitled to compel the Director or his officers to attend the Director has voluntarily appeared before Oireachtas Committees on a number of occasions to discuss matters of legal policy on which it was felt that the practical experience of his Office might be of assistance to members of the Oireachtas. Such appearances have always been on the strict understanding that individual cases would not be discussed.

The question has sometimes been raised whether the conferring of prosecution powers on a non-elected official who is not accountable to or answerable to any elected representative for prosecution decisions is reconcilable with democratic principle. The point was raised in the Oireachtas in the course of the debate on the 1974 legislation by Major Vivian DeValera, TD, in the following terms:

> *"It has been accepted that an Attorney General changes with the Government and that is right. The Attorney General, apart from his function in Government as an administrator of justice, is also the Government's confidential legal adviser. It is patently clear therefore that the Attorney General should come and go with the Government.*

[4] Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997, section 3(6)

> *Is it not desirable that the Public Prosecutor shall be in the same position? Like the Attorney General, the Public Prosecutor will be dealing with matters of policy with regard to prosecutions and Government administration of law. He should be in a position to take that responsibility. If democracy is to function, it is desirable that at the pinnacle of every point, that the representative elected by this Dáil to carry the ultimate responsibility shall be responsible in the same as a Minister is ultimately responsible to the electorate. These are policy matters. It is a principle of democracy which we should adhere to. It is getting away from democratic principles to appoint permanent officials at the top."*[5]

These points were, however, roundly rejected by the Government supporters of the Prosecution of Offences Bill who insisted that the Bill's purpose was to remove prosecutions from the political arena. Again I quote from Mr. John Kelly, TD:

> "The political content in this work will be very small; in fact it will be non- existent except in as far as routine prosecutions are brought under an Act which itself has got a political complexion, and of course that Act should be applied by all Governments as long as it remains an Act…
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> This civil servant is, I think, rightly established as such. I think it would be quite wrong if it were somebody who changed with the Government going out of office because that would identify him clearly as a political creature. That would be wrong because it would encourage the public to do what this Bill is designed to discourage. It would encourage the public to believe that political pressure or political cronyism of some sort brought to bear on the Director of Public Prosecutions could be effective. Since naturally he himself would, because he would lose his

[5] Dáil Debates, 11 June, 1974, Vol 273, col. 880-1

> job as soon as the Government went out, have an interest in holding on, it would instantly give him an interest in bending to that political pressure brought in favour of some member, at high or low level, of the party which is then in power".[6]

Since the Irish debates in 1974, the tendency in other common law jurisdictions has been very much towards the establishment of separate and independent Directors of Public Prosecution. In Canada until recently the functions in Ireland exercised by the Attorney General, by the Director of Public Prosecutions, and by the Minister for Justice, were in general, combined in a single individual known either as the Attorney General or the Minister for Justice. In practice, however, both at federal and provincial level separate units in his office were responsible for the prosecution function and in many provinces mechanisms were adopted to ensure that any instructions had to be given openly and made public. In Nova Scotia the Director of Public Prosecutions model was followed and the Director has been fully independent since 1990. At the federal level in Canada a new independent Office of Director of Public Prosecutions has now been established as a result of the passing of the Federal Accountability Act which came into force on 12 December 2006. In Australia every state and territory has established an Office of Director of Public Prosecutions and that office also exists at the level of the Commonwealth of Australia. The degree of independence from the political appointed Attorney General of each state varies. At least one state, Tasmania, has a fully independent DPP and most of the others have at least an operational independence although there may be a reporting relationship with the Attorney General.

In Northern Ireland, the DPP has at present a relationship with the British Attorney General similar to that of the English DPP, that is to say the British Attorney General has a power of "general superintendence" but the DPP is independent at the level of the individual case. When the justice and home

[6] Dáil Debates, Fri. 21 June 1974, col. 1391

affairs functions are devolved to the local Northern Ireland institutions, it is intended that the Northern Ireland DPP will have a similar independence to that of the DPP in Ireland.

There are of course various other methods of accountability of the Director of Public Prosecution in Ireland. The Director of Public Prosecutions is always accountable to the courts in respect of prosecutions brought by him in the sense that if he behaves wrongly he is likely to be criticized by the court for his actions. Secondly, it is the practice to keep the Garda Síochána informed as to the thinking behind decisions made in the Office, not least to ensure that the Garda Síochána are fully aware of all the requirements of the prosecution service. If the Director and his Office were to behave in ways which were erratic or unsustainable it would not be long before the Garda Síochána would be likely to complain about this. Furthermore, by virtue of the fact that the Garda Síochána have a power (as do injured parties in relation to offences) to seek a review of decisions, where they are dissatisfied with the decision of the DPP they can always invoke this right.

Giving of Reasons to Victims

Historically the Office did not give reasons for decisions not to prosecute to victims of crime. I do not intend to go into any great detail in this paper on the reasoning behind this policy or indeed the thinking which has led to a pilot project in the area of crimes which lead to deaths as those matters have been very fully canvassed in two recent reports issued by my Office. I would, however, like to make it clear that the thinking behind the recent change in policy is not designed to increase the accountability of the Office, although it may well have that effect. Despite the change in policy it remains the case that the Director of Public Prosecutions prosecutes on behalf of the People as a whole, on behalf of society, not on behalf of individual victims. For this reason I think the concept of accountability is not the appropriate concept to use when discussing the Office's relationship to victims. There is not and will

not be accountability to victims in the sense that we will regard ourselves as bound by their wishes or will allow them to determine how cases should proceed. The immediate past president of the Law Society, who has expressed his concerns in the recent past, need have no fears on that account.

The fundamental idea behind the change in policy is one of fairness, not of accountability. It is only right that citizens who have been particularly affected by a crime, whether directly as victims or whether as the relatives of victims of crime, should wherever possible be kept informed as to why a decision which has a major impact on how they lead their lives was made. The fact that the Office acts on behalf of the People as a whole should not prevent us from recognizing that while we do not act on behalf of the victim as such the victim of crime nevertheless has a special interest in the outcome of that case over and above the interests of any other individual citizen. The fact that we act on behalf of the People as a whole should not prevent us from taking into account the interests of the individual victim where this is not in conflict with the interest of society as a whole. Of course, the prosecutor also must always have regard to the rights of the accused person in relation to any investigation and trial but again where no conflict exists this need not preclude the prosecutor from having as much regard as possible to the interests of the victim.

It has long been the case that victims, along with members of the Garda Síochána, are entitled to seek a review of a decision not to prosecute. Of course, to some extent this right was not very effective where a victim did not in fact know the reasons why a case was not being proceeded with. The giving of reasons to injured parties may well make it easier for them to seek a review of a decision, particularly where they believe that the Director or his officers have made an error. In such a case the victim will have a chance to put forward his or her point of view and seek a review of the decision.

I believe that the operation of this policy will lead to a considerable demystification of law and I would hope that it would also lead to an improvement in public confidence in the criminal justice process. One of the difficulties with never giving reasons for decisions is that speculation and rumour tends to fill the gap and very often a fanciful rumour can drive out a much more simple fact which underlay a decision not to prosecute.

Of course I and the Office are very mindful of the cases in which it will not be possible to give a reason because doing so would adversely affect the interests of some other person who would not have an opportunity to defend himself, or where giving a reason would cut across some other interest such as a privacy interest. But a sampling of our existing files would suggest that such cases are not as common as might be thought. The intention in the pilot project is to give real reasons and not merely very generalized ones. By real reasons I mean explaining the matter in such a way that the injured party can actually grasp why the decision which was made was in fact made.

As I say, I don't propose on this occasion to go any further into the details of the scheme which has already been amply publicized by the media and for those interested can be read on my website at www.dppireland.ie

In conclusion, these are very exciting times for our Office. I am confident that we can make our new policy work and that this pilot project will work. If it does I believe that it will play an important part in helping us to provide a fair and effective prosecution service on behalf of all of the people of Ireland.