

Speech for the environmental enforcement conference

It is my pleasure to be here this morning, and I want to thank Aine Ryall for inviting me. It is really lovely to be back here in the Aula Maxima after so many years.

(As Both the ENPE Chair Anne Brosnan and the President John O Halloran have mentioned.) it is timely to be having our conference so soon after the publication last week of the EPA’s report on the State of Our Environment. Those of you who have had a chance to read even the summary will know that it sets out in a detailed way the challenges across every area where progress is measured: Climate, Air Quality, Nature, Water and Waste. While the report references progress in some areas – and indeed the production of such a detailed robust excellent report like this is, in itself, an achievement – it also contains stark assessment of the overall outlook. Deteriorating trends are identified for protected habitats and bird populations. The overall grade for water is assessed as poor with no net improvement in river or lake quality in recent years. Only 15% of Ireland’s protected habitats are in good conservation status. Ireland is not meeting the guidelines set by WHO for multiple air pollutants. I could go on.

In the foreword of the EPA report, chairperson Laura Burke lays down the challenge to us all. We must do better. Vastly better. If that is true for all of us here who as individuals want to pass down a sustainable liveable planet to the generations coming after us, it is a particularly stark call to action for those of us who are paid by the public to provide the kind of leadership that this report is calling out for.

As everyone in this room will know the challenges articulated in this and other reports require a range of actions to drive the kind of large-scale change of choices and human behaviour that is required. These actions include awareness raising, education, data collection, and increased resourcing of inspection and enforcement activity. I appreciate therefore that enforcement is only one part of the overall toolkit but I am going to speak to you this morning about some of my own previous regulatory roles to underline the point that assertive enforcement *can* play a decisive role in moving the dial on whether behaviour is perceived to be socially acceptable negligence or excused as “a once-off” or instead as behaviour that is wrong and at odds with a society’s value system. I will speak in particular about the pointy end of the enforcement spear – criminal prosecutions – which are a particularly powerful expression of a society’s values. The other reason I mention these previous professional experiences is because they have given me an increased awareness of the challenges for agencies in pursuing these kinds of investigations and prosecutions.

Earlier regulatory experiences

As mentioned during my introduction, I worked from 2007 to 2011 as in-house legal advisor in GSOC at the time when agency was being established. I think it is fair to say this was a difficult time to be in GSOC. There is lots of international research about the challenges that face policing oversight bodies particularly at the start – often because of the strong public support for police which of course is so important in a functioning democracy; and because of a strong public understanding of the challenges that the job of policing entails. In this way the context is possibly not a million miles from the high regard that the public in a locality might have for say a local employer or a neighbour. The Ombudsman Commission had the same police powers as the Gardaí, and I remember just how contentious it was – amongst the gardaí and indeed in some parts of the media – when these powers of arrest and search were being used for the first time.

My second experience of a regulatory environment was when I joined the new Enforcement division of the Central Bank in 2011. Some of you will remember that this was after the Honohan report criticised the period of so called “light touch regulation” of the financial services industry that preceded the financial

crash. The Central Bank was at that time seeking to put in place a much more assertive enforcement regime over financial service providers. I recall the shock for the board members of some financial service providers who now suddenly found themselves to be ‘persons of interest’ or ‘suspects’. Fines were issued; press releases were published with the names of those found in breach of financial service regulations. For the persons concerned this involved a sea change in approach which was in this context, broadly backed by public opinion.

From these experiences and indeed the viewpoint I have now in the Office of the DPP of the complex files that come in from a range of specialist investigative agencies, I have created a short list of some of the kinds of difficulties that can arise which make these cases challenging:

1. The first is that many regulatory agencies have a range of enforcement options – for example disciplinary or administrative or criminal. Enforcement in this environment can be more complex than say for policing because in some circumstances you need to be clear when you seize evidence or ask questions which process you are pursuing. As an aside because administrative sanctions processes were not historically a part of our legal landscape in Ireland, we actually have more experience in this country than in many of our European neighbours of going the prosecution route.
2. A second challenge that many regulatory agencies share is that the persons under investigation tend to be well resourced and represented by lawyers who may not be specialist in either administrative or criminal law. For example, the kind of legal correspondence that I would have received when pursuing a case in the Central Bank, would be largely unheard of in the course of a Garda investigation. However, as a regulatory agency grows more confident typically it will not take as much notice of this kind of legal correspondence as it might at the start.
3. A third practical challenge that often comes up for specialist agencies is that inspectors or authorised officers can find it more challenging to secure evidence than Garda members – simply because members of the Garda Síochána are more recognisable, usually have clearer powers and carry a kind of automatic authority in the public mind. While regulatory agencies will always be the most specialist at the subject matter, there will often also be an important role for the use of police powers in relation to serious offending no matter what the subject matter. It is important therefore for regulatory agencies to try to have a relationship at a strategic level with the Gardaí.
4. Fourthly there is the fact that although the vast majority of cases in the criminal justice system are dealt with by way of a guilty plea this is often not true of regulatory offences or complex financial crime or indeed organised crime. When a regulatory body decides to prosecute or sends a file to my Office and we prosecute it on indictment then the trials that follow are often hard fought, involve experts that have to be sourced sometimes across other jurisdictions; as well as voluminous exhibits and disclosure. It can be helpful sometimes in complex cases for the ODPP to be involved at the investigative stage and we do provide this service (albeit sparingly!) where it is needed.
5. The fifth and final common challenge I was going to mention this morning is the difficulty that can arise in conveying to juries and judges the seriousness of the offending behaviour and that what is at stake is “criminal”. There can be problems also in the context of court backlogs in getting the case on and in keeping witnesses on board. Some jurisdictions have dealt with these issues through the creation of specialist courts – for example for financial crime or for environmental crime.

Notwithstanding these common issues that can arise in these kinds of prosecutions brought by specialist or regulatory agencies, I do not mean to suggest that the context is always the same. In fact, given the urgency of the environmental issues facing the country and the planet, one would hope that the context for prosecuting environmental crime where the evidence is made out, is becoming clearer and clearer for everyone in society including prosecutors, juries and judges.

Another reason I mention these regulatory experiences is because I know that working in regulatory enforcement can feel like an isolated and unpopular activity. It can be useful I think to build networks with agencies and sectors who are facing similar challenges. In that regard I think the National Criminal Investigation Forum, which the Office of the DPP participates on along with the EPA and a wide range of regulators and the Gardaí, is a very useful network and one that I have spoken to myself in the past year. In fact, I understand that the EPA is hosting the next session of this group next week.

Some information about ODP

So, what role should a national prosecution service play in all of this? First, a few words about *our* context. The Office of the DPP consists of a staff of over 280. More than 160 of these are lawyers and the rest perform various legal support or corporate service functions. In addition to the core staff of the Office we have 30 state solicitors around the country. These are private practitioners contracted by us to prosecute and instruct counsel in circuit courts nationwide. Finally, we have panels of barristers, junior counsel and senior counsel, who prosecute on our behalf in the Circuit and Central Criminal Courts.

Generally, when you hear that a *“file has been sent to the DPP”* what this means is that the investigative agency has sent a file to the Directing Division. This Division consists of around 30 lawyers whose primary task is to review the approximately 11,000 files that come in every year from investigators with a view to deciding whether to prosecute or not. We have assigned certain specialties to some of these lawyers so that they can become expert in an area. We have for example a small team of specialist lawyers who review sea fisheries files and a separate small team that deal with other areas of environmental law. Each team has a dedicated lead lawyer. I would also mention that we also have dedicated experts on organised crime because as we know there can be a transnational OGG aspect to complex environmental crime that is important to be live to.

Sea fisheries

Because we are in Cork where many of our sea fisheries cases start, I will mention that area of work first. I should say that being a sea fisheries expert in the Office of the DPP may not be an especially attractive proposition as we have four lawyers who operate an on-call 24-hour phone service to the Sea Fishery Protection Authority. The Authority can contact us at night or during the weekend in the course of a detention of a fishing boat to seek directions or advice about a range of offences such as logbook offences or a failure to place acoustic devices on fishing nets. For example, we have a case currently awaiting sentence where the fishing vessel failed to affix an Acoustic Deterrent Device to their commercial fishing net as they are required to do. For those not in the know about these matters, the purpose of an Acoustic Deterrent Device is to protect marine mammals such as the dolphin, porpoise and whale by avoiding net entanglements. As part of our training and regular engagement with the Sea Fisheries Prosecution Authority we have been discussing how to ensure that the valuations that we rely on at a sentencing stage provide a full understanding for any sentencing judge of the impact of the illegal activity including the low grading on sea stocks and the risks to endangered or prohibited species.

Other areas of environmental crime

When it comes to other areas of environmental crime, our main dealings are with the EPA, although it is important to acknowledge that the EPA prosecutes the majority of the cases it brings summarily itself and only sends us any files it considers may merit prosecution on indictment. In recent years many of these cases have related to breaches of licenses granted by the EPA to waste disposal companies and companies that manufacture dairy products. Last year saw the conclusion of a long running case involving offences contrary to the Waste Management Act 1996. This case first arrived in our office in 2009. One of the accused was finally sentenced just last year – to a sentence of three years with 12 months suspended. I think this is possibly the first environmental crime case in this country where the accused faced a prison case. I will not say much more about the case as I know that Tom Ryan is going to speak about this and other cases when he speaks later this morning.

The EPA also plays an important supervisory role in respect of the enforcement activity of local authorities and its report last week refers to the 197,300 environmental inspections in 2022 and the fact that 93% of the environmental prosecutions brought by local authorities were in the waste sector.

Another important area of focus for all of us should be wildlife crime and we will hear about this from Niamh Guiry later this morning. I know from my conversations with other senior prosecutors in other jurisdictions that some of them are now prosecuting serious cases involving organised crime gangs who are involved in the illegal trade of wildlife.

One of the often-cited challenges of the overall enforcement landscape for environmental crime is the number of agencies involved. This is not unique to Ireland, but it does underline the importance of today's conference theme which is around organisational co-operation.

What is the role of the ODPP in supporting this important work?

So, given the range of different enforcement activity, what should be the focus of the Office of the DPP in supporting this important environmental crime investigation and prosecution work? I will mention four areas:

1. By being responsive when we receive a file containing allegations of environmental crime and decide on the case as efficiently as possible. In the case of a decision to prosecute it is incumbent on us to proactively move the case on to the extent that court processes permit. As I mentioned already, the main way in which we do this is by assigning files to dedicated lawyers who can build up expertise by developing good working relationships with the relevant agencies, and by undertaking expert training or attending relevant conferences. Unfortunately, Eveleen Healy, our lead lawyer on environmental crime couldn't make it today but I know if she were here, she would say that she has learned as much or more from her engagement with the EPA as they have hopefully learned from her.
2. A second role we can play is **by participating in available networks**, both domestically and internationally that support this enforcement work. The Office participates in quarterly online meetings with the Irish National Waste Enforcement Committee, and we have delivered training to the Network for Ireland's Environmental Compliance and Enforcement (NIECE) which is another useful collaborative structure. Recently we have also become a supporting member of ENPE.
3. Thirdly we can contribute **by providing training to investigators on the law and practicalities of running prosecutions**. We already provide occasional training to EPA and the Sea Fisheries Board, and we remain open to provide training to other interested investigative agencies if there is sufficient demand. It may

be that there would be merit in the development of more on-line resources in this regard. In fact, I know that EPA, local authorities and ourselves are planning online joint training around waste enforcement in November this year and there is an intention I think to have this training made available as an online resource.

4. Fourthly we can support this work by Engaging with government departments in response to requests for observations about reforms of the law or on the implementation of EU instruments. It is really important that when EU directives are being implemented into Irish law that any offences created are drafted so that they will not be overly complex to prove or to explain to a jury and are actually prosecutable. We also provide observations on new legislation that may not relate directly to environmental law but could be of relevance. A recent example that might be of interest is the new section 55 of the Criminal Justice (Miscellaneous Provisions) Act 2023 which provides for the first time for the possibility of witnesses giving evidence without their identity being disclosed. Although I should say that I envisage that this provision will not be justified often.

New EU Directive

I have not spoken here about the new EU directive as we will have a dedicated talk on that next this morning from Vita Jukne from the European Commission. All I can say is that for my part I think the Directive contains a lot of potentially useful provisions. For example, those provisions aimed at ensuring that the offences created are punishable by criminal penalties that are effective, proportionate and dissuasive. It also has potentially useful provisions relating to corporate liability and the liability of any person in a leading position within a company. I think the requirement to have a National Strategy could also create the space for further clarifying all of our respective responsibilities and how we can support each other and importantly, be resourced to do this effectively.

Concluding Remarks

I will conclude by reiterating that I am clear eyed about the challenges in investigating and preparing a case for prosecution. It is a resource intensive task for agencies that have a range of competing functions. Many of these cases are hard fought and take years. There is also the risk that notwithstanding the level of resourcing, the real extent and impact of environmental crime cases are not fully understood, and cases are dealt with by the courts in a way that does not have a real deterrent effect.

My Office does want to fully play our part. We can and do provide support to investigative agencies tasked with putting together a complex file so that they are supported in identifying the key proofs and in preparing any case for trial. We assign these cases to dedicated lead lawyers with a view to ensuring that these cases are pursued with the same tenacity that we apply to other types of offending. It is also part of our job as prosecutors to continue to find ways to communicate the seriousness of the alleged offending to a court. We have our own resourcing struggles, but I think there is the potential for us to provide more support and training beyond what we do already, and we will be happy to do this where there is the demand.

I'll finish by remarking that 40 years ago, people in a pub would watch someone drunk getting into their car to drive home and say nothing. Such widespread societal acceptance no longer exists, and this is due partly to education but also to a strong campaign of detecting and prosecuting drink driving. Many of us now look back at the generation before us and wonder how there wasn't more uproar about this or indeed about a range of other types of serious offending. The generation coming after us are facing the impacts of climate change, pollution and loss of biodiversity. In future years they will also look back on our action or inaction. They deserve the full commitment of us all – but especially those of us in public service leadership positions – to address our attention to these challenges.