EXPLANATORY MEMORANDUM TO

The Attorney General's Human Rights Guidance (Public Prosecution Service for Northern Ireland) Order (Northern Ireland) 2014

SR 2014 No. 131

1. Introduction

1.1. This Explanatory Memorandum has been prepared by the the Attorney General for Northern Ireland to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.

1.2. The Statutory Rule is made under the powers conferred by section 8(3)(c) of the Justice (Northern Ireland) Act 2004 and is subject to the negative resolution procedure.

2. Purpose

2.1. The Statutory Rule brings into operation human rights guidance for the Public Prosecution Service by the Attorney General for Northern Ireland on the exercise of Public Prosecution Service functions in a manner consistent with international human rights standards.

3. Background

3.1. Section 8(1) of the Justice (Northern Ireland) Act 2004 obliges the Attorney General for Northern Ireland to issue guidance for criminal justice organisations on the exercise of their functions in a manner consistent with international human rights standards. This Statutory Rule brings into operation guidance for the Public Prosecution Service as required by section 8(3)(c) of the 2004 Act.

4. Consultation

4.1. The Attorney General has consulted with the Advocate General pursuant to section 8(1A) and section 8(5A) of the Justice (Northern Ireland) Act 2004.

5. Equality Impact

5.1. The Attorney General for Northern Ireland is not listed as a public authority for the purpose of section 75 of the Northern Act 1998.

5.2. The Statutory Rule provides for the coming into force of the guidance under section 8 of the Justice (Northern Ireland) Act 2004. This guidance is based upon international human rights standards and therefore the principles of equality and non-discrimination form a central component of the guidance which the Statutory Rule brings into operation.

6. Regulatory Impact

6.1. A Regulatory Impact Assessment is not required.

7. Financial Implications

7.1. Not applicable.

8. Section 24 of the Northern Ireland Act 1998

8.1. It is the view of the Attorney General that this Statutory Rule is compliant with section 24 of the Northern Ireland Act 1998.

9. EU Implications

9.1. Not applicable.

10. Parity or Replicatory Measure

10.1. The Attorney General is making the Statutory Rule in fulfilment of a legal requirement under section 8 of the Justice (Northern Ireland) Act 2004.

10.2. The Statutory Rule applies to Northern Ireland only. There is no corresponding Great Britain Statutory Instrument.

11. Additional Information

11.1. The text of the guidance is attached to this Explanatory Memorandum at Annex A.

ANNEX A

HUMAN RIGHTS GUIDANCE FOR THE PUBLIC PROSECUTION SERVICE

INTRODUCTION

1. Human rights standards are designed to make life better for individuals and communities and they should not be, and not be viewed as, burdens to competent professionals conscientiously carrying out their duties. When competent professionals are working diligently to the high standards set by their own disciplines they will almost invariably comply with human rights standards. This guidance is designed to assist professionals by offering them a framework within which their own professional standards can safely operate. By following this guidance those to whom it is addressed can be confident that their work is compliant with international human rights standards.

2. This guidance is without prejudice to the requirement on all public authorities to comply with their obligations under section 6 of the Human Rights Act 1998 and with EU Law.

THIS GUIDANCE IS ADDRESSED TO THE PUBLIC PROSECUTION SERVICE

3. While based on international standards of human rights law, this guidance is intended to be focused on those areas of most relevance and assistance to the Public Prosecution Service. Guidance under section 8 of the Justice (Northern Ireland) Act 2004 is not designed to be static or unduly rigid. It will be revised in the light of adjustments in human rights standards and the experience both of those to whom it is addressed and the public.

INTERNATIONAL STANDARDS

4. This guidance is based on international human rights standards, in particular the:

    - European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR);
    - International Covenant on Civil and Political Rights;
    - Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence;
    - Council of Europe Convention on Action Against Trafficking in Human Beings;
    - United Nations Convention on the Rights of the Child;
    - Rome Statute of the International Criminal Court;
    - United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime (2000);
    - Council of Europe Recommendation (2000) 19 on the role of public prosecution in the criminal justice system;
    - Council of Europe Recommendation (95) 12 on the management of criminal justice;
    - Council of Europe Recommendation (2006) 8 on assistance to crime victims;
    - Council of Europe Recommendation (2002) 5 on the protection of women against violence;

- Council of Europe Recommendation (2000) 11 on action against trafficking in human beings for the purposes of sexual exploitation;
- Council of Europe Recommendation (91) 11 concerning sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults;
- Council of Europe Recommendation (97) 13 concerning intimidation of witnesses and the rights of the defence;
- Council of Europe Recommendation (2005) 9 on the protection of witnesses and collaborators of justice;
- Council of Europe Recommendation (87) 18 concerning the simplification of criminal justice;
- Council of Europe Recommendation (97) 20 on "hate speech";
- Guidelines for the Role of Prosecutors – Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Havana between 27th August and 7th September 1990;
- Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (1999) – International Association of Prosecutors;
- European Guidelines on Ethics and Conduct for Public Prosecutors "The Budapest Guidelines" (2005);
- Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations (30 March 2011);

- Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims;

- Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime;

- Office of the High Commissioner for Human Rights 'Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence' adopted 5 October 2012.

DELAY

5. Timely disposal of criminal cases is the entitlement of the entire community including defendants, victims and witnesses. Timeliness is at the centre of a properly functioning criminal justice system and is a requirement of international human rights standards.

6. The requirement of timely disposal applies to the whole trial process, including the pre-trial stages. All persons in the PPS whose work may affect the timeliness of criminal proceedings should carry out their work with due care and efficiency. Those involved in the assignment of work should ensure they have the necessary information from the State Pathologist's Department (SPD), the Coroner's Service, the Police Service for Northern Ireland (PSNI) and Forensic Science Northern Ireland (FSNI) to prioritise work in accordance with the guidance set out in the next two paragraphs.

7. Whether or not any lapse of time becomes unreasonable depends upon the circumstances of each case. Matters should usually be assessed as a whole and the need for expedition balanced against the proper administration of justice. When work is given to the PPS prioritisation should occur so that limited resources are directed to where the need for expedition is greater. To that end work should normally, subject to serious public safety considerations and subject to any overriding direction from a court, be prioritised as follows:

    a) Priority should be given to work where the accused is a child in custody.

    b) Priority should next be given where the accused is an adult in custody.

    c) Priority should next be given where the accused is a child.

    d) Priority should next be given where delay has already occurred particularly where this delay has been caused by the action or inaction of any public authority.

8. A record should be kept of the approach to prioritisation adopted for each case. Reasons for exceptional or individualised prioritisation must be recorded.

9. The PPS should ensure that during the trial process PPS staff do not contribute to unnecessary delay by failure to meet timetables set by the court. The PPS, FSNI, the SPD and the PSNI must communicate effectively with one another to ensure that this does not occur. If delay is anticipated or has occurred the PPS should inform the court in order to facilitate case management.

10. The PPS should make available upon request predictive indicators for the time taken to complete standard types of work. In cases where the difficulty or complexity of work being

undertaken results in work taking longer to do than is normal or expected then, provided the work has been performed diligently with proportionate resources devoted to it, such delay should not be regarded as unreasonable.

11. Where unreasonable delay has been caused by the PPS then responsibility for this should be accepted promptly and notified to the court together with, if the relevant work remains undone, a detailed timetable for its completion. The PPS should not accept responsibility for delay which has been caused by other public authorities, and should advise the court of where delay originates to facilitate greater efficiency (both in the immediate case and to inform future procedures).

12. Prosecutors should have particular regard for the impact of delay on the welfare of children.

13. The zeal to avoid delay should never result in a diminution in the quality of work.

ROLE OF PROSECUTORS

14. Prosecutors should perform their duties fairly, consistently and expeditiously, and respect and protect human dignity.

15. In the performance of their duties and acting within the confines of their legal authority, prosecutors should, in particular:

    a) carry out their functions fairly, impartially and objectively;

    b) ensure equality before the law, and make themselves aware of all relevant circumstances including those affecting the suspect, irrespective of whether they are to the latter's advantage or disadvantage;

c) not initiate or continue a prosecution when an impartial investigation shows the charge to be unfounded;

d) not present evidence against suspects they know, or believe on reasonable grounds, was obtained through recourse to methods which are contrary to the law without first disclosing this to the court;

e) comply with the relevant professional standards such as the revised code for prosecutors and relevant professional standards including the Bar of Northern Ireland Code of Conduct and the Solicitors' Practice Amendment Regulations 1987 as amended 25th June 2013;

f) give due attention to the investigation and prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognised by international law;

g) be aware that the actions of the PPS may inadvertently have a traumatic effect on witnesses and to strive to counter that effect where possible;

h) seek to safeguard the principle of equality of arms, in particular by disclosing to other parties – save where otherwise provided by the law – any information which they possess which may affect the justice of the proceedings; and

i) abstain from discrimination on any ground such as sex, sexual orientation, race, colour, language, religion, political, or other opinion, national or social origin, association with a national minority, property, birth, health, disability or other status.

DECISIONS TO PROSECUTE

16. In deciding whether a prosecution should commence or continue, a prosecutor should:

    a) seek to ensure all necessary and reasonable investigations and enquiries have been made by querying any apparent error or omission in the file received from the PSNI;

    b) take decisions based upon an impartial and professional assessment of the available evidence;

    c) decline to use evidence reasonably believed to have been obtained through unlawful methods which constitute a grave violation of the suspect's or other person's human rights;

    d) strive to strike a balance between the general interest of society and the interests and rights of the individual;

    e) preserve professional confidentiality;

    f) give due consideration to discontinuing proceedings conditionally or unconditionally or diverting cases from disposal by the courts, where such action is appropriate, particularly in cases against juveniles;

    g) take prosecutorial action against juveniles only to the extent that is strictly necessary;

    h) ensure that consideration is given to whether requiring a witness to give evidence involves such risks to their safety as to breach their rights under Article 2 or 3 ECHR; and

    i) consider whether the decision not to prosecute might, in exceptional circumstances, amount to a denial of a victim's right not to be subjected to inhuman or degrading treatment.

MAKING DECISIONS IN CASES OF VIOLENCE AGAINST WOMEN, CHILDREN AND DOMESTIC VIOLENCE

17. The PPS should adopt a comprehensive response to violence against women, children and domestic violence. Prosecutors should:

    a) take account of the relationship between victims, perpetrators, children and their wider social environment;

    b) regard violence against women and children as an aggravating factor in deciding whether or not to prosecute in the public interest; and

    c) where necessary give consideration to an application for a restraining order.

18. In cases where the victim fails to lodge an official complaint, withdraws such a complaint or discontinues their support for proceedings, the prosecutor should ensure:

    a) consideration is given to proceeding with the complaint where the evidence allows;

    b) that as far as possible access to the information and support facilities continue despite any reluctance to engage with the criminal process; and

    c) that a risk assessment is conducted considering the seriousness of the situation and the risk of repeated violence towards the victim and any associated children.

19. Where a complainant of sexual offences or domestic violence retracts an allegation the offence of perverting the course of justice may have been committed. There may be credible reasons why a complainant may retract a truthful allegation. Where the prosecutor believes that it was the retraction rather

than the original allegation which was false, then he/she should give very careful consideration to whether a prosecution for this retraction is in the public interest. Any decision to prosecute in such circumstances is likely to be highly exceptional, since the truth of the original allegation leads to the conclusion that the complainant was a victim.

MAKING DECISIONS IN CASES OF HUMAN TRAFFICKING

20. The PPS should consider trafficking in human beings to be a serious violation of human rights when assessing the public interest of prosecuting identified victims of trafficking.

21. Investigation and prosecution should not be dependent upon reporting by a victim and the PPS should actively consider continuing with proceedings even if the victim has withdrawn his or her statement.

22. The PPS should take into account the extent to which victims of trafficking were compelled to engage in unlawful activities in order to prevent imposing penalties on identified victims when applying the public interest test.

23. The PPS should ensure that, while the identification procedure is ongoing, potential victims of trafficking are not punished for immigration-related offences.

24. The PPS should ensure that it produces clear internal guidance on steps to be taken when prosecuting suspects who may be victims of trafficking.

MAKING DECISIONS IN CASES OF SERIOUS HUMAN RIGHTS VIOLATIONS

25. During an investigation and when considering and dealing with prosecutions for acts or omissions that amount to serious

human rights violations (including those carried out by agents and non-state actors) the PPS should have due regard to the principles of adequacy, thoroughness, impartiality and independence, promptness, public scrutiny and the involvement of victims.

26. While the PPS is not directly responsible for the quality of PSNI investigations, prosecutors should query any apparent error or omission in the file received from the PSNI in accordance with the above principles.

27. When considering violent incidents and, in particular, deaths at the hands of state agents, the PPS must take all reasonable steps to uncover any racist or sectarian motive and to establish whether or not national, religious or ethnic hatred or prejudice may have played a role in the events.

28. Where the outcome of an investigation and the facts so warrant, the PPS must take the necessary steps within its powers to bring those who have committed serious human rights violations to justice.

MAKING DECISIONS IN CASES OF HATE CRIME

29. Prosecutors should treat offences motivated by prejudice or hate relating to an individual's personal characteristics such as disability, race, religion, sex, or sexual orientation, as aggravating factors in deciding whether or not to prosecute in the public interest.

30. The PPS should give special attention to cases involving hate speech. In dealing with such cases the PPS should give careful consideration to the suspect's right to freedom of expression; however where the speech in question is aimed at the destruction of the rights and freedoms of other people, such

speech will not be protected under freedom of expression provisions such as those in the ECHR.

31. When considering whether or not to proceed with a prosecution (and in particular when applying the public interest test) the following six factors should be considered:

    a) context;

    b) standing or position of speaker;

    c) intent;

    d) content or form;

    e) extent of the speech; and

    f) the likelihood, including the imminent risk, that actual action is incited as a result of the speech.

GIVING REASONS FOR NO PROSECUTION

32. In cases where no prosecution is issued against a suspect, reasons should be given to the victim for that decision.

33. The PPS should review 'no prosecution' decisions when representations are made seeking such a review.

34. Particular regard should be had for those cases where the death is, or may have been, caused by acts or omissions by agents of the state. In such circumstances, prosecutors must provide a substantive and reasonable explanation for not prosecuting such agents so as to ensure public confidence in the state's respect for the rule of law.

DISCLOSURE

35. Prosecutors should seek to safeguard the principle of equality of arms, in particular by disclosing materials to the accused in accordance with the law and the principle of fair trial.

36. Fairness requires issues of disclosure to be dealt with by way of proper application of the Criminal Procedures and Investigations Act 1996 as amended by the Criminal Justice Act 2003. Prosecutors should ensure that:

    a) full disclosure be made of all material held by the prosecution that weakens its case, strengthens that of the defence or is capable of reducing any sentence imposed upon the accused;

    b) disclosure duties are applied continuously; not only in the pre-trial period but also throughout the trial;

    c) responses to disclosure requests are prompt to assist the accused in the timely preparation and presentation of their case;

    d) where it is necessary to do so in order to ensure a fair trial disclosable material containing sensitive information should be placed before the court for issues of disclosure to be determined;

    e) consideration is given to the interests of those that need to be protected including those of victims and witnesses who might otherwise be exposed to harm; and

    f) if material does not satisfy the disclosure criteria then there is no requirement to disclose it. Disclosure as an absolute right does not exist.

37. If prosecutors conclude that a fair trial cannot take place because of an inability to disclose which cannot be remedied they must not continue to prosecute.

38. Prosecutors must also be alert to the need to provide advice to, and where necessary probe actions taken by, disclosure officers to ensure that disclosure obligations are met.

39. Complaints procedures for dealing with alleged breaches to the rules should be published.

COMMUNICATION

40. Members of the PPS should maintain good internal communication, thereby ensuring accurate dissemination of information within the organisation. When a case is before the court the prosecutor in attendance should be aware of the most up-to-date position.

41. The PPS should actively engage and co-operate with other criminal justice agencies such as the police, the courts, the legal professions and other government agencies to accelerate information flows and improve inter-agency organisation and efficiency. Where the PPS becomes aware of a deficiency it should inform that agency immediately so that they are aware of the issue and can react accordingly.

VICTIMS AND WITNESSES

42. Prosecutors should take account of the interests of witnesses and take or promote measures to protect their life, safety and privacy.

43. The PPS should ensure, as far as is possible in line with its other obligations, that it works together with other organisations to ensure a co-ordinated response to victims.

44. The PPS should provide adequate, accessible and timely information on available support services to victims.

SPECIAL MEASURES

45. Prosecutors should consider and, as far as possible and consistent with the interests of justice, seek to ensure the protection of the victim's physical and psychological integrity, particularly when they could be required to provide testimony.

46. Adequate measures open to the PPS should be taken to ensure protection against intimidation and to relieve pressure on vulnerable witnesses. While respecting the rights of the defence and taking into account the wishes and feelings of the witness, applications should be made to allow vulnerable witnesses alternative methods of giving evidence which would protect them from intimidation resulting from face to face confrontation with the accused.

47. The victims and witnesses who require consideration of special measures are those who are vulnerable as a result of their personal characteristics and the nature, or circumstances of the crime. Individuals are also vulnerable where they are at risk of secondary and repeat victimisation, intimidation or retaliation.

48. An application for special measures should be considered (and will usually be made) where the witness is a child. The wishes of the child may be taken into account however, to the extent appropriate to their age and maturity. A child is someone who has not yet attained the age of 18 years.

49. In the case of child victims or witnesses of sexual exploitation special conditions or measures should be sought by the PPS in order to diminish the traumatising effects of such hearings and to maximise the quality of their evidence.

50. Specific protection measures/special measures to be considered and applied for, where appropriate, may include the following:

    a) Recording by audiovisual means statements.

    b) Not revealing or delaying releasing the identity of witnesses and/or releasing only selected details.

    c) Using pre-trial statements as evidence where it is not possible for witnesses to appear in court or where appearing in court may result in great and actual danger to the life and security of witnesses, their relatives or other persons close to them.

    d) Excluding the media and/or public from all or part of the trial.

    e) Further measures including using screens, disguising the face or distorting the voice.

51. Anonymity should only be applied for as an exceptional measure and only where the defence can have the opportunity to challenge the need for anonymity of the witness, his or her credibility and origin of his or her knowledge. Anonymity should only be applied for where it is likely that the competent judicial authority will find that:

    a) the life, bodily integrity or freedom of the person is seriously threatened, or in the case of an undercover agent, his or her potential to work in the future is seriously threatened; and

    b) his or her evidence is likely to be significant and the person appears to be credible.

52. Where a witness is missing the PPS must be satisfied that all reasonable efforts to secure their presence have been made if the PPS intends to introduce their statement in evidence.

53. Anonymity is preferable to non examination of a witness where the evidence of a witness may be decisive for the outcome of the trial.

54. A video recorded statement is preferable to a written statement.

55. The application of special measures should allow the defence an adequate opportunity to challenge the evidence given by a witness. The final decision as to whether and to what extent special measures will be permitted in any individual case will rest with the court.

INFORMATION

56. The PPS should ensure that victims are kept informed and understand the outcome of their case; relevant stages of criminal proceedings; and the verdict and sentence.

57. Victims should have the opportunity to indicate that they do not wish to receive such information.

58. Prosecutors should take proper account of the views and concerns of victims when their personal interests are affected, and take or promote actions to ensure that victims are informed of both their rights and developments in the case.

TRAINING

59. Specialised training should be provided to all staff working with child victims and victims of special categories of crime, for example, domestic or sexual violence, terrorism, crimes motivated by racial, religious or other prejudice, as well as to those working with families of murder victims.

60. Relevant training should be provided as is appropriate to the level of contact with victims.

61. Training should include training on:

    a) general awareness of the effects of crime on a victim's attitude and behaviour, including verbal behaviour;

    b) the risk of causing secondary victimisation and the skills required to reduce this risk; and

    c) the availability of services providing information and support specific to the needs of victims and the means of accessing these services.

PRIVACY

62. The PPS should take appropriate steps within its powers to avoid as far as possible impinging on the private and family life of victims and witnesses as well as to protecting the personal data of victims and witnesses, in particular during the investigation and prosecution of the crime.

63. Childrens' confidentiality and privacy should be respected through the avoidance of unnecessary disclosure of any information which could lead to their identification.

64. The PPS should adopt clear standards by which they may only disclose information received from or relating to a victim to a third party when the victim has consented to such disclosure, or there is a legal requirement to do so.

65. The PPS should respect the confidentiality of information obtained from third parties, unless disclosure is required in the interest of justice or by law.

AUDIT

66. A professional ethos of objective deduction and neutrality as to conviction or acquittal are essential elements of the independence required for the administration of justice.

67. The PPS should ensure that as far as possible timely disclosure of all results and records necessary for its decision making are provided to it.

68. A full and complete written or electronic record of the decision making process must be maintained.

69. The PPS must carry out its operational duties without prejudice to victims or suspects. Processes preventing potential conflicts of interest between staff members and victims or suspects should be in place and observed.

70. The PPS should account periodically for its activities as a whole and, in particular, the way in which its priorities were carried out.

GENERAL

71. The PPS should ensure that the above guidance is circulated to all staff to ensure awareness of and adherence to, the above standards.

72. It is similarly important that the general public and other criminal justice organisations are aware of the standards to which the PPS is held. This guidance should be available for viewing by others who may have an interest in, or who may be affected by, the work of the PPS.

73. Regard must be had to this guidance when making or reviewing contractual or other agreements with other statutory agencies.

REVIEW AND MONITORING

74. Difficulties encountered in the application of this guidance by the PPS should be notified to the Attorney General as soon as possible.

75. The Attorney General will formally seek the views of the PPS on the revision or amendment of this guidance annually. It is open to the PPS to suggest revision or amendment of this guidance at any time.

John F Larkin QC
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