

The Decision to Prosecute – Code of Guidance

1. Introduction

- 1.1 All criminal proceedings in the Bailiwick of Guernsey are brought in the name of the Law Officers of the Crown. This Code explains the general principles that are applied when making decisions to prosecute.
- 1.2 Prosecutors are not investigators and cannot direct the police or other investigators but they may give advice during the course of an investigation about matters connected to it such as possible lines of inquiry that an investigator might pursue to help establish whether an offence has been committed, the evidential requirements in relation to specific offences and the likely admissibility of evidence.
- 1.3 In serious or complex cases prosecutors are more likely to decide whether a person should be charged with a criminal offence and, if so, what that offence should be. In most cases, however, that decision will be taken by the Police and then subsequently reviewed by the prosecutor.
- 1.4 Every case that prosecutors receive is reviewed in accordance with this Code.
- 1.5 Fair and effective prosecution is essential to the maintenance of law and order. The decision to prosecute an individual is a serious step and even in minor cases may have serious implications for all involved. Each case is unique and must be decided on its own merits.
- 1.6 Prosecutors must be independent and objective and must not let their personal views influence their decisions. Nor must they be affected by improper or undue pressure from any source. Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.
- 1.7 It should be noted that prosecutors cannot disclose publicly the detailed reasons for their decision in a particular case. There are many reasons for this. For example, the decision may have been based on confidential information that relates to the credibility, reliability or health of an essential witness or could involve revealing sensitive police operations. Furthermore, public disclosure of the reasons may expose the accused person to accusations of crime in circumstances where he no longer has the opportunity of defending himself against such allegations in a court of law.
- 1.8 However, victims and witnesses are entitled to some explanation and this will generally be given to them by the police. Additionally, in cases involving death or serious injury, serious sexual assault or significant loss prosecutors will, where appropriate, meet with victims and/or their immediate family to explain their decision in more detail in so far as is possible.

2. The Prosecution Test

- 2.1 The Prosecution Test comprises two parts – the evidential test and the public interest test. A prosecution should only start or continue when the case has passed both parts of the Prosecution Test.
- 2.2 The evidential test requires prosecutors to be satisfied there is sufficient evidence to provide a realistic prospect of conviction against each defendant on each charge.
- 2.3 A realistic prospect of conviction is an objective test and means that in the judgement of the prosecutor the evidence is such that a properly directed court is more likely than not to convict the defendant of the offence(s) charged.
- 2.4 When deciding whether there is sufficient evidence to pass the evidential test consideration will be given, amongst other things, to the following issues:
- (i) whether the evidence can be used in court or is likely to be excluded because of legal rules, such as hearsay, that mean it cannot be used;
 - (ii) whether the evidence appears reliable – consideration will be given to any explanation given by the suspect and whether it is credible, what evidence there might be that supports or detracts from the reliability of a confession, whether the background of any witness could impact upon his or her credibility (including any motive to embellish or fabricate evidence), whether other material exists that supports or damages the integrity of the evidence as well as any other matter that appears relevant to establishing whether there is a realistic prospect of conviction.
- 2.5 If the evidential test is not met, and it is considered no more evidence can be obtained that would be likely to affect that decision, proceedings should not be commenced or continued, no matter how serious the allegation.
- 2.6 If, and only if, prosecutors consider there is a realistic prospect of conviction will they then move to the second stage, which is to apply the public interest test.
- 2.7 A prosecution will usually take place unless the prosecutor is satisfied there are public interest factors tending against prosecution which outweigh those tending in favour. As a general proposition, the more serious the offence or the offender's criminal record, the more likely it is a prosecution will be required in the public interest.
- 2.8 However, it has never been the rule that suspected criminal offences must automatically be the subject of criminal proceedings. A prosecution might therefore not take place where the matter can be dealt with properly by some other means, such as a formal caution being given or, in the case of a young person, through action taken by the Children's Convenor.

2.9 Prosecutors must balance carefully the public interest factors for and against prosecution. Assessing the public interest is not a simple matter of adding up the number of factors on each side of the line; prosecutors must instead decide the importance of each public interest factor in the particular circumstances of each case and then make an overall assessment. In some cases one factor alone that is in favour of prosecution may outweigh a number of other factors that point the other way.

2.10 Examples of common public interest factors tending in favour of prosecution include:

- (a) a conviction is likely to result in a significant sentence;
- (b) a weapon was used or violence was threatened during the commission of the offence;
- (c) the defendant was in a position of trust or authority;
- (d) the offence was committed against a person serving the public (eg a police officer or nurse);
- (e) the evidence suggests the offence was premeditated;
- (f) the victim of the offence was vulnerable, or was put in considerable fear of, or suffered, personal attack, damage or disturbance;
- (g) the offence was committed in the presence of a child or motivated by discrimination;
- (h) the defendant has relevant previous convictions or cautions and/or was already under an order of the court;
- (i) there are grounds for believing the offence is likely to be continued or repeated;
- (j) the offence was carried out by a group;
- (k) there was a marked difference in the ages of the suspect and the victim, of which advantage was taken;
- (l) the suspect was a ringleader or organiser;
- (m) the offence, whilst in itself is not serious, is prevalent;
- (n) a prosecution would have a significant positive impact on maintaining public confidence.

2.11 Examples of common public interest factors tending against prosecution include:

- (a) the court is likely to impose a very small or nominal penalty;
- (b) the seriousness and the consequences of the offending can be appropriately dealt with by an out-of-court disposal;
- (c) the offence was committed as a result of a genuine mistake or misunderstanding (although the more serious the offence the less likely it is this will apply);
- (d) any loss or harm arising from the offence is minor and was the result of a single incident;
- (e) the defendant's age and antecedent history;
- (f) a prosecution is likely to have a very bad effect on the victim's physical or mental health (but always keeping in mind the seriousness of the offence);
- (g) the suspect has been subject to appropriate regulatory proceedings or a punitive civil penalty that adequately addresses the seriousness of the offending;
- (h) the suspect is, or was, suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated;
- (i) a prosecution may require details to be made public that could harm sources of information, international relations or national security.

2.12 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 the offence has had. However, prosecutors do not act for victims or their families in the way that advocates in private practice act for their clients because prosecutors must form an overall view of the public interest.

2.13 In exceptional circumstances the normal evidential test may not be capable of being met because not all the required evidence is available immediately but there is a substantial risk the suspect may abscond or commit further serious offences. Therefore, if it is proposed that once the suspect is charged an application will be made to the court to keep a suspect in custody and the following conditions are met, the suspect may be charged even though the evidential test is not met at that point in time.

2.14 The conditions are:

- the evidence required to apply the Prosecution Test is not yet available but is reasonably believed to exist;
- it can be obtained within a reasonable time;
- the seriousness or the circumstances of the case justify making an immediate charging decision;
- there are continuing substantial grounds to object to bail in accordance with The Bail (Bailiwick of Guernsey) Law, 2003;
- in all the circumstances of the case an application to withhold bail may properly be made; and
- the prosecutor consents

2.15 Until such time as the full evidential test is met regular checks will be made by the prosecutor to ensure swift progress is being made to obtain the missing evidence and that when obtained it is likely to be admissible. In addition, the public interest test must be met at all times.

3. Selection of Charges

3.1 Prosecutors should select charges which:

- reflect the seriousness and extent of the offending that is supported by the evidence;
- give the court adequate powers to sentence and impose appropriate post-conviction orders; and
- enable the case, wherever possible, to be presented in a clear and simple way.

3.2 This means that prosecutors may not always choose or continue with the most serious charge where there is a choice.

- 3.3 Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one.
- 3.5 Prosecutors must take account of any relevant change in circumstances as the case progresses.

4. Accepting Guilty Pleas

- 4.1 Defendants may want to plead guilty to some, but not all, of the charges or plead to different or less serious ones because they admit only part of the crime. Prosecutors should only agree to this if they consider the new charges adequately reflect the seriousness of the offending, the court will retain adequate sentencing powers and the interests of the victim are unlikely to be adversely affected.
- 4.2 Where a defendant pleads guilty to the charges but on the basis of facts that are different from the prosecution's case, and where this may significantly affect sentence, the court should be invited to hear evidence to determine what happened and then sentence on that basis.
- 4.2 Occasionally, defendants will ask the court to take further offences into consideration when sentencing. These are offences with which the defendant has not been charged but which he or she nevertheless admits having committed.

5. Young Offenders

- 5.1 The Child Youth and Community Tribunal system was brought in as part of the measures in the Children (Guernsey and Alderney) Law 2008.
- 5.2 Some basic principles behind the system are:
- the local community is in the best position to decide what should happen to children;
 - children who offend almost always have the same needs and background as children in need of care and protection;
 - children's needs and deeds must be tackled together if they are to be dealt with effectively;
 - disputed facts (eg whether the child has committed the offence alleged) should be dealt with by a court, but once the facts have been established, a court, with its emphasis on formal procedures, is not the most appropriate place to look in detail at how best to deal with troubled children.
- 5.3 In most cases where a person accused of a criminal offence is aged between 12 and 18 he or she will be dealt with by the Child, Youth and Community Tribunal System. The system looks at the young person's general circumstances as well as challenging what he or she has done. The aim is to try to stop or prevent behaviour that causes problems for other people. In all

cases where an accused person is aged under 18 the Police will refer the case to the Children's Convenor.

- 5.4 However, in some cases where the matter is more serious or involves road traffic offences where a disqualification from driving may be imposed in the event of a conviction, the Police will make a joint referral to both the Children's Convenor and the Law Officers to decide whether the child or young person should be prosecuted by the Law Officers or dealt with in some other way by the Children's Convenor. Although the same broad principles as set out in the rest of this Code will continue to apply, the fact that the suspect is a youth will be an influential factor in determining whether a prosecution is required in the public interest.