



THE DECISION TO PROSECUTE: A JAMAICAN PROTOCOL

“...The role of the Prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.”

Boucher v The Queen (1954) 110 CC 263, 270

Foreword



Paula V. Llewellyn, CD., Q.C.
Director of Public Prosecutions, Jamaica

To be an effective Prosecutor in a challenging environment is no easy task. It is an experience driven occupation which allows no room for error in the exercise of one's Judgement.

On the 22nd November 2006 in the matter concerning the death of Patrick Genius the Judicial Committee of the Privy Council ("JCPC")...affirmed that the position and functions of the Director of Public Prosecutions (hereinafter referred to as DPP) under the Jamaican Constitution are such that judicial review of his decisions is a "highly exceptional remedy" although it is available in principle. They went on to say, "***it is sufficient in our opinion, in cases involving the exercise of Prosecutorial discretion to apply established principles of judicial review.***" These principles would have proper regard to the width of the DPP's discretion, the polycentric policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the Courts to assess their merits. ***Mohit v The Director of Public Prosecutions of Mauritius***, [2006] UKPC 20.

However, it is my view that for the public interest to be properly served, fair and effective prosecution is essential to the maintenance of law and order. Prosecutors in Jamaica today

must demonstrate fearlessness, impartiality and a monumental work ethic in order to achieve the desired objectives.

From my appointment as DPP in March 2008, I observed at the time that I was "fully aware of the public's clamour for transparency and accountability and I will certainly be moving along with my team to enhance the managerial structure and to put in place systems which will help to assist in respect of this transparency and accountability." This Protocol is another step in the process of providing that sought for and promised fuller transparency. It will be a living document which will be revised periodically to reflect local and international developments in prosecutorial practices and relevant laws.

The trial of matters generally is fuelled by the will and capability of the Prosecutor, but is also influenced in no small way by other variables such as factors pertinent to the other stakeholders in the trial process, resource constraints, availability of witnesses, and the peculiar factual circumstances of each case. In the interest of Justice, the Office of the Director of Public Prosecutions (hereinafter referred to as the ODPP) at all times must strive to exercise the best discretion in determining which matters to continue and which matters to discontinue. The age of a matter is only one of the factors that must be considered. More so, the burden is greater where the safety of witnesses is at stake.

It is not the case, nor has it ever been said, that those suspected of criminal offences must automatically be prosecuted. A prosecution is only ever appropriate if it is in the public interest to bring it. In deciding exactly where the public interest lies in a particular case the Prosecutor must examine all the factors and consider the justice of the situation. These vary from case to case as the application of the Prosecutor's discretion is not an exact science. It has and will always be a delicate balancing act. In general, the more serious the offence, the more likely is it that the public interest will require a prosecution to proceed.

This Protocol outlines how Prosecutors in Jamaica have consistently strived to approach the decision making process and reflects current local and international prosecutorial practices. It lists the stages and the tests which are applied before making a decision in each case. The factors listed are non exhaustive and where matters such as mental capacity or maturity are taken into consideration, the mere assertion without more of their existence will not persuade a Prosecutor to take them into account. Cogent evidence shall be required before accepting such factors which fall to be considered.

Fair and effective Prosecution necessitates commitment from those required to discharge these duties. Jamaican Prosecutors do not shrink from this challenge and by continuing to employ the criteria contained in this Protocol we shall demonstrate our commitment to these principles and discharge our duties accordingly.

We look forward to the continuation of the process of articulating prosecutorial best practices which supports transparency and accountability by partnering with the Canadian Department of Justice and the Canadian International Development Agency (CIDA) who will be taking up the baton from our British partners to assist us in compiling a Code of Conduct and Operating Manual for Prosecutors.

I wish to acknowledge my appreciation firstly to my colleague prosecutors in Jamaica for their support and encouragement. Secondly, profound gratitude to Ms. Denise Bradshaw of the Crown Prosecution Service in England and the British High Commission who have partnered with us in the drafting of this Protocol.

Paula V. Llewellyn, CD., QC.,
Director of Public Prosecutions, Jamaica
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1. Introduction

This Protocol acknowledges the public's desire to understand the role and the attendant duties of Prosecutors when exercising their discretion to institute, continue or discontinue the prosecution of criminal proceedings. It also meets the desire of all Prosecutors to be seen to operate in a transparent way on behalf of the public which they serve. This document outlines the processes and the methodology which Prosecutors employ when exercising their prosecution function. The processes set out in the Protocol evidence the high level of service that Prosecutors are committed to providing in every case that they consider.

The Protocol reflects the fact that the principles and methods employed in making decisions with regard to prosecution are underpinned by values of robust independence and fairness. By employing these principles and values Prosecutors should be able to achieve the highest degree of consistency when making these key decisions.

When adhered to the Protocol shall ensure that Jamaica shall continue to benefit from prosecution processes that are transparent, fair to victims and witnesses of crime, the suspect/ accused and also reflect the interests of society.

2. Definitions

In the Protocol the term:

“accused” is used to describe a person who is the subject of formal criminal proceedings having been either charged or summonsed.

“appellant/applicant” is used to describe a person appealing a conviction and/or sentence.

“**convict or convicted person**” is used to describe a person who has admitted his guilt or who has been found guilty in a court of law;

“**fiat**” is used to mean the authority granted by the DPP to those who do not possess such authority to criminally prosecute cases or to be actively associated with a prosecution.

“**Nolle Prosequi**” is used to mean the formal entry upon the record made by a Prosecutor in a criminal action in which that individual declares that he or she wishes to discontinue the actions against certain defendants, certain issues, or altogether.

“**Prosecutor**” is used to describe any Attorney at Law, Clerk of the Court or Deputy Clerk who is exercising the power to prosecute either because they are a member of the ODPP, or in exercising their Prosecutorial function as a Clerk of Court or having been given a fiat by the Director to bring a prosecution.

“**ruling**” is used to describe a formal advice or recommendation based on collected statements of potential witnesses as well as other material to the investigating entity.

“**suspect**” is used to describe a person who is not yet the subject of formal criminal proceedings.

3. The Authority to Prosecute

The authority to prosecute is derived from the Jamaican Constitution 1962 (The Constitution) which at Section 94 (1) creates the Office of the Director of Public Prosecutions (ODPP). This enables the Director of Public Prosecutions (DPP) or those acting under him/her to exercise the functions of commencement of a prosecution, continuing (either by adoption

from the police or any other person or authority) of a prosecution and finally the functions of discontinuance of a criminal prosecution.

This Protocol is issued by the DPP in accordance with the obligation cited at Section 94 (4) of The Constitution which states that the DPP shall provide both general and special instructions to those who are exercising his/her functions.

In the Protocol, the expression “police or other investigators” is used to describe members of all those investigative agencies, including the Independent Commission of Investigations (INDECOM), Financial Investigations Division (FID), who prepare and present cases to be considered for prosecution.

4. The Application of the Protocol

This Protocol shall apply in respect of all cases where a decision to commence proceedings is made after 16th day of April, 2012.

This Protocol deals only with the decision making processes in respect of the 3 functions listed below.

1. The decision to commence criminal proceedings.
2. The decision to adopt and continue a criminal prosecution.
3. The decision to discontinue a criminal prosecution.

It cites the factors which must specifically be considered in relation to these functions. It does not deal with every decision that must be made by a Prosecutor during the life of a criminal case.

5. The Prosecutors' Ethical Approach to Criminal Proceedings

Section 94(6) of The Constitution states "In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority."

Accordingly the Prosecutor occupies a powerful and privileged position in society. Other members of the society therefore have the right to expect of their Prosecutors the highest level of professional integrity. Prosecutors must not be affected by improper or undue pressure from any source. The decision with regard to whether or not to recommend a criminal charge and subsequent prosecution or discontinuance of a case has the capacity to have a profound impact upon the lives of others in society, including and victims, suspects/accused persons.

The decision to prosecute is one of the most important decisions the Prosecutor has to make. Great care must be taken in each case to ensure that the right decision is made. A wrong decision to prosecute, as well as a wrong decision not to prosecute, has the potential to undermine public confidence in the criminal process.

The Prosecutor must at all times act independently and be seen to act independently. In the discharge of the Prosecutorial function the Prosecutor is as independent as the Judge. This principle has now become well established in law having been most recently re-affirmed in the 2001 Privy Council Appeal of *Randall v The Queen* which in repeating the principle that "**The duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a Minister of Justice**": it cited *R v Puddick* (1865) 4 F & F497 at 499; *R v Banks* [1916] 2 KB 621, 623. In the same case the Privy Council went on to cite at some length Rand J in the Supreme Court of Canada in *Boucher v The Queen* (1954) 110 CC 263, 270, which

provides the following additional clarification with regard to the ethical approach of the Prosecutor:

“It cannot be over emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the Prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.”

This includes the Prosecutor inviting the court to stop the proceedings if the point is reached at which he or she concludes there is no longer a reasonable prospect of conviction; requesting that the court adjourn a case for the prosecution to have an opportunity to review the matter should further evidence or information emerge which calls into question either, the specific charge being pursued or the whole prosecution.

Further to the above, Prosecutors shall when selecting what charges the prosecution shall proceed upon ensure that their selection of charges:

- Reflect the seriousness and extent of the offending supported by the evidence;
- Give the court adequate powers to sentence and impose appropriate post-conviction orders, for example Confiscation Orders;
- Enable the case to be presented in a clear and simple way.

This means that Prosecutors may not always choose or continue with the most serious charge where there is a choice particularly when preferring a lesser offence will still enable the Court, upon conviction, to impose punishment for proportionate criminality.

6. The Impartiality of the Prosecutor

The Prosecutor must be fair, independent and objective. Recognised prosecutorial criteria must be applied at each stage of the decision making process. A decision of whether to prosecute must not be influenced by:

- The personal feelings of the Prosecutor concerning the offence, the suspect or the victim;
- The possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution or otherwise involved in its conduct;
- The race, place of origin, social class, colour, religion, political opinions or political associations, activities or beliefs of the suspect or any other person involved;
- Possible political advantage or disadvantage to the government or any political party, group or individual;
- Any improper or undue pressure from **any** source.

7. The Prosecutor, Police and other Investigators

The functions of the Prosecutor and those of the police and other investigators are separate and distinct. The Prosecutor decides if a prosecution should be instituted and, if so, on what terms. He or she acts independently of those responsible for the investigation. Whilst the Prosecutor may consider the views of the investigator when appropriate, in the final analysis it is the responsibility of the Prosecutor to decide whether or not to proceed and what witnesses to rely on in proof of its case.

The roles of the Prosecutor and the investigator are however interdependent. Cases cannot be prosecuted unless they have first been investigated but investigators have no powers to bring those prosecutions. The Prosecutor cannot direct investigations, but he or she may request further investigation to pursue additional lines of enquiry which are relevant to the decision-making process by way of providing a ruling on a case. Every case that Prosecutors receive from investigators is reviewed. Prosecutors must ensure that they have as much information as they need to make an informed decision about how best to deal with the case. This will often involve Prosecutors providing guidance and advice to the police and other investigators about lines of enquiry, evidential requirements, and assistance in any pre-proceedings procedures throughout the investigative process by providing a ruling on the case

A ruling is provided in a written document where the Prosecutor advises on the case having examined all the relevant material and all of the circumstances of it. A ruling cannot be based solely on a report from the referring entity as the Prosecutor is always expected to make his independent assessment of the available material provided to determine the viability of a prosecution. The Prosecutor is expected to have sole responsibility for the handling of the prosecution of the matter.

This includes advice in relation to:

- What criminal charges are appropriate based on the material available;
- Whether there is sufficient cogent material to support a charge;
- The admissibility of evidence;
- The present state of the law;
- Whether a case should be tried summarily or on indictment;
- The disclosure of material relevant to the case;
- Other or additional areas of investigation.

8. The Decision: Whether to Prosecute

The decision to charge and thereafter continue to prosecute an individual is a serious step. Fair and effective prosecution is essential to the maintenance of law and order. It is the duty of Prosecutors to ensure that the right person is prosecuted for the right offence and to bring offenders to justice wherever possible. Decisions taken fairly, impartially and with integrity help to deliver justice for victims, witnesses, suspects/accused persons and the public.

It is the duty of Prosecutors to review, to advise on and to prosecute cases. Prosecutors must ensure that the law is properly applied and that each case is considered on its own facts and on its own merits.

Prosecutors should identify and, where possible, seek to rectify evidential weaknesses, and discontinue those cases where the public interest clearly does not require a prosecution (see part 9B; pages 17-22).

When considering the institution or continuation of criminal proceedings the first question to be determined is the sufficiency of evidence. A prosecution should not be commenced or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by an identifiable person. The proper test is whether there is a reasonable prospect of a conviction should proceedings be instituted. This decision requires an evaluation of how strong the case is likely to be when presented at trial.

Prosecutors must ensure that they do not allow a prosecution to commence or continue, if to do so, would be seen by the Courts as oppressive or unfair so as to amount to an abuse of the process of the Court as a matter of law.

Review is a continuing process and Prosecutors shall take account of any change in circumstances that occur as the case develops. Wherever possible, Prosecutors should interface with the police and other investigators at the earliest opportunity if they are considering amending the charges or terminating the prosecution.

9. The Full Two Stage Test

The decision with regard to the commencement or continuation of criminal proceedings is made following the application of the full two stage test to the evidence and circumstances of the case.

In most cases Prosecutors should only decide whether to prosecute after the investigation has been completed and after all the available evidence has been reviewed. However, there will be cases where it is clear, prior to the collection and consideration of all the likely evidence, that the public interest does not require a prosecution. In these rare instances, Prosecutors may decide that the case should not proceed further.

In another category of cases it will be equally clear that prior to the collection and consideration of the evidence, the public interest will require a prosecution, e.g. murder. The approach to such serious cases, where there is a higher than normal risk of absconding by the suspect pending such evidence collection, is to commence the prosecution on the basis that such evidence, is reasonably believed to exist and will be collected as quickly as possible when all of the material shall be subjected to the full two stage test. This will enable the suspect to be remanded into custody thus reducing the risk of the suspect absconding from the jurisdiction.

Prosecutors should only move to recommend a charge when they are satisfied that the broad extent of the criminality has been determined and that they are able to make a fully informed assessment of the public interest. If Prosecutors do not have sufficient information to take such a decision, the investigation should continue until as much information as it is possible to amass has been collected at which point the case should again be subjected to the two stage test.

Finally, Prosecutors must follow any guidance issued by the DPP to ensure that decisions in all cases are appropriate and correct and are reached following an agreed standard conduct.

9A. Stage One: The Evidential Stage

In order to conclude that criminal proceedings should be commenced or continued a Prosecutor must be satisfied that there is “a reasonable prospect of conviction” being secured in the case. This will exist if, in relation to an identifiable suspect, the evidence is credible and admissible, i.e. it will not be excluded under any of the rules of evidence - and is reliable, thus enabling a Jury properly directed in accordance with the law, Resident Magistrate, or Judge of the Supreme Court, to be satisfied beyond reasonable doubt that the suspect who is prosecuted has committed the criminal offence charged.

There must be sufficient evidence to provide a reasonable prospect of conviction against each suspect on each charge. A Prosecutor must consider what the defence case may be, and how it is likely to affect the prospects of conviction.

When deciding whether there is sufficient evidence to prosecute, Prosecutors must consider whether the evidence can be used and whether it is reliable. There will be many cases in which the evidence does not give any cause for concern. But there will also be cases in

which the evidence may not be as strong as it first appears. In particular, Prosecutors will need to consider the following issues:

- Can the evidence be used in Court?
- Is it likely that the evidence will be excluded by the Court?
- There are legal rules that might mean that evidence which seems relevant cannot be given at a trial. For example, is it likely that the evidence will be excluded because of the way in which it was obtained which might lead to a miscarriage of justice of the suspect/ accused. For example, where there is contamination of evidence, such as clothes from the victim being placed in the same evidence bag as the suspects' clothing enabling cross DNA and fibre contamination to occur.
- What explanation has the suspect/ accused given?
- Is a Court likely to find any explanation credible in the light of the evidence as a whole?
- Does the evidence support an innocent explanation?
- Is there evidence which might support or detract from the reliability of a confession?
- Was there any breach of any rules in obtaining the confession?
- Is the identification of the suspect likely to be questioned? Is the evidence of his or her identity strong enough?
- Are there concerns over the accuracy, reliability or credibility of the evidence of any witness?
- Is there further evidence which the police or other investigators should reasonably be asked to find which may support or undermine the account of the witness?
- Does any witness have any motive that may affect his or her attitude to the case?
- Is there any further evidence that could be obtained that would support the integrity of evidence already obtained?

Prosecutors should not ignore evidence because they are not sure that it can be used or is reliable. But they should look closely at it when deciding if there is a reasonable prospect of conviction. Some defects can be remedied by further investigation and evidence collection, others never can be. The Prosecutor must be mindful of the difference between these two states and identify which applies and act proportionately and in good time in response.

Following consideration of the evidential stage of the test, a consideration of the Public Interest Stage can be had.

9B. The Public Interest Stage

When the Prosecutor is satisfied that the evidential criteria are met a prosecution will usually take place unless the Prosecutor concludes there are public interest factors tending against prosecution which outweigh those tending in favour. The more serious the offence or the offender's record of criminal behaviour, the more likely it is that a prosecution will be required in the public interest. It may also be appropriate from time to time to reflect broader government policy directives and prosecute cases of certain offences regardless of public interest factors, such as during a zero tolerance campaign in respect of possession of drugs no matter how small the quantity concerned.

Assessing the public interest is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number. Each case must be considered on its own facts and on its own merits.

Prosecutors must decide the importance of each public interest factor in the circumstances of each case and go on to make an overall assessment. It is quite possible that one factor

alone may outweigh a number of other factors which tend in the opposite direction. Although there may be public interest factors tending against prosecution in a particular case, Prosecutors should consider whether nonetheless a prosecution should go ahead.

The absence of a factor does not necessarily mean that it should be taken as a factor tending in the opposite direction. For example, just because the offence was not “carried out by a group” does not transform the “factor tending in favour of a prosecution” into a “factor tending against prosecution”. An individual can commit just as serious a crime as a group.

Some common public interest factors which should be considered when deciding on the most appropriate course of action to take are listed below. The following lists of public interest factors **are not exhaustive but are merely illustrative of the types of matters which may fall to be considered**, each case must be considered on its own facts and on its own merits.

A prosecution is more likely to be in the public interest if:

- A conviction is likely to result in a significant sentence;
- The offence involved the use of a weapon or the threat of violence;
- The offence was committed against public officers (for example, a nurse; a police or prison officer);
- The offence was repeated and ongoing over a significant period of time;
- There are grounds for believing that the offence is likely to be continued or repeated;
- The offence was committed by a public officer who was abusing his office;
- The offence was premeditated;
- The offence was carried out by a group;
- The offence was committed in the presence of, or in close proximity to, a child;

- The offence was motivated by any form of discrimination against the victim's ethnic or national origin, race, place of origin, social class, colour, religion, political opinions gender, age, belief, or the suspect demonstrated hostility towards the victim based on any of those characteristics;
- The offence was committed in order to facilitate a cover-up thereby attempting to or actually perverting the course of justice;
- The victim of the offence was in a vulnerable situation and the suspect/accused took advantage of this;
- There was an element of corruption or undue influence of the victim in the way the offence was committed;
- There was a marked difference in the ages of the suspect/accused and the victim and the suspect took advantage of this;
- There was a marked difference in the levels of understanding of the suspect/accused and the victim and the suspect took advantage of this;
- The suspect/accused was in a position of authority or trust and he or she took advantage of this;
- The suspect/accused was a ringleader or an organiser of the offence;
- The suspect/accused previous convictions are relevant to the present offence;
- The suspect/accused is alleged to have committed the offence in breach of an order of the court;
- A prosecution would have a significant positive impact on maintaining community confidence;
- The degree of culpability of the suspect/accused in connection with the offence was high;
- A failure to prosecute would have a profound effect upon public order and morale;

- The prevalence of the alleged offence and the need for deterrence, both personal and general is high;
- The attitude of the victim of the alleged offence to a prosecution and their desire for a prosecution in favour of any other disposal;
- The necessity to maintain public confidence in such basic institutions as the Parliament and the courts exists.

A prosecution is less likely to be required if:

- The Court is likely to impose a nominal penalty;
- The suspect/accused has been subject to any appropriate regulatory proceedings, or any punitive or relevant civil penalty which remains in place or which has been satisfactorily discharged, which adequately addresses the seriousness of the offending;
- The offence was committed as a result of a genuine mistake or misunderstanding;
- The loss or harm can be described as minor and was the result of a single incident; particularly if it was caused by a misjudgement;
- The law which is being used is obsolete or obscure;
- Whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
- There are available other and equally efficient alternatives to prosecution;
- Whether the alleged suspect/accused is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
- There has been a long delay between the offence taking place and the date of the trial, unless:
 - ❖ The offence is serious;
 - ❖ The offence has only recently come to light;

- ❖ The complexity of the offence has meant that there has been a long investigation; or new investigative techniques have been used to re-examine previously unsolved crimes and, as a result, a suspect/accused has been identified.
- ❖ Due to machinations by the suspect/ accused.
- A prosecution is likely to have an adverse effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence and the views of the victim about the effect of a prosecution on his or her physical or mental health;
- The suspect/accused played a minor role in the commission of the offence;
- The suspect/accused has put right the loss or harm that was caused (but a suspect must not avoid prosecution disposal solely because he or she pays compensation or repays the sum of money he or she unlawfully obtained);
- The suspect/ accused is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated. There must be a balance of a suspect's/accused's mental or physical ill health with the need to safeguard the public or those providing care services to such persons;
- A prosecution may require details to be made public that could harm sources of information, international relations or national security, the inability to comply with the obligations that the suspect has a fair trial in the absence of breaching national or an individuals' personal security;
- 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 that the offence has had. In appropriate cases, for example, a case of homicide or where the victim is a child or an adult who lacks mental capacity, Prosecutors should take into account any views expressed by the victim's family.

However, the Prosecutor does not act for victims or their families in the same way a defence lawyer acts for his client, and Prosecutors must form an overall view, balancing some or all of the previous factors listed within the context of the particular case.

10. Young Offenders

Whilst youth of itself shall not provide an immunity from prosecution for the commission of criminal offences it can, when combined with other public interest factors and vulnerabilities, such as mental capacity and immaturity, properly lead to a decision to refrain from prosecution and either lead to an out of court disposal/diversion or to no action being taken at all. This last option would only occur in the most minor cases.

Special considerations also apply to the prosecution of children in respect of Section 12 of the ***Sexual Offences Act 2009***. In respect of this section a diversion from prosecution programme has been established as an alternative to prosecution when the facts and circumstances of the case make that an appropriate outcome.

The programme is based upon the premise that the young person understands the serious nature of sexual activity with girls under the age of 16 years and is prepared to undertake a programme of guidance and other activities to prevent future offending. Consequently, before being referred to the Director of Public Prosecutions for a decision with regard to the appropriateness of criminal proceedings, the young person concerned must meet the following criteria:

- The boy must be under 18 years of age.
- The sexual activity must have taken place with a full consent of the alleged victim and that there were no aggravating factors that affected the girl's decision to consent to sexual intercourse.
- The boy must admit to the sexual activity.

- The boy must agree to attend the Women's Centre of Jamaica Foundation, Trafalgar Road, Kingston, for an initial assessment and then participate in a programme of counselling, guidance and any other appropriate activity by attending the Women's Centre. The programme will continue for a minimum of three months when the boy's participation will be reviewed.

Such cases will be passed to Specialist Prosecutor in the ODPP to consider and diversion will only be recommended when it is appropriate in all of the circumstances.

The above approach reflects the acknowledgement of the longer term damage which can be done to a child because of an encounter with the criminal law early in his or her life, consequently in some cases prosecution must be regarded as a severe measure with significant implications for the future development of the child concerned.

In addition to the usual public interest factors being considered the following relevant considerations should be borne in mind when considering the prosecution of a child.

- The seriousness of the alleged offence;
- The age, apparent maturity and mental capacity of the child;
- The available alternatives to prosecution and their likely efficacy;
- The sentencing options available to the court if the matter were to be prosecuted;
- The family circumstances and, in particular, whether the parents appear willing and able to exercise effective discipline and control of the child;
- The child's antecedents, including the circumstances of any relevant past behaviour and whether a prosecution would be likely to cause emotional or social harm to the child, having regard to such matters as his or her personality and family circumstance.

In accordance with Section 3 of the ***Child Care and Protection Act 2009*** in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

11. Reopening a Prosecution Decision

People should be able to rely on decisions taken by Prosecutors. Normally where a prosecution has been unconditionally terminated, that is the end of the matter.

In exercising his/her power to discontinue proceedings, the DPP enters what is called a *nolle prosequi*. This power arises under Section 94 (3) (c) of the Constitution and Section 4 of the Criminal Justice (Administration) Act.

Section 4 of the Criminal Justice (Administration) Act prescribes that at any stage before the court renders judgment the DPP may discontinue criminal proceedings in any Court by entering a *nolle prosequi*. He/she may do so by stating in open Court where the proceedings are pending or by informing the Clerk of the Courts in writing that the Crown does not intend to continue such proceedings. Thereupon the proceedings shall be at an end and on receipt of such notice the accused person shall at once be discharged in respect of the charge for which the *nolle prosequi* is entered.

The entering of a *nolle prosequi* by the DPP is not an acquittal on the charges being tried and the DPP has the power to bring back or re-indict the matter. A *nolle prosequi* can be entered even though the accused person has pleaded guilty to a lesser charge on the indictment for example pleading guilty to manslaughter instead of murder, as long as the court has not yet passed sentence.

Such a situation happened in 1983 in the case of **R v Lloydell Richards** .SCCA 135 of 1983. On appeal to the Court of Appeal the only ground pursued was that the prosecution on the second indictment was in contravention of Section 20 (8) of The Constitution of Jamaica which provides so far as relevant:

“No person who shows that he has been tried by a competent Court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal proceedings relating to the conviction or acquittal.”

12. The Consent to Prosecute

The DPP is the supreme prosecuting authority in Jamaica. The DPP usually signs the indictment (statement of charges of the accused person) in Supreme/ Circuit/ Gun Court cases whereas it will be the Clerk of Court signs the indictment in cases before the Resident Magistrate Court (their authority to do so being derived from the ***Judicature (Resident Magistrates) Court Act***).

The proffering of an indictment is the sole prerogative of the prosecuting authorities and persons who undertake private prosecutions must get the consent of the DPP. This is usually done by the DPP issuing a *fiat*, which allows such person to actively associate himself or herself with the prosecution, the ODPP will then determine the degree of association. Human rights groups such as Jamaicans for Justice (JFJ) have made use of this facility to prosecute policemen.

In respect of the prosecution of a number of offences, the legislation requires the consent of the DPP for this to happen. The DPP shall, upon receipt of a written request for consent, should be provided with the attendant case files, assess the case and when appropriate consent to the charge being preferred.

A table of such legislation is reproduced at APPENDIX A.

APPENDIX A

Offences chargeable only with the consent of the DPP

There are certain offences where the police or charging authority must receive the consent of the DPP before any charges can be laid. Any prosecution for these offences, which proceed without the DPP's consent, will be null and void. These are some of the offences:

LEGISLATION	SECTION	OFFENCE
<i>Corruption (Prevention) Act</i>	Section 12(1)	Failure to make statutory declaration to Corruption Commission
<i>Exclusive Economic Zone Act</i>	Section 19(1)	Criminal offences committed within the EEZ.
<i>Food and Drugs Act</i>	Section 27(c) (d)	Person offering or promising money, bribes, gifts or inducements to F&D Inspector (s.27) ¹ F&D Inspector soliciting or receiving money, bribes, gifts or inducements.
<i>Interpretation Act</i>	Section 49(2)	Directors, General Managers etc of companies that have been charged
<i>Larceny Act</i>	Section 25	Conversion by Trustee
<i>Marriage Act</i>	Section 55, 61-69	Breach of duty by Marriage Officer (s.55), Personation of Marriage officer(s.62), tampering with marriage register (s.61), False ceremony of marriage(s.65), etc
<i>Maritime Areas Act</i>	Section 14(1)	Criminal offences committed within the territorial sea.
<i>Parliament (Integrity of Members) Act</i>	Section 15	Failure to make statutory declaration to Integrity Commission; knowingly

¹ Once these are gazetted officers, the police can in the alternative charge under the **Corruption Prevention Act** without having to seek the ruling of the DPP

		making false statement or failure to attend enquiry
<i>Perjury Act</i>	Section 11	Wilfully making inconsistent or contradictory statements in a judicial proceeding.
<i>Pesticides Act</i>	Section 20 (1)(d) (f)	Interfering with article seized by Pesticide Inspector (s.20(1)(d)) Knowingly giving false information to pesticide inspector (s.20(d)(f))
<i>Pharmacy Act</i>	Section 26 (d) (f)	Person offering or promising money, bribes, gifts or inducements to Pharmacy Inspector (s.26(d)) ² Pharmacy Inspector soliciting or receiving money, bribes, gifts or inducements.
<i>Police Public Complaints Act</i>	Section 8 (4)	Police Complaints Authority to furnish DPP with file and exhibits in relation to complaint against police officer
<i>Public Utilities Protection Act</i>	Sections 5 & 6	Director or employee of public utility soliciting or receiving money, bribes, gifts or inducements (s.5) ³ Person offering or promising money, bribes, gifts or inducements to employee or director of public utility.(s.6)

² See fn 1

³ See fn 1

<i>Shipping Act</i>	Section 119	To prosecute person for breaching the Act after matter dealt with as a disciplinary offence
<i>Terrorism Prevention Acts</i>	Sections 5-12, 13, 15-16	Any terrorism offence (s. 5-12) failure to report terrorism offence (s.13), duties of financial entities to report (s.15&16)
<i>Transport Authority Act</i>	Section 17(1) (2)	<p>Person offering or promising money, bribes, gifts or inducements to Transport Authority Inspector</p> <p>Transport Authority Inspector soliciting or receiving money, bribes, gifts or inducements.⁴</p>

⁴ See fn 1