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MEDIA RELEASE

Guidelines from the Office of the DPP for Prosecuting Cases Involving Malicious Communications: Section 9 of the Cybercrimes Act of Jamaica, 2015

Following on recent public utterances from different quarters weighing in on Section 9 of the Cybercrimes Act which deals with Malicious Communications, the Office of the Director of Public Prosecutions (ODPP) as a public service has prepared guidelines to Prosecutors when considering whether to prosecute or not to prosecute cases involving Section 9 of the Cybercrimes Act.

Our colleagues in England, the Crown Prosecution Service, who have similar provisions in their Malicious Communications Act 1988 had found it prudent to issue guidelines with the recommendation that the police, at the earliest opportunity during their investigations, consult with the Prosecution Service before the initiation of prosecution meaning, before charges are laid and the matter is placed before the Court. We concur with this approach and to that

end these guidelines have been prepared by in consultation with me by Mrs. Andrea Martin-Swaby, Deputy Director of Public Prosecutions and Mrs. Yanique Gardener Brown, Assistant Director of Public Prosecutions, Ag Head and Deputy Head respectively in charge of the ODPP's Cybercrimes and Digital Evidence Unit, for use in our Jamaican Jurisdiction.

At common law it has always been recognized that in operational matters involving the investigation of a citizen, the police or law enforcement will have primacy of decision making. The Director of Public Prosecutions (DPP) cannot direct the police not to arrest and charge anyone. The DPP can only make recommendations to the police which they can accept or reject. It is after the matter is placed before the Court that the DPP under the Constitution can take over, or intervene in or discontinue any matter if the interests of justice makes it necessary so to do.

This position was reiterated in the Privy Council case of the *Commissioner of Police of Antigua v Steadroy Benjamin 2014 UKPC page 8* where the Law Lords reaffirmed that the police will always have primacy in investigations, and that a Director of Public Prosecutions cannot instruct the police who to prosecute or who not to prosecute, we can only make recommendations.

In paragraph 33 of the judgment of Lord Wilson stated that:

"The Boards' conclusion does not disable it from stressing the importance of a good, mutually respectful, working relationship between the police and the Director ...

The Director can generally be expected to have a wider perception than the police of whether; for example, a proposed prosecution is in the public interest. The Director cannot instruct but he can request. The police would be wise to treat with care before deciding to reject a request by the Director not to institute proceedings."

In the spirit of mutual respect and professional collegiality, members of the ODPP's Cybercrimes and Digital Evidence unit met with Assistant Commissioner Clifford Chambers and his team from the Counter Terrorism and Organized Crime Division (CTOC) of the JCF which deals with the investigation of Cybercrimes and other serious criminal matters. We shared the draft guidelines and had a very fruitful and positive discussion on the issues arising around Section 9 of the Cybercrimes Act and the way forward.

To that end, we publish these guidelines for the benefit of all Prosecutors and for the advice of the police with the recommendation that in matters of this nature, police investigators ensure that they are aware of these guidelines and that at the earliest opportunity they consult the ODPP before

they make the final decision to arrest, charge and initiate prosecution before the courts. I hereby reiterate that the initiation of prosecution, which is a term of art, is the laying of an information before the Court after an Accused has been charged (which is usually done by law enforcement in our jurisdiction).

These guidelines which are attached with this media release, will also be placed on the website of the ODPP (<http://www.dpp.gov.jm>), and through the Commissioner of Police will be disseminated to his members by any means he deems appropriate. I have taken note of a recent parliamentarian's suggestion in his sectoral debate that in the review of the legislation going forward, that the initiation of prosecution should only take place with the consent of the DPP. That will be a matter for the purview of parliament, however it is our considered view that the sharing of these guidelines with Prosecutors and law enforcement as well as members of the public may go a far way in assuaging previously stated concerns in the public domain as well as serve to not only build knowledge and capacity among law enforcement officers and Prosecutors, but will also enhance the administration and perception of justice in this area among members of the public.

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Director of Public Prosecutions