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# Public Prosecution Service Code for Prosecutors

Bar Council – Consultation Response

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## Introduction

The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.

The Bar Council welcomes the opportunity to contribute to the consultation on the PPS Code for Prosecutors launched in May 2015. However, we would highlight the difficulty in meaningful consultation during recess periods and welcome the decision to extend the deadline for responses in order to facilitate feedback from members. The Bar's response to the consultation is structured by chapter in relation to the main changes to the previous edition of the Code for Prosecutors published in 2008.

## Chapter One

1. The Bar Council highlights the additions contained in Chapter 1 which now set out that:

*1.8 This Code serves a dual purpose of:*

- (i) providing a Code for Prosecutors and*
- (ii) informing the public about the way in which prosecutors take decisions and the standards to which they are expected to adhere.*

2. The Bar welcomes these changes from the previous edition of the Code as they recognise the dual purpose of the code and provide for an improved understanding of the role played by prosecutors in the criminal justice process.

## Chapter Three

3. The Bar Council notes that Chapter Three of the Code has been expanded to include the role of Forensic Science Northern Ireland and other expert witnesses. We point to two paragraphs contained within this updated section:

*3.9 Forensic scientists from FSNi carry out examinations and analyses according to accredited procedures. In compiling reports and giving evidence they act independently of police and the PPS. The evidence of a forensic scientist will commonly include observations based upon examination and analysis and a conclusion expressed as the opinion of an independent expert.*

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*3.11 The foregoing paragraphs apply equally with necessary modifications, to any other expert witnesses such as a medical consultant, forensic accountant or State Pathologist.*

4. The Bar Council welcomes this addition to the Code for Prosecutors and emphasises that all experts should be acting independently of the police and PPS when providing evidence to the Court.

### Chapter Four

5. Chapter Four provides more detail on how prosecutors should approach prosecution decisions and the Bar points to the section on exceptional cases:

*4.6 There may be exceptional cases where it is clear, prior to the completion of an investigation, that the public interest will not require a prosecution, in which case a Public Prosecutor may decide that the Test for Prosecution will not be met and the case should not proceed further. Prosecutors should only take such a decision 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. Any such decision must be approved by the relevant Assistant Director or Regional Prosecutor.*

6. The Bar Council is content with the addition of this section on exceptional cases by the PPS as we recognise that this codifies normal practice by counsel in receiving and undertaking instructions.

7. The PPS has also made alterations around the considerations under the public interest test by adding:

*4.13 In deciding whether a prosecution is required in the public interest, prosecutors should take into account the views expressed by the victim and the impact of the offence on a victim and, in appropriate cases, their family, where such views are available. However PPS does not represent victims or their families in the same way as solicitors act for their clients. It is the duty of Public Prosecutors to form an overall view of the public interest.*

8. The Bar Council recognises the important and valuable role which victims play in the prosecution process. However, we would express concerns that allowing such wide scope for the views expressed by victims into account could lead to undue pressure on the independence and robustness of the decisions being made in the

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public interest. The PPS must be mindful that victims or their families cannot expect to direct the prosecution case or unduly influence the decision making process.

9. The Bar Council also highlights the addition to the Code around the cost of a prosecution as a relevant factor under the public interest test:

*4.14 The Public Prosecutor should also consider whether prosecution is proportionate to the likely outcome. Cost is a relevant factor when making an overall assessment of the public interest, but the public interest for or against a prosecution should not be decided on the basis of cost alone. In relation to cost the Public Prosecutor should have regard to whether the cost to the PPS and the wider criminal justice system could be regarded as disproportionate when weighed against any likely penalty.*

10. The Bar Council recognises that the PPS has a limited budget and we take the view that in certain circumstances, cost may be taken into account when determining the public interest test. However, the Bar stresses that cost cannot be a determining factor for the Public Prosecutor in determining an overall assessment of whether the public interest requires prosecution through the Courts.

11. The new Code also contains additions to those who can request a review of a decision of no prosecution:

*4.67 The following persons can request a review of a decision of no prosecution:*

- a victim in the case;
- the family of a victim who is deceased as a result of the alleged criminal act;
- the parents or guardian of a victim who is under 18;
- the family or representative of a victim who is incapacitated through disability or injury;
- the legal representative of a victim in the case;
- elected representatives or other professionals who are acting on behalf of a victim in the case;
- businesses represented by a single point of contact.

12. The Bar Council expresses concern at the expansion in the categories of persons who can request a review of a decision of no prosecution. In the 2008 Code a review was limited to a “specific request” being “made by a person, typically a victim, involved in the case” (4.11.2). We believe that the addition of six new

categories will lead to the number of requests for review increasing exponentially. The PPS should consider revising the scope of this.

### Chapter Five

13. The Bar highlights the addition of provisions around the circumstances in which prosecutors should bring to the court's attention the appropriate sentencing range in a case and where, in the context of an assessment of the dangerousness of a defendant, they should express the prosecution's view as to whether the defendant poses a significant risk to members of the public:

*5.22 Although prosecutors should not advocate a particular sentence, they must be in a position to assist the court as to any statutory provisions relevant to the offence and to any relevant guidelines as to sentence laid down by the Court of Appeal. In this context it is appropriate for the prosecutor to indicate the sentencing range appropriate to the facts of the case in line with relevant authorities. The prosecutor's attention is also drawn to the decision in Attorney General's Reference No 8 of 2004 (Dawson) in which the Lord Chief Justice stated:*

*"Where an indication is given by a trial judge as to the level of sentencing and that indication is one which prosecuting counsel considers to be inappropriate, or would have been considered to be inappropriate if he had applied his mind to it, he should invite the attention of the court to any relevant authorities".*

*The Prosecutor should also draw the court's attention to any expert evidence or specialist reports in relation to relevant matters, such as where a defendant has a mental health issue. The Prosecutor must also be able to assist the court in relation to the provisions of the Criminal Justice (Northern Ireland) Order 2008 which relate to the assessment of the dangerousness of a defendant. In these cases a prosecution advocate should give the Court the prosecution's view as to whether the defendant poses a significant risk to members of the public of serious harm.*

14. The Bar Council has particular concerns as to whether it is appropriate for prosecution counsel to advise the trial judge in relation to the dangerousness of a defendant as contained in 5.22 above. The Bar considers that this provision represents a direct conflict with the Bar of Northern Ireland Code of Conduct at 19.9(a) which states: *"in relation to sentencing the prosecuting barrister: a) should not attempt by advocacy to influence the trial judge"*.

15. Counsel's duty has always been to inform the Court of the statutory sentencing range and the relevant authorities that serve to inform the Court as to where, on the appropriate scale, any case is likely to fall having regard to aggravating and

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mitigating factors. Meanwhile the issue of dangerousness is determined by the Court on the basis of evidence that establishes to the Court that a particular defendant presents a significant risk of serious harm. It is prosecuting counsel's duty to identify to the Court the evidence that informs the Court as to whether that threshold is met. Prosecuting Counsel may also seek to evaluate the quality of that evidence and point to strengths or weaknesses in any opinion expressed by a witness.

16. Paragraph 5.22 in the new Code suggests that Prosecuting Counsel should articulate the subjective opinion of the PPS as to its preferred outcome. This could create a significant risk if, for example, a view is taken by the PPS that is against the weight of the evidence. Consequently, the new Code for Prosecutors fails to recognise that Counsel's duty is to identify to the Court the evidence, including the strengths and weaknesses of that evidence in relation to the issue of whether a particular Defendant is dangerous. However, it is not Counsel's duty to call upon the Court personally or to seek to influence the Court by expressing the subjective view of the PPS as to where that balance lies. The PPS or any counsel instructed on its behalf should not call expressly for a particular sentence or state that a particular defendant is dangerous as this must be a decision for the judge.
17. Furthermore, Paragraph 5.22 appears to conflict with the earlier provision in 5.20 which states that *"sentencing is a matter for the court. Prosecutors must not approbate expressly or impliedly the sentence to be imposed by the court"*. The new Code requires the prosecutor to effectively advocate that the defendant be found dangerous which means that the prosecutor is ultimately promoting a discretionary life sentence, an indeterminate custodial sentence or an extended custodial sentence as the only appropriate methods of disposal for the court.
18. The Bar Council notes that there is no provision around advising the trial judge on the dangerousness of a defendant in The Code for Crown Prosecutors issued by the Crown Prosecution Service in England and Wales. Given the considerations outlined above, we consider that paragraph 5.22 should be removed.
19. In addition, the Bar Council is also mindful of the duty contained in the Bar's Code of Conduct at 19.10 that *"the prosecuting barrister should read and follow the current Code for Prosecutors issued by the Public Prosecution Service"*. The conflict between the two codes must be resolved and the PPS should engage with the Professional Conduct Committee to ensure that the new Code for Prosecutors can be reconciled with the Bar's own Code of Conduct.

## Chapter Seven

20. The Bar Council notes that there are additions to the Code of Ethics at 7.4 and 7.24 which reference the Terms of Engagement:

*7.4 Counsel are required to act in accordance with their Terms of Engagement and to comply with particular instructions to counsel in any individual case.*

*7.24 Failure by independent counsel instructed by the PPS to adhere to this Code of Ethics and their Terms of Engagement may result in the Prosecution Service not availing of the services of that particular counsel in the future. Where appropriate any breaches of this Code of Ethics by independent counsel will be referred to the appropriate professional body for its consideration and breaches of the Terms of Engagement will be dealt with under the arrangements set out in that document.*

21. The Bar Council is content with these additions to the Code of Ethics.