Police Exercise of the Charging Discretion

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Introduction

In New Zealand all state prosecutors, including the New Zealand Police, operate under the Solicitor-General's *Prosecution Guidelines* (Crown Law Office, 1992). These guidelines are formulated to ensure that decisions to commence and to continue prosecutions are made on a consistent, principled, and publicly known basis. The Attorney-General is the senior Law Officer of the Crown in New Zealand, and as such has ultimate responsibility for the Crown's prosecution process. Successive Attorneys-General however have taken the view that it is inappropriate for them, as Ministers holding political office in the Government of the day, to become involved in decision-making about the prosecution of individuals. In practice therefore the Solicitor-General exercises all of the senior Law Officer's functions relating to the prosecution process. Almost all prosecutions in this country for offences under the general criminal law are brought by the Police. A few exceptions are those prosecutions brought by other Government Departments, local authorities, or special authorities such as the RSPCA. Prosecutions by individuals, although permitted in most cases, are rare. The Solicitor-General's *Prosecution Guidelines* are therefore a prime source of guidance for the Police in deciding whether to prosecute any individual for any offence. They indicate the basis on which the Law Officers of the Crown expect those decisions to be made.

The general discretion to prosecute

The initial decision to prosecute a person rests in most cases with the Police. Although the Police may often seek legal advice from its own in-house legal advisers, local Crown Solicitors, or from the Crown Law Office (Solicitor-General), it is never for the Solicitor-General or other legal adviser to make the initial decision to prosecute; it is their function to advise.

The two major considerations in deciding whether to prosecute are:

- Evidential sufficiency, and
- The public interest

1 *Evidential sufficiency*

The first question always to be considered is whether the person making the decision ("the prosecutor") believes that there is sufficient admissible and reliable evidence that an offence has been committed by an identifiable person, to establish a prima facie case against that person. A prima facie case is one where, if the evidence is accepted as credible by a court or properly directed jury the court or jury could find guilt proved beyond reasonable doubt.

2 The public interest

The second major consideration is whether, assuming a proper evidential basis for the prosecution, the public interest requires a prosecution to proceed. Generally, the more serious the charge, and the stronger the evidence to support it, the less likely it will be that a matter can properly be disposed of other than by prosecution. On the other hand, the public interest may require that a prosecution should almost invariably follow for some classes of offences if the necessary evidence is available, eg, driving with an excess breath or blood alcohol level. Factors that may assist in determining whether the public interest requires a prosecution include:

- The seriousness (or conversely the triviality) of the offence: eg, does the conduct really warrant the intervention of the criminal law?
- The prevalence of the alleged offence and the need for deterrence.
- The effect of a decision not to prosecute on public opinion.
- The attitude of the victim of the alleged offence to a prosecution.
- All mitigating or aggravating circumstances.
- The youth, old age, physical or mental health of the alleged offender.*
- The degree of culpability of the alleged offence.*
- Whether the consequences of any resulting conviction would be unduly harsh or oppressive.
- The likely sentence imposed in the event of conviction having regard to the sentencing options available to the court.
- The availability of any proper alternatives to prosecution.
- The staleness of the alleged offence.
- The obsolescence or obscurity of the law.
- Whether the prosecution might be counter-productive, for example by enabling the accused to be seen as a martyr.
- The entitlement of the Crown or any other person to compensation, reparation or forfeiture as a consequence of conviction.
- The likely length and expense of a trial.
- Whether the accused is willing to co-operate in the investigation or prosecution of others or the extent to which the accused has already done so.

None of these factors, or indeed any others which may arise in particular cases, will necessarily be determinative in themselves. All relevant factors must be considered and weighed according to their importance.

Factors of particular significance in cases of persons who may be "under a disability" or mentally impaired are marked with an asterisk.

A weighing of all the above factors in any given case usually overwhelmingly favours

prosecution in the vast majority of cases. In general, persons having a mental impairment are treated no differently to anyone else.

Police General Instructions concerning prosecuting mentally disordered persons

Police General Instructions in this area are sparse, and have not been updated for some time, referring still to the previous Mental Health Act 1969 and the Criminal Justice Act 1954. General Instruction M 104 reads as follows:

Offences Committed by Mentally Disordered Persons.

> (1) Where an offence is committed by a mentally disordered person whether "committed" or an informal patient within the meaning of the Act that person shall be dealt with before the Court in the usual manner.
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> (2) It does not necessarily follow that a "committed" or informal patient was under disability or insane at the time of the offence and this is an issue for the court to determine.
>
> (3) Where such a patient is found by the Court to be "under disability" (eg, unable to plead) and the Court orders detention in a hospital pursuant to s 39G of the Criminal Justice Act 1954 the information should not be withdrawn.[1]

According to Police General Instructions, therefore, outdated as they are, the view is that the Police consider that issues of the mental capacity of a suspect are not within their proper province or sphere of competence. The Police, perhaps not unnaturally, shy away from making judgments in this area, preferring to leave such matters for the Court to determine. Offenders are prosecuted without a weighing of the mental state of the suspect as a major factor in the actual initial decision to prosecute. Of course, any indicators of a person's mental state, or status or capacity known to the Police will be advised to the Court so that appropriate enquiries may be made or reports obtained.

Alternatives to prosecution for mentally impaired persons

Alternatives to prosecution, such as warnings or diversion are not often appropriate for mentally impaired persons. A warning, as will be obvious, may not be comprehended or acted upon, and diversion schemes usually require an admission of guilt, a conscious choice between diversion and prosecution, and some measure of community service or reparation. An understanding of these options and processes may be ruled out if a person is likely to be found to be "under disability".

Prosecution will only be avoided in rare cases

Given the unsuitability of alternatives to prosecution, and the weight of Police policy in

1 The purpose of this instruction is to ensure that the information and the prosecution remains "live" in case the Attorney-General directs that a defendant originally detained as a special patient, but no longer considered to be "under disability", be brought again before the appropriate court under subs (4) or (6) of s 116 of the Criminal Justice Act 1985. If the Attorney-General directs instead that such a defendant shall thereafter be held as a patient, any prosecution is then permanently stayed by virtue of s 116(7) of the Act. Similarly, if orders are originally made under s 115(2) of the Act detaining the defendant merely as a *patient*, the original proceedings are thereupon permanently stayed by virtue of s 115(5) of the Act. The proceedings will either be revived in the event that the defendant again comes before the court on the direction of the Attorney-General, or will be stayed by virtue of either s 115(5) or s 116(7) of the Act.

favour of prosecution in all but the rarest of cases, it is difficult to imagine cases that might escape the prosecution process. An example might be a person with a known intellectual impairment who assaults a care-giver or fellow resident in a minor way. If the assault is minor, and the victim agrees, and there is a reasonable prospect that the perpetrator is or is likely to be found to be "under a disability", then a prosecution may be considered unwarranted and inappropriate. If such offending persisted, however, a prosecution might well be warranted to see whether a formal finding of "under disability" and the exercise of some appropriate disposition option might be of some benefit to the offender or victim of the offences. As offending becomes more serious, such as assault with a weapon, or assault with intent to injure, injuring with intent, indecent assault, etc, it is likely that the Police (and society) would consider a prosecution as the only appropriate response under our present system.

Conclusion

The Police in New Zealand have a discretion to prosecute offenders for offences against the general criminal law. The discretion is very wide and is to be exercised in accordance with guidelines laid down from time to time by the Solicitor-General, who exercises a supervisory role over the criminal process under a delegation from the Attorney-General. Whilst the mental health or capacity of a suspected offender may be a factor in the exercise of a discretion to prosecute that person, it would not be a major factor in the vast majority of cases. The Police do not consider it appropriate that they make definitive judgments about a suspect's mental state, preferring to leave such matters to medical authorities and the Courts. Current policy and guidelines require that generally mentally impaired persons are not treated differently to other persons as far as the initial decision to prosecute is concerned. Only in extremely rare cases would a prosecution for an offence be foregone by the Police because of a person's mental state or capacity, either at the time of the offence or the investigation.