



## **Code on the decision to prosecute**

### **Issued by HM Attorney General for Jersey**

#### **Introduction**

- 1) The decision to prosecute (ie to charge) an individual is a serious step. Fair and effective prosecution is essential to the maintenance of law and order. Even in a minor case a prosecution has serious implications for all involved - the victim, a witness and a defendant. Centeniers are to apply the Code to ensure that they make fair and consistent decisions about prosecutions.
- 2) The Code contains important information for those who work in the criminal justice system and the general public. It helps Centeniers to play their part in ensuring that justice is achieved. If a Centenier is in any doubt as to the application of the provisions of the Code then he or she should seek advice from a Legal Adviser or Crown Advocate from the Law Officers' Department.

#### **General principles**

- 3) Each case is unique and must be considered on its own. There are, however, general principles which apply in all cases.
- 4) The duty of the Centenier is to make sure that the right person is prosecuted for the right offence and that all relevant facts are given to the Court.
- 5) Centeniers must be fair, independent and objective. They must not let their personal views of the ethnic or national origin, sex, religious beliefs, political views or sexual preference of the offender, victim or witness influence their decisions. They must not be affected by improper or undue pressure from any source.

#### **The Code tests**

- 6) There are two stages in any decision to prosecute. The first stage is the **evidential test**. If the case does not pass the evidential test it must not go ahead no matter how important or serious it may be. If the case does pass the evidential test the Centenier must decide if a prosecution is warranted in the public interest.
- 7) The second stage is the **public interest test**. The Centenier will only start or continue a prosecution when the case has passed both tests. The evidential test and the public interest text are explained below.

## **The Evidential test**

- 8) Centeniers must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each defendant on each charge. They must consider what the defence case may be and how that is likely to affect the prosecution case.
- 9) A realistic prospect of conviction is an objective test. It means that the Magistrate, a jury or bench of Jurats properly directed in accordance with the law is more likely than not to convict the defendant of the charge alleged.
- 10) When deciding whether there is sufficient evidence to prosecute, Centeniers must consider whether the evidence can be used and is reliable. There will be many cases in which the evidence does not give any cause for concern. There will, however, also be cases in which the evidence may not be as strong as it first appears. Centeniers must ask themselves the following questions:

### **Can the evidence be used in Court?**

- a) Is it likely that the evidence will be excluded by the Court? There are certain legal rules which 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 gathered or because of the rule against using hearsay as evidence? If so, is there enough other evidence to ensure a realistic prospect of conviction?

### **Is the evidence reliable?**

- b) Is it likely that a confession is unreliable because (for example) of the defendant's age, intelligence or lack of understanding?
  - c) Is there material which might affect the credibility of the witness? For example, does the witness have any dubious motive that may affect his or her attitude to the case or a relevant previous conviction?
  - d) If the identity of the defendant is likely to be questioned, is the evidence about this strong enough?
- 11) Centeniers should not ignore evidence because they are not sure whether it can be used or is reliable. They should, however, look closely at it when deciding if there is a realistic prospect of conviction.
  - 12) Where Centeniers have concerns over the possible exclusion of evidence, they should consult and be guided by the advice of the Police Legal Adviser.

## **The public interest test**

- 13) In 1951, Lord Shawcross (Attorney General for England) made a classic statement on public interest which has been supported by Attorneys General ever since:

*"It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution"* (House of Commons Debates, Volume 483, column 681, 29 January 1951).

- 14) The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. In cases of any seriousness a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the Court for consideration when sentence is being passed.
- 15) Centeniers must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the offender. Some factors may increase the need to prosecute but others may suggest that another course of action would be better. The following lists of some common public interest factors (both for and against prosecution) are not exhaustive. The factors which apply will depend on the facts in each case.

### **Some common public interest factors in favour of prosecution**

- 16) The more serious the offence the more likely it is that a prosecution will be needed in the public interest. A prosecution is likely to be needed if:
- 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 offence was committed against a person serving the public (for example, a police officer, prison officer or a nurse);
  - d) the defendant was in a position of authority or trust;
  - e) the evidence shows that the defendant was a ringleader or an organiser of the offence;
  - f) there is evidence that the offence was premeditated;
  - g) there is evidence that the offence was carried out by a group;
  - h) the victim of the offence was vulnerable, has been put in considerable fear or suffered personal attack, damage or disturbance;
  - i) the offence was motivated by any form of discrimination against the victim's ethnic or national origin, sex, religious beliefs, personal views or sexual preference;
  - j) there is a marked difference between the actual or mental ages of the defendant and the victim or there is any element of corruption;
  - k) the defendant's previous convictions or cautions are relevant to the present offence;

- l) the defendant is alleged to have committed the offence whilst under an order of the court;
- m) there are grounds for believing that the offence is likely to be continued or repeated (for example, by a history of recurring conduct);
- n) the offence, although not serious in itself, is widespread; or
- o) the offence has resulted in substantial financial loss.

## **Some common public interest factors against prosecution**

17) A prosecution is less likely to be needed if:

- a) the Court is likely to impose a very small or nominal penalty;
- b) the offence was committed as a result of genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);
- c) 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);
- d) there has been a long delay between the offence taking place and the date of the trial, unless:
  - i) the offence is serious;
  - ii) the delay has been caused in part by the defendant;
  - iii) the offence has only recently come to light; or
  - iv) the complexity of the offence has meant that there has been a long investigation;
- e) a prosecution is likely to have a very bad effect on the victim's physical or mental health (always bearing in mind the seriousness of the offence);
- f) the defendant is elderly or 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). Centeniers must balance the desirability of diverting a defendant who is suffering from significant mental or physical ill-health with the need to safeguard the general public;
- g) he defendant has put right the loss or harm that was caused (but defendants must not avoid prosecution simply because they can pay compensation);
- h) details may be made public which could harm sources of information, international relations or national security;

- i) the defendant is already serving a lengthy custodial sentence and little may be gained by further prosecution; or
- j) the defendant has been or will be subject to appropriate regulatory action or civil proceedings which adequately address the offending.

18) Deciding on the public interest is not simply a matter of adding up the number of factors on each side. Centeniers must decide how important each factor is in the circumstances of each case and go on to make an overall assessment.

## **The relationship between the victim and the public interest**

19) Centeniers act in the public interest and not just in the interests of any one individual. Centeniers must always think very carefully about the interests of the victim and the views expressed by the victim, and the impact that the offending has had upon them. If the victim is a child or person unable to speak for themselves, it may be necessary to take into account the views of the victim's family or other persons responsible for care of the victim. The views of victims should be taken into account at all stages, including considering whether or not it is in the public interest to commence a prosecution, discontinue a prosecution or to agree to certain pleas. The interests of the victim, are an important factor when considering where the public interest lies.

## **Young offenders**

20) Centeniers must consider the interests of a youth when deciding whether it is in the public interest to prosecute. The stigma of a conviction can cause very serious harm to the prospects of a young offender or a young adult. Young offenders can be diverted from entry into the criminal justice system at a Parish Hall Enquiry without the need for a Court appearance. The younger the child, the less likely that prosecution will be in the public interest. However, the seriousness of the offence or the offender's past behaviour may make prosecution necessary. Young offenders should be prosecuted in the Youth Court (rather than the Royal Court) wherever circumstances permit.

## **The threshold test – charging in special circumstances**

21) 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 (or to seek substantial conditions imposed on bail) and the following conditions are met, the suspect may be charged even though the evidential test is not met at that point in time.

22) The conditions are:

- a) the evidence required to apply the Prosecution Test is not yet available but is reasonably believed to exist;
- b) it can be obtained within a reasonable time;
- c) the seriousness or the circumstances of the case justify making an immediate charging decision
- d) there are continuing substantial grounds to object to bail;
- e) in all the circumstances of the case an application to withhold bail may properly be made; and
- f) a Legal Adviser from the Law Officers' Department agrees.

## **Charges**

23) Centeniers should select charges which:

- a) reflect the seriousness of the offending;
- b) give the Court adequate sentencing powers; and
- c) enable the case to be presented in a clear and simple way.

24) This means that Centeniers may not always continue with the most serious charge where there is a choice. Further, Centeniers should not continue with more charges than are necessary.

25) Centeniers should never go ahead with more charges than are necessary simply to encourage a defendant to plead guilty to a few. In the same way they should never proceed with a more serious charge simply to encourage a defendant to plead guilty to a less serious one.

## **Accepting guilty pleas**

26) Defendants may want to plead guilty to some, but not all, of the charges. Alternatively they may want to plead guilty to a different, possibly less serious, charge because they are admitting only part of the crime. Centeniers should only accept a defendant's plea if they think the Court is able to pass a sentence which matches the seriousness of the offending. Centeniers must never accept a plea just because it is convenient. If the offence is an offence against the person (that is to say a violent or sexual offence) then it should not be discontinued or lesser pleas accepted without consultation by the appropriate agencies with the victim or their family/carer if they are a child or unable to be consulted directly.

**Consent to prosecution**

27) Certain statutes provide that prosecution for an offence cannot be commenced without the consent of the Attorney General. If in doubt as to whether or not the offence falls within this category, the Centenier should contact a Legal Adviser from the Law Officers’ Department.

**Power of the Attorney General to overrule a Centenier’s decision**

28) Members of the public should be able to rely upon decisions taken by Centeniers. Normally, if a Centenier tells a person that there will not be a prosecution that is the end of the matter. However the Attorney General is the ultimate authority in respect of all prosecutions in the Island and has the power to overrule a Centenier’s decision not to prosecute. In exercise of this power he may direct a Centenier to lay a charge. Where appropriate Centeniers should inform a person whom they have decided not to charge of this possibility.

29) Similarly the Attorney General may direct a Centenier not to proceed with a prosecution which has been commenced.

**Conclusion**

30) Centeniers form part of the Honorary Police. They are answerable to the Attorney General.

31) The Code for Centeniers is designed to make sure that everyone knows the principles which Centeniers apply when carrying out their work. Centeniers should take account of the principles of the Code when they are deciding whether to charge a defendant with an offence. By applying the same principles Centeniers are helping the criminal justice system to treat victims fairly and to prosecute defendants fairly and effectively.

32) The Code is issued by the Attorney General and is available from all Parish Halls and the Law Officers’ Department, Morier House, St Helier, Jersey JE1 1DD.

33) It is also available at the States of Jersey Police Headquarters and also on the website of the Law Officers’ Department.

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