

ROYAL COMMISSION INTO INSTITUTIONAL
RESPONSES TO CHILD SEXUAL ABUSE

(Public Hearing - Criminal Justice
DPP complaints and oversight mechanisms)

Hearing Room 2
Level 17, Governor Macquarie Tower
Farrer Place, Sydney

On Friday, 29 April 2016 at 10am

Before

The Chair:	Justice Peter McClellan AM
The Presiding Member:	Justice Jennifer Ann Coate
Commissioner:	Mr Bob Atkinson AO APM

1 THE CHAIR: Good morning, everyone. All familiar faces,
2 bar a couple, for those who are new, a particular welcome.
3 Can I firstly, this morning, acknowledge the traditional
4 custodians of the land upon which we meet, the Gadigal
5 people of the Eora Nation, and pay my respects to their
6 elders both past and present.
7

8 This is our third roundtable discussion and some of
9 you have already participated significantly in the work
10 that we have done in respect to criminal justice issues.
11 Today we want to complete the discussion with respect to
12 complaints and oversight mechanisms which could apply,
13 might apply, should apply to directors of public
14 prosecutions and their officers.
15

16 As you know, Justice Coate and Commissioner Atkinson,
17 who are beside me today, and I have been charged with
18 bringing back to the whole Commission our suggested
19 recommendations that the six Commissioners ultimately will
20 determine what we say to government. We are, as ever,
21 helped by the extraordinary efforts of Leigh Sanderson and
22 her team. As I always say, I give her all the credit but
23 I accept responsibility for any error, but none has been so
24 far detected. Leigh has behind her a team of people who
25 are working very hard to ensure that what we bring forward
26 is appropriate for the circumstances.
27

28 Some of you may know that we had a public roundtable
29 last week at which I outlined much of the work that we have
30 been doing generally in relation to criminal justice, but
31 in short, criminal justice was recognised in our Terms of
32 Reference and by the Commissioners in response to the Terms
33 of Reference as a significant issue for survivors of child
34 sexual abuse. I don't have to emphasise to all of you why
35 that is so.
36

37 It is also a source - and we hear it in respect of all
38 stages of the criminal justice process, particularly in our
39 private session material - of significant complaint.
40 Whether it is justified is another matter altogether but a
41 lot of people are unhappy with the way the criminal justice
42 system works in relation to sexual assault. Again, that's
43 no mystery to any of you, I'm sure, but it happens to be
44 the case.
45

46 We have, as you know, looked at these issues in some
47 public hearings. Case Study 15 looked at the

1 Queensland DPP but then it carried over to the New South
2 Wales DPP and the Retta Dixon study in the
3 Northern Territory looked at the position in the
4 Northern Territory. All of you would by now be familiar
5 with what those reports disclosed and the problems that
6 could be identified in the processes in each case.
7

8 The Commission has said in response to Case Study 15,
9 which was the Queensland/New South Wales study, that
10 anybody that is given statutory independence and that
11 cannot be subject to any external reviews is at risk of
12 failure in its decision making processes.
13

14 When the decisions being made are critical to the
15 lives of the individuals involved, be it either the
16 complainant or the accused, and are being made on behalf of
17 the entire community, it is relevant to ask whether the
18 current structure, where there is absolute immunity from
19 review of any decision, is appropriate. Experience
20 suggests that an absence of review increases the risk of
21 administrative failure.
22

23 Mark Aronson, welcome, he is joining us today, and
24 Leigh has particularly arranged for him to come and talk in
25 the space of the role of administrative law in relation to
26 decision making in our society.
27

28 In Case Study 15, you I am sure are all aware, we did
29 mention or refer to the position in England and Wales where
30 there are two manifestations of review or audit, if you
31 like; firstly, the Victims Right to Review Scheme and
32 secondly, the Crown Prosecution Service Inspectorate, the
33 latter being a body external to the DPP, the former being a
34 body set up internally but with, so far as can be arranged,
35 an independent role within the DPP service.
36

37 As many of you who are here today know, earlier this
38 year we had some preliminary discussions about these
39 issues. At that stage we didn't have the benefit of a full
40 understanding of what takes place in England and Wales, so
41 since then we've made arrangements to find out and what
42 we've done is Leigh and I, via videolink, met last week and
43 recorded a discussion with the DPP for all England and
44 Wales, the officers in charge of the Victims Right to
45 Review Scheme, and we also had a discussion with the
46 Chief Inspector of the Crown Prosecution Service
47 Inspectorate.

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What we are going to do this morning - and I am sorry but you have to watch me a fair bit because I did the questioning - is play you the recording of those discussions so that everyone can understand what they say, firstly, about what they do and secondly, about its effectiveness.

I should say at the outset that we are all conscious that there are differences between England and Wales and each of your respective State prosecutorial bodies, the greatest difference being the size of the England and Wales operation compared with each of yours. I think Leigh tells me that if we add up all of your prosecuting staff together, you don't reach half the number of prosecutors that there are in England and Wales.

That gives rise to some issues that are the same issues but the response may be different having regard to that factor, which is one of the things that we want to discuss later in the day.

You will have noticed that Lloyd Babb is not with us this morning. Lloyd sends his apologies. Leigh and I spoke with him last week and we have his current perspective on these issues. He had the benefit of reading the transcript of the interviews we did last week and came informed with that knowledge and he, I am sure some of you know, I know South Australia do, has given a lot of thought to the issues in this space and a considerable amount of that thought has taken place since we last met, and he is consciously moving down a path which is his response, as it were, in his context, to these issues and recognising the benefits that have come in England and Wales.

As you all know, today's roundtable is being broadcast through our website and apart from that, we will also be making a transcript of the proceedings and we would be grateful if you could just identify yourself when you speak, although we now have the transcription people in an elevated position and it's easier for them to work out who you are than it was when they were at ground level, so maybe that's not so essential today.

Again, welcome and again my thanks and the Commission's thanks for you all making the time available to enable the Commission to reach a mature position with

1 respect to these various issues. We are very grateful for
2 that. Now, Leigh, I think it's over to you to make the
3 system work; is that right?
4
5 MS SANDERSON: Fortunately, not to me.
6
7 THE CHAIR: Someone else. The first discussion is I think
8 with the DPP; is that right?
9
10 MS SANDERSON: Yes.
11
12 THE CHAIR: All right.
13
14 (Recording of discussion played)
15
16 "THE CHAIR: I want to talk to you about your experience
17 with your accountability mechanisms.
18
19 MS SAUNDERS: Okay, of which we have lots.
20
21 THE CHAIR: That's right. Now, I have a sort of working
22 knowledge of what you've got, but I would like, if I may,
23 to just talk about the processes, but to start the
24 discussion to understand why it was that accountability
25 mechanisms came into existence at all. When your office
26 was first set up, were there any accountability mechanisms
27 that came together with the creation of the Office of the
28 DPP?
29
30 MS SAUNDERS: No, absolutely, because I suppose it sort of
31 starts really in 1986 when the Crown Prosecution Service
32 was set up, because it's a creature of statute, and that
33 statute made it clear that the Director of Public
34 Prosecutions was accountable to Parliament for prosecution
35 decisions - or not decisions but policies and the workings
36 of the CPS. We had to publish a statutory code - Code for
37 Crown Prosecutors - which set out how we will make our
38 decisions in every single case, so we have a Code for Crown
39 Prosecutors which has sort of high-level overarching
40 principles and guidance in it, and that's laid before
41 Parliament whenever we update it and, importantly, the big
42 accountability piece in the Act is that it means that the
43 Attorney-General superintends the work of the CPS and the
44 DPP. Superintendence has never really been - it's not
45 defined in the Act, but we have a memorandum of
46 understanding --
47

1 THE CHAIR: Right. If you had that in an Australian
2 statute, it would probably ring alarm bells about political
3 influence on the decision-making processes. Does the word
4 cause any controversy in England?

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6 MS SAUNDERS: No, and we've got a memorandum of
7 understanding which very clearly sets out that - and the
8 sort of established protocol is very much that casework
9 decisions are a matter for the DPP. In theory, there is a
10 direction - an ability of the Attorney-General to direct
11 the DPP, but that's never ever happened and I think would
12 lead to some constitutional issues, if it ever did happen.
13 So, for example, I do not tell the Attorney-General if
14 we're looking at prosecuting or considering a prosecution
15 against any member of Parliament or anybody who might be
16 connected to the sort of political sphere. So we don't
17 tell him that, so he's not involved in it at all.

18
19 And I may consult him, but prosecution decisions are
20 very much mine. There are some things we need to, by
21 statute, go to him for consent. So, in some Explosive
22 Substances Acts, we need his consent in order to prosecute,
23 just in some cases it needs my personal consent.

24
25 THE CHAIR: Yes. Again, going back to when the office was
26 first created, beyond saying that the Attorney had that
27 role, whatever that means, was there any accountability
28 mechanism to provide a confidence in the general public
29 that you were actually following your identified
30 procedures?

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32 MS SAUNDERS: Nothing set up in the Act, but later there's
33 HMCPSI, so the CPS Inspectorate was set up, which is
34 independent of the CPS, and it was set up to come in and
35 inspect, so it does what it says on the tin, so it inspects
36 the CPS, either areas or it does thematic reviews as well.
37 So they might do a review of how we deal with child
38 witnesses, for example, and they might do that with the
39 police inspectorate, so they look at the end-to-end
40 process. So we have the Inspectorate, which is now very
41 well established, but we also - I also go to Parliament to
42 talk to parliamentary committees about the work of the CPS
43 about our policies - again, not about individual casework
44 decisions, but about how we operate.

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46 THE CHAIR: Can I then understand a little more about the
47 inspectorate? When was that first created?

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MS SAUNDERS: When was that first created? That must have been created - I don't know the exact date, I can find out, but in the 1990s, I think it was, because I certainly took part in some of the first inspections, so at that point I was within the service, but worked for the Inspectorate for a short time, so it's been around --

THE CHAIR: So you changed sides, as it were, to go from the Inspectorate to become the director; is that what happened?

MS SAUNDERS: There was a few jobs in between, but I have done the Inspectorate work, so I understand where they're coming from. For me, equally as a Chief Crown Prosecutor where they have come into my area and inspected it, what has been incredibly useful is that it's an objective independent sort of person coming in to have a look. I would expect them - I would be worried if they were finding things that I really didn't know anything about, so to some extent it's a bit of an affirmation of are we on the right track, are we doing the right things, but equally it is that check and challenge, so if there is something we don't know about, which would be really worrying, they should be able to find it.

So I think they have been very useful. There's a bit of - we are working with the Inspectorate at the moment because there is something about their currency and making sure that their reports are very quick rather than taking months, by which stage we can say, yes, that was fine at the time but actually the time has moved on and now we look at what we've done and it's all sort of different. So it has to be quite immediate.

THE CHAIR: Was the Inspectorate created because of a particular controversy? Where did it come from?

MS SAUNDERS: I don't recall that it was. I think the Inspectorate came about because perhaps the Attorney, and externally, they wanted more reassurance about the performance of the CPS. We had established inspectorates into the police and, at that time, we also had an inspectorates into the courts, so the CPS was really the only part of the criminal justice system that didn't have an independent inspectorate, so I think it was more around making sure that everyone had the same sort of transparency

1 and accountability.

2
3 And those words have become very important to us. So
4 in 1986 there wasn't sort of a huge amount of transparency
5 in the way in which we did things, so we talked to the
6 Attorney, but we didn't talk to very many other people.
7 Now, we publish vast amounts of data, we publish all our
8 policies - and not just publish them but we consult the
9 public when we're drafting the guidance so that they can
10 have input. We publish reasons for our decisions. We
11 publish press statements. I go to Parliament. We talk to
12 the press. So the transparency around the way in which we
13 operate and the work that we do and why we make our
14 decisions is completely different to 1986.

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16 THE CHAIR: Now, when the Inspectorate was created, was
17 there any opposition to its creation and any suggestion
18 that it may bring political influence into the
19 prosecutorial process?

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21 MS SAUNDERS: No concern at all about bringing political
22 interference into the prosecutorial decision-making,
23 because, again, certainly at the time they started, they
24 were not necessarily looking at ongoing prosecutions. It
25 tended to be prosecutions that had been finished. That's
26 changed. They look at some more live cases now, because
27 actually it's far more useful to look at live cases.

28
29 But, because again they report - they sit outside the
30 Attorney-General's purview, so he can't make them say
31 something. They are independent. Again, in their report,
32 they do their report, they publish it, and we will answer
33 it, as may indeed the Attorney may sort of say something -
34 very rarely does. So there was no controversy over the
35 political interference at all, because there wouldn't be.

36
37 I think there might have been some concern - I can
38 certainly remember some of my colleagues having some
39 concern about, you know, what were they going to do, how
40 could they judge us, but at that point what we did in order
41 to make sure that they understood the way in which the CPS
42 worked is we staffed a lot of the Inspectorate with
43 secondees from the Crown Prosecution Service - not all of
44 them, but some of the inspectors were on secondment from
45 the CPS. So they were aware of what we should be doing and
46 the most up-to-date guidance.

47

1 THE CHAIR: In choosing the chief inspector, which
2 I understand there is, how is that done? Is that an
3 appointment by the Parliament, or by the Minister, or how
4 is that done?

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6 MS SAUNDERS: It's through - it's very similar to my
7 process. It's a public appointment, so it goes through a
8 Civil Service Commissioner who will chair the board, and it
9 will be a sort of normal process with a number of tests or
10 sort of, along the way, finishing with an interview. The
11 Attorney will, now Ministers, have some say. They can't -
12 they don't - what will happen is the process carries on and
13 then you'll have a sort of an introductory meeting with the
14 Attorney to make sure there are no issues there, and then
15 it goes through to - I'm not sure if the Prime Minister
16 signs it off, but the Prime Minister signs off my
17 appointment, but I'm not a political appointment. And for
18 the chief inspector, he also had to go through a
19 confirmatory hearing with the Justice Committee, which is a
20 committee --

21
22 THE CHAIR: Of the Parliament?

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24 MS SAUNDERS: -- of parliamentarians. Yes.

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26 THE CHAIR: And they could say no, could they?

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28 MS SAUNDERS: I think the chief inspector might know
29 better than I about what would happen if they did not
30 confirm him. I think that would be an issue and they'd
31 have to run the process again, perhaps. What they can't do
32 is say, "Not him, but I'd like her." So they would just
33 deal with him.

34
35 THE CHAIR: It's a bit like appointing a Chief Justice in
36 America.

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38 MS SAUNDERS: Yes, as I understand it.

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40 THE CHAIR: Yes. In terms of the operation of the chief
41 inspector, as far as you are concerned and people holding
42 your office, has it proved to be a good thing for the
43 office?

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45 MS SAUNDERS: I think it has. We have worked very closely
46 with the Inspectorate and we see them as a critical friend,
47 in that they can come in, they can look at things. If we

1 want them to, we can ask them to come in, so I haven't
2 exercised that power, but certainly my predecessor did
3 where we had a case where we were very worried about - it
4 was a very high profile prosecution against some police
5 officers. It collapsed because of disclosure issues and my
6 predecessor asked the Inspectorate to come in and to do a
7 report into that to give him some assurance about what was
8 happening and what did happen and, also, an objective view
9 about what had happened. So there are lots of ways in
10 which we use them which are really useful. The end-to-end
11 inspectorates I think with the police inspectorate are
12 incredibly useful again, because it's not looking at us in
13 isolation. So we do find them very useful and we welcome
14 their input.

15

16 THE CHAIR: I assume there have been occasions when the
17 Inspectorate has commented adversely upon some part of the
18 work of your office; would that be right?

19

20 MS SAUNDERS: Yes. When I was Chief Crown Prosecutor for
21 London, just before that the Inspectorate had been in -
22 under a previous regime, I should say - but did a very
23 critical report about London. I mean, again, the
24 reassurance was that they were not telling us anything that
25 we didn't know, but it confirmed what we knew. So we were
26 able to sort of really take some action around it.

27

28 I don't for one moment suggest that we agree with them
29 all together and in some of the recent reports we have said
30 that's all well and good, but we knew that already, we've
31 already put things in place, and we're moving ahead with
32 it. Where again it helps us is we've got some initiatives
33 going on at the moment across the criminal justice system
34 and we've particularly encouraged them to come back and
35 have a look at how those are developing.

36

37 THE CHAIR: Do I take it that the Inspectorate reports to
38 Parliament?

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40 MS SAUNDERS: They publish their reports and I think they
41 lodge them in Parliament as well.

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43 THE CHAIR: So everything they say is public, or is it
44 sometimes confined?

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46 MS SAUNDERS: No, up until now, all their reports have
47 been published and will continue to be so.

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THE CHAIR: Does that, then, create controversy or difficulty for you if they are critical of something that's happened in your office?

MS SAUNDERS: It's never good if we have something out that's critical. I mean, it hasn't been a major issue because, again, we encourage and welcome the transparency. We do see a copy of the draft report, so if there is anything factually incorrect, we can challenge it. What we also do is we issue our own press statement in response to the Inspectorate report and we now publish a document setting out our response to their recommendations and to their findings. So we are becoming, I suppose, less - we don't always necessarily accept every single recommendation, nor do we have to. It is their recommendation, so the majority of them we will, and we will say what we're going to do about it, but sometimes we will say, "Actually, we don't accept that, we're not going to do that", and set out our reasoning.

What hasn't happened but is starting to happen now is the Inspectorate is coming back more obviously to say, "We did this report 18 months ago. These were our recommendations. You accepted them. Tell us what you've done about them." Because I think that's very important, otherwise it becomes meaningless.

THE CHAIR: That's right. And given the capacity for disagreement in the public domain, does that cause your office any problems? Do you become involved in controversies that are adverse in terms of the working or reputation of your office?

MS SAUNDERS: We haven't, not with the Inspectorate, no, and - I mean, to some extent, most of their reports do not engender very much pickup in the public sphere. They have just literally published one today, which was talking about the digital work across the criminal justice system, which has been picked up, but it's been again very small, so there's been no controversies as yet, touch wood.

THE CHAIR: Could they, do you think, emerge? Is it possible that there could be a real conflict between you and the Inspectorate?

MS SAUNDERS: We're independent, then they're independent

1 of us, so it could be that we would not agree with any of
2 their recommendations. I mean, quite often there will be
3 the odd one or two that we will say: well, part of it we
4 might but we're not really going to do that because - and
5 there's nothing that the Inspectorate can do, of course, to
6 make us do it. But the Attorney can intervene at that
7 point, because the Attorney will see the reports and what
8 we do do is make sure that, you know, when we're talking to
9 the attorney I meet the Attorney in a monthly
10 superintendence meeting and we will ordinarily go through
11 the Inspectorate reports and tell him what our response is
12 and what we're doing and why. So if there was any great
13 controversy, he would be likely to meet with both the
14 Inspectorate and with myself, but we've never been in that
15 position yet.

16
17 THE CHAIR: I have a copy of the Inspectorate Act of 2000,
18 which I think is the latest. It just says that the chief
19 inspector is to inspect or arrange for the inspection of
20 the operation of your office. It does not make any attempt
21 to define what a "inspection" means or what can be
22 inspected. Does that cause any difficulty?

23
24 MS SAUNDERS: No, we talk to the Inspectorate on an annual
25 basis about what their work program is going to be for the
26 forthcoming year and, indeed, the Inspectorate will ask us
27 if we have any ideas particularly for the thematics that we
28 think would be useful for them to look at. So there is a
29 great deal of cooperation between us about their work
30 program and, also, the way in which they do it, so they're
31 very clear about how they conduct their inspections, the
32 sort of documentation they expect, the access they expect.

33
34 So, for example, yesterday we had a meeting of all the
35 Chief Crown Prosecutors from England and Wales and Kevin
36 McGinty, the chief inspector and some of his team came
37 along to talk about their new area inspections, which are
38 going to be much more focused, they're going to be much
39 shorter and sharper and a bit more risk assess. So they
40 will come in, they will look at the area, because we give
41 them all the performance that we see from the areas. They
42 will decide against a sort of weighted score card where are
43 the areas that they think the area is perhaps not
44 performing as well as it should be, and will then target
45 those areas to have a look at, so areas will know. So no
46 one inspector may be the same and it will be much more
47 bespoke to areas, and areas will know exactly which parts

1 of their operation the Inspectorate are looking into, and
2 we're piloting that with the Inspectorate in two areas at
3 the moment, so that gives you a sort of sense of the
4 dialogue that we have with the Inspectorate. So it's never
5 a sort of, you know, complete sort of bash - it's not like
6 that.

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8 THE CHAIR: No.

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10 MS SAUNDERS: Our relationship is not like that.

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12 THE CHAIR: No. Do you maintain a good personal
13 relationship between you and the chief inspector?

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15 MS SAUNDERS: Yes. I mean, I know Kevin and we have a
16 sort of regular dialogue. It's mainly done through liaison
17 through the office. We have a specific single point of
18 contact for the Inspectorate that works with them to make
19 sure that they get access to what they need, to make sure
20 that we see draft reports and that we deal with our
21 responses. So as well as the sort of area contacts, we do
22 have a headquarters contact that liaises with them very
23 carefully, but they do remain independent, so, you know, it
24 is that balance between coming in objectively to look at
25 our operation but having good working relationships with
26 them.

27
28 THE CHAIR: Yes. I imagine from time to time you or your
29 office would make decisions perhaps not to prosecute, which
30 may be controversial and the newspapers write a lot about
31 them, I imagine, from time to time. Does the inspectorate
32 have any role in relation to a controversy that might break
33 out in relation to a particular decision?

34
35 MS SAUNDERS: No, they have never - never done an
36 individual - a report in relation to an individual case.
37 Their reports tend to be about reports into area
38 performance and general thematic issues. The only time
39 that they have done a report into a thematic - a specific
40 case is when a previous director has asked them to come in
41 and to look at it and it was a very different type of - it
42 wasn't really so much an inspection as using them to come
43 in and give us a sort of insight and an objective insight
44 into what has happened. So they have never - and I would
45 be very concerned if they suddenly picked up on a sort of
46 press report and said, "Okay, we're going to come in and
47 look at that case and do an inspection on it."

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2 THE CHAIR: Yes.
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4 MS SAUNDERS: That's not what I see their role is.
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6 THE CHAIR: No, which means that effectively by agreement
7 you're defining what "inspection" means in the Act,
8 I guess.
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10 MS SAUNDERS: Yes.
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12 THE CHAIR: Can I then discuss with you the mechanisms for
13 review, which I understand you have implemented within the
14 office and ultimately I want to talk to you a little about
15 judicial review. You may know that our High Court in
16 Australia said that DPP decisions couldn't be judicially
17 reviewed. There's obviously a different attitude to that
18 in the United Kingdom.
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20 MS SAUNDERS: There is.
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22 THE CHAIR: Yes. Can we start with the internal review
23 processes, which I think are referred to as complaints; is
24 that the way it's phrased?
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26 MS SAUNDERS: No. We've got two very separate sort of
27 processes. One is a complaints process, which deals with
28 people's dissatisfaction about the way in which the service
29 has performed, and then there is a very separate process
30 around - if it's somebody who is a victim who is
31 complaining about a decision not to prosecute, then that's
32 called the Victims' Right to Review, which is a separate
33 and a very different process, so complaints as such, which
34 is any member of the public can complain, a defendant or a
35 victim or a witness can complain, MPs, and that's dealt
36 with through our complaints process, which we've got a very
37 clear escalation process for complaints.
38
39 And, indeed, we have an independent assessor of
40 complaints who comes in and looks at the way in which we've
41 handled the complaint and can make findings against us and
42 also order us to pay small amounts of costs in some form of
43 compensation if he finds that that's the case. That's very
44 rare for him to do that, but it does happen, but that's
45 very separate from a Victims' Right to Review.
46
47 THE CHAIR: I wonder if we could then just trouble you to

1 give us a little bit of the detail so that the
2 practitioners in Australia will understand how it all
3 works. First of all, the service issues, any member of the
4 public or someone who has been involved in a prosecution
5 can lodge a complaint; is that the way it goes?
6

7 MS SAUNDERS: Yes. And they do that --
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9 THE CHAIR: And this is under --
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11 MS SAUNDERS: Sorry, go on.
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13 THE CHAIR: Sorry, this is under a procedure defined by
14 your office?
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16 MS SAUNDERS: Yes.
17

18 THE CHAIR: It doesn't have a statutory foundation?
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20 MS SAUNDERS: No, no. We have a set complaints process,
21 which is clearly set out on our website, so members of the
22 public can access it and understand what it's about, and
23 understandably the sort of first level will be dealt with
24 at the local level, so from somebody looking at the
25 complaint objectively but dealt with at the local level,
26 and then there's a series of escalations until it will be
27 dealt with by somebody outside the area, so we've got about
28 (indistinct - simultaneous speakers) --
29

30 THE CHAIR: So if someone lodges a complaint in relation
31 to a decision not to prosecute, where does that first get
32 looked at?
33

34 MS SAUNDERS: Well, that wouldn't be under the complaints
35 procedure now, because that would be under the Victims'
36 Right to Review. So if it's a victim, they have very
37 different rights and they can challenge our decision not to
38 prosecute. If it was a member of the public who just
39 wanted to complain about that decision, then they would
40 have to go through the complaints procedure, which under
41 the complaints procedure we may look at the case again, but
42 we're not obliged to review the case in the same way as
43 under the Victims' Right to Review. I mean we could pick
44 it up if it's the wrong decision --
45

46 THE CHAIR: So if it is one of these complaining members
47 of the public not party to the prosecution in any way, what

1 are the steps that could be taken in relation to that
2 complaint? It's reviewed in the local office by someone
3 who was not engaged --
4

5 MS SAUNDERS: Yes, it would be reviewed --
6

7 THE CHAIR: By someone not engaged --
8

9 MS SAUNDERS: Yes, it would be reviewed in the local
10 office first. Yes. Sorry.
11

12 THE CHAIR: By one person or by a committee?
13

14 MS SAUNDERS: No, by one person, and we've got
15 identifiable levels. So the first level will be the local
16 manager, who will look at it and deal with it. If that
17 doesn't answer the complainant satisfactorily and they sort
18 of want to go to the next level, it will be dealt with by
19 either the Deputy Chief Crown Prosecutor or the Chief Crown
20 Prosecutor in that area, and they can ask for the whole
21 file, to have a look at the whole file, if they are
22 concerned. They might just ask for a briefing note. So it
23 really depends what it is, but if at that point any of the
24 people reviewing it think, "I'm not sure that this is
25 right," they can go back and look at the whole case again
26 and they can change the decision if they think the decision
27 is wrong, because that's allowed for in the Code for Crown
28 Prosecutors.
29

30 THE CHAIR: Now, I should have asked you this, I'm sorry,
31 first of all, and that is how would the original decision
32 not to prosecute have been made? Who would have made that
33 decision?
34

35 MS SAUNDERS: That would have been our reviewing lawyer,
36 so an in-house reviewing lawyer, which again the level of
37 that reviewing lawyer rather depends on the case. But they
38 don't have to have it signed off by anybody else. It is
39 the lawyer who is in charge of the case who looks at it,
40 considers all the evidence, assesses whether or not there
41 is a realistic prospect of conviction. If they decide that
42 there isn't, then they will not proceed with the case.
43 They may decide that there is sufficient evidence but it's
44 not in the public interest and then decide not to continue
45 with the case.
46

47 But they have to articulate their reasons in a review

1 note and refer to - obviously it's got to be within the
2 code test as well as any other guidance that we publish.

3
4 THE CHAIR: So that original decision is not signed off by
5 a person at the top of the tree in the local area office?
6 No. When the service complaint is dealt with and it's just
7 again a member of the public and the decision is made that
8 there is no problem with what's happened in the office, is
9 the complainant given a written response and do they get
10 reasons?

11
12 MS SAUNDERS: Yes. I mean two things happen. If we
13 decide not to prosecute a case and it's one where we have
14 been dealing directly with the victim, so in rapes, serious
15 sexual assault cases, cases where there are deaths, we will
16 have been talking to the family anyway, so we will
17 initially give them written reasons why we're not going to
18 prosecute. And for families of victims who have died or
19 rape/serious sexual assaults, we also offer the victims or
20 the families the ability to come and talk to us and we will
21 explain in more detail what our reasoning is.

22
23 For members of the public who write in and complain,
24 they will get a letter back setting out the reasons why we
25 did not proceed. We may not go into the full details of
26 the case, because what you don't want to do is be trying
27 the case in another forum, but we will give our reasons and
28 an explanation.

29
30 THE CHAIR: If it's a sexual assault case and the
31 prosecutor forms the view that the complainant is just not
32 credible and that the jury is most unlikely to accept the
33 evidence, how do you explain that to a complainant?

34
35 MS SAUNDERS: Well, our guidance is very clear, that we
36 look at the credibility of the allegation - and I think
37 this is very clear. We're having quite a debate in England
38 and Wales at the moment about is this all about the
39 credibility of the victim, or is it about the credibility
40 of the sort of allegation. So in some ways, because our
41 guidance is very clear, we look at the whole allegation,
42 because what we found was that prosecutors historically -
43 and this was sort of pre some of the sort of cases that
44 have made us look at this, so like Jimmy Savile and other
45 cases - but before that people were looking at the victims
46 themselves.

47

1 So a very good example is we've had quite an issue
2 with cases of men grooming young girls and then passing
3 them around to be sexually abused. And what you found was
4 that the girls in that case were quite often from troubled
5 backgrounds, they may have been in care homes, they were
6 susceptible to somebody apparently showing them affection,
7 and then asking them to do things, you know, supplying them
8 with drugs or drink and, ordinarily, you would have looked
9 at those, or we would have looked at those victims and said
10 their credibility was not good enough so that we could put
11 them before a jury.
12

13 We were very clear now in our policies that it's not
14 about the credibility of the victim - she can be incredibly
15 troubled, she can have drink/drug problems, she may have
16 previous convictions, she may have convictions, you know,
17 for offences that she's committed at the behest of the
18 people who have been grooming her. But you've got to look
19 at the allegation in the round, because it's not just about
20 the credibility of the victim, because by looking at that,
21 we found that we were not prosecuting cases that we should
22 have been, and we have successfully now prosecuted many of
23 these grooming cases where, you know, 10 years ago we
24 wouldn't have even entertained a prosecution. So I suppose
25 that helps us - this is a very long answer, sorry - to some
26 extent --
27

28 THE CHAIR: That's all right.
29

30 MS SAUNDERS: -- because we wouldn't write to the victim
31 saying, "This is all about your credibility." What we
32 would say is, "You've made your allegation, but because of
33 the whole evidence, because of the surrounding allegation,
34 we do not think that there is enough." Some of those
35 conversations are very difficult and I've certainly had
36 them with victims myself where it is a very difficult
37 conversation, but many of them have said, "We may not
38 still - you know, we may still be very upset and
39 disappointed by the decision, but, actually, we understand
40 what it is and that helps us to sort of move on and,
41 because we understand what it is, we can accept it, even
42 though we're disappointed."
43

44 THE CHAIR: But I take it from what you're saying that
45 your prosecutors don't shy away from including in the
46 explanation doubts about the credibility of complainants?
47

1 MS SAUNDERS: No. I mean, it very much depends, because
2 we don't have to have corroboration - and these are
3 incredibly difficult cases, because it tends to be the ones
4 where you just have the complainant's word and then you
5 have the defendant's. So we will look to see - I mean, if
6 it literally is sort of one-on-one, then you will look to
7 see the sort of - it's very often the surrounding
8 circumstances. Are there text messages between them; did
9 they know each other before, was this a sort of - you know,
10 what was in the defendant's mind; you know, how the victim
11 behaved that might have given him the belief - the honest
12 belief - that actually there was consent. So, again, it
13 would be explaining all of those circumstances, but
14 I suppose that's very different from just saying to a
15 victim, you know, "It's your credibility. We don't believe
16 you." It's very different from that.

17

18 THE CHAIR: Yes. In terms of, then, a complaint or a
19 review, I suppose - is that the correct term - request from
20 a complainant, can you just confirm for me the steps that
21 that would go through?

22

23 MS SAUNDERS: This is called Victims' Right to Review and
24 it is quite recent - we only brought it in I think it was
25 in late 2013/14 - and what can happen there is that the
26 victim can say, "I don't agree with the decision not to
27 prosecute and I would like it reviewed." And, again, this
28 is all publicly available on our website. That first
29 review will be done, again, by a local manager, who will
30 look at the file - and we call this a local informal
31 resolution. So, again, there are very strict time scales
32 within which this has to take place and they will look
33 again at the sort of case and decide whether they think it
34 was right or not.

35

36 If they agree with the decision, they will let the
37 victim know and sometimes - sometimes what the victims want
38 is a better explanation, so they will get a very full
39 explanation as to why the manager thinks that decision was
40 right not to prosecute. That may be an end to the matter
41 for some victims; for some, it's not, and they can then go
42 on to the second stage, which is complaining to our Appeals
43 and Review Unit, which is a unit that we have set up here
44 in headquarters where the case file will come in and a
45 completely new lawyer from outside of the area - so based
46 within headquarters - will look at it again and they may
47 ask for further evidence to be obtained and they may sort

1 of look to build the case themselves, but they will look at
2 the case and decide whether or not the case should be
3 prosecuted or not.

4
5 Again, a very full letter with an explanation will go
6 back to the victim either explaining why we are still not
7 prosecuting, or in those cases where we do change the
8 decision why we have changed the decision, and then the
9 case will then proceed to court.

10
11 THE CHAIR: I assume that people when they first lodge the
12 application for review, or some of them, will write you
13 letters saying, "These are the reasons why you should
14 prosecute." Is that right?

15
16 MS SAUNDERS: A lot of them will do, and some of them may
17 come up with extra evidence.

18
19 THE CHAIR: Do you invite submissions in that sense?

20
21 MS SAUNDERS: No, the initial letter will be enough and we
22 will - in some cases we will go back to the police and ask
23 them if there is any extra evidence. If we think there's a
24 line of investigation that hasn't been followed or should
25 have been dealt with, we will go back and ask the police to
26 do that. So we don't go back to the victim specifically
27 and say, "Do you have anything else that we should look
28 at?"

29
30 THE CHAIR: You don't, no.

31
32 MS SAUNDERS: No, because that should come in the letter.

33
34 THE CHAIR: Right. Is the information given to people in
35 these circumstances such that they would know that if they
36 do have things they want to say, then they have an
37 opportunity to say them?

38
39 MS SAUNDERS: So (a) it's published on our website and
40 it's very clear but, also, when we write to victims to tell
41 them that we're not going to pursue a case, if it's a pre
42 charge case, we will write to them and we tell them at the
43 bottom of the letter that they do have the ability to
44 review the decisions. If it is post charge, so it is one
45 that we've stopped at court or we discontinue before it
46 gets to court but post charge, again, we will tell the
47 victim that they have the right to review the decision.

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THE CHAIR: Now, this process you indicate has come into being fairly recently; is that right? And was it borne of a particular controversy?

MS SAUNDERS: Not so much a controversy. It was two reasons. One is we knew the European directive on victims was coming into place, so it's been activated last year, 2015, so that was partly getting ahead of what we knew was coming over the horizon from a European directive and partly in response to a case, which was a case which had a very long history, but eventually went to the Court of Appeal, who overturned the decision not to prosecute, but what they said in their judgment was really this shouldn't be for the court to do; there should be a step before it gets to judicial review, which is that the prosecutor should review their decisions first and that victims should have a right to sort of ask the prosecution to do that.

So it was very much in response to the case of Killick, the case was called, which wasn't - it was an assault case, it wasn't a sexual abuse case, and that really sort of set out for us that we needed to be able to have a process of Victims' Right to Review (a) to sort of - so that we took responsibility for reviewing our own decisions, but it also stopped cases going to the Court of Appeal for judicial review.

In theory, it's still there, but we've had a number of cases where following a Victims' Right to Review the victim has then tried to judicially review the cases and the courts have said, "No, this has all gone through the right processes. It's been reviewed in accordance with the VRR procedures - the Victims' Right to Review - and, therefore, we're not going to judicially review it."

THE CHAIR: I guess you would be very disappointed if the court found it necessary to intervene, having regard to the processes you now have in place.

MS SAUNDERS: Extremely thorough processes and I think for victims it gives them a great degree of confidence and actually for the public as well, because it shows them that if we get it wrong we will change it. The good news is that we publish our statistics annually and I think it's .16 per cent I think of decisions that we look at are actually overturned. So very few - that's right -

1 0.16 per cent, so it's very few decisions that we actually
2 overturn.

3
4 THE CHAIR: The effect is, as you say, public confidence
5 is strengthened in what you're doing. Are there many
6 decisions that are made in the review process in the many
7 cases that are called upon for review?

8
9 MS SAUNDERS: Not huge numbers, interestingly. From June
10 2013 when we started the pilot to December 2015, we
11 received 4,170 requests for review and we prosecute
12 annually somewhere just short of I think it's 800,000
13 cases. So that gives you a sort of sense of the - you
14 know, it's a small number.

15
16 Of those 4,170, we overturned 519 decisions and the
17 majority we do look at, we review what those decisions are
18 and what sort of cases are coming to the Appeals and Review
19 Unit and the vast majority are offences against the person,
20 and sexual offences, not surprisingly.

21
22 THE CHAIR: No. As I understand it, you have what's
23 referred to as the Child Sexual Abuse Review Panel. Have
24 I got that right?

25
26 MS SAUNDERS: Yes, that's a panel that we set up - my
27 predecessor set up jointly with the police to look at old
28 non recent cases where victims have been concerned about
29 previous decisions either not to investigate - many of them
30 are decisions not to investigate - and some would have been
31 decisions not to prosecute. So the process for that is we
32 identified a number of non recent cases. We obtained the
33 file. There is a panel of police investigators from
34 different forces and senior prosecutors from different
35 areas. They look at the papers again and then make
36 recommendations either back to the police force to
37 investigate, or to the prosecutors to have a look again at
38 the cases.

39
40 The ones I've been involved in, they have mainly been
41 around the investigations, so they have all gone back to
42 police forces with recommendations to further investigate.
43 That panel has got a fairly limited shelf life, really,
44 because it was looking at a sort of specific number of
45 non recent cases which had previously been investigated.

46
47 THE CHAIR: Again, I assume it came out of the controversy

1 that has been around in relation to old allegations of
2 sexual assault; is that right?

3
4 MS SAUNDERS: Yes, that's right. To be fair, not every -
5 I mean, we also have - now, because of the numbers of
6 non recent cases coming through the system, many of which
7 came out of the sort of controversy around the sort of the
8 way in which we have previously dealt with sexual abuse
9 cases, the police have set up an overarching operation
10 called Operation Hydrant, which tracks all these cases
11 around the country and makes sure that there are also sort
12 of deconfliction processes in place if - because people
13 don't stay in one particular county, so different police
14 forces may be dealing with similar allegations.

15
16 So we liaise very closely with - my principal legal
17 adviser talks to Operation Hydrant and we make sure that
18 we've got the right processes in place, the right people
19 are dealing with these cases. We deconflict if a number of
20 areas are sort of investigating the same suspect or the
21 same allegations, so we've got a number of different ways
22 in which we make sure that we really get to grips with that
23 now."

24
25 THE CHAIR: I trust you found that interesting. We did
26 talk a little bit more. Alison Saunders obviously has very
27 deep experience, but also a very large job in running her
28 office.

29
30 The second discussion is with Angela Deal, who is the
31 head of the Appeals and Review Unit, and the legal manager
32 of that unit, Sarah Boland. They are going to talk about
33 how that unit operates and what its role is.

34
35 (Recording of discussion played)

36
37 "MS DEAL: My name is Angela Deal. I'm the head of
38 the Appeals and Review Unit for the CPS and this is Sarah
39 Boland, who is the legal manager with lead responsibility
40 for the Victims' Right to Review scheme, because my unit
41 deals with all of the appellate court cases for the CPS and
42 we have responsibility for the second stage of the Victims'
43 Right to Review scheme.

44
45 THE CHAIR: Thank you, and thank you very much, both of
46 you, for your time in your morning. Can I just make sure
47 that I understand the process. If I'm a victim, or allege

1 I'm a victim, and I go to the police and then the police
2 send a brief for prosecution and then a decision is made
3 not to prosecute, what role do either of you have if I am
4 very upset about that decision not to prosecute?
5

6 MS BOLAND: Immediately, we don't have a role. The victim
7 will be told by the police or by letter from the CPS that
8 no charges will be brought and they will also be told that
9 if they are not happy with that decision, they will give
10 them contact details of that local area decision - the
11 manager of the person who made that original decision. So
12 the first stop is to go to the local area. That manager
13 will look at the decision. If he or she thinks it's wrong,
14 they will overturn it there and then. If they agree with
15 the decision, they will explain that to the victim and say
16 they are upholding the decision, but they will also then
17 give our details if the victim is still unhappy so that
18 they can come to our units in London for us to take a
19 second - it's a second tier, a formal look at it.
20

21 THE CHAIR: So in terms of the documentation of this, you
22 would receive in London a note from your area office saying
23 that this is our file, or do you get all of the detail, and
24 here is a letter from an alleged victim who wishes to have
25 the case reviewed; is that how it would look?
26

27 MS BOLAND: Not quite. The victim will be told they can
28 contact us by email, letter or telephone call, so we will
29 usually get a telephone call or an email from the victim
30 and, at that stage, we will then go to the area and ask for
31 their details. It's a very, very simple straightforward
32 procedure by the victim and a simple phone call will be
33 enough.
34

35 If the area, having looked at it, upholds the decision
36 and knows the victim is still going to be unhappy because
37 they can't give them any more information, there's no
38 further explanation to be given and they know it's
39 inevitable that the victim will come to us, on those
40 occasions the manager can send the case straight to us in
41 any event and tell the victim they have sent it to us. And
42 that happens in, I would say, about 10, 15 per cent of
43 cases.
44

45 THE CHAIR: I can imagine there would be victims who,
46 getting the original letter saying there will be no
47 prosecution and the reasons, say, "These are ridiculous.

1 For this reason, you should reverse this decision." Do you
2 get those sorts of letters coming in?
3
4 MS DEAL: Yes.
5
6 MS BOLAND: They don't have to give any reason or
7 justification as to why they want the decision looked at
8 again.
9
10 THE CHAIR: No.
11
12 MS BOLAND: Yes, we get all sorts of responses.
13
14 MS DEAL: Very much so.
15
16 THE CHAIR: But you do get people writing, I can imagine
17 in an angry tone, saying, "This is ridiculous. You haven't
18 thought about this and that."
19
20 MS DEAL: We get those letters and we also get phone calls
21 of a very similar nature, so we have a small team who man
22 the telephones and take those calls and deal with what are
23 very often quite distressed or disgruntled victims.
24
25 THE CHAIR: I can imagine.
26
27 MS DEAL: They're trained in dealing --
28
29 THE CHAIR: That would be a hard job.
30
31 MS DEAL: It is, it is a hard job, and they do it very
32 well.
33
34 THE CHAIR: Once it gets to your office, is it looked at
35 by only one person, or by a committee of persons, or what's
36 the process?
37
38 MS BOLAND: It's allocated to one of our team of lawyers.
39 They're specialist lawyers who have been hand picked
40 because they are experienced in most areas of the law, and
41 they will look at it and make a decision. Whatever their
42 decision is, their final letter or review comes to me as
43 the manager. If they decide they want to overturn the
44 decision not to prosecute, then, as a matter of law and
45 procedure, the case has to be looked at by a deputy head of
46 division, which is Angela Deal, so where a lawyer makes a
47 decision to overturn, if I agree with it, I will forward it

1 to Angela. But within that, there is a lot of discussion
2 that goes on. Lawyers tend to ask each other and me our
3 opinions, because these are difficult cases.
4

5 But the actual procedure is the lawyer makes the
6 initial decision and then that comes to me and if it's to
7 be overturned it has to be sanctioned by someone of
8 Angela's grade.
9

10 THE CHAIR: But if it's to sustain the original decision,
11 then it stops with you, is that the way it works?
12

13 MS BOLAND: Although I do sometimes refer things to Angela
14 because they are difficult decisions, but where I'm quite
15 happy and it seems quite straightforward, yes, I will deal
16 with it.
17

18 THE CHAIR: In terms of the reasons why you might be
19 overturning decisions, do they have any general pattern, or
20 are they really right across the board?
21

22 MS DEAL: The sort of review that we carry out is a full
23 code test review based on our Code for Crown Prosecutors,
24 so it's a complete, fresh, relook at all the evidence.
25 We're not initially looking at the approach taken by the
26 original lawyer; we're looking at it afresh. And so we
27 will review the case to see whether we consider there to be
28 sufficient evidence and whether it would be in the public
29 interest. And we then look - once we've reached our own
30 view on that, we look back at what the original
31 decision-making lawyer had done, how they'd approached it,
32 and what we consider to be wrong about the approach that
33 they took and we are also engaged in collating quite a lot
34 of information now on a quarterly basis, which we pass to
35 our senior managers for performance purposes and we look at
36 what sort of areas, trends, types of decision are being
37 made that we think reveal lessons that can be learned by
38 the areas.
39

40 And, ordinarily, I would say the majority of the cases
41 that we look at in some way, we say the evidential part of
42 the code test has not been applied in the correct way. So
43 that might be that we believe, for instance, that lawyers
44 have attributed too much weight to elements of the evidence
45 that we don't think deserve that much weight; perhaps they
46 have been influenced by myths and stereotypes, particularly
47 in the sort of rape and sexual offence-type cases.

1 Sometimes there are issues around what we believe to be a
2 misunderstanding of case law. So it's those sorts of
3 issues that we would highlight and we then - in every one
4 of the cases that we overturn, we feed back to the area and
5 give them a copy of our review so that they have something
6 for learning purposes.

7
8 THE CHAIR: I get the impression that there will be on the
9 file from the original decision maker a fairly detailed
10 report as to why they decided not to prosecute?

11
12 MS DEAL: Yes. All of our cases are actually digital. We
13 deal with - all of our case load is electronic and those
14 review notes from the original decision are on our
15 electronic case management system. So we have access to
16 their review and we also get hold of any paper copy files
17 that they are relying on, so we do have all of the
18 information that they had access to and we have a copy of
19 their own case review.

20
21 THE CHAIR: And their case review, the obligation in that
22 case review is to provide a thorough analysis of the
23 evidence and reasons for not prosecuting; is that right?

24
25 MS DEAL: That's correct.

26
27 THE CHAIR: What about cases where there might be multiple
28 counts, or there might be alternative counts. The easiest
29 one to talk about is murder/manslaughter where there may
30 have been a charge of murder brought but a plea to
31 manslaughter is accepted by the prosecutor. Do those
32 decisions end up with you?

33
34 MS BOLAND: No, we've taken the decision not to take
35 those. The basis of the legal position was that it's where
36 a victim has had no remedy at all. There is an argument to
37 say that where there's been a substantial reduction in the
38 charge or some charges are brought that the victim doesn't
39 like, there's an argument as to the fact that perhaps it
40 may be desirable for them to have a review. But it's
41 wholly impractical for two reasons: firstly, the time
42 constraints. We take a look at all the evidence and where
43 you are accepting pleas within the timetable of a court,
44 which tends to move quite fast, it's simply impractical for
45 us to have the evidence here in London, to look at it, go
46 through it, know everything about the case, speak to the
47 police, speak to the victim and decide what the position

1 should be.

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The second thing is there would be so many that we're a fairly small unit and although we can cope with the current workload, to have a huge influx of all the various pleas that are taken across England and Wales would mean that we wouldn't be able to cope with it and that would be to the detriment of victims who had had no remedy, whose cases we're looking at now, so it's logistical and practical reasons, really, that we've not gone down that road at the moment.

MS DEAL: But that's clear enough under the policy. We have a published policy which makes it clear.

THE CHAIR: These are the sorts of decisions that can cause real controversy in Australia, and I assume it's true in England and Wales, too.

MS BOLAND: But we still have our complaints system. They can use that for anything that's outside Victims' Right to Review. Ours is different, because we're taking a second opinion on a case and doing a proper roots and branch look at it. It's the thoroughness that stops us from doing it in a breadth, if you like, for acceptance of pleas.

THE CHAIR: I know a little about the role of the Inspectorate. Does the inspector ever look at the work that you're doing in your part of the organisation?

MS DEAL: The Inspectorate haven't been in to look at our work yet. We've had an inspection - a sort of mini inspection conducted by an audit team who are based with the Ministry of Justice, so they have come in and had a look at the processes that we run, but the Inspectorate - the CPS Inspectorate have not yet.

MS BOLAND: That's our letters - victims' letters. That was --

MS DEAL: That was in connection with it. Yes, there has been a thematic inspection of dealing with victims across the CPS. That wasn't specifically focused on the Victims' Right to Review Scheme and it wasn't specifically focused on the unit that we belong to. But they did have a look at communication - it was to do with communicating with victims and looking at the standards of written

1 communication with victims. So they came and had a look at
2 the letters that we produce, but apart from that the
3 Inspectorate haven't had any direct role in looking at the
4 way that we function.
5
6 THE CHAIR: Yes, but I assume the Inspectorate could.
7
8 MS DEAL: Yes, the Inspectorate can choose to look at --
9
10 MS BOLAND: We're expecting them at some point.
11
12 MS DEAL: Yes, we are.
13
14 THE CHAIR: And what's the general sense in the office
15 about the role of the inspector? Is it welcomed or --
16
17 MS BOLAND: Well, I've been through inspections in a
18 different life in the CPS and you accept it, yes, as part
19 of an overview. It can be useful because they can see in
20 detail what you do and can explain that to the management
21 as well, sometimes. So, yes, I don't think people have
22 much of a view one way or the other, really. They are
23 accepted as a fact of life.
24
25 MS DEAL: I think from our perspective as well, we are a
26 very recently established unit. We were only set up in
27 2010. So all of our - we're in the fortunate position to
28 have recruited staff and set up processes from scratch, so
29 I think we feel in a pretty strong position anyway to - so
30 we're very happy to be inspected.
31
32 THE CHAIR: Yes. You mentioned that there was an audit.
33 What is the audit process?
34
35 MS DEAL: Well, it's an internal audit process. It's a
36 member of the internal auditor team comes in and basically
37 just looks at the - it's sort of quality assurance case
38 progression type arrangements. They don't look at the
39 quality of the legal decision-making; they are really
40 assuring the CPS board that all of our performance
41 assurance measures are in place. It's that kind of audit.
42 It's a very small scale. It's not on the same sort of
43 scale as an inspection from the Inspectorate.
44
45 THE CHAIR: But there is a team, then, within the
46 organisation that is engaged in auditing different parts of
47 the organisation from time to time; is that the way it is?

1
2 MS DEAL: Yes. I think we used to have our own team
3 within CPS. I think now they have merged with a team that
4 is based at the Ministry of Justice.
5
6 THE CHAIR: Is the audit report made public?
7
8 MS DEAL: I'm afraid I don't know. It certainly goes to
9 the CPS board, but what happens to it after that, I don't
10 know.
11
12 THE CHAIR: Can I talk to you about your experience with
13 sexual assault cases. Do they pose any particular
14 difficulties as far as you are concerned? And you
15 understand our remit here is looking at the sexual assault
16 of children, but it, of course, inevitably carries over to
17 sexual assault generally. Do those cases give you any
18 particular difficulties or issues?
19
20 MS DEAL: Well, they are amongst the most difficult cases
21 that we deal with. They are extremely time consuming.
22 Most of the evidence or a lot of the evidence is
23 video-recorded evidence. It takes a lot of time to observe
24 all of that evidence. But our lawyers are trained in rape
25 and serious sexual offence prosecutions, so it's an area
26 that they are very familiar with. So it's more an issue of
27 they are just very, very time consuming and difficult cases
28 in themselves.
29
30 THE CHAIR: And from the point of view of your particular
31 role in the organisation, do you have specialists who look
32 at them in your organisation or your part of the
33 organisation, or is it just part of your general
34 decision-making?
35
36 MS BOLAND: Every lawyer who deals with a rape case
37 charging decision has to be what's called a rape
38 specialist. They have to have gone through various
39 training and if you're dealing with child abuse cases, you
40 have to also have had specialist training. So, for
41 example, we have 16, 17 lawyers and we've got only two that
42 aren't trained in that way. So the others can all deal
43 with rape or child abuse.
44
45 THE CHAIR: What does that training involve? Is it an
46 intensive training exercise?
47

1 MS BOLAND: The rape training is fairly intensive. It's a
2 two-day course where you go through various aspects. You
3 have some experts coming in and talking about people's
4 reactions, why they might delay before reporting, that sort
5 of thing. It also involves a trip to one of the - what we
6 call the havens, which is where a rape victim will go to be
7 examined by a trained doctor to get the evidential samples,
8 so you physically visit there and you have to watch a rape
9 trial. So it is fairly time consuming and intensive.

10

11 You also have to then have prosecuted, or prepared for
12 prosecution, I think it's at least two rape cases under
13 supervision of another rape specialist. So you come out
14 with a pretty good grasp of what to look for and how to
15 deal with them.

16

17 THE CHAIR: Is there any apprehension about prosecuting a
18 sexual assault trial, particularly when it involves a
19 child, where there is only one victim who has come forward?

20

21 MS BOLAND: Well, I mean, that's something you just have
22 to put in the balance, because inevitably in sexual cases
23 it's one person's word against the other.

24

25 THE CHAIR: Yes.

26

27 MS BOLAND: And, in a way, that's something that takes
28 experience to look for - why would they lie, are there any
29 other factors. Clearly, it's far, far easier if you've got
30 two or three children, or adults who were children at the
31 time, coming forward with no possibility of collusion all
32 saying the same thing. That goes into the easy category,
33 really.

34

35 THE CHAIR: Yes.

36

37 MS BOLAND: The ones where it's one person's word against
38 another pose clear difficulties. But, again, that's where
39 our - we have very helpful policies and guidance which help
40 to point you in the right direction and, again, it's
41 experience, what happened at trial, what can we do better.
42 But there's no getting away from it - they are hard cases.

43

44 THE CHAIR: They are hard cases, but merely because
45 there's only one victim and word against word that's not a
46 reason why you wouldn't prosecute?

47

1 MS BOLAND: No, not at all. Often that is the case,
2 because that goes with the territory with a sexual case.
3
4 MS DEAL: We actually have quite a good track record in
5 successful outcomes on those cases, so it's not something -
6 obviously it's something we have to be very careful about
7 when we're thinking about prosecuting those cases, but when
8 we've chosen to do so, we've had very good outcomes.
9
10 THE CHAIR: Yes. And the other issue that is of interest
11 to us particularly is that in Australia the High Court said
12 there could be no judicial review of a prosecutor's
13 decision, courts could never look at it. Now, that's
14 different in England, I gather, and I gather from your
15 decision there is a capacity, then, to ask for a judicial
16 review in the conventional way; is that right?
17
18 MS BOLAND: Yes.
19
20 MS DEAL: Yes, there is, but what happens - what we found
21 to happen so far is, because we now have this stage where
22 the case will have been looked at completely afresh in any
23 event through the Victims' Right to Review Scheme, the
24 judges at the High Court are very much less likely to grant
25 permission to somebody who is seeking judicial review of
26 our decision not to prosecute and, in fact, we've had a far
27 lower number of judicial review applications since the
28 Victims' Right to Review Scheme has been in place and none
29 of the applications have yet been successful in securing
30 permission to appeal.
31
32 THE CHAIR: It would be awkward if they did, I suppose.
33 But the impression I have is you need leave, do you, from
34 the High Court before you can bring that case?
35
36 MS BOLAND: So the 13 that have applied have not had leave
37 from the High Court and the basis is whether our decision
38 is irrational or so unreasonable that no reasonable
39 prosecutor would have come to it. And because our
40 reasoning is always (indistinct - simultaneous speakers) --
41
42 THE CHAIR: So it's a Wednesbury approach to it.
43
44 MS BOLAND: Exactly.
45
46 THE CHAIR: It's a Wednesbury approach to it, is it?
47

1 MS BOLAND: Exactly right. And the High Court has been
2 very supportive of the Victims' Right to Review Scheme,
3 because they were the ones who decided that it should be
4 set up in the first place.

5
6 THE CHAIR: Yes.

7
8 MS BOLAND: And what they said is that they will not - you
9 can judicially review any decision of the CPS, but what the
10 High Court have said is they will not entertain any
11 application for judicial review of a decision not to
12 prosecute unless it's been through our unit first. So they
13 want it to come to us first and then there is the
14 possibility of reviewing our decision, but as you've heard,
15 there has been no success in that at all yet.

16
17 THE CHAIR: No. But does a victim need leave of the
18 High Court to bring a judicial review proceeding from a
19 decision that you've made?

20
21 MS DEAL: Yes.

22
23 THE CHAIR: Unlike, say, some other decision made by the
24 administrator, there is an extra step in the process, is
25 there?

26
27 MS DEAL: No, they all require permission. That's the
28 first step of bringing a judicial review.

29
30 THE CHAIR: So there is a legislative step, is there? If
31 you want to be judicially reviewed, you need the leave of
32 the court to even be able to bring the proceedings; is that
33 the way it works? That's a "yes", I think, is it?

34
35 MS DEAL: Yes, it is. What will happen is the applicant
36 will lodge their application and it will ordinarily be
37 considered by a single judge of the High Court on the
38 papers and they will decide either to grant leave or not to
39 grant leave, and that's the stage that all judicial reviews
40 go through.

41
42 THE CHAIR: It might be a decision or an application in
43 relation to the Minister for Health or the Minister for
44 Railways, or what ever, they all have to go through a leave
45 process?

46
47 MS DEAL: Yes.

1
2 MS BOLAND: Yes.
3
4 THE CHAIR: That's interesting. Can I just ask you this:
5 I suspect both of you have been in the prosecution world
6 for some time. I won't ask you how long.
7
8 MS DEAL: Yes.
9
10 THE CHAIR: But what would be the perception since your
11 unit, if that's the right word, was created? Do you
12 believe it's improved the level of the quality of
13 decision-making across the prosecution service?
14
15 MS DEAL: We're not in a position yet to have data to
16 really rely on to show us that. But anecdotally, I think
17 it's been a huge help. I think it's been - it's given us
18 an opportunity to have oversight of the decision-making
19 that is going on across the country. We have, then, been
20 able to feed back from experienced lawyers lots of learning
21 points not just on an individual case-by-case basis, which
22 we do, but also, as a sort of general learning resource for
23 the service and I think that has been taken on board.
24 Certainly as well in our rape and sexual offence units -
25 those units that concentrate on that kind of case have
26 invited us to give talks and to contribute to the training
27 that they provide and I think that that has enabled them to
28 look again at some of their decision-making and I think it
29 is helping to push up standards. But we don't have the
30 data to be able to prove that.
31
32 THE CHAIR: No. I assume there is a continual education
33 process going on within the service of all the lawyers.
34 Are you invited on a regular basis to talk about what
35 you're seeing and what you're observing in your work?
36
37 MS DEAL: We've been invited on a number of occasions.
38 We've also been invited to contribute information to the
39 development of ongoing training for rape and serious sexual
40 offences and we provide a sort of overview of the sorts of
41 issues that keep cropping up in case review that we think
42 are problematic. We feed those back to the senior managers
43 of the service so that they can decide what they want to do
44 with it.
45
46 THE CHAIR: I assume the service is so large that you've
47 got some regular bulletin or information distribution

1 system; is that right?

2

3 MS DEAL: Yes, that's right. We also have -
4 electronically, we have a sort of an internal internet, an
5 info net, where we have what we call the casework hub,
6 which is a central point where all lawyers - well, any
7 member of staff of CPS can access and we have - there we're
8 going to have - we're in the process of setting up an
9 ongoing series of updates about the sorts of cases, the
10 sorts of problems that we've seen and the sorts of lessons
11 that people need to take on board. So that's something
12 that everybody - all lawyers will be able to just access
13 any time they like.

14

15 THE CHAIR: It sounds like a significant capacity exists
16 in your part of the organisation to contribute to the
17 quality of the work across the organisation. Would that be
18 the way that you're seen by prosecutors?

19

20 MS DEAL: I believe so. We are in the fortunate position
21 where we are a central unit that has a remit right across
22 the service, so we have the benefit of that level of
23 oversight. So we can feed back to individual lawyers and
24 we can feed back to the service in general. I'm not sure,
25 because I don't think anybody has actually asked, how we
26 are perceived by lawyers on the frontline. I think most of
27 them are appreciative of feedback that they receive, but
28 obviously, we are also in the position of overturning our
29 fellow colleagues' decisions, and that's not always an easy
30 thing for a lawyer to accept.

31

32 THE CHAIR: So are you invited to all of the regional
33 Christmas parties, or not?

34

35 MS DEAL: I don't think we're on their Christmas card
36 list, no.

37

38 MS BOLAND: One advantage we have is that because our unit
39 also deals with all judicial reviews and High Court work
40 and appellate work as well as Victims' Rights to Review,
41 we've got a big source of knowledge of what they consider
42 to be quite difficult aspects, because they don't deal with
43 them that often, and things like abuse of process - and we
44 have an overview as to what's happening across the country.
45 So when one area runs into an unusual problem, the managers
46 will often ring us, and they know us because of the
47 Victims' Right to Review as well and they will often get an

1 answer, because we've had that problem in another part of
2 the country. So we have become an information resource.

3
4 So although they are not always obviously, inevitably,
5 that happy that we've disagreed with one of their
6 professional decisions, I think we're still used very much
7 as a source of information about unusual problems that they
8 don't necessarily come across very often themselves.

9
10 THE CHAIR: Yes. Obviously there are some decisions that
11 you would have to make in circumstances of significant
12 public controversy - at least that's what happens in this
13 country. I assume that's true for you as well. Do you
14 ever get any sense that people are trying to put pressure
15 on you in relation to the decision that you make in an
16 improper way?

17
18 MS DEAL: No.

19
20 MS BOLAND: Not really improper, and it's not really the
21 public ones, it's individual victims will try and put
22 pressure on us and they go to MPs and so on, but we're
23 fairly oblivious to it and, indeed, were we to overturn a
24 decision under pressure, that would immediately be
25 disclosed and would be an abuse of process at a court, so
26 we're very mindful of that. So not really - it's there,
27 but we just do our job and it doesn't really worry us too
28 much.

29
30 THE CHAIR: What about Attorneys and so on publicly saying
31 things, does that happen very much?

32
33 MS DEAL: No, that doesn't actually happen at all, or it
34 hasn't happened in my experience since setting up the unit.
35 The Attorney-General is completely separate from our
36 decision-making function and we've never received any kind
37 of involvement or pressure from that area, or even MPs get
38 written to by individual victims, as Sarah said, who are
39 unhappy with a decision that we've made, and they will
40 write to us or write to the Director of Public Prosecutions
41 and raise the issues that their constituent has raised.
42 But it's simply then a matter of explaining the basis of
43 the decision that has already been taken. There's no means
44 for them to bring pressure upon us to change that decision.

45
46 THE CHAIR: So you do respond, though, by explaining what
47 you've done.

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MS DEAL: Yes, we do.

THE CHAIR: My final topic is if the matter comes to you and you look at it and say, "Maybe more could have been done to investigate", and perhaps the victim has written saying more should have been done to investigate, do you have a capacity to go to the police and discuss with them whether or not the investigation itself was appropriate?

MS BOLAND: Yes, very much so. All the lawyers who are on our team are used to doing the first off charging, they have all been used to doing that, advising the police on charging before they came to this unit, often for many years, and it's quite natural for us to have a communication with the police. It's a little bit more difficult in our unit, because we're central and we're dealing with police forces across England and Wales, so sometimes it's a little bit tricky to get hold of the actual officer, but that's very much part of our work.

We did give an undertaking to the police when the unit was first set up that we wouldn't ask the police to do unnecessary work to sort of prove that we shouldn't prosecute, because they've got enough to do. So, generally, if we get a feel for the case, we think we're going to overturn it but more work needs to be done, yes, we don't hesitate to go back to the police and, surprisingly, despite the fact that I'm sure most officers thought this case was done and dusted and off their desk, they are 99 times out of 100 extremely helpful and cooperative.

THE CHAIR: And I'm sure that they probably, when they sent it across, felt that it maybe should be prosecuted, so I guess in that sense they have a real understanding of the case and maybe an interest in making sure it's thoroughly considered.

MS BOLAND: Yes.

THE CHAIR: Thank you both."

THE CHAIR: It is time for a cup of tea, which I think is just outside. When we come back we will hear from Kevin McGinty, who is the Chief Inspector, and then I want the views around the table about these various matters.

1 But there is a cup tea just outside.

2

3 SHORT ADJOURNMENT

4

5 THE CHAIR: Kevin McGinty is the Chief Inspector of the
6 Crown Prosecution Service Inspectorate. He will explain to
7 you where he came from and how he was appointed and then
8 how he undertakes the work of that office.

9

10 (Recording of discussion played)

11

12 "THE CHAIR: Firstly, when did the Inspectorate start
13 and why did it happen? Where did it come from?

14

15 MR MCGINTY: It started as an internal process as part of
16 the Crown Prosecution Service as an internal audit
17 effectively. That grew - the CPS was created in 1987, from
18 memory, and as I say it started with this internal checking
19 process. In about 1999 it became clear that this would be
20 better if it was an external - an independent process -
21 independent of the CPS, as a result of which the
22 Inspectorate was created by the Inspectorate Act 2000. It
23 is the Crown Prosecution Service Inspectorate Act 2000.

24

25 THE CHAIR: I've got a copy of that here. I'm going to
26 ask you a couple of questions about that later on.

27

28 MR MCGINTY: And from that moment on, from about 2001, it
29 became an independent Inspectorate headed by a Chief
30 Inspector who was given power to employ staff to assist
31 him. Since then - and I think you've spoken to
32 Alison Saunders, the DPP yesterday - over the years the CPS
33 has grown another internal process for internal compliance
34 and, at the moment, we're working out how best to work with
35 them. We maintain our independence, clearly, but we try to
36 work as close as we can with the CPS to make sure we're not
37 doubling up on things.

38

39 THE CHAIR: Yes. How long have you been in the chair?

40

41 MR MCGINTY: I took over the post on 1 April last year.
42 Prior to that, I had spent some 23 years in the
43 Attorney-General's Office. One of my main functions there
44 was to advise the Attorney-General in his superintendence
45 of the Crown Prosecution Service and the Serious Fraud
46 Office. As you are probably aware, the Attorney-General
47 also has a role in respect of how the DPP goes about her

1 functions.
2
3 THE CHAIR: So you, as it were, have been intimately
4 involved in understanding the processes of the prosecution
5 service for quite a long time.
6
7 MR MCGINTY: Yes.
8
9 THE CHAIR: And before you, the person who fulfilled your
10 role - a similar background?
11
12 MR MCGINTY: Michael Fuller. He was an ex chief
13 constable - a policeman. He was qualified as a lawyer, but
14 his job had been Chief Constable for Kent his last job
15 before he became Inspectorate. Before that - and there's
16 only been three of us - it was somebody called Stephen
17 Wooler, who had followed - I've sort of followed the same
18 path that he had, in a sense. He was Deputy Head of the
19 Attorney-General's Office before he became Chief Inspector,
20 as was I.
21
22 THE CHAIR: Your appointment is, I assume, made by the
23 Attorney; is that right?
24
25 MR MCGINTY: It is. It's a public appointment, it's a
26 statutory office. There is a board - it's an open
27 competition. There is a board which is chaired by the
28 Public Appointments Commission. It makes a recommendation
29 to the Attorney. The Attorney comes up with two candidates
30 who he thinks are good. He goes to the Justice Committee,
31 which is one of the committees of the Parliament. They
32 make a recommendation and then he makes the appointment for
33 a fixed term.
34
35 THE CHAIR: And the term is?
36
37 MR MCGINTY: In my case, it's four years.
38
39 THE CHAIR: Renewable or is --
40
41 MR MCGINTY: Renewable, yes. They tend not to be renewed,
42 to be fair. Michael Fuller's was not renewed.
43 Stephen Wooler's I think was once, but it's partly
44 political in the sense that Cabinet Office has a
45 considerable interest in public appointments, of which I am
46 only one, and there is a general acceptance that a public
47 appointment is made for a fixed term and it's only extended

1 in exceptional circumstances, but one of my fellow
2 inspectors, Chief Inspector of Police, recently had his
3 contract extended for a further two years, so it does
4 happen - not everyone wants it extended of course.
5
6 THE CHAIR: When you say it's political, is the concern
7 that the possibility of renewal could bring political
8 forces to bear on the person who may want renewal, is that
9 the theory?
10
11 MR McGINTY: I don't mean that. I mean political with a
12 very small "P". There are a large number - there are
13 hundreds of public appointments that are made by Ministers
14 during the course of the year and if everybody had their
15 contract extended, if there was a general acceptance the
16 contracts were extended, the whole thing would become very
17 stagnant. So there is a general - it's not specific to me,
18 it's not specific to the Inspectorate, but the status quo
19 is that you would normally not extend unless there were
20 exceptional circumstances.
21
22 THE CHAIR: So when you take on a job like you've taken
23 on, you know you've got to find another job at the end,
24 pretty much.
25
26 MR McGINTY: Or retire.
27
28 THE CHAIR: Was the creation of the Inspectorate
29 controversial in any real sense? Was there anxiety about
30 it?
31
32 MR McGINTY: No, not really. I was in the
33 Attorney-General's Office at the time when this proposal
34 was made. It wasn't - indeed, it was largely welcomed.
35
36 THE CHAIR: Is there any suggestion which has already been
37 raised here that, by creating your office, that may have
38 the consequence that political forces would come to bear
39 upon the prosecuting office and the decisions that were
40 being made by prosecutors?
41
42 MR McGINTY: Absolutely none.
43
44 THE CHAIR: And has there ever been --
45
46 MR McGINTY: Absolutely none. It may be that we have a
47 different system. As you know, our Attorney-General who

1 superintends the Crown Prosecution Service and the SFO, in
2 a sense that would be a much more sort of difficult
3 constitutional issue than simply having an Inspectorate
4 that goes in and looks at cases that have already been
5 decided. But we're well used to the idea of having the
6 attorney who superintends and, when he does, he acts
7 independently of government. The whole role of how
8 superintendence works is quite complex, but certainly I've
9 not heard any criticism of the Inspectorate being perceived
10 as having some political impact on the CPS. I am already
11 at arm's length from my Minister, who is the
12 Attorney-General. He does not superintend me as such,
13 the Act makes that clear. Although we have to work
14 together on a day-to-day basis, his powers in relation to
15 me are actually quite limited. I'm allowed to act as
16 I wish.

17
18 One other thing you might be interested in is that the
19 Justice Committee has over the last year, when it was
20 refreshed after the election, taken a great interest in the
21 criminal justice Inspectorate, so that's myself, prisons,
22 probation and police, and have insisted on seeing protocols
23 set up between ourselves and our respective Ministers
24 setting out the basis upon which we work with each other
25 and trying to ensure our independence from Ministers.
26 That's not to say that there is any problem in relation to
27 independence - speaking for myself, there isn't any - but
28 there is this further oversight of that relationship by the
29 Justice Committee, albeit an informal one.

30
31 THE CHAIR: Do you in any way report to or respond to the
32 Justice Committee of the Parliament?

33
34 MR MCGINTY: I have tried to build up a working
35 relationship with the Justice Committee, because one of my
36 concerns when I took over this job is that my inspectors
37 used a lot of resources in inspecting, coming up with a
38 very detailed report. It involves a lot of work for the
39 Crown Prosecution Service, too. I was concerned that
40 no-one was reading these reports, and so I have tried to
41 ensure that they get a broader reading base. I've tried to
42 engage the Justice Committee to explain to them that these
43 reports give them material upon which they can challenge
44 and question both the Director of Public Prosecutions and
45 the Attorney-General, who superintends them. So I've been
46 working on that and, yes, I think we have a reasonable
47 relationship.

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THE CHAIR: But there is no formal process whereby you go and talk to them or they question you about your work.

MR MCGINTY: They can summon me, and indeed I got an email from them yesterday summoning me to give evidence to them later this year, in July, about aspects of independence. When I was last before them I agreed that what I would do is that I would send them a copy of each report that I published together with a note setting out those things that I think would be of interest to them. The last time that they took evidence from the Director of Public Prosecutions, they asked me to go in before she did to provide them with answers to some of the questions they wanted to ask before they interviewed her. So it's not a formal relationship in that sense, although they can summons me, but there is quite a bit of contact.

THE CHAIR: Now, the fact that the Attorney superintends the office, does that complicate your work in inspecting the office?

MR MCGINTY: He doesn't superintend my office, no.

THE CHAIR: No, no. I understand that.

MR MCGINTY: He superintends the Crown Prosecution Service. Superintendence is a rather curious concept and it's very difficult to explain and I think probably the closest I've ever got to hearing an explanation that sort of fits how it works in practice is of a parent's relationship with a rather independent-minded 17-year-old child. The Attorney cannot, and does not, interfere with individual decisions.

The Director of Public Prosecutions will often - is responsible for keeping the Attorney informed of the more sensitive and complex work that she's doing. She can certainly go to the Attorney-General for advice. If there is a difficult case, then inevitably there is conversation between them about how best to handle it, and there have been very, very few instances in my knowledge where there has at the end of the day been a complete disagreement about any particular issue. It's usually sorted out between the two of them. Superintendence is very much based on personal relationships between the Attorney and the Director and officials in AGO and officials in the CPS.

1 The Attorney can only --

2

3 THE CHAIR: Could the Attorney say --

4

5 MR McGINTY: -- direct - sorry.

6

7 THE CHAIR: Could the Attorney direct to prosecute or not
8 prosecute an individual?

9

10 MR McGINTY: No. The Attorney-General for many years was
11 also the Attorney-General for Northern Ireland, which was a
12 completely separate office and he superintended - it was
13 the Office of the Director of Public Prosecutions there,
14 which became the Public Prosecution Service. He there had
15 a statutory power of superintendence and direction and he
16 could direct. I mean, he never did in my experience,
17 because that would have been politically unwise in the
18 circumstances.

19

20 As far as England and Wales were concerned, the Act
21 simply says "superintends". Many Attorneys held the view
22 that they still had the power of direction, although they
23 never sought to exercise it, but it was made clear when
24 there was a protocol agreed between the Director and the
25 Attorney about five years ago, which came out of the
26 scandal of cash for honours and MPs' expenses, where there
27 was concern expressed that the Attorney had a role in
28 respect of his superintendence of the DPP when the DPP was
29 considering whether to prosecute MPs or politicians.

30

31 So this protocol was agreed between them, which means
32 that in cases involving parliamentarians or
33 ex-parliamentarians, the Director does not inform the
34 Attorney-General about the work which she is doing on those
35 respective cases.

36

37 The protocol also creates - and there's a statutory
38 basis for this, and forgive me, I can't remember what it
39 is - the Attorney can direct the Director in respect of a
40 case involving national security, but if he does, he has to
41 report to Parliament.

42

43 THE CHAIR: And would your remit allow you to look at that
44 relationship and determine whether or not it was working in
45 the public interest, or not?

46

47 MR McGINTY: My remit statutorily is to inspect the

1 operation of the Crown Prosecution Service, so, in theory,
2 yes, I could, I think.

3
4 THE CHAIR: I was going to ask you, I've got a copy of
5 your Act in front of me. It's extraordinarily brief for a
6 piece of legislation - at least the sort we'd get in
7 Australia, and it's --

8
9 MR MCGINTY: It's a good thing to have short Acts of
10 Parliament.

11
12 THE CHAIR: Well, I applaud it, but your power is to
13 inspect or arrange for the inspection of the operation of
14 the Crown Prosecution Service. In Australia, that would
15 probably lead to a debate about what was meant by
16 "inspection" and what was meant by "the operation of the
17 service". Has there been any controversy about your remit
18 in England?

19
20 MR MCGINTY: No, there hasn't, and partly I suspect
21 because of the history of the Inspectorate. It's growth
22 from an internal Inspectorate where it was used to doing
23 inspections within the service meant it continued to do
24 that. There is a sort of assumption, because of the
25 oversight of the Attorney-General, that the CPS will
26 cooperate with any inspection we wish to carry out. In
27 fact, we've got powers to do it whether they like it or
28 not, and although there is the 2000 Act, that was amended
29 by the 2006 Act. I'll get you the details over of the 2006
30 Act.

31
32 In 2006 there was pressure from Cabinet Office to
33 merge all of the Inspectorates, and a Bill was going
34 through Parliament which allowed that. From memory, it got
35 through the Commons, but the Lords rejected it and they
36 brought in an amendment which allowed the Inspectorates to
37 continue their independent existence but created a schedule
38 to the Acts that gave us powers, including mine, which sets
39 out that I can go in. I have powers to demand any document
40 that I want to see, I can go in without warning. I'll make
41 sure that you get that, because it's an important
42 clarification on what my powers are.

43
44 Similarly, the wording of the Act is worded in the
45 same way that the other Inspectorates are. So, for
46 instance, Her Majesty's Inspectorate of Constabulary take a
47 much more aggressive stance on inspection than I need to,

1 and I know that the Inspectorate of Constabulary has a JR
2 pack ready if he wants to go in to a particular police
3 force and there is any resistance. He will go straight to
4 court and insist on it.

5

6 THE CHAIR: How large is your office? How many people do
7 you have in your office?

8

9 MR MCGINTY: We're currently about 33. We're split over
10 two offices. We have an office in York in the north of
11 England and we have an office in London, 15 or 16
12 inspectors, of which some are legal inspectors and some are
13 business inspectors. The business inspectors tend to have
14 a financial or an administrative or an accounting
15 background. The legal inspectors tend to be - or are
16 lawyers obviously.

17

18 THE CHAIR: So would I be right to think that, in general
19 terms, that means your functions are looking at the
20 operation of the legal capacity of the service, but also
21 looking at its efficiency; is that right?

22

23 MR MCGINTY: Absolutely, yes. Absolutely.

24

25 THE CHAIR: Now, there is an auditor of some sort,
26 I think, isn't there, too, or is that not right?

27

28 MR MCGINTY: There's the National Audit Office.

29

30 THE CHAIR: Yes. Do they cover the same territory as you
31 in terms of efficiency or --

32

33 MR MCGINTY: No. Well, the function of the National Audit
34 Office is to report to the Public Accounts Committee on
35 matters relating to value for money, essentially, and they
36 will look at all government departments to see how money is
37 being spent, to see whether it's being spent efficiently
38 and whether it's actually providing value for money. There
39 is an overlap. So, for instance, two inspections that the
40 National Audit Office have done recently have been about
41 case progression, is that an efficient process, which of
42 course, as you can imagine, it's not.

43

44 THE CHAIR: Yes.

45

46 MR MCGINTY: And, more recently - and they're doing a
47 follow-up on this at the moment - about asset recovery, how

1 effective the prosecution processes are in getting assets
2 out of criminals. So there is a degree of overlap and we
3 can work with the National Audit Office.

4
5 THE CHAIR: They are tasks that you could perform in your
6 office, too; you could have done those two tasks?

7
8 MR MCGINTY: Indeed, as far as case progression is
9 concerned, at the same time we were doing an inspection on
10 a new program in the Magistrates Courts over here on it's
11 called Transforming Summary Justice, which is essentially
12 an attempt to make sure that every single court hearing is
13 effective. So you try and identify cases in the early
14 stage as to whether they are going to plead guilty or not
15 guilty. If it's assumed it's going to be a guilty plea, it
16 goes into a guilty assumed plea court, and is dealt with on
17 the first experience. Everything is prepared for that for
18 a first appearance. If it's assumed to be a not guilty, it
19 goes into what's called an NGAP court, where at the first
20 hearing there just said all the things that need to be
21 determined for the effective hearing, which is to be the
22 second one. So things like victim protection and special
23 measures, disclosure all should be sorted out there.

24
25 So we were doing that at the same time that the
26 National Audit Office were doing their case progression and
27 there wasn't a great deal of contact between us during the
28 course of the inspection because we were looking at
29 slightly different things, but there was quite a lot of it
30 once we had formalised our report but before we published
31 to see whether there were issues where we were saying
32 completely different things. We weren't; we were saying
33 the same thing effectively, and we shared quite a bit of
34 data with the National Audit Office.

35
36 THE CHAIR: Can I ask you how you go about your task? How
37 do you plan what you're going to do?

38
39 MR MCGINTY: It was infinitely more complicated and time
40 consuming that I ever believed until I actually joined this
41 organisation. It usually takes about two months to set up
42 an inspection where the inspectors, first of all, consider
43 what it is that they actually want to inspect within the
44 type of the inspection, so there is a risk-based sort of
45 assessment, what sort of questions they need to ask, who
46 they need to see, what they are looking for, how many cases
47 they need to drag out of the system to look at. So that

1 takes, as I say, about a month or two.

2
3 Then there is about a week on site. Then there is a
4 amount of follow-up. One of the things I've been trying to
5 do is reduce the amount of time between when we are on site
6 and when we publish our report, as a result of which I've
7 asked my inspectors to come up with a new way of looking at
8 CPS areas, which is much more focused on risk and which
9 would allow us to look at all of the areas of the CPS over
10 the course of 18 months, two years. They have been working
11 on that for the last two months - we about to start two
12 pilots. If it would help you, I could show you the sort of
13 program that we developed - what we actually look at when
14 we're looking at - as I say, it's a pilot, and it will
15 change, but I'd be very happy to let you see a copy of it
16 if that would assist you.

17
18 THE CHAIR: I'd appreciate that very much. How do you
19 choose or decide where you're going to go and what you're
20 going to look at?

21
22 MR MCGINTY: Well, we carry out a number of different sort
23 of inspections. We carry out area inspections which, as
24 I say, we've tried to change, so we've got this new process
25 in place which is to get an idea of how the CPS is working
26 across the country over the course of, say, two years.

27
28 We carry out thematic inspections, which is to pick a
29 particular subject, and recently we've done one on, for
30 instance, Rape and Serious Sexual Offence Units within the
31 CPS where we'll look at units within a number of areas and
32 come up with a sort of a report that deals with how RASSO
33 works across the CPS.

34
35 We also have joint inspections with the other
36 inspectorates. So this year, for instance, with
37 Constabulary, we are looking at disclosure in criminal
38 cases and we're looking at stalking and harassment. Now,
39 we are required to consult stakeholders and the
40 Attorney-General on what our program for the next year
41 should be, so we come up with some ideas, we put that out,
42 we ask for comments, comments come back, other suggestions
43 are made, and we then finalise a program and publish that
44 in our annual report or our business plan.

45
46 I can also be asked - if you've got the statute in
47 front of you, you can see that the Attorney-General can ask

1 me to carry out a particular report in a particular matter.

2
3 There is an argument - and I don't know what the
4 answer is - for saying that if I choose to carry out an
5 inspection myself, I cannot look at individual cases,
6 because that might not fall within the definition of
7 operation of the Crown Prosecution Service. I think, from
8 memory, this statute actually says that the
9 Attorney-General can ask me to report on any matter
10 touching on the operation. We have carried out inspections
11 on individual cases and what's gone wrong in the past, but
12 all of those instances have been when the Attorney-General
13 or the Director of Public Prosecutions, with the support of
14 the Attorney-General, has asked me to do that or asked us
15 to do it. So there is that kind of inspection as well.
16 Those are few and far between.

17
18 THE CHAIR: When you say you consult with stakeholders
19 about what you're going to do for the coming year, who are
20 the stakeholders that you do consult with?

21
22 MR MCGINTY: There are a statutory list again which I can
23 get over to you. We broaden it, inevitably, but it would
24 be the Attorney-General, it would be the Director of Public
25 Prosecutions, it would be the other criminal justice
26 inspectorates, there would be people like the Victims
27 Commissioner, we write to the Justice Committee, the
28 judges, Senior Presiding Judge - it's quite a broad range
29 of people some of whom will engage, some won't.

30
31 THE CHAIR: Sure, but presumably the judges have a
32 particular perspective, given what they see in the courts.
33 Do I take it you are then talking to the senior judges who
34 are responsible for criminal trials in different parts of
35 England and Wales - is that the way it goes?

36
37 MR MCGINTY: Our contact tends to be with the Senior
38 Presiding Judge, who is currently Lord Justice Fulford.
39 It's always a Court of Appeal judge - one of the senior
40 Court of Appeal judges, and it's his responsibility to have
41 oversight of the criminal process throughout England and
42 Wales. So I'm --

43
44 MS BOYNE: The Chief Magistrate as well.

45
46 MR MCGINTY: -- seeing him next week, which is part of a
47 regular meeting with him, but we also write to him and we

1 also send him all our reports. He does comment on our
2 program and we also meet with the Chief Magistrate, who has
3 a role in respect of magistrates across the country.
4

5 THE CHAIR: So you have a continuing dialogue with those
6 people, is that the way I should understand it?
7

8 MR MCGINTY: Yes.
9

10 THE CHAIR: In terms of how you decide what you should
11 look at, do you classify issues having regard to their
12 significance? Do you look at resources needed to do a
13 particular task? How do you prioritise, as it were, for
14 yourself what you will do?
15

16 MR MCGINTY: It's a mixture of things. I have fixed and
17 limited resources. I cannot increase them over the next
18 period - the next spending review period of four years.
19 I have to reduce my resource by 15 per cent, which is going
20 to be difficult and which I can only achieve through losing
21 some staff.
22

23 I am not so unusual in that. That's the same for all
24 departments - in fact, 15 per cent is a bit more generous
25 than many other departments. My budget is about
26 2.9 million, which is small. So I have to work within that
27 budget. Within that budget there are certain inspections
28 that we - joint inspections in particular, because they
29 require more planning because you're working with another
30 Inspectorate, that we've usually sort of agreed or at least
31 believe we're going to agree about 18 months in advance.
32 So they are then fixed in the program. Sometimes they drop
33 out but usually they are fixed.
34

35 At the moment our program is dominated by the new
36 program I mentioned about looking at areas over a two-year
37 period, so that's going to take up quite a lot of our time
38 over the next two years. It will take up less time as we
39 get more used to doing it and the areas get more used to
40 what we expect of them.
41

42 Then it's a question of what resources we have left.
43 We try to leave some flexibility, because we are sometimes
44 asked by the Attorney to do something. This Attorney has
45 asked me to carry out two inspections in the time that I've
46 been here, one of which we've just completed, one of which
47 I've not declined to do, but I didn't think I was the most

1 appropriate person to do it and it's effectively gone off.
2 But in choosing what to do, it's intelligence, it's picking
3 up things as we go through the area as to what might be
4 causing trouble, it's listening to what people say.
5

6 If the Victims Commissioner tells us, for instance,
7 that there is a big issue about - one of the things we did
8 recently was a look at how the CPS communicates with
9 victims, which is something of great interest to the
10 Victims Commissioner, because a poorly drafted letter
11 explaining why you're not bringing a prosecution or why
12 you've dropped it is actually sometimes more damaging than
13 the decision itself.
14

15 So we looked at that. So it's a mixture of what we're
16 asked to do, it's a mixture of our own risk assessment, and
17 it's an element of whose turn it is to be looked at.
18

19 THE CHAIR: Does the work that you do impose burdens on
20 the Prosecution Service in responding to your inspectors?
21

22 MR MCGINTY: Oh, inevitably, and any inspected body will
23 tell you that.
24

25 THE CHAIR: And is that --
26

27 MR MCGINTY: Yes, of course.
28

29 THE CHAIR: Is that an issue? Is there complaint about
30 that?
31

32 MR MCGINTY: It's not a big issue particularly. One of
33 the advantages we have is that we have access to the CPS
34 computer system. Most of their cases are actually kept
35 digitally, so we can drag everything - almost everything we
36 need to look at in terms of casework from computers on our
37 own desks. There are exceptions and the Crown Court is not
38 entirely digitised yet, so we may need to look at some
39 paper files which require them to go and look at them.
40

41 A lot of the other material we look at when we're
42 inspecting is material the CPS already have on line in one
43 format or another and they can provide us with. So finance
44 papers, their own compliance records are things we have to
45 ask for perhaps but don't create a huge burden.
46

47 The biggest burden I suspect for the CPS is actually

1 arranging for people to be interviewed, perhaps, but it's
2 not - they will argue sometimes about the time limits we
3 give them to comply, but there's never been any - as far as
4 I'm aware, there's really never been any sort of kickback
5 about, "We can't do this."
6

7 THE CHAIR: Do you let the Director know where you're
8 going in advance of where you're going?
9

10 MR McGINTY: Yes.
11

12 THE CHAIR: And I assume there is a continual
13 communication between you personally and the Director
14 personally?
15

16 MR McGINTY: Yes, yes, and with other people within the
17 office at different levels, too, at the CPS and Serious
18 Fraud Office. We can go in without notice. I've never
19 seen value will be gained by that, frankly. As I say, we
20 can look at any cases we want to without telling them
21 anyway, because we have access to them on the system. I've
22 never seen any need to date to go in without notice.
23

24 THE CHAIR: Can I ask you about the thematic review of
25 rape and serious sexual offences. I've got a copy of the
26 summary in front of me. How did that come about? What
27 caused you to do that task?
28

29 MR McGINTY: I think it was a follow-up, wasn't it?
30

31 MS BOYNE: Well, we had done it. It wasn't a follow-up as
32 such, because it was a big gap since the last one, but we
33 had done it before. It's obviously a sensitive area in
34 this country.
35

36 MR McGINTY: Indeed, it was a sensitive area and, as you
37 know, the Director of Public Prosecutions, when she took
38 office, made victims one of her priorities. There has
39 always been an issue about how rape and serious sexual
40 offences are actually prosecuted and dealt with in the
41 criminal justice system. She herself initiated a review of
42 her work and the MET's work - the Metropolitan Police's
43 work under the aegis of a retired Lord Advocate from
44 Scotland, Elish Angiolini. So there was a lot of work
45 going on in that area.
46

47 The CPS had set up these specialist units within areas

1 and we thought it was about time to go and look at them and
2 see how they were operating. We think they're a good idea
3 and largely operating reasonably well, but there was an
4 issue about resourcing.

5
6 THE CHAIR: You record some deficiencies, and record them
7 as criticisms, but are they the sort of issues you would
8 have expected to find, or did you find things to be
9 extraordinary in the sense of not achieving what you
10 thought they should be achieving?

11
12 MR MCGINTY: I don't think there was anything
13 extraordinary. The CPS has experienced considerable
14 funding issues. It's had its budget reduced over the last
15 five years by about 30 per cent. It's lost thousands of
16 staff. Now, that is bound to impact on its ability - it's
17 not necessarily always a bad thing, because if you have
18 your budget cut, then you need to look at what you're doing
19 and you can come up with more efficient and more effective
20 ways of doing it, and the CPS has been hugely successful in
21 achieving that, and it is not my function to say that the
22 CPS is overall under funded. I don't have the information
23 on which to make that assessment.

24
25 But what I can say is that as we carry out inspections
26 of the CPS generally, we do see issues that come from a
27 much reduced staff, lower resources, the need for constant
28 change. As the budget was reduced, the CPS had to make
29 changes in order to deal with that. So, for instance,
30 reduce the number of the offices, so there are far fewer
31 offices now. That meant that, for instance, huge areas of
32 the country like the west of England are now covered by two
33 offices - one in (indistinct) and one in Bristol, which
34 means that for staff that is a big issue. So there was all
35 this going on and that does impact on staff's ability to
36 work efficiently and effectively.

37
38 They also have trouble recruiting the specialist staff
39 they need for RASSO units. So no great surprises. I think
40 the thing that concerned me more than anything else was the
41 degree to which the units have been under resourced. And I
42 don't necessarily mean under funded in that sense, but the
43 need for suitably qualified lawyers, and the time it took
44 the CPS to recognise that there was that problem.

45
46 THE CHAIR: You record that in over 10 per cent cases the
47 Code for Crown Prosecutors was not applied correctly at the

1 charging stage, which you say is a worse result than our
2 findings in relation to non-specialist cases. Now, looking
3 at that crudely, 10 per cent non-compliance seems like a
4 significant degree of non-compliance, but are we talking
5 about a serious issue when you identify that one, or is it
6 what you might have expected given the problems?
7

8 MR MCGINTY: That was at the charging stage and the whole
9 principle of RASSO units is that you get it right the first
10 time so that there is no need to explain to victims and
11 witnesses later on that the charges have changed. It
12 doesn't necessarily mean to say they weren't corrected
13 later on, but ideally, if a RASSO unit is to work
14 effectively, it should be getting it right first time.
15

16 THE CHAIR: Right. And in that they are not in, you say,
17 over 10 per cent of cases, is that a product of the issues
18 you speak about in terms of resources and the ability of
19 those who end up in the RASSO units?
20

21 MR MCGINTY: Yes, it is. It is all slightly complicated.
22 Because of the relationship between the prosecutors and the
23 police, the prosecutors themselves are very dependent on
24 what the police actually provide them with and there are
25 issues about timeliness of what is provided as well as the
26 quality of what is provided. This wasn't a joint
27 inspection of RASSO. This was one where we couldn't really
28 look at what the police were doing, because it wasn't a
29 joint inspection with HMIC. This was just a CPS
30 inspection. But it was not a good figure. The report
31 itself was undermined, because it took a long time. There
32 was a long delay between the field work and the publication
33 as a result of which the CPS had changed things
34 significantly by the time the report was published, which
35 is why I want to try and reduce the amount of time between
36 inspection and publication.
37

38 THE CHAIR: Were they changing --
39

40 MR MCGINTY: They're in a better state now --
41

42 THE CHAIR: Were they changing things because they knew
43 you had come in and found some problems?
44

45 MR MCGINTY: Well, that's what we said, yes.
46

47 THE CHAIR: Which, if it's true, is not a bad thing

1 anyway.

2

3 MR MCGINTY: I think it is true. I think it is true.

4

5 THE CHAIR: There is also a comment about early
6 investigative advice being under used. Is that the
7 relationship between the office and the police in the
8 process of investigating?

9

10 MR MCGINTY: It's partly that and partly they are very
11 busy and there is a tendency to try and - one of the things
12 that we come up with in virtually every single report we do
13 is the importance of early investigative advice. If you
14 get it right at an early stage, if you're giving advice to
15 the police at an early stage, you then don't have to deal
16 with all the problems that come up later. If, however,
17 you're stretched and you've got a lot of cases with
18 existing problems, you tend to spend your resources trying
19 to deal with the problems you've got on your plate at the
20 moment, because it's in court the next day or the day after
21 that, rather than looking at cases further down the line
22 where you should be giving early advice which prevents that
23 from happening.

24

25 The CPS - it's an ongoing battle, in a sense. But one
26 of the recommendations we make in virtually every report we
27 publish is if you're going to advise, give the advice
28 earlier, engage with the police at an early stage, engage
29 with the defence at an early stage. That's key for
30 transforming summary justice. There are challenges for
31 both of those.

32

33 THE CHAIR: I assume you prepare a draft report. Do you
34 then provide that to the Director and invite comment upon
35 the draft?

36

37 MR MCGINTY: We do. The inspectors meet together to come
38 up with their own views as to what they have seen. One of
39 them is responsible for drafting the report. The report
40 then goes to usually the Chief Crown Prosecutor for the
41 area or the DPP, depending on who is the most appropriate
42 person to do it, but it can be shared within the CPS as to
43 who needs to look at it. They will then come back with
44 comments. They are supposed to be comments about factual
45 accuracy, albeit sometimes it's a bit broader than that.

46

47 We will then look at their comments and amend

1 accordingly, depending on whether we accept what they're
2 saying or not. There is usually a battle about: "But
3 that's not true anymore, because of what we've done since
4 you've been there". And our answer to that is: "Well,
5 that's not what we inspected. You're telling us that, but
6 we don't know whether that's true or not". But we will try
7 and amend the report to say things like, "We understand
8 that since the inspection the Crown Prosecution Service are
9 putting in place. We do not know how well that's
10 operating".

11
12 There has grown a tendency in recent years, which
13 I may stop - I don't know yet - is that after we have made
14 our amendments, we send it back to the CPS and then there's
15 another argument what we have accepted and what we haven't
16 accepted. The other Inspectorates don't do that. Police
17 don't, for instance. They simply say: "Right, well,
18 that's it. You've made your comments and this is the
19 report". And that speeds the process up. I may look at
20 that. But these are not huge - they are not big
21 differences. They tend not to be big differences.

22
23 THE CHAIR: Then you publish your report. How is that
24 published? Do you send it to the Attorney, or what do you
25 do?

26
27 MR MCGINTY: The Attorney will get an early sight of it
28 anyway. After it's been to the CPS, the Attorney will get
29 an early sight of it. Before I go on to that, I was about
30 to say that in the past the CPS have tended to be more
31 concerned about the draft press release about the report
32 than they have been about the report, largely because the
33 press release tends to deal with all the negative aspects
34 of the report. I've tried to change that a bit, but the
35 media are only interested in the bad bits, they're not
36 interested in the CPS doing a good job. So it's difficult.

37
38 In terms of the report, yes, it's finalised, the
39 Attorney gets a copy. We send embargoed copies to a number
40 of people. The media will get it the night before together
41 with the press release. We then publish it both in hard
42 copy, although we don't do much of that these days, it goes
43 on to our website and we send copies to various people. So
44 the stakeholders I mentioned earlier, so the DPP will get a
45 copy, the Senior Presiding Judge will get a copy, the Chief
46 Magistrate will get a copy, the Justice Committee gets
47 copies. The Victims Commissioner gets copies.

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THE CHAIR: And do they in the ordinary course get very much press?

MR MCGINTY: It depends what the subject is as to whether or not it's of interest to the media. One of the problems that I have compared to my other inspectors is that the CPS overall are actually doing quite a good job. They are doing - the vast majority of the cases they do, they do well. It's not like prisons which are a disaster; it's not like police which is awful; it's not like probations which has all been privatised and is in a dreadful state. So their reports - there was one from prisons yesterday about the state of Wandsworth Prison with rats and that gets attention, because it's interesting.

My report comes saying CPS are doing reasonably well, or quite well, but they could do a bit better tends not to be. We published a report yesterday on digitisation. This is the process by which they stop using paper in court, it's all done on tablets. And the CPS have been leading on this and they have achieved quite a lot. What the media have picked up on is that for certain bits of evidence, such as filmed interviews with children in child sex abuse cases, or film material from police wearing cameras, it's actually sent in a hard copy to the CPS and they have been losing it, or they have not been able to find it.

That's what the media picked up on. It was a sort of fairly minor issue. It's important, don't get me wrong, to have child abuse, interviews with children gone missing is serious. It's gone missing within the CPS office rather than left on a train or something, but that's what the media picked up on. So they are not always good at picking up on the things that sort of matter.

THE CHAIR: That's the universal experience of people in your job and mine, let me say. Did the sexual assault report attract much public comment or newspaper discussion?

MR MCGINTY: It was one of them, yes. It got more publicity than quite a lot of the others did. I certainly ended up giving an interview for Sky News or something, I think - I can't remember - and that's usually an indication of how interested the media are and I think I did something for radio as well. So, yes, that did get picked up.

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It was undermined, as I say, because it - for a number of reasons, not all our fault - was a delayed report and the very strong message coming out from the CPS was that this is out of date.

THE CHAIR: When your report is released, is there at the same time a response from the CPS released, or how does that --

MR McGINTY: Oh, yes.

THE CHAIR: So at the very same time they both go into the public domain together?

MR McGINTY: Yes. Yes. The CPS obviously has sight of the report from an early stage. We will also share with them our press release. I usually try to get them to share their press release with me. That sometimes happens, it sometimes doesn't happen. But there is no point, in a sense, in us being at each other's throats in the media about it. The report is there. The report contains what I actually wanted to say about the CPS.

THE CHAIR: I was going to ask you, but you've already told me: you do talk directly to the press yourself from time to time.

MR McGINTY: Yes. It's not something that I have a particular interest in doing and will sort of try and avoid it, if I can, but I see it as part of my responsibility of trying to increase interest and readership of my reports. I see my function - it's not my function to run the CPS, it's not my function directly to try and improve how they work. I hope that the reports do have that impact. But it is essentially to give others the material to hold the CPS to account. They have an important and responsible role. It is difficult for people to hold them to account unless they've got reliable and independently assessed material which allows them to do that. That's important for the Attorney, it's important for the Justice Committee, it's important for a number of people and I'm trying to get it across to these people: look, this is the material you need to see, this is the material you need to know about if you're going to challenge what the CPS are doing.

So, as part of that process, I want to try and get

1 more people to read the report. I want to try and increase
2 their readership.

3
4 THE CHAIR: And has the same view about relationship with
5 the press been adopted by your predecessors?
6

7 MR MCGINTY: Yes. Some people have more appetite for it
8 than others, and if I don't limit it to previous inspectors
9 I can probably say this more easily. You mentioned at the
10 beginning of this interview what my sort of plans were
11 after my four years, which is probably to retire. If I was
12 looking to raise my profile for another job in the future,
13 I might be more interested in having my face on television
14 or my voice on radio more often.
15

16 THE CHAIR: Yes, I understand. The final topic I wanted
17 to talk to you about, and it's a difficult question,
18 I know, for you to be asked and respond to, but having
19 regard to your experience both before you had the job and
20 now that you have the job, do you think that the
21 Inspectors' office carries with it significant public
22 benefit in terms of the Prosecution Service?
23

24 MR MCGINTY: Yes, but not as much as perhaps it could and
25 should. I think - I think it is important. I think that
26 although I said that the CPS is doing a reasonably good
27 job, there is an argument for saying that if it wasn't
28 exposed to public scrutiny in the way that it is from our
29 reports, whether that would continue, whether bad practice
30 would feed in. I think what I've tried to do because of my
31 previous job as well is to ensure that the law officers -
32 the Attorney and the Solicitor - are actually much more
33 engaged in the reports that we come up with.
34

35 So we put in place a process whereby when we're about
36 to publish a report we will go and see the Attorney or the
37 Solicitor - usually the Solicitor-General, tell them what's
38 in the report, so that he can then use that when he's going
39 to the CPS to hold them to account and get them better
40 informed.
41

42 So I think there are a number of differing levers that
43 we can push. I told you about my work with the Justice
44 Committee to inform them as to the sort of questions they
45 can be asking the Director. So, yes, I think there is a
46 valuable role for the Inspectorate. It's independent, it
47 can look at anything it wants to, it can be asked to look

1 at things and we can go in and look at things of particular
2 concern, and I think, yes, it does perform a useful role
3 within the criminal justice system in ensuring that it's as
4 good as it can be.

5

6 THE CHAIR: There are suggestions that the role that you
7 perform is one which gives the public confidence in the
8 effectiveness of the Prosecution Service. Do you think it
9 does achieve that outcome in England and Wales?

10

11 MR MCGINTY: I think it goes some way to - you're never
12 going to calm all public fears or make people happy when
13 they're never going to be happy. The criminal justice
14 system is such, as you know, it is not going to make people
15 happy. There is no happy outcome in anything that ends up
16 in a criminal court.

17

18 What we try to ensure is that people: (1) understand
19 what has happened; and, (2), know that the Crown
20 Prosecution Service have acted with integrity and fairly
21 through the process. I think media tend to cover it - if
22 there is a coverage of a report, they say "Independent
23 Watch Dogs", or - and that's important. It's why we moved
24 from an internal CPS system - well, you know, the CPS say,
25 "Well, we looked at it and it looks fine to us." That
26 doesn't achieve anything. But for a body that is known to
27 be independent to say, "We've looked at this. Some of it
28 is not good, most of it is," I think that is of some
29 reassurance. But you're not going to be able to reassure
30 everybody. As I say, the system is inherently one where
31 people are unhappy.

32

33 THE CHAIR: I know that there will be some people I guess
34 in the CPS who maybe aren't so happy that you exist, but is
35 it recognised, as far as you can see, by the senior people
36 in the CPS that having an independent inspector does assist
37 them in doing their job?

38

39 MR MCGINTY: I actually generally think that they do, and
40 I don't think it's just at a senior level. I think it's at
41 every level. One of the issues the CPS has is that there
42 are some communication issues between headquarters and the
43 various areas. Sometimes the areas do not tell
44 headquarters what's happening, and the Inspectorate can be
45 useful in ensuring that headquarters are aware of what's
46 happening in the areas.

47

1 We have access to staff in the CPS at all different
2 levels and we tend to interview people on the frontline as
3 well as more senior management levels and quite often what
4 we hear from frontline workers will not be what they're
5 telling their managers, or feel able to tell their
6 managers. So there is an information process going on here
7 which actually helps the CPS.

8
9 Certainly, in my time here, I have not known of any
10 negative response to the CPS at any level. Sometimes it's,
11 "You're asking us for too much too soon or too quickly,"
12 or, "Do you really need to come back to us just yet?
13 Couldn't you come back when we're doing a bit better?"
14 But, largely, no, it's been a very, very positive response
15 to the CPS."

16
17 THE CHAIR: Thank you. I hope you all found our
18 discussions interesting.

19
20 Just before we break for lunch, all of you either know
21 Mark Aronson, I'm sure, or know his name because you've
22 read something he's written. We've asked him to come and -
23 perhaps between now and lunch, Mark - just talk in terms of
24 the origins and the benefits of an administrative review
25 process, which extends across, of course, to judicial
26 review.

27
28 PROF ARONSON: First of all I will speak about judicial
29 review. I have to say that, while it interests me, I think
30 it is the least relevant option on the table for present
31 purposes, not just because of the High Court precedents, of
32 which there are several, saying that they won't get
33 involved in judicial review of prosecutors' decisions, but
34 also because I think the High Court was right. I think
35 there is a real separation of powers issue when a judge is
36 saying "You are charging the wrong thing. I want you to
37 charge this" or "You shouldn't let this person off, you
38 should be charging X, Y, Z", et cetera.

39
40 I think that that might lead through - and I will get
41 to it in a moment - to the scheme that the CPS is running,
42 which is administrative, not judicial, review.

43
44 Secondly, I will pick up a few little points that seem
45 to emerge from your discussion with the people in England.
46 It might be of interest to note that the term "inspector"
47 or "inspectorate" goes back to the initial Factory Acts.

1 1803 I think was the first, or 1801, anyway, something
2 around about then. Initially, really up until
3 Maggie Thatcher's time, the inspectorates were prosecutors,
4 essentially. They had other roles, too, but they were
5 prosecutors.

6
7 Under Thatcher's time, or under Thatcher's New Public
8 Management, as she called it, they took on a role almost of
9 being auditors. In fact, the auditor - the National Audit
10 Office, which was rebranded under her - changed its
11 function, too, and it started looking at value for money
12 rather than adding up the credit side and the debit side of
13 the account books.

14
15 So the emergence of the inspectorate, or the
16 transmutation of the inspectorate system in Britain, is
17 something that we have not experienced, but it also
18 obviously produces, really, to an outsider such as me,
19 anyhow, a real puzzle as to the overlap between the
20 National Audit Office and the individual inspectorates.

21
22 Secondly, can I talk about the guidelines that the
23 British use. In the interviews that you did they talked
24 about the CPS codes, et cetera. Partly those codes are
25 required by statute, but most of them aren't. Certainly,
26 the Victims' Right to Review, the VRR, is not required;
27 they simply did it under prompting from the Killick case,
28 but, nevertheless, they did it.

29
30 The interesting thing is that legislation there is
31 much more skeletal than it is in Australia, and I think
32 Australia is experiencing a real drift towards skeleton
33 legislation. We do have long Acts, but most of the
34 regulators' Acts, most of the bumph in the regulators' Acts
35 talks about who can be appointed, what the quorum is, how
36 they can have their meetings, and so forth and so on, but
37 when you look at the substantive tasks they are meant to
38 perform you will get a motherhood section that says that
39 they have to do really good things in a number of
40 paragraphs, and that's about it.

41
42 The skeleton legislation in Britain is more skeletal
43 even than that. They leave everything, much to the disgust
44 of some of the parliamentary drafting office, to
45 subordinate legislation, and now there is a further
46 development - to guidelines that don't even have binding,
47 strictly speaking, statutory force.

1
2 The judicial response, in judicial review, has been to
3 turn most of those guidelines or codes of practice into
4 things that are almost binding, as if they were of
5 statutory force. If you want to look at an example, I can
6 quote you one from yesterday in the UK Supreme Court, of
7 the Crown, on the application of O, an anonymised person in
8 immigration detention, where, for 30 or so pages, the UK
9 Supreme Court is going over the wording and meaning of
10 a code as if it were a statute.

11
12 Finally on judicial review in England, the
13 possibility of judicial review there, in this context,
14 reminds me of an article that a colleague of mine at the
15 LSE, Professor Tom Poole, wrote some time ago about
16 judicial review of prerogative powers. He noted that the
17 House of Lords, back then, had expanded judicial review to
18 cover almost anything, and he said that that is step one of
19 the process. That's the good news. The bad news is, step
20 two, you will never win, or almost never, whether it be the
21 prerogative of mercy, the prerogatives of war, of honours,
22 of treaties and so forth and, of course, of prosecutions.

23
24 The research that I did following the Killick case
25 revealed - for me, anyhow - only one case in which judicial
26 review was successful in England and Wales, and that was
27 a case where the prosecutors were told to go back and think
28 again rather than bringing a prosecution. It was an
29 application by the defendant and, incidentally, by her two
30 sisters, who were her victims.

31
32 In Killick, the case also was an application by
33 a defendant saying, "You've broken your word. You told me
34 I was free of this. Now you are trying to prosecute me.
35 You shouldn't." My view is that those sorts of
36 applications are best handled by the trial judge on an
37 application for a stay for abuse of process, or whatever.

38
39 So if I could move on, if I may, from judicial review,
40 which I think is a non-starter, to the administrative
41 review --

42
43 THE CHAIR: Just before you do - maybe you and I should
44 talk about this somewhere else - the High Court does seem
45 to have run together a merit assessment with judicial
46 review as we might ordinarily understand it - that's our
47 High Court here.

1
2 PROF ARONSON: Yes.
3
4 THE CHAIR: That may drive a perspective - I appreciate
5 that the English have tended to step into merit more than
6 we have been prepared to do here, but when you look at the
7 High Court decisions here, I think they have tended, or
8 some judges have tended, to run the two together.
9
10 PROF ARONSON: Certainly there has been a shift - you are
11 talking about Minister for Immigration v Lee, and cases
12 like that?
13
14 THE CHAIR: There is a whole line of them.
15
16 PROF ARONSON: The review has certainly become more
17 substantive over the last five years and less focused
18 solely on issues of process. I think that's true. But
19 I think that the Australian position of not having judicial
20 review of prosecution decisions is not dependent on the
21 sort of grounds that one might run, whether you run
22 Wednesbury, for example, as a tight ground or as an
23 expansive ground. I think the Australian attitude is that
24 reviewing prosecution decisions would breach our separation
25 of powers.
26
27 THE CHAIR: That's right.
28
29 PROF ARONSON: So that's a consideration that cuts across
30 considerations as to the degree of merits that a judicial
31 review court might engage in.
32
33 THE CHAIR: That's where, in fact, Gaudron and Gummow came
34 to rest. None of the other judges talked about it.
35
36 PROF ARONSON: I think that's right.
37
38 THE CHAIR: And we have taken that and said, well, that's
39 the immutable position in relation to a statutory
40 office-holder, but that's a discussion for another day,
41 perhaps.
42
43 PROF ARONSON: All right. There were several aspects of
44 the Victims' Rights to Review process that would present
45 difficulties. Most people around the room would be better
46 equipped than me to cope with those, I think, but can
47 I mention one that really hasn't been mentioned. It

1 puzzled me. You have got a victim who requests a review
2 and the initial decision says, "No, we think the decision
3 not to prosecute was correct". It then goes up to London.
4 London overturns that decision and says, "No, there should
5 be a prosecution." One thought that occurred to me, or one
6 puzzlement that occurred to me, is who is going to do the
7 prosecution? It has to be a prosecutor who has reasonable
8 and probable cause to believe that a prosecution is
9 appropriate, otherwise they are running the risk of
10 liability for the tort of malicious prosecution, which is
11 fairly obvious. So it seems to me that their process might
12 actually require an engagement of three sets of eyes, or
13 more: the initial decision, the local quick review,
14 London's review and then back to a different prosecuting
15 team. That's a difficulty.

16
17 Another difficulty that you yourself raised is that
18 Australia is a much smaller country and to muster up an
19 entirely independent review, even if largely on the papers,
20 would be extraordinarily difficult to arrange. My only
21 response to that would be that we have all of the
22 prosecutors here from around Australia: it must be
23 possible to arrange something on an inter-office basis if
24 it is thought really necessary.

25
26 My last comment, because I know it is coming on to
27 lunchtime, is that I got conflicting messages from those
28 video recordings. On the one hand, I got a message that
29 the CPS tells the victims what has happened, what they have
30 decided, in more or less lengthy reasoned statements and so
31 on, and one of the other interviewees said, "We discuss it
32 with them." There is, I think, room for an enormous
33 difference between those two propositions.

34
35 Our DPPs, as far as I'm aware, in cases of sexual and
36 other violent crimes - our guidelines say that the
37 prosecutor will discuss with the victim about whether to
38 charge and what charge. In other words, we front-end that
39 discussion rather than have, if I am right, the review at
40 the back end, after the initial decision has been made.

41
42 If that's right, and if I had to make a choice,
43 I would much rather have the front-end involvement than the
44 back-end involvement.

45
46 THE CHAIR: I didn't ask them, but I think it may be that
47 they do both.

1
2 PROF ARONSON: I got conflicting messages from that,
3 I must say.
4
5 COMMISSIONER O'CONNELL: They are supposed to, by law, do
6 both. Sorry to interrupt.
7
8 THE CHAIR: Go ahead.
9
10 COMMISSIONER O'CONNELL: Under the European convention
11 around victims' rights which was mentioned, they are
12 actually required to do both, and a thematic report that
13 they stepped over, that was referred by the Inspectorate,
14 pointed out that in nearly one-half of cases they actually
15 failed to do it. Despite how gloriously they talked about
16 their letter system and their consultation, the
17 Inspectorate thematic found that it had many shortcomings.
18 So they are not meeting even their minimum standards.
19
20 PROF ARONSON: So it might be a project in development,
21 really.
22
23 COMMISSIONER O'CONNELL: Yes.
24
25 PROF ARONSON: Thank you.
26
27 MS SANDERSON: Could I just clarify one thing, I think,
28 just because I have had the benefit now of seeing the
29 interviews a number of times. I think what was said was
30 that in the case of the sexual assault matters, then they
31 will also offer a meeting. So it's not that it is either
32 a discussion or written reasons. They give written
33 reasons, but they also offer a further meeting to discuss
34 it if it is in that category of cases.
35
36 PROF ARONSON: I'm happy to hear that.
37
38 THE CHAIR: All right. Lunchtime - in the same place.
39 Thank you very much.
40
41 LUNCHEON ADJOURNMENT
42
43 THE CHAIR: I want to now turn to open up the discussion
44 to everyone, but I thought we'd try and do it by addressing
45 some particular issues and see whether, first of all, I can
46 get a consensus on what strikes me anyway as a pretty
47 simple proposition, which is that DPP should have written

1 policies for decision making and consultation with victims
2 and police.

3
4 Does anyone want to say to the contrary of that
5 proposition? I didn't think so. It gets harder from here
6 on. Secondly, publish all those policies. Does anyone
7 want to say to the contrary to that? Does everyone do that
8 at the moment, by the way?

9
10 MR CHAMPION: We don't publish all policies and that's
11 probably something that we need to work on. I think -
12 I don't know quite the figure - we've got about 180
13 policies, which is a large amount, and I'd say
14 approximately a third of them are not published, but they
15 would probably be ones that the public wouldn't be so
16 interested in.

17
18 THE CHAIR: No. Do you publish any?

19
20 MR CHAMPION: Yes.

21
22 THE CHAIR: Do you publish amendments, so to speak?

23
24 MR CHAMPION: Absolutely, yes.

25
26 THE CHAIR: Does everyone publish? Tasmania I thought
27 didn't; is that right?

28
29 MR COATES: I haven't been in the job long; they're going
30 up very shortly.

31
32 THE CHAIR: It is a bit like the Inspectorate in England,
33 is it?

34
35 MR BYRNE: Can I say that, from my perspective, we publish
36 our guidelines that are issued under the Act. There is
37 another level of instruction that goes out and it very much
38 falls in at that level as to what should or should not,
39 what can and cannot be published. There is some risk that
40 if you publish material to the public at large, as opposed
41 to the profession, that it can be misunderstood in the
42 context in which it is taken, that is one of the risks
43 that's associated, but the primary policies, from my
44 perspective anyway, should be published and are in our
45 case.

46
47 THE CHAIR: Does anyone else want to comment on that

1 issue?

2

3 COMMISSIONER O'CONNELL: I would only say, from the role
4 that I have as the Commissioner, that the publication of
5 those policies makes my function somewhat easier because
6 when then I receive a complaint, I can look at that
7 document and take that into account, but it also becomes an
8 instrument then in terms of if I am required, and I hasten
9 to add, I have never in South Australia been required to
10 invoke my authority to report a public official to the
11 parliament yet, because most of the public officials I deal
12 with are very obliging, but I think it is a really
13 important thing in terms of both transparency and
14 accountability.

15

16 THE CHAIR: Yes. Are there any other views on that topic?
17 Now it gets harder. What do we think about providing, as
18 of right, that complainants can ask for and receive written
19 reasons for decisions to prosecute or more likely not
20 prosecute? Where do we sit on that?

21

22 MR KIMBER: I will speak for my office. We don't have a
23 policy around that but I've decided that we should and
24 decided a while ago.

25

26 THE CHAIR: Before we came along?

27

28 MR KIMBER: No, at about the same time. Am I on oath? Am
29 I still on oath? But it's not just about that, it's about
30 the fact that I think we've all had, in my time as a
31 prosecutor, just this growing knowledge of explaining
32 things better is actually part of the responsibility, it's
33 not just the prosecuting, and I am keen to move towards a
34 policy where when requested we will do that. It will be
35 more transparent and perhaps more easily digested. I note
36 that some other offices have those policies and I would be
37 inclined to pick up and adopt those.

38

39 THE CHAIR: Who does have that policy at the moment?
40 Victoria.

41

42 MR CHAMPION: We have that policy and it's used. I think
43 the figures might be possibly an average of about 30
44 reasons letters per year for me. We think we may have been
45 the second prosecuting agency in the world to instigate a
46 policy of giving reasons for discretionary decisions. The
47 Irish DPP we think was the first.

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THE CHAIR: That's the Republic.

MR CHAMPION: Yes, but we're very willing to give reasons for our discretionary decision making and it's a published policy so people can approach us and they do.

THE CHAIR: The whole of our history - and Mark knows this better than any of us - of the development of administrative law has been, of course, founded upon telling people why and giving them reasons.

PROF ARONSON: Yes.

MR CHAMPION: I might also add that I find that they are actually very difficult letters to write. I think there was some advertence to that during the discussions we heard this morning and there is a fine balance as to how much information you can give people because some of the information that we use in order to make the discretionary decisions is very, very difficult material to grapple with and we have to be protective of people's, often, mental health. Some of the decisions we make in that area can impact and if people are told that some of these issues are too difficult, they contribute to the difficult decision to either discontinue or settle a case. If we go the full distance in telling them everything, that can be really challenging for them.

MR COATES: And what about the privacy of other people?

MR CHAMPION: That's another issue, yes, of course.

MS SHEAD: Is there also an issue if there's a system of review providing meaningful reasons to a complainant, where you could, on an evidentiary basis, contaminate, potentially, the complainant's evidence by reference to --

THE CHAIR: We will come to that under the review heading. That is when it starts to get really hard, I think. Michael, you wanted to say something about that?

COMMISSIONER O'CONNELL: I just wanted to add, as a layer of caution, because the people stepped over the thematic report and its findings when it comes to the communication letters that they talked about in a very positive way, because those letters, when reviewed in a sample that was

1 taken by the Inspectorate, found that over 70 per cent of
2 the letters that they took had no evidence, the
3 consultation that is required under that Act has happened
4 before the decision had been made. In 43 per cent of the
5 cases the letters didn't reach the victim in a timely and
6 organised manner.

7
8 One in five of the letters failed to even mention that
9 there's a review process that's available, yet, they said
10 all these very positive things about it. I am very
11 supportive of the entire concept and I think it is
12 conceptually sound. What I do do is hasten to warn that
13 even at the level that they're operating in the
14 United Kingdom, there are still some inherent problems with
15 their system that came out of that --

16
17 THE CHAIR: You think we should have sworn each of the
18 people I spoke to, do you?

19
20 COMMISSIONER O'CONNELL: No. If you came to speak to me
21 as the Commissioner for Victims Rights I would tell you all
22 the wonderful things that I do in my office and maybe not
23 be quite as strong, I'll be introspective in terms of the
24 product that I was selling you. I am just making the point
25 that an independent thematic report produced by the
26 Inspectorate, which he mentioned and two other people
27 mentioned but they didn't actually tell you in detail the
28 results, and the results of that are actually what we could
29 learn from rather than the concept itself.

30
31 THE CHAIR: And all those reports aren't publicly
32 available.

33
34 COMMISSIONER O'CONNELL: Yes, that's right.

35
36 THE CHAIR: Is there anyone else who wants to talk or has
37 any ideas about the first but more straightforward
38 proposition about giving reasons for the decision itself?

39
40 MS DE CICCIO: It would be worth reflecting on the fact
41 that the letter itself, the meeting to discuss potentially
42 the contents of the letter, we find with our victim support
43 agencies that, particularly for victims of crime, these
44 sorts of discussions are really difficult if they're not
45 supported, both ahead of the meeting, if they're not
46 supported after the meeting, if they're not given support
47 during the meeting, then they can be quite difficult

1 confronting traumatic circumstances. As John has noted,
2 there is an element of balance that has to be achieved in
3 the context of how you deal with the victim in those sorts
4 of circumstances.

5
6 To think that the process itself can be treated in
7 that sort of independent sort of exchange of information
8 would be erroneous. It needs a lot of supports around it
9 to be done effectively and to avoid doing any further harm
10 to the victim and ensuring that in some cases they may
11 understand it but still will not accept it and it is around
12 how you then treat with that after that event.

13
14 THE CHAIR: But you're not saying that John should stop
15 doing it.

16
17 MS DE CICC0: No, I just think that we need to be
18 cognisant that it is not just about the discussion and the
19 communications.

20
21 MR USHER: Flowing from that, in the Northern Territory
22 the majority of our prosecutions relate to victims who are
23 indigenous whose first language is not English, sometimes
24 it may be their 10th language. We focus more on the spoken
25 and the oral. We don't have a policy or guideline in
26 relation to providing written reasons, but we do try to
27 make contact as early as possible through our Witness
28 Assistance Service in relation to the matter and we will
29 have that conversation with an interpreter and also with
30 our indigenous liaison officer as well. We try to promote
31 that focus at the spoken word, there are no written words
32 that could overcome those issues.

33
34 COMMISSIONER HINCHEY: I would support that approach for
35 all of the jurisdictions as long as people can come away
36 with some written information that they can refer to, but
37 many times the process itself is a justice process for
38 victims of crime, particularly when the justice system
39 doesn't end in a conviction or a sentence, and it is the
40 procedural justice issue for many victims of crime that
41 stays with them as much as the crime itself.

42
43 The opportunity to be acknowledged and to have their
44 questions answered and to have things explained to them in
45 a way that they can understand is critical for their level
46 of satisfaction.

1 THE CHAIR: Just as an aside, I was interested, I don't
2 know whether all of you are thinking in the same way, about
3 the approach that is taken to assessing the prospects of a
4 successful prosecution in sexual assault one on one cases.
5 Do you all think in the same way as the English are
6 attempting to think or do we still just look at the
7 possibility that the complainant may not be believed
8 because of her or his particular characteristics?
9

10 MR BYRNE: I don't think it is easy just to divorce the
11 two because the characteristics - for want of a better
12 term - of the complainant impact upon the quality of the
13 complaint, but certainly in Queensland we are adopting the
14 process and have adopted for a number of years the process
15 that the English DPP was speaking of.
16

17 MR McGRATH: Can I say for Western Australia that I am
18 entirely in agreement with what Michael just said, that it
19 is the credibility of the entire case. One facet is the
20 credibility of the complainant and the issue of whether or
21 not we would run an oath on oath case doesn't arise. An
22 oath on oath case, by matter of course, is conducted if it
23 is neutral. There would have to be many negative factors
24 for it not to be run and we have a higher success rate in
25 Western Australia on oath versus oath cases, it is the
26 normal course. If you have two complainants, as you know,
27 judge, in Western Australia we have our section 31A of
28 cross admissibility, so it is normal course now.
29

30 THE CHAIR: Yes.
31

32 COMMISSIONER O'CONNELL: Could I add that there are
33 actually some prosecutions done by police and I am not
34 convinced, on my assessment of some cases recently, that
35 they actually understand the difference between that
36 concept of it. In a case that I am looking at at the
37 moment where the Director of Public Prosecutions has issued
38 a White Paper and a matter of sex offences has been
39 referred back to the police for them to prosecute in the
40 Magistrates Court, the entire brief is ready, it is to go,
41 it has a note on the front of it that for reasons
42 inexplicable, the police determined that the victim lacks
43 credibility and decided not to prosecute her and that's the
44 end of the matter.
45

46 I still think there are some prosecution authorities
47 outside the DPP who don't understand that shift in

1 mentality as well as the DPP people do and given that we
2 are dealing with sex offences now that can be prosecuted in
3 summary jurisdictions and in some places they are done by
4 the police then that's an important consideration.

5
6 THE CHAIR: Do prosecutors have a view about that?

7
8 MR COATES: We have a pilot scheme at the moment where our
9 office does all summary indecent assaults, probably for one
10 of those reasons, and the other reason of course is we have
11 witness assistance, we can give more support, but certainly
12 I think in the summary defences you often get cases where
13 it is just one person's word against the other.

14
15 THE CHAIR: Yes, you will. What about Victoria, are many
16 prosecuted by the police as opposed to by your people?

17
18 MR CHAMPION: Sex offences are heard in the
19 Magistrates Court. Generally, we don't get involved in
20 them except if they're something particular, it might be a
21 conflict of interest or something notorious about it.
22 Police had not obliged to follow the DPP's prosecution
23 policy. I think they do or I am aware, I suppose, by word
24 of mouth that they do, but nothing in law obliges them to
25 do that.

26
27 MS DE CICCIO: I would just note, judge, that I think the
28 Commission has heard and received quite a lot of material
29 from our Victoria Police around some of the changes in the
30 way they investigate sexual assault cases and particularly
31 child sexual assault cases where they take a whole of story
32 approach and so they've changed radically over the course
33 of the last four or five years.

34
35 MR PEDLEY: In terms of Commonwealth DPP, we handle both
36 summary and indictable matters, so all the cases, whether
37 they're summary or indictable, are all handled by our
38 office.

39
40 THE CHAIR: Yes. What about Queensland?

41
42 MR BYRNE: I will give you the short version. We get
43 involved in very few summary prosecutions for sexual
44 offences. The reasons why we do get involved are very
45 complicated and that's why I give you the short version.
46 In terms of how the police prosecutors approach the matter,
47 their operational procedures manual adopts, in effect, the

1 same test as the DPP guidelines outline. I am unaware of
2 police prosecutors adopting an attitude of focusing simply
3 on the credit of the complainant. It may occur in some
4 instances but I am not aware of it.

5

6 THE CHAIR: It certainly has been a culture - hopefully of
7 the past - that all of us old people recognise.

8

9 MR BYRNE: Yes. It has been a culture not only with
10 police prosecutors in the past.

11

12 THE CHAIR: Yes.

13

14 MR USHER: There is also a jurisdictional issue here. We
15 have been civilianised now for two and a half years, so all
16 the summary prosecutions in Darwin are conducted by lawyers
17 within our office. What we have found is our figures have
18 increased from 330 defendants being committed to 450 being
19 committed since we have civilianised and we have noticed
20 that offences relating to child sexual abuse are now dealt
21 with in the Supreme Court, they are now being committed to
22 the Supreme Court, whereas previously police would have
23 dealt with them and our office would not have been aware of
24 them, because it is a jurisdiction in which those matters
25 can be dealt with summarily, so that's quite interesting.

26

27 THE CHAIR: And that is suggesting a change in the way
28 they're being assessed as viable cases.

29

30 MR USHER: Exactly. That is, child sex matters, indecent
31 dealings, all those matters were matters which could be
32 dealt with summarily that were not coming through.

33

34 THE CHAIR: South Australia?

35

36 MR KIMBER: Because my office doesn't prosecute them it's
37 a bit difficult for me to know precisely how they're
38 handled once there, so I can't dispute what Michael said
39 about that individual matter, but as a general proposition
40 it is certainly my experience that police prosecutors are
41 not as experienced, police prosecutors tend to be perhaps
42 some years behind in the way they approach different
43 things, in the way they assess things, so it doesn't
44 surprise me that people talk anecdotally of problems like
45 that.

46

47 THE CHAIR: Kara, you have been on both sides of the

1 fence. What is your understanding in New South Wales?

2

3 MS SHEAD: My understanding might be a little out of date,
4 but my experience was that all summary child sexual assault
5 matters are conducted by the New South Wales DPP and that
6 has been the case for many years now.

7

8 THE CHAIR: And in terms of the approach to assessing the
9 prospects of success, what is the mind space there?

10

11 MS SHEAD: I think the mind space for many years has been
12 to assess the case as a whole, not focusing on the
13 complainant's credibility, although I agree with other
14 speakers, judge, that that is often a primary concern but
15 it cannot be divorced from the evidentiary value and other
16 aspects of the case.

17

18 THE CHAIR: Yes. I don't know which one to go to first
19 and I'm mindful of what Mark had to say, but I guess I've
20 got to bite the bullet. The English allow judicial review
21 and I was a bit worried about it compromising the
22 independence of the judiciary. It may be apparent to you
23 by now that I think that's probably right, I can't see how
24 it ever could, but they in the way they approached it, of
25 course, are dealing, as was indicated, in the context of
26 Europe as well as the common law, but equally, as is now
27 apparent, once they stepped in, effectively telling the
28 prosecution service to set up an internal review process, a
29 merit review process, the role of judicial review or the
30 opportunity for it falls away, but nevertheless, it remains
31 an ultimate sanction.

32

33 The High Court here in Maxwell, as I am sure most of
34 you know - maybe not the victims support people - it was
35 Gaudron and Gummow who said no judicial review and they
36 just said it; they didn't reason it, they just said it. We
37 had a period, we poor old intermediate appellate judges,
38 when we felt the High Court would just rain upon us new law
39 without too many reasons, but it was in the context of a
40 discussion about the prerogative of the Crown. Gaudron and
41 Gummow did acknowledge that that discussion had not yet
42 confronted the fact that each of you who are prosecutors
43 are, of course, creations of statute. They acknowledged
44 that but they then just moved on to say that, "We think the
45 law should now be said to be you can't do it."

46

47 Leaving aside the academic argument, given that you

1 would confine the capacity of a court to say, "Go and do it
2 again", rather than, "You must do it this way", which is
3 the discussion we opened up before lunch, does anyone have
4 a problem with a superior court having that capacity if
5 someone was really upset about it?
6

7 I could take it further and I could go, Michael, to
8 Queensland, where Michael knows, and probably you all know,
9 we had a good look at the case involving the swimming
10 coach, Volkers. That had a difficult history and the
11 complainant, or one of the complainants, there were three,
12 after not succeeding in persuading the prosecutors to bring
13 the case, brought proceedings in the Supreme Court herself
14 and somewhat interestingly, I will just put it that way,
15 the judge said, for reasons ultimately tipped by the fact
16 that the DPP had chosen not to prosecute, the prosecution
17 wasn't in the public interest and it should not go ahead,
18 so the Supreme Court brought it to an end.
19

20 In one sense that was a merit review, not a judicial
21 review because the decision was made, effectively, this is
22 not in the public interest, it shouldn't be prosecuted,
23 rather than a more confined examination of whether or not
24 the decision making process had failed in the sense that we
25 understand judicial review.
26

27 That is the space in which we need to think. What is
28 the reaction to whether or not judicial review should be
29 available in Australia?
30

31 MR BYRNE: Could I just supplement that in one respect, if
32 I might?
33

34 THE CHAIR: Yes.
35

36 MR BYRNE: I may be wrong on this, but my understanding is
37 that part of the reasoning behind the decision given by the
38 judge on the private prosecution was in response to the
39 nature of the defence, for want of a better term, to the
40 application for leave to proceed and that was that it was,
41 in effect, an abuse of process and improper to use this,
42 given the history of what had occurred with the matter.
43

44 THE CHAIR: I am not quite sure about that, Michael.
45 There were other factors as well. One was that it had been
46 a matter of public controversy.
47

1 MR BYRNE: Yes, certainly, there were a lot of matters.
2
3 THE CHAIR: That one strikes us as a little odd too;
4 I mean, it ends up there because it's a matter of public
5 controversy.
6
7 MR BYRNE: Yes.
8
9 THE CHAIR: It was a complex of reasons.
10
11 MR BYRNE: Yes. I wasn't trying to isolate that as the
12 most important but I thought that was the one that set the
13 context for that basis of reasoning.
14
15 THE CHAIR: You may be right. What do we think?
16
17 COMMISSIONER O'CONNELL: England used a combination of
18 administrative law and human rights law. There are a
19 number of decisions, in 2000, 2006 and 2010, that indicate
20 that and they become the basis of the victim complaint
21 system in the UK where it lays out the criteria about a
22 decision being illogical, irrational, based on stereotypes
23 or misunderstandings, et cetera: for example, the bit
24 about misunderstanding comes from R v DPP Ex Parte of 2006
25 and the like.
26
27 Those decisions indicate, when read in conjunction
28 with some of the persuasive law from Europe, that the two
29 jurisdictions in Australia that have charters on human
30 rates, ACT and Victoria, you could actually run a very good
31 argument for judicial review on the basis of what you're
32 saying.
33
34 THE CHAIR: I was going to come to Victoria in that light.
35
36 COMMISSIONER O'CONNELL: I think they would be the two
37 jurisdictions, if you were to run a case and take on what
38 the High Court has implied, that you would have the best
39 chance because of the nature of the volume of law that is
40 around that and also the volume of law that was around
41 administrative decisions that are made in the High Court
42 jurisdiction around immigration and those sort of things.
43 I think if you put it all together, you would be able to
44 run a very good argument.
45
46 THE CHAIR: I want to try and ask the question without
47 even thinking about the High Court.

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COMMISSIONER O'CONNELL: In my view, it should be an option; no-one should be above the law.

THE CHAIR: Well, there's a challenge, ladies and gentlemen. What do the prosecutors think?

MR CHAMPION: I will kick off. From Victoria's point of view - and I can only speak for Victoria - and perhaps when you asked the question about what we think Australia wide about this, there may well be some very difficult questions, in the constitutional sense, about whether there could be an overarching body. I really restrict myself to the Victorian jurisdiction and our own experience with the Victorian public prosecution service.

I work in an evidentiary based profession and at the moment I'm not seeing evidence, it may be there but I've not seen evidence that would satisfy me that we, in Victoria, need a judicial review system set up to oversight a DPP's discretionary decision making.

I am not saying the evidence is not there, it might come at some stage, but I've held this position for nearly five years and I haven't come across a case yet where I've felt that our processes within our service fell down to the extent where I'd consider that, you know, there was a significant failure of our processes.

The Commission has probably seen what we have by way of policy and process and I think we are particularly strong in that area and we acknowledge the independence of the Director of Public Prosecutions' position, but the independence has got to be seen in light of the degree of accountability which we say, in terms of our processes and our policies, make us, effectively, accountable and there are various other ways in which we're accountable. So I suppose what I'm saying is I'm not seeing yet the need for the type of body that we're now talking about.

THE CHAIR: It may be a product of how well you run the office. But I regret to say we had a look at the Northern Territory, and if ever there was a case where judicial review would have said something about the quality of the decision-making, leave aside the decision, it would have said it in that case.

1 MR CHAMPION: I completely understand that, and I suppose
2 the Commission would say, well, we use those as exemplars
3 of conduct in different areas from which we can draw
4 conclusions.

5
6 THE CHAIR: Not necessarily conclusions, but the question
7 is, as a matter of principle, if these problems can arise
8 when you do have policies - and the Northern Territory had
9 a policy which wasn't followed - should we say, and it
10 would be a last resort, there should be a capacity for
11 judicial review?
12

13 MR CHAMPION: I think my position at the moment is that
14 I can't see, in Victoria, we would need it. I hold
15 a position that sits in the Victorian Constitution, it is
16 a statutory position. Effectively, I do what I get paid to
17 do, and that is make difficult decisions at my level at the
18 top end of a highly structured set of processes that take
19 place.
20

21 MR COATES: What decisions are you going to get reviewed?
22 In cases where there might be one charge of, say, indecent
23 assault that you don't go on with, that can get reviewed -
24 which would seem to be under the CPS system - or do you
25 have reviews where there is a multiple rape case but you
26 proceed with lesser offences? Do you get reviewed about
27 what you put in the Crown's statement of facts?
28

29 THE CHAIR: No, no, no.

30
31 MR COATES: What decisions do you suggest we should have
32 reviewed?
33

34 THE CHAIR: All you can do is review a final decision made
35 by a decision-maker, that's all, which has effects upon
36 people's rights.
37

38 MR COATES: But we make decisions every day about people
39 on all different things. Some are not to proceed; some are
40 not to proceed with significant matters but to proceed with
41 minor matters; some are to make concessions to the defence
42 about the Crown's statement of facts or what we're going to
43 dispute on a plea of guilty. All of those are decisions.
44 So what ones of those do you suggest we should have
45 judicially reviewed?
46

47 THE CHAIR: I'm not suggesting anything, but, again,

1 I just say to you, if you have judicial review it's
2 available in relation to all decisions amenable to review
3 by the court. I mean, Mark and all his people have helped
4 to develop the law in that way because we believed that it
5 was necessary that administrative decisions should be
6 capable of scrutiny by a judicial officer. That's where it
7 all comes from.

8
9 The question is whether decisions - I won't put the
10 label "administrative" on them at this stage, but whether
11 decisions of DPPs should be subject to the same review
12 that - virtually every decision-maker who can affect
13 people's rights in public office is reviewable.

14
15 MR McGRATH: Can I say, your Honour, one of the most
16 significant decisions we make is obviously the decision to
17 prosecute, and that is a decision, as we all know, that
18 dramatically changes the lives of the individual, and
19 recognising the enormous significance to victims as well.

20
21 My difficulty, obviously, is the separation of powers,
22 the need to have the appearance and the actual reality of
23 that separation and impartiality. The courts ultimately
24 would be deciding who is the litigant, who is brought
25 before the courts and the forensic decisions that would be
26 made.

27
28 The other aspect is, on a review, the enormous parts
29 that make up the prosecutorial discretion and the decisions
30 that it would be a difficult task to conduct a review of.
31 So I just see these inherent difficulties. The largest one
32 would be the fragmentation in the criminal process.

33
34 THE CHAIR: I don't know that it's right to think that
35 judicial review would allow a judge to say who should be
36 prosecuted and who shouldn't be. That was the discussion
37 I opened up with Mark. All it would be able to do would be
38 to look at the quality of the process.

39
40 COMMISSIONER O'CONNELL: That's what the body of case law
41 in England shows, and similarly the Supreme Court decisions
42 around the federal jurisdiction in the United States which
43 allow a victim to apply by writ of mandamus for a review,
44 and in those cases, the court can order that the decision
45 be undone but it can't order what the decision will be:
46 they have to go back and go through the process again.

1 THE CHAIR: Let me say, I think it would be very unlikely
2 that a judge would, in the exercise of discretion, ever
3 stop a prosecution, because the available remedy there, of
4 course, to defend yourself against the prosecutor - I don't
5 know about the other States - but which is one of the
6 reasons why at the intermediate appellate level in
7 New South Wales we effectively said, in relation to any
8 argument pre-trial by accused, "No, you go and have your
9 trial, and if you fail, then you can come and talk to us."

10

11 MR McGRATH: Perhaps I should put it that it is an inquiry
12 into the forensic choices being made by a participant who
13 is actually before, or will be before, the courts. So if
14 you develop what Mr Coates said, from Tasmania, about the
15 wide variety of decisions that are made, one could have
16 inquiries by the court into all aspects of those decisions
17 where that person, the State, is a litigant before the
18 court. It's a matter of, I think, great complexity, as
19 your Honour has noted. It's not just merely, with respect,
20 looking at procedural error. There would be these
21 difficulties.

22

23 THE CHAIR: Yes. But these difficulties we face in
24 relation to whenever the State is challenged as to an
25 administrative decision and seeks to defend it in the
26 court. In principle, I don't think it's different. The
27 context is different because we're talking about crime.

28

29 MR SEFTON: In that respect, the context being that you
30 actually have proceedings before the court, whereas,
31 generally, other administrative decisions which the State
32 might be making, which are amenable to review, aren't
33 connected with the very engagement of the court process and
34 decisions made during --

35

36 THE CHAIR: They may be, they could be.

37

38 MR SEFTON: Yes, they may on some occasions.

39

40 THE CHAIR: A decision to bring proceedings by a minister
41 to restrain someone could be the subject of proceedings.

42

43 MR SEFTON: Yes, there certainly may be examples of it,
44 but as soon as we move into a field of opening up judicial
45 review generally about decisions made by a director, you
46 are engaging in potentially a very wholesale way with that
47 area where you have this interaction and there are

1 questions as to the utility of the process in terms of the
2 ultimate outcome using judicial review as distinct from
3 whether internal review mechanisms or other external merits
4 type mechanisms, as have been proposed, may be more
5 effective to achieve the outcomes being sought.
6

7 If one was to look at judicial review rights, then
8 I would suggest that it should not necessarily follow that
9 they should apply to all decisions, because, again, in the
10 context of matters which we have heard raised, the question
11 of a decision whether to prosecute or not has been perhaps
12 one element, but even if one was to extend judicial review
13 to a decision such as that, decisions in respect of an
14 accused and decisions made in respect of a trial which
15 might be dealt with, as your Honour has indicated, by way
16 of saying, "That should be dealt with after the trial to
17 avoid fragmentation", or perhaps a stay of proceedings if
18 there's been some form of abuse in what has occurred, may
19 also need to be considered.
20

21 Perhaps one other element of this is the nature of the
22 very decision which one may end up reviewing and the fact
23 that it does involve a careful assessment of a whole range
24 of factors, including public interest, which, of itself,
25 makes judicial review potentially a process which is in
26 many cases - and I just say many because there are always
27 going to be examples, I think, that one can come up with
28 which will be the exception, but in many cases - it will
29 make it a process unlikely to yield the results that say
30 a victim might want to achieve and will potentially have
31 a series of costs in terms of time and resources of the
32 various directors and their organisations in having to
33 defend these matters. Just deciding what materials get put
34 before the court if there is a challenge about a decision
35 whether to prosecute or not, I could imagine, could be
36 complicated as well. So there are a range of difficult
37 decisions and factors which would influence that ultimate
38 question, I think.
39

40 THE CHAIR: I didn't expect a warm response to the idea,
41 by the way, but are you all saying the English have got it
42 wrong? Is that what you are saying - the English judges
43 have got it wrong?
44

45 PROF ARONSON: Can I say that, to me, the value of the
46 English decision was not to engage in judicial review; it
47 was to force the CPS to set up their system.

1
2 THE CHAIR: That's the practical.
3
4 PROF ARONSON: Once the CPS has done that, the judges
5 don't want any more to do with it.
6
7 THE CHAIR: That's going to take me to the next warm
8 subject. You are getting ahead of me, Mark.
9
10 PROF ARONSON: Can I also add that it's not just Gummow
11 and Gaudron. I have a footnote here - Likiardopolous,
12 which was 2012; Magaming, 2013 - there is a number.
13
14 MR BYRNE: And Elias.
15
16 PROF ARONSON: Yes, Elias - I forgot that. So there is
17 quite a number.
18
19 THE CHAIR: But they built upon, didn't they, Gummow and
20 Gaudron?
21
22 MR BYRNE: Yes, but it is not just simply a case of Gummow
23 and Gaudron sitting on their own and being held up as the
24 torch. It has been adopted by a number of others.
25
26 THE CHAIR: But it started with Gummow and Gaudron saying,
27 in one paragraph, "This is the law". It's lovely to be in
28 that position.
29
30 MR COATES: They are clearly saying it is a chapter 3
31 matter.
32
33 THE CHAIR: Okay.
34
35 MR BYRNE: Could I just add one other observation. Most,
36 if not all, of the States and Territories are in the same
37 legislative position as Queensland, where the
38 Attorney-General has a concurrently running power to
39 present indictments and to terminate prosecutions. That,
40 in a sense, provides a form of review to a dissatisfied
41 complainant or complainants.
42
43 The second aspect of that concurrently running power
44 is that if there becomes a power to judicially review the
45 decision of the DPP on a decision to present an indictment
46 or not - is that power to be extended to that power to the
47 Attorney-General, the concurrently running power, or is it

1 to be segregated off and, if it is, why is it to be
2 segregated off? They are issues that just occur to me.
3
4 MR COATES: In the Tasmanian DPP Act it's not only the
5 Attorney-General, it is also the Solicitor-General, and the
6 DPP can't discontinue an indictment of a proceedings
7 instituted by the Attorney-General or the Solicitor-General
8 without their consent.
9
10 THE CHAIR: Sorry, say that again?
11
12 MR COATES: The DPP cannot discontinue proceedings that
13 have been instituted by the Attorney-General or the
14 Solicitor-General without their consent.
15
16 THE CHAIR: I take it, Michael, you don't like the idea of
17 judicial review?
18
19 MR BYRNE: No. Sorry, you are correct. Let's be
20 unambiguous about it.
21
22 COMMISSIONER O'CONNELL: Can I just address the question
23 that has been put over here. The English case law really
24 limits the judicial review from the point of view of
25 victims' rights to really four areas: the decision that
26 was made was illogical, and that includes
27 a misunderstanding, and the leading case there was where
28 a decision was made and made again and made again in
29 relation to a person with mental illness, where all of the
30 lawyers misread the letter in relation to it, and a person
31 was quite competent to give evidence and they withdrew it.
32 The next one is where it is irrational. The third one is
33 where it is inconsistent with the guidelines, which the
34 DPP, at that time a he, set for himself, and then he made a
35 decision inconsistent with what he had published. So in
36 those circumstances, in my humble view, where else does the
37 person go?
38
39 THE CHAIR: Mark?
40
41 MR PEDLEY: Your Honour, I just want to make mention of
42 the policy behind the Administrative Decisions (Judicial
43 Review) Act, which I guess does embody a limitation on
44 judicial review in prosecution-type matters. So section 9A
45 is certainly very important. So I guess that has, to
46 a very large degree, been enshrined in federal legislation.
47

1 THE CHAIR: So you are saying the feds have closed the
2 gate?
3
4 MR PEDLEY: From a legislative point of view. That's not
5 to say that it couldn't be opened again, but currently it
6 is reflected in the legislation.
7
8 THE CHAIR: Yes. Northern Territory? How would you feel
9 about judicial review?
10
11 MR USHER: Given your Honour's observations in relation to
12 case number 17 we don't really have very far to go, but in
13 relation to that matter it may be questioned whether, had
14 the internal practices and internal review systems within
15 the NTDPP at the time been more stringent, that result may
16 not have been the case. So judicial review, in my view,
17 simply doesn't enter into it in relation to that matter.
18 Definitely from an internal perspective in 2002 that matter
19 was dealt with incorrectly, and that was acknowledged by
20 the director.
21
22 THE CHAIR: Yes, it was. Anyone else on this?
23
24 MR CHAMPION: Could I make an observation. From the
25 material that I read, the UK material, and also from the
26 discussions this morning, I couldn't really identify a role
27 of the DPP in all of that. The DPP's role seemed to be
28 absent from any of the decision-making. I'm just not sure
29 whether anyone knows what that role is.
30
31 In my case, I'm required to deal with all
32 discontinuances, just by way of example. So I get to see
33 the material and I get to read the material that is
34 presented to me. But I am just unclear as to what the role
35 of the DPP in the UK is in this.
36
37 THE CHAIR: Because it is much larger, she doesn't have
38 a direct role. It's done at the regional office. That's
39 one of the reasons why I mentioned early on that there are
40 real differences because of size, and it is the review
41 process that then goes into London at the end of the day,
42 with the absence of Christmas party invitations. So it is
43 big enough to create that process.
44
45 MR CHAMPION: I wonder whether that really explains why
46 the English have had to go down this pathway of judicial
47 review, because of the scale of the operation that they

1 have going.

2

3 THE CHAIR: It may do, and I want to turn next - have we
4 exhausted judicial review as a topic?

5

6 MR PEDLEY: Could I make one additional point on perhaps
7 the policy behind the Administrative Decisions (Judicial
8 Review) Act. It is really to stop the fragmentation of the
9 criminal justice process. So I think that's a fairly
10 important point.

11

12 I guess while we are considering victims, also, we
13 have to have regard to the fact that people, if they are
14 charged - if they are able to challenge prosecution
15 decisions and fragment that process other than through
16 defending the prosecution, that's not a good thing for the
17 criminal justice system.

18

19 COMMISSIONER O'CONNELL: But don't they challenge you to
20 the extent that they apply and get stays to stop you being
21 able to prosecute? Isn't that --

22

23 THE CHAIR: That used to be fashionable but it's stamped
24 out pretty much.

25

26 COMMISSIONER O'CONNELL: But it is still an entitlement
27 that exists, if the person wanted to pursue it.

28

29 MR PEDLEY: In the prosecution.

30

31 THE CHAIR: It does, and indeed there is a prosecution in
32 New South Wales of now Archbishop Wilson for historical
33 sexual offences where the Archbishop has failed, so far, to
34 persuade a court to stay, but that's on appeal. It will be
35 interesting to see how that's ultimately dealt with.

36

37 THE CHAIR: John, did you have something you wanted to
38 say?

39

40 COMMISSIONER HINCHEY: Look, I'm not a lawyer,
41 your Honour.

42

43 THE CHAIR: That's a good thing.

44

45 COMMISSIONER HINCHEY: Perhaps the existence of a judicial
46 review in the United Kingdom gives authority to the
47 Victims' Right to Review process. It's rarely used, I've

1 noticed, but it might give weight and some authority to
2 that process.

3
4 THE CHAIR: It undoubtedly does, because it was the
5 High Court that said, "This is what you should do", and
6 very directly said it, and it would seem that in their
7 context, it seems to be working reasonably well.

8
9 COMMISSIONER HINCHEY: So any review process, therefore,
10 should have some weight behind it and some authority,
11 whether you go for a judicial review process or another
12 form. But there has to be some transparency and
13 accountability around decision-making.

14
15 Case study 15 - I think the Commission makes a very
16 valid point: there's absolute immunity, currently, from
17 review of any decision. Now, is that appropriate for those
18 most affected around crime? Are they invited to
19 participate in a process where they have no rights? There
20 are no victims' rights in Australia, there are guiding
21 principles only, and there is an absence of systemic
22 transparency and accountability in the process that they
23 are asked to participate in.

24
25 THE CHAIR: Anyone else on judicial review as a separate
26 subject?

27
28 Now, it really gets tough. What about merits review?
29 What presently happens inside your organisations? Is there
30 any process that could be considered to be a review of
31 a primary decision? I take it that decisions to terminate
32 are made by directors, is that right; or is it delegated
33 down?

34
35 MR KIMBER: There is a system of review in my office.
36 Decisions are delegated down and with respect of those
37 decisions there is a written policy with respect to, first,
38 who can make those decisions; and, secondly, that a review
39 will be conducted if it is requested - and that is a merits
40 review, in that instance - and by whom that review will be
41 done.

42
43 THE CHAIR: Does your process mirror, in your context, the
44 English process, do you think?

45
46 MR KIMBER: It does in my mind. There are some
47 differences. I mean, one of the things about the English

1 process is that the victim is actually given a piece of
2 paper that says, "This is the process", and I think there
3 is a lot to be said for that, quite frankly, and it is
4 highly likely that I will move in that direction as well.
5 So, you know, that's a difference. But otherwise the
6 general flavour of the policy, if you like, is the same.
7 It's a clear opportunity, both for the victim, but also for
8 the police, which I think is also important, because they
9 may disagree with the decision themselves. They may feel
10 more empowered to complain about that decision on behalf of
11 a victim or even on their own behalf. So it also picks up
12 the importance of consultation with them.

13
14 It also builds upon the statutory obligation that
15 exists under the Victims of Crime Act, which is an
16 obligation to consult about decisions of that nature, and
17 so it builds on a statutory framework in that sense.

18
19 THE CHAIR: Does it work satisfactorily?

20
21 MR KIMBER: I believe so. I believe so. As you know, we
22 have introduced, but not yet completed, an audit process
23 that will look at whether policies like that policy and
24 others are being complied with.

25
26 THE CHAIR: Michael, from your perspective?

27
28 COMMISSIONER O'CONNELL: As the Commissioner for Victims'
29 Rights, I can consult any public official on the way that
30 a victim is being treated, in conjunction with the
31 governing guidelines or declaration on victims' rights, and
32 if I form a view, it's an absolute authority, like the DPP
33 have, that the victim has been aggrieved and there is an
34 inconsistency in the way they have been treated, I can
35 recommend a written apology be made, and if the authority,
36 whether it be the DPP, the Commissioner of Police or an
37 individual public official, doesn't make that apology, then
38 I can report that to parliament, which then kicks in a
39 parliamentary process of scrutiny of that department or
40 whatever.

41
42 I can say that in nine years I've never issued notice
43 to our Director of Public Prosecutions for written apology,
44 in the process that he has --

45
46 THE CHAIR: So is it your experience that his review
47 process is working satisfactorily?

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COMMISSIONER O'CONNELL: His review process I will limit it to, because I think that's the only fair thing I can do. There were differences of opinion that have existed in the past, but at this point in time I would say that the relationship is a good and sound one.

I have to say, I also appoint legal counsel for victims, and I fund that out of my office, so that they can become involved more actively in the consultation process, which was the point you made. Because I think lots of them don't actually understand, and it puts the DPP in a fairly precarious position, both in terms of disclosure, in terms of the some of the conversations that victims want to have, and the other is in terms of disadvantage, that they don't actually know much about the system, and having someone who has made it quite clear that they are not the victim's lawyer, they are a lawyer representing the public interests and the State, leaves some sense of uncomfortableness, to say the least, and so having someone else help them - and I think there is much to be said for the point that Mark raised before about trying to proactively deal with things before a complaint becomes necessary, rather than build more and more complaint mechanisms on top. I know it's going to sound contradictory to what I said before, but I still believe, in my own sense, that no-one should be above the law.

THE CHAIR: I don't think any manager would say other than that was sensible. Darryl?

MR COATES: In our office, which is I think a bit different to what they do in the CPS, we have reviews before the decision is made. So, for example, if the person who has the file thinks that a matter should be discharged, it goes to a committee of three and the complainant has to be got in at this stage to be spoken to, to say, "We have these problems, what do you say about it?"

THE CHAIR: They speak to the committee or --

MR COATES: No, they will speak to the individual who will say what the problems are. That will be documented and go to the committee.

The committee of three will make the decision. If they are unanimous, then it will be a discharge and the

1 complainant will be told that. And then, with the new
2 policy, they will also be told that they will have a right
3 of review to the director.
4

5 If they disagree - say it is two:one, or whatever -
6 then it comes to me to make the decision. So, in that way,
7 we've tried to in-build the review and the consultation
8 with the complainant before the decision is made, before
9 the accused is notified or his counsel or solicitor is
10 notified.
11

12 THE CHAIR: So, as I understand it, the complainant then
13 has an opportunity for direct input at the point at which
14 it might appear that the decision is going to be adverse to
15 the complainant's interests?
16

17 MR COATES: Yes.
18

19 THE CHAIR: And when they meet to put their point of view,
20 who do they meet with?
21

22 MR COATES: They will meet with the lawyer who is in
23 charge of that case. He will then make a detailed memo.
24

25 THE CHAIR: Is that the person who is presently holding
26 the view that it shouldn't be prosecuted?
27

28 MR COATES: Well, yes, but if they wish to meet with
29 someone more senior, then someone from that committee will
30 meet with the complainant.
31

32 THE CHAIR: It might be that some would criticise
33 a process which took you to the person who has an adverse
34 view, to take your point of view.
35

36 MR COATES: I can see that point. The other thing is we
37 engage with complainants. From 48 hours from the person
38 being charged the police have to write to us, and then
39 within 48 hours of that we have engaged with them through
40 our witness assistance office. So it's not --
41

42 THE CHAIR: You build a relationship?
43

44 MR COATES: We build a relationship. They don't just get
45 a letter saying, "We're discharging the matter."
46

47 MR USHER: That's the beauty, your Honour, in relation to

1 being in a smaller office where you do have that front-end
2 direct contact. There are no tiers, as in the English
3 model. There are none of these layers. Ultimately, it
4 goes up to the deputy director, myself, or the director.

5

6 THE CHAIR: Do you have a process like Darryl has?

7

8 MR USHER: It goes straight to me. It goes straight to
9 the deputy director. We don't have a committee. If
10 a prosecutor makes a determination to discontinue a matter,
11 a nolle recommendation goes through me as the gatekeeper to
12 the director.

13

14 THE CHAIR: Do you ensure that the complainant has
15 a chance to put their view to you?

16

17 MR USHER: Definitely. That's in our guidelines.

18

19 THE CHAIR: Yes, I know.

20

21 MR USHER: Your Honour, it's not 2002. We are a very
22 different office, and --

23

24 THE CHAIR: Do you see any wisdom in having a committee in
25 there that gives you the benefit of more than one mind when
26 you come to make your ultimate decision?

27

28 MR USHER: No, I don't see the benefit of a committee in a
29 smaller office. We only have 45 prosecutors, so I have
30 that direct contact with all of my prosecutors. If the
31 complainant requires a meeting with myself then I conduct
32 that meeting myself. There is no point in putting another
33 layer in there.

34

35 JUSTICE COATE: Who is your committee? How are they
36 constituted?

37

38 MR COATES: The committee includes the deputy director,
39 and we have four principal Crown counsel - I think two of
40 them are Crown law officers under the Criminal Code. So
41 they are the committee. So any three of those can look at
42 the matters.

43

44 Likewise, even the decision to indict, if it goes to
45 a committee member - everything is done by memo, so there
46 is a memo in relation to every decision. That will go to
47 one member of the committee and if she or he is in

1 agreement with the recommendation on the indictment, then
2 that will just proceed. If there is any sort of
3 substantial change, it has to go to two other members.
4

5 THE CHAIR: Western Australia?
6

7 MR McGRATH: Our approach has some of the hallmarks of
8 Tasmania. We are very much at the front end with victims.
9 We are involved, certainly in the metropolitan area but
10 also country, with victims just pre committal, so the
11 engagement is made and consultation is required at the
12 front end.
13

14 We allocate a file manager who ultimately would be at
15 the level commensurate with the trial lawyer to manage the
16 file. Under our statement of guidelines there must be
17 consultation with the victim if the file manager, being the
18 counsel, is forming the view that he or she have some
19 doubts about the matter and there has to be a meeting,
20 which is a form of proofing as well, and a discussion would
21 be conducted about the case.
22

23 That must be recorded in writing under our guidelines
24 and it is. The senior police officer involved must also be
25 consulted and his or her view is recorded. If the counsel
26 forms a view the matter should be discontinued, it must
27 then be put in writing to a senior state prosecutor who is
28 at a very senior level. That senior state prosecutor would
29 have the power to sign a discontinuance but under our
30 system of review they are required to consult with what is
31 called a consultant state prosecutor and that's usually
32 done by way of memorandum. At that point a decision would
33 be made to continue or discontinue.
34

35 If a victim is not satisfied with that, they can
36 request to meet with myself or when we've got a deputy
37 director. There is one thing I accept and that is that we
38 don't have it recorded that they are told that you have the
39 right to speak to the director and that's something that
40 I've learnt from this Commission, we'll do that, but
41 invariably, consultant state prosecutors would tell me
42 about that.
43

44 In that case I have given delegations under the
45 Criminal Procedure Act to senior state prosecutors to sign
46 discontinuances. However, if it is on public interest
47 grounds, the delegation is limited to five people, the

1 consultant state prosecutors and the deputy director,
2 because on public interest grounds I think it would a very
3 narrow decision making.
4

5 We are very heavily involved with what I will call the
6 consultation. It is one of the great benefits. Whilst
7 we're in one of the biggest provinces in the world, there
8 are nine floors in one building so I'm within 80 metres of
9 any decision maker. The population of Perth is only
10 2 million, so we've got this great control of that, as your
11 Honour noted, compared to the United Kingdom. It is the
12 use of the authorisations and the need to front-end.
13

14 THE CHAIR: Victoria?

15
16 MR CHAMPION: We don't have a structured process of
17 review, but having said that, we have heavy victim
18 engagement right from the beginning of cases. We are
19 dominated by the Victims Charter which obliges us to keep
20 people effectively in the loop with cases, keep them
21 advised of court dates and bail decisions and so on, so
22 I think our office does that really very well.
23

24 All our decision making is written and when I get to
25 see a decision that I have to make, there's supporting
26 memoranda that filter up from case officers, who are
27 appointed early in the case, through to supervisors and
28 then to a crown prosecutor who might make a recommendation
29 about various aspects of the case, either a discontinuance
30 or the settlement of a case, negotiated plea settlements
31 and so on. That would be in writing by a crown prosecutor,
32 or a senior crown prosecutor if it is a bigger decision,
33 and that will come to me to make a final decision.
34

35 THE CHAIR: Where in the process does the victim have the
36 opportunity to say, "If you're mindful of not prosecuting,
37 for these reasons you should reflect on that decision."
38

39 MR CHAMPION: All victims are consulted at the point.
40 I won't make a decision of discontinuance in a case, for
41 instance, without the victim having been consulted about
42 that decision; that's very clear.
43

44 THE CHAIR: What do you get by way of understanding what
45 the victim has to say?
46

47 MR CHAMPION: That consultation generally takes place with

1 the case officer, perhaps the case officer's manager, often
2 crown prosecutor who is in the case, effectively, the
3 prosecution team, plus normally someone from the Witness
4 Assistance Service as well. It is at that point at which
5 you get victim consultation and the views of the victim are
6 conveyed. We don't have a written process that sets out
7 for victims that they could ask for a review, but there
8 have been occasions when people have made their displeasure
9 very clear and I've re-looked at cases. It doesn't happen
10 very often.

11

12 THE CHAIR: One of the things that troubles judges but
13 only as a matter in principle, and of course I am New South
14 Wales, not Victoria, are the cases that end up being
15 compromised on the morning, if you like.

16

17 MR CHAMPION: Yes.

18

19 THE CHAIR: We do wonder about the decision making process
20 that has been undertaken to get to that what appears to be
21 rushed position, because we're not told the night before
22 even, we're just told in the morning. I can understand
23 that there are reasons of course that are obvious if it
24 becomes a plea, but when it becomes some form of
25 discontinuance on the morning - and this is where the
26 Northern Territory got into trouble because the decision
27 making was being made, as I recall it, the day before.

28

29 MR USHER: It was within a couple of days before.

30

31 THE CHAIR: Yes, in a very short time frame and as I say
32 judges just muse on the issue because we don't know what
33 has actually happened. Does that sort of decision making
34 process occur in Victoria, overnight, so to speak?

35

36 MR CHAMPION: It does happen and it happens for various
37 reasons. It may be that a victim has decided they simply
38 can't go ahead with the case, that occurs occasionally, or
39 something has happened in the process of the last week or
40 so, or an accused person has made an application for a
41 discontinuance and it is looked at at the last moment.

42

43 THE CHAIR: In that event, does the victim get a look in
44 on that decision making process at that stage?

45

46 MR CHAMPION: Yes, indeed.

47

1 THE CHAIR: How would you do that? If you get an
2 application a week before the trial date, what happens so
3 that the victim's position is before you ultimately?
4

5 MR CHAMPION: Ideally and I would think most often the
6 victim has a phone call from the informant or perhaps from
7 the solicitor, the informant being the policeman or
8 policewoman in the case, contact by that means, and we have
9 plenty of facilities in our office for people to be seen
10 and victims are often coming into the office and being
11 spoken to face to face.
12

13 There are some victims that don't want to engage or
14 who may be interstate or on the other side of the world and
15 there are occasions when it's just impossible to do it, but
16 cases will stop on the morning of a hearing for a whole
17 diversity of reasons which sometimes are simply out of
18 people's control, sometimes the process falls down. We
19 have to concede that on occasions.
20

21 THE CHAIR: Daryl in his small jurisdiction has a
22 committee process. What do you think about that?
23

24 MR CHAMPION: In a small office I could see that that
25 could work. I think in our office, with so many cases,
26 that could tend to be a cumbersome process. I am not
27 saying it's impossible but it might tend to make the
28 process of cases more difficult to achieve.
29

30 THE CHAIR: Victims might say that's a brake on the
31 process and proper reflection is a good thing. What do you
32 think?
33

34 MR CHAMPION: I accept that view as possible. I think
35 that from my own experience, with our staff in our office,
36 people are very diligent in the way that they look after
37 their cases and, as I think I said earlier, I am yet to
38 find a case where I felt that there was a failure or
39 something hadn't occurred properly.
40

41 THE CHAIR: Others will say that a committee system gives
42 you the benefit, ultimately, if it comes to you or has to
43 come to you, of a consideration by more than one mind in a
44 joint arrangement, which is, of course, why we have
45 appellate judges sitting in groups of three or five or
46 whatever and why we have juries, of course, of 12, is to
47 get multiple views.

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MR CHAMPION: In effect, I would say in our office we already have that achieved to a large extent by the fact that we have a process of written memoranda working upwards towards me and there will be plenty of occasions when I assemble the particular team. If I am in doubt about a case or I want some more information then I'll call them up and assemble them and we'll talk about it amongst the team, with myself present and often the police informant.

THE CHAIR: Do you think there would be benefit in the public knowing how you operate?

MR CHAMPION: Well, if it's a case of publicising it on a website, most certainly. There would be --

THE CHAIR: What, including it in guidelines, or whatever you'd like to call it, that are published so that people know?

MR CHAMPION: I wouldn't have a difficulty with that at all.

COMMISSIONER DAVIES: It seems, and particularly listening to our UK cousins, that probably the biggest source of complaint from victims, not just in relation to DPPs or OPPs but prosecuting police as well, is the lack of timely communication and communication I suppose can mean a lot of things to different people.

It is not just about receiving a letter, it is about actually engaging in a conversation and explaining to someone, as Mark alluded to earlier, who may very well never have been exposed to the legal system, the legal profession, policing at all in their lives, so they are total strangers to the process, they have no idea what's happening, and really all they want to know is who, when, how, why and in a timely fashion, and I would think that most of the problems, if they're explained before the event, for DPPs will disappear because everything will have been explained to them thoroughly. They may not like the end decision but at least they will have been engaged in that process by being communicated with properly and given their voice before the decision is made.

THE CHAIR: I think the last part of that is an experience that certainly I've had and I'm sure the other two have had

1 in private sessions. People want to know that when you
2 guys at the top make decisions you've actually had proper
3 regard to what they are saying about their case. If they
4 think that that has happened, you're much more likely to
5 have a good acceptance of a decision not to prosecute. It
6 is when they feel they haven't had their chance that that's
7 a problem.

8
9 MR KIMBER: I think, at least from my perspective, that we
10 have to be really careful about where written reasons come
11 in. Written reasons, for me at least, are the very end of
12 the process. If we adopt a process of using written
13 reasons too much, we don't want that to become a substitute
14 for all of the meetings that we have along the way that are
15 the explanation. The conveying of the decision, unless the
16 victim doesn't want this, should be a face-to-face personal
17 meeting and then if subsequent to that they want written
18 reasons to confirm or further explain or to have a record
19 of what was discussed in that meeting, that's when the
20 written reasons come in.

21
22 It is not really a concern that I have about written
23 reasons because I think they are appropriate in certain
24 circumstances, but we need to make sure that they're the
25 very end of the process, not the substitution for what
26 I think has over the last decade or two decades become much
27 more of the DNA of DPPs, which is to consult with victims
28 and try and explain the decision and give them a chance to
29 have the meeting and have their say and learn about the
30 criminal justice process, which is often very foreign to
31 them, because it is there you get the understanding, not
32 through a letter in the post about, "You've never met me
33 but here is the decision."

34
35 Certainly, my experience is - and Michael may debate
36 it, I don't know - that's very much embedded in my office
37 and is assisted quite significantly by having a
38 Witness Assistance Service which is within the office.
39 They have everyone as a client, but it certainly assists in
40 that liaison.

41
42 THE CHAIR: Kara, again from both sides of the fence.

43
44 MS SHEAD: To pick up on that last comment, I often have
45 the experience with complainants where New South Wales
46 consults very heavily with victims from the beginning to
47 the end, sometimes they're invited to provide in writing

1 views that they hold about the prosecution continuing and
2 those views are taken into account and multiple views are
3 provided up the line to the director.
4

5 There is consideration by the lawyer with carriage,
6 often a written report by the Crown Prosecutor, and then a
7 professional assistant in the director's chambers will also
8 provide a report and then either of the two deputies or the
9 director determine the matter.

10
11 The reports must include, the guidelines say, the
12 views of the victim, or victims, and they are considered.
13 Often there is disagreement amongst the reports and the
14 views that go to the director, between the different
15 lawyers who have made assessments of these cases, where
16 often there is no correct answer. Reasonable minds can
17 differ upon whether or not, in the public interest, the
18 prosecution should proceed.

19
20 I do wonder sometimes at the timing issue when it's a
21 very short time and a trial is due to commence and a victim
22 is asked in a really limited amount of time to provide
23 their views, their capacity to do so in times of stress,
24 where they are due to give evidence the next day, for
25 example, and we all know from experience that is a deeply
26 distressing time where a great deal of anxiety comes to the
27 fore.

28
29 I have also had the experience on many occasions
30 personally where what I thought I communicated to a victim
31 or a complainant about the process, reasons, difficulties,
32 and I thought that I'd done so clearly and having had
33 considerable experience in doing that, was not understood,
34 often because the complainant or a victim is very stressed
35 or inexperienced in the criminal justice process or I've
36 perhaps explained things poorly and what they may take away
37 from a conference might be very different to what was
38 sought to be conveyed.

39
40 I think the face-to-face meeting is very important to
41 allow for discussion, but if reasons are to be given at the
42 very end of the process, doing so in writing I think can be
43 valuable because it doesn't leave scope for
44 misunderstanding about what those reasons were, so far as
45 they can be done in such a way to reveal what they truly
46 were and I think there's a real issue with that.
47

1 THE CHAIR: Again, looking at Daryl's process, how do I
2 understand the New South Wales DPP's process in terms of
3 multiple minds being brought together and ultimately, if
4 need be, the director having the benefit of those multiple
5 minds; is that happening or not?

6
7 MS SHEAD: It is happening. It is not a committee system
8 but it has the similarity.

9
10 THE CHAIR: How does it happen so that you could say to a
11 victim, "This is the process". What can you say?

12
13 MS SHEAD: The process is one that steps up quite similar
14 to the Victorian system where whoever has the prosecution
15 at that particular time, let's say the matter is still in
16 the Local Court, it has not yet been committed for trial,
17 there is a different process, the individual lawyer will
18 form a view, write a report. That will go to the managing
19 lawyer who will write a report not necessarily agreeing
20 with the recommendation of the lawyer with carriage.

21
22 That will then go to the director's chambers where a
23 senior solicitor will review both of those reports and
24 write a third report and it is only at that time when there
25 are three independent assessments of the entire brief of
26 evidence, the victim's views being recorded in writing by
27 the solicitor with carriage.

28
29 THE CHAIR: It is the solicitor at the beginning who
30 speaks to the victim?

31
32 MS SHEAD: Yes.

33
34 THE CHAIR: No-one else along the path speaks to the
35 victim?

36
37 MS SHEAD: Often if the matter has been committed for
38 trial there will be multiple consultations then with a
39 crown prosecutor at that point in time, so the victim then
40 will often have spoken to the solicitor with carriage, if
41 that person remains the same, which is the ideal model, and
42 also with the crown prosecutor, but it can only be one
43 person, that's correct.

44
45 THE CHAIR: And who has the authority to make the decision
46 to bring the proceedings to an end?

47

1 MS SHEAD: It depends. There is a difference. In the
2 Local Court, in some of the regional offices, the deputy
3 senior crown prosecutors have that delegation. In the city
4 office, once a matter is committed for trial, it is the
5 director's chambers, so the two deputies and the director
6 himself.
7
8 THE CHAIR: The director or a deputy may make the
9 decision, one of the three?
10
11 MS SHEAD: Isn't that what I just said? I am sorry,
12 I said something wrong. All matters that are committed to
13 trial have to go to the director.
14
15 THE CHAIR: The director and not the deputies?
16
17 MS SHEAD: Or the deputies, yes. It is only when the
18 matters are in the Local Court that there's --
19
20 THE CHAIR: So the deputies have the authority of the
21 director to bring it to an end.
22
23 MS SHEAD: They do, yes.
24
25 THE CHAIR: Does the victim have a right to ask to meet
26 with the person who has that authority?
27
28 MS SHEAD: That does occur. Whether there is a right -
29 would you mind, your Honour?
30
31 THE CHAIR: Not at all.
32
33 MS SHEAD: I am not aware of any right.
34
35 THE CHAIR: You have become a defender, so that's all
36 right.
37
38 MS SHEAD: There's not a right but it's not uncommon that
39 people seek to speak.
40
41 THE CHAIR: Are they told they can?
42
43 MS SHEAD: Not that I'm aware of.
44
45 THE CHAIR: I think we're getting some head shaking.
46
47 MS SHEAD: Not as a rule.

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THE CHAIR: Wearing both hats, should they? Should they know that, if they wish to, they can speak to the ultimate decision maker?

MS SHEAD: Prior to or after the decision is made?

THE CHAIR: One way or the other.

MS SHEAD: I wouldn't wish to speak for the director, obviously, in my current position, but absent a review process, the provision of information can be important. Prior to the final decision, if they wished to put their views forward, I am sure the offices of the DPP would argue that that process is in place; their views are communicated with sufficient time.

THE CHAIR: Yes. It is interesting, though, when we did look at Queensland and New South Wales, the process of review in New South Wales was undertaken without any consultation with any of the complainants at all. Any capacity for that reviewer to have assessed the strength of the person as a witness was not available.

MS SHEAD: No. My understanding is that the guidelines have changed since that time and it is now mandatory for that to occur and in my experience prosecutors take that obligation very seriously and do endeavour to consult with victims in a timely way.

THE CHAIR: If you have the ultimate decision maker in the current structure, why wouldn't be it be sensible to ensure that if the victim wanted it, before the final decision was made the victim had a chance to speak to that decision maker?

MS SHEAD: I think given the size of the New South Wales office, if that opportunity were afforded to every victim, it would be an incredibly onerous task for the deputies and the director to take the time to speak to victims in every matter where charges were being discontinued. How would you divide matters where only some charges were being sought to be discontinued or whether the whole prosecution was being discontinued?

Some victims become very distressed when they're consulted on only a number of charges that are due to be

1 tried, are discontinued, or whether there's a plea
2 negotiation that occurs; it would be unworkable.
3
4 THE CHAIR: Because the English review system only
5 entitles you to a review in the event that everything has
6 gone away.
7
8 MS SHEAD: Yes.
9
10 THE CHAIR: Which sounds like a sensible way of
11 rationalising the resource, doesn't it?
12
13 MS SHEAD: It has to be much more sensible.
14
15 THE CHAIR: I know you can't speak for Lloyd Babb, so
16 we'll talk to him ourselves, but the impression I have -
17 and the people behind you can nod or otherwise - is the
18 system is a little bit ad hoc and what might happen in a
19 particular case will vary without necessarily any adherence
20 to a structured policy; is that right?
21
22 MY HYLAND: What do you mean by ad hoc?
23
24 THE CHAIR: In some cases the victim might get to speak to
25 the decision maker, in some cases they may not; the victim
26 may speak to the primary officer or may speak to someone
27 further up the chain. In other words, you can't predict at
28 the beginning just what will happen.
29
30 MR HYLAND: I think what Kara was talking about is
31 dependent on where in the process the issue has been
32 considered. If it had been considered in a lower court
33 then it's the solicitor with carriage; if it is in a higher
34 court, it is with the Crown Prosecutor.
35
36 THE CHAIR: Who does the victim get to talk to?
37
38 MR HYLAND: In a lower court, before the involvement of
39 the Crown Prosecutor, it would be the solicitor.
40
41 THE CHAIR: And that's all?
42
43 MR HYLAND: Yes.
44
45 THE CHAIR: Is that decision reviewed by anyone?
46
47 MR HYLAND: That person is not spoken to again but the

1 report of that report writer is reviewed by the next report
2 writer.
3
4 THE CHAIR: If the prosecutor says, "No, this case
5 shouldn't go ahead", do they have the authority to stop it
6 in the Local Court?
7
8 MR HYLAND: No.
9
10 THE CHAIR: Who makes that decision?
11
12 MR HYLAND: Chambers or a crown.
13
14 THE CHAIR: So the director or the deputy director even in
15 relation to a Local Court matter?
16
17 MR HYLAND: Or a deputy senior crown prosecutor in the
18 country.
19
20 THE CHAIR: Right, so we moved it further out. We are now
21 getting to the point where, given your size and volume, you
22 are starting to look a bit like the disposition of matters
23 as the English have, that's remote from head office.
24
25 MR HYLAND: Remote, yes, but I would say the decision
26 making process, from what I understand, differs
27 significantly between New South Wales and the UK in
28 relation to the level of the decision making.
29
30 THE CHAIR: If I am in Tamworth and I am the local
31 whatever with authority to terminate a prosecution in the
32 Local Court, who am I?
33
34 MR HYLAND: You would be the deputy senior crown
35 prosecutor.
36
37 THE CHAIR: And is my decision reviewed by anyone?
38
39 MR HYLAND: No, but if you're in the UK you would be less
40 than a deputy senior crown prosecutor.
41
42 THE CHAIR: So we say the protection here for a victim is
43 that it is just a more senior person who makes the
44 decision?
45
46 MS SHEAD: There are multiple people that look at it
47 before it gets to the deputy senior. In the UK the line

1 solicitor makes the decision: "I have carriage of it
2 I decide, no further proceedings." In the country, in the
3 DPP, the solicitor will look at it, then probably a
4 managing lawyer and then the deputy senior crown prosecutor
5 for that regional office, those three people.

6
7 THE CHAIR: And who speaks to the victim?

8
9 MS SHEAD: Normally, it will be the solicitor with
10 carriage whilst it is in the Local Court.

11
12 MR McGRATH: That is a large difference. When I watched
13 those videos, it seems to be the paucity of the
14 supervision, the management, the tiers that one sees in the
15 UK where there's one lawyer making the decision, it's all
16 moved ex post and not only do you get lack of tiers, you
17 get tiers in the system, whereas I think we've heard around
18 this room, your Honour, and certainly we have in
19 Western Australia, is there are multiple levels of
20 management supervision in writing being recorded at the
21 front end; work to be done but it's such a disparate
22 difference from what we can glean or I've gleaned from the
23 United Kingdom.

24
25 THE CHAIR: What happens - and I haven't finished all the
26 States yet - in any State if the victim is a child or
27 someone with a disability? How do you approach those
28 cases? Is it just the same process that operates or what
29 do you do? In other words, if you've got by definition the
30 possibility of communication difficulties, what are you
31 doing?

32
33 MR CHAMPION: We have a child witness service in Victoria
34 that really looks after all of our children and often
35 I will be seeing material coming to me with recommendations
36 from social workers at the Child Witness Service that this
37 case, for instance, should really discontinue because of
38 the welfare of the child being involved in the proceedings.
39 I suppose overlaid on that, of course, will be parents and
40 guardians who we would refer to and they would effectively
41 have, I presume, the legal guardianship to be able to
42 contribute to decision making.

43
44 THE CHAIR: What about disabled people?

45
46 MR CHAMPION: It is difficult for me to answer that
47 question. I am assuming at the moment there are levels of

1 guardianship attaching to people that are disabled to that
2 extent, where it is difficult for them to make their own
3 independent decision making.

4
5 THE CHAIR: Michael, Queensland?

6
7 MR BYRNE: Under the current guidelines the authority to
8 discontinue a prosecution based on the reasonable prospects
9 test sits at the level of a principal crown prosecutor. If
10 it is a decision which has any facet of public interest
11 involved, it is to come to me, or in my absence the deputy.
12 As a case is received into the office, it's allocated both
13 to a victim liaison officer and to a case lawyer. The case
14 lawyers are set up in pods or teams so that the case lawyer
15 has a supervising trial prosecutor. Within those teams is
16 sitting the business unit that we call the chambers and the
17 principal crown prosecutor is the senior legal member of
18 the chambers.

19
20 If a case lawyer is of the view that there are no
21 reasonable prospects on any or all charges that have been
22 preferred by police, there will be a process of informal
23 discussion with the supervising trial lawyer. If the case
24 lawyer is of the view, regardless of the view taken by the
25 trial prosecutor, that there are no reasonable prospects of
26 success, there is consultation with the victims and I am
27 talking here about offences where there are victims. There
28 is also consultation with investigating police. A formal
29 written memorandum or note will be written to the principal
30 crown prosecutor for endorsement through the trial lawyer,
31 with the trial lawyer adding handwritten notes or their own
32 document outlining their views.

33
34 The principal crown prosecutors - and bear in mind in
35 my State my furthest reaching office is 1,800 kilometres
36 away from me - are all encouraged, if they have any
37 concerns, to discuss at their peer level about the matters
38 and to come to the directorate, myself, my deputy, or the
39 executive director who is also a crown prosecutor, as the
40 position is at the moment, through a process of discussion.

41
42 If I have any concerns about the matter I will either
43 form my own committee from senior lawyers within the office
44 and our body of consultant crown prosecutors sits outside
45 the chamber structure. Alternatively, I may take the view
46 that if I'm having doubts about whether there's reasonable
47 prospects, depending on the views of the victim which are

1 recorded in the material, that it may simply be a case that
2 it is a jury question as well.

3
4 There is very much a focus on not relying just on the
5 written material, but that provides a record, but there is
6 to be discussion because I think we pick up a lot of
7 nuances through the discussion that aren't apparent in the
8 written material.

9
10 THE CHAIR: Are you talking about discussions within
11 your --

12
13 MR BYRNE: With the case lawyer, the trial lawyer, the
14 principal crown prosecutor.

15
16 THE CHAIR: It is, effectively, mirroring what Daryl is
17 saying in Tasmania.

18
19 MR BYRNE: It is a slightly different twist on it, but
20 yes. It is not uncommon in Brisbane that I'll have all of
21 them sitting in my office. If I'm dealing with the
22 regional office I will telephone or in more recent times
23 I've caught up to the 21st century and skyping so that we
24 have face to face, so there is that communication that goes
25 on.

26
27 As a result of these hearings over a number of months
28 now, it has become apparent to me that we haven't been
29 giving our victims enough notice of what they can do. My
30 experience, however, is that our staff across the whole
31 State have developed far more of a victim focus than they
32 had back in the time of case study 15, and that where they
33 perceive that there remains real discontent, they are
34 willing to tell them, "You can speak to my Principal Crown
35 Prosecutor", or the Principal Crown Prosecutor might be
36 saying, "I will be speaking to the director or deputy
37 director, can you give me a phone number in case we need to
38 chat", or something like that. I find myself speaking with
39 victims as part of the decision-making process, both before
40 and after, I should say.

41
42 THE CHAIR: And I would assume they welcome it?

43
44 MR BYRNE: Well, if I'm speaking with them they do.
45 Sometimes --

46
47 THE CHAIR: The message isn't necessarily welcome, but the

1 fact that you talk with them is?
2
3 MR BYRNE: Yes, although there are a number of people, I
4 am told, who, when the offer is made, say "No, I don't want
5 to speak to anybody any more." But the mere fact that I am
6 ringing somebody means they've said, "Yes, I want to have a
7 hearing."
8
9 THE CHAIR: Sure. But the opportunity is made available.
10
11 MR BYRNE: Indeed. That is not all well set out in
12 guidelines at the moment, but they are the practical
13 processes.
14
15 THE CHAIR: And do you accept that it should be in
16 guidelines?
17
18 MR BYRNE: Absolutely, and it will be. But that, along
19 with a number of other things that have come out of the
20 Royal Commission - I have decided that it is better to wait
21 and get an overall product rather than chopping and
22 changing.
23
24 THE CHAIR: Sure.
25
26 MR BYRNE: I should also say that we are part-way through
27 our first process audit. We selected 136 files. We have
28 audited 100. The next 36 won't take too long, and that
29 will be reported to our executive management team
30
31 THE CHAIR: Auditing from what point of view?
32
33 MR BYRNE: It has been an internal audit as to process,
34 whether that has been followed. We've adopted the view
35 that the initial audit should be done wholly within the
36 chambers, so the Principal Crown Prosecutor for that
37 chambers audits as part of an educative process.
38
39 It will be moved out of that completely internal focus
40 maybe after one more - maybe it's two more, but we'll get
41 the education process going. Then it might be audited by
42 Principal Crown Prosecutors from other chambers, it might
43 be somebody else, but it is within the organisation.
44
45 JUSTICE COATE: As to compliance with guidelines?
46
47 MR BYRNE: Yes.

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THE CHAIR: I was going to come to that as my last topic but you have got there ahead of me.

Mark, is there anything you wish to add from the Commonwealth's perspective on this?

MR PEDLEY: Your Honour, similarly - rather than have a committee sort of approach, as Darryl has, we have had a stepped process, whereby the case officer would make a recommendation to the supervisor, then the branch head would look at that. There would not be a decision in the office, a summary decision, that doesn't involve two people. There would not be a decision on indictment that doesn't involve at least 3 and possibly 5 people, in a process.

The sorts of decisions we are talking about are now recorded electronically. So that is kicked off by the case officer who records their views electronically. It goes to their supervisor, then goes to the branch head, then will go to the practice group leader and might go then to the director.

THE CHAIR: And if there is a victim, when does the victim's view come and who do they come before?

MR PEDLEY: Upfront. Our policies require early consultation with the victims.

THE CHAIR: What about when a decision is being made not to go ahead?

MR PEDLEY: That will be explained to them orally and then they will be spoken to by the case officer and sometimes they are spoken to by the witness assistance officer. Particularly if they have a particular concern about the need of the particular person and --

THE CHAIR: But are they spoken to from the point of view of saying, "Is there anything further you want to say?"

MR PEDLEY: Your Honour, probably the Commission has made us reflect on that perhaps we're not doing quite enough in that area, and I think really what we'll be looking at is trying to build in a greater capacity for the victims to take up a right to ask us to reconsider.

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THE CHAIR: All right. Well, can I turn, then, to inspectors and audits. I take it that if I was to suggest that you should all have an independent inspector, I would get fairly unanimous response, would I?

MR McGRATH: Next question.

THE CHAIR: Justice Coate says you would never invite me to your Christmas party.

I think it's the view of the Commissioners, probably given the size of Australian jurisdictions, that that may be an issue in relation to independent inspectors anyway. We don't have a concluded view and we certainly haven't, all six of us, talked about it, but that is an issue that needs to be considered.

But at the heart of the inspectorate, obviously, is an assurance which can be given to the public at large and a reassurance of confidence in your individual organisations that the processes which you have in place are actually being followed. Again, when we look at administrative bodies around our contemporary democratic society, there is almost always some form of review providing an accountability mechanism and public reporting of the results of that review.

I assume everyone would accept that there is a benefit to be had from some formalised process of review, at least from time to time, of the working of your own office. Am I right in thinking that? Does everyone accept that there needs to be, as a proper management tool, some form of review?

(General assent)

THE CHAIR: Yes? Well, then, the question is: what is the best way to do it in the Australian context? Does the Commonwealth do anything in that space at the moment? Does the Auditor-General come in and have a look?

MR PEDLEY: We have an independent audit committee and I've been giving some thought to asking them to audit process, as Michael and Adam have really commenced. I think probably an internal audit process is certainly the best first step for us. Those auditors, they are

1 independent.

2

3 THE CHAIR: When you say independent, just explain?

4

5 MR PEDLEY: So not staff members. They are members
6 appointed by the office, but they report to the director
7 independently.

8

9 THE CHAIR: Where do you get them from? What sort of
10 people are they?

11

12 MR PEDLEY: One is a former deputy solicitor from the
13 State DPP, Robyn Gray. We have a former auditor from the
14 defence department and we have another auditor from another
15 senior government department.

16

17 THE CHAIR: Is their report made public?

18

19 MR PEDLEY: Not yet, no.

20

21 THE CHAIR: What does that mean?

22

23 MR PEDLEY: Well, reports to the director, but also the
24 auditor's report is included in our annual report.

25

26 THE CHAIR: So it is made public through the annual
27 report, is it?

28

29 MR PEDLEY: In a summary way, yes.

30

31 THE CHAIR: Right. What is the Northern Territory's
32 position?

33

34 MR USHER: Judge, there is a power under the NT Audit Act,
35 that the Auditor-General NT can come in and look at
36 performance efficiencies.

37

38 We have currently tendered for an external auditor to
39 come in to review our office for efficiencies in relation
40 to budget restrictions, and we've been looking at other DPP
41 offices around the country. We have currently put out for
42 tender there.

43

44 But can I just say that one current Australian
45 initiative that we haven't been talking about here, which
46 is very important in the Northern Territory jurisdiction,
47 I would think, in relation to all offences relating to

1 sexual assault, is the national strategy on domestic and
2 family violence. That has changed the landscape completely
3 in our jurisdiction in the last one to two years.

4
5 The number of our matters that we discontinue has
6 dramatically reduced. There's so much focus now on the
7 victim, the victim's rights, leaving matters to the jury,
8 matters of credibility, not looking at the victim himself
9 or herself. It's a changed environment. In relation to
10 that our practices have changed dramatically. We are now
11 moving towards White Ribbon accreditation. We are involved
12 in a lot of other bodies nationally and also in our own
13 jurisdiction.

14
15 That has also led to our internal review from an
16 external auditor. We are currently looking at KPMG and
17 some of the other large audit organisations to do that, as
18 well as the gentleman who conducted the recent DPP office
19 review in Queensland.

20
21 THE CHAIR: And would you envisage making the report
22 available publicly?

23
24 MR USHER: Yes. Oh - I shouldn't commit to that. It
25 depends. The terms of reference are there. It may be that
26 perhaps not all matters, but some matters, yes.

27
28 THE CHAIR: There may be sensitivities, but the question
29 is are you prepared to accept that the public should know
30 when you have done wrong in the minds of the auditor?

31
32 MR USHER: Definitely. We pride ourselves on transparency
33 and accountability. So we should continue that.

34
35 THE CHAIR: Victoria?

36
37 MR CHAMPION: It seemed to me that there were two
38 distinctions in what we are talking about here. If we're
39 talking about a form of inspectorate general or chief
40 inspector as they have in the UK, it seems to me that that
41 is quintessentially a government policy decision and it
42 would be difficult for me to comment about that. If that's
43 what government imposes upon us, then that's what they do.

44
45 THE CHAIR: But do you think it would be a good idea?

46
47 MR CHAMPION: Whether it is that or whether it is a form

1 of internal audit committee - if it was an internal audit
2 committee, of course, that's something internal to the
3 organisation that we could bring about without government
4 involvement.

5
6 THE CHAIR: Of course, that's where they started in
7 England and then they recognised the need for independence.
8 As I said, I think it has two advantages: one, for you, in
9 managing the organisation; but, secondly, public confidence
10 in the operation of the organisation.

11
12 MR CHAMPION: It is difficult for me to say whether it
13 would be a good idea or not. I really haven't got a fixed
14 view about it. We certainly have discussed at some length
15 within our organisation the prospect of an internal audit a
16 little similar to South Australia and what they are
17 proposing and what they have started. So I think the best
18 I can say is that we've at least started to talk about the
19 topic within our organisation, given the work of the
20 Commission.

21
22 THE CHAIR: And would you see an internal auditor
23 nevertheless making that report publicly available?
24

25 MR CHAMPION: I wouldn't see a difficulty with that.
26 That's something that could be made available in the annual
27 report.
28

29 THE CHAIR: Yes. And the West?
30

31 MR McGRATH: My preference would be an internal audit
32 process similar to what has been described in Queensland
33 and South Australia. We are subject to the Auditor-General
34 who could undertake review, but it is more likely to be an
35 internal review.
36

37 We have an audit committee but that does not, at this
38 stage, engage in the audit of files, but that's something
39 that could be expanded and I would consider doing that.
40 And it would be done similar to what Michael Byrne said,
41 about examining a certain percentage of files to see
42 whether there was compliance.
43

44 As to publication, the compliance could be recorded as
45 part of the annual report.
46

47 THE CHAIR: Jon White, I haven't engaged you all day, but

1 you have been listening no doubt. You are smaller,
2 I assume, than Tasmania in all of this. What are your
3 processes at the moment in relation to victims and then
4 what do you think about any review process?

5
6 MR WHITE: Well, we are based on, I suppose, early
7 engagement with complainants. I will confine myself to
8 sexual offence matters. A case officer makes early
9 engagement with a complainant and a witness assistance
10 officer is appointed. I suppose if there is a question of
11 a no bill or discontinuance, then in the first instance,
12 the case officer will discuss that with the complainant and
13 also seek the views of the informant, and then do a report
14 to the head of the Sexual Offences Unit, who will then pass
15 it on to me and I will make the decision, or the decision
16 is made at a senior level by my deputy or assistant or me.

17
18 So a small office, a flat structure, but it does have
19 some elements of the Tasmanian system in the sense that
20 more than one or two people have looked at it and there is
21 engagement with the complainant. And I would engage with
22 complainants, and occasionally do, if there is some point
23 to it or I get a sense that that would be useful.
24 Sometimes I send it back for further engagement with
25 a complainant.

26
27 THE CHAIR: And do you have any published material that
28 enables the complainant to know how you are operating?

29
30 MR WHITE: We don't and we are developing that, along,
31 I think, the lines of South Australia and Queensland, as
32 a basis for allowing an internal audit. So we do have
33 internal processes which are written down. At this stage,
34 they are not published, but I think they should be and they
35 will be.

36
37 THE CHAIR: You might talk to Tasmania about that.

38
39 MR WHITE: The most important thing is, of course, that
40 the victim knows what they can do.

41
42 THE CHAIR: Absolutely.

43
44 MR WHITE: And what their position is. I think,
45 mentioning something that Greg said earlier, we make
46 decisions which are very often unpalatable. I've never
47 found a difficulty with the acceptance of the decision, as

1 distinct from agreement with the decision by the victim.
2 So I think if victims feel that their views are being taken
3 into account and they have received an explanation, then
4 they will accept the decision, and I think they see the
5 point in having an independent DPP that takes into account
6 a range of views. I mean, one thing that hasn't been
7 mentioned today is that we are not simply trying to reflect
8 the victim's views in making decisions; we are reflecting
9 a whole lot of other views, taking into account the rights
10 and considerations of the accused, et cetera. I think if
11 that is properly explained to victims, they do understand
12 why it is necessary for the DPP to make the decisions that
13 they make and for that to be an independent decision. So
14 it seems that if there is proper communication there is
15 a great degree of acceptance of that.

16
17 THE CHAIR: Is your office audited at the moment?

18
19 MR WHITE: It would be liable to be audited by the
20 Auditor-General but, in practice, that would be very
21 unusual. It might come around once every seven years.

22
23 THE CHAIR: Would that be an audit of process.

24
25 MR WHITE: It would be an audit of process. But I see
26 some considerable merit in identifying with great
27 particularity what the process is and having an internal
28 audit of that and publishing it in the annual report. We
29 publish other performance indicators in our annual report,
30 so I can't see why we shouldn't publish the degree to which
31 we comply with our own guidelines concerning consultation
32 with the victims and the process of discontinuing matters.

33
34 THE CHAIR: Darryl?

35
36 MR COATES: Likewise, I can see the merits in having an
37 internal --

38
39 THE CHAIR: You don't want an inspector, I assume?

40
41 MR COATES: I beg your pardon?

42
43 THE CHAIR: You don't want an inspector?

44
45 MR COATES: No. I suppose that's really not a matter for
46 me, anyway. It is a matter for government and I can't
47 speak for them. Although, I would say in small

1 jurisdictions like Tasmania and the ACT you have financial
2 problems and also expertise problems.

3
4 THE CHAIR: We're mindful of those issues. That's plain.
5 Yes. But internal audit with a public reporting?

6
7 MR COATES: Yes and, in fact, the previous director and
8 the Deputy Commissioner of Police did an audit on the
9 discharges a couple of years ago and that was published in
10 the annual report.

11
12 The other thing is we report on the number of
13 discharges in our annual report that we make every year.
14 I haven't done an historic analysis of it, but I did look
15 at the last year, and our discharges for sexual assaults
16 was less than our general discharge, which is probably
17 reflective of our early engagement in those offences, those
18 types of offences.

19
20 THE CHAIR: Is it the experience of everyone, as it is in
21 the Northern Territory, that the number of cases going
22 through to prosecution in the sexual assault window has
23 increased?

24
25 (General assent)

26
27 THE CHAIR: Yes. South Australia, I think we understand
28 your position, that you don't want any external inspector.

29
30 MR KIMBER: No, but I do have an open mind about once we
31 have run our audit once and we have actually refined the
32 process and learnt from it - by "learnt from it" I mean
33 learnt about the process and the best way to do it, not the
34 results; I mean, they are important for other reasons -
35 I actually have an open mind about at least having on the
36 committee an external person, and I'm certainly of the
37 view, like Jon, that we publish in the annual report all
38 sorts of performance indicators - conviction rates, other
39 relevant indicators, and also victim satisfaction rates,
40 because we run a survey in that space - I can't see any
41 good reason why we wouldn't publish the key findings of the
42 audit process.

43
44 THE CHAIR: Michael?

45
46 MR BYRNE: As to the involvement of an external --
47

1 THE CHAIR: Inspector.
2
3 MR BYRNE: Well, an inspector, no, I would prefer not to
4 have in the space. I have an open mind, much the same as
5 Adam, about bringing somebody else external in to a process
6 once we have developed our audit and seen what it has
7 looked like and what the shape is. But as I sit here now,
8 I don't see the need at the moment, but my mind may well
9 change.
10
11 THE CHAIR: It would be a public confidence issue if you
12 had it.
13
14 MR BYRNE: Well, part of the public confidence issue, to
15 my mind, is resolved by the publication of the results. If
16 you are publishing results that show that you have
17 a 99.9 per cent compliance across every indicator, there is
18 a cause for concern and there isn't going to be much
19 confidence in that.
20
21 THE CHAIR: No.
22
23 MR BYRNE: If they are realistic figures and they are
24 obviously realistic figures, there is some confidence that
25 goes with that in the mere reading of them.
26
27 THE CHAIR: Mmm.
28
29 MR BYRNE: Flowing from that, I've always been of the view
30 that we would be publishing, probably through the annual
31 report, the results.
32
33 I should also say that we are admittedly in early
34 stages, but our executive has resolved to adopt something
35 of a victim satisfaction survey that South Australia does.
36 We are looking at different ways of conducting that,
37 probably predominantly online so that there is a better
38 take-up. Those results would be published, I would expect.
39
40 THE CHAIR: Kara, either your own views or if there is
41 anyone behind you, but I'm sure those behind you - I can
42 only see one of them - know that we have been talking to
43 the director about these issues. I think his mind is
44 moving similarly to South Australia and Queensland. Please
45 come forward and tell everyone your name.
46
47 MR HYLAND: I am Craig Hyland, Solicitor for Public

1 Prosecutions, New South Wales. When we met with you last
2 Friday the Director of Public Prosecutions indicated to you
3 that the nature of audit in New South Wales was changing
4 and that there were different legislative obligations on
5 us. We undertook at that stage, from recollection, to
6 provide Ms Sanderson some details of that, but,
7 essentially, that means that every member on the audit
8 committee is an external member, they are not internal
9 members.

10
11 Currently, we have a mix of both. We have conducted
12 random audits around the State and we are having our
13 methodology reviewed by auditors in relation to how we've
14 done that.

15
16 The other thing we mentioned was that there was
17 a performance audit in 2008 by the Auditor-General, and
18 that report was published. That, to some extent, went into
19 processes and systems and made certain recommendations.

20
21 As far as publication, I think the director's view was
22 that he didn't have real difficulty with that.

23
24 THE CHAIR: Yes. Now, is there anyone else that I have
25 missed who has a view about the issue of an inspector and
26 an auditor, particularly from the victims' side of things?

27
28 COMMISSIONER DAVIES: Your Honour, if I could just say,
29 looking at the English model that we saw this morning, and
30 if I can refer to my notes - they were taken at the time,
31 your Honour - they don't review matters that can't be
32 remedied; they make recommendations that can't be enforced;
33 and can take up to six to eight months to complete their
34 review or inquiry and respond to the complainant, and if
35 the complaint is upheld they apologise and say, "We will
36 try to make sure it doesn't happen again".

37
38 So there are a lot of bureaucrats there and a lot of
39 cost to the taxpayer, of whom victims are part of that
40 group, of course. They all said they thought they were
41 doing a jolly good job and then pointed out the fatal flaws
42 in their system. So I'm not a huge fan of that process.

43
44 THE CHAIR: Of an inspectorate?

45
46 COMMISSIONER DAVIES: Yes. In relation to victims I don't
47 know that that delivers a whole lot to them.

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THE CHAIR: Except that they would say it has improved the administration of the office as a whole, which must be of benefit to victims. That's what they would say.

COMMISSIONER DAVIES: Well, in my humble opinion, I think they might say that with a number of systems that perhaps wouldn't be as cumbersome and take so long to deliver anything and cost so much.

THE CHAIR: Yes. Well, you heard the inspector saying that he wants to speed up the process. But, equally, you heard him say - and indeed, the head of the service say - they get, as it were, forewarned of what is coming in a public report and respond. Now, many would say that's not a bad thing either. In other words, there are benefits to the running of the office that will ultimately be of benefit to people that you engage with every day.

COMMISSIONER DAVIES: Yes, I understand and accept that, your Honour. But he also said that it wasn't his job to make the organisation better: his job was to write reports so other people might be able to use them to see if they could make the organisation better.

THE CHAIR: That's because he didn't have the power to implement them.

COMMISSIONER DAVIES: I understand that, but that's an indication of the cumbersome nature of it.

COMMISSIONER KRISHNA: I think what victims normally want is transparency and accountability, and it doesn't necessarily have to come from an inspectorate, but there has to be just some sort of audit or review system in place. We don't want to make another huge bureaucratic or cumbersome process, as Greg has been pointing out, but we need some sort of oversight mechanism that can give confidence to the public and to victims in relation to the decisions that are being made.

COMMISSIONER DAVIES: And I think, on that, if there is some body put in place somewhere - "body" as in organisation - that is going to make recommendations about improvements, there would perhaps need to be some level of enforceability so that people couldn't just thumb their noses and say, "Thank you for your interest", and we all

1 move on. There doesn't seem much point in that, to me.
2 And we did hear that they regularly say, "Well, thank you
3 for your recommendation. We're not going to adopt that."
4

5 COMMISSIONER O'CONNELL: Could I just add three points.
6 The first is that there aren't any declarations on victims'
7 rights in Australia where there is a mandatory obligation
8 to tell victims that they actually have entitlements. Most
9 victims' rights are actually written quite passively. So
10 bearing that in mind I do have to, in all fairness, say
11 that I am warmed and heartened by the approach taken by all
12 directors here today in indicating their willingness to
13 accept obligations that are actually mandatory in law -
14 although I would argue that they should be.
15

16 The second is that in the UK, if there is a process of
17 grievance in place and it does aggrieve the victim even
18 further, they can, through a referral, go to the
19 Parliamentary Ombudsman and the Parliamentary Ombudsman can
20 then order a consolatory payment be made by that agency for
21 the additional harm that they cause as a consequence of
22 their slowness or their failure to comply with their own
23 procedures and processes.
24

25 So there is a remedy available, but it actually
26 politicises the process because you have to go to your
27 local Member of Parliament to get the referral to the
28 Parliamentary Ombudsman. But they did observe this
29 morning, one of those agencies, that there is a right of
30 consolatory payment as one of the remedies that existed.
31 I'm not arguing necessarily that that should be the case,
32 but I am arguing for enforceable rights in some way.
33

34 The third matter is to return to a point that you made
35 about children and people with disability. Could I just
36 draw attention to section 32A of our Victims of Crime Act,
37 which does allow the Commissioner for Victims' Rights in
38 South Australia, or his or her nominee, including legal
39 counsel, to exercise any right that a victim might have on
40 their behalf, and that was introduced as a result of
41 parliament grappling with the issue of, in particular,
42 children and people with disability.
43

44 THE CHAIR: Well, then, is there anything else that anyone
45 wants to say? Mark, you have sat there patiently all
46 afternoon.
47

1 PROF ARONSON: With interest.
2
3 THE CHAIR: I hope so.
4
5 MR PEDLEY: Your Honour, could I raise one point? It is
6 about communication with victims. I think it is very hard
7 to communicate with victims - obviously they are stressed.
8 There is just an idea - I think it has come from Lloyd
9 Babb's office - is there some best practice or could the
10 Commission help us with identifying what would really be of
11 assistance in communicating with victims in terms of
12 conveying material to them? I know we are pretty much
13 along the lines that oral communication is best, followed
14 up by writing, but is there a best practice about how you
15 do communicate in a way with victims to get information
16 across --
17
18 THE CHAIR: Thank you for raising that. There are two
19 issues, really: when do you engage with a victim and, as
20 part of that, how often; and, secondly, as you say, how do
21 you go about it? It's fairly clear that there is a common
22 view that there has to be a face-to-face communication, if
23 the victim wants it. That is I think a fairly clear
24 position. I also think it is probably fairly clear that
25 there needs to be a written document as well, for a number
26 of reasons, not the least of which was raised I think by
27 Kara, wasn't it, and that is that it removes the capacity
28 for the victim further down the track to have misunderstood
29 or to not have appreciated what was actually being said,
30 because they have it in a document. But, yes, we will take
31 that on board, thank you.
32
33 COMMISSIONER O'CONNELL: Could I just add on that point,
34 as the co-chair of the National Victims of Crime Working
35 Group, which reports to Australia's Attorneys General, that
36 there is actually a national framework that was developed
37 in 2013, which is going to be considered out of session by
38 the Attorneys General and the Chief Executives of Justice,
39 and that framework includes a set of guidelines on how to
40 deal with complaints from victims of crime as a set of
41 basic principles.
42
43 THE CHAIR: Is that a draft?
44
45 COMMISSIONER O'CONNELL: That's the draft, which you are
46 welcome to.
47

1 THE CHAIR: Is it embargoed?
2
3 COMMISSIONER O'CONNELL: No, no. Well, I'm co-chair,
4 Mahashini is co-chair - we will give it to you.
5
6 JUSTICE COATE: And appropriate forms of communication?
7
8 COMMISSIONER O'CONNELL: Yes. Just very, very briefly, in
9 2008 the Federal Government said they were going to develop
10 a federal charter on victims' rights and develop a national
11 victims' assistance scheme, all driven by Bob Debus, the
12 former New South Wales Attorney, and when he left the
13 Commonwealth withdrew from that, argued that they don't
14 deal with victims generally and that it should be a State
15 responsibility.
16
17 So the States have taken over the responsibility of
18 running the national working group and we were tasked with
19 developing a set of guidelines for exchange of information,
20 a set of guidelines on how we refer complaints from one
21 jurisdiction to another, and that is what underpins those
22 guidelines, by way of a protocol, and each State now has
23 a nominated person to receive complaints, receive referrals
24 for victim assistance in that jurisdiction.
25
26 In South Australia that's me and in the ACT it's Jon.
27 For reasons I cannot explain, the Attorneys-General signed
28 and endorsed it but it is quite obvious, from the looks
29 around here, that no-one knows that it exists, but it does
30 and it has been in place for three years, governing the way
31 victims should be treated across Australia.
32
33 MR USHER: Flowing from that, there's Commonwealth funding
34 that has been allocated to a group in Alice Springs to
35 develop a guide for prosecutors on how to deal with victims
36 of crime in a family domestic violence situation, which
37 extends to sexual assault. It is quite large, it's in
38 draft at this point, but two chapters are specific to
39 prosecutors. They deal with legislative reforms on a
40 national and jurisdictional basis and also deal with
41 practicalities of how to deal with victims of crimes in
42 that context. It is currently in draft form but once
43 that's published, that's Commonwealth money, so that can be
44 distributed.
45
46 THE CHAIR: When it that due to be published?
47

1 MR USHER: It is only in draft. I am not sure what the
2 reporting cut-off is.

3
4 MS DE CICCICO: Could I add to the welter of reports. Our
5 Victorian Law Reform Commission, which does have a
6 definitive reporting date of 1 December of this year, is
7 doing quite a broad victims in the criminal justice
8 proceedings and I think we have sent you some of the
9 material before and they have released quite a detailed
10 discussion paper and it does cover the role of victims in
11 the decision to prosecute and the role of the victims in
12 the criminal trial itself, amongst a range of other things,
13 the role of the victim. That will certainly inform
14 Victoria's thinking, but it may be of help to others as
15 well.

16
17 THE CHAIR: Thank you very much.

18
19 COMMISSIONER O'CONNELL: Could I make one other point and
20 that is that I would ask the Commission to give some
21 consideration to vicarious trauma as well. We are actually
22 often asking lawyers, lawyer trained people, to work with
23 very highly emotional people and engage with them hour
24 after hour after hour and there's very little that is done
25 to tackle that very issue for those people and then you
26 can't really blame them if they make ineffective and
27 inappropriate decisions if they haven't attended to their
28 rehabilitation as well.

29
30 THE CHAIR: No, that's true, but you've stepped into
31 another space altogether which is, of course, the family of
32 the victim and there's a real issue there about their
33 trauma and how that is managed as well and that can be
34 quite significant.

35
36 COMMISSIONER O'CONNELL: Yes.

37
38 THE CHAIR: Are we all done? Can I again thank you all
39 for coming and giving us your time. I have now chaired,
40 I don't know, multiple roundtables about different subjects
41 and I've had the same sense today as we've had in every
42 roundtable and that is of people who have come to help us
43 by making a significant and positive contribution, but
44 furthermore, we all end up as good friends at the end of
45 the day and that's very valuable to us.

46
47 I trust that we will be able to provide you with a

1 report in due course, which will assist all of you, in the
2 way that we can, to best manage your offices going forward,
3 but again, thank you for your time.
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5 AT 4.06PM THE PUBLIC ROUNDTABLE WAS ADJOURNED ACCORDINGLY
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