4 The Prosecution

Introduction

4.1 Our terms of reference invite us to address "the arrangements for the organisation and supervision of the prosecution process, and for safeguarding its independence".

4.2 In this chapter we consider whether in Northern Ireland the police should continue to prosecute the majority of cases heard in the magistrates' courts, with the Director of Public Prosecutions being responsible for the more serious cases at that level and for all prosecutions in the Crown Court, or whether an independent prosecuting authority should be responsible for all criminal prosecutions. We look at the point in a case prior to a decision to prosecute when an independent prosecutor could become involved and the nature of any such involvement, for example whether it should be supervisory or advisory in relation to the police. The relationship between the investigative and prosecution processes is also examined.

4.3 We examine the nature of prosecutorial discretion and the grounds on which it might be exercised, including the extent to which a prosecutor might have a role in diverting offenders away from the court process. We also address accountability, including the relationship between the prosecutor and the executive arm of government, and how it can be reconciled with the concept of independence.

4.4 Prosecution is pivotal in the criminal justice system. It is the gateway through which cases are brought to court following investigation by the police or other investigative agency. We concur with the view of the Director of Public Prosecutions that the independence of the prosecution function stands at the heart of the rule of law. In a common law environment the prosecutor stands between the state and the individual and it is critical therefore that the prosecuting authority is independent from the executive. That theme will run through our recommendations in this area.

4.5 Public confidence demands that decisions on whether to prosecute are taken in a fair, objective and consistent manner, taking account of the likelihood of securing a conviction and any public interest considerations. Just as people need to be confident that cases are prosecuted firmly, fairly and competently, in a wholly impartial manner, so it is also important

that decisions to prosecute are not taken lightly. The very act of bringing a prosecution against an individual, even for a relatively minor offence and followed by discontinuance or acquittal, is liable to cause distress and damage to reputation.

Human Rights Background

4.6 The arrangements for prosecuting offences differ widely in jurisdictions around the world, reflecting differing legal systems and cultures. There is therefore no one template to draw from. Research carried out for the Review[1] notes that while few international human rights instruments deal specifically with the prosecution, the prosecutorial authorities have an important role to play in relation to a range of human rights issues at the pre-trial stages. These include ensuring that detained suspects are promptly brought before a judicial authority and that the trial takes place within a reasonable time,[2] together with provisions in support of the requirement for a fair trial with due regard to the rights of the defence.[3] Also, as an independent body having early contact with the police investigative process, the prosecuting authority can have a role in assessing the adequacy of investigations into criminal violations of human rights and in identifying and acting upon any misconduct by the investigators.[4]

4.7 We did pay particular attention to the *UN Guidelines on the Role of Prosecutors* and the *Standards and Statement of Essential Duties and Rights of Prosecutors* adopted by the International Association of Prosecutors (IAP). While not a human rights instrument as such, the IAP Standards are clearly heavily influenced by the UN Guidelines and were produced with full regard to the human rights context.

4.8 The UN Guidelines and IAP Standards recognise the importance of the prosecutor being in a position objectively to assess the evidence before deciding whether to prosecute. They require that prosecutions should not be initiated, or should be discontinued, if the evidence shows charges to be unfounded, while the IAP Standards (Article 4.2d) provide that a case should be proceeded with only when it is well founded upon evidence reasonably believed to be reliable and admissible. Where there is a reasonable belief that evidence is obtained unlawfully, especially if a suspect's human rights are violated, it is not to be deployed and the prosecutor is enjoined to take steps to ensure that those responsible are brought to justice (UN Guideline 16 and IAP Standards 4.3(g) and 4.3(h)). Prosecutors are expected to give due attention to the prosecution of crimes committed by public officials, especially where violations of human rights are involved (UN Guideline 15).

1 Livingstone and Doak, Research Report 14, section 4.2.

2 ECHR Article 5(3), ICCPR Article 9(3), BOP Principle 37, CRC Article 37(d).

3 ECHR Article 6(1) and 6(3), ICCPR Articles 14(1) and 14(3).

4 ECHR Articles 2(2), 3, ICCPR Articles 6(1) and 7, UNDHR Articles 3 and 5, UNCAT Article 15.

4.9 The Guidelines and Standards give an indication of the contribution to be made by the prosecutor in support of the fair trial and minimum defendants' rights requirements of the European Convention and the International Covenant on Civil and Political Rights. UN Guideline 13b provides that prosecutors should "take account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect". The IAP Standards talk of seeking "to ensure that all necessary and reasonable enquiries are made and, in accordance with the law or the requirements of a fair trial, the result disclosed, whether that points towards the guilt or innocence of the suspect" (IAP Standard 3.1e).

4.10 The Guidelines and Standards encourage prosecutors to consider action to divert appropriate cases away from the formal criminal justice system, especially where juveniles are involved. But they stress that this should be addressed in accordance with national law, with full respect for the rights of suspects and victims. Prosecutors are required in all that they do to consider and take account of the views and concerns of victims and to keep them informed (UN Guidelines 17 and 18, IAP Standard 4.3(i)), in accordance with the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

4.11 Impartiality, fairness and objectivity are themes that recur frequently in these instruments and which can only be safeguarded if prosecutors are enabled to act with independence. UN Guideline 4 places a duty on states to ensure that the prosecution can act "without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability". They and the IAP Standards also recognise the importance of conditions of service, remuneration and tenure being organised in a way that reinforces independence. The Standards say that prosecutors should "remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest". They refer to prosecutorial discretion being exercised independently and free from political interference.

4.12 In stressing the importance of independence, the Standards recognise that non-prosecutorial authorities may have the right to issue general or specific instructions to prosecutors – in that event such instructions should be transparent, lawful and within established guidelines drawn up to safeguard the prosecutor's independence. Similar strictures apply where there is provision for prosecutors to be instructed by another authority on whether to proceed with or discontinue individual cases, although it is stressed that this should be exceptional.

4.13 In highlighting the importance of independence, that does not imply isolation or detachment from the rest of society or other criminal justice agencies. UN Guideline 19 and IAP Standard 5 view co-operation with the police, the courts, the legal profession and other government agencies as necessary in order to ensure fairness and effectiveness.

4.14 We have taken the principles enunciated in these human rights instruments and the IAP's Statement of Professional Standards into full account when addressing prosecution arrangements in Northern Ireland.

The Structure and Organisation of the Prosecution Process

BACKGROUND TO CURRENT ARRANGEMENTS

4.15 The Office of Director of Public Prosecutions was created by the Prosecution of Offences (Northern Ireland) Order 1972. This Order, made at the outset of Direct Rule, has its origins in the Hunt Report,[5] which called into question the practice of the police undertaking almost all prosecutions (98%) in the magistrates' courts (the police also conducted the bulk of committal proceedings for cases going on to the higher courts). It did so on the ground that the impartiality of the police might be questioned if they were to investigate, decide who was to be prosecuted and then conduct cases in court; there was also concern about the impression given of an over-close relationship between the police and the courts. In the light of this, Hunt called for consideration to be given to the establishment of an independent prosecution service along the lines of the Scottish procurators fiscal.

4.16 Following Hunt, a Working Party on Public Prosecutions was established under the chairmanship of the (then) Hon J C MacDermott (subsequently to become Lord Justice MacDermott) to examine whether the Scottish system should be adopted for summary prosecutions in Northern Ireland. The MacDermott Report,[6] while focusing on summary trials, noted the use of part-time Crown Solicitors, appointed by the Attorney General, in Assize and Quarter Session cases. It adopted the view of the Royal Commission on the Police in 1962 that "it is undesirable that police officers appear as prosecutors except for minor cases. In particular we deplore the regular employment of the same police officers as advocates for the prosecution. Anything which tends to suggest to the public mind the suspicion of alliance between the police and the court cannot but be prejudicial".[7] The Working Party was also influenced by the burden which court work placed on the police, diverting them from their mainstream duties, but made clear their view that the police had carried out this role with complete integrity and competence.

5 *Report of the Advisory Committee on Police in Northern Ireland* (1969), Belfast: HMSO Cmnd 535.

6 *Report of the Working Party on Public Prosecutions* (1971), Belfast: HMSO, Cmnd 554.

7 Cmnd 1728, paragraph 381.

4.17 In the event the MacDermott Working Party did not recommend adoption of the Scottish system (on the ground that grafting it onto a completely different system of criminal jurisprudence would not work) and came to the view that it would be a retrograde step if "trifling" cases could not be processed through the courts expeditiously by the police. However, it did reach the conclusion that, as a matter of general principle, prosecutions should be conducted by public prosecutors, independent of the investigating process and of political influence. It recommended the establishment of a Department of Public Prosecutions, staffed with full-time lawyers that would be responsible for prosecutions brought in all courts, other than minor summary cases.

THE PROSECUTION OF OFFENCES (NORTHERN IRELAND) ORDER 1972

4.18 The Prosecution of Offences Order gives the Director of Public Prosecutions an overview of all prosecutions in Northern Ireland. The Director has a role in ensuring that all prosecutions are carried out properly and he can take over prosecutions being conducted by any other individual or agency. Article 5(1)(c) provides that the Director shall, where he thinks proper, initiate and undertake on behalf of the Crown proceedings for indictable offences (tried in the Crown Court) and for any summary offence or class of summary offence that he considers should be dealt with by him. Article 6(3) of the Order places a corresponding duty on the Chief Constable to inform the Director of indictable offences and any other offences specified by the Director.

4.19 Article 6(3) places a duty on the Chief Constable to respond to a request from the Director for information necessary for the discharge of his functions under the Order and in particular information on "any matter which may appear to the Director to require investigation on the ground that it may involve an offence against the law of Northern Ireland... ". This could be interpreted as giving the DPP the opportunity to ensure that a full and proper investigation has taken place. However, he has emphasised to us that he and his staff have no locus in supervising or participating in police investigations. In practice Article 6(3) is formally invoked on the rare occasions when the facts of an alleged crime are reported directly to the DPP; but it also underpins the routine requests for further information or enquiries frequently made of the police by the Director when considering whether to prosecute. The Order also makes provision for the appointment of the Director and his staff and for the relationship between the Director and the Attorney General, matters which we will address later.

4.20 The Police (Northern Ireland) Act 1998 provides that where, as a result of investigations of a complaint against the police, the Police Ombudsman believes that a criminal offence may have been committed, he or she is required to send the papers to the Director. It also enables the Director to seek further information from the Ombudsman to assist in deciding whether there should be a prosecution.

WHICH CASES ARE PROSECUTED BY THE DPP AND WHICH BY THE RUC?

4.21 Other than indictable only offences (serious offences such as murder, manslaughter, rape and robbery), which must be referred to him, it is for the Director to determine which type of case his Department will take on. The offences which the police are required to refer to the Director for decision on whether to initiate prosecution, and subsequently to prosecute in court, are listed in Appendix 5D to the RUC Manual. In addition to indictable only offences, those requiring to be referred to the DPP are selected for a variety of reasons including: seriousness; complexity both of substantive law and of evidential issues; political, racial or sectarian sensitivity; the fact that the offences are against children; in some cases the sexual nature of the offences; the fact that the accused is a police officer etc. The DPP keeps the list of cases to be referred to him under review and in recent years has added to it indecent assaults, offences of gross indecency between men and "stalking" offences.

4.22 It remains the case that, while the DPP does prosecute the more serious cases in the magistrates' courts as well as virtually all cases in the Crown Court, the large majority of prosecutions are undertaken by police officers. In 1997 there were 1,128 prosecutions carried out by the DPP in the Crown Court, 7,262 by the DPP in magistrates' courts and 27,209 by the RUC in the magistrates' courts. It is noteworthy that some 20,233 RUC prosecutions were for motoring offences of which 11,093 would be classified as minor (failure to wear a seat belt, excess speed, failure to produce documents etc). Overall, 76% of cases were prosecuted by the police including 79% of those in the magistrates' courts.

4.23 In addition to most road traffic offences, police prosecutions would typically include burglary, theft, assault, some disorder offences, criminal damage, and some offences of indecency. As already pointed out, the decision on whether to prosecute in such cases can have major implications for the parties involved and its significance should not be down-played simply because the offending behaviour is not as serious as in those cases where the DPP is involved.

CHARGE OR SUMMONS?

4.24 Defendants may be proceeded against by way of charge or summons. This is the case whether they are prosecuted by the police or by the DPP, and whether they are tried summarily in a magistrates' court or on indictment in the Crown Court. A suspect may be charged at any point in the investigation, often but not invariably following arrest by the police. At this stage he or she is subject to a "holding charge" which may be revised once the investigation is complete and at the point where it is decided to prosecute.

4.25 A summons to appear in court, normally deployed in less serious cases, is sought after the investigation is complete and it has been decided to proceed. The summons is presented by

the police to a justice of the peace (or a clerk of petty sessions) who exercises judicial discretion in determining whether to sign or refuse it. It is then usually served at the defendant's usual or last known home address a reasonable time before the court hearing. Service of summonses by post has been piloted and consideration is being given to extending this practice more widely.

PROSECUTIONS CONDUCTED BY THE POLICE

4.26 The opening of Central Process Offices (CPOs) in Armagh and Londonderry in January 2000 completes a process of change through which all police prosecutions throughout Northern Ireland are the responsibility of such offices. Under these arrangements, the investigating officer passes the completed file through his or her line manager to the sub-divisional commander (SDC). The SDC, or an officer not below the rank of inspector to whom he or she has delegated the responsibility, then has the options of taking no further action, authorising a caution or recommending prosecution to the CPO. At the CPO, police inspectors dedicated to the task, using specific criteria, determine whether to prosecute and the terms of a summons (or whether to amend the holding charge). The prosecution is then conducted by an inspector from the CPO.

4.27 If the inspector does not believe that a case for prosecution is made, he or she must refer it to the chief inspector in command of the CPO or his deputy. Only they can direct "no prosecution". It is open to them to consult with the DPP's Department. The criteria used by the CPO in determining whether to prosecute are set out in a Force Order and mirror the evidential and public interest tests used by the DPP. However, in the course of discussions with the police we did gain the impression that the application of such criteria by police officers might not always be as rigorous as would be the case if carried out by trained lawyers within the Department of the DPP. The accountability arrangements for the RUC, while extensive, do not focus on their role as prosecutors and publicly available information about this part of their work is limited.

4.28 Prior to the introduction of CPOs, police prosecutions were carried out by local sub-divisional process offices. Under these arrangements an investigating officer would submit a prosecution file, through his line manager, to the sub-divisional commander or a designated officer not below the rank of inspector who assessed the evidence and directed prosecution or no prosecution. In the event of a prosecution, the case was presented by the local duty inspector.

4.29 Replacing these local arrangements with the CPO structure should promote objectivity and consistency in decision making. It should also encourage the development within the police of a body of expertise in this area, while providing some degree of structural separation of the prosecutorial and investigative processes. However, it is too soon to evaluate the impact of

this change. At the time of writing it was estimated that around 25 to 30 police officers of inspector or chief inspector rank, seven sergeants and 80 to 90 administrative support staff would be employed in the CPOs, once they were fully operational throughout Northern Ireland.

PROSECUTIONS CONDUCTED BY THE DIRECTOR OF PUBLIC PROSECUTIONS

4.30 In addition to the Director and his deputy, the Department of the DPP consists of 41 lawyers and 114 support staff. The DPP's staff work under the supervision of a Senior Assistant Director and six Assistant Directors, respectively responsible for the Belfast/Eastern circuit, the Northern/Southern circuit, Belfast Crown Court (which includes scheduled offences), special and complex cases, fraud cases and High Court matters including appeals and judicial review. The Department's offices are located primarily in Belfast, although staff from the Northern/Southern circuit work out of Coleraine and Omagh, each with a complement of eleven staff.

4.31 Decisions as to prosecution may be taken by any of the Director's legally qualified staff. However, there are internal instructions requiring that files of a particular nature, or involving particular offences, be referred upwards for decision, some to the Director or Deputy Director. There are restrictions on the decision making capacity of some members of the professional staff, normally as a result of their grade or because they are not fully trained.

4.32 The DPP adopts a two-step test in determining whether to prosecute. The first requirement is that the evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction, i.e. that a jury (or other tribunal), properly directed in accordance with the law, might reasonably be expected to find proved beyond reasonable doubt that the accused committed the offence in question. The second requirement is that it is in the public interest to prosecute. The Director starts from a presumption that the public interest requires prosecution where there has been a breach of the criminal law, especially when the offence is of a serious nature. However, there are instances when this might not be the case, for example where the defendant is ill or elderly, the offence is technical or is about to be repealed, the offence is stale, or where prosecution would involve disproportionate expense.

4.33 The nature of the decision on prosecution is significant. The DPP is more than a reviewer of a decision to prosecute already taken by the police and formally takes the decision to prosecute or "directs" on cases referred to him. This results in a proactive involvement by the DPP. It is why, when the police charge, it is accepted as a "holding charge" pending direction by the DPP. Other than in the simplest of cases, the police do not purport to charge the accused with all the offences for which he or she might be prosecuted, leaving it to the DPP to determine the exact nature and extent of the charges.

4.34 Where holding charges are preferred in serious cases, the early involvement of a DPP lawyer through a screening process provides an important safeguard to ensure that there is sufficient evidence to warrant the charge and to seek a remand; this happens within one day and before the first court appearance in Belfast, while in other courts for resource reasons it may happen up to a week later. If it is judged that there is insufficient evidence to support the charge then the DPP directs that the charge be withdrawn at the first court appearance.

4.35 Where a DPP case is proceeding by way of summons, the police submit a file to the Director and, unless time limits come into play, only take out a summons after a direction to prosecute has been issued.

4.36 The DPP has no formal involvement in the conduct of police investigations, prior to charge or summons, or between the charge and the submission to him of the police investigation file. It is however open to the police to seek the advice of the DPP's staff in the course of their investigations, especially where it is apparent that complex issues of law or evidence are likely to be involved.

4.37 The Director has provided the police with detailed instructions on what should be included in an investigation file, which is transmitted by the police manually rather than electronically. The DPP will normally await receipt of the complete file before making a decision. Having received the file, in deciding whether or not to prosecute, his staff may consult with the police, victims and witnesses and visit the scene of the crime. Consultation has been found particularly useful in cases where sexual offences are involved, identification is at issue, where the credibility or reliability of witnesses is in question, and in complex fraud cases. The DPP views early contact with victims and witnesses as important, not only in the context of deciding whether to prosecute, but also in pursuance of his Department's policy on victims and witnesses, as a means of reassuring them that their interests are being taken into account.

4.38 The DPP seeks further information from the police before coming to a decision on whether to prosecute in about 30% of cases. While this relatively proactive approach may add to the time taken to process cases at the earlier stages, it is the DPP's view that it improves the quality of decision making and is less likely to result in problems, such as discontinuance, at later stages. This is especially so, given the increasing complexity of cases.

4.39 Once a decision is taken to prosecute, a lawyer on the DPP's staff collates the evidence to be used in summary proceedings, or at committal where the trial is to be conducted on indictment. The DPP instructs independent counsel to conduct cases in the Crown Court and, often, to take business through the magistrates' courts, including summary trials, remand hearings and committals. In the magistrates' courts, both a police prosecutor and a DPP representative may therefore be present at the same time. Were it not for pressure of work, we understand that the Department's own staff would be doing much more of the court business. The DPP's professional staff have rights of audience in the magistrates' courts, county courts and Crown Court.

4.40 We should record that there are increasing workload pressures on the DPP's Department. We have already referred to the extension of the number of cases triable summarily which have to be reported to the DPP. Recently enacted legislation has also had a significant effect. The Criminal Procedure and Investigations Act 1996 came into force in Northern Ireland in January 1998 and has resulted in an as yet unquantifiable increase in legal and administrative work associated with disclosure. The Director has responsibilities under the Proceeds of Crime (Northern Ireland) Order 1996 in applying to the High Court for restraint orders to freeze a defendant's assets prior to a confiscation hearing in the Crown Court. There will also be considerable implications for the DPP, as for other parts of the criminal justice system, arising from the incorporation of the *European Convention on Human Rights*.

SPEED OF PROCESSING CASES

4.41 The DPP and RUC have played their part in efforts to tackle delay in the criminal justice system and are currently implementing new systems to reduce the time taken to bring cases to trial (see Chapter 15). This applies to cases prosecuted by the RUC and to those that are for the DPP. In relation to the latter, there are arrangements for joint case management which were put in place following an analysis, undertaken in 1996/97, of the reasons for delay in processing indictable cases from charge through to committal. The associated report highlighted the problems that could arise if post-investigative preparation of cases was seen as two distinct processes, police file preparation and DPP case file review, and argued that the necessary independence of police and prosecutor would not be compromised by administrative compatibility between them. From comments made to us during our consultations, it is clear that while progress has been made in reducing delay, there remains scope for considerable further improvement.

ACCOUNTABILITY AND THE PROSECUTION PROCESS – CURRENT ARRANGEMENTS

4.42 Both accountability and independence are crucial in relation to the prosecution process, but there are inevitable tensions between them. For example, in what way can a prosecution service be held accountable to a Minister, yet retain its independence? The current position is set out in Article 4 of the Prosecution of Offences (NI) Order 1972, which provides for the appointment of the Director of Public Prosecutions and the deputy DPP by the Attorney General for Northern Ireland. The Director and his deputy may be removed from office by the Attorney on grounds of inability or misbehaviour; their retirement age is 65.

4.43 Under Article 3(2) of the Order, the Director operates under the superintendence and direction of the Attorney General in all matters. Article 5(2) makes him responsible to the

Attorney for the performance of his functions under the Order. This means that in law the Attorney may require that any particular case or class of case should be brought to his attention before any direction is given; and the Attorney could direct that a particular case be prosecuted or not. The prosecution of certain offences, such as those relating to official secrets, explosive substances or corruption, requires the consent of the Attorney General.

4.44 It is clear from the terms of the Order, a piece of legislation drafted during the time of the Stormont Parliament but with significant amendment (in respect of accountability arrangements) made in the early days of direct rule, that it envisaged the DPP operating in the context of a local administration, with a locally appointed Attorney General. However, under direct rule, the Attorney General for England and Wales has also been appointed Attorney General for Northern Ireland; and the Director's line of accountability has therefore been to the Attorney General at Westminster.

4.45 Given the Attorney's position as a member of the Government, his power of "superintendence and direction" could have implications for the essential independence of the Director in carrying out his functions. However, successive Attorneys have placed emphasis on not allowing political considerations to interfere with their position as guardians of the public interest, one aspect of which is their role in relation to prosecutions. The Director has emphasised to us that there has been no political interference in the exercise of his functions by the Attorney General. The classic statement of the constitutional position of the Attorney General in relation to prosecutions was given by Attorney General Sir Hartley Shawcross to the House of Commons in 1951 where he said that:

> "It is the duty of an Attorney General... to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. He may, although I do not think he is obliged to, consult with any of his colleagues in the government, and indeed, as Lord Simon once said, he would in some cases be a fool if he did not... the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision and does not consist, and must not consist, of telling him what the decision ought to be. Responsibility for the eventual decision rests with the Attorney General and he is not to be put, and is not put, under pressure by his colleagues in the matter... it is the Attorney General, applying his judicial mind, who has to be the sole judge of those considerations."

That is the principle to which the Law Officers, both in Northern Ireland and England and Wales, have long adhered when applying considerations of public interest.

4.46 While the Director maintains his independence of action, he does consult the Attorney from time to time on various matters, including difficult or sensitive cases, or cases which give rise to public interest considerations. That ability to consult and seek views from the Law Officer,

if used by both parties with due respect for the need to maintain the Director's independence, is an element of accountability which should enhance the quality of the decision making process. However, we do recognise that significant disquiet has been expressed by groups in Northern Ireland about the possibility of political interference occurring under the current arrangements, especially in relation to a small number of high profile cases. Given the difficulties associated with making public the details of any communication between the DPP and the Attorney on an individual case, there is the scope for speculation which can be damaging to confidence.

4.47 It is for the incumbents of the posts of Attorney General and Director of Public Prosecutions to ensure that this most important and sensitive relationship works in a way that promotes and safeguards the administration of justice. The management of this relationship is an issue which has been addressed in many other common law jurisdictions.

4.48 As a government Minister the Attorney General answers in Parliament for matters falling within his or her own responsibilities. This includes superintendence of the Director of Public Prosecutions for Northern Ireland. Occasionally, the Attorney General will make a statement on a particular prosecution decision if it is properly a matter of great public interest.

4.49 The Prosecution of Offences (Northern Ireland) Order 1972 laid responsibility for funding the DPP's office, staffing it and providing its accommodation on the Ministry for Home Affairs. Since direct rule these functions have been carried out by the Secretary of State for Northern Ireland. This means that the Secretary of State and the Permanent Secretary of the Northern Ireland Office have a proper concern for the expenditure of the Department of the DPP, and internal accountability mechanisms reflect that position. However, the Secretary of State and the Northern Ireland Office have no locus in relation to the discharge of the Director's prosecution functions. We do not know why responsibility for resource issues was allocated in this way, but it is likely that the size of the Director's Department was not considered sufficient to justify establishing separate finance and personnel functions for it.

4.50 The Director's decisions on whether to prosecute or not are subject to judicial review although, on the basis of a recent House of Lords judgment,[8] decisions to prosecute are amenable to review only when there is dishonesty, bad faith or some other exceptional circumstance. A handful of applications for review of decisions not to prosecute have been made, of which one was successful when a decision not to prosecute for intimidation was sent back for consideration of whether there was a reasonable prospect of conviction for an alternative offence of criminal damage. The Director and his Department constitute a public authority within the terms of section 6 of the Human Rights Act 1998, and as such will be subject to its provisions; it is unlawful for them to act in a way that contravenes a right contained in the European Convention.

8 *R v Director of Public Prosecutions, Ex Parte Kebilene and Others*, House of Lords, 28 October 1999.

4.51 Another aspect of accountability lies in the DPP's relationship with victims of crime in particular, and the public at large, who have a clear interest in the effective prosecution of crime. Opportunities for contact between the Director's Department and the wider community have been inhibited by the existence of a state of civil strife since the inception of the office in 1972. However, there has always been close contact between the Director's Department and victims of crime. Consulting victims in advance of trial can provide reassurance for the victim that all aspects of the case will be fully examined and that their interests will be properly taken into account, and gives the victim the opportunity to raise any concerns about the trial.

4.52 The Director and his staff have been taking steps to build upon and develop the service which they provide to victims. The DPP's circular to staff, *Victims, Witnesses and the Prosecution* (September 1997), provides a statement of what victims and witnesses can expect from the DPP at various stages in the process. Provision of information on the progress of cases is a high priority, as is the matter of special assistance for vulnerable witnesses and victims; and the guidelines say that the position of victims is to be taken into account in addressing the public interest element of decisions on whether to prosecute. In addition, the Director's office has lent valuable support to various inter-agency working groups in the whole area of victim care.

4.53 *Victims, Witnesses and the Prosecution* sets out the Director's policy on the giving of reasons for decisions not to prosecute. Given that this is an aspect of accountability which arouses considerable interest, we reproduce the relevant passage in full:

> "The Director, when giving reasons for decisions as to prosecution, will do so in general terms. The Director will indicate, when requested, whether the decision was based on evidential or public interest considerations. The requirements of justice and fairness militate against giving detailed reasons. If detailed reasons are given in one or more cases, they must be given in all. Otherwise, wrong conclusions will inevitably be drawn in relation to those cases where detailed reasons are not given, resulting either in unjust implications regarding the guilt of the suspect or former accused, or suspicions of malpractice, or both. If, on the other hand, reasons are given in all cases and those reasons are in more than general terms, the unjust consequences are even more obvious. For example, to state that the absence of a particular proof was the sole reason for non-prosecution would amount to conviction without trial in the eyes of the public at large and would deprive the person concerned of the careful public analysis of the evidence that the trial procedure affords."

If a decision is taken at the trial stage to reduce the charge or accept a plea to a lesser offence, then the DPP's guidance requires that the reasons be explained to the victim, if he or she wishes, and that counsel or the DPP's representative should listen to anything which the victim wishes to say.

4.54 In the event of a written complaint being made against his Department in relation to the exercise of its professional functions, the Director or one of his senior staff determines the level at which it should be dealt with and from which a response should issue. Written procedures require that complaints be dealt with promptly and courteously, normally within 15 working days, and copies of all relevant correspondence are archived, with a view to the nature and volume of complaints being reviewed annually by the Board of Management.[9] Serious complaints against the DPP would be addressed by the Attorney General. There is no independent element in this process, but most complaints are about decisions on prosecution and it would be difficult to involve people from outside the Department in dealing with them.

4.55 The existence of human rights norms constitutes an increasingly important accountability mechanism, in that they provide a benchmark against which to measure the performance of the prosecution system. In this context we would also draw attention to the significance of conferences of prosecutors and international organisations of which the present Director is a member. Such organisations foster the development of international standards drawing on human rights instruments such as the UN Guidelines. We have already mentioned the International Association of Prosecutors, which is dedicated to promoting the highest standards in the administration of justice and to ensuring that the duties and responsibilities of prosecutors are recognised and protected. The Director is also a member of the Heads of Prosecution Agencies Conference. Consisting of prosecutors from Commonwealth countries and the Republic of Ireland, the Conference fosters co-operation and the exchange of ideas and is also concerned with "assisting in preserving the vital independence of prosecutors in member countries and at the same time promoting a balance between independence and public accountability".

Views Expressed During the Consultation Process

4.56 The role of the police in prosecuting minor offences received considerable attention in the consultation process. The proposition that responsibility for initiating and undertaking all prosecutions should rest with an independent prosecuting authority attracted widespread support from a broad range of political parties, NGOs representing human rights interests, some practitioners and other individuals and organisations.

4.57 Most of those advocating change focused on the desire to enhance public confidence by distancing the quasi-judicial decision to prosecute from the investigative function. It was argued that the police, as investigators, were not best placed to determine objectively whether the outcome of an investigation justified prosecution. Scrutiny by an independent prosecutor

9 The Board of Management comprises the Senior Assistant Director, Assistant Directors and the Head of the Financial Control and Resources section, under the chairmanship of the deputy Director. Its primary function is to ensure that the aims and objectives of the Department, set by the Director, are met.

was also seen by some as providing a safeguard against mistakes or malpractice on the part of the police; and indeed others saw it as a means of protecting the police against unjustified complaints and allegations. There were concerns that police prosecutors were not as well placed as qualified lawyers to deal with the increasing complexity of criminal justice legislation and the growing importance of human rights issues, when presenting cases in court.

4.58 It is important to record that some of those who argued for this change made clear that they were not doing so out of a sense of criticism of the police. Indeed there were some favourable comments about the expertise of police officers working in this field, although practitioners talked of variable competence. Some, who were equivocal about the need for change, pointed to the local knowledge that a good police prosecutor could bring to a case and expressed concern at the lack of authority given to counsel employed by the DPP in summary cases. We were told that court business could be held up as counsel telephoned the DPP's office in order to obtain instructions. There was one suggestion that responsibility for prosecuting minor offences might be retained by the police but with greater scope for supervision by the DPP. The RUC did not have strong views about retaining the prosecution function in relation to minor offences and could appreciate the public confidence arguments for making all prosecutions the responsibility of an independent prosecutor. However, they did point to the advantage of developing a cadre of expertise in evidential and court related issues within the police service.

4.59 The minority who argued for retention of the police prosecuting role did so for a variety of reasons: the police were doing a good job; the involvement of a prosecution service in minor cases would increase delay; and cost considerations.

4.60 There was debate about the relationship between investigation and prosecution and the stage in a case when an independent prosecutor should become involved. Some argued for the complete separation of the investigative and prosecution processes, in order to safeguard the independence of the prosecutor, thus preventing the objectivity of the prosecution service from being compromised by the investigative ethos. Others, including practising lawyers, saw advantage in the early involvement of the prosecutor well before the police submitted the investigation file for a decision on prosecution. This would help ensure that evidential issues were addressed at an early stage, thus reducing delay further down the line, lessening the likelihood of holding charges being changed at a later stage, and, in some cases, identifying at the outset weaknesses in a case which might result in it being dropped. Care would have to be taken to ensure that the prosecutor did not get too close to the police in these circumstances. The RUC pointed out that, particularly in serious cases, they valued the opportunity to seek the advice of the DPP at an early stage and that sometimes they sought his input prior to charge.

4.61 There was a significant and broad based body of opinion that an independent prosecution service should have a much more "hands on" role in the investigative process. Some talked of the ability of the prosecutor to direct or supervise investigations, attend interviews of

suspects and visit scenes of crime, and there was one suggestion that the prosecutor should be given the responsibility of drafting warrants of arrest and charging suspects. The Scottish system of procurators fiscal was often mentioned, as was the role of District Attorneys in the United States. Those expressing these views came to them from a number of different perspectives. There was the public confidence dimension in the sense of subjecting the police to external supervision to ensure that human rights were respected and that all cases were investigated fairly and impartially, including offences committed by public officials and members of law enforcement agencies. There was also a view that enabling the prosecutor to become involved in investigations, particularly of the more serious cases, made for a more effective approach to dealing with crime.

4.62 Delay was a concern of practising lawyers and some of the human rights organisations, especially in relation to the more serious cases where custody was involved. Reference was made to the time taken for the RUC to present files to the DPP and to the length of time taken by his Department in determining whether to prosecute, especially in cases where further information had to be sought from the police. There was a feeling that it should take a matter of days for the police to submit a file to the DPP, unless the case was especially complex, and days or weeks, rather than months, for the DPP to direct. A long term objective might be to aim for time limits along the lines of those operating in Scotland, although it was recognised that in present circumstances this could place the defence in some difficulties. Concern was expressed about the Criminal Procedure and Investigations Act 1996 which some felt placed complex decisions on disclosure to the defence in the hands of the police, with police officers being required to make the initial judgement on what might undermine the prosecution case.

4.63 The possibility of the prosecutor having a central role in diverting cases (e.g. in relation to young people or mentally disordered offenders) away from the criminal justice system did not receive a great deal of attention. Those who did comment were broadly in favour, especially if there were suitable schemes, and options involving restorative justice, available to the prosecutor. However, there were differing views about the concept of prosecutorial fines as operated in Scotland and some civil law jurisdictions. Some saw this as a useful diversionary measure enabling the speedy resolution of straightforward cases (similar in principle to fixed penalties), while others felt that disposals of this sort should be left to the judiciary.

4.64 As for the performance of the DPP's Department, many of those whom we consulted did not express a view, some were critical and some commented favourably on the performance of the criminal justice system as a whole. We were left with a sense that some at least of those who said they wanted lawyers to take on all prosecutions were influenced by a positive view of the way in which the Department had conducted itself over the years. The Attorney General emphasised to us that, on the basis of his experience and that of his predecessors, he had complete confidence in the professionalism of the DPP and the Department.

4.65 Some concerns were expressed about the handling of particular types of case. Organisations representing the Nationalist perspective and some human rights groups said that the DPP's Department had not demonstrated the necessary objectivity, independence and rigour in pursuing cases where Nationalists had been the victims, especially where the security forces were implicated. A number of cases were quoted in some detail, giving rise to allegations of partiality and/or political influence on the prosecution process. There was concern that no public explanation was ever offered about why prosecutions had not taken place or charges were withdrawn in such cases and that private enquiries of the DPP were invariably met with the response that it was not policy to give reasons.

4.66 On the same theme, comment was made by these groups about the very small number of successful prosecutions resulting from deaths caused by security force actions. There were similar concerns about what they felt was lack of action following allegations of police misconduct. It was said that the DPP gave the appearance of being in business in order to secure convictions on behalf of the RUC. Those expressing these views felt that there was not the constructive tension between the RUC and the DPP that was so crucial if the public were to have confidence in the prosecution system.

4.67 A range of views was expressed about the future shape of an independent prosecutors' office, from some who saw no need for change at all through to those who effectively wanted to replace the DPP's Department with a new organisation having no connection with previous arrangements. Clearly, if the DPP's Department were to assume significant additional responsibilities, it would at the very least require substantial change in structure and organisation. A wide body of opinion, from across the political spectrum, favoured a move towards a new office responsible for all prosecutions. A submission made from the Unionist perspective supported the creation of a single independent prosecution service, responsible for all prosecutions, with a sufficiently independent chief to ensure the degree of cross-community acceptance necessary for its effective functioning. This would necessitate the recruitment through open advertisement of high calibre staff with a long-term strategy of developing a cadre of highly skilled senior prosecutors able to manage a case from scene of crime through to prosecution in the Crown Court. The service would have a key role in developing public confidence. During the consultation process, there were a number of references to the procurator fiscal model and a suggestion that posts in the prosecution service should be open to defence lawyers.

4.68 We should record that a number of people stressed the importance of learning from the experiences associated with the early years of the Crown Prosecution Service (CPS) in England and Wales. Under-funding at the start, over-centralisation and bureaucratic procedures, together with lawyers appearing in court insufficiently briefed, were mentioned in that context as pitfalls to be avoided.

4.69 As for where political responsibility for prosecutions should lie, most who commented envisaged devolution of the function sooner or later, although some expressed reservations

about whether this should happen before local institutions of government had proved themselves. There was recognition of the difficulties associated with getting the balance right between independence and accountability. The concern to distance the prosecution service from political influence meant that there was little support for a Minister of Justice having any role in relation to prosecutions.

4.70 There were suggestions that a local Attorney General might be appointed. Some felt that such a person ought not to be a member of the Assembly or Executive, but rather would be drawn from the ranks of senior lawyers and would be essentially a non-political figure. A local Attorney would have an oversight function in relation to prosecutions, but there was a view in some quarters that he or she should not be in a position to issue directions on whether or not to prosecute or require the discontinuance of prosecutions. There was a suggestion that an independent prosecution service might be accountable to Parliament or the Assembly for matters of financial probity and administration but not in respect of decisions on whether or not to prosecute. A common theme was the desire to insulate the prosecutor from political influence.

4.71 On wider issues of accountability, there was a general desire to see a prosecution service that was more answerable to the public. Suggestions included an annual report and publication of factors taken into account in deciding whether to prosecute, as well as a more open and proactive role in communicating with the public at large. On the difficult question of reasons, there was one suggestion that full reasons should be required for the initiation of criminal proceedings or the refusal to do so. Others recognised the difficulties of spelling out reasons, especially given the implications for the rights of the suspect. There were calls for a clear, accessible and open complaints procedure, with an independent element.

4.72 A number of people stressed the importance of accountability to victims through providing them with information and taking their views into account. There was some support for the idea of external scrutiny of the work of prosecutors. For example, the Northern Ireland Human Rights Commission might be invited to examine papers in cases of disquiet. Another idea was that an international agency might be invited to send individuals of standing to review the operation of an independent prosecution service, perhaps after two years of its operation.

Research and Experience of Other Jurisdictions

4.73 Through our visits and with the benefit of research conducted on our behalf[10] we examined with great interest prosecutorial arrangements in a range of common and civil law jurisdictions. There are considerable variations in the systems and in ways of dealing with such issues as the relationship between investigation and prosecution and between

10 Bryett and Osborne, Research Report 16.

independence and accountability. Such differences are influenced by cultural and historical background and by what is best suited to the particular political and legal systems of the jurisdictions concerned. This is not the place for a comprehensive survey, but we do seek to identify aspects of experience elsewhere that may be relevant to a debate about a prosecution system suited to the particular circumstances of Northern Ireland.

WHETHER THE POLICE SHOULD HAVE A ROLE IN THE PROSECUTION PROCESS

4.74 Internationally the trend, while not universal, has been towards giving responsibility for all aspects of prosecution to a prosecution agency independent of the police. There is a long tradition in civil law systems of public prosecutors taking responsibility for prosecutions in the public interest, which pre-dates the creation of police forces. Although the inquisitorial process originated in an inquiry by a judge, specialised officials acting on behalf of the court later became charged with building the case against the defendant long before police forces came in to existence. In the common law tradition by contrast prosecutorial functions remained mainly in the hands of private individuals until police forces developed in the nineteenth century. The notion of a separate prosecution agency emerged in most common law countries, after police forces had already been established, and is not so embedded within the common law culture. During the course of the last century, however, independent prosecution services have been establishing themselves and taking responsibility for all prosecutions.

4.75 England and Wales provide a useful starting point. Until 1986 the police were responsible for investigating crime and for the prosecution of cases through the courts, with the exception of the most complex and serious which were prosecuted by the DPP. As in Northern Ireland today, prosecutions for minor offences were often conducted in magistrates' courts by police officers; the police instructed lawyers to act on their behalf in the more serious cases. By 1980, most county and metropolitan councils had prosecuting solicitors' departments and the range of offences prosecuted by lawyers was increasing. The Royal Commission on Criminal Procedure, reporting in 1981 under the chairmanship of Sir Cyril Philips,[11] recommended the establishment of a separate service responsible for the prosecution of all offences. In doing so the Royal Commission took account of the following main considerations:

- concerns that combining the role of investigation and prosecution invested too much power and responsibility in one organisation;
- the inherent desirability, from a public confidence perspective and in order to secure a balanced criminal justice system, of separating the investigative and prosecutorial functions;

11 *The Royal Commission on Criminal Procedure* (1981), London: HMSO, Cmnd 8092.

- inconsistencies in prosecution policy across the country and concerns that too many cases were being prosecuted on the basis of insufficient evidence; and
- a desire for greater accountability and openness and common standards on the part of prosecutors.

4.76 Following on from the Philips Report, the Prosecution of Offences Act 1985 established the Crown Prosecution Service as a national agency responsible for reviewing police decisions to prosecute and for conducting all prosecutions in the courts. Thus England and Wales moved from a situation where almost all prosecutions were carried out by or at the behest of the police to one where responsibility was vested in an independent prosecution service.

4.77 In Scotland, all prosecutions are the responsibility of procurators fiscal working under the authority of the Lord Advocate. In considering the applicability or otherwise of the Scottish experience to Northern Ireland, it is worth bearing in mind some of the features of the inquisitorial system associated with Scottish criminal procedure and the historical context. The office of procurator fiscal emerged during the late 16th to 18th centuries, when it took over the investigative and prosecutorial functions of the medieval sheriff who was left primarily with a judicial function. The fiscal in Scotland therefore predates the police and has developed as an integral part of the Scottish system and culture over the centuries.

4.78 Prosecutorial arrangements in Ireland have similar roots to those in England and Wales and in Northern Ireland. They have evolved with the Irish State and are governed to a large extent by the provisions of the Irish Constitution (Article 30.3) and by statute, in particular the Prosecution of Offences Act 1974, which established the office of Director of Public Prosecutions. In summary, it is for the DPP to determine whether to prosecute cases that are tried on indictment (except for a small number of offences where the consent of the Attorney General is required). He nominates barristers from the private bar to present such cases in court. He takes the decision based on papers submitted to him by the Garda Síochána through the State Solicitor Service. However, he has little involvement in summary cases heard before the district courts and which form the bulk of criminal business. Many of these cases are prosecuted by the Garda investigating officer. In Dublin, Garda court presenters are being introduced on a phased basis and one of their duties includes the prosecution of summary offences. In summary cases outside Dublin a superintendent or inspector determines whether to prosecute and presents the case in court; in Dublin, the Chief State Solicitor's Office prosecutes the more serious cases heard in the district courts.

4.79 These arrangements have been the subject of considerable scrutiny in recent years, most recently by a Study Group, working under the auspices of the Office of the Attorney General and chaired by Mr Dermot Nally, former Secretary to the Government. Included, amongst other things, in the Group's terms of reference was the question of "whether there is a continuing role for the Garda to prosecute as well as to investigate crime". Its report last year

concluded that while there was scope for improvement in co-ordination and effectiveness, the existing system should not be replaced with a unified prosecution service. The Group reached this conclusion largely on grounds of financial considerations and general confidence in the current arrangements expressed during the course of its consultations.

4.80 As for common law systems outside these islands, the system in the United States is well known. There, the US Attorney in federal cases and the District Attorney (who is directly elected) at local level are responsible for deciding whether to prosecute almost all cases (we understand that in some areas the police have a role in the prosecution of very minor traffic infractions). This system and culture is so well established that the question of police involvement in prosecutions is simply not an issue. Similarly in Canada, while detailed arrangements vary between the various jurisdictions, executive responsibility for all prosecutorial matters is vested in the relevant Attorney General operating through Crown Counsel. In South Africa the Constitution and the National Prosecuting Authority Act 1998 established a single body with responsibility, inter alia, for deciding whether or not to institute criminal proceedings. During our visit to South Africa it was apparent that this Authority was intended to take an increasingly high profile in prosecution work in order to enhance public confidence, improve efficiency, safeguard individual rights and enhance consistency of approach.

4.81 In Australia and New Zealand, the police still retain a substantial role in deciding upon and conducting prosecutions of less serious or summary cases and, in some cases, in processing indictable offences through the committal stage. One significant factor behind this may be the existence in country areas of widely scattered communities where, for practical reasons, police involvement in less serious cases is seen as the most efficient approach. In Australia, the trend seems to be towards reducing police involvement in prosecutions.[12] In New Zealand, however, the Law Commission has considered and rejected the idea of a single unified prosecution service but has recommended instead a dedicated national career oriented prosecution function within the police, responsible for prosecuting all summary cases in court. This would impose an internal separation between the investigation and prosecution of crime and seems to be a rather more advanced form of the Central Process Office approach being adopted by the RUC.

4.82 The Netherlands is a fairly typical example of prosecutorial arrangements in a civil law jurisdiction. There are some 450 prosecutors and 2,500 support staff, organised on a regional basis, but under the central direction of a Board of Prosecutors. The prosecutors have responsibility for the investigation of crime, although in practice they become involved only in the more serious cases at this stage, and for determining whether to prosecute in all cases. Their decision on whether to prosecute is based on evidential and public interest grounds, in accordance with guidelines laid down at the centre. Such guidelines might specify types of crime to which priority should be given or procedures for handling sensitive cases such as

12 Brye tt and Osborne, Research Report 16.

those involving sex abuse. On our visit it was apparent that the ability to settle cases out of court, for example through diversion or a prosecutorial fine, was valued by prosecutors and that effective co-operation with the police and local authorities was a key priority.

THE INTERFACE BETWEEN INVESTIGATION AND PROSECUTION

4.83 In earlier parts of this chapter, we have referred to the idea of separating the investigative from the prosecutorial function. It will be apparent from what we say in this section that, based on the experience of other jurisdictions, the matter is not quite so simple.

4.84 One of the key factors behind establishing the Crown Prosecution Service in England and Wales was the desire to draw a clear line between functional responsibility for investigation and prosecution. Under the 1985 Act, the police retained the power to investigate and to decide what charge to bring. The CPS took over the conduct of all criminal proceedings instituted by the police, defined as meaning from the time of the issue of a summons or warrant or from the time of charge. The police assembled the evidence for review by the CPS. The responsibility of the CPS was to determine whether the evidence was sufficient to prove the charge and, if not, what other evidence might be needed. If such evidence was not available, then it was for the CPS to decide whether to discontinue the case. The CPS has no role in supervising investigations although it advises on legal issues if asked; nor can it direct that lines of enquiry be pursued. In commenting on the working of these arrangements in the early years, the Glidewell Report[13] quoted the evidence of Sir Alan Green, the then DPP, to the Public Accounts Committee:

> "In many ways the very convenient relationship between the police and their County Prosecuting Solicitors disappeared. I think that suddenly a steel curtain came down between the two services and this went a bit too far. People in both services, both the police and ourselves, felt that we must keep our distance, we must not talk to each other, we must not communicate, the CPS is independent of the police and must be seen to be so."

The Glidewell Report noted that in practice the police had retained several important functions post-charge, including preparation of the case file and making arrangements for the initial court appearance.[14] This meant that on occasion the CPS would not become aware of a case for as long as 14 days after a prosecution was initiated.

4.85 It is apparent to us from our reading and discussions held in London that effective joint management of the interface between investigation and prosecution is of critical importance to the efficiency and effectiveness of the criminal justice system as a whole. The Royal

13 *The Review of the Crown Prosecution Service* (1998), London: HMSO, Cmnd 3960 (The Glidewell Report).

14 *The Review of the Crown Prosecution Service* (1998), London: HMSO, Cmnd 3960 (The Glidewell Report), page 127.

Commission on Criminal Justice[15] considered the issue of whether it was more appropriate for the prosecuting authority (rather than the police) to initiate proceedings but did not recommend such a change largely because of the practical implications. However, the thrust of recent thinking, evidenced in such reviews as Glidewell and the *Review of Delay in the Criminal Justice System* conducted for the Home Office by Martin Narey in 1997, has been to place the emphasis on co-ordination, partnership and integrated working between the police and CPS with the prosecutor being fully involved from the point of charge.

4.86 The arrangements in Scotland are rather different, and we mention them in some detail here as a number of people have suggested to us that they are worthy of consideration in the Northern Ireland context. Procurators fiscal have a common law duty to investigate crime and section 17(3) of the Police (Scotland) Act 1967 places Chief Constables under a statutory duty to comply with the lawful instructions of the fiscal. In terms of their relationship with the police, the fiscals are in some ways in a position more akin to their counterparts in civil law jurisdictions than to their CPS colleagues.

4.87 In practice it is only in the more serious or complex cases that the fiscal would become heavily involved at the investigative stage, for example through attendance at the scene of a murder to take charge of the evidential aspects of the investigation and autopsy arrangements. In serious cases, the police will consult with the fiscal at an early stage and positively welcome his or her assistance and direction. Another factor militating in favour of this early involvement is that in some respects the fiscal has more investigative powers than the police, for example in seeking arrest or search warrants or authorisation to take blood samples. In the large majority of cases, however, the fiscal's formal involvement starts at the point of considering a report by the police with a view to determining whether or not to institute criminal proceedings.

4.88 The critical importance and benefits of effective working arrangements between prosecution and police are demonstrated by the timetable to which the prosecutor has to work in Scottish custody cases. The 110-day rule relates to cases prosecuted under the solemn procedure, i.e. those heard in the High Court or before a sheriff sitting with a jury. In summary custody cases in the district or sheriff court, the time limit for commencement of trial is 40 days. Following arrest, the defendant must be brought before a court on the next working day, by which time the fiscal will have decided whether there is reasonable suspicion to support a charge and seek remand in custody. The fiscal then has eight days to complete initial enquiries with a view to committing accused persons on his or her own authority. In murder cases, and cases involving accused persons under the age of 16, the fiscal must seek authority from the Crown Counsel to have the accused fully committed at the next appearance in court. The committal process in Scotland does not constitute any form of preliminary hearing or consideration of the papers supporting the case; rather it involves the fiscal exercising a quasi-judicial function in assessing whether the evidence is sufficient to secure a conviction as

15 *Royal Commission on Criminal Justice. Report by Viscount Runciman of Doxford* (1993), London: HMSO, Cmnd 2263.

charged. If the fiscal is not so convinced, then the defendant is "liberated", which leaves open the possibility of indictment within one year. From the point of committal, trial must start within 110 days during which time evidence is assembled, witnesses precognosed (a procedure whereby the fiscal interviews witnesses), the case put to Crown Counsel, who makes the decision as to proceedings and issues instructions to the fiscal accordingly. It is, however, important to emphasise that some aspects of Scottish criminal procedure, relating to disclosure for example, are very different from Northern Ireland.

4.89 Evidence of a complaint, including witness statements obtained by the police, is e-mailed by the police to the fiscal in a standard form, with information fields and data transfer arrangements set out in joint protocols. In less serious cases, this usually enables a quick decision to be taken on whether to proceed by way of summary trial before a district court or sheriff. It is then for the fiscal to issue the complaint to the accused and arrange a court hearing. In summary matters there is a target, which is currently being met, to have 75% of cases in court within nine weeks of receipt of the report.

4.90 From what we heard on our visits, it is worth recording that the participants in these processes in Scotland seemed comfortable with the arrangements (although comments were made about the tightness of the time limits). The independence of the fiscal was fully respected, relations and the level of co-operation between the fiscal and police seemed good and cases were generally processed speedily and efficiently without impairment of the quality of justice. At the same time, the Crown Office and Procurator Fiscal Service are very much alive to their responsibilities in respect of Convention rights, which have applied in relation to actions of the Scottish Executive (and therefore to the actions of prosecutors, since they act on behalf of the Lord Advocate) since May 1999. They have been conducting an extensive review to ensure that their policies, practices and procedures are closely aligned to the requirements of the Convention.[16]

4.91 In civil law jurisdictions, the prosecutor invariably has a role in supervising investigations, certainly those of more serious criminal behaviour; in some countries, France for example, judges play a supervisory role in the most serious cases. In the inquisitorial environment it is not surprising that the distinction between investigation, prosecution and adjudication should be more blurred than is the case in common law systems. We did hear some concerns from defence lawyers that the involvement of prosecutors with the police in an investigation might compromise their ability to make dispassionate judgements and process cases in court further down the line. In some jurisdictions this problem is addressed by ensuring that where a prosecutor is involved at the investigative stage, different personnel review the case and appear in court.

4.92 The FBI and local police services in the United States have a tradition of involving the US Attorney or District Attorney at an early stage in the investigation of serious crime.

16 *Crown Office and Procurator Fiscal Service Annual Report* 1998-1999, Edinburgh: HMSO, page 14.

Prosecutors might be involved in the planning of major operations and in the development of long-term strategies to deal with organised crime. This ensures the availability of early advice on evidential issues and such matters as timing of arrest. The prosecutor also has a role in giving specialist advice and seeking judicial authorisation of the use of certain investigative tools such as wiretaps. The early involvement of prosecutors was represented to us as helping to avoid legal difficulties further down the line, reducing the need for requests for supplementary information and facilitating the efficient processing of cases at the later stages. We were left in no doubt nevertheless that the need for the prosecutor to remain independent from the police was crucial and indeed we heard some opposition to the concept of co-location of police and prosecutor. In such systems it was apparent that much depended on the standards and integrity of individual prosecuting attorneys.

4.93 In Manhattan we were told that the District Attorney's office was expected to make the decision whether to charge within hours of arrest or detention. In the less serious cases the police were left to investigate with relatively limited prosecutorial involvement. However, to facilitate the decision making process within such a short time-frame, extensive use was made of pagers and video-conference facilities, while in around 35% of cases the police faxed a pro forma provided by the prosecutor containing the information on which a decision to charge could be based.

4.94 In South Africa it is for the prosecutor to determine whether to charge, based on consideration of a police "docket", which is a standard form file. It was clear to us that one benefit of the development of the independent prosecution service was that it reduced the capacity of suspects to put pressure on the police to withdraw charges. Early prosecutorial involvement in investigations was seen as important in assisting the police in developing their investigative techniques, in accordance with evidential requirements. We were told of legislation enabling the establishment of a limited number of investigating directorates, headed by prosecutors, to facilitate partnerships with the police and other agencies in dealing with particular types of serious crime such as urban terrorism and car-jacking.

4.95 To sum up on the investigation/prosecution interface, the international trends we observed were towards:

- greater prosecution involvement at the investigative stage (in an advisory and sometimes supervisory role), especially in relation to serious crime giving rise to complex evidential issues;
- early involvement of the prosecutor in deciding whether to proceed further;
- recognition of the importance of partnership between police, prosecutor and other agencies, and effective procedures for getting information and evidence from the police to the prosecutor to enable speedy and informed decisions to be taken (IT, protocols and effective communications were critical); and
- appreciation of the need to safeguard the independent role of the prosecutor.

DIVERSION

4.96 In several jurisdictions covered in the research programme and visited by the Group, the prosecution has the discretion to divert cases away from the court process, notwithstanding that there is sufficient evidence to prosecute. This tends to be more prevalent in countries where the prosecutor has responsibility for all prosecutions (diversion is less likely to be an issue where such responsibility is limited to serious cases) and is involved relatively early in the process.

4.97 In England and Wales, where the prosecution role is one of review after proceedings are instituted by the police, it is the police who have the discretion to issue warnings and cautions, and who can embark upon initiatives such as restorative justice. However, the CPS can, and do in appropriate cases referred to them, suggest to the police that they take such action.

4.98 In Scotland there is a fairly sophisticated diversionary package available to the procurators fiscal, including fiscal warnings, conditional offers for fixed penalties, fiscal fines and diversionary schemes (e.g. supervision by a social worker, referral to drug treatment, restorative interventions etc). During our visit to Scotland it was clear that fiscals valued their diversionary role, both as an effective response to dealing with certain types of offender and as a means of avoiding congestion in the court system. Members of the fiscal service emphasised the importance of having diversionary schemes available across the jurisdiction so that maximum advantage could be taken of this approach and for the sake of fairness and consistency.

4.99 The fiscal fine[17] (accounting for almost 20,000 cases in 1998) is available where there is sufficient evidence to support a prosecution for offences triable before a district court and in circumstances determined by internal guidelines. In issuing it, at levels between £25 and £100, the fiscal renounces the right to prosecute and it does not appear on criminal records. The offender does have the option of asking for the case to be heard in court, thus complying with human rights requirements.

4.100 The prosecutorial fine is a disposal employed in the Netherlands, where other forms of diversion can also be considered by the prosecutor. Interestingly there the prosecutors have agreed that the police can divert young people to the "Halt" project, a nationwide scheme for young people combining some of the features of community service and restorative justice. Giving this responsibility to the police enables action to be taken in suitable cases within hours of arrest, the immediacy of the intervention being seen as a critical factor in ensuring the right impact.

17 Section 56 of the Criminal Justice (Scotland) Act 1987, as amended by section 61 of the Criminal Justice (Scotland) Act 1995.

4.101 It was apparent that, where they had this option, prosecutors had a range of criteria in determining the types of cases to be diverted, for example: admission of guilt by the offender; lack of previous convictions; the nature of the offending behaviour; triviality or otherwise of the offence; and the age of the offender. In some cases, there was the option to resume prosecution if the offender failed to co-operate with the process after having agreed to it.

ACCOUNTABILITY AND INDEPENDENCE

4.102 Safeguarding the independence of the prosecutor, while at the same time providing for accountability and transparency, is one of the most important issues considered by the review. In the following paragraphs we look at how this has been addressed in a range of other jurisdictions. We examine how others have handled the relationship between the prosecutor and the political process, since the independence of the prosecutor from political influence is an issue which received considerable attention during the consultative stage of our review. In doing so, we are conscious of the different forms of accountability identified by our researchers, in particular the subordinate/obedient relationship and the explanatory/answerability models.[18] We focus primarily, but not exclusively, on the experiences of those common law jurisdictions most likely to be relevant in the Northern Ireland context.

4.103 In England and Wales, section 3(1) of the Prosecution of Offences Act 1985 provides that "the Director of Public Prosecutions shall discharge his functions ... under the superintendence of the Attorney General". Interestingly, and unlike the current position in Northern Ireland, the Attorney General is given no explicit power to "direct" the DPP. This appears to have been a conscious decision of the legislators, given that earlier legislation had made a specific reference to a power of direction. In practice rarely, if ever, did an Attorney General formally exercise the power of direction while these provisions were in force, although according to the Glidewell Report, it seems that on occasion some did in all but name.[19]

4.104 As for what is meant by "superintendence", the issue is examined in some depth by the Glidewell Report.[20] In short, the relationship between Attorney General and DPP is in practice primarily consultative in nature, enabling the Attorney to retain a general overview of prosecution policy and be aware of potentially contentious or important cases; also, the DPP is expected to provide sufficient information to the Attorney General to enable the Attorney to answer to Parliament for the performance of the Crown Prosecution Service. Successive Attorneys have made the point that they are not in the business of directing or managing the day-to-day conduct of individual prosecutions. However, while there is some uncertainty over

18 Bryett and Osborne, Research Report 16.

19 Page 194, paragraph 8.

20 *The Review of the Crown Prosecution Service* (1998), London: HMSO, Cmnd 3960 (The Glidewell Report), pages 193-196.

whether in law the Attorney General for England and Wales does have a power of direction over the DPP in the handling of individual cases, there seems to be acceptance that in the (unlikely) event of a stark divergence of view on whether or not to prosecute, then the Attorney's view would prevail. Under common law the Attorney does have the power to end a prosecution through entering a "*nolle prosequi*".

4.105 In England and Wales, as in other jurisdictions, it is not only the relationship between the prosecutor and the Attorney General, but also the position of the Attorney General in relation to the Government and Parliament that is significant. The conventions surrounding the office of Attorney General are important in assessing the independence of the prosecution system. While the Attorney is invariably either a member of the House of Commons or House of Lords, and as a Law Officer is the Government's principal adviser on legal matters, convention requires that when exercising functions in relation to prosecution decisions he or she does not act as a representative of Government but in a separate capacity as guardian of the public interest. In this capacity the Attorney should not take into account political considerations but may take into account public interest considerations in accordance with the Shawcross doctrine. The Attorney's accountability to Parliament (and therefore that of the DPP through him) is one of general answerability for prosecution matters and the policy applied in particular cases. The Attorney answers parliamentary questions, written and oral, appears before select committees and may be involved in adjournment debates. However, he would not answer for "the 'intrinsic merits of individual decisions' or the 'nitty gritty' of each and every one of the 1.3 million cases conducted annually by the prosecution authorities that [he superintends]".[21] As permanent head of the Crown Prosecution Service, the DPP is accountable to Parliament for the efficient administration of the CPS and has on a number of occasions appeared before select committees.

4.106 In Scotland, the Lord Advocate is in a clear supervisory role in relation to the Procurator Fiscal Service in that fiscals are subject to his directions contained in a Book of Regulations, Crown Office circulars and specific instructions which may be issued in particular cases. However, section 48(5) of the Scotland Act 1998 explicitly states that any decision of the Lord Advocate, in his capacity as head of the Prosecution Service, shall continue to be taken by him independently of any other person. Section 27 is also of interest in that it envisages the possibility of a Lord Advocate not being a Member of the Scottish Parliament (indeed, neither of the current Law Officers is an elected Member); in such circumstances the holder of the office could be enabled by Standing Orders to participate in parliamentary business, but not vote. This would enable the Lord Advocate to answer questions and make statements. Section 27 also deals with the issue of MPs asking questions about the conduct of

21 Mr John Morris, Attorney General, House of Commons, 5 March 1998.

particular cases in that it enables the Lord Advocate to decline to answer such questions if to do so might prejudice criminal proceedings or would otherwise be against the public interest. By virtue of section 44 both Law Officers are *ex officio* Ministers of the Government.

4.107 Other Commonwealth jurisdictions have variations on the relationship between an Attorney General and a chief prosecutor. In Australia each state DPP is accountable to a politically appointed Attorney General. However, we understand that while in constitutional terms the relationship could be described as supervisory, and prosecutorial decisions can be debated in state parliaments, no decision by a DPP has ever been overruled by an Attorney General. We note with interest the view of Australian DPPs quoted in the research report[22] that so long as the Attorney General's power is not exercised with any regularity and never in respect of individual cases, it can be a valuable safeguard rendering the DPP accountable for the considerable power with which he or she is vested. We also note the views of the DPP of Western Australia: "The high responsibility given to an unelected official (DPP or chief prosecutor) to wield great power carries with it the duty to be accountable for its exercise."[23]

4.108 Canadian jurisdictions contain a range of models. In Alberta we were told that while the Attorney General was a working politician and oversaw the prosecution service, this had not caused significant difficulties. He would be informed of high profile prosecutions and might be called to account in the legislature but did not exercise control or play any decision making role in relation to individual prosecutions.

4.109 During our visit to South Africa, our attention was drawn to what in Southern Africa was seen as a landmark judgment on the relationship between the Government Minister responsible for prosecution and the permanent head of the prosecution service - a case brought by the Attorney General of Namibia in the Supreme Court[24] to determine whether he had the power to direct the Prosecutor General on whether to initiate a prosecution or discontinue it. The judgment contains a review of the position in other Commonwealth jurisdictions and of legal and academic authorities on the subject. The Supreme Court concluded that the "final responsibility for the Office of Prosecutor General" assigned by the Namibian Constitution to the Attorney General did not of itself amount to the ability to "superintend and direct" and did not therefore give the Attorney the power to direct in individual cases. It rejected as unconstitutional a provision of a 1977 Act, enacted by the South African Government during its administration of Namibia, which gave the Minister (i.e. the Attorney) express power to direct the prosecutor and reverse any decision taken by him. In doing so, the Court took account of the intention of the Constitution that the Office of DPP should be truly independent, subject only to the duty of the Prosecutor General to keep the Attorney General properly informed.

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22 Bryett and Osborne, Research Report 16.

23 Bryett and Osborne, Research Report 16, page 3, Chapter 3.

24 *Ex parte Attorney-General, Namibia: In Re: The Constitutional Relationship between the Attorney General and the Prosecutor General* - 1995(8) BCLR 1070 (No 5).

4.110 Of all the jurisdictions visited, the Republic of Ireland has perhaps the most clearly defined statutory safeguards for the independence of the prosecutor, contained in the Prosecution of Offences Act 1974. Section 2(5) states that the DPP shall be independent in the performance of his or her functions, while section 6 makes it unlawful to communicate with the DPP or others involved in the prosecution process in order to influence them not to prosecute or to withdraw proceedings; this provision does not, however, apply to the defendant, the defendant's professional advisers, the defendant's family or to a social worker or anyone personally involved in the case. The Attorney General in the Republic is appointed by the President on the nomination of the Taoiseach in accordance with Article 30 of the Irish Constitution, but is not necessarily an elected politician. The relationship with the DPP is set out in section 2(6) of the 1974 Act which provides that the Attorney and the Director shall consult from time to time in relation to matters pertaining to the functions of the Director. We understand that statutory consultations are very rare, but that consultations on an informal basis, often at the request of the Director, are more frequent.

OTHER ACCOUNTABILITY ISSUES

4.111 Whether or not reasons for prosecutorial decisions should be given, and if so, in what detail, are current issues in several jurisdictions. They have important implications for accountability, in the explanatory/answerability sense, both in relation to individuals affected by a case and in relation to cases where there is a high degree of public interest.

4.112 In the United Kingdom jurisdictions, as in many others, there has been some reluctance on the part of prosecutors to give reasons for decisions in any but the most general terms. The considerations taken into account by the DPP for Northern Ireland were generally endorsed by those to whom we spoke, with particular concerns about the need to protect the rights of the suspect. Other considerations militating against giving reasons were concern about releasing witness related material outside the controlled environment of the court and resource implications.[25] It would be a significant additional burden if prosecutors had to consider in individual cases how far they could go in releasing reasons without infringing the rights of witnesses and suspects or contravening other public interest considerations.

4.113 The DPP in the Republic of Ireland has also come out strongly against giving reasons for his decisions in individual cases.[26]

4.114 Outside the United Kingdom and the Republic of Ireland we detected a greater willingness to contemplate giving reasons in individual cases. In Canada the presumption is against doing so but there are important exceptions. For example, where a decision is taken not to prosecute in a case of misconduct by a public servant, a press release might be issued giving the broad

25 *Annual Report of the Crown Office and Procurator Fiscal 1998/99*, Edinburgh: HMSO, paragraphs 24-25.

26 *Annual Report of the Department of the Director of Public Prosecutions, 1998 (1999) Dublin* - Appendix 7.

reasons for the decision. In the United States it was apparent during our visit that District Attorneys were prepared to be very open in explaining publicly their approach to some cases, provided that their intervention would not be seen as prejudicial. In South Africa, we were told that attempts would be made to give reasons in general terms, but this approach invariably led to pressure for more detail. The draft Code of Conduct for prosecutors there sounds a word of caution: "reasons for the exercise of prosecutorial discretion should not be supplied where any individual rights, such as those of victims, witnesses or accused, might be compromised or where it might not be in the public interest to do so." On our visits to the Netherlands and Germany we noted that there was a mechanism whereby aggrieved victims could learn of reasons for non-prosecution by appealing to the courts against the prosecutor's decision.

4.115 Despite the caution in this area, we did detect a feeling in some quarters that a more flexible approach to giving reasons might be inevitable. We note the postscript to the Butler Report[27] where the observation is made that, while it would be absurd to suggest that in every case the CPS should give reasons for a decision not to prosecute, there may well be cases where it would be right to do so. Also, while it is not the practice of the CPS to divulge detailed reasons for its decisions, in cases where a victim has died prosecutors will meet relatives to discuss the basis on which a decision to drop a case was taken.[28]

4.116 Especially if reasons are not given as a general rule, public confidence could be enhanced if there were more widespread understanding of the process and the considerations that go into decisions on whether or not to prosecute. In this context, the CPS is required to furnish an annual report to the Attorney General, which is laid before Parliament; also the DPP in England and Wales is required to produce a code giving guidance on general principles to be applied by prosecutors, and which must be included in the annual report.[29] The code gives useful guidance on the sorts of considerations that are taken into account in assessing evidence and rehearses some of the public interest considerations that might militate in favour of or against prosecution. Similarly, the annual report of the Crown Office and Procurator Fiscal Service provides a readable and informative guide on the work of the Service. The DPP in the Republic of Ireland produced his first annual report in 1998.

4.117 During our visit to South Africa we were interested to see that the National Prosecution Authority was engaged in a public consultation process about the development of a prosecution policy document, similar in some aspects to the CPS Code, and a Code of Conduct for members of the Authority. According to the draft policy document, its purpose is to make sure that everyone knows the principles that prosecutors apply when they do their work. Similar initiatives are taking place elsewhere. We should add, however, that the development of a prosecution policy document did not include making publicly available

27 *Inquiry into Crown Prosecution Service. Decision making in Relation to Deaths in Custody and Related Matters* (1999), London: HMSO.

28 *Statement on the Treatment of Victims and Witnesses by the Crown Prosecution Service* (1993), London: HMSO, page 4.

29 Prosecution of Offences Act 1985, sections 9 and 10.

detailed manuals of instructions on the circumstances when prosecutions could take place; to do so was argued to be against the public interest in that such information would be of value to potential offenders and its widespread availability might have the effect of fettering the discretion of the prosecutor.

4.118 It was apparent to us that in several jurisdictions accessibility and involvement in community issues on the part of prosecutors were having a positive impact in increasing understanding and transparency. Outreach programmes in the United States, carried out by District Attorneys and the US Attorney, were being given high priority and it was clear that in the Netherlands the involvement of prosecutors, jointly with other agencies, in managing local responses to crime was viewed positively. The Procurator Fiscal Service in Scotland participates to the full in the development of local inter-agency initiatives which can involve attendance at meetings with community councils during evenings and weekends. The Glidewell Report[30] commented on the need for the CPS to adopt a higher public profile, whilst taking care not to compromise its independence; it recommended CPS involvement in community safety initiatives being developed by local authorities in partnership with the police, under the auspices of the Crime and Disorder Act.

4.119 One other important accountability instrument is that of an inspectorate. In the CPS an internal inspectorate was formed in 1997. The Glidewell Report commented positively on its work and made recommendations to enhance its effectiveness and public standing, in particular through the introduction of an independent element into inspectorate activity.[31] The inspectorate was seen as enhancing public confidence in providing assurances about efficiency and quality of performance and in spreading best practice. Legislation establishing a statutorily based independent inspectorate for the CPS is currently before Parliament.

4.120 To sum up on the issue of independence and accountability as it is viewed in various jurisdictions around the world, if there are discernible trends they seem to be in the direction of:

- independence of prosecutorial decision making from political influence;
- the enhancement of transparency and public understanding through the development of "explanatory" mechanisms; and
- the provision of some form of insurance or redress against the (unlikely) possibility of misconduct or incapacity on the part of the senior prosecutor.

30 Pages 204 onwards.

31 Pages 199-203.

Evaluation and Recommendations

4.121 In this part of the report, we make recommendations for the development of a prosecution service in Northern Ireland that will assume responsibility for deciding on and undertaking all prosecutions currently undertaken by the police. We go on to deal with accountability issues and conclude with an assessment of the organisational and resource implications of our proposals.

4.122 We have taken account of the wide range of views that we have heard about all aspects of the prosecution process, including those that were critical of the present arrangements and of the DPP's Department. Some of those critical of the Department cited particular cases to illustrate their concerns. However, we should also record that we met with the DPP and his senior staff on a number of occasions in the course of our work and we were left in no doubt as to their commitment to professionalism, objectivity and above all to sustaining the independence of the office.

RESPONSIBILITY FOR PROSECUTIONS

4.123 We considered carefully the important question of whether responsibility for all criminal prosecutions should lie with a single unified prosecution service. This would mean the police no longer taking the decision to prosecute in less serious cases and presenting them in magistrates' courts.

4.124 There are arguments on both sides. Those in favour of retaining the current arrangements for police prosecutions of summary cases argued that the system appeared to work; we did not detect a strength of feeling on the part of practitioners or others that the arrangements for police prosecutions were fatally flawed in some way. The introduction of Central Process Offices throughout Northern Ireland means that, within the police, there is some degree of separation between the investigative and prosecution processes. We were also reminded of the view that processing trivial cases through a prosecution service might be wasteful, unnecessary and add to delay; this was a factor clearly in the minds of the MacDermott Working Party. Making a change would inevitably have significant resource implications.

4.125 The case in favour of change, supported by most who commented and in line with international trends, is founded largely on the desire to separate the prosecutorial function from the organisation responsible for carrying out investigations. This was the rationale behind the original recommendation of the MacDermott Report to create an independent prosecution service in Northern Ireland and reduce the role of the police in prosecutions. Securing the independence of the prosecution process for cases at all levels of seriousness should assure the public that decisions on whether to proceed are made against consistently applied criteria by legally qualified staff. In saying this, we are conscious that decisions on

whether to prosecute the most trivial cases can have a major impact on the parties concerned. On the question of the local knowledge of police prosecutors, we have noted the point made to us by prosecutors in some other jurisdictions that this can leave police officers open to influences which could impair their objectivity in deciding whether to prosecute. We are also mindful of the increasing complexity even of less serious cases and the increasing significance of human rights issues. Such considerations militate in favour of lawyers appearing in court for the prosecution to deal with difficult legal issues as they arise. The human rights instruments seem to us, in the Northern Ireland context, to point in the direction of having a separate service responsible for all prosecutorial decisions.

4.126 It is of course possible for the prosecutor to have an overview of prosecutions carried out by the police and to use the process currently available to the DPP to call cases in for consideration. However, it is not, in our view, likely that a prosecution service would be able to monitor the prosecutorial function within the police with sufficient rigour; nor do we believe that such an arrangement would be consistent with the sort of relationship between police and prosecution service that we envisage. Later in this chapter we make recommendations about public accountability in relation to the prosecution process and we think that these are likely to be more effectively implemented if all or most prosecutions are the responsibility of one independent body.

4.127 Public confidence in the future criminal justice system in Northern Ireland is of critical importance. We believe that the independence of key parts of the process from each other, and from influence by government, is central to this. Investigation, prosecution and adjudication are the key components of the process in this context. The clear separation of such functions provides an assurance of objective, dispassionate decision making, and of checks and balances. This is important if the rights of the parties, including defendants, victims and witnesses, are to be protected and seen to be protected. **We recommend that in all criminal cases, currently prosecuted by the DPP and the police, responsibility for determining whether to prosecute and for undertaking prosecutions should be vested in a single independent prosecuting authority.** Thus the police would no longer have a role in prosecuting less serious cases before the magistrates' courts.

4.128 We did consider whether there might be a class of trivial cases, minor regulatory traffic offences for example, where prosecutorial responsibility should be left with the police. We decided against such an option as it would dilute the principle of independence, which we believe to be so important, for little practical gain. However, we do not suggest any change to the current arrangements whereby prosecution for TV licence offences under the Wireless Telegraphy Act and motor tax offences are brought by the Regional TV Licensing Centre and the Driver and Vehicle Licensing Agency respectively. Nor do we propose any change in the arrangements for other prosecutions currently carried out under the auspices of government departments or agencies, many of which are presented by the DPP. We also see the right to bring private prosecutions continuing as at present.

THE INTERFACE BETWEEN INVESTIGATION AND PROSECUTION - GENERAL

4.129 We considered whether the prosecution service should have a supervisory role in relation to police investigation, perhaps by making it responsible for the conduct of investigation into crime as in Scotland and other jurisdictions. We understand the argument that this might provide reassurance against possible excesses by investigators and improve the quality of investigations by ensuring that evidential issues are fully addressed at the earliest possible point. However, such an arrangement would seriously compromise the independence of the prosecution and investigative processes from each other, which in Northern Ireland we believe to be an important safeguard and confidence building measure in itself. Against the background of Northern Ireland, having a prosecution service that is objective in its approach and able to take full account of the rights of the suspect in accordance with human rights norms might not sit easily with it being given a supervisory or participatory role in investigation. We share the view of the MacDermott Working Party that introducing the Scottish model of prosecutorial supervision of investigation into a very different criminal justice system and culture would constitute a fundamental change, which is not necessary and might well not work or produce the desired outcomes.

4.130 **We recommend that the investigative function should remain the responsibility of the police and not be subject to external supervision.** However, our recommendations below, many of them influenced by what we have seen in Scotland, the United States and other jurisdictions, do, we believe, go a long way towards meeting the concerns of those who were attracted to the idea of giving the prosecution service a supervisory role in relation to investigations.

4.131 On the basis of submissions made to us, it was apparent that some saw a role for the prosecutor in ensuring a full and rigorous investigation of all cases no matter what the circumstances or who might be involved. As noted above, Article 6(3) of the Prosecution of Offences (Northern Ireland) Order 1972 already places a duty on the Chief Constable to respond to a request from the DPP for information on any matter requiring investigation on the ground that it may involve a criminal offence and to provide the DPP with any information necessary for the discharge of his functions. **We recommend that the powers contained in Article 6(3) of the Prosecution of Offences (Northern Ireland) Order 1972 be retained and that the head of the prosecution service should make clear publicly the service's ability and determination to prompt an investigation by the police of facts that come into its possession, if these appear to constitute allegations of the commission of a criminal offence, and to request further information from the police to assist it in coming to a decision on whether or not to prosecute**.

4.132 This last recommendation would underline the central point that, while it is no part of the prosecutor's function to supervise investigations, it is the prosecutor's concern to prosecute crime and when allegations of criminal offences come into his or her domain, the prosecutor

has a duty to see that such allegations are investigated. The question arises of what happens in the event that the prosecutor is dissatisfied with the response to a request for matters to be investigated and believes that they have not been pursued with sufficient vigour by the police. We note that under the Police (Northern Ireland) Act 1998 the Secretary of State and the Police Authority of Northern Ireland may refer a case to the Police Ombudsman after consultation with the Chief Constable where it is desirable to do so in the public interest. **We recommend that Article 6(3) of the 1972 Order be supplemented with a provision enabling the prosecutor to refer a case to the Police Ombudsman for investigation where he or she is not satisfied with an Article 6(3) response.**

4.133 The early involvement of the prosecutor in a case raises the question of his or her role if he or she were to suspect malpractice on the part of the police investigators. **We recommend that a duty be placed on the prosecutor to ensure that any allegations of malpractice by the police are fully investigated.** This would be consistent with human rights guidelines and is in line with present practice. As for whether evidence secured in such circumstances should be deployed in court, that is a matter for the prosecutor who would take account of the human rights imperative of a fair trial and the need to avoid abuse of process. It would not necessarily be in the interests of justice for all such evidence to be excluded in all circumstances. The prosecutor, in deciding whether to use evidence obtained through malpractice or unlawful means, would make a judgement on whether it was likely to be regarded as admissible in court and on whether it would be proper in all the circumstances to use it.

4.134 We should emphasise that recommendations such as those in the previous paragraphs are not intended to place the prosecution in a position of authority over the police investigator. They are intended to ensure that the prosecutor has the necessary powers to exercise his or her prosecutorial duties effectively and in conformity with human rights obligations.

4.135 While we do not envisage prosecutorial supervision of investigation, we were impressed by the strength of the arguments for early involvement of a prosecuting lawyer in police investigations in the more complex and serious cases. This came through strongly in our visits to Scotland, the United States and many of the civil law jurisdictions. The involvement of prosecuting lawyers might amount to providing advice on whether there is sufficient evidence to justify an arrest and charge or it could be more proactive in contributing to the planning of a complex operation in a way that was likely to secure admissible evidence. Such advice is already given on occasion in Northern Ireland. **We recommend that it be a clearly stated objective of the prosecution service to be available at the invitation of the police to provide advice on prosecutorial issues at any stage in the investigative process.**

4.136 This last recommendation raises the question of whether a prosecutor who has given advice at the investigative stage, especially if closely involved in the case on a regular basis, is in a position to make an objective decision on whether to prosecute. In some jurisdictions which we visited, in such circumstances another prosecutor would take the decision on whether to prosecute or the decision would be the subject of scrutiny by a supervisor. That would not

always be easy or practical in a jurisdiction the size of Northern Ireland, and we do not believe that the nature of the relationship we envisage between prosecution and police should give rise to many problems of this sort. **We suggest that, where a prosecutor has been extensively involved in advising the police on prosecutorial matters at the investigative stage, in order fully to safeguard the independence of the prosecution process consideration should be given to the possibility of arranging for the decision to prosecute to be made or scrutinised by another member of the prosecution service.**

4.137 For the sake of clarity, we wish to say that we fully appreciate the need for the police to have access to legal advice from their own lawyers on such matters as employment issues, operational matters and civil claims. These are not matters for the prosecution.

THE INTERFACE BETWEEN INVESTIGATION AND PROSECUTION – RESPONSIBILITY FOR CHARGING

4.138 In the more serious cases where the suspect is subject to a charge, we gave careful thought to the point at which the prosecutor should assume responsibility. In particular, should the prosecutor be responsible for initiating proceedings by taking the decision to charge following an arrest? This would involve a legal professional input at an early stage and appears to provide a valuable safeguard. However, we have considered relevant provisions of the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE) and associated codes as they apply to the detention, treatment and questioning of suspects by police officers. We have also looked at the practicalities and resource implications. These considerations, and in particular our concern to interfere as little as possible with the current PACE procedures, militate against giving prosecutors a role immediately after the point of arrest, as would be necessary if it were to be their responsibility to prefer the initial charge. In order to maintain a clear distinction between investigation and prosecution, we believe that the police are best left with the responsibility of deciding what charges to bring initially in the light of their investigation and after interviewing suspects, but that a professional prosecutor should be involved at an early enough stage to take responsibility for deciding which charges should be presented to the court and for presenting the case in court. **We recommend that where the police prefer a "holding" charge under Article 38(7) of the Police and Criminal Evidence (Northern Ireland) Order 1989, a prosecutor should be seized of and be responsible for the presentation of the case before a magistrates' court in accordance with the provisions of Article 47 of the Order.**[32] **It should be the prosecutor's sole responsibility to formulate and determine the charge that is presented to the court.**

32 Article 47 requires that a person charged and detained in custody shall be brought before a magistrates' court as soon as is practicable and in any event not later than the following day, or where that day is a Sunday, Christmas or Good Friday, the next following day that is not one of these days.

The prosecutor should have legal responsibility for the application to the magistrates' court for remand, including the presentation of all supporting evidence. This will require legislative change.

4.139 Under Article 47 of the Police and Criminal Evidence (Northern Ireland) Order 1989 once a person is charged, he or she must be brought before a magistrates' court within the required timescale. It is not possible to drop the charges before the court appearance, although they can of course be withdrawn at the hearing. **We recommend that consideration be given to amending the Police and Criminal Evidence (Northern Ireland) Order 1989 to enable a prosecutor, on reviewing the case, to withdraw the charges before the court appearance.** Further we appreciate that publicity surrounding the charging of an individual can be distressing and damaging to reputation. Accordingly **we recommend that (if the law is changed in the way we suggest), until the prosecutor has determined whether to proceed with the remand application, the fact of the arrest and the name of the person detained should not be publicised.**

4.140 We recognise that the arrangements recommended in the previous paragraphs will require prosecutors to be available to receive papers and appear in court outside normal working hours and at weekends before the first remand hearing takes place. In the event of police bail being granted, the time limits are less stringent but the same principles would apply.

4.141 We have considered carefully the present position and the relationship between the police and prosecutor in relation to the preparation and presentation of cases between charge and trial. Following charge, it will continue to be for the police to produce evidence to enable the prosecutor to direct on whether to proceed with the prosecution and to put together material to enable the prosecutor to take decisions on disclosure. However, **we recommend that the prosecutor should assume full responsibility for the case between the point of charge (or summons) and trial, including tracking progress of the case, advising the police on the evidence required to secure conviction and deciding on what matters should be disclosed to the defence.** On the basis of discussions in Northern Ireland and of what we have seen elsewhere, we see the prosecution as having the key role at this stage of the process in ensuring the timely management of cases and focusing attention on evidential issues. Close co-operation with and, on evidential matters, direction of the police on the part of the prosecutor is crucial if cases are to be processed efficiently and to a high standard. This does not mean the prosecutor having responsibility for investigation or the direction of police resources and we are satisfied that it can be pursued without impairing the essential independence of the two organisations.

4.142 We recognise that the approach as suggested in the preceding paragraphs would place significant additional responsibilities on the prosecution and that there would be practical and resource implications. We are also aware of the scale of change in organisation and process that would be associated with implementation of the totality of our recommendations. The lesson from other jurisdictions is that change should be carefully planned and properly

resourced if the integrity of the prosecution process is to be safeguarded and not put under unacceptable pressure. With that thought in mind, **we suggest that the timing of commencement of legislation that will flow from our recommendations should be planned so as to ensure that all necessary resources, preparation and training are in place and completed before procedural changes are introduced.**

4.143 As regards disclosure, it is for the prosecution to take full responsibility for deciding what matters should be disclosed to the defence. But we note the concerns raised by practising lawyers that the police act as a filter by making judgements in the first place as to what material may undermine the prosecution case. In fact the disclosure code issued under the Criminal Procedure and Investigations Act 1996 states that the police disclosure officer must also provide the prosecutor with schedules listing all material which may be relevant to an investigation. However, **we believe that the present disclosure provisions should be reviewed and suggest in Chapter 14 that this might be one of the matters for consideration by a Law Commission.**

4.144 The issue of the time taken to bring cases to trial is dealt with in Chapter 15. In this context the period between first remand and committal for trial is critical. At present the average time taken to progress non-scheduled custody cases through this period is about 30 weeks of which 16 weeks account for the time taken for the police to submit a file to the DPP. Through joint case management, between the police and DPP, efforts are being made to reduce these periods, although it is recognised that sufficient time taken to prepare properly can reduce the likelihood of problems later on, including the risk of miscarriages of justice. We believe that our recommendations, which should mean a closer involvement of the prosecutor throughout, will aid further progress. However, we view with interest the Scottish system where it is for the fiscal to make a motion for committal, on being satisfied that there is sufficient evidence for a jury to convict. This process does not involve a preliminary consideration of the evidence by the court. We also note the trend in England and Wales towards simplified procedures for transferring cases to the Crown Court. **We recommend that consideration be given to introducing simplified procedures for transferring cases to the Crown Court in Northern Ireland, while ensuring safeguards for a defendant who wishes to argue that there is no case to answer. Such a development could be accompanied by a major effort further to reduce time taken to bring cases to trial.**

THE INTERFACE BETWEEN INVESTIGATION AND PROSECUTION – SUMMONS CASES

4.145 The less serious cases, which form the bulk of criminal business, are normally processed by way of summons. Most of these are currently prosecuted by the RUC but, if our recommendations are accepted, they will in future be processed by an independent prosecution service. That service will continue of course to prosecute the more serious cases

tried before magistrates' courts. In considering how this might work, we have been concerned to ensure proper scrutiny of the case before issue of summons, to avoid unnecessary additional costs and not to add to delay.

4.146 The Scottish and Manhattan experiences were instructive. There should normally be no need for any prosecutorial involvement until a decision is required on whether to proceed in these cases. **We recommend that once the police at divisional level decide that they wish to proceed and judge that they have sufficient evidence to warrant prosecution, the facts of the case should be sent to the prosecutor. In order to facilitate the process, consideration should be given to the development of standard forms, with the information fields necessary for purposes of issuing a summons, which could be e-mailed or faxed to the prosecutor.** We understand that the criminal justice integrated IT project, currently being developed, would support such a mechanism.

4.147 Where these cases are submitted by the police to the prosecutor, it would be appropriate for them to be endorsed by or routed through a supervisory level within the police, in order to provide safeguards and quality control. However, prosecutors in some other jurisdictions stressed the importance of their being able to deal with material prepared by the police officer most involved and being able to discuss issues directly with the investigator when questions arose. The more remote the point of police interface was from the actual investigation, the greater was the danger of misunderstanding and delay. **We recommend that in summons cases arrangements be made to ensure that the facts of the case are passed to the prosecutor by a police officer who is close to and familiar with the investigation.** There should be no need for cases to be processed through several levels within the police and, in particular, we would counsel against retaining any form of Central Process Office to act as a link with the prosecutor. We see the prosecution service as taking over the role of the Central Process Office; the additional cost of expanding the prosecution service accordingly to deal with the caseload should to a considerable extent be offset by ending this function within the police.

4.148 The prosecutor, having examined the case and decided to prosecute, would be responsible for drawing up the summons, deciding when the case was to be heard, submitting the summons to a JP or clerk of petty sessions for consideration and signature, and arranging for it to be served.

4.149 As for prosecution in court, **we envisage moving towards a position where it is the norm for legally qualified staff of the prosecution service to present cases at magistrates' courts (including committals), while retaining the option of briefing independent counsel when appropriate.** This is an approach which would help enhance the quality and diversity of work available to the prosecutor's staff while providing value for money. We do not at this stage recommend using non-qualified staff from the prosecution service to prosecute routine cases as we see the involvement of lawyers in all aspects of prosecution work as an important confidence-builder.

DIVERSION AND THE COMMUNITY

4.150 It is currently the police who, in Northern Ireland, determine whether to divert offenders away from the court process - for example by way of warning or caution. In the case of juveniles they are advised by juvenile liaison bureaux (in those areas where they exist), which may in some cases recommend intervention by other agencies such as social services or education as part of a proposal to caution. We do not wish to disturb these arrangements which are consistent with the role of the police in the community; moreover, if all such cases were to be processed through the prosecutor's office for decision it would add significantly to costs and delay. In 1994/95 some 3,900 offenders were the subject of an official caution in respect of notifiable offences, 60% of those in respect of theft.

4.151 Considerations of equity require that decisions on whether to caution are taken on a consistent basis across Northern Ireland; and, given the role which we envisage for the prosecution service in relation to decisions on prosecution for all offences, it must have an input into policy on cautioning. **We recommend that caution guidelines should be agreed between the police and the prosecution service. Statistics should be kept and the practice kept under review, with particular attention being paid to consistency of approach and to ensuring that cases are dealt with expeditiously.**

4.152 As to whether the prosecution service should have the option of diverting offenders away from the court process in cases submitted to it by the police, we are conscious that this is less likely to be an issue at present, given that the DPP is only involved in the more serious cases. On rare occasions the DPP might refer a case back for police caution. However, we noted that in other jurisdictions, where the prosecution had responsibility for deciding on all prosecutions, there was often a presumption that every effort would be made to divert offenders away from the courts if at all possible. In the scheme of things that we are proposing, **we recommend that prosecutors be enjoined positively to consider the diversion option in their consideration of cases. The options available to them might be:**

- **referral back to the police with a recommendation to caution;**
- **diversionary options, for example mentally disordered offenders or drug users being referred to treatment or young offenders being offered programmes to address offending behaviour; and**
- **the making of arrangements for restorative interventions.**

If prosecutorial diversion is to develop in a meaningful way, it will of course be dependent on the availability of diversionary schemes.

4.153 The cases to be considered for prosecutorial diversion are likely to be more serious than those where a police caution is issued, given that the police will have passed them to the prosecutor for a decision on whether to prosecute**.** In the circumstances **we think it right**

for the prosecutor to have the ability to review the decision not to prosecute if the offender fails to follow through the arrangements for diversionary activity, treatment or restorative agreements.

4.154 We thought carefully about the possibility of prosecutorial fines. It might be argued that they involve the imposition of punishment, or putting pressure on a suspect to accept punishment without recourse to due process. However, provided that in issuing a fine it is made very clear that the recipient has the option of fighting the case in court, there should be no human rights objections to this course. It would be a means of expediting some of the less serious cases, while giving the alleged offender the opportunity of avoiding a criminal record. In principle the concept is little different from a fixed penalty. **We recommend that consideration be given to introducing the prosecutorial fine in Northern Ireland.** Consideration would have to be given to whether it should be possible to cite a prosecutorial fine in any further court proceedings, as is the case with cautions.

4.155 A well-structured approach to diversion, on the part of the police and the prosecutor, has the dual benefit of avoiding criminalisation in suitable cases and reducing the volume of business in the courts. It is important, however, that the community understand the process if confidence is to be retained that effective action is being taken in respect of criminal behaviour. **It will be necessary for the prosecution service, together with the police, to engage with the community and other agencies and service providers about what is involved in the diversionary process and to seek to arrive at a clear understanding of what diversionary schemes and options may be available at the local level.**

4.156 This last recommendation brings us into an important area. It opens up the prospect of prosecutors engaging at the local level with other agencies and the community in a way that has not hitherto been possible. From our visits to other jurisdictions we are conscious of the enhanced and positive contribution that prosecutors can make to the criminal justice system and the community at large through such engagement, without compromising their independence. It is not just about issues of diversion, but also involvement in community safety matters, court user issues and helping familiarise the public with criminal justice processes. **We recommend that outreach to the community and inter-agency working be a stated objective of the prosecution service.**

POLITICAL ACCOUNTABILITY

4.157 We were asked in our terms of reference to safeguard the independence of the prosecution process; and it is clear from comments made to us throughout the consultation period that independence from political influence is what is sought above all else. Yet the prosecution service which we envisage will be bigger than at present, spend more money, have a greater role in the criminal justice system and have a higher profile in the community. In the

circumstances, some form of political accountability is inevitable and we did not come across any jurisdiction where the prosecutor was able to act entirely without reference to government and/or legislature. The challenge is how to develop a meaningful relationship between prosecution, the executive and the legislature without compromising the essential independence of the process.

4.158 The weight of opinion, though by no means unanimous, was that responsibility for prosecutions should be devolved to local Northern Ireland institutions sooner or later. Some felt that it could be delayed until local institutions of government had had time to prove themselves. Given the discrete nature of the function, it would be possible for the prosecution service to remain accountable to an Attorney General in London for a period after other criminal justice functions had been devolved. However, **we recommend that political responsibility for the prosecution system should be devolved to local institutions along with other criminal justice functions, or as soon as possible after devolution of such functions.** We so recommend because the prosecution service, whilst sustaining its independence, will need to work effectively in partnership with other local criminal justice agencies and interact rather more with local communities than in the past; this does not fit well with a system where the service looks to London for its political focus at a time when other domestic functions are run from Northern Ireland.

4.159 After devolution, one possible solution would be for the prosecution service to be accountable to a Minister for Justice. That does occur in some other jurisdictions. However, given the potential sensitivities of Northern Ireland and the need for the prosecution to be seen to be independent, we recommend against such a line of accountability to any departmental Minister with operational responsibilities. Nor do we believe that it is right for the prosecution service to be dependent for finance, accommodation or other corporate services on another department; it should be a self-sufficient organisation. We thought about other possibilities including an entirely free standing service, one which reports to the First Minister and Deputy First Minister or the retention of a role for the Attorney in London. But none of these is ideal.

4.160 A number of people have suggested that the head of the prosecution service might be accountable to a local Attorney General. We regard the creation of such a post as raising many issues beyond our terms of reference. But we note that such a figure might have responsibilities as senior legal adviser to the Northern Ireland Executive, be responsible for the legislative draftsmen, be the Executive's link with the Law Commission, and take responsibility for human rights-proofing legislation. **We recommend that consideration be given to establishing a locally sponsored post of Attorney General who, inter alia, would have oversight of the prosecution service. We see the Attorney General as a non-political figure drawn from the ranks of senior lawyers and appointed by the First Minister and Deputy First Minister. We would suggest a fixed term appointment, with security of tenure, say for five years, which would not be affected by the timing**

of Assembly terms. The appointment process should be transparent, enabling people to declare themselves as candidates. We would see such a position as carrying significant status, equivalent to that of a High Court judge, and attracting candidates of the highest possible calibre.

4.161 The question of political accountability arises in the event that this proposal is adopted. **We recommend that the formulation in section 27 of the Scotland Act 1998 be adopted in that, although not a member of the Assembly, the Attorney should be enabled by Standing Orders to participate in Assembly business, for example through answering questions or making statements, but without voting rights.**

4.162 An Attorney General appointed along the lines envisaged above would be less "political" than almost all counterparts in other common law jurisdictions, where the post holder is a member of the Government or at the very least an appointee of the governing party. This would, in itself, help insulate the prosecution process from political pressure. However, in the particular circumstances of Northern Ireland, we believe that this independence should be further strengthened, by ensuring that the relationship between the Attorney General and the head of the prosecution service, while containing elements of oversight, is consultative and not supervisory. In other words, **there should be no power for the Attorney General to direct the prosecutor, whether in individual cases or on policy matters.** Our impression is that in some other common law jurisdictions the relationship between Attorney and prosecutor works well in practice and that the independence of the prosecutor in decision making is respected; but ultimately, if there were disagreement between the Attorney and the prosecutor on an individual case, then in law the Attorney's will would probably prevail. We do not believe that such an arrangement would be suitable in the Northern Ireland context.

4.163 We are attracted to aspects of the model in the Republic of Ireland. **We recommend that legislation should: confirm the independence of the prosecutor; make it an offence for anyone without a legitimate interest in a case[33] to seek to influence the prosecutor not to pursue it; but make provision for statutory consultation between the head of the prosecution service and the Attorney General, at the request of either.** The Attorney General would be answerable to the Assembly for the work of the prosecution service in general terms but **we recommend that it be made clear on the face of legislation, as in section 27 of the Scotland Act 1998, that the Attorney could decline to answer questions on individual cases where to do so might prejudice criminal proceedings or would be contrary to the public interest.** It may be that the prosecutor and Attorney General would conclude that in no circumstances should they be expected to answer such questions. Nevertheless we do not think that this should be ruled out for all time, as will be apparent from our views on the giving of reasons for decisions. **We recommend that the head of the prosecution service should be accountable to the appropriate Assembly**

33 People with a legitimate interest could be the defendant, his or her medical or legal advisers, his or her family, professionals with an interest in the case such as teachers or social workers, and the victim. Section 6 of the Republic of Ireland's Prosecution of Offences Act 1974 contains a possible formulation.

Committee for financial and administrative matters relating to the running of service. In this event it would be important that Standing Orders made clear the limitations on questioning which might impinge on individual cases.

OTHER ACCOUNTABILITY MEASURES

4.164 Giving reasons for decisions to the public or interested stakeholders such as victims or the relatives of victims is the most direct form of accountability in the explanatory sense. We have noted the submissions of human rights groups that prosecutors should be more responsive to victims and their families when they raise concerns about the investigation of their case. We think it right that victims should be given as much information about their case as they request, so far as is possible, and we can see that there might be circumstances where public confidence would be enhanced by providing explanations for decisions in individual cases.

4.165 However, this is a difficult area and we note the reluctance of prosecutors in many jurisdictions to give detailed reasons. It would be inimical to the interests of justice if conclusions were drawn about the guilt of an individual, not on the basis of a trial before an independent tribunal, but rather because it appeared from reasons given for non-prosecution that the case had to be abandoned due to some technicality or concern for the welfare of a particular witness. There would also be a damaging effect on witnesses whose credibility was called into question. We can think of other instances where giving detailed reasons would not be in the public interest.

4.166 However, we are also of the view that there will be occasions when it should be possible to give quite detailed reasons to victims in such a way as would not be prejudicial to the interests of justice or the reputations of others. In some cases where there are evidential difficulties, for example, it should be possible to explain what these are without impugning in any way the reputation of an individual. We note that in the United States District Attorneys tend to be very open in explaining their approach in cases of major public concern, perhaps in part because of their elected status. The experience in Germany and the Netherlands has also shown that it is possible to formulate a system of giving reasons without prejudicing the cause of justice.[34]

4.167 **We recommend that, where information is sought by someone with a proper and legitimate interest in a case on why there was no prosecution, or on why a prosecution has been abandoned, the prosecutor should seek to give as full an explanation as is possible without prejudicing the interests of justice or the public interest. It will be a matter for the prosecutor to consider carefully in the circumstances of each individual case whether reasons can be given in more than**

34 Fionda, *Public Prosecutors and Discretion: A Comparative Study* (1993), page 211.

general terms and, if so, in how much detail, but the presumption should shift towards giving reasons where appropriate. We appreciate that this could impose a significant additional burden on the prosecution service. We suggest that those regarded as having a legitimate interest in a case be confined for the most part to victims and their families. There may be the occasional high profile case, where it might be appropriate to respond to public concerns and make reasons for prosecutorial decisions more widely available, but this will be the exception rather than the rule.

4.168 We should stress that we do not envisage reasons for prosecutorial decisions being made available to public representatives on a routine basis. If such a practice were to become the norm, the independence of the prosecution service would be liable to be compromised.

4.169 Giving reasons might be slightly less of an issue if there were greater public understanding of the work of the prosecution service. This is also an important element of accountability, from what we have seen in other jurisdictions. **We recommend that the head of the prosecution service be required by statute to publish the following:**

- **an annual report;**
- **a code of practice outlining the factors to be taken into account in applying the evidential and public interest tests on whether to prosecute; and**
- **a code of ethics, based in part on the standards set out in UN Guidelines.**

It would also be beneficial for the service to publish good practice guidelines on such matters as the treatment of witnesses and refer to them in its annual report. Publications of the sort outlined above, together with a programme of outreach, would in our view remove much of the mystery in the process which was apparent to us during the public consultations that we carried out. We also believe that a policy of transparency and openness would enhance public confidence and the quality of work satisfaction for those in the service.

4.170 Greater public understanding of the way in which the prosecution system works, achieved through a policy of transparency and openness as outlined above, should have a significant impact in confidence building terms. However, particularly given that it will not always be possible for prosecutors to give detailed explanations for their decisions, there remains an issue about providing assurances on the quality of prosecutorial decision making. **We recommend that the prosecution service should be subject to inspection, with a significant independent input.**

4.171 The scale of the prosecution service in Northern Ireland will not be sufficient to warrant a standing inspectorate. For the same reason, it would not be feasible for inspections to be carried out by teams made up primarily of members of the service. **We recommend that the Criminal Justice Inspectorate, which we propose in Chapter 15, be given the responsibility for buying in the professional expertise necessary to carry out inspections.** The source of expertise might be prosecutors or independent lawyers from

other jurisdictions, the Crown Prosecution Service inspectorate, for example. Inspection activity would not be limited to covering the quality of professional decision making on prosecution matters but should also embrace other aspects of service provision such as contact with victims and management issues. **We recommend that the Criminal Justice Inspectorate be under a statutory duty to arrange for the inspection of the prosecution service, report to the Attorney General on any matter to do with the service which the Attorney refers to it and also report the outcome of inspections to the Attorney General. We recommend that the Criminal Justice Inspectorate should include in its annual report a review of inspection activity and its outcomes in relation to the prosecution service.** All of this would be consistent with what is proposed for the CPS.

4.172 The handling of complaints is an essential part of effective accountability mechanisms. **Details of complaints procedures for the prosecution service should be publicly available and included in the service's annual report, along with an account of the handling of complaints throughout the year.** Given the increased role of the prosecution service, there may be a greater volume of complaints and **we recommend that an independent element be introduced into the procedures where the complainant is not satisfied with the initial response and where the complaint is not about the exercise of prosecutorial discretion. The Criminal Justice Inspectorate should audit the operation of the prosecution service's complaints procedures on a regular basis.**

THE PROSECUTION SERVICE

4.173 So far in this section of the report, our recommendations have been concerned with where responsibility for prosecutions should lie, the role of a prosecution service and accountability mechanisms. We now address the issue of the nature of the organisation that will deliver the service that we envisage.

4.174 In functional terms, what we are recommending entails building upon the responsibilities and work of the existing Department of the Director of Public Prosecutions. However, our recommendations entail taking on new work, a different approach to aspects of its existing work and substantial organisational change. We feel that this should be reflected in the name of the prosecution service. **We recommend that the Department of the Director of Public Prosecutions be renamed the Public Prosecution Service for Northern Ireland.**

4.175 As for the professional head of the service, we considered the case for a new title, perhaps "Chief Public Prosecutor". We envisage major changes in the prosecutorial arrangements in Northern Ireland, which we believe will enhance the system and public confidence in it. A new title for the head of the organisation would help to demonstrate to those outside it, as well as those inside, that the remit and responsibilities of the organisation have changed considerably. On the other hand, the term "Director of Public Prosecutions" is used in many

common law jurisdictions throughout the world and within these islands. It is widely understood and indicates a position of standing and status, as befits the head of an independent prosecution service. The arguments are finely balanced. We make no recommendation on the title of the head of the Public Prosecution Service.

4.176 It is particularly important that the process of appointing the head of the Public Prosecution Service is insulated from any possibility or appearance of political influence. The same applies to procedures for dismissal in the event of incapacity or misconduct. **We recommend that the appointment process for the head of the Public Prosecution Service and deputy be through open competition, with a selection panel, in accordance with procedures established by the Civil Service Commissioners for Northern Ireland. These appointments would be made by the Attorney General for Northern Ireland. Appointments would be for a fixed term, or until a statutory retirement date. There should be statutory safeguards to ensure that removal from office by reason of misconduct or incapacity would be possible only after a recommendation to that effect coming from an independent tribunal.**

4.177 The new organisation will be larger than the present Department. A substantial number of additional legal staff, together with support staff, will be needed to undertake the prosecution work that is currently the responsibility of the police. The corporate functions of the Service will need to be strengthened if it is to assume full responsibility for its own finance, personnel and administration, which we regard as particularly important.

4.178 If the Public Prosecution Service is to work as envisaged in our recommendations, it will require good accessibility to local courts and the police at divisional level together with the ability to interface with the communities which it will be serving. This points to a significant degree of decentralisation. Accordingly, **we recommend that the Public Prosecution Service should establish local offices from which the bulk of prosecutorial work in their respective areas would be conducted. The boundaries of such offices should be coterminous with police and court boundaries, which in turn are based on district council areas.** We make no recommendation about the precise number of such local offices. We think that five, including Belfast, may be about right but suggest that this should be the subject of detailed consideration, based on such factors as caseload and accessibility. **We recommend that each of these offices should be headed by a senior prosecutor of sufficient status for decisions on most prosecutions to be delegated to the local offices.**

4.179 In looking at the nature of the transition that will be involved in moving from the present arrangements to the new, we took account of a number of considerations. We need above all to consider the importance of sustaining the quality of justice through the period of change. The experience of others suggests to us that a measured approach to organisational change is likely to produce the best results in the Northern Ireland context.

4.180 We were given access to information on the religious and gender balance of the Department of the DPP. While the religious and gender balance is reasonably reflective of that in the community, we do recognise the views of those who would like to see a staffing complement that is diverse in terms of professional background and experience and which will help sustain an environment of measured change. While some support staff from the Central Process Offices might be encouraged to transfer into the Public Prosecution Service, there will remain the need to recruit substantial additional numbers of people at a range of levels, both professional lawyers and administrative staff. **External recruitment of new staff should be subject to open competition, in accordance with fair employment and equal opportunities best practice. A substantial recruitment exercise would provide the opportunity to attract applicants from a range of diverse backgrounds, including defence lawyers and people from all parts of the community, with a geographical spread across Northern Ireland. Consideration should be given to some posts being the subject of fixed-term contracts and to offering financial assistance to a limited number of students seeking professional qualifications, on the basis that they might start their career within the Public Prosecution Service.** This exercise, together with the expanded role for the Public Prosecution Service and implementation of others of our recommendations, will herald a period of significant change. However, we should stress the importance of sustaining the quality and efficiency of the service's work throughout this time.

4.181 **We recommend the appointment of a senior manager as head of Corporate Services to work to, and alongside, the head of the Public Prosecution Service. This post would have particular responsibility for driving the change agenda and ensuring the efficient and effective management of what will be a larger and more dispersed organisation than is the case at present.**

4.182 The influx of newly recruited staff, increasingly complex legislation, the human rights dimension and the change in operating environment will place a big premium on training. We noted the emphasis placed on training by the Procurator Fiscal Service during our visit to Scotland, especially in relation to human rights. **We recommend that at the earliest possible stage in establishing the Public Prosecution Service training needs should be identified and the necessary resources deployed to meet them.**

4.183 In the course of our work, we considered in some detail whether there were lessons to be derived from the *Review of the Crown Prosecution Service in England and Wales* that reported in 1998 under the chairmanship of the Rt. Hon Sir Iain Glidewell. Indeed we have already referred to some of the issues identified in this report. That review examined the development of the CPS since its formation in 1986 and contained much useful material about the management of structural change and the interface between the CPS, police and other agencies. There are many differences between the scenario that we envisage and that which was associated with the formation of the CPS. For example, the introduction of the CPS meant that, almost overnight, police responsibility for the vast bulk of prosecutions was

transferred to an independent service, whereas in Northern Ireland it is already the case that a substantial number of cases are the responsibility of the DPP. In addition, the scale of the operation in England and Wales was and remains totally different. We are aware that the DPP has already considered the applicability of Glidewell to his Department. However, **we recommend that those who are considering the resource implications and the organisational issues arising from our proposals in respect of the prosecution function should examine the Glidewell Report, with a view to seeing whether there are lessons to be learnt from the experience of England and Wales.**

RESOURCE ISSUES

4.184 One of the clear lessons coming out of the Glidewell Report is the importance of ensuring that any new structures in this field are properly resourced from the outset. We employed consultants to produce a broad indication of the possible cost implications of our recommendations for the prosecution system. We are grateful to them and to the RUC and the DPP for their co-operation in enabling the work to be done.

4.185 The consultants produced a model based on a number of assumptions drawn from our report. These included the Public Prosecution Service assuming responsibility for all prosecutions currently carried out by the police, with the consequential need for more staff, to some extent offset by the closure of the Central Process Offices. They worked on the basis of the Public Prosecution Service being a stand-alone agency, with its own corporate structure and decentralised offices. They also took account of the need for out of hours cover and made assumptions about the time that would be needed to process cases of differing degrees of complexity. In short their broad estimate of the additional annual costs of the proposed arrangements was in the region of £1.5 million to £2 million, with additional start-up costs of about £2 million. This does not take account of any redundancies that might be associated with the process. The DPP's budget for 1998/99 was just over £7.5 million.

4.186 We should emphasise that much more detailed work will be required to produce a firmer estimate of the costs of our proposals in this chapter. The emphasis on outreach, involvement in inter-agency working, working with victims and training will carry some additional resource implications.