

REVIEW OF THE
CRIMINAL JUSTICE
SYSTEM IN
NORTHERN IRELAND
MARCH 2000

Criminal Prosecution Procedure and Practice: International Perspectives

Keith Bryett and Peter Osborne



Criminal Justice Review Group

RESEARCH REPORT:

16

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Procedure
and
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Notations and Abbreviations

ASU	Administrative Support Unit.
Belfast Agreement	The agreement reached between the majority of the Northern Ireland political parties, and the UK and Irish governments, signed at Belfast on 10 April 1998. The agreement is reproduced at www.nio.gov.uk/agreement.htm .
CJRG	Criminal Justice Review Group, established under the terms of the Belfast Agreement of 10 April 1998. The body which commissioned this research from the authors.
CJU	Criminal Justice Unit.
CPS	Crown Prosecution Service.
CPSI	Crown Prosecution Service Inspectorate.
CSS	Chief State Solicitor.
DPP	Director of Public Prosecutions.
FPS	Federal Prosecution Service (Canada).
IPOC	Integrated Proceeds of Crime Unit (Canada).
NIO	Northern Ireland Office.
RUC	Royal Ulster Constabulary.

Executive Summary

This Report was commissioned from the authors by the Criminal Justice Review Group (CJRG). In it we examine criminal prosecution models in a number of jurisdictions with particular emphasis on accountability and the independence of prosecutors, and on equity and fairness within the different models. We also consider varieties of accountability, the subject-matter of accountability, and the meaning of ‘independence’ for present purposes.

We consider values in criminal justice and identify criteria by reference to which a criminal prosecution process might be judged – we suggest that it be efficient, effective, fair to each person whose interests are affected by a decision, equitable as between all whose interests are affected by the agency’s decision, independent, that it preserve and enhance public confidence, be consistent in its decisions, accountable, and that it apply open, transparent and documented procedures. We consider each criterion, and also the modern-day role of the prosecutor.

We do not make recommendations in this Report. Rather, in keeping with our terms of reference, we have suggested at various points options for Northern Ireland for consideration by the CJRG. Those suggestions are summarised in Chapter 5, the broad thrust of which is that:

- No single foreign model of criminal prosecution would in itself satisfy all the requirements of Northern Ireland society.
- We do not suggest a move from an adversarial to an inquisitorial model of criminal justice.
- We do not suggest a reduction in the scope of discretion available to prosecutors.
- We suggest that investigating magistrates or similar should not be introduced in Northern Ireland.
- We advocate the separation of the investigative and prosecution functions and in consequence of this we suggest that prosecution functions be removed from the police.
- We suggest the introduction of statutory prosecution time limits.
- We suggest that a new name be applied to any new prosecution organisation in Northern Ireland.

- We suggest the development of a charter of values and measurable objectives for the criminal justice process.
- We suggest that prosecutors give reasons for non-prosecution to victims and to the media.
- We suggest that victims, defendants and witnesses be better equipped with information relating to the case with which they are involved.
- We suggest that an internal inspectorate would be very useful in the assurance of consistency in decision-making and the spread of best practice in the prosecution organisation, and that an external inspectorate could play an important role in enhancing public confidence in the prosecution function as well as providing an avenue of appeal for aggrieved complainants.
- We suggest that prosecutors liaise with community criminal justice consultative groups but that they should not be members of the groups.
- We note the perennial difficulties in reconciling independence with political accountability and suggest a model which we believe would overcome the traditional fears.
- We suggest that a commitment to human rights norms and due process values be incorporated into the conditions of service of prosecutors.
- We highlight the benefit of continual education and ethical training and sociological awareness for prosecutors.
- We advocate greater openness and transparency in respect of the prosecution function, especially in the publication of information and as regards the community consultative procedures mentioned above.

1 Introduction

1.1 The Context

The parties to the Belfast Agreement 'believe that the aims of the criminal justice system in Northern Ireland are to:

- deliver a fair and impartial system of justice to the community;
- be responsive to the community's concerns, and encouraging community involvement where appropriate;
- have the confidence of all parts of the community; and
- deliver justice efficiently and effectively.'

For their part, the specific terms of reference of the Criminal Justice Review Group, so far as they pertain to this Report, provide:

Taking account of the aims of the criminal justice system as set out in the Agreement, ... [to] address the structure, management and resourcing of publicly funded elements of the criminal justice system and ... [to] bring forward proposals for future criminal justice arrangements (other than policing and those aspects of the system relating to emergency legislation, which the Government is considering separately) covering such issues as:

- the arrangements for the organisation and supervision of the prosecution process, and for safeguarding its independence; ...¹

1.2 Structure of Report

We believe that this Report represents a comprehensive examination of criminal prosecution procedures in a number of developed countries around the world. It has been compiled

¹ The Agreement: Agreement reached in the multi-party negotiations, Annex B ('Review of the Criminal Justice System – Terms of Reference'), Belfast, 1998 p. 24.

according to the requirements of the Criminal Justice Review Group (CJRG) and in keeping with the original submission of the authors. In this introductory chapter we flag a number of key areas and issues which are important to our overall findings and we list the jurisdictions chosen for investigation. We also explain how the Report is structured and outline our methodology in a general sense. In concluding this chapter, we address some fundamental issues relating to values in criminal justice which inform the remainder of the Report.

Chapter 2 contains an empirical analysis of the criminal prosecution processes in various jurisdictions. Some of these jurisdictions were included at the request of the CJRG, while we selected others because, in each case, we considered them necessary to achieve an appropriate and representative sample. As far as possible each study in Chapter 2 is considered on the basis of a common template; readers will appreciate, however, that not all practices discussed are a part of every jurisdiction examined. This is particularly the case with some practices and procedures which may currently exist only in the justice systems of jurisdictions of an adversarial nature and not in those of an inquisitorial nature, and vice versa. Nonetheless, every effort has been made to present the various arrangements in a coherent format.

In Chapter 3 we examine both the concept of and models for accountability. This complex issue will be seen to be inextricably interwoven with the principle of the independence of the prosecutor. Together these issues are central concerns in achieving a balance between the exercise by police and/or prosecutors of their powers, and the preservation of the rights of interested parties, whilst taking the public interest into account. Decisions will be taken in the prosecution system which do not satisfy all those with a legitimate interest. When this occurs, we consider whether the decision-maker must be in a position to explain and justify the decision, and if so to what authority. Chapter 3 also considers the issue of appealing decisions in the prosecution system.

Chapter 4 continues the theme introduced in Chapter 3, focussing on the need for equity and fairness within the criminal prosecution system. It is argued that these abstract concepts should be fundamental precepts of the prosecution process in any criminal justice system. While the issues are addressed in outline in Chapter 2 in respect of each jurisdiction examined in the Report, Chapter 4 resumes the theme in greater detail. The concepts of equity and fairness are considered especially with reference to a criminal justice inspectorate or 'ombudsman', equity monitoring of prosecutions, training and general human rights considerations.

Chapter 5 contains our concluding views on the project and makes suggestions for issues which the CJRG may wish to consider further.

1.3 Conditioning Factors

A number of factors have informed our research, our thinking and our deliberations, as well as the presentation and structure of this Report. These factors include the following:

1. Northern Ireland is a relatively small jurisdiction, in terms both of its territorial area and its population.
2. Northern Ireland has a history of inter- and intra-community strife and tension, of a variety and intensity unparalleled elsewhere in Western Europe.
3. Our terms of reference suggest that this Report not exceed 20,000 words in length. While we have been unable to limit ourselves to such an extent, nonetheless we have been forced at a number of junctures to presume upon background knowledge on the part of the reader. Where we make that presumption, we also endeavour to highlight it.

1.4 Our Research Questionnaire

We issued a questionnaire to a wide range of criminal justice experts in different jurisdictions. Our questionnaire was designed to encompass all of the legal and managerial issues that we envisaged would be relevant to the development of a best practice model of criminal prosecution. We were aware that the nature of the practice in some jurisdictions was such that certain of our questions were of less relevance in individual cases. In some cases there was an exchange of correspondence with authorities in particular jurisdictions to seek clarification on various points in response to our questionnaire.

We received a varied measure of co-operation from different agencies in different jurisdictions. In New Zealand where a major review of the local criminal justice system is being finalised, the assistance rendered was very helpful. A number of Australian jurisdictions including New South Wales, Queensland, Western Australia and the Northern Territory were also very helpful as was the DPP for the federal jurisdiction. Several Canadian authorities also were fulsome in their assistance. These included Ontario, Québec, and the federal Department of Justice. We are also indebted to the Dutch authorities who provided us with material from a survey conducted across the public prosecution services of member states of the European Union.

A copy of our research questionnaire is appended to this Report.²

² Appendix A ('Survey Questionnaire: Prosecution Processes in Northern Ireland').

1.5 Appreciation of Assistance Given

We have been supplied with very many documents and much of the commentary below about procedures in the various jurisdictions is drawn from those documents. To cite each authority in every instance would require much additional time and space. We have, for example, drawn heavily on the data supplied from the study conducted among member states of the European Union.³ In practice we have acknowledged the titles of reports and other publications where they are first mentioned and at other key points.

Documents (mainly copies of legislation) and reports in our possession are, of course, available to the CJRG.

1.6 The Selection of Models for Examination

In selecting the jurisdictions for consideration in this Report we were mindful of the requirements of CJRG members and of the variety of criminal prosecution arrangements that exist in the developed world. Accordingly, we included examples of systems from both adversarial and inquisitorial jurisdictions and from long established as well as the more recently developed democracies. Our selection also took into consideration the fact that there had been recent and analogous reviews in some of the jurisdictions.

The jurisdictions selected for examination and discussed in this Report are:

- England & Wales,
- Scotland,
- The Republic of Ireland,
- France (State),
- The Netherlands (Regional),
- Belgium,
- New Zealand,
- Australia (Regional and State),
- Canada, and
- United States (Multi-level).

3 *Euro Justice, Co-operation between public prosecution services in the European Union*, The Hague, Netherlands: Public Prosecution Service, 1998.

1.7 Template for Discussion of Each Model

As near as possible we have endeavoured to examine the models according to a specific template. Our intention has been to present data in a manner which, so far as is possible, assists comparison. Some aspects, however, are worthy of comment.

‘Diversion’ is a difficult concept both to discuss and to compare across jurisdictions. It is possible that the meaning of this term varies from place to place. In some inquisitorial jurisdictions, for example, where prosecutors exercise wide discretion from the investigative stage, a decision not to prosecute can amount to a form of diversion. There are also diversion programmes which are only invoked at the pre- and post-sentencing stage in many jurisdictions. These are generally determinations of the court rather than by a prosecutor. Similarly, some programmes, particularly those relating to juveniles, are administered by the police according to policy guidelines which do not involve the prosecutor. Most jurisdictions now also have systems of ‘on the spot fines’ for minor offences, particularly those involving traffic violations.

1.8 Presumption of Familiarity with Northern Ireland Model

We have presumed that the CJRG – for which this Report has been prepared – is familiar with the existing criminal prosecution process and related matters in Northern Ireland. We have, therefore, provided in Chapter 2 merely a cursory introduction to the present structures in Northern Ireland.

1.9 Key Issues

A number of issues should be noted and addressed at the outset of this Report. These are:

- 1.9.1 ‘The danger of transplantation’
- 1.9.2 ‘Adversarial’ and ‘inquisitorial’ models of criminal justice
- 1.9.3 Varieties of prosecutors – ‘public’ and ‘private’
- 1.9.4 Independence of the prosecution function
- 1.9.5 ‘Opportunity and legality’ – discretion in criminal justice
- 1.9.6 Values in criminal justice
- 1.9.7 The role of the prosecutor

1.9.1 'THE DANGER OF TRANSPLANTATION'

It is most likely appreciated by all readers, but nonetheless essential to record here, that each jurisdiction in the world has a unique political, legal, social, cultural and economic pedigree. These factors will in each case have blended to ensure that suggestions for direct transplantation of facets of one jurisdiction to another will rarely, if ever, be appropriate. Any innovation will at best have to be specifically tailored to account for local cultural and legal concerns. As Collins notes in the context of the law of obligations, 'One cannot transplant a single foreign concept into domestic law without undermining the coherence of its conceptual scheme, which ultimately causes confusion and inconsistency.'⁴

1.9.2 'ADVERSARIAL' AND 'INQUISITORIAL' MODELS OF CRIMINAL JUSTICE

There has been much discussion in the academic and professional literature about the advantages and disadvantages of the commonly styled 'adversarial' and 'inquisitorial' models of investigation and prosecution. We encountered, and discuss in this Report, many of these advantages and disadvantages without making a general judgement about either model. We believe that each of these models is more than merely a means of investigation and prosecution of criminal matters, but is a part of the culture of the relevant society.

1.9.3 VARIETIES OF PROSECUTORS – 'PUBLIC' AND 'PRIVATE'

While there are different varieties of 'prosecutor' in Northern Ireland and in many other jurisdictions, each variety may be categorised as either 'public' or 'private'. This Report is principally concerned with systems of public prosecution, although whenever appropriate the position and role of private prosecutors is considered. While outlined in this introductory chapter, the distinction between the two and the consequences which flow from that distinction are discussed in detail in Chapter 3.

Essentially, public prosecutors are people who prosecute as a function of the office or post which they hold, and within this category we include not alone staff of the various DPPs in each jurisdiction, but also revenue officials, officers of the various food agencies, health and safety inspectorates and so forth, who nominally prosecute in their private capacity but who in reality satisfy our definition of prosecuting as a function of the office or post which they hold. In contrast, private prosecutors for our present purposes typically are those who prosecute because of personal motivation. While private prosecutors most often are also the victims of the crime which they are prosecuting (usually a minor assault), generally they need not be. In Northern Ireland and in England and Wales, the overwhelming majority of private

4 H Collins 'Methods and Aims of Comparative Contract Law', 1991 *Oxford Journal of Legal Studies*, pp. 396 – 406.

prosecutions are summary in nature, and private prosecutions on indictment are rare. In the few cases where private prosecutions are pursued on indictment, there is authority in England and Wales to the effect that the private prosecutor must engage lawyers to conduct the prosecution in the Crown Court.⁵ This is a theme which will be resumed in Chapter 3 and is considered further in this chapter in the discussion of the role of the prosecutor.

It should also be noted that as early as the 1840s, there had as a result of political necessity evolved in Ireland a reasonably comprehensive system of public prosecution, while other common law jurisdictions such as England were still reliant on private prosecutions and a system of rewards to prosecutors.⁶ Indeed, as long ago as 1867 there existed in Ireland Rules for Crown Solicitors and Sessional Crown Solicitors which set out guidelines for the exercise of their powers, as well as a code of conduct.⁷ Police prosecution in Ireland, for further example, can be traced to the establishment of an Irish constabulary in 1836, replacing the county constabularies. Nonetheless, private prosecution existed in tandem, albeit a procedure utilised in Ireland to a much lesser extent than in other jurisdictions. Therefore in modern times in Northern Ireland and in the Republic of Ireland and for more than a century and a half previously, public prosecution has been the norm and private prosecution has been the exception.

1.9.4 INDEPENDENCE OF THE PROSECUTION FUNCTION

Our research showed us that the independence of the prosecution process and of its actors was a key factor in determining how a given system functioned. It also became clear from our research, however, that the concept of ‘independence’ can and does mean different things to different people. It will be seen in Chapter 3 that different jurisdictions address different concerns under the common rubric of ‘independence’.

Therefore, although the ‘independence of prosecution’ in many jurisdictions means the separation of the prosecution process from that of investigation, other considerations will be identified. In New Zealand, for example, a recent review has seen the police reinforced as the prosecution agency for the lower courts, generally. In this arrangement, independence infers the separation of the police prosecutions section from other sections of the force. In Australia, the Federal DPP has indicated in his response to our questionnaire that:

the concept of [the] ‘independent’ prosecutor is most usually concerned, not with independence from the investigator, but independence from government. As noted in

5 *R v George Maxwell (Developments) Ltd* [1980] 2 All ER 99. Consider also the failed private prosecution which arose out of the killing of Stephen Lawrence in England.

6 E Bell *The Office of Director of Public Prosecutions for Northern Ireland*, Unpublished PhD Thesis: The Queen’s University of Belfast, 1988.

7 See J F McEldowney ‘Crown Prosecutions in Nineteenth-Century Ireland’ in D Hay and F Snyder (eds), *Policing and Prosecution in Britain 1750-1850*, Oxford: Clarendon Press, 1989, pp. 446 – 449.

the *Prosecution Policy of the Commonwealth* the establishment of the Office of the DPP was seen as involving the effective removal of the prosecution process from the political arena.⁸

To offer a further contrast, in the Republic of Ireland, a recent official report has noted the greater importance of the separation of the prosecution and the judicial functions than the separation of those of investigation and prosecution.⁹

1.9.5 'OPPORTUNITY' AND 'LEGALITY' – DISCRETION IN CRIMINAL JUSTICE

Discretionary powers are a central feature of prosecutorial decision-making in Northern Ireland, as they are in all other common law jurisdictions. For example, not every offence in respect of which there is evidence of the guilt of an individual must be prosecuted. The first issue addressed by a prosecutor in a common law jurisdiction is whether there is sufficient evidence against a suspect to warrant a prosecution, although the level of proof demanded to satisfy that test can vary between jurisdictions.¹⁰ Significantly, however, even though there is sufficient evidence to warrant a prosecution, prosecutions in individual cases might not be launched if a consideration of 'the public interest' suggests that inaction is a better option than prosecution. The public interest typically entails consideration by the prosecutor of a wide range of issues such as the age of the suspect, whether the alleged offence involved a breach of trust by a person in a position of responsibility and so forth. Prosecution systems of this variety, in which the public interest is an important factor which may mandate against prosecution in the face of comprehensive evidence of guilt, are said to be of the 'opportunity', or 'expediency' model. They epitomise the discretion-based model of criminal justice.

Wide discretion, however, is not an essential element of systems of public prosecution. Therefore some jurisdictions, pre-eminently Germany, have reduced the role of prosecutorial discretion to an extent which in the UK or Ireland would be considered to be radical. Therefore, while discretion is a central feature of common law systems of prosecution, it is not necessarily essential. In contrast to the opportunity model, Germany has limited the scope of prosecutorial discretion so that it is often restricted to a legal assessment of the sufficiency of the evidence against the suspect, and so as to exclude the public interest aspect of prosecutorial discretion which is so important in common law systems. Such an approach is described as the 'legality' model of prosecution systems and epitomises the reduction of prosecution discretion to the greatest extent possible.

8 Director of Public Prosecutions, Commonwealth of Australia. Response to Questionnaire: Prosecution Processes in Northern Ireland, 1999, paragraphs 3.1 – 3.2.

9 Public Prosecution System Study Group, *Report*, Dublin: Institute of Public Administration, 1999, p. 42, paragraph 5.5.1.

10 The standard of proof required by prosecution agencies varies within relatively narrow bands. In Northern Ireland, the test is whether there is a reasonable prospect of a conviction, while in England and Wales the (arguably more pragmatic and resource-focused) test is whether there is a realistic prospect of a conviction.

In Germany in crimes of any seriousness, prosecutors enjoy discretion only in respect of the evidential sufficiency of the file against the suspect. If there is sufficient evidence to warrant a prosecution, then that course must be pursued. The prosecutor in Germany in the equivalent of an indictable offence enjoys no discretion in respect of the public interest – this factor is regarded as a consideration for the court to be reflected in the verdict and the penalty (if any). Hence, prosecution decisions can with relative ease be converted into purely legal and evidential exercises with no complicating concerns for the public interest. German law gives the prosecutor no discretion in the most serious cases and explicitly requires the prosecutor (and therefore the police as well) to investigate and prosecute every serious crime that is committed. We note the suggestion by Fionda¹¹ that in Germany, which is the paradigm of the legality model, the cautious extension of discretion within criminal justice agencies may be a product of historical distrust of official power.

In providing the CJRG with a comprehensive treatment of the relevant issues within our brief, we consider the radical change to prosecution structures in Northern Ireland which a move from the discretion-based opportunity model of prosecution to a largely non-discretionary legality model would represent. In considering this possibility, which we ultimately reject, it should be noted that ‘there is a large degree of convergence between the two systems. In Britain, where discretion is theoretically total, most cases are prosecuted, and in a legality system, where there is theoretically no discretion available, a similar, or perhaps even greater, number of cases are not prosecuted.’¹² Sanders and Young, however, note that:

Despite this convergence, there are still important differences. Because diversion in a legality system is an exception to a general rule, non-prosecution decisions are relatively strictly controlled even if they are greater in number than in systems like that in England and Wales. The conditions under which those exceptions can be made are generally specified in the laws of those countries, and diversion decisions are usually made by prosecutors. In order to encourage consistency and adherence to official policy, there are relatively small numbers of senior decision makers [in legality systems].¹³

A number of arguments can be raised against a switch from an opportunity to a legality model of criminal justice. In our view the strongest argument is one of principle¹⁴ and is synthesised in the observation of Davis that rules without discretion ‘cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases.

11 J Fionda *Public Prosecutors and Discretion: A Comparative Study*, Oxford: Clarendon Press, 1995, p. 11.

12 A Sanders and R Young *Criminal Justice*, London: Butterworths, 1994, p. 209.

13 *Ibid*, p. 209.

14 An argument based on pragmatism is that such a change would entail a greatly increased number of trials.

The justification for discretion is often the need for individualized justice.¹⁵ Prosecutors, as gatekeepers to the criminal justice system, ensure that the infliction of unwarranted prosecution is avoided. Bell writes:

Further, in faithfully fulfilling the gate-keeping discretion prosecutors prevent a loss of public respect for the law which would inevitably result if it were thought that it was [being] administered harshly and unsympathetically, as by prosecuting the old, the infirm or the afflicted for trivial offences.¹⁶

We are aware that notable commentators have misgivings about the extent of discretion within criminal justice,¹⁷ and that a tension can exist between individualised justice (which is secured by the utilisation of discretion in an opportunity model), and consistency between cases (which is an imperative of equality between individuals).¹⁸ We recognise that unaccountable and unregulated discretion is as harmful as rigid law; as an American judge has memorably said, '[a]bsolute discretion, like corruption, marks the beginning of the end of liberty.'¹⁹ In our view, however, the opportunity model of criminal justice when coupled with comprehensive safeguards of accountability, equity and fairness as are discussed throughout this Report, represents the best of both options for Northern Ireland – individualised but transparent and accountable justice, applied equitably within the community by prosecutors who are independent of investigative, political and other improper influence. Allied with the safeguards discussed in the body of this Report, the trust and confidence engendered by the structures established under the Belfast Agreement should assure those who may have had a historical distrust of official power that a transparent and accountable discretion-based model of criminal justice in Northern Ireland remains the most appropriate option. Indeed, the paradigm of the legality model, Germany, is itself increasingly extending public interest discretion to a wide range of low and medium level crimes.²⁰

1.9.6 VALUES IN CRIMINAL JUSTICE

The context and nature of this research prompts consideration, at the very outset, of values in the criminal justice process, and particularly the balance between due process and crime control as informing philosophies.

15 K C Davis *Discretionary Justice: A Preliminary Inquiry*, Baton Rouge: Louisiana State University Press, 1969, p. 17.

16 E Bell, 1988, pp. 291 - 292.

17 See for example K Hawkins (ed) *The Uses of Discretion*, Oxford: Clarendon Press, 1992, pp. vi - vii.

18 D J Galligan 'Regulating Pre-Trial Decisions' in I H Dennis (ed), *Criminal Law and Justice*, London: Sweet and Maxwell, 1987, p. 158.

19 Douglas J in *New York v US* 342 US 884 (1951).

20 US Bureau of Justice Statistics 'German and American Prosecutions: An Approach to Statistical Comparison' (www.ncjrs.org/txtfiles/166610.txt), 1998 p. 4.

Packer in 1968 suggested a particularly durable model of criminal justice values.²¹ While Packer's thesis has been variously endorsed, refined, criticised and rejected by different commentators, nonetheless it still provides a useful basic theoretical template against which the criminal process of any given jurisdiction might be assessed. Packer's analysis adopts two distinct models of criminal justice, each of which might be thought to occupy a position at the opposite end of a single spectrum.²²

These two models are termed the 'crime control model' and the 'due process model'. Packer himself recognised that the use of such normative 'models' artificially distorts reality, but believed nonetheless that there is a considerable value in such an approach at the level of theory. Packer also noted that the schemes are polarities, as are the value-sets which underlie them. They are, he said, constructed as an aid to analysis, and not as a program for action. Indeed, Packer suggested that 'a person who subscribed to all of the values underlying one model to the exclusion of all of the values underlying the other would be rightly viewed as a fanatic.'

The characteristics of each can be briefly described as follows.

Crime Control (metaphorically described as an assembly line conveyor belt):

- repression of crime and preference for 'law and order'
- communitarian values favoured over individual values
- process speed and efficiency are at a premium; at the extreme, efficiency is more important than reliability
- strong emphasis on the role of the police in identifying offenders and on extra-judicial fact-finding
- importance of finality, with appeals procedures reduced to a minimum
- greater likelihood of wrongful convictions; lesser likelihood of wrongful acquittals

Due Process (metaphorically described as an obstacle course towards establishing guilt):

- displays mistrust of informal fact-finding procedures such as police interviews, which by their nature risk error
- aim is as much to protect the factually innocent as to convict the factually guilty
- individual values favoured over communitarian values
- process inefficiencies are tolerated where necessary to strengthen individuals' rights

21 H Packer, *The Limits of the Criminal Sanction*, Palo Alto, CA: Stanford University Press, 1968.

22 Packer, however, did not fully explain the relationship between the two models, and accepted that it is slightly incorrect to refer to them as absolutely polarised, in that each really represents different values regarding acceptable means to the same end.

- 'the integrity of the criminal justice system is a higher objective than the conviction of any individual'²³
- greater likelihood of wrongful acquittals; lesser likelihood of wrongful convictions

The utility of Packer's analysis is not that either represents the values of any given society; indeed, many legal systems embody elements of both. Rather, the utility lies in the use of the models as tools of analysis. By considering the importance which is attached to the different aspects of the criminal process, it is possible to predict in a general way in that jurisdiction the likely relationship between wrongful convictions and wrongful acquittals.

As mentioned, Packer's analysis has been the subject of criticism and refinement, and the work of those authors may be consulted as necessary.²⁴ It nonetheless is our view that the two models originated by Packer 'allow us to recognise the value choices that underlie the details of the criminal process.'²⁵ Galligan argues that they still serve 'as a useful way of identifying a basic source of tensions within criminal justice.'²⁶

The question therefore arises for every society as to where on the continuum between crime control and due process it wishes to anchor its criminal justice values, subject to the observation that the two models in reality represent different means to a broadly common goal – the detection and effective punishment of crime. Importantly, however, the question of where on the crime control/due process spectrum any criminal justice system should be placed by criminological analysts must take account of both formal law and organisational practices, and also any inconsistency between the professed theory of the law and its substantive content. That theory may diverge from the reality.

In view of the cultural, historic and contextual issues which are raised both in this chapter and in Chapter 2, it seems certain that the options which will be best suited to Northern Ireland going forward will be those which tend more towards due process than towards crime control. Arguments in favour of moving the ultimate focus of guilt-determination from the judicial forum to that of the investigating police service would appear to be singularly inappropriate at this important juncture in the history of Northern Ireland.

23 M Zander *Report of the Royal Commission on Criminal Justice* (Dissenting Report), London: HMSO 1993, p. 235. In a similarly evocative phrase, A Ashworth has written that 'there can be values higher than truth' in 'Crime, Community and Creeping Consequentialism', *Criminal Law Review* 220, 221, 1996.

24 See for example, J Griffiths 'Ideology in Criminal Procedure or a Third 'Model' of the Criminal Process', 1970 vol 79 *Yale Law Journal* 359, 367; A E Bottoms and J D McClean *Defendants in the Criminal Process*, London: Routledge & Kegan Paul 1976, p. 226; A Ashworth, *The Criminal Process: An Evaluative Study*, Oxford: Clarendon Press, 1994, p. 28; M King, *The Framework of Criminal Justice*, London: Croom Helm, 1981.

25 N Padfield *Text and Materials on the Criminal Justice Process*, London: Butterworths, 1995, p. 5.

26 D J Galligan, 1987, p. 163.

1.9.7 THE ROLE OF THE PROSECUTOR

The role of the prosecutor in jurisdictions such as Northern Ireland, England and Wales and the Republic of Ireland has evolved to a considerable extent over past decades. Nonetheless, the essential prerequisites to the appointment of an individual as a prosecutor have probably remained static – the United Nations *Guidelines on the Role of Prosecutors* highlight in particular ‘integrity and ability, with appropriate training and qualifications’.²⁷ These themes are constant throughout this Report.

A central role of the prosecutor in common law jurisdictions is to determine who should be prosecuted and who not. ‘According to former prosecutor and [US] Supreme Court Chief Justice Robert Jackson, the power to charge gives a prosecutor “more control over life, liberty and reputation than any other person in America”’.²⁸ This observation might just as easily have been made of prosecutors in western Europe regarding people in these jurisdictions.

In addition to this central role, however, prosecutors also discharge a large number of other discretionary powers, many of which flow from the decision on prosecution. Prosecutorial discretions may be regarded as being either ‘dispositive’ or ‘processual’ in nature.²⁹ The former term describes those small number of discretions relating to the manner in which the case is disposed of, such as by way of prosecution, non-prosecution, caution, the imposition of a prosecutor fine in lieu of prosecution (an option not available in Northern Ireland) and so forth. The larger number of processual discretionary decisions are those concerned with the processing of the case from initial charge through to trial following upon a decision to prosecute. Processual decisions would include the decision whether to proceed by way of arrest or the summons procedure. Consequent upon a positive decision to prosecute, the most significant processual discretions exercised by prosecutors are the selection of charges and, associated with or dependent upon this, and where necessary the selection of the mode of trial, being either summary or on indictment.

The initiation of the formal criminal process calls for the potential exercise of a large number of further dispositive and processual discretionary powers, including the possibility of accepting a ‘charge bargain’, that is to accept a plea of guilty to a lesser offence than that charged or to a lesser number of charges. Decisions must be taken by the prosecution in regard to pre-trial motions, for example whether or not to contest bail. To a limited extent, a decision on the disclosure of evidence may be required. Many further discretionary powers are exercised in the course of a trial.

27 UN Doc A/CONF.144/28/Rev.1 at 189, paragraph 1 (1990).

28 J Samaha *Criminal Procedure* (4th ed) Belmont CA: Wadsworth Publishing 1999, p. 507.

29 Terminology which was coined by A Ashworth, 1994, p. 9.

Prosecution, therefore, can be seen as the crucial link between law enforcement and penal sanction.³⁰ As the central figure in that link – the ‘gatekeeper’ to the criminal justice process – the prosecutor in exercising the central discretion of whether or not to prosecute operates as a pre-court filter for cases which are commenced by the police but which are not to be prosecuted by them. The prosecutor in deciding whether or not to prosecute, is acting in a quasi-judicial capacity. As the *Code for Crown Prosecutors* of the CPS in England and Wales notes, the ‘decision to prosecute an individual is a serious step. Fair and effective prosecution is essential to the maintenance of law and order.’³¹ It is elsewhere provided that the English DPP and staff ‘act as an important filter both into and away from the criminal justice system. It is important to make sure that those against whom there is not enough evidence to proceed, do not enter the system, as it is to prosecute firmly and fairly those who properly need to be put before the courts.’³² The stated duty of the CPS in England and Wales puts well some of the essential duties of a prosecutor, namely ‘to make sure that the right person is prosecuted for the right offence and that all the relevant facts are given to the court.’³³

Professional prosecutors (as distinct from police prosecutors) will generally be qualified lawyers who in addition to their prosecutorial codes of conduct will also be subject to the codes of conduct of their professional organisation. Some police prosecutors will also be lawyers. Lawyer prosecutors, as lawyers, will also be Officers of the Court. It can not be doubted that police prosecutors should be subject to the same requirements of ethics and integrity as are their civilian counterparts. Prosecutors are expected not to be partial as might be a defendant, but, as was said by Avory J in *R v Banks*,³⁴ counsel for the prosecution ‘throughout a case ought not to struggle for the verdict against the prisoner, but ... ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice.’ It is this characteristic of the public prosecutor which will often distinguish that officer from the victim. In private prosecutions, therefore, it has been held in England and Wales that the private prosecutor in a trial on indictment must engage solicitors and counsel to conduct and plead the case in the Crown Court. The private prosecutor therefore can play no formal role in the case unless called as a witness. The expressed rationale is that the particularly onerous nature of a Crown Court prosecution requires professional discipline and the impartiality of conduct which could be guaranteed only by solicitors and barristers. Judge David noted that the Crown Court ‘is not an appropriate forum to ventilate a private grievance or to pursue a personal vendetta’ and concluded that the ‘interests of a private prosecutor will more often than not be inimical with these duties and constraints.’³⁵

30 A Sanders, *Prosecution in Common Law Jurisdictions* Aldershot: Dartmouth, 1996, p. xi.

31 Crown Prosecution Service (1994), *Code for Crown Prosecutors*, paragraph 1.1.

32 Crown Prosecution Service (1994), *Code for Crown Prosecutors: Explanatory Memorandum*, paragraph 4.4.

33 Crown Prosecution Service (1994), paragraph 2.2.

34 [1916] 2 KB 621.

35 *R v George Maxwell (Developments) Ltd* [1980] 2 All ER 99.

The role of the prosecutor, therefore, is not to secure a conviction at any cost. Rather, as was said in the High Court of Australia in *R v King*,³⁶ the duty of a prosecutor ‘is to present the case against the accused fairly and honestly; not to use any tactical manoeuvre legally available in order to secure a conviction.’ The public prosecutor, as a ‘minister of justice’, is more an officer of the court than a partisan proponent of a cause. This philosophy has been translated into prosecutorial guidance in the Australian Commonwealth jurisdiction, the Prosecution Policy of which provides that ‘throughout a prosecution the prosecutor must conduct himself or herself in a manner which will maintain, promote and defend the interests of justice, for in the final analysis the prosecutor is not a servant of government or individuals – he or she is the servant of justice.’³⁷ The relevant paragraph, however, concludes by emphasising the adversarial nature of the proceedings and that the prosecutor is ‘fighting the community’s corner’:

At the same time it is important not to lose sight of the fact that prosecutors discharge their responsibilities in an adversarial context and seek to have the prosecution case sustained. Accordingly, while that case must at all times be presented to the court fairly and justly, the community is entitled to expect that it will also be presented fearlessly, vigorously and skilfully.

American prosecutors, however, are reminded of their ethical obligations in more forceful terms. From its first edition, the American Bar Association guidance provided that ‘[a]lthough the prosecutor operates within the adversary system, it is fundamental that his obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public.’³⁸ In a classic phrase, it was said in the US Supreme Court that the prosecutor ‘is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer... It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.’³⁹

Similarly in England in *Ostler v Elliott*,⁴⁰ Donaldson LJ referred to the prosecutor ‘whose job in life is not to obtain a conviction at all costs but to make certain that the full facts, whether they point to a conviction or to an acquittal, are put before the Justices.’⁴¹ Viscount Sankey LC in *Maxwell v DPP*⁴² averted to the due process aspirations of the criminal justice

36 (1986) 67 ALR 379.

37 Government of Australia, *Prosecution Policy of the Director of Public Prosecutions for the Commonwealth*, 1990, paragraph 6.1.

38 American Bar Association, *Standards for Criminal Justice: Standards Relating to the Prosecution Function and The Defense Function*, Commentary, 1971 p. 44. See now third edition (1993).

39 *Berger v US* 294 US 78, 88 (1935).

40 Unreported Queen’s Bench Divisional Court, 27 June 1980 (No 134/79).

41 Note also the American Bar Association (1971), paragraph 1.1 which provides in sub-paragraph (c) that it is the duty of the prosecutor to seek justice, not merely to convict.

42 1935] AC 309, shortly thereafter endorsed by Hewart LCJ in *R v Sugarman* (1935) 25 Cr App R 109.

system, whereby ‘the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues.’ This is reflected in the CPS ‘Statement of Purpose and Values’ in which the Service undertakes in part to ‘treat all defendants fairly.’⁴³

The role of the prosecutor, therefore, is to serve justice rather than the State. It was highlighted in the introduction to this section that the decision on prosecution, while central to the role of prosecutors, is not the only role which they play and is only one of a number of dispositive discretions with which they are invested. It is with this central dispositive discretion of deciding who should and who should not be prosecuted, however, that the prosecutor is most commonly stereotyped. Nonetheless, when it is recognised that this central discretion is directed at the attainment of justice in each individual case – justice for these purposes including justice to the victim, to the defendant and to the community – it then follows that other methods of attaining that same objective should properly come within the competence of prosecutors. Hence, the modern prosecutor in common law jurisdictions and increasingly in Northern Ireland deploys an increasing range of dispositive discretions such as the caution and prosecutor fines. It is for this reason that in Chapter 3 we consider the potential role of prosecutors in criminal justice consultative form as a mechanism which would increase the accountability of prosecutors.

Following from this, there is an evolving theory that prosecution policies, and implicitly individual prosecution decisions also, must be informed by an awareness of social justice,⁴⁴ and a realisation that prosecuting and human rights are concomitant.⁴⁵ Both of these themes are resumed in Chapter 4.

43 Crown Prosecution Service (undated), ‘Statement of Purpose and Values’.

44 A Ashworth, note 24 above, p. 156 and following.

45 N Cowdery, ‘Hot Seat or Siberia’ [1995] *Journal of the New South Wales Bar Association* 5, 8.

2 Criminal Prosecution Models

This chapter outlines the criminal prosecution arrangements in Northern Ireland, and thereafter describes criminal prosecution models in other jurisdictions.

2.1 Prosecution Structures in Northern Ireland

The structure of criminal prosecutions in Northern Ireland as it existed prior to 1972 reflected the joint legal heritage of the two jurisdictions on the island and bears considerable resemblance to the system as it presently exists in the Republic of Ireland. In fact, it is striking how little has changed in either jurisdiction over the decades – the MacDermott Report in 1971, for example, recorded in part that the ‘prosecution of approximately 98% of cases which can be heard and determined at a Magistrates Court is carried out by police officers’,¹ a proportion which has fallen little if any in the intervening period. It seems that a similar proportion of prosecutions in the Republic of Ireland are carried out by the Garda Síochána (police) in that jurisdiction.²

The MacDermott Report recommended the immediate establishment of a Department of Public Prosecutions for Northern Ireland, regarding such an innovation as being of ‘the utmost importance’.³ The Department of the DPP was duly established in 1972. Since 1972, therefore, the system of prosecutions in Northern Ireland is based upon the primacy of the DPP, who has a statutory power to control all prosecutions in the jurisdiction,⁴ and who is responsible to the Attorney General for Northern Ireland for the due performance of the

1 Working Party on Public Prosecutions, *Report* (‘MacDermott’), NI Cmd 554, Belfast: HMSO, 1971.

2 In each of the years from 1975 to 1996, more than 99 per cent of all prosecutions in the Republic of Ireland were summary prosecutions, the overwhelming majority of which were prosecuted by the police service. For more recent information see ‘Report on Crime’ in respective editions of the Garda Síochána *Annual Report* (1982 – 1996) Dublin: Garda Síochána.

3 *Ibid.*, p. 10.

4 *Prosecution of Offences (Northern Ireland) Order 1972*, article 5.

functions of the Director.⁵ The nature of this relationship has been variously described as shadowy,⁶ a mystery,⁷ opaque,⁸ unclear⁹ and ambiguous.¹⁰ This relationship is key to the concept of accountability, a theme which is considered in detail in this present Report but particularly in Chapter 3.

The functions of the DPP for Northern Ireland are principally regulatory, rather than participatory.¹¹ By this we mean that the staff of the DPP's Department brief counsel and conduct prosecutions in only a minority of cases, the majority still being prosecuted summarily by the Royal Ulster Constabulary (RUC) in a system which retains the same basic structure as it displayed in the late nineteenth century. The DPP in Northern Ireland has never had an investigative function nor, with the possible exception of limited pre-charge screening by DPP professional officers in some circuit offices, has the Northern Ireland DPP ever performed a role approximating to the supervision of investigations. However, there exist in Northern Ireland comprehensive obligations upon the police to report a wide range of crimes to the DPP as required by legislation,¹² and the DPP for Northern Ireland may require that further investigations in respect of an alleged offence be carried out by the police;¹³ regular formal liaison occurs between the two agencies to facilitate such directions. A model of prosecution can thus be discerned where the DPP can, in individual cases, exercise a power of direction over the police and where the mandatory reporting requirements result in the Director being supplied with information on all crime of any consequence within the jurisdiction.

The result is that 'the Director has all, save the most minor, investigations reported to him'.¹⁴ Consequently, he is in theory in a position to effectively discharge his supervisory and regulatory role over all prosecutions, save the particularly minor (for example the lesser road

5 *Prosecution of Offences (Northern Ireland) Order 1972*.

6 *The Times* 13 April 1977 ('The Office of the DPP'). We are indebted to Bell, note 6 above, for his research in respect of this and the following four footnotes.

7 *Hansard* (House of Commons), Third Standing Committee on *Prosecution of Offences Regulations 1978*, Session 1978 - 1979, Volume 4, column 6.

8 *Ibid*, column 8.

9 B Dickens 'The Control of Prosecutions in the United Kingdom' (1973) 22 *International and Comparative Law Quarterly* 1.

10 *The Sunday Times* 13 January 1980 ('But How Does He Decide?').

11 Whilst the role of the DPP in NI includes the supervision of the investigative process and the prosecution of serious crime there are times when this role adopts a more hands on approach during the investigative phase. For example, in matters requiring a DPP prosecutor, the standard procedure is for a DPP professional officer to view the file produced by the arresting officer to determine its suitability for court purposes. The professional officer may then edit the statements of witnesses removing material which is perceived to be inadmissible. Such statements are then re-typed by DPP staff and returned to the investigating officer who will advise the witness of the changes and why they were made before requesting the witness to sign the new statement.

12 *Prosecution of Offences (Northern Ireland) Order 1972*, article 6(3).

13 *Prosecution of Offences (Northern Ireland) Order 1972*, article 5(1)(b).

14 E Bell, 1988, p. 85.

traffic offences). Even in the latter case, however, prosecutions for offences which might objectively be regarded as minor or trivial may be dealt with by the DPP's Department if they concern matters of sensitivity, such as prosecutions of politicians or members of the RUC or the armed forces.

Although the substance of the DPP's powers in Northern Ireland *vis-à-vis* police prosecutions compares to that in England and Wales, the detail differs. Principally, the manner in which the 'duties' of the Northern Ireland DPP are prescribed differs from England and Wales in so far as there is no *obligation* on the DPP for Northern Ireland to *take over* police prosecutions, as there is in England and Wales.¹⁵ To that extent, therefore, the system of summary prosecution in Northern Ireland, whereby the police are normally the prosecutors, is quite similar to that pertaining in the Republic of Ireland.

2.2 Prosecution Structures in Other Jurisdictions

We will now consider structures within the selected jurisdictions. These are:

- 2.3 England and Wales
- 2.4 Scotland
- 2.5 Republic of Ireland
- 2.6 France
- 2.7 The Netherlands (Regional)
- 2.8 Belgium
- 2.9 New Zealand
- 2.10 Australia (Regional and State)
- 2.11 Canada
- 2.12 USA (Multi-level)

We have, in view of the joint common law origins of the two Irish jurisdictions, paid particular attention to the position in the Republic of Ireland.

¹⁵ *Prosecution of Offences Act* 1985, section 3(2)(a).

2.3 England and Wales

2.3.1 NATURE/STRUCTURE OF JUSTICE SYSTEM WITHIN WHICH THE CRIMINAL PROSECUTION PROCESS OPERATES

England and Wales is a parliamentary democracy. The parliament at Westminster is the centrepiece of a political system and a model of justice which were introduced in many parts of the world throughout the period of empire. This is the home of common law around which the adversarial model of criminal justice has developed.

The criminal justice system is adversarial with a hierarchy of courts which reflects the existence of offences with different degrees of seriousness. Criminal trials on indictment are conducted with a jury selected from eligible citizens,¹⁶ while summary trials take place in the Magistrates Court without a jury.

In this system as it is presently practised there is a national Office of the DPP which is responsible for criminal prosecutions. There are 43 police forces organised regionally throughout the jurisdiction.

There has been substantial change in criminal prosecution arrangements in England and Wales since the Phillips Royal Commission in 1981.¹⁷ One consequence of that Commission's recommendations was the *Prosecution of Offences Act* 1985 which created the Crown Prosecution Service (CPS). This effectively marked the removal of the prosecuting function from the police.

The DPP, who acts under the 'superintendence' of the Attorney General, is the head of the CPS. The Attorney General is appointed by the Queen on the recommendation of the Prime Minister and is an elected politician. The Attorney General is required by constitutional convention to be independent of the political process when acting in superintendence of the DPP.

Since its inception the CPS has been structured so that the jurisdiction is divided into regions and districts. It has retained this devolved structure despite a substantial inquiry into its management, chaired by Sir Iain Glidewell which reported in 1998.¹⁸ We will deal with the findings of this committee in some detail as they touch on many issues of significance to our Report.

16 We have used the term 'eligible' throughout this Report when discussing those who may be selected for jury service. To explain who is eligible in each jurisdiction would be a surprisingly lengthy task. Generally, such matters as age, soundness of mind, criminal record, occupation and mental and physical fitness impact on an individual's eligibility to serve on a jury. There are, however, variations in the jurisdictions examined. To gain some idea of the complexity of this issue, see, for example, *Jury Service in Victoria Final Report – Volume 1 – December 1996*, published by the Law Reform Committee of the Victoria, Australia, government.

17 Royal Commission *Report of the Royal Commission on Criminal Procedure* (Phillips) Cmnd 8092, London: HMSO, 1981.

18 Review of the Crown Prosecution Service, *Report* (Glidewell) Cm 3960, London: TSO, 1998.

The creation of the CPS was not welcomed by the police.¹⁹ Its creation can be seen as the beginning in England and Wales of what some saw as the long-overdue process of separating the policing (investigative) function from the prosecution function. There was the additional matter of who should determine the nature of a charge to be preferred following an investigation.

Despite reorganisation in 1993, the CPS did not achieve its purpose to the total satisfaction of the Government. This is evident from comment in the Glidewell Report, which in its introduction observed that the review was a consequence of Government perceptions that the public lacked confidence in the CPS.

In any event, Glidewell believed that the CPS had become too centralised and bureaucratic. Despite the appearance of decentralisation through the regional structure, local offices of the CPS had little autonomy. The committee saw this as a mistake, considering the prosecution process to be largely local in nature.

Other operational problems included the amount of time that senior CPS legal staff were spending on managerial duties to the exclusion of court work. In addition the volume of work in the Magistrates Courts was highly demanding on CPS resources.

The committee considered that assembly of a court file should be the responsibility of the CPS and not the police as was the case at the time.²⁰ They also endorsed the power of the prosecutor to discontinue a prosecution.

The committee found that the system whereby police facilities, often called Administrative Service Units (ASUs), provided the interface between the investigator and the CPS did not always function well.²¹ There was a tendency for each to blame the other for inefficiencies. The committee noted the frequency of complaints by magistrates and judges about such inefficiencies. An additional related problem was listing difficulties and timeliness which suffered as a consequence of the CPS and courts having different performance indicators in this regard.

The committee considered that the CPS should assume responsibility for a prosecution from the point of charge. They also recommended the creation within the CPS of a so-called 'Criminal Justice Unit' (CJU), with some police staff, to assemble and manage the case files. These units would also be responsible for fast track matters and for the actual conduct in court of summary prosecutions. The police presence in CJUs was seen as being useful in ensuring that additional requirements of the prosecutor were fulfilled promptly.

19 See, for example, J Fionda 'The Crown Prosecution Service and the Police: A Loveless Marriage?' 1994 vol 110 *The Law Quarterly Review*, pp. 376-9.

20 How this system works in Northern Ireland at present can be understood by reference to *Scrutiny of Time Taken Between Charge and Committal in Prosecution on Indictment*, Bryett and Osborne (Northern Ireland Office (internal document) (1997).

21 Glidewell, note 63 above, acknowledged a number of CPS/Police co-operative initiatives in Appendix D at point 3 and other initiatives recommended by Narey (Home Office, *Review of Delay in the Criminal Justice System: A Report*, London: TSO, 1997, Appendix D, point 3 (iv)).

In addition, the committee recommended that the CPS be responsible via the new CJUs for arranging the initial hearing in the Magistrates Court and for matters related to witness availability, warning and care. This would leave the police with responsibility for the investigation, charging and the preparation of related papers prior to the involvement of the CPS.

Other criminal matters in the Magistrates Courts and trials in the Crown Courts would be the responsibility of so called 'Trial Units' which would be similar to the CJUs but without a police presence. The outcome of the recommendations for CJUs and Trial Units is discussed in Chapter 3.

The committee also considered that groups of Special Casework Lawyers be created to deal with serious crime and other prosecutions requiring special expertise.

In a press release headed 'A Fresh Start for the Crown Prosecution Service,' on the 12 April 1999 the recently appointed DPP, David Calvert-Smith QC described the consequences of change. The CPS now has 42 areas each headed by a Chief Crown Prosecutor. Generally, this matches the number of Constabularies. Each area is seen as an operational unit of the CPS with its own business manager. In addition, and in keeping with the Glidewell Committee's recommendations, there is a greater emphasis on serious cases and on local independence.

These new arrangements for criminal prosecution in England and Wales more closely resemble the Scottish system. It remains the case, however, that CPS prosecutors do not participate in the investigative process to the extent undertaken by their Scottish counterparts.

The police are not recognised as having a prosecuting function.

2.3.2 ROLE OF PROSECUTION AND POLICE

The role of a prosecutor is to determine the sufficiency and admissibility of evidence and then if there is sufficient evidence to decide whether to prosecute based on public interest. While the nature of the charge is a matter for the police, prosecutors have the discretion to discontinue the prosecution or amend the charge.

In deciding whether or not to prosecute, a prosecutor may request further investigation by police. Some CPS staff work in close liaison with police in the preparation of the original court file.

The role of the police is purely investigative.

2.3.3 PROSECUTORS' POWERS REGARDING ALTERNATIVES TO TRIAL

There is no system of prosecutorial fines available to prosecutors, and we understand that suggestions in the Runciman Report²² that they be introduced are not being adopted by Government. There is, however, a well-established system of cautioning as an alternative to prosecution. In 1994, for example, 70 per cent of offenders under 18 years of age, 36 per cent of those in the category 18-20 years, and eight per cent aged 21 and over were cautioned.²³

2.3.4 DIVERSION

See above.

2.3.5 INDEPENDENCE AND ACCOUNTABILITY

The DPP is accountable to the Attorney General for both the conduct of the prosecution process and for the finances of the CPS. Various provisions of the *Prosecution of Offences Act* 1985 create these accountability measures.

The Attorney General is said to exercise 'supervision' over the DPP. 'Supervision' has been interpreted by one Attorney General as a need to 'oversee the effective and efficient administration of the prosecution authorities that I superintend.'²⁴ The determination of the Glidewell Committee was in part that:

[I]n relation to the overall conduct of the Crown Prosecution Service and to the overall prosecution policy which the Service should pursue, the Attorney General does, in the last resort, have the power to give directions to the DPP... Although there may be some doubt whether in theory the Attorney General does have the ultimate power to direct the DPP to prosecute or not to prosecute in a particular case, it seems that in practice all holders of both offices have accepted that the Attorney General's power of superintendence of the DPP is such that, in the event of a stark disagreement, the Attorney General's view would prevail.

The DPP and the CPS produce an annual report which is in the public domain. Each of the 42 new areas will also produce a report.

There is a *Code for Crown Prosecutors* which is a public document. There are limited circumstances in which interested parties may be granted judicial review of a prosecutor's

22 Royal Commission on Criminal Justice, *Report*, ('Runciman') Cm 2263, 1993.

23 E Campbell 'Two Futures for Police Cautioning' in P Francis, P Davies and V Jupp (eds) *Policing Futures: The Police, Law Enforcement and the Twenty-First Century*, Basingstoke: MacMillan, 1997, p. 52.

24 The then Attorney General Mr John Morris QC, cited in Glidewell.

decision not to prosecute, or, to continue a prosecution on the grounds that the code was not correctly applied. There are also Charging Standards relating to offences against the person, driving offences and public order offences which provide guidance on appropriate charges. The intention here is to produce consistency in charging.

There is a CPS Inspectorate (CPSI). Glidewell supported its retention and recommended its expansion. This recommendation was premised largely on the notion that increased devolution of decision making created the need for greater checks and balances by a competent and credible, evaluative agency. Glidewell also noted that some functions which we would see as being properly those for an inspectorate were undertaken within the existing Management Services Division.

The CPSI is an internal body, a situation that has both advantages and disadvantages. The alternatives to a single, internal auditing body are considered in Chapters 3 and 4 of this Report.

2.3.6 EQUITY AND FAIRNESS

To the extent that equity and fairness are achieved, they appear to be a consequence of the measures intended to produce accountability as described in the previous section, the pressure created by media coverage and the appeals system in the courts.

Research is currently being undertaken by the CPS relating to fairness in the trial. This has become an issue since the introduction of the *Criminal Procedure and Investigations Act 1996*.

2.3.7 EFFICIENCY AND EFFECTIVENESS

The Glidewell Committee acknowledged the value of the CPSI as an agent for promoting efficiency and effectiveness. It cited in particular the spread of good practice as a consequence of the inspectorate's visits to different centres.

The setting and monitoring of performance indicators and requirements of timeliness are further endeavours to achieve efficiency and effectiveness.

2.3.8 JUDICIAL ROLES

Prosecutors have no judicial role.

The judiciary is independent. It plays no part in the investigative or prosecutorial processes other than the issue of some search warrants and the determination of bail applications. The role of the judiciary can be categorised as that usually associated with the adversarial system.

There is a system of lay magistrates to deal with summary matters but when lay magistrates sit they are advised on law by a Clerk.

2.3.9 CONCLUSIONS

The criminal prosecution process in England and Wales is still undergoing change as a consequence of the recommendations of various inquiries and of new legislation. What is emerging is a system which reflects an awareness of the requirements of contemporary accountability and a growing preference for a clear division between the role of the prosecutor and the police officer.

The reorganised CPS gives promise for the future about the quality of its services. Despite this optimistic forecast, there are those who would say that the liaison between the police and prosecutor is too close. It is also the case that insufficient time has passed for the new arrangements to be tested. Perhaps, more importantly, commentators such as Spencer highlight that the CPS has no powers over the police and argue that the system lacks 'an organised pre-trial phase.'²⁵

2.4 Scotland

2.4.1 NATURE/STRUCTURE OF JUSTICE SYSTEM WITHIN WHICH THE CRIMINAL PROSECUTION PROCESS OPERATES

Although Scotland is a part of the United Kingdom and has only recently re-adopted an independent legislature, its prosecution procedures are quite different from those that exist in the other jurisdictions of the UK.

There is a national prosecution service, termed the Crown Office and Procurator Fiscal Service. Policing is undertaken by eight regionally-based constabularies.

The senior legal officer is the Lord Advocate, a political appointee, although the holder of that office is said by convention to be independent in making decisions concerning prosecution. The Lord Advocate is assisted in his functions by the Solicitor General for Scotland. The head of the Crown Office is the Crown Agent for Scotland. Officers known as Procurators Fiscal undertake prosecutions in the courts. These officers are based at six regional and 49 district locations throughout the jurisdiction. They have a commission to prosecute from the Lord Advocate. In addition, there are a number of 'Crown Counsel'

25 J R S Spencer 'French and English Criminal Procedure', in B S Markesinis (ed) *The Gradual Convergence*, Oxford: Clarendon Press, 1994, p. 44.

(sometimes known as Advocates Depute) who are practising members of the bar who also hold a commission to prosecute. These are usually senior counsel who prosecute the more serious offences.

The justice system is adversarial with a hierarchy of courts which reflects the existence of offences with different degrees of seriousness. Criminal trials in the High Court – invariably of ‘serious matters’ – are conducted with a jury selected from eligible citizens. A second tier of criminal courts known as Sheriff’s Courts are presided over by a judge. When a Sheriff’s court is constituted to hear a criminal matter (maximum penalty three years in this jurisdiction), known as solemn proceedings, a Sheriff (judge) sits with a jury. If the matter is a summary matter (generally, maximum penalty three months in this jurisdiction but there are exceptions), the Sheriff sits alone. In the lowest level of court, known as a District Court the judge sits alone. In a District Court the judge is either a lay Justice of the Peace or a Stipendiary Magistrate. The latter, who is a qualified legal practitioner exercises the same summary powers as a Sheriff. A Justice of the Peace may only impose custodial sentences up to 60 days.

2.4.2 ROLE OF PROSECUTION AND POLICE

In Scotland, the decision to prosecute is not one for the police. Depending on the nature of the offence, the decision to prosecute will be made by a Procurator Fiscal or some more senior officer on behalf of the Lord Advocate.

Because the decision to prosecute lies with the prosecution service, the prosecutor becomes involved in the investigative process at an early stage. As provided by section 17(3) of the *Police (Scotland) Act 1967*, ‘...in relation to the investigation of offences the Chief Constable shall comply with such lawful instructions as he may receive from the appropriate prosecutor.’

In addition, there is a general provision which might be thought of in terms of a policy-creating provision. Section 12 of the 1967 Act provides that the ‘The Lord Advocate may from time to time issue instructions to a Chief Constable with regard to the reporting, for consideration of the question of prosecution, of offences alleged to have been committed within the area of such Chief Constable and it shall be the duty of a Chief Constable to whom any such instruction is issued to secure compliance therewith.’

Procurators Fiscal possess other powers related to the prosecution process. Some of these powers have been described as follows:

The prosecutor may seek a warrant to obtain a specimen of blood from a suspect, a warrant to precognosce (interview) a witness on oath before a judge, an examination of the accused before a judge, in private, to elicit any admission, denial, explanation,

justification or comment which the accused may have, including an account which discloses a defence, or comment on an extrajudicial confession alleged to have been made to the police committal in custody for further enquiries to be made, for example an identification parade.

Matters can be withdrawn or diverted (see below). Withdrawal does not have to be concerned with sufficiency of evidence. Public interest is likely to be a key issue in determining withdrawal. Interested parties have no right to appeal a decision not to prosecute.

Implicit in the foregoing is the role of the police who are responsible for the investigation of all criminal offences, subject to the requirements of the prosecutor. Police officers do not prosecute.

2.4.3 PROSECUTORS' POWERS REGARDING ALTERNATIVES TO TRIAL

For withdrawal see comments above. Prosecutors have the power in less serious criminal matters (generally those dealt with in courts of summary jurisdiction) to impose what is known as a 'Fiscal Fine' as an alternative to prosecution.²⁶ If such an arrangement is agreed and the fine paid, no proceedings will commence and no conviction will be recorded.

2.4.4 DIVERSION

See the comments in the previous section. In addition, there are Warning Letters and an option where, for example, a social work intervention is considered more appropriate. Because the Procurator makes all decisions about prosecution, the system of 'fixed penalties' (on the spot fines) for some traffic offences is administered by that office.

Despite the existence of sufficient evidence, a prosecutor may decide not to prosecute in matters deemed to be trivial.

Except for the most serious matters, young persons are subject to the Children's Hearings System. Under this arrangement a panel of non-legal persons assisted by a Children's Reporter, who is not necessarily a lawyer, considers individual cases.

2.4.5 INDEPENDENCE AND ACCOUNTABILITY

The Crown Agent has responsibility for the management of the prosecution service but the Lord Advocate is politically accountable for acts and decisions taken by the prosecution

²⁶ See Crown Office and Procurator Fiscal Service *Annual Report* 1997-1998, Edinburgh: Crown Office, 1998, p. 6, wherein it is noted that a study of the system of Fiscal Fines had resulted in a recommendation for that system to be expanded.

service. Directions and guidance on policy and practice are issued to prosecutors on his authority and with his approval. This has been dealt with in the previous section on the role of Prosecution and Police.²⁷

There is no external inspectorate. Matters for the High Court are examined by ‘a specialised unit at Crown Office.’

2.4.6 EQUITY AND FAIRNESS

As mentioned above, policy directions and guidance are given to prosecutors under the hand of the Lord Advocate.

There is no form of appeal against a prosecutor’s decision not to prosecute.

Media pressure, appeal through the hierarchy of the courts²⁸ and the openness of the system are all measures through which equity and fairness are sought to be achieved.

Another measure which it is said has the effect of promoting equity and fairness is the need for the Procurator Fiscal Service ‘to act in a way that is compatible with the European Convention on Human Rights. Thus regard is had to the Strasbourg jurisprudence principles.’

2.4.7 EFFICIENCY AND EFFECTIVENESS

The involvement of a prosecutor at an early stage makes it less likely that a weak prosecution will be commenced. In addition, the availability of prosecutorial fines and the probative powers of the prosecutor have a similar effect.

Timelines for the submission of court papers and arraignment are substantially less than is the case in Northern Ireland. There are also key target objectives which include timeline issues which must be met by prosecutors.

The engagement of private counsel (Crown Counsel) to prosecute in solemn matters is seen as a means of measuring the efficiency and effectiveness of Procurator Fiscals’ decisions to prosecute.

The existence of a well established, computerised case tracking system in all Procurator Fiscal’s offices makes a substantial contribution to the efficiency of the prosecution system.

27 See paragraph 2.4.2.

28 ‘The Appeal Court may quash a conviction if it is of the view that the conduct of the Crown or the police or any other person involved in the investigation or prosecution has been oppressive. In addition, the court may quash a conviction if it is of the view that justice has not been seen to be done. Thus, even although there is no actual prejudice, bias or oppression, the ‘perception’ of possible bias, oppression or injustice will be sufficient grounds to warrant a conviction being quashed.’ (Questionnaire response 3).

2.4.8 JUDICIAL ROLES

Prosecutors can be said to have a judicial role in so far as they have the power in certain circumstances to impose a fine.

The judiciary is independent. It plays no part in the investigative or prosecutorial processes other than the issue of some search warrants and some bail requirements. The role of the judiciary could be categorised as that usually associated with the adversarial system. The judiciary is seen as ‘a significant constitutional check in the exercise of the functions of the public prosecutor.’ As noted earlier (see opening section) there is a lay magistracy (Justices of the Peace). Recently Stipendiary Magistrates have been introduced. Their jurisdictional limits are discussed in the opening section of this case study.

2.4.9 CONCLUSIONS

The role of the prosecutor in Scotland intrudes into the investigative process. This is a system which bears some similarities with the inquisitorial model in Europe. In Scotland, the prosecutor has the power to instruct the police and has the sole authority to charge or otherwise, or to discontinue a prosecution.

The Scottish criminal prosecution process has many features which could usefully be duplicated in a jurisdiction where those charged with reform of that process might wish to confine the role of the police to investigation. It seems to us, however, that in a system which gives substantial powers to its prosecutors, an external inspectorate would be appropriate.²⁹

2.5 Republic of Ireland

2.5.1 NATURE/STRUCTURE OF JUSTICE SYSTEM WITHIN WHICH THE CRIMINAL PROSECUTION PROCESS OPERATES

The Republic of Ireland is a parliamentary democracy in the Westminster model with national arrangements for criminal prosecution and policing.

A number of agencies concurrently have responsibility for aspects of criminal prosecutions in the Republic of Ireland. These include the Office of the DPP, the Garda Síochána, and the Office of the Chief State Solicitor (CSS). Indeed, the Garda Síochána in practice has sole

²⁹ In the response to our questionnaire, the Crown Office noted the current establishment of an office to monitor the standard of work throughout the service (Questionnaire response 5).

responsibility for the prosecution of most offences which are prosecuted summarily. Other agencies also play a role in respect either of specialist prosecutions, or on a more general level in prosecutions albeit with less frequency than those mentioned.³⁰

The Republic of Ireland criminal justice system is adversarial in nature with a hierarchy of criminal courts which try offences of different degrees of seriousness. Summary prosecutions (of ‘minor offences’³¹) will take place in either the District Court or, far less frequently, the Special Criminal Court. Summary prosecutions are normally undertaken by the Garda Síochána. Prosecutions on indictment will take place in the Circuit Criminal Court, the Central Criminal Court or the Special Criminal Court. Generally, criminal trials other than for minor offences are conducted with a jury selected from eligible citizens.³² While summary prosecutions can in theory be pursued by any person, prosecutions on indictment may be conducted only by the DPP. Further, while the DPP has a monopoly over prosecutions on indictment, no public prosecutor in the Republic of Ireland has a power to take over a summary prosecution unless it is commenced in the name of the DPP or the Attorney General; this is the case whether the prosecution has been commenced by a police officer or by any other citizen.

The structure of the prosecution in the Republic of Ireland has endured largely unchanged since the last century. Arguably, indeed, the only reform of substance has been the creation in 1974 of the Office of the DPP to assume the criminal prosecution and related functions of the Attorney General. Most of the key relationships are regulated by custom, convention, informal liaison and a limited body of case law rather than statutory framework.

The decision to prosecute is most commonly exercised by the Garda Síochána alone,³³ although, with increasing frequency in more serious cases, the police will refer the matter to the DPP prior to charge. Such referrals, however, remain in proportionate terms a small minority of the total number of offences prosecuted. Nonetheless referrals by the Garda Síochána to the DPP appear to account for a large proportion of the more serious offences. All offences which are to be prosecuted on indictment must be referred to the DPP, while some others are referred in any event as a matter of practice. We have been unable to determine the precise criteria applied by the Garda Síochána in deciding within their

30 These include the Attorney General, Government departments, local authorities, the Revenue Commissioners, statutory undertakings such as the National Authority for Occupational Safety and Health, the Electricity Supply Board and the residual private prosecutor (or ‘common informer’).

31 ‘Minor offences’ is the term utilised in Article 38.2 of the Irish Constitution to describe the category of offences which may be tried summarily before the lowest court. Offences of relative seriousness can be classified as ‘minor offences’, including some with a maximum penalty of 12 month’s imprisonment.

32 The exception to the stated generality is that no jury sits in the Special Criminal Court, the judicial bench of which is comprised of three judges.

33 This is certainly the case in summary prosecutions which numerically account for the overwhelming majority of prosecutions undertaken.

discretion whether to refer a matter to the DPP,³⁴ although it seems to approximate to the category of indictable offences, a category which is much wider than the category of offences which are prosecuted on indictment.³⁵

The Office of the DPP in 1998/1999 had a professional staff of 15, excluding administrators,³⁶ and the bulk of professional legal work in criminal prosecutions is in fact handled by the Office of the CSS or local State Solicitors. The Office of the DPP is located in Dublin and has no regional representation.

Decisions of the DPP to prosecute are taken up by the State Solicitor Service whose head, the CSS, fulfils the role of intermediary between the investigating Garda and the DPP in those files which are referred to the Director's office. The association with the DPP is described as that of 'solicitor-client'. However, while the CSS operates as the 'solicitor' for the DPP in trials in the Dublin Circuit Criminal Court, the Special Criminal Court and in the Central Criminal Court, the CSS is accountable neither to the Garda Síochána nor the DPP, but to the Attorney General. His staff will sometimes act as prosecutor in the Dublin District Courts. To the extent that the DPP in 1974 inherited the criminal prosecution functions of the Attorney General, it has been suggested that responsibility for that aspect of the workload of the Office of the CSS is by implication owed to the DPP. This, however, is a matter of constitutional speculation and no statute regulates the relationship. The Office of the CSS has both a criminal and a civil workload. Indeed, in the face of unprecedented growth in civil litigation against the State in recent years, the volume of civil work has displaced the traditional balance between the two varieties of work.

Private counsel are briefed for prosecutions on indictment, while summary prosecutions are undertaken in the Dublin metropolitan area by police officers or solicitors of the CSS, and in areas outside the Dublin metropolitan area by Garda inspectors or superintendents, or local State Solicitors. The 1999 Report of the Public Prosecution System Study Group recommended that the staff of the CSS who perform functions on behalf of the DPP should be transferred to the staff of the DPP, and that the line of responsibility of local state solicitors should be altered to lead to the DPP and not to the Attorney General.³⁷ Pending such reform, however, the present arrangements can best be described as anomalous. The Office of the DPP has itself in recent years described a system characterised by 'widespread

34 Police officers are obliged by law to refer certain categories of investigation to the DPP (such as explosives offences, official secrets and marital rape cases), and thus have no discretion in such cases. They also have been obliged by the DPP to refer to him pre-charge all investigations of murder, fatal road traffic offences and sexual offences (Public Prosecution System Study Group, note 9 above, paragraph 2.2.5).

35 Only a minority of indictable offences must be prosecuted on indictment, and in fact the majority of indictable offences are prosecuted summarily. See the statistical tables appended to the annual *Report on Crime* published by the Garda Síochána (1982-1996).

36 *The Law Directory* 1999 Dublin: Law Society of Ireland, 1998, p. 818.

37 Public Prosecution System Study Group, 1999, paragraph 5.7.4.

duplication’, ‘unwieldy communications’ and administrative inefficiencies.³⁸ Indeed, the previous DPP is recorded as having commented on the occasion of his retirement – ‘The amazing thing is, given the way the system operates, that it works so well so often.’³⁹

2.5.2 ROLE OF PROSECUTION AND POLICE

The Garda Síochána has evolved a role of public prosecutor in the lowest court. As an organisation, the Garda Síochána is responsible to the Minister for Justice and is totally independent of the DPP, the Attorney General and all other agencies; likewise, those agencies are independent of the police. Professional prosecutors are clearly segregated from investigations in so far as prosecutors play no official role in the investigative process, although investigators play a central role in the prosecution of most summary offences.⁴⁰ Whilst prosecutors may give informal advice to investigators there is no compulsion on the police to accept advice given. Indeed, case law has held that the agencies are entirely independent of each other and that it would be unlawful for police officers to regard themselves as bound by any such advice.⁴¹

In numerical terms, the majority of prosecutions are undertaken by the Garda Síochána, and the decisions whether to charge and the selection of charge in practice are police powers.

Based as it is on an opportunity model of prosecution as distinct from one of legality,⁴² prosecutors in the Republic of Ireland have the right to withdraw matters or not to proceed, for reasons of the public interest as well as for reasons of evidential deficiency.

2.5.3 PROSECUTORS’ POWERS REGARDING ALTERNATIVES TO TRIAL

There is no provision for prosecutorial fines or similar in lieu of prosecution, short of the decision not to prosecute.

2.5.4 DIVERSION

There is a national juvenile diversion programme operated by the Garda Síochána.

38 Office of the Director of Public Prosecutions: *Statement of Strategy 1997 – 2000*, Dublin, 1997, p. 5.

39 C Coulter, ‘Lack of Cohesion Caused Mistakes – Barnes’ *The Irish Times*, 16 September 1999.

40 It will be recalled that a precondition to the summary prosecution of an offence is that it be ‘minor’ according to criteria established in case law. Some offences (such as murder and rape) may only be prosecuted on indictment.

41 *The State (McCormack) v Curran* [1987] ILRM 225.

42 A distinction which was explained fully in Chapter 1 of this Report.

2.5.5 INDEPENDENCE AND ACCOUNTABILITY

It has been seen that a number of agencies in the Republic of Ireland prosecute criminal offences. While each would profess its independence in the discharge of the prosecution function, that independence is placed on a statutory footing only in respect of the DPP. Police prosecutors in the District Court would claim to be independent as a result of common law and constitutional convention, while professional lawyers of the CSS and the Bar would in addition to common law and constitutional sources, regard their independence in their prosecution role as inherent in their respective codes of professional ethics and their position as officers of the courts. The analogy must be drawn with the prosecution role of the Attorney General, who is regarded as a matter of constitutional convention as independent of Government and all other influences in the discharge of duties relating to the prosecution function, while in one among other roles, for example, being the legal adviser to the Government.

Individual prosecuting lawyers, while independent of political influence in the discharge of their functions, are accountable to the head of their relevant prosecuting service (most commonly the CSS). Lawyers of other agencies prosecute on an infrequent basis and their lawyers would be independent in the discharge of their prosecution function as a result of constitutional convention. Although within the Office of the Attorney General, we understand that the CSS regards himself as under the direction of the DPP in matters relating to the prosecution function of the Office of the CSS. Prosecutions on indictment are conducted by barristers selected from a list maintained by the DPP and who would, while owing their professional allegiance to the courts and the Bar Council, nonetheless be accountable on a case by case basis to the instructing solicitor, namely the CSS and/or DPP. Equally, the internal lawyers of the DPP in their casework also are accountable to the Director, although expected to bring independent judgement to their casework.

Therefore, while internal lines of accountability can be traced within both the Office of the CSS and the Office of the DPP, the focus for present purposes falls upon the accountability of the Director and specifically whether those lines of accountability proceed further than the DPP.

The Office of the DPP was established in 1974, when the criminal prosecution functions of the Attorney General were transferred to the new law officer.⁴³ While the DPP is a civil servant in the service of the State and is appointed by the Government, he is required by statute and by constitutional convention to be independent in the performance of his duties.⁴⁴ The DPP is not responsible to any other official, agency or forum (such as the Attorney General), but since 1997 is subject to minimal parliamentary accountability. The

43 *Prosecution of Offences Act, 1974*, section 2.

44 The *Prosecution of Offences Act, 1974*, for example, provides in section 2(5) that ‘The Director shall be independent in the performance of his functions.’ Section 2(4), which provides that the DPP ‘shall be a civil servant in the Civil Service of the State’ accords to the Director a status distinct from and of a more independent nature than civil servants in the service of the *Government*.

independence of the DPP, however, raises issues regarding the accountability of that office. A parliamentary committee in 1987, for example, noted ‘major and growing concern’ centring on ‘the absence of any system for making the DPP accountable or answerable for his decisions.’⁴⁵

The DPP is subject to what are at best minimal requirements of accountability, and which are also dealt with further in Chapter 3. It will be seen that prosecution structures in Ireland mark the extreme in prosecutorial independence from the political process within a system which practices the adversarial model. The degree of independence and relative lack of accountability enjoyed by the DPP in the Republic of Ireland is remarkable by international comparison.

The limited 1997 reform to which reference has been made was introduced by the *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997*. This legislation provides that the Committee of Public Accounts, and that committee only, may, in respect of the DPP and his officers, direct the attendance at the Committee of persons and the production of documentary evidence. The Act limits questioning relating to the DPP to ‘the general administration of the office’, and to discussion of ‘statistics relevant to a matter referred to in a report of and published by the [DPP] in relation to the activities generally of the office.’ Even in light of the limited powers described, section 5(1)(d) prevents the Committee of Public Accounts from compelling the production of evidence or the attendance of a witness ‘if the evidence or document could, if given, sent or produced to it, reasonably be expected to prejudice or impair the prevention, detection or investigation of offences, the apprehension or prosecution of offenders or the effectiveness of lawful measures, systems, plans or procedures employed for the purposes of the matters aforesaid...’. However, a wider scope is afforded to questioning of the DPP’s financial budget-holder in respect of the financial affairs of the office.

A Review of the office of DPP which was undertaken by members of the Department of Finance, reported in 1996. This investigation, among other things, recommended that the DPP produce an annual report. This is now being done and the first annual report in the Office’s 24 year history was published in 1999; it is likely that the annual reports of the DPP will form the basis of such questioning as takes place in the Committee of Public Accounts.

While the annual report can itself be seen as a nominal accountability measure, in the Report for 1998 the previous Director suggests that his accountability stemmed from three other factors. These are:

1. The possibility of the removal of the Director from Office under a statutory formula the grounds for which might be summarised as ill-health or misbehaviour,
2. Statutory provisions for ‘consultation’ between the Attorney General and the DPP, and
3. The constant interaction of his office with the Garda Síochána and other state agencies.

45 Dáil Éireann Select Committee on Crime, Lawlessness and Vandalism *Report*, Dublin: Government Publications, 1987, pp. 1-2.

The first factor, namely the removal from Office of a law officer of State, is likely to be a draconian measure, employed only in the most extreme of circumstances. It is one which would be inappropriate for the majority of cases in which an issue may arise regarding the discharge of the prosecution function. To suggest otherwise is to hold that unrelated statutory inquiries as to the Director's fitness for office would be routinely held, perhaps a number of times per week. Further, removal from office is a reactive sanction as distinct from a proactive accountability measure – it is not a measure which will routinely produce accountability or transparency in respect of the case load of the prosecution service.

The second factor cited by the previous Director stems from the statutory requirement that 'The Attorney General and the [DPP] shall consult together from time to time in relation to matters pertaining to the functions of the Director.'⁴⁶ The measure was memorably introduced in the 1974 Bill to 'prevent the Director of Public Prosecutions from being so independent that he might become awkward.'⁴⁷ Nonetheless, while there are recorded instances of such 'statutory consultations',⁴⁸ they appear to occur infrequently. As is clear in the legislation, however, the relationship of the Attorney General and the DPP in the consultation process is one of equals and the Attorney has no power to direct the DPP – they must merely 'consult together from time to time'. It should be noted that the Government of the day expressly intended that the arrangements for the Director's independence in the Republic of Ireland should differ from those which existed in the *Prosecution of Offences (Northern Ireland) Order* 1972 and the then current English legislation. This aspect of the discussion will be considered further in Chapter 3.

The third factor suggested by the previous Director may indeed be a form of 'very real accountability', as the previous Director suggests,⁴⁹ but as a measure of accountability *ad hoc* interaction between the police and the prosecution service patently lacks the transparency and formality towards which the CJRG strives and which appear to be necessary for the maintenance of public confidence in the Northern Ireland prosecution system. Indeed in Northern Ireland, where public confidence in the police is a live issue, accountability to the police would be of minimal confidence-inspiring benefit.

To the previous DPP's list may be added a newly-launched variety of accountability, namely accountability to the victim of crime. While the previous DPP consistently declined to make public the reasons for not prosecuting in any individual case, the Victims' Charter, first published in September 1999, provides that victims of crime may now insist upon an internal review of any decision by the DPP not to prosecute a suspect in connection with the harm the victim has suffered. A senior legal assistant in the Office of the DPP who has not dealt with the original case will carry out an internal review and will report back to the petitioning

46 *Prosecution of Offences Act*, 1974, section 2(6).

47 The sponsoring Minister in the debates on the *Prosecution of Offences Bill, 1974*, 78 *Seanad Debates* 1157 (17 July 1974).

48 See for example C. Cleary 'DPP to meet Attorney General over blood scandal outcome' *The Irish Times*, 27 October 1997.

49 Office of the Director of Public Prosecutions *Annual Report 1998*, Dublin: DPP, 1999, paragraph 9.2.

victim on how the decision not to prosecute has been arrived at. There is no provision for further appeal save for the implicit right of access to the courts to challenge any exercise of public power.

The process of accountability to the courts by way of judicial review has produced some case law, which to date holds that the DPP effectively enjoys an immunity from judicial review. There have been reported instances of judicial comment on the prosecution service in the course of trials and appeals, but no formalised structures exist for the regular transmission of such critiques. We understand, however, that where communicated to the DPP and/or reported in the media, all such comments are responded to and where appropriate, are acted upon.

Section 6 of the *Prosecution of Offences Act, 1974* could be said to further reinforce the independence of the DPP and prosecutors more generally from the public and from politicians. This section provides that it is 'not ... lawful' (although curiously it is not stated to be a criminal offence) to communicate with any of the State prosecutors – principally the DPP or a member of his staff, State Solicitors or police officers – 'for the purpose of influencing the making of a decision to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings.'⁵⁰

2.5.6 EQUITY AND FAIRNESS

There have been suggestions that the information-gathering and statistical resources available within the prosecution process will be enhanced. Currently, however, such statistical information as is compiled and published is insufficient to track individual cases or monitor the impact of prosecution policies within the community on bases such as sex, race, socio-economic profile of suspect and so forth.

Policy directives to ensure equity and fairness are said to exist but none are in the public domain.

The usual system of appeals through the courts is available to test the fairness of any criminal proceeding. While the DPP sets guidelines for prosecutors there is no form of criminal justice inspectorate or formal internal DPP inspectorate to systematically review prosecutorial decisions in individual cases. Judicial review is an option in individual cases, but to date no litigant in the Republic of Ireland has overturned by court order a decision of the DPP not to prosecute.

50 It is also an offence under section 1 of the *Prevention of Corruption Act 1906* and at common law to attempt to bribe a police officer or other person involved in the prosecutorial process in order to persuade them to show favour in the discharge of their function.

2.5.7 EFFICIENCY AND EFFECTIVENESS

The efficiency and effectiveness of the entire prosecution function is not monitored or co-ordinated by any single office, agency or Government Department.

2.5.8 JUDICIAL ROLES

The judiciary is independent and this is underpinned by the constitutional position of each judge. Judges play no part in the investigative or prosecutorial processes other than the issue of search warrants, dealing with bail and in some cases the taking of depositions in preliminary hearings for prosecutions on indictment. The role of the judiciary does not differ from that usually associated with the adversarial system.

2.5.9 CONCLUSIONS

Notwithstanding limited reform over recent years, the criminal prosecution process in the Republic of Ireland remains essentially in the same form in which it existed in the late nineteenth century. Reforms since 1974 have been piecemeal and, with the exception of the Victims' Charter in 1999, appear not to have addressed in a co-ordinated and cross-cutting manner the central concerns of accountability, transparency, equity and fairness in the exercise of this key public power. The Republic of Ireland DPP, for example, enjoys an 'extraordinary' degree of independence⁵¹ – more independence than any other comparable office-holder in an adversarial jurisdiction – and yet is subject to fewer and less stringent requirements of accountability. The production of an annual report by the DPP⁵² and a number of recent reviews of offices of State including that of the DPP,⁵³ however, are evidence of the recognition of a need for change.

51 C Corns 'Prosecution Systems: An Evaluation of Four Models for the Structure, Role and Functions of the Commonwealth Office of the Director of Public Prosecutions,' A report prepared for the Commonwealth Director of Public Prosecutions, 1993, p. 19.

52 Office of the DPP, note 49 above.

53 Consider for example the Public Prosecution System Study Group, 1999.

2.6 France

2.6.1 NATURE/STRUCTURE OF JUSTICE SYSTEM WITHIN WHICH THE CRIMINAL PROSECUTION PROCESS OPERATES

The Republic of France is a constitutional democracy. In France the justice system generally is organised on national lines. The system is often referred to as inquisitorial, a term which some authorities believe to be the subject of public misunderstanding.⁵⁴ Whatever the substance of these concerns, there are substantial differences between this system⁵⁵ and the adversarial system which exists in Britain and in other states influenced by Britain during the days of empire. For convenience, therefore, and to avoid confusion we will refer to this and other mainland European systems which we examine as inquisitorial.

The Minister for Justice can be said to be the person responsible for the Department of Public Prosecution (DepPP) although the notion of individual freedom of decision-making is acknowledged. Public prosecutors are senior figures and carry the same status as a judge. State prosecutors carry out the instructions of their regionally based Public Prosecutor.

For more serious cases there is also a judicial officer known as a *juge d'instruction* who interrogates the witnesses and the suspect, recording their statements. This record becomes the basis of the case against the accused and can be taken into consideration by the court irrespective of whether those who gave the statements have given evidence in the court. Some matters are heard by a tribunal consisting of three judges and a nine person lay jury, while in other matters the three judges sit without a jury. For less serious offences a single judge will preside.

There are some key differences between the French system and those systems which we describe as adversarial. These differences include, the extent to which the prosecutor is involved in the investigative process and the fact that in the French inquisitorial system judge(s) interrogate the accused and the witnesses during proceedings. In addition, a victim can be joined as a *partie civile* in the action which bestows certain rights including the right to address the court.

There are essentially two police forces in France. The national police, a civil body accountable to the Minister of the Interior, and a Gendarmerie – a military force – accountable to the Minister of Defence. The policing function within both forces is divided into administrative and criminal investigation functions.

54 See Spencer, 1994, p. 35.

55 There is no 'plea of guilty' as exists in the British system. Neither is there a rule against hearsay.

2.6.2 ROLE OF PROSECUTION AND POLICE

The prosecutor holds the power to initiate a prosecution and to determine the nature of any charge. The investigative police are answerable to the prosecutor who directs their investigative activities. Officers of the DepPP have supervisory powers and responsibilities at regional level.⁵⁶

Prosecutors have the same powers as members of the Criminal Investigation Department and can, if necessary, carry out actual investigations. Police officers exercise their powers by virtue of an authorisation granted by the DepPP. Prosecutors can authorise the police to detain a suspect in custody for a total of 48 hours.

In essence, whilst police carry out the initial investigation, once a suspect is identified there follows a pre-trial investigation which is carried out by a prosecutor or other judicial officer. The pre-trial investigation will include an assessment of the reports of any expert witnesses. These witnesses are not retained by either side but are appointed by the court.

Whilst criticism of the French investigative process has not been as obvious as that of the Belgian system, a long series of unsolved murders of Britons in France has produced British media criticism of the efficiency of the French process.⁵⁷

2.6.3 PROSECUTORS' POWERS REGARDING ALTERNATIVES TO TRIAL

There is no system of prosecutorial fines. At the present time, however, parliament is considering a proposal to create a system whereby the DepPP, under the authority of a judge, can require an offender to pay compensation in lieu of being prosecuted.

Penal mediation exists but it has not yet reached the degree of sophistication described in the Belgian study below. There is a system of mediation within the *code de procedure civile*. 'Penal médiation' and 'Civile médiation' differ only in the nature of the offences covered by each. Under this arrangement a mediator who may be an independent individual or an association can mediate between the victim and offender. This process is recognised by the Ministry of Justice to whom the outcome must be reported for it to have effect.

56 To those not familiar with the French criminal justice system, there are a number of investigative arrangements which can appear quite confusing. The following short quote from Yue Ma may be of some assistance in explaining these arrangements: 'Police investigative powers differ greatly depending on the character of the offense being investigated.' 'There are three types of criminal inquiries: the flagrant-offense inquiry, the preliminary inquiry, and the inquiry by examining magistrate. The primary distinction between the inquiry by examining magistrate on one hand and the flagrant-offense inquiry and the non-flagrant-offense inquiry on the other is that the former is conducted by the examining magistrate, whereas the latter two are conducted by police or prosecutors', in 'Comparative analysis of exclusionary rules in the United States, England, France, Germany, and Italy,' *Policing: An International Journal of Police Strategies & Management*, vol 22, no 3, 1999, pp. 280-303, 288.

57 See, for example, A Sage 'Three-tier police system catches fewer criminals,' *The Times*, 30 October 1999, p. 7.

2.6.4 DIVERSION

See previous section.

2.6.5 INDEPENDENCE AND ACCOUNTABILITY

In a record published for the conference of representatives of the public prosecution services of the Member States of the European Union,⁵⁸ it was said of France that ‘the organisation of the Department of Public Prosecution ... is particularly complex since it is based on the principle of hierarchical subordination which provides significant scope for initiative and allows its members a considerable degree of independence.’

In the same publication it is noted that the ‘planned reforms to the Ministry of Justice will ensure that the Minister of Justice is no longer able to issue instructions concerning individual cases.’ This suggests greater independence for the prosecutor in the future.

An important accountability measure is the right of injured parties to commence a civil action, in which the prosecuting authorities have no power to intervene, in instances where no criminal prosecution has been brought. An additional measure of accountability is the right of a victim, as discussed above, to be joined formally in the criminal proceedings being brought by the prosecutor. In these circumstances the victim is permitted to be legally represented.

2.6.6 EQUITY AND FAIRNESS

If a state prosecutor decides not to prosecute, the interested party can bring the accused before the court or before examining magistrates by way of civil action.

What would seem to amount to one challenge to the notion of fairness is explained by a commentator who states that in France, an individual’s ‘rights of defence’, ie those rights which include the right to counsel, to receive notice of the proof against him/her and the right to be informed of his/her privilege against self-incrimination, ‘do not attach until the case reaches the stage of inquiry by examining magistrate. The rights have no application at the police inquiry.’ This authority argues that ‘the belated attachment ... in effect deprives the suspect of the legal protection when he (sic) needs it most, that is, at the police inquiry stage.’⁵⁹

58 *Euro Justice, ‘Co-operation between public prosecution services in the European Union,’* The Hague, Netherlands: Public Prosecution Service, 1998.

59 Yue Ma, 1999, in part, citing E A Tomlinson ‘Nonadversarial Justice: the French experience,’ *Maryland Law Review*, vol 42, pp. 131-95.

2.6.7 EFFICIENCY AND EFFECTIVENESS

There are aspects of the system, especially the early involvement of the prosecutor, which are helpful to achieving efficiency. In particular, matters which are not worthy of the courts do not result in a charge as they might in a system where the prosecutor becomes involved later in the process. Whether this is an effective means of dealing with those who commit crime would require comparisons of a range of statistical material over time, which is beyond the remit of this Report. It can be said, however, that the avenues of redress open to a dissatisfied victim have the potential to enhance the effectiveness of the system.

2.6.8 JUDICIAL ROLES

The professional development paths of judiciary and public prosecutors are similar. Once qualified, a judge can become a public prosecutor and vice versa.

The judiciary does not participate in what might be termed the operational phase of the investigative process. But unlike the judge in a trial conducted in an adversarial jurisdiction, they do interrogate witnesses and the accused during a trial. The Assize Court which deals with most serious crimes sits with three examining magistrates (judges) and a jury of nine.

Examining magistrates are appointed and administered by the DepPP.

2.6.9 CONCLUSIONS

The criminal prosecution process in France has some marked differences to the arrangements in Northern Ireland, the Republic of Ireland and in England and Wales. In France the police are essentially controlled by a senior judicial figure. There is also much significance placed on the pre-trial process. In this regard and in addition to the control exercised by the DepPP and the State Prosecutor, the *juge d'instruction* has a very influential role.

Whilst the process in France seems to operate so as to eliminate from prosecution at an early stage those matters which have little chance of success, the rights of the accused once this stage has passed might be described as Spartan by comparison with the position of an accused in the Northern Ireland system. Conversely, it must be said that the victim of crime is accorded more status than is the case in courts in the UK or the Republic of Ireland.

Historically, the police in France have been an agent of the State protecting the state from its citizens.⁶⁰ They are part of a prosecution machine in which the police are inextricably linked with the DepPP and the State Prosecutor. Whilst this may be an accepted process in France, it is unlikely to be regarded as suitable in an environment where a clear separation of the investigative and prosecution roles is regarded as necessary to the credibility of the system overall.

An inspectorate of prosecutions might be a useful additional safeguard in a prosecution system which is so state-centred.

2.7 The Netherlands

2.7.1 NATURE/STRUCTURE OF JUSTICE SYSTEM WITHIN WHICH THE CRIMINAL PROSECUTION PROCESS OPERATES

The justice system in The Netherlands is largely decentralised. It is a system which can be categorised as inquisitorial.⁶¹ Courts are situated in towns which are significant for their location throughout the country. Each of these locations forms a district and has its own prosecutors' office. Districts are then arranged into areas of jurisdiction each of which has a court of appeal. Areas also have a prosecutors' office headed by an Advocate General. Finally, there is the Supreme Court of The Netherlands which also has a prosecutors' office. This office is headed by the Prosecutor General. Prosecutors are part of the judiciary.

There is a board of prosecutors-general which determines the national investigation and prosecution policy. This board is responsible for the public prosecution service. The Minister for Justice is politically responsible for the decisions of the public prosecution service. The Minister is generally concerned with policy but may give directions to the public prosecution service on how they should act in criminal cases. Prior to giving such an instruction, the Minister will consult with the board of prosecutors-general.

It will be noted that both the investigation and prosecution policy come from the same source. When this is considered together with the fact that the public prosecution service and the judges jointly form the judiciary, the system as a whole can be seen as a state-sponsored collective. This is substantially different to arrangements in Northern Ireland, the Republic of

60 In his 1957 work *The Police of Paris*, P J Stead noted the unpopularity of the police in France. He related this unpopularity to the French love of freedom and the machinery of state for the subjugation of the people. This machinery included the police and the state trained judiciary, 'not ... selected from the advocates who have distinguished themselves at the bar of the courts,' a completely different arrangement to that which existed in Britain.

61 But see the discussion of this term in the case study of France.

Ireland and in England and Wales. While there is a careful separation of the professional activities of prosecutor and police officer in The Netherlands, the system, overall, is one which pursues a common purpose.

The police in The Netherlands underwent a substantial reorganisation which was completed in 1992. Presently there are 25 regional police forces and a national police. The police are administered by a regional board which is comprised of the Burgomasters (mayors) within the region and the Regional Chief Crown Prosecutor. The board is headed by one of the Burgomasters appointed for that purpose. The holder of this office is the regional manager of police and carries out the duties of this office assisted by the Chief Constable for the region.

2.7.2 ROLE OF PROSECUTION AND POLICE

Prosecutors are responsible for the investigative outcomes of the police. As such, prosecutors have authority over the police with regards to criminal investigation.

Prosecutors may request the court to grant an order for pre-trial detention. If this option is taken, the prosecution is regarded as having commenced with that detention.

Prosecutors are also responsible for the enforcement of any sentence imposed by the court.

Since this research commenced an important change to the way in which the prosecutor and police interact has been developed in Amsterdam and is being expanded into regional jurisdictions. There is now in the employ of the office of the Prosecutor a group of individuals known as *Parket Secretaire* (loosely translated as judicial secretaries). These persons are not prosecutors⁶² but are legally qualified and are vested with limited powers to initiate or discontinue prosecutions in what are regarded as minor cases. In effect, they are lower level case managers. Persons holding this office may not commit persons to custody and do not have the powers of prosecutors, for example, to authorise wire taps. The judicial secretaries are funded jointly by the police and the prosecutors office. Some are based in police stations others in the prosecutors office. Decisions taken by judicial secretaries are overviewed by the prosecutor. The function of the judicial secretaries is seen as being of particular importance as they relieve the prosecutor of much work in lower level matters. Judicial secretaries are the only officials who have access to both the police and prosecutions computing systems. It is intended to introduce software which will analyse offence and offender data when it is input by the judicial secretaries and will then respond with a predetermined strategy and charge scale to deal with the matter. The aim is for consistency across the system.

Police officers conduct criminal investigations under the supervision of the relevant public prosecutor.

⁶² In a system similar to that which exists in France, prosecutors and judges in The Netherlands undergo a lengthy formal training in a dedicated establishment before commencing professional practice.

2.7.3 PROSECUTORS' POWERS REGARDING ALTERNATIVES TO TRIAL

It has been the case for many years that in matters regarded as simple criminal offences, eg shoplifting, a prosecutor may set a fee which may be paid by the offender. If the sum is paid, the offender will not appear before the court. In matters considered to be petty, the whole issue may be dealt with in this manner at the police station.

Again, whilst this research has been proceeding the system of prosecutorial fines has been expanded to include more serious offences. Substantial sums can now be levied for matters like a death arising from an industrial accident. In these more serious matters, there is a scale of fine which requires a prosecutor to obtain authorisation from various sources depending on the amount being set. For the largest amounts the authority of the board of Prosecutors-General must be sought.

The system of fines and/or reimbursement to victims may be invoked whilst the prosecution is proceeding. When this occurs the matter is dismissed.

2.7.4 DIVERSION

See also the comments in the previous section.

A system of mediation in criminal matters has recently been introduced in Amsterdam. It is under the supervision of a former judge.

2.7.5 INDEPENDENCE AND ACCOUNTABILITY

This is a system in which independence in the sense of the separation of the prosecution process from the police investigation is not possible, in that the prosecutor controls the investigation.

Independence of the prosecution process from the political process is limited by the nature of the prosecution structure. It will be noted, however, that the Minister for Justice tends to interact with or consult with the board of Prosecutors-General when exercising powers of office.

In so far as accountability is concerned, there is the usual system of appeal courts open to challenge the decisions of the trial courts. Victims can also complain to a court of appeal over issues like the decision of a prosecutor not to prosecute or to discontinue a prosecution. Prosecutors are bound under statute to act in the interests of victims.

Given the control of the investigative process by prosecutors and their wide powers of discretion in commencing or withdrawing a prosecution it is important to consider the

safeguards in place to ensure that there is no abuse of office. In this regard, police and prosecutors have a right of appeal up to the board of Prosecutors-General if necessary. As the board only makes joint decisions it can be said that there is the potential for accountability if the police or a prosecutor are prepared to pursue a particular issue.

It is also the case that the Minister for Justice is answerable to the Parliament for the proper functioning of the criminal prosecution system.

2.7.6 EQUITY AND FAIRNESS

It is difficult to comment on the equity and fairness of a system which is clearly designed to minimise the number of matters reaching the courts. There are accountability measures discussed in the previous section which are likely to contribute to equity and fairness but there is no inspectorate.

2.7.7 EFFICIENCY AND EFFECTIVENESS

The system appears to strive for efficiency by ensuring that the very least number of matters as is possible reach the courts. Whether this is an effective means of dealing with those who commit crime would require comparisons of statistical material over time, which is beyond the remit of this Report. In commenting on their system of prosecutorial fines, the Dutch authorities have noted that ‘the suspect quickly knows where he is at, criminal cases do not remain lying on desks for a long time and courts have less criminal cases to try.’⁶³

2.7.8 JUDICIAL ROLES

Judges preside at trials and interview witnesses. As with some other systems within the inquisitorial model, there is a panel of lay persons who sit with the judges.

Mindful to the fact that prosecutors are members of the judiciary, the comments included in the discussion of the role of prosecutors are relevant.

2.7.9 CONCLUSIONS

The system of criminal prosecution in The Netherlands has undergone and is continuing to undergo a ‘stream-lining’ of processes with the apparent intention of making the system more efficient and, perhaps, more effective. It is a system where the prosecutor is placed to make

63 *Euro Justice*, 1998, p. 136.

very early judgements about the need to bring a prosecution or otherwise. It is also a system within which there are measures that can be invoked by both the victim and the offender to question the decisions of a prosecutor.

As with many other jurisdictions having an inquisitorial system, diversion is increasingly the preferred option for dispensing justice. This is achieved through the power of the prosecutor to exercise discretion in imposing a fine in lieu of criminal proceedings and with the introduction of mediation.

2.8 Belgium

2.8.1 NATURE/STRUCTURE OF JUSTICE SYSTEM WITHIN WHICH THE CRIMINAL PROSECUTION PROCESS OPERATES

Belgium is a federal parliamentary democracy with a monarch. Prior to 1830, Belgium was a part of The Netherlands. The justice system is, therefore, similar in structure to The Netherlands with a public prosecution service. It is an inquisitorial system.

The country is divided into 27 judicial districts with a King's prosecutor as overall head. Like The Netherlands, these districts are grouped to form five regions each with its own court of appeal. There is a prosecutor general for each region. There is also a prosecutor general for the Supreme Court. Collectively the prosecutors general constitute the management board of the service.

While prosecutors are not a part of the judiciary, they are of equal status and form part of the executive as examining magistrates.

In keeping with many other west European jurisdictions, there are two national police agencies in Belgium and a local police.⁶⁴ For the purposes of this Report, the Judicial Police are the most significant having exclusive competence in judicial (criminal) matters. The King's Advocate can issue general instructions to the police.

⁶⁴ For more information on the various policing arrangements in Belgium, a useful English language summary is contained in J Sheptycki 'Police Culture and Structures of Social Control: Police-Related Scandal in the Low Countries in Comparative Perspective,' 1999 vol 9(1) *Policing & Society*, 1999, especially pp. 7-10. See also the diagram in 'Co-operation between public prosecution services in the European Union,' *Euro Justice*, 1998.

2.8.2 ROLE OF PROSECUTION AND POLICE

The prosecutor is, essentially, in charge of the judicial police for the purposes of conducting a criminal investigation. In effect, this means that prosecutors are very close to the investigative process. The prosecutor has sole power to decide whether or not to bring a prosecution.

A prosecutor can arrest a suspect and place him/her on pre-trial detention for up to 24 hours. For longer periods of detention the prosecutor must gain the authorisation of an instructing judge.

The police investigate criminal matters under the direction and supervision of a prosecutor.

2.8.3 PROSECUTORS' POWERS REGARDING ALTERNATIVES TO TRIAL

In relative terms, Belgian prosecutors have some wide options for dealing with matters other than by proceeding to trial. In explaining these measures, we will draw heavily on the work of Peters and Aertson⁶⁵ a paper of whose explains in detail the various forms of *Médiation*.⁶⁶ Peters and Aertson note how there have been several important evolutionary stages prior to the development of *Médiation*.

At the prosecutorial service there has always been a 'de facto' practice of a simple or conditional waiver ('sepot') of the prosecution based on the principle of opportunity. When this is combined with special conditions it is called a 'praetorian probation'. Since 1984 the transaction law allows the prosecutor to conclude a case by asking the suspect to pay a certain sum of money to the state.

A pilot project testing penal mediation was followed by enactment of legislation in 1994. 'The law introduces in the Code of Criminal Procedure a new article 216ter, which allows the public prosecutor to dismiss a case under certain conditions.'

'Penal mediation applies to criminal offences, committed by adults, when in the opinion of the public prosecutor a penalty of over two years' imprisonment doesn't seem to be necessary. In these cases the law offers the prosecutor the possibility of proposing to the suspect one or more of the following conditions or measures in order to obtain an extinction of the public action.' The conditions, or measures, cited include reparation, medical treatment, training and community service. The prosecutor can combine the measures if considered necessary.

65 T Peters and I Aertson 'Restorative approaches of crime in Belgium' (www.csc-scc.gc.ca/bprisons/english/belge.html).

66 Peters and Aertsen suggest that 'Mediation as a problem-solving intervention has to be considered in direct relation to the discussion of the purpose of the criminal justice system. By putting the emphasis on the dialogue between the victim and the offender, a common solution is worked out with the help of a mediator. In this way reparation, redress and sometimes even reconciliation become core values of the penal action.'

Appropriately qualified staff have been employed to enable the mediation process to be undertaken.

It is said that a strength of mediation is that it is undertaken within the criminal justice system. The mediation process can be abandoned if it is not perceived by the prosecutor to be producing the required outcome.

There are a number of problems with the process according to the evaluation authorities. To explain these problems would require much space and we do not regard them as relevant to prosecutors' powers. The identified problems relate partly to the programme being relatively new and appear to be capable of resolution.

The selection process for mediation is undertaken by liaison between the prosecutor and the mediator. Once selected the mediator deals separately with the offender and the victim until a satisfactory relationship is reached.

There is a further development of relevance to this Report. Médiation programmes have been created at police level.

They focus primarily on minor offences and try to arrange as soon as possible a financial settlement between the offender, who acknowledges the facts, and the victim. These projects are based on an agreement with the prosecutorial service. The prosecutor is informed about the settlement and subsequently closes the file with a prosecution waiver ('sepot').

2.8.4 DIVERSION

See above, remembering that a prosecutor has the power to discontinue a prosecution at any time.

2.8.5 INDEPENDENCE AND ACCOUNTABILITY

As mentioned above, due to its origins, there are many similarities between the Belgian system and that of The Netherlands. Hence, this is also a system in which prosecutorial independence from the police investigation is not possible in the sense that the prosecutor controls that investigation.

Independence of the prosecution process from the political process is limited by the nature of the prosecution structure. It will be noted, however, that the Minister for Justice tends to interact with or consult with the board of Prosecutors-General when exercising powers of office.

In so far as accountability is concerned, there is the usual system of appeal courts open to challenge the decisions of the trial courts. Victims can also complain to a court of appeal over issues like the decision of a prosecutor not to prosecute or to discontinue a prosecution.

2.8.6 EQUITY AND FAIRNESS

It is difficult to comment on the equity and fairness of a system which is clearly designed to minimise the number of matters reaching the courts. The accountability measures discussed in the previous section seem to contribute to equity and fairness but there is no inspectorate.

2.8.7 EFFICIENCY AND EFFECTIVENESS

The system appears to strive for efficiency by ensuring that the very least number of matters as is possible, reach the courts. Whether this is an effective means of dealing with those who commit crime depends on the views of a particular society. At the least it would require comparisons of statistical material over time, which is beyond the remit of this Report. It is also the case that the whole philosophy which underlies Médiation, for example, is quite different to that which informs current arrangements in Northern Ireland, the Republic of Ireland and in England and Wales.

What must also be said is that this is an investigative-prosecutorial system which has been subjected to much criticism; in particular, its failures regarding the paedophile murder investigations surrounding Marc Dutroux have received much publicity.⁶⁷ Whilst this may not point to defects in the intentions of the system it says a great deal about accountability mechanisms throughout the process. A parliamentary commission reviewed the circumstances surrounding this matter. The commission's report suggested ineptness and inaction by the police and reflected on the need to improve the police command structure. More importantly, it saw a need for an external audit of the efficiency of the judicial services.⁶⁸ The report also hinted that its work had been impeded by the will of those who hid information, denied evidence and camouflaged reality in order to evade their responsibility. One competent source with whom we raised this issue, but who wished to remain anonymous, expressed the view that the degree of independence of some highly

67 See, for example, J-M Chauvier 'The Troubled State of Belgium: The White Year Turns to Grey,' *La Monde diplomatique*, October 1997.

68 See Chambre des Représentants de Belgique, 'Enquete Parlementaire sur la manière dont l'enquête, dans ses volets policiers et judiciaires a été menée dans «l'affaire Dutroux-Nihoul et consorts», 16 Feb 1998. An approximate translation of the title reads: 'Parliamentary Inquiry into the way in which the police and judicial inquiry was lead (handled) in the Dutroux-Nihoul and associates affair. The report was authored on behalf of the Parliamentary Commission of Inquiry by M R Landuyt and Mme N De T'serclaes. It was presented in the Quatrieme session de la 49e legislature and its reference numbers are 713/6-96/97 and 713/8-96/97.

placed officials made the achievement of accountability difficult.⁶⁹

2.8.8 JUDICIAL ROLES

Judges have powers to issue certain kinds of warrants and other authorisations following a request from the prosecutor. Judges are appointed by the King and serve for life.

2.8.9 CONCLUSIONS

This is an inquisitorial model which has the potential to benefit from the efficiencies of a prosecutor being involved in an investigation from an early stage. But this 'advantage' is open to the criticism that the investigative and prosecution arrangements are a seamless continuum which create an imbalance of state power against an individual. Whilst it is the case that an accused person has certain rights not accorded an accused in the adversarial model, it remains the case that there is no independent inspectorate. The system is as good as those who make it work. It is, therefore, important to note that Belgian investigative and prosecution authorities and processes have been severely criticised since the uncovering of a paedophile ring with the arrest of Marc Dutroux in 1996. Criticisms included allegations that paedophiles in highly placed official positions were being protected.

The options for a prosecutor to divert offenders from the courts have a great deal of merit in terms of their flexibility and ability to bring offender and victim together. The consequential savings in time and resources, however, must be balanced against the checks and balances which exist to ensure their proper use.

2.9 New Zealand

2.9.1 NATURE/STRUCTURE OF JUSTICE SYSTEM WITHIN WHICH THE CRIMINAL PROSECUTION PROCESS OPERATES

New Zealand is a parliamentary democracy of the Westminster model. It has a national prosecution process and a single police agency. The police are responsible to Parliament through a Minister of Police. The prosecution process is undertaken within a justice system

⁶⁹ This view is perhaps supported by a comment in *The Economist*. In an article headed 'Belgium. Cleaner?' about the corruption trial of Willy Claes the Belgian former Secretary-General of NATO, the author has observed that '[t]here is also a sense in which Belgian justice, notoriously politicised and disaster-prone, is itself on trial...' 12 September 1998.

that is adversarial in practice. This is a system which reflects the influence of the English political and legal models during its early development but one which has been refined according to local needs.

New Zealand has a hierarchy of courts similar to those usually found in adversarial systems. Generally, criminal trials are conducted with a jury selected from eligible citizens.

The Criminal Prosecution process in New Zealand has been the subject of a major review. The most recent publication in the review process was produced in 1997 by the New Zealand Law Commission.⁷⁰ That comprehensive report addresses all issues related to the New Zealand criminal prosecution process. We have drawn substantial information from this and other publications.

The Attorney General is the senior legal officer in New Zealand. This post is a political appointment. The holder is in the anomalous position of being both a member of the executive and of cabinet in addition to being an independent officer of the Crown. The senior non-political appointment is the Solicitor-General who is chief executive of the Crown Law Office. The mandate of this office includes the prosecution of criminal offences.

In practice, the back-bone of the prosecution system for the superior courts is a number of Crown Solicitors. The holders of this office are appointed by the Governor-General of New Zealand. Appointees are usually from major law firms. These appointees, in turn, either brief members of their own firm for the prosecution of individual cases or they draw from a panel of barristers and solicitors, appointed by the Solicitor General from outside of the appointee's firm. Prosecutions in the lower courts, including committals are usually conducted by Police officers as explained below.

There is no DPP nor is there a body resembling the CPS as presently exists in England and Wales.

2.9.2 ROLE OF PROSECUTION AND POLICE

From the foregoing it can be seen that the prosecution arrangements in New Zealand uniquely reflect a local evolutionary process. In a system which might be described as having strong elements of private enterprise, in terms of the prosecution of serious criminal offences, there are at least two other interesting features. The first of these relates to police as prosecutors. In many jurisdictions where police still conduct prosecutions there is pressure for the practice to be discontinued. One of the primary reasons cited for ceasing the practice is to give meaning to the notion that investigation and prosecution should be separate.

⁷⁰ Law Commission *Preliminary Paper 28, Criminal Prosecution*, Wellington: Law Commission, 1997.

In New Zealand, this concept of separation appears to mean separation within the police system rather than between the police as investigators and some other body as prosecutors.⁷¹ The present Law Commission inquiry has examined various options without suggesting a preference for separating the police from the criminal prosecution process.

This means that police officers prosecute most matters heard in a summary jurisdiction and they prosecute indictable matters to committal. This is broadly similar to the situation that presently exists in many of the Australian State jurisdictions. There appears to be no statutory basis for this prosecution role and, again, like Australia, may well be a consequence of the remoteness of centres of population in past times making it convenient for a police officer, often the arresting officer, to appear for the Crown.

If refinement of the present arrangements for police to prosecute is undertaken it is likely that change will bring an 'independent' police prosecution's body headed by a Deputy Commissioner which, nonetheless will be a part of the New Zealand Police.

At present an investigating officer will determine the charge to be proffered and the police prosecutor will use his or her discretionary powers in the manner explained below as to whether a prosecution will proceed. We have been informed that few police officers who prosecute have legal qualifications although some specific training is given.

Prosecutions within the superior courts are conducted by a Crown Solicitor or by some other legally qualified person appointed according to the system mentioned earlier. The indictment presented in the superior court may not necessarily be the same as the charge which was originally proffered or that for which the accused was committed for trial.

Crown Solicitors have little or no influence on summary or committal matters unless they are consulted by the police.

The second feature which is of interest because of the stark contrast it provides with the system presently existing in Northern Ireland is that of contact between prosecutors and victims/witnesses. The situation is best explained in the following quote from the Law Commission's discussion paper:

...Crown solicitors [prosecutors] were divided on the question of whether they should see victims at all before the trial. Some referred to the *Victims of Offences Act 1987*, as well as to an understanding that Crown solicitors should have pre-trial contact with

⁷¹ Whilst it might be said that in many jurisdictions where police officers still conduct prosecutions, these officers are not attached to the general duties police but remain separate, in New Zealand the arrangement proposed is more formal. The proposal suggests an autonomous and career-oriented national service. Such a service would have a chain of command/responsibility to the Deputy Commissioner.

child victims of sexual abuse. Two Crown solicitors considered that it was clearly improper to interview victims or witnesses before trial about the evidence, for fear of being seen to influence their testimony by the interview, or being seen to coach them...⁷²

The two issues discussed in this section are very good examples of the extent to which once similar systems have evolved quite differently to accommodate individual societal problems and demands.

2.9.3 PROSECUTORS' POWERS REGARDING ALTERNATIVES TO TRIAL

As prosecutors in the first instance in most cases, the police in New Zealand have a broad discretion when determining whether a prosecution will be commenced. In making such a determination police will consider the sufficiency of the evidence, whether diversion or some alternative procedure is appropriate and the matter of public interest.

There are general instructions for the police and there are prosecution guidelines produced by the Solicitor-General. Within these guidelines there are two main considerations; those related to evidential sufficiency and those related to public interest.

Police may decide not to prosecute in particular cases. Depending on the nature and seriousness of the offence and the age and antecedents of the offender, a warning, mediation or counselling may be imposed.

What is colloquially known as 'plea bargaining' between prosecution and defence is permitted. This practice is intended to produce a plea of guilty, thereby saving the court's time.

At present prosecutors do not have a stated power to discontinue a prosecution although, in practice, they do so by offering no evidence or withdrawing information by leave of the court in summary matters.

There is no provision for prosecutorial fines.

2.9.4 DIVERSION

Through their use of discretion in certain circumstances police are able to use various diversion schemes as alternatives to proceeding to trial in the courts.

72 Law Commission, 1997, p. 85. By comparison, in Northern Ireland whilst a prosecutor may not meet a victim before proceedings begin, in matters within the jurisdiction of the DPP (as opposed to those dealt with entirely by the police), a professional officer (prosecutor) will read and amend witness statements, including that of the victim, as a part of the investigative process. For additional comment see the notes on criminal prosecution in Northern Ireland at the beginning of this chapter. In contrast to the position in New Zealand, in the US, witness conferences are held between the prosecutor and the witnesses to discuss testimony. These conferences can occur at any stage leading up to the trial.

Diversion is approved by a designated police prosecutor and can be offered under certain circumstances. Included in those cases where diversion might be offered are those where the defendant has admitted guilt and has no previous convictions. Diversion is not offered where the alleged offence is serious. Before diversion is offered both the arresting officer and any victim of the offence must be consulted.

If a defendant is offered and accepts diversion the 'diversion co-ordinator' may impose conditions on that person.

2.9.5 INDEPENDENCE AND ACCOUNTABILITY

Independence of the prosecution process is a matter of accepting the extent to which the substantial role of the police in that process permits a truly 'independent' system. Paradoxically, the almost total involvement of prosecutors from private practice in the higher courts suggests a strong measure of independence but one which requires a high degree of overt accountability and professionalism.

We understand that the Law Commission, in its draft report on Criminal Prosecution, will recommend that the Solicitor-General establish prosecution standards for all 'core' state prosecuting agencies and that the standards be modelled on the existing Solicitor-General's Guidelines.

The Crown Law office and the New Zealand Police both produce an annual report.

In certain circumstances the Police Complaints Authority may choose to review a police decision to prosecute or not to prosecute.

The judicial reviewability of decisions regarding prosecution is, at best, unclear.

2.9.6 EQUITY AND FAIRNESS

It is considered that equity and fairness are assured through the annual reporting arrangements and through the oversighting of Crown solicitors by the office of the Solicitor-General. There is also the usual system of appeals through the hierarchy of the courts.

2.9.7 EFFICIENCY AND EFFECTIVENESS

There are no specific criteria for determining efficiency and effectiveness. The process by which responsibility for the conduct of prosecution agencies is vested in a Minister and the production of an annual report appear to be sufficient to satisfy local requirements for efficiency and effectiveness.

2.9.8 JUDICIAL ROLES

The judiciary is independent and does not take part in the investigative process. This is an adversarial model where the focus of the judiciary is to adjudicate on matters of law, to ensure that hearings are conducted according to prescribed procedure, that matters like the availability of legal aid have been adequately addressed and to deal with bail applications and related matters.

Although judges do sit in the District Court in matters of summary jurisdiction, many such matters are dealt with by Justices of the Peace and new Community Magistrates who are not legally qualified.⁷³

2.9.9 CONCLUSIONS

Criminal prosecution arrangements in New Zealand appear to largely satisfy public requirements. The system whereby prosecution in the superior courts is undertaken essentially by members of the private bar has some merit, in so far as the process is largely removed from the public sector.

2.10 Australia (Regional and State)

2.10.1 NATURE/STRUCTURE OF JUSTICE SYSTEM WITHIN WHICH THE CRIMINAL PROSECUTION PROCESS OPERATES

The predominant legal jurisdictions in so far as criminal prosecutions in Australia are concerned are based on the six States and the Northern Territory which collectively form the Commonwealth of Australia.

⁷³ The Law Commission of New Zealand unsuccessfully opposed the move to create the Community Magistrates. In 1978, following a review of the courts and related matters, the Magistrates Courts were renamed District Courts and the existing Stipendiary Magistrates became judges of the District Court.

Under the Australian constitution specific powers are granted to the Commonwealth with residual powers being vested in the States. The consequence of this is that most criminal prosecutions are undertaken within a specific state or territory jurisdiction.⁷⁴

Each State and the Northern Territory has its own body of criminal law, its own judiciary, magistracy, police agency, courts and prison system. While there are similarities in the law, in legal structures and in legal practices, each jurisdiction is quite separate. This creates a situation whereby extradition is important for dealing with even quite localised policing problems which involve a criminal offence.

Each State and Territory has a DPP with responsibility for criminal prosecutions. In some jurisdictions this responsibility begins with the committal stage while in others it begins from trial stage. All DPPs are accountable to Parliament through the office of the Attorney General, a political appointee. All DPP officers who prosecute are professionally qualified and hold a commission to prosecute. When demand necessitates, private counsel are briefed to prosecute and are given a commission as appropriate.

In all jurisdictions, systems are adversarial in practice and reflect English origins. There are Stipendiary Magistrates but no system of lay magistrates.⁷⁵ The justice system being adversarial there is a hierarchy of courts which reflects offences with different degrees of seriousness. Generally, criminal trials are conducted with a jury selected from eligible citizens for all matters dealt with on indictment.

All Australian police forces are headed by a commissioner who is accountable either directly or indirectly to an elected member of parliament (a minister). In all State and territory jurisdictions the police act as prosecutors to the extent that they appear in most summary matters.⁷⁶ In some of these jurisdictions they also deal with committal matters.

2.10.2 ROLE OF PROSECUTION AND POLICE

There has been a conscious attempt to ensure a division between the two functions by making the police and the prosecution service accountable to different ministries.

Such overlap as occurs is confined to a prosecutor being asked informally to give advice on an appropriate charge or to request further investigations to be undertaken by police in a matter that is already before the courts.

74 Whilst there is a federal police force and a federal DPP, they are concerned with offences against the Commonwealth. There is no system of dedicated federal courts for criminal prosecutions, nor are there federal prisons although there is a federal police agency. Offences against Commonwealth legislation are largely dealt with by constituting a federal court in a State or the Northern Territory owned court facility by a member of the relevant state or territory judiciary (or magistracy) duly authorised to sit in the federal jurisdiction.

75 However, see comments under the heading *Judicial Roles* at paragraph 2.10.8 of this Report.

76 There are some matters, for example perjury, where the approval of the DPP is required before a prosecution can be commenced.

Police investigate and decide whether to prosecute and the charge to be proffered. A prosecutor cannot instruct the police in these matters. When advice as to an appropriate charge is sought from the prosecutor by police they are not bound to act on the advice given.

As noted above there is some variation between State and Territory jurisdictions in so far as matters prosecuted by police and those prosecuted by officers of the DPP.

In New South Wales, for example, DPP staff prosecute in all committal hearings and in the superior courts.

In Queensland, however, DPP staff (who are known as Crown Prosecutors) only prosecute in committal hearings under certain circumstances, which would include where a police officer is a defendant and those instances where it is deemed prudent for police not to prosecute. The DPP commented that the physical size of the jurisdiction (nearly 1.75 million square kilometres) and relatively small population (approximately 3 million people) make the total removal of police officers from the prosecutions role impossible at present on the grounds of cost.

In Western Australia, prosecutors work in prosecution teams comprising professional, administrative and clerical staff, headed by a team manager. The clerical staff draft court papers, liaise with the court registries, Crown witnesses and police and they perform para-legal work including assisting the prosecutors in court.

A Court of Petty Sessions Team concerns itself with committal matters although police prosecutors deal with the first appearance in such matters.

There is no statutory authority for police to prosecute – they do so by leave. DPPs generally believe that the police should not conduct prosecutions.

DPP officers do not conduct investigations but may be consulted by police during an investigation as to an appropriate charge, etc. After receipt of committal papers, DPP officers may request further investigations by police.

In some jurisdictions occasional joint training programmes are conducted for DPP officers and police prosecutors.

The police conduct most criminal investigations although there are other agencies like the National Crime Authority. This national body of seconded police investigators and professionally qualified persons conduct investigations into what might be termed major crime issues.

2.10.3 PROSECUTORS' POWERS REGARDING ALTERNATIVES TO TRIAL

There are no arrangements for prosecutorial fines.

See comments under 'Diversion', below. Police in some jurisdictions have a system of cautions which can be used under certain circumstances. For example, an elderly person who has not been previously convicted, commits a minor theft and admits guilt may be officially cautioned rather than prosecuted.

2.10.4 DIVERSION

Most jurisdictions have some form of diversion schemes which operate with regard to young offenders and some drug and sexual offence related matters. In totality there are many such schemes across the various jurisdictions. To try and examine even a respectable sample of the schemes in any professional manner would take far more time and resources than are at our disposal.

2.10.5 INDEPENDENCE AND ACCOUNTABILITY

Evidence of independence of the office of DPP is presented in the form of the relevant DPP Act and the fact that no Attorney General in Australia has ever overridden a decision of a DPP.

All DPPs produce an annual report which in each case is a public document.

One DPP suggested that an inspectorate should be established to enhance the existing accountability mechanisms.

2.10.6 EQUITY AND FAIRNESS

A range of opinions have been expressed on the issue of equity and fairness. In New South Wales the DPP considered that equity and fairness are achieved by the following means: the openness of the system; the appeals system; decisions of the DPP which are debated in parliament from time to time; and, the recording and publishing of statistics on all facets of criminal prosecution. The DPP in Queensland, however, noted that insufficient resources exist to guarantee equity and fairness. In the Northern Territory the DPP commented that he was unable to provide precise responses but did raise the openness of the courts and the appeal process as measures of equity and fairness.

Equity and fairness is said to be assessed against prosecution policy and guidelines and the application of the law.

2.10.7 EFFICIENCY AND EFFECTIVENESS

Statistical data was seen as an important indicator of the efficiency and effectiveness of the operations of the DPP. That data related to performance indicators which included the cost per court day and per case, and timeliness. Stakeholder satisfaction was seen as being a helpful measure of efficiency and effectiveness.

The DPP in the Northern Territory, however, commented that performance indicators that pointed to efficiency in terms of cost factors and similar were problematic in a jurisdiction which contained a large transient population including substantial numbers of tourists.

2.10.8 JUDICIAL ROLES

Judicial roles are largely confined to the usual functions of judges in legal systems which are adversarial in nature.

Stipendiary Magistrates sit in summary jurisdiction. In isolated areas two authorised Justices of the Peace may constitute a court of summary jurisdiction acting as lay magistrates. Such courts may deal with minor matters where there is a plea of guilty but would otherwise adjourn matters to a court in which a Stipendiary Magistrate was sitting.

2.10.9 CONCLUSIONS

Whilst the criminal prosecution system in the Australian jurisdictions appears to be largely accepted by society, it is a system in transition. In at least Western Australia and New South Wales, specific reform is ongoing. One thing that became clear from our communications with the various DPPs is that in all jurisdictions there is professional objection to police acting as prosecutors. The West Australian Attorney General has made it clear that he intends to move towards the removal of police from the prosecution function. In New South Wales, officers of the DPP have taken over the presentation of evidence in committal proceedings. In Queensland, the so called Fitzgerald inquiry in 1989 found that wherever practicable prosecution responsibilities should be removed from the Police Department. It can be said generally, therefore, that there is mounting pressure for police to be removed from the prosecution process.

A further interesting point was the comment of the DPP in Queensland, who believed that there was a need for an inspectorate to ensure equity, fairness and accountability. We believe this to be a concept that could be usefully developed and included in any future reforms in Northern Ireland and we discuss it further in Chapters 3 and 4.

2.11 Canada

2.11.1 NATURE/STRUCTURE OF JUSTICE SYSTEM WITHIN WHICH THE CRIMINAL PROSECUTION PROCESS OPERATES

The Dominion of Canada is comprised of a collection of provinces and territories each with its own legislature. In this sense it has some parallels with Australia. The arrangements for criminal prosecution, however, are quite complex.⁷⁷ While the province of Québec is a civil law jurisdiction, the remainder of the Canadian provinces and territories are common law jurisdictions. The primary piece of legislation which creates criminal offences is the *Criminal Code* which is a federal statute. Because the Canadian Constitution is silent on the matter of jurisdiction over prosecutions, both federal and provincial authorities bring criminal prosecutions. We do not intend to explore the intricacies of this arrangement but will concentrate on the features of individual structures.

The justice system being adversarial there is a hierarchy of courts which reflects offences with different degrees of seriousness. Criminal trials are conducted with a jury selected from eligible citizens where an offence carries a punishment of five years imprisonment or more.⁷⁸

Policing arrangements in Canada are also complex by comparison with those in the UK and the Republic of Ireland. The Royal Canadian Mounted Police has jurisdiction nationally but is also available on a contractual basis to provide local policing services. Whilst this option is taken up by some jurisdictions, very many local jurisdictions have their own police agency. In Québec, the Sûreté du Québec polices that province and provides a local service on contract. Some other large municipal agencies also provide policing services on contract to smaller municipalities. Police services tend to come under the responsibility of the relevant Ministry of the Solicitor General, either federal or provincial.

In all jurisdictions, the executive power over prosecution is vested in the relevant Attorney General. Attorneys General are elected members of parliament. Generally, the provincial Attorneys General bring prosecutions for offences against the provisions of the Criminal Code that arise within their own jurisdiction. The federal Attorney General will bring such prosecutions in the territories. There is a Federal Prosecution Service (FPS) which is managed by the federal Assistant Deputy Attorney General (Criminal Law). This person is responsible

⁷⁷ In the recent past, criminal prosecution arrangements in Canada have been seen as having the potential to be too closely linked to the political process. As a consequence of this concern, the Law Reform Commission of Canada examined the relationship between the Attorney General and the Crown Prosecutor, generally. The Commission's report was published in 1990 (Law Reform Commission of Canada, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*, Working Paper 62, Ottawa: Law Reform Commission, 1990) and recommended revision of the existing system in favour of the model then existing in the Commonwealth of Australia with salary and tenure provisions as existed in the Australian state of Victoria but with appointment and removal arrangements as existed in Ireland.

⁷⁸ There is an ongoing review of jury related issues but specifically about their composition and the growing multi-cultural nature of Canadian Society. See D Pomerant 'Multiculturalism, representation and the jury selection process in Canadian Criminal Cases', Ottawa: Ontario Department of Justice (Working Document), 1994.

to the federal Deputy Attorney General. The FPS is contained within the Federal Department of Justice. Each province has its own prosecution service⁷⁹ which is contained within the relevant Ministry of Justice or Attorney General. The management arrangements of the provincial prosecution services mirror the federal arrangement including the titles of the relevant office holders.

In each jurisdiction, the Attorney General appoints agents who are known as Crown Attorneys or Crown Counsel. There are also Standing Agents who are members of the private bar appointed to act on behalf of the Attorney General in conducting criminal prosecutions. Jurisdictions are divided into regions which are relatively self contained. Police officers in Canada do not prosecute.

2.11.2 ROLE OF PROSECUTION AND POLICE

The investigation and prosecution functions in Canada are quite distinct.⁸⁰ There has been a conscious attempt to ensure a division between the two functions by making the police and the prosecution service accountable to different ministries.

Such overlap as occurs is confined to a prosecutor being asked informally to give advice on an appropriate charge or to require further investigations to be undertaken by police in a matter that is already before the courts.

In most provinces and territories, the police investigate, decide whether to prosecute and decide on the charge to be proffered. A prosecutor cannot instruct the police in these matters. When advice as to an appropriate charge is sought from the prosecutor by police they are not bound to act on the advice given. In Québec, the evidence in all criminal matters is screened by a prosecutor before a charge is laid by police.

Once a charge is laid the evidence is reviewed by a prosecutor to determine the prospect of conviction and to consider the public interest before deciding whether the matter should continue.

79 Nova Scotia is an exception. In that province there is a Public Prosecution Service (PPS) which is an independent agency of government. This is a model similar to the English DPP.

80 There are now Integrated Proceeds of Crime (IPOC) units which bring together investigators and prosecutors. Measures have been taken to isolate prosecutors in these units from too close an alignment with investigators. This issue is discussed at paragraph 3.4.1.1.

2.11.3 PROSECUTORS' POWERS REGARDING ALTERNATIVES TO TRIAL

A prosecutor has the discretion to divert an accused from the criminal process. Diversion usually follows a process of charge screening and is subject to a number of conditions which include an admission of guilt, agreement of the party aggrieved and the absence of prior convictions. It is a measure most usually undertaken with young persons.

In the case of young persons, charge screening is undertaken initially to determine whether a matter might properly be withdrawn. Diversion is an alternative to trial rather than to withdrawal.

The procedures to be followed are set down in the relevant 'Crown Policy Manual', 'Alternative Measures' policy document, or similar.

There is no system of prosecutorial fines at any level of jurisdiction.

2.11.4 DIVERSION

See comment in previous section.

2.11.5 INDEPENDENCE AND ACCOUNTABILITY

As already noted, investigation and prosecution are discrete. As mentioned in the opening comments to this section, however, there have been concerns about the independence of the prosecutor from the political process. A prosecutor is said to have delegated independence exercised as a representative of an attorney general, a political appointee. It should be understood that by constitutional convention, in the exercise of prosecutorial authority the Federal Attorney General 'is exempt from the dictates of Cabinet and is expected to act without political interest, influence or interference'.⁸¹ It seems that the provincial system mirrors this arrangement.

There does not appear to be any independent arrangements to ensure the accountability of prosecutors beyond the courts themselves. Numerous policies determine how a prosecutor should deal with particular situations. Prosecutors are subject to the discipline of the Law Society of Upper Canada. Despite a prosecutor having wide discretion in terms of proceeding with a matter or otherwise, there is no right of appeal over such decisions.

Within the various jurisdictions, there does not appear to be a practice of producing an annual report which is available to the public.

81 In a response to our questionnaire on behalf of the head of the Federal Prosecution Service, it is noted that the principle of independence endorsed by at least four Attorneys General of Canada since 1978 is as stated by Sir Hartley Shawcross while Attorney General of England – HC Debs. Vol 483, Cs 683-4, 29 January 1951.

2.11.6 EQUITY AND FAIRNESS

In determining equity and fairness in the Canadian prosecution system the FPS acknowledges that ‘there are no formal mechanisms, such as statistical monitoring, for ensuring the equitable and fair operation of the prosecution process.’ Provincial attitudes suggest reliance on policy requirements and the oversight of the courts for these purposes.

2.11.7 EFFICIENCY AND EFFECTIVENESS

The efficiency and effectiveness of the prosecution services does not seem to be tested by any externally administered evaluation process.

There is, however, evidence of an awareness of the need for efficient practice which enables the effective achievement of organisational goals. For example, in the Province of Ontario there is an ‘Integrated Justice Project’ which is intended, when complete, to:

link electronically every part of the justice system – police, Crown attorneys, courts, corrections, parole and the private bar... This allows police officers and Crown attorneys to spend less time on duplicating paperwork... The project enables lawyers to file documents with the courts without leaving their offices... More than 80 law firms are participating in the project which has electronically filed more than 1000 documents with the courts.⁸²

Ontario also has what is claimed to be a state-of-the-art case management system in its civil jurisdiction and is examining a system for moving ‘ticketable’ offences into the municipal jurisdiction.

2.11.8 JUDICIAL ROLES

The judiciary is a separate body and is independent. It plays no part in the investigative or prosecutorial processes other than the issue of search warrants and some bail requirements. The role of the judiciary could be categorised as that usually associated with the adversarial system but with local variation – for example, a judge may confer with both defence and prosecutor prior to a trial to see whether a matter can be resolved.

82 Attorney General for Ontario, ‘Ontario Government Business Plans 1998-1999,’ (www.gov.on.ca/mbs/english/press/plans98/atg.html), p. 10.

2.11.9 CONCLUSIONS

The prosecution process in Canada has been the subject of much inquiry during the past decade. Mention has been made of the work of the Law Reform Commission of Canada.⁸³ This investigation was to some extent a consequence of continued concerns about the head of the prosecution service, the Attorney General, being involved in the political process. Whilst the Commission stopped short of recommending that the functions of the Attorney General be separated from those of the Minister for Justice it made reference to this possibility. Instead, it recommended the creation of a new prosecution service, independent of government and modelled on the DPP arrangement as existed in various other jurisdictions, including England and Wales, the Republic of Ireland and Australia.

The present FPS and those of the various provinces do not appear to reflect this need for separation although the FPS has been restructured during the past five years.

Whilst the present system has some admirable features like the clear division between investigation and prosecution, it does not seem to provide the division between the political process and prosecution which we would see as vital to any revised system in Northern Ireland. In this regard, the comments of the Australian federal DPP concerning 'independence', cited in Chapter 1, are relevant.

2.12 United States of America (Multi-Level)

2.12.1 NATURE/STRUCTURE OF JUSTICE SYSTEM WITHIN WHICH THE CRIMINAL PROSECUTION PROCESS OPERATES

In the United States the justice system is comprised of numerous agencies which exist within a complex array of jurisdictions and sub-jurisdictions. These jurisdictions which, for various purposes, exist at national, state, regional and municipal level have structures which take many forms.

In a general sense the justice system in the United States belongs to the adversarial family of procedures. There is a network of prosecuting authorities commonly known as State court prosecutors who are mainly located at county level. One source suggests there to be 2,343 such offices.⁸⁴ Offices are generally under the control of a Chief Prosecutor, the majority of whom are elected by popular vote in the relevant jurisdictions. Prosecuting staff at the county offices are variously known as district attorney, county attorney, prosecuting attorney, commonwealth attorney and state's attorney. These are the officers who conduct the majority

83 Note 77 above.

84 C J DeFrances and G W Steadman *Prosecutors in State Courts*, 1996, NCJ-170092, Washington DC: US Department of Justice, 1998.

of general criminal prosecutions within a system of upper and lower courts. Matters which carry punishment of six months imprisonment or more are usually heard before a jury. In some instances there is an option to elect a non-jury trial.

Police agencies exist at all of the levels of jurisdiction mentioned above. There are approximately 14,000 agencies. The majority of these agencies are municipally-based. There is a great deal of overlap in role function of agencies at different levels of jurisdiction.

2.12.2 ROLE OF PROSECUTION AND POLICE

Most prosecutors in the United States have almost unlimited discretion in deciding whether to bring a charge against an offender. It is also the case that some jurisdictions have 'Priority Prosecution Programmes' which focus on 'high rate, dangerous offenders'. As there is no requirement for offenders to be charged with all offences alleged, the process can appear quite flexible to those familiar with systems with less prosecutorial discretion.

Generally speaking, the police within 24 hours of arrest present information to a prosecutor, and the prosecutor will either file charges with the appropriate court or order the release of the person arrested.

Plea bargaining is used extensively. This means that a plea of guilty is achieved as a consequence of negotiation between the prosecutor and the accused (perhaps in consultation with his or her legal representative).

Prosecutors, within the totality of the many arrangements which exist in the United States, can be seen to fulfil many roles. For example in areas like Los Angeles where there is a substantial youth gang problem, prosecutors interact with other criminal justice and community based agencies to develop strategies to tackle the gang problem. Within this environment the prosecutor adopts various law enforcement functions which include 'case selection and data management, collection and presentation of evidence; development of testimony; victim/witness protection; recommendations of bail and detention; disposition and sentencing recommendations; and interagency collaboration and community mobilization to control youth gang crime'. To put this particular role in context, we note that Los Angeles County alone has over 40 full-time prosecutors for hardcore youth gang prosecution.⁸⁵

Other roles for prosecutors in the US include participation in so called Criminal Justice Planning Commissions which exist in many states.⁸⁶ These Commissions may include

85 K Ehrensaff 'National Youth Gang Suppression and Intervention Program,' School of Social Service Administration, University of Chicago, 1991 (www.ncjrs.org/txfiles/d0011.txt).

86 Bureau of Justice Assistance 'Improving State and Local Criminal Justice Systems: A Report on How Public Defenders, Prosecutors, and Other Criminal Justice System Practitioners are Collaborating Across the Country,' Washington DC: Office of Justice Programs, 1998 (www.ncjrs.org/txfiles/173391.txt).

representatives from education, health and human services authorities in addition to the full complement of criminal justice agencies. Programmes include the development of strategies to reduce trial delays, community-based alternatives to incarceration, law reform, and the development of CD-ROM type facilities containing information about the criminal justice agencies. This information is for the use of the agencies themselves.

One such Committee is accredited with having played 'a critical role in shaping the county's movement toward a redesigned criminal justice system'. Another produced a computer programme called JUSSIM (Justice System Improvement Model). It also published 'an evaluation of the progressive criminal justice plan for the fair, efficient, and effective resolution of criminal cases.'

In other jurisdictions, the Task Force concept has been adopted. These groups include prosecutors and they consider issues which include law reform such as the re-scheduling of minor offences to make them 'bail forfeitable' and the empowering of prosecutors to treat certain misdemeanours as civil matters.

Police officers essentially are investigators and do not prosecute.

2.12.3 PROSECUTORS' POWERS REGARDING ALTERNATIVES TO TRIAL

In earlier sections we have pointed to innovation in prosecution related issues. Because there are so many jurisdictions in the US it is impossible to do more than point to trends.

Prosecutors can use their wide discretion not to prosecute where offenders volunteer to participate in existing diversion programmes or to pay compensation to victims.

2.12.4 DIVERSION

Prosecutorial fines do not appear to be a feature of the US criminal prosecution system. It is the case, however, that the complexity of the system is such that there may exist something of this nature which we have not encountered. Certainly our queries to various US sources did not produce any such information.

At various parts of our Report we have been able to point to much innovation within various US jurisdictions, for example, although not a function of the prosecutor there is an extensive pre-trial release programme. Release in such cases is effected by order of a court.⁸⁷

⁸⁷ B A Reaves and J Perez *Pretrial Release of Felony Defendants*, 1992 NCJ 148818, Washington DC: US Department of Justice, 1994. The system was based on pre-trial release programmes which had existed for some time in Europe.

2.12.5 INDEPENDENCE AND ACCOUNTABILITY

The fact that most chief prosecutors are publicly-elected is regarded as a strong measure of accountability, as inappropriate or ineffective conduct will most likely result in a failure to be re-elected. Conversely, the almost unfettered discretion of prosecutors over the decision to prosecute suggests the need for greater accountability measures than presently exist.

In some state jurisdictions there are guidelines and policies designed to hold prosecutors accountable. In other jurisdictions there are statutory provisions to deter inappropriate behaviour by the prosecutor.

2.12.6 EQUITY AND FAIRNESS

To the extent that equity and fairness are achieved, they appear to be a consequence of a number of influences. These are the measures intended to produce accountability as described in the previous section, the pressure created by media coverage and a complex system of appellate courts that conclude for both state and federal systems with the US Supreme Court.

2.12.7 EFFICIENCY AND EFFECTIVENESS

It is difficult to discuss the efficiency and effectiveness of 'the' criminal prosecution process in a country with such a multitude of systems and arrangements. What can be said, however, is that in many of the jurisdictions and sub-jurisdictions efficiency and effectiveness are sought to be achieved by means which include: the tendency to elect most chief officials which is seen as making them publicly accountable, the fact that in many cases locally generated money is being spent, and the dynamics of a system which, overall, generates much reform and innovation.

2.12.8 JUDICIAL ROLES

Most judges in the United States are appointed by their relevant legislature although some judges are still elected by the public. They play no part in the investigative or prosecutorial processes other than the issue of search warrants, bail requirements and approve the consequences of plea bargaining. The role of the judiciary could be categorised as that usually associated with the adversarial system.

Lower courts are presided over by judges who, in some jurisdictions, are called magistrates.

2.12.9 CONCLUSIONS

This most complex of systems has evolved to meet the requirements of a nation which values devolution of power and authority above all else. It is a system which due to the multitude of small agencies is difficult to defend in terms of efficiency yet it is effective to the extent that it is largely accepted by the American public and displays a great deal of ingenuity of practice in some jurisdictions.

In this last respect, for example, in Delaware and Rhode Island, State-wide computer systems are being developed to link all criminal justice agencies into one network. Some of the benefits of such arrangements are said to be a single data entry arrangement accessible to all, an automated criminal court calendar and single statistical summaries.

Whilst it is not a system that could readily be transplanted to another jurisdiction with its own customs and cultural values, much innovative practice has evolved to make the system more efficient and more effective. For example, in the state of Delaware there is a state-wide video-conferencing system which links the offices of the prosecutor, the public defender, police departments and the courts.⁸⁸ There is substantial political influence within the American criminal justice system with many justice-related officials being elected. This is a practice which we did not find elsewhere.

Probably the key to understanding the diversity of the system is the extent of prosecutorial discretion and how that power over the decision to prosecute or otherwise is utilised across the multiplicity of agencies. Discretion, for example, can be used as a screening process, as a catalyst for diversion or as a means to focus prosecutorial resources at particular offences or persons. Such freedom will always raise questions of accountability. Given the apparent openness of the criminal justice process generally, it may be that adequate accountability is maintained. One aspect that might concern, however, is the fact that most prosecutors are elected which suggests that majority opinion is likely to have a powerful influence on decisions to prosecute, particularly in highly emotive situations.

88 See note 86 above.

3 Accountability and Independence

3.1 Introduction

It was seen in Chapter 1 that discretion is an elemental feature of prosecution in an opportunity-based model of criminal justice such as exists in Northern Ireland, and this chapter now considers both the necessity for accountability and the options utilised to achieve it. We emphasise that a particular need for accountability arises in the context of discretionary powers. Where a person in discharge of a public function has an option to choose between two or more outcomes, he or she enjoys a discretion and as a matter of principle it should be possible to require the individual to explain why any particular option was preferred to the alternative(s). The question of whether accountability should entail also a power of direction by another agency is considered in detail.

In addition, Chapter 1 emphasised that the real independence of the prosecutor, and of the prosecution function generally, is essential to a fair and impartial criminal justice process. Significantly, the perception of prosecutorial independence can be of equal importance to its reality. Reconciling the twin principles of independence and accountability has been a recurring theme in discussions of this topic and is a central concern of this chapter.

3.2 What is ‘Accountability’?

‘Accountability’ in this context must be understood in a number of senses, in respect of which there is some overlap. The meaning of the concept of accountability can change with the context in which it is employed, and it has been interpreted differently in different jurisdictions. In this Report we consider accountability of three varieties, they being explanatory and co-operative accountability, subordinate and obedient accountability, and financial accountability. We also consider some internal variations of each type.

3.2.1 EXPLANATORY AND CO-OPERATIVE ACCOUNTABILITY

Traditionally, a variety of accountability has been thought to be an obligation to *explain* the bases upon which decisions of a class are made or the bases upon which decisions in an individual case were reached. Such is described as ‘explanatory and co-operative’ accountability, more recently styled as ‘answerability’.¹ In relation to its role in respect of both classes of cases and individual cases, explanatory accountability takes the form of a process whereby the decision-maker may be called to explain an impugned decision to a responsible authority and may canvass the views of other authorities or agencies about certain matters of policy. Explanatory and co-operative accountability, where it is found, is regarded as necessary to monitor the efficacy of discretionary decisions and to properly deal with the consequences of any unsustainable exercise of that discretion.

As mentioned and as will be addressed below, accountability of this variety can be regarded also as ‘answerability’, implying an explanatory and co-operative relationship but not one in which there is any degree of subordination by any party to the relationship. Explanatory and co-operative accountability typically is confined to matters of policy as distinct from individual cases, and can be either proactive or reactive. Proactive explanatory accountability would exist where a prosecution agency canvasses the views of another agency, the public or other interested entities regarding the formulation of a policy. Reactive explanatory accountability would exist where the prosecutor provides to another person or agency an explanation of decisions taken or policies applied. An example of explanatory and co-operative accountability would be the relationship between a prosecution agency and a parliamentary committee where that committee has the power to consider policies of the prosecution agency and perhaps to make recommendations in respect of policy.

3.2.2 SUBORDINATE AND OBEDIENT ACCOUNTABILITY

Second, obligations of accountability might be understood as giving rise to a relationship of *subordination and obedience* on the part of the prosecution agency.² Subordinate and obedient accountability in particular presents the most significant challenge to the independence of the prosecutor because the prosecutor is liable to direction by another agent or agency. The dictionary definitions of the terms indicate the character of this form of accountability. Subordination implies a relationship in which one party is of lower rank or is of lesser importance – inferior, and under the orders of the other(s); obedience implies submission to authority and dutiful compliance. It can be seen that at an extreme, subordinate and obedient accountability might as easily be described as ‘servient’.

1 Glidewell Report, 1998, p. 205, paragraph 52.

2 Phillips Report, 1981.

Subordinate and obedient accountability also connotes a standing relationship structured in law with an established hierarchy such as that between law officers or between ministers of government and their departments.

Subordinate and obedient accountability therefore challenges directly the concept of independence of the prosecutor, and the tension between this variety of accountability and the independence of prosecutors is addressed below. Subordinate and obedient accountability can apply both in the realm of policy and in that of individual cases, and can be either proactive or reactive. An example of classic subordinate and obedient accountability would be the relationship between a prosecution agency and a local prosecutions committee as proposed by the 1981 Royal Commission on Criminal Procedure, where the prosecutions committee would control the budget of the agency, appoint senior prosecution officials and generally review performance of the agency, set targets and so forth. A more tempered example of subordinate and obedient accountability would be the relationship between a prosecution agency and an attorney general where, as is the case in England and Wales, the Attorney General under statute ‘superintends’ the DPP and where the Attorney ultimately has the power to direct the DPP.³

A variation of subordinate and obedient accountability restricts the relationship to one of review only but, as a necessary catalyst for the exercise of the power of review, imports also features of the explanatory and co-operative variety. Such ‘review accountability’ exists where the third party has a power to require an explanation of the prosecutor, coupled with a transparent power to overturn the decision or policy in question by the application of pre-defined and transparent criteria. Review accountability typically is reactive as distinct from proactive, and can apply either in respect of individual cases or matters of policy. Reviews of policies, however, generally occur only by consideration of an individual case. A classic example of this variety of accountability would be the well-established process of judicial review of prosecutors’ discretions by the courts in the UK and in the Republic of Ireland, although as will be seen in this chapter, it would be possible to extend the principle of review accountability to non-judicial fora such as an inspectorate.

In short, the central distinction between accountability of the subordinate and obedient variety, as compared to that which is explanatory and co-operative, is whether the person or body to whom the prosecutor is accountable has the power to over-ride the prosecutor, or, for example, has the power merely to note the explanations and responses of the prosecutor and perhaps to broadcast them to a wider audience.

³ See note 1 above, pp. 194-195, paragraph 8.

3.2.3 FINANCIAL ACCOUNTABILITY

Third, every public authority is properly subject to requirements of financial accountability. To the extent that the relevant structures for financial accountability do not trespass upon the discharge of the professional and administrative support work of the prosecution office, then the issue of financial accountability is beyond the scope of this Report and will not be dealt with further.

3.2.4 CONCLUSION

Effective accountability of any variety contributes to the empowerment of people in the society in which it operates. This is because accountability is a recognition that although prosecutors discharge important discretionary powers, they derive those powers from the state, which in turn derives the powers from its people. Effective accountability procedures are a recognition that prosecutors are merely custodians of those powers for the people. Equally, however, ineffective accountability or the complete absence of mechanisms for accountability is dangerous within a society, because in such cases there is a harmful presumption that prosecutors are not the custodians of these significant powers, but that they possess them as of right. The dual consequences of such a situation will be disempowerment of the people in that society, and the development of a culture of institutionalised arrogance on the part of the prosecution service. We therefore believe that effective mechanisms for accountability are essential in a liberal democratic society.

Few prosecution models in opportunity-based systems of criminal justice conform to either a wholly explanatory or a wholly subordinate and obedient model of prosecution accountability. Most contain elements of both, although tending towards one more than the other. An outline of the structure of prosecution systems in the jurisdictions selected for this Report is contained in Chapter 2 and will not be repeated here. This chapter focuses on the nature and relative strengths and weaknesses of accountability systems, and specifically the relationship between accountability and independence. To that end, we will shortly consider what is ‘independence’ for these purposes.

3.3 The Subject-Matter of Accountability

We begin with a basic question, the answer to which informs much of the discussion in the latter portion of this chapter – ‘what for present purposes is the subject-matter of prosecutorial accountability?’

There are at least three potential answers. Concerns about the accountability of prosecutors might focus on the policies which prosecutors formulate and apply ('policy accountability'), or on the manner in which any given case was dealt with ('individual case accountability'), or on both ('comprehensive accountability'). The distinction between what we style 'policy accountability' and 'individual case accountability' loosely approximates to the well-established distinction in administrative law between policy and operations. This distinction between prosecution policy and the prosecution treatment of individual cases is important because each will be seen to raise unique concerns when we come to identify suitable accountability mechanisms and channels. As one example, a subordinate and obedient form of accountability if applied to individual cases and if routinely invoked, would destroy prosecutorial independence, while subordinate and obedient accountability might be entirely compatible with prosecutorial independence if restricted to the realm of prosecution policy. These issues will be seen to be particularly topical in the context of prosecutorial accountability within the political realm and in relationships between law officers.

3.4 What is 'Independence'?

The terms of reference for our study, and indeed the Agreement itself, mention the concept of independence at a number of points. This is for good reason. An independent prosecutor is less likely to be a partial prosecutor. An independent prosecutor has greater detachment from a file than would a prosecutor connected, for example, to the investigator, to a political 'master', or to the victim. Independence of the prosecution function therefore is an important aspect of a fair and just system of prosecution; as Ayoola has written, '[t]he manifest and transparent objectivity of the Public Prosecutor ... goes a long way to assure the public of the fairness of his decision.'⁴ Therefore 'independence', similar to accountability, has different facets and different meanings which may change with the context in which the word is used.

Two central issues are neatly summarised by Corns:

The notion of prosecutorial independence is complex but can be broken down into two fundamental dimensions:

- (i) the need for prosecution decisions to be made free from any political influence or considerations...
- (ii) the need to clearly demarcate criminal investigations from prosecutions decisions...

4 E O Ayoola 'Decision to Prosecute' [1991] *Commonwealth Law Bulletin* 1032, 1035.

Conversely, because prosecution authorities must be independent and possess significant discretionary powers, adequate *accountability* measures and structures must exist to control and monitor that independence and discretion.⁵

‘Independence’ can have different meanings. With respect to Corns, we would add further strands to the prosecutor’s independence, thus compiling the following list. Prosecutors should be:

- 3.4.1 independent of the investigative agency,
- 3.4.2 independent of the executive, ie the body responsible for the government of the jurisdiction,
- 3.4.3 independent of the victim,
- 3.4.4 independent within their prosecuting organisation,
- 3.4.5 financially independent, and
- 3.4.6 independent of the judiciary.

In each case, it is important to recall that independence from the relevant entity is compatible both with a close working relationship, and more importantly, with accountability both of the subordinate and obedient variety, and the explanatory and co-operative variety. These realities will shortly be dealt with. It is worth noting as a preliminary to this discussion, however, that ‘In the final analysis, it is not possible to confer absolute independence by legislation. The public must depend to a large extent on the integrity of the individual and that is something that can only be judged in the light of experience.’⁶

3.4.1 INDEPENDENCE FROM THE INVESTIGATIVE FUNCTION

3.4.1.1 Introduction

From the outset we were mindful of the fact that criminal prosecution invariably follows criminal investigation and that there has to be an interface between those two processes. It became apparent during our research that in different jurisdictions the interface between investigation and prosecution occurs at different points in these two processes. This can be demonstrated by thinking of the total process as a continuum with investigation at one end and prosecution at the other. The point of interface in different jurisdictions will vary along this continuum. The central issue is where should lie the interface between investigation and prosecution – between police and prosecutor – on the continuum of criminal procedure

5 Corns, 1993, pp. 8-9.

6 G Flatman QC ‘Independence of the Prosecutor’, paper presented to the Australian Institute of Criminology Conference, 18 and 19 April, 1996, p. 4.

which stretches from investigation to prosecution? In other words, 'at what point does investigation end and prosecution begin?' This is an important preliminary issue as it informs the debate on whether investigators should have a role as prosecutors, or prosecutors a role in supervising or even conducting investigations.

To our minds, the investigative process occupies that portion of the criminal justice continuum where evidence relating to an alleged offence is gathered, up until evidence is detected which is sufficient to warrant the laying of a charge against a suspect. We debate below whether the decision to charge is a task which should properly be reserved to prosecutors or whether it is more appropriately the function of an investigator. The prosecution occupies that portion of the criminal justice continuum between the conclusion of the investigation and the commencement of the trial, while trials and appeals are regulated by the presiding judges, and post-conviction issues by the prisons and probation authorities. The point at which the division is made between the investigative and prosecution elements of a common process, however, varies between different jurisdictions.

In New Zealand, for example, the police conduct the investigation, decide on and lay a charge and then prosecute in the lower court. The police are totally independent of the legal professional (barrister or solicitor) who only becomes substantially involved after committal. At the other extreme, in France, the legal professional (public prosecutor or other official) controls the police investigation, may become involved in the investigative process and determines any charge arising from the investigation. In most of the other jurisdictions which we examined the interface lies somewhere between these two extremes.

In Northern Ireland at present in crimes of seriousness, the investigation-prosecution interface is generally fixed at a point post-charge, although subject to variation dependent on the nature of the offence suspected. Hence, for example, earlier prosecution involvement may be required in cases of evidential complexity or where statutory consent is required prior to a prosecution. The position is similar in the Republic of Ireland. Again common to both jurisdictions, there is in fact no interface between investigation and prosecution in many minor offences, in that the police both investigate and prosecute such cases.

While prosecution will often be the natural culmination of a criminal investigation, many dangers have been identified in adversarial systems of criminal justice from too close a link between the investigative and prosecution functions. These concerns include a fear that an unduly close relationship between investigator and prosecutor will undermine the objectivity which the prosecutor must bring to the assessment of evidential sufficiency and the public interest in respect of the investigation file.

Such close links are implicit, and indeed cultivated, in integrated units which are an increasingly common feature of specialist criminal investigation and prosecution. Two examples among many are the Integrated Proceeds of Crime (IPOC) Units in the Canadian Federal jurisdiction, and the Criminal Assets Bureau in the Republic of Ireland. In each case,

multi-disciplinary teams address issues relating to the seizure of suspected criminal assets and laundered money. In the case of IPOC Units, detailed risk management strategies are in place to ensure that the integration of prosecutors and investigators does not compromise their respective independence. As regards safeguarding prosecutorial independence, the following provisions apply:

- there has been careful definition of the prosecutors' roles in the units to ensure that their skills are preserved and to ensure that they do not simply become investigator-lawyers,
- the decision to prosecute in cases investigated by IPOC units does not rest with the prosecutors in the units, but is made by unrelated prosecutors in a regional office of the Department of Justice,
- the actual conduct of prosecutions from each IPOC unit is not undertaken by prosecutors from the unit, but by prosecutors from an appropriate Federal Prosecution Service regional office, and
- prosecutors in IPOC units continue to report to Federal Prosecution Service supervisors in their regional office.

It should be noted, however, that any attempt to clinically isolate the functions of investigation and prosecution must also recognise the contribution which each makes to common goals in the criminal justice process. The previous DPP in the Republic of Ireland has written that 'While the investigative and prosecutorial functions are separate and independent, they are also interdependent...'⁷ This section considers the respective roles of investigators and prosecutors in the context of the principle of prosecutorial independence.

Two issues which are central to the concept of prosecutorial independence from the investigation are the extent to which police should act as prosecutors, and the extent to which prosecutors should have any role – supervisory, participatory or otherwise – in the investigation of crime. These are now considered.

3.4.1.2 Investigators as Prosecutors

A blurring of what we regard as the important distinction between investigation and prosecution can arise where nominally full-time investigators act also as prosecutors. Typically this will be by way of police officers prosecuting offences which they or their colleagues have investigated, and where the practice exists it is invariably restricted to summary prosecutions.⁸ The established arrangements in Northern Ireland and in the Republic of Ireland provide examples of such arrangements.

7 Office of the Director of Public Prosecutions, 1998, p. 6.

8 The exception of New Zealand was noted in Chapter 1 where police will generally prosecute summarily, and on indictment up to the point of committal for trial.

While much has been written abroad regarding the demerits of police prosecutors,⁹ these concerns were noted in Northern Ireland as long ago as 1969.¹⁰ In more recent times, most western countries have clear concerns with police acting as prosecutors. In Canada, the Law Reform Commission has stated that ‘having prosecutions prosecuted by the police is undesirable’, and recommended that ‘all public prosecutions should be conducted by a lawyer responsible to, and under the supervision of, the Attorney General.’¹¹ The practice in the developed world of police acting as prosecutors is declining.¹²

Commonly-raised arguments why the police should not prosecute include:

- public perception,
- the police are not officers of the courts and are not subject to the same professional ethical standards as are solicitors and barristers,
- the police organisation was not established to perform a prosecution role and has merely evolved that capacity,
- as a matter of ideological principle, the investigative and prosecution functions should be separate to ensure objectivity in the decision to invoke the criminal process, an objectivity which the police prosecutor might not be able to bring to a case which he or she has investigated or which has been investigated by a colleague within the police organisation. In other words, to ensure that prosecution decisions are based not on the interests of the investigators but rather on broader public interest considerations,¹³ and
- with police prosecution, there is a greater danger of inconsistent decisions and policies.

These arguments are not without their opponents and those contrasting views will be considered below.

The system of public prosecutions in Northern Ireland received in the period 1969 to 1971 the attention of two Government-appointed groups. The Hunt Report in 1969¹⁴ noted the dangers to the public perception of the impartial administration of criminal justice if the investigative and prosecutorial functions remained merged, even in the case of summary offences. It was noted that at that time:

9 See for example Law Reform Commission of Canada, 1990, and the Public Prosecution System Study Group, 1999.

10 Advisory Committee on Police in Northern Ireland, *Report* (‘Hunt’) Cmd 535, Belfast: HMSO, 1969.

11 See Law Reform Commission of Canada p. 62, 1990.

12 See chapter 2. Two notable exceptions are New Zealand and the Republic of Ireland where in each case the role of police as prosecutors has recently been re-affirmed. See Law Commission of New Zealand, note 115 above, and in the Republic of Ireland the Public Prosecution System Study Group, 1999.

13 Corns, 1993, p. 8, paragraph 3.1(ii).

14 See note 10 above, Chapter One.

It is the practice in Northern Ireland that prosecutions in the lower courts are undertaken by police officers and that the police decide, sometimes after taking legal advice, when prosecutions should be undertaken. While it is the unmistakable duty of the police to make offenders amenable to the law, the impartiality of the police may be questioned if they are responsible for deciding who shall be prosecuted and thereafter for acting in court as prosecutor. This practice can result also in a mistaken impression of the relationship between the courts and the police....¹⁵

JUSTICE in 1970 noted similar dangers in the contemporary prosecution process in England and Wales, where the researchers highlighted the danger to public perception and the quality of justice where the same police officer often decided on whether to charge a suspect, selected the charge, acted as prosecutor, and also took the stand as his or her own chief witness.¹⁶

Resuming the theme less than a decade later in its 1979 evidence to the Royal Commission on Criminal Procedure (England and Wales), JUSTICE submitted that:

The question of whether to prosecute partakes of the nature of a judicial decision, since, although the accused may eventually be acquitted, the bringing of a charge on insufficient evidence can have disastrous consequences on a man's (sic) domestic life and career, particularly if he is held in custody pending trial. It is difficult for investigators to achieve the necessary detachment and unfair to expect them to do so.¹⁷

In Northern Ireland in 1971, the MacDermott Working Party on Public Prosecutions said of the role of the RUC in prosecuting cases:

When it is remembered that in County Courts and Courts of Assize the Crown case is presented by the Crown Solicitor or Crown Counsel it is difficult to appreciate how this burden of conducting prosecutions in Courts of Summary Jurisdiction was allowed to develop to such an extent especially at a time when the criminal law was becoming exceedingly complicated as a result not only of Judicial decision but of a torrent of legislation and many extensions of the jurisdiction of these Courts. The answer probably lies in the fact that a 'willing horse' – the police – was readily available and in the fact that the system worked – albeit that as a result ordinary police work may have suffered.¹⁸

These views reflected the earlier *Final Report* of the 1962 Royal Commission on the Police, which had stated in part:

15 *Ibid*, Paragraph 142.

16 JUSTICE (British Section of the International Commission of Jurists) *The Prosecution Process in England and Wales*, London: JUSTICE Education and Research Trust, 1970, pp. 3 *et seq*.

17 JUSTICE (British Section of the International Commission of Jurists), *Pre-Trial Criminal Procedure: Police Powers and the Prosecution Process*, London: JUSTICE Education and Research Trust, 1979, p. 28, paragraph 65(d).

18 MacDermott, 1971, p. 3.

In general, we think it is undesirable that police officers should 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 court and the police cannot but be prejudicial.

In Northern Ireland, the MacDermott Working Party ‘at an early stage’ reached a number of conclusions which, with respect, we broadly adopt. These included:

- (a) that in the main ‘police work’ and ‘court work’ should be kept separate,
- (b) that police officers should not be required to perform the dual role of policeman and public prosecutor, and
- (c) that in Courts of Summary Jurisdiction the Crown case should, as in other Courts, be presented by members of the legal profession.¹⁹

It was in conclusion considered to be self-evident that ‘those participating in a police service should be concerned with police work and not in addition be required to prosecute those against whom they consider a *prima facie* case exists – in other words to enter into the legal arena.’²⁰

In similar vein, the Australian Federal DPP has argued that there are:

...compelling reasons of both efficiency and public policy why the police should not be involved in the conduct of prosecutions save possibly for very minor road traffic offences. If the police must retain the right to institute a prosecution, once proceedings have commenced the further conduct of the matter should be the responsibility of an independent prosecuting service. Decisions relating to the conduct of a prosecution must be made dispassionately, and it may be asking too much of human nature for a police prosecutor, who is part of the same organisation that investigated the offence, always to achieve the necessary degree of detachment no matter how honest and conscientious he or she may be.²¹

Significantly, it should also be noted that police prosecutors who are not legally-qualified are ill-equipped to deal with the increasingly complex issues of fact and law which can frequently arise even in the Magistrates Court, the tribunal in which the overwhelming majority of criminal trials are held.

These and related issues have recently been considered in the Republic of Ireland by the Public Prosecution System Study Group which in its Report expressed different opinions

19 *Ibid.*

20 *Ibid.*, p. 4.

21 M Rozenes ‘Prosecutorial Discretion in Australia Today’, paper presented at the Australian Institute of Criminology Conference, 18 and 19 April, 1996.

from those which we hold. On the issue of whether prosecuting should be solely the responsibility of lawyers rather than police, for example, the Group thought that the matter was ‘a pragmatic issue of effectiveness and cost.’²² The Group addressed concerns that police prosecutors might bring to a prosecution less objectivity than would professional prosecutors, but was satisfied ‘that Garda discipline and procedures, trial in open court, the existence of basic constitutional rights for the accused and a vigorous legal system should, if rigorously operated, provide sufficient safeguards in the criminal prosecution system.’²³ Equally, the Group noted that prosecutions by lawyers can on occasion suffer from the lawyer’s lack of familiarity with the detail of the case.²⁴ The Group suggests that further efficiencies are derived from the facts that in the majority of cases prosecuted by the police, ‘it is not necessary for the investigating Garda to prepare a full file or brief a lawyer’²⁵ and that the use of police prosecutors benefits the operation and management of the police force itself in that officers when prosecuting do so before judges and often senior officers.²⁶ Overall, the Group noted that the principal argument in favour of the present arrangements for police prosecution in the Republic of Ireland ‘is that it works.’²⁷

We take issue with virtually all of the Group’s findings of principle to the extent that each might be transferable to Northern Ireland. To our minds, criminal prosecution becomes a pragmatic issue of effectiveness and cost only when there already are guarantees of more fundamental issues such as fairness and justice. Equally, we recognise that in any given jurisdiction the rhetoric of police objectivity and the reliance on abstract rights as safeguards for defendants might differ from the reality experienced in day-to-day prosecuting. The danger of a lawyer-prosecutor having insufficient familiarity with the detail of a case is ever-present in any system of prosecution but is no more likely than where the prosecution is conducted by a police officer other than the investigator. The Group’s suggestion that police officers when prosecuting often do not need to prepare a full file is curious, and seems to risk making a virtue of incomplete preparation. We would be particularly concerned at how a prosecutor, be he or she a lawyer or police officer, can properly apply the established prosecution criteria without fully marshalling the evidence at a preliminary stage, and how a prosecutor can properly present a case without structuring the evidence in a systematic fashion. Further the use of the prosecution function as a tool of internal police management seems to distort the primary purpose of prosecution, while any significant reliance on an argument that certain arrangements ‘work’ seems unambitious.

22 Public Prosecution System Study Group, 1999, p. 42, paragraph 5.5.1.

23 *Ibid.*, p. 35, paragraph 4.4.8.

24 *Ibid.*, p. 34, paragraph 4.4.5.

25 *Ibid.*, p. 38, paragraph 4.5.3.

26 *Ibid.*, p. 38, paragraph 4.5.4.

27 *Ibid.*, p. 37, paragraph 4.5.1.

In the context of Northern Ireland, there is a live issue of public confidence in the police and perhaps different considerations therefore apply in Northern Ireland as compared to the Republic of Ireland. As is stressed throughout this Report, not only must justice be done, but it must be seen to be done. This latter point is especially tested where either the same person, or the same organisation, will be investigator, accuser and prosecutor in the same case. The CJRG might consider whether such arrangements are best avoided and in consequence whether prosecution functions should be removed from the police.

3.4.1.3 Prosecution Supervision of Investigations

On the assumption that a point of demarcation is established between investigation and prosecution, the related issue arises of whether prosecutors should have any role in supervising investigations and if so, to what extent. At all times in this immediate discussion, we are focussing on the relationship between such a role and the independence of the prosecutor.

It has been seen in Chapter 2 that prosecutors in inquisitorial systems of criminal justice frequently perform quasi-investigative roles, but that this tends to be exceptional in common law jurisdictions. The significant common law exception to this generality is that of the USA. Corns describes relevant facets of the US arrangements:

At the State level, the District Attorney is responsible for criminal prosecutions. The office of DA is an elected position, the duration varying between States. State prosecutions are conducted by lawyers attached to the office of the DA. The police do not prosecute. The DA holds ultimate discretion in prosecution decisions. Through the use of the grand jury procedure, the DA or federal prosecutor can be heavily involved in criminal investigation well before charges are laid and even before a suspect is identified...

In summary, the prosecution, and indeed whole criminal justice system, in the United States is more 'political' than any other jurisdiction discussed in this Report. It is simply accepted as part of American socio-legal culture that prosecutorial (and judicial) decisions can, and should be, influenced by political considerations...²⁸

In Scotland, the procurator-fiscal was seen to play a significant role in the supervision and oversight of police investigations.

The Royal Commission on Criminal Justice in 1993 argued against any dilution of the separation of investigation and prosecution. The Report says in part:

The relationship of the CPS with the police ... is particularly relevant. We see as central to it the unambiguous separation of the roles of investigator and prosecutor. It was the need for a separate prosecution authority which led to the establishment of the CPS in

28 Corns, 1993, p. 26, paragraph 4.8.

the first place. In our view, just as the police should concentrate on discovering the facts relevant to an alleged or reported criminal offence, including those which may tend to exonerate the suspect, so should the CPS concentrate on assessing both the strengths and weaknesses of the case which, if the decision is taken to proceed, will bring the defendant before the court.²⁹

The two principal respects in which this issue arises are the question of pre-charge consultation between the investigator and the prosecutor, and the question of direct placement of prosecutors in police stations.

In common law jurisdictions, prosecutors tend to be ‘involved’ in the prosecution of serious offences – the equivalent of prosecutions on indictment in Northern Ireland – at least from the stage of committal, although the practice in summary prosecutions varies widely and often summary prosecutions are entirely police-based. The questions in respect of prosecutions on indictment are at what earlier point of the process might the prosecutor be involved, and of what nature might that involvement be? Québec (both state and federal systems) operates pre-charge screening to the extent that a Crown Prosecutor will examine the police file and if appropriate will ‘verify’ every information from the police before it is sworn by a justice,³⁰ while in New Brunswick and in British Columbia pre-charge screening takes place at the federal level only. In addition to pre-charge screening, the practice in Québec also requires police agencies to consult the prosecution at every stage of the procedure, including requests for search warrants and electronic surveillance.³¹ Pre-charge vetting of the evidence is a common characteristic of civil law criminal justice systems, and is well-developed in France, Belgium and Germany. While many jurisdictions surveyed replied that police sometimes referred to the prosecution agency for advice prior to charge, in no common law jurisdictions of which we are aware other than New Brunswick and British Columbia is that a *requirement*.

It can be argued that the decision to lay a charge is a quasi-judicial act and as such should not normally be discharged by the police or other investigator – that it is a function best performed by a professional prosecutor. If this were accepted, the prosecutor would take responsibility for the file at least from a point pre-charge in prosecutions on indictment, and prior to the charge or the issue of the summons in summary prosecutions. This commonly is facilitated although not mandated in different jurisdictions. Consider, for example, the power

29 Royal Commission on Criminal Justice, 1993, p. 69, paragraph 2.

30 Information from the Department of Justice, Canada. See also note 122 above, the Canadian Law Reform Commission, Working Paper No 62, recommendations 19, 20 and 21. We note also that the threshold of proof required by a Crown Prosecutor in a pre-charge screen in Québec – that the case can be proved beyond any reasonable doubt – is higher than the equivalent threshold which is applied in most common law jurisdictions. The latter tend to require a ‘reasonable prospect of a conviction’ or a close variation of that formula. See R Bouchard ‘The Prosecution System in Canadian Criminal Law: The Need for a Division of Responsibility’, paper presented to the conference *Reform of the Criminal Law*, London 26-29 July 1987, p. 4.

31 Correspondence with the International Criminal Defence Attorneys Association.

vested in some prosecutors to require the police to make further enquiries.³²

The second issue, that of the placement of DPP professional officers in police stations, is an option which has been adopted in England and Wales. CPS lawyers have since 1996 been placed in police Administrative Support Units on a ‘permanent’ basis.³³ Such arrangements could be said to trespass on the independence of the public prosecutor. The principle that the investigative and prosecution functions should not only be separate but that they should be manifestly so has been argued above, and was endorsed by the 1981 Royal Commission on Criminal Procedure and, prior to that, in the Hunt Report in 1969. Referring to the recent changes in England and Wales, Narey³⁴ adopts what some might regard as a pragmatic attitude and states that he does ‘not consider that working with the police in this way would necessarily impinge on the proper independence of the prosecutor or depart from the ... [Royal Commission on Criminal Procedure] principle of a clear distinction between investigation and prosecution. To paraphrase one defence lawyer I interviewed, “independence is a state of mind”.’³⁵

The approach of Narey and that of Hunt are subtly, but significantly, different. Both recognise the necessity of independence and impartiality in the matter of criminal prosecutions. The important distinction, however, is that Narey and others of a similar view would regard that proposition as being in itself sufficient for the purposes of the relevant criminal justice system. In contrast, however, we believe that this principle would not go far enough in Northern Ireland. The fact of impartiality is of course an essential element in the administration of justice, but it is not in itself sufficient. Criminal justice commentators are aware of the importance not alone of independent, fair and impartial law enforcement, but also of the manifest transparency and visibility of that impartiality. We fear that any arrangement which would blur the distinction between the investigative role of the police and the prosecutorial role of the DPP would be a retrograde step and, in the current climate, would inflict harm on public confidence in and perception of the DPP. That Department has striven long and hard since its inception to demonstrate its independence and separation from the RUC, and we regard the physical dislocation of the personnel of the two agencies as an important symbol of the nature of the relationship. Any dilution of the physical

32 Consider for example the *Prosecution of Offences (Northern Ireland) Order 1972*, articles 5(1)(b) and 6(3). See also Canadian Law Reform Commission, 1990, recommendation 14.

33 See Home Office *Protecting the Public*, London: HMSO, 1996, p. 26, paragraph 5.8, Narey note 66 above, pp. 8 and 14, and the Crown Prosecution Service press release, ‘First Pilot Scheme for CPS Lawyers in Police Stations,’ 26 November 1996 (www.coi.gov.uk/coi/depts/gcp/coi5010b.ok). Administrative Support Units (‘ASUs’) as their title suggests are features of most police forces in England and Wales, whose function it is to undertake the bulk of the administration and bureaucracy which is involved in criminal prosecutions, so as to relieve operational officers of much of the paperwork and afford them maximum availability for operational duties.

34 Home Office (1997).

35 *Ibid.*, p. 11.

demarcation of the agencies is likely to have a negative impact on the public perception of the DPP in particular. In short, we regard Narey's comment regarding independence as being 'a state of mind' as wholly inappropriate for Northern Ireland in present times.

Particularly in point, an Australian DPP has commented that 'There will always be a tension between the need to ruthlessly evaluate police work in the form of charges and briefs, and the personal relationships which inevitably develop between prosecutors and particular officers, chiefly in the [Criminal Investigations Branch]. The potential problem is pronounced in small jurisdictions. ... [It] is not sufficient simply to rely on the professionalism of any lawyer, but to ensure that systems and procedures are in place to minimise the possibility of a restraint on independence... [A]ttention must be paid in a prosecution service to the implementation of risk management strategies.'³⁶ Such risk management strategies would include the obvious, such as ensuring that the same prosecutors do not routinely deal with the same investigators.

3.4.2 INDEPENDENCE FROM THE EXECUTIVE

Independence from political influence is the classic *raison d'être* offered for an independent prosecutor. Corns summarises the position:

The need to 'depoliticise' prosecution decision-making has been the driving impetus for the establishment of DPPs. It is suggested that any Office of public prosecutions can only be truly independent if it is located externally to the Office of the Attorney General. Similar to the notion of 'justice', prosecutorial systems must not only be independent from government but must also be seen to be independent. This requirement of separating prosecution functions from the political office of the Attorney General has been regarded as fundamental by ... noted authorities.³⁷

The independence of the prosecutor from political influence typically will also be augmented by detailed appointment and removal provisions.³⁸

The thorny question of reconciling this central independence of the prosecutor with some degree of political accountability is addressed below in the detailed discussion of mechanisms for achieving accountability.

The issue of prosecutors' independence from politics raises the issue of political affiliations on their part. This might include, for example, a prosecutor's membership of a political party

36 J McKechnie 'Directors of Public Prosecutions: Independent and Accountable', paper presented to the *Sixth International Criminal Law Congress*, Melbourne, 10 October 1996, pp. 24-25.

37 Corns, 1993, p. 8, paragraph 3.1(i).

38 Provisions regulating the appointment and removal of the DPP in the Republic of Ireland, for example, occupy three and a half pages of legislation. See the *Prosecution of Offences Act*, 1974, section 2.

or of a group or association commonly perceived as having a political or quasi-political agenda. On this point, we initially note the European Convention on Human Rights and Fundamental Freedoms which provides in part:

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority...
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, ... or for maintaining the authority and impartiality of the judiciary.

Article 11

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime ... or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

We also note the United Nations *Guidelines on the Role of Prosecutors* which in part provide:

8. Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in

a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.

9. Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.³⁹

It can be seen that the European Convention clearly envisages that restrictions might legitimately be placed on the freedom of association of ‘members of the armed forces, of the police or of the administration of the State.’ Prosecutors could be regarded as encompassed within this qualification to the generality of Article 11. The freedom of association for prosecutors which is advocated in the UN Guidelines, however, appears from paragraph 8 to advocate a general freedom to associate and to assemble, which ‘in particular’ should include the freedom to participate in public discussion of the specified matters. The inclusion of the freedom to participate in public discussion of matters relating to law, the administration of justice and so forth clearly does not limit the freedom to those activities – it is an inclusive rather than an exclusive provision and thus the UN Guidelines would appear to circumscribe the State’s ability to limit the political associations of prosecutors.

The Québec *Act Respecting Attorney General’s Prosecutors*, however, prohibits prosecutors from being candidates in any elections, from being members of a political party, from paying contributions to political parties or to candidates in elections, and from engaging ‘in any other partisan activity in favour or against a political party or a candidate in ... an election.’⁴⁰ The Act also provides that prosecutors who wish to engage in political activity may be facilitated by being re-classified within another section of the public service on the same minimum conditions which they enjoyed as a prosecutor. Such a re-classified prosecutor may then, after his or her political activity has ceased, re-apply for a post as prosecutor.⁴¹

On the contrast between independence in fact and the perception of independence, it struck us as curious that the office of the independent public prosecutor in Northern Ireland is styled as a ‘Department’. Just as ‘police force’ is no longer an appropriate term to describe

39 UN Doc A/CONF. 144/28/Rev. 1 at 189, Paragraph 1 (1990).

40 *Ibid*, section 9.1.

41 *Ibid*, section 9.11.

what is intended as a police service,⁴² so also a ‘Department’ of the DPP seems equally inappropriate, implying as it does that the prosecution service is a subordinate and biddable unit of government, in much the same way as are the various Government Departments and Ministries.

3.4.3 INDEPENDENCE FROM VICTIMS

The role of the prosecutor being in large part to bring objectivity to the task of prosecution and to reflect the public interest in the circumstances of the case, public prosecutors normally should be independent of the victim. This is because the interests of a victim and the broader interests of justice may not be identical in the circumstances of individual cases. This important principle, however, should not dilute the fact that the interests of a victim are central to many of the decisions taken by prosecutors. Central though victims’ interests may be, however, they should not be decisive – the prosecutor’s decision ultimately must be an independent decision based on a consideration of the evidence and prosecution policy. The important place of victims in the criminal process has been underlined with increasing frequency and authority over the past two decades. Victims’ interests now are recognised in most charters and codes for prosecutors,⁴³ and are enshrined in international instruments.⁴⁴

The principle of prosecutorial independence from the victim is less straightforward in cases of private prosecution than it is in cases of public prosecution. It was seen in Chapter 1 that private prosecutions remain a not insignificant feature of summary criminal procedure in Northern Ireland, England and Wales and in the Republic of Ireland, to name but some jurisdictions. In Chapter 1, we drew a distinction between those who prosecute as a function of the office or post which they hold, and those who prosecute as a result of personal motivation. For the purposes of this Report we regard those in the former category as public prosecutors and those in the latter as private. Such private prosecutions, which require a high degree of personal motivation, typically will be pursued by the victim of the crime and only after a public prosecutor has reached a negative decision on the victim’s complaint.

Most commonly, private prosecutions will be for minor offences prosecuted summarily – private prosecutions on indictment are rare in Northern Ireland and in England and Wales, and are prohibited in the Republic of Ireland. Clearly, ‘pure’ private prosecutors will not be

42 Although we acknowledge that the etymological origins of the word ‘force’ in this context relate to a body of people in the sense of a work-force as distinct from a philosophy of coercive law-enforcement.

43 Consider for example the *Code for Crown Prosecutors* (England and Wales), the *Victims’ Charter and Guide to the Criminal Justice System* Dublin: Department of Justice, Equality and Law Reform, 1999 (Republic of Ireland) and the *Prosecution Policy and Guidelines* of the DPP, New South Wales as a small sample of an extensive range.

44 Consider for example Council of Europe Recommendations No R (85) 11 on *The Position of the Victim in the Framework of Criminal Law and Procedure*, No R (96) 8 on *Crime Policy in Europe in a Time of Change* and the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (adopted by the General Assembly in resolution 40/34 of 29 November 1985).

independent of the victim, and the victim and the prosecutor being synonymous, by definition so also will be their interests. It is for this reason that judicial authority in England and Wales requires that a private prosecutor in a crime of seriousness be compelled to introduce an element of objectivity into the conduct of the prosecution by engaging a solicitor and counsel to conduct the case on his or her behalf.⁴⁵ In justifying this restricted latitude which is available to private prosecutors on indictment, it was held in *R v George Maxwell (Developments) Ltd* that the interests of a private prosecutor will more often than not be inimical with the duties of and constraints upon prosecutors.⁴⁶ The judicial view will be recalled from Chapter 1 that the Crown Court 'is not an appropriate forum to ventilate a private grievance or to pursue a personal vendetta.' This also is quite likely the reason for the statutory power vested in the DPPs in Northern Ireland and in England and Wales to take over any prosecution,⁴⁷ a power which does not exist in the Republic of Ireland.

3.4.4 INDEPENDENCE WITHIN PROSECUTING ORGANISATIONS

A prosecution organisation should not be a monolith with a single thought process. Rather, each should be the sum of its professional and administrative parts. It is therefore recognised by some, that the independence of the prosecutor is as much a live issue in terms of the internal organisation of a prosecuting agency, as it is in the national constitutional framework within which the agency exists and operates. The DPP for Western Australia, for example, has said:

Naturally, it is not possible for a director of any jurisdiction to make all decisions due to the volume of work. Therefore, independence requires independence not only for the Director but for all decision makers, which in practical terms is every Crown Prosecutor.

Hence the need to create a structure which fosters and protects independence while conforming to the requirements of accountability.

...there is a need to develop in an office a culture of independence of thought, and the ability to build a system which allows rigorous dissent in the case of decision making.⁴⁸

It has been pointed out to us that in the Canadian Federal Prosecution Service, prosecutors are expected to exercise independent judgement, but that theirs is a delegated independence exercised as representatives of the Attorney General of Canada. As such they are not wholly

45 *R v George Maxwell (Developments) Ltd* [1980] 2 All ER 99.

46 *Ibid.*

47 See respectively the *Prosecution of Offences (Northern Ireland) Order 1972*, article 5(3) and the *Prosecution of Offences Act 1985*, section 6.

48 McKechnie, 1996, p. 21.

autonomous but are subject to the overall direction and control of their superiors in the administrative hierarchy, and are required to implement and apply Federal Prosecution Service policies.

Independence can therefore be seen to be equally as important in terms of the confidence with which individual prosecutors in any given agency can approach their task, as it is that the head of the organisation can resist any attempt at political influence through, for example, an attorney general.

3.4.5 FINANCIAL INDEPENDENCE

We highlight the self-evident point which, at its most blunt, is that the person ‘who pays the piper calls the tune’. Any prosecution service must be adequately funded so that the integrity of the service is not compromised. As discussed above, however, we do not suggest that prosecutors be immune from financial accountability. While the executive arm of government is subject to constant spending tensions, matters of high principle are involved in the immediate issue – ‘If a community wishes to be governed by the rule of law and to accept the principle that all men, women and children have equality of rights and responsibilities under law, then it follows that the justice system will be a cost of living in a civilised community.’⁴⁹

3.4.6 INDEPENDENCE FROM THE JUDICIARY

An immediate issue to be considered briefly is whether the internationally-recognised principle that the judicial and the prosecution functions be separate⁵⁰ is transgressed by features of some criminal justice systems such as prosecutor fines and the concept of investigating magistrates.

Prosecutor fines are a feature of inquisitorial systems of criminal justice, and of the Scottish criminal process. Their introduction in England and Wales was recommended by the Royal Commission on Criminal Justice, but we understand that this recommendation has not been accepted by Government. Prosecutor fines amount to a prosecutorial dispositive power⁵¹ in the sense that they are a means by which the prosecutor may determine a case, necessarily outside a judicial forum. This raises the question of whether the prosecutor in doing so is performing a judicial function. On balance, we believe that the power to impose prosecutor

49 *Ibid.*, pp. 27-28.

50 Note, for example, the United Nations *Guidelines on the Role of Prosecutors* which in part provide that ‘The office of prosecutors shall be strictly separated from judicial functions,’ note 27 above, paragraph 10. The principle echoes the general tenet of common law *nemo iudex in causa sua* – that nobody should be a judge in their own case.

51 See Chapter 1 for a discussion of processual and dispositive prosecutorial powers.

finer does not differ in any material respect from the other dispositive options already deployed by prosecutors in Northern Ireland and in England and Wales, such as the caution. To an extent, indeed, such an arrangement could be seen as a logical progression from the current 'on-the-spot' penalties for some traffic and other minor violations. To our minds, they would not trespass from the realm of quasi-judicial activity in which prosecutors have always engaged as their central role,⁵² into the realm of judicial activity.

It occurs to us, however, that in the event that prosecutor fines or similar dispositive discretions were to be introduced in Northern Ireland, prosecutors would require comprehensive training, and that the exercise of any powers to impose a penalty should be subject to rigorous supervision by an external agency. This latter issue is developed later in this chapter in the discussion of accountability.

It was seen in Chapter 2 that investigating magistrates are a feature of French criminal procedure in particular and to differing extents also are features of other systems based on the inquisitorial model of proof. The introduction of such a judicial officer as an 'inquirer' in a case, owing allegiance neither to the prosecution nor to the defence, would be a radical innovation in an adversarial or contest model of proof such as exists in common law jurisdictions. It would impact significantly not only on prosecution and on criminal investigation, but on the format and conduct of trials and on the entire criminal justice process. Before any such change were made, therefore, we suggest that attention should focus on the rationale which might inform it.

If, as we suspect, the purpose to such a change would be to import into the investigation and prosecution processes a large degree of objective or outcome-neutral oversight, then to our minds the role of the prosecutor in a common law jurisdiction, augmented by greater requirements of consultation between prosecutor and investigator and more frequent reference by investigators to prosecutors, should in pure theory achieve that same end but with a less radical impact on the fabric of adversarial criminal processes. It would be imperative in what is mooted – which in short would be an enhanced office of public prosecutor tending towards the American DA model, but without the party-politicisation which characterises the US system⁵³ – that in any enhanced role for prosecutors they would continue to recognise their ethical obligations to the attainment of justice in each case which obligations transcend the concerns of any single constituency in the criminal justice process.

Significantly, any such enhanced office of public prosecutor would risk offending the principle discussed above, namely that the functions of investigation and prosecution should be kept separate. A prosecutor superintending investigations would to the extent of that superintendence dilute the previously-discussed principle, resurrecting concerns which include a feared reduction in prosecutorial objectivity and consequentially a tendency towards

52 See Chapter 1 for a discussion of the 'Role of the Prosecutor' in which the quasi-judicial nature of the office of prosecutor is considered.

53 See also above paragraph 3.4.1.3.

a guilt-focus. While such an enhanced role for prosecutors would risk offending the separation of the functions of prosecution and investigation, however, it would honour the more significant principle of the separation of the judicial function from that of the prosecution. To our minds, the introduction of investigating judges would impact on those same principles but in reverse and more harmful order.

3.5 The Relationship Between Accountability and Independence

To the question – ‘What are [your] Office’s three greatest qualities?’ – the DPP for New South Wales is recorded as responding – ‘Independence, independence and independence’.⁵⁴ The quintessential rationale for the establishment of an office of DPP in western jurisdictions has been to provide an independent authority to perform the range of functions involved in prosecution, and this theme of independent action has been identified by the parties to the Agreement as one of central importance to the prosecution function.⁵⁵ Indeed, we hold with the view that an independent prosecution service is part of the constitutional balance of many late 20th century democracies. We have considered in detail the forms which that independence can take, although we have also noted that different concerns arise in the context of private prosecutors than public prosecutors.

While we argue that the independence of the prosecution service is of fundamental importance, we also note that ‘independence without accountability is an illusion. Independent power is entrusted only to those who give an account of its exercise.’⁵⁶ Despite the received wisdom of public officials, some DPPs and various government ministers in many jurisdictions throughout this century, we do not accept that independence and accountability are mutually exclusive. In reality, we hold that they are different strands of the same web, overlaying each other and combining to produce arrangements for public prosecutions which will bear the weight of community confidence. The debate over the accountability of prosecutors has, however, often been skewed by the misconception that independence and accountability are irreconcilable principles.

John McKechnie QC, the DPP of Western Australia, summarises the arguments in pithy fashion:

One of the least understood areas of law and government is the relationship between independence and accountability.

54 Cowdery, 1995, p. 6.

55 Belfast Agreement, Section on ‘Policing and Justice’, Annex B, wherein the CJRG is tasked to consider ‘the arrangements for the organisation and supervision of the prosecution process, and for safeguarding its independence.’

56 McKechnie, 1995, p. 29. McKechnie adds at p. 18 that ‘Communities are less likely to allow [criminal justice agencies] independent action when their accountability has the appearance of being more limited.’

It is necessary to examine the relationship before understanding why independence can only be assured if there is appropriate accountability. The high responsibility given to an unelected official to wield great power carries with it the duty to be accountable for its exercise.

A statutory office can be entirely independent in the sense of its decision making and, nevertheless, be properly accountable for the quality and the consequences of that decision making.

For many years in different jurisdictions, both statutory officeholders and governments have deliberately confused the relationship to justify, on the one hand, unchecked and unaccountable behaviour and, on the other hand, lack of political responsibility for the consequences of certain unpopular acts or decisions.⁵⁷

Reinforcing his point, McKechnie offers the following example:

There is a world of a difference between a police minister standing apart and separate from decisions to charge suspected drug offenders, and the same minister [not] requiring of a commissioner proper standards of conduct, supervision, financial accountability, and risk management procedures within a drug squad. The former is appropriate; the latter is abrogation.⁵⁸

Complete independence prevents any assurance that discretionary decisions are being properly made – where there is no accountability in decision-making, neither are there any of the safeguards traditionally associated with democratic society, such as the possibility of review or of an appeal.

Ayoola comments ‘that it is not enough to point to the apparent independence of the prosecuting authority as affording assurance of fairness. It is essential that there should be some mechanism external to the process itself for ensuring some degree of accountability... A mechanism that assures some degree of openness and accountability in prosecutorial decisions should be built into the system itself.’⁵⁹

The principal rationale of requiring accountability of prosecutors is to ensure that the powers which they enjoy and the policies which they apply are at all times and in all cases being used properly. When combined with independence, a position is reached where the prosecutor should be immune from and protected from improper influence while making decisions in individual cases, but should be responsible to account for those decisions after the fact and at all times to be prepared to account for the prosecution agency’s policies. The essential

57 *Ibid.*, p. 9.

58 *Ibid.*, p. 10. McKechnie offers as a second example the necessary respect for judicial independence on the one hand, and what he regards as legitimate requirements of judicial accountability, for example, for the efficiency of the service which they provide, on the other.

59 Ayoola, 1991, p. 1036.

distinction lies between influencing a prosecutor to take a certain view of a case when the matter is being determined, which would be wrong, and requiring him or her afterwards to explain why they did something one way rather than another, or at any time to explain and justify the prosecution policies which are in place. The latter is not merely proper, but is essential to the balance of power and responsibility in a developed society.

In short:

Whilst it is argued that prosecutorial independence is an essential element in the proper administration of criminal justice it must be equally recognised that inherent in an independence without accountability is the potential for making arbitrary, capricious, and unjust decisions.⁶⁰

The remainder of this chapter will consider the mechanisms employed to achieve accountability of the different varieties which we have previously introduced.

3.6 Achieving Accountability

The relationship between the public prosecution service and the executive branch of state is fundamentally important, although it is only one of the contexts in which accountability might or might not be found. The various ways in which accountability is achieved, and the relative advantages and disadvantages of each mechanism, are now considered. In considering each, it is worthwhile to note the conclusion of McKechnie, that the accountability of a prosecuting service is in fact one of the bastions of its independence.

A number of relationships between public prosecutors and other institutions or agencies bear upon prosecutorial accountability. They provide a useful template for this discussion in that they address the relationships in many jurisdictions which we have examined and which to a greater or lesser extent in each give rise to some form of accountability, while honouring to an equally variable extent the central principle of prosecutorial independence.⁶¹ Those relationships and concepts are:

- The Attorney General
- Parliament
- The Courts
- The Media

60 Coldrey QC 'The Office of the Director of Public Prosecutions: Independence, Professionalism and Accountability', cited in G Flatman QC, 'Independence of the Prosecutor', paper presented to the *Australian Institute of Criminology Conference*, 18 and 19 April, 1996, p. 4.

61 We have adopted from McKechnie, 1996, the basic list of topics which we apply in the following analysis.

- Prosecution Policy
- The Police
- Victims
- The General Public
- Internal Structures
- Inspectorates

While each will be considered in turn, one issue in particular cuts across many of the categories just mentioned and for that reason the issue is addressed at this preliminary juncture. That issue is the provision by prosecutors of reasons for their decisions.

3.6.1 THE PROVISION OF REASONS FOR NON-PROSECUTION

It is clichéd but necessary to emphasise that this issue is concerned with the provision of reasons for non-prosecution, for discontinuance or for the acceptance of a plea of guilty to a lesser charge than was initially charged, as distinct from the provision of reasons *for* prosecution. This is because the reasons *for* a prosecution are provided in the course of the evidence in the trial. To ease presentation of the arguments, we will for present purposes regard decisions to discontinue and decisions to accept a plea to a lesser charge as decisions not to prosecute.

The received wisdom in some common law jurisdictions is that reasons can not be given to the public or to victims to explain a decision not to prosecute. One lengthy formulation of the arguments against the provision of reasons is that of the previous DPP in the Republic of Ireland:

If 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 the reasons are refused, resulting either in unjust implications regarding the guilt of the suspect or former accused, or in suspicions of malpractice, or both. If on the other hand reasons are given in all cases, and those reasons are more than bland generalities, the unjust consequences are even more obvious and likely. In a minority of cases, the reasons would result in no damage to a reputation or other injustice to any individual. In the majority, such a result would be difficult or impossible to avoid. The reason for non-prosecution often has little or no relevance to the issue of guilt or innocence. It may be, and often is, the non-availability of a particular proof, perhaps purely technical, but nevertheless essential to establish the case. It may be the sudden death or departure abroad of an essential witness. To announce that such a factor was the sole reason for non-prosecution would amount to conviction without trial in the public estimation, and

to depriving the person involved of the protection afforded by the careful analytical examination in open Court of the case against him which judicial procedure affords. In other cases, the publication of the particular reasons for non-prosecution could cause unnecessary pain and damage to persons other than the suspect, as where certain types of aberration become apparent in an intended witness.⁶²

As will be seen shortly, however, the position in the Republic of Ireland may be in transition to a greater degree of openness and transparency.

This restrictive view of the prosecutor's ability to provide reasons is not a view which is universally held by DPPs. The *Statement of Prosecution Policy and Guidelines* of the DPP for Western Australia, for example, provides in part:

Nolle Prosequi – Publication of Reasons

45. Generally, reasons for discontinuance of a prosecution will be given to an enquirer who has a legitimate interest in the proceedings, including representatives of the media. Reasons will not be given if to do so would prejudice the administration of justice or would cause significant harm to a victim, witness or accused person.

It should be noted that the presumption in Western Australia is in favour of the provision of reasons for non-prosecution – generally, ‘reasons...will be given...’ – and illustrates a mindset of openness and an institutional culture of transparency. It should also be noted that potential harm to victims, accused and witnesses caused by the provision of reasons, must be ‘significant’ before it will override the presumption that reasons generally should be provided.

In similar vein, we were told on behalf of the DPP for the Commonwealth of Australia that:

...in any case where a prosecution is discontinued it is appropriate that the reasons for that decision be given as a matter of course to both the agency that investigated the matter as well as the victim, if any, or his or her family... Further, reasons may also be given on request to the media and other concerned members of the public.⁶³

Due to the nature of the offences within the jurisdiction of the Australian Commonwealth DPP, however, ‘only very rarely will the occasion arise where reasons will be given to an individual as the victim of a Commonwealth offence.’ It should nonetheless be noted that although individuals are infrequently the victims of Commonwealth offences, individuals commonly are perpetrators, and that the Commonwealth DPP regards it as axiomatic that reasons should normally be made available to interested parties including the media. It is perhaps a question of priority – we were further told:

62 Director of Public Prosecutions, 1998, p. 39, Appendix 7. This quotation, however, is extracted from a statement issued in 1983 but which is reproduced in the 1998 Annual Report.

63 Correspondence with the authors.

As to the provision of reasons to the victim of an offence or his family, or indeed to the public generally by responding to media requests, as the Royal Commission on Criminal Procedure stated in its 1981 report, one of the standards by which any prosecution system must be judged is the extent to which it is accountable in the sense that those who make the decisions in the prosecution process can be called on to explain and justify their actions. We believe that there is a clear and obvious public interest in providing reasons for such decisions to victims etc and the public generally.⁶⁴

The DPP for Queensland has said that reasons are provided, on request, to victims, and police,⁶⁵ while in Ontario it is normal practice when a case is withdrawn for the Crown Attorney to provide in open court an explanation of the decision.⁶⁶

In England and Wales, if the CPS does not proceed or accepts a plea of guilty to a lesser offence, 'it is generally accepted that the complainant/victim should be informed of the decision and given an explanation for it if he or she wishes.'⁶⁷ The Butler Report on *CPS Decision-Making in Relation to Deaths in Custody and Related Matters* suggested, but did not recommend, that the CPS consider issuing reasons for non-prosecution in death in custody cases where an inquest returns a verdict of unlawful killing.⁶⁸

In the Republic of Ireland, a change appears to have occurred in the previously long-standing policy of not giving reasons for prosecution decisions. In November 1999 the Office of the DPP issued to the media a copy of a letter from the Director to the Attorney General in which the DPP explained the events which led to an unsafe conviction for a serious offence.⁶⁹ It remains to be seen whether this precedent in the Republic of Ireland will be followed in coming years.

A related issue is whether prosecutors should benefit from some protection in civil law from allegations that they have defamed suspects or discontinued defendants through the provision of reasons. It seems to us, however, that even under current law the defences of justification ('truth') and fair comment would be available to the prosecution agency, and the defence of qualified privilege would also be available in respect of the provision of reasons to the investigating agency and to the victim on the basis that the investigators and the victim have an obvious interest in being informed of the decision.

64 Correspondence with the authors.

65 Correspondence with the authors.

66 Correspondence with the authors.

67 Glidewell, 1998, p. 141, paragraph 55.

68 Butler, *Inquiry into Crown Prosecution Service Decision-Making in Relation to Deaths in Custody and Related Matters* ('Butler') London: The Stationary Office 1999, Postscript 2 (www.official-documents.co.uk/document/cps/custody/sec12.htm).

69 See 'DPP's Report Relating to Wall Prosecution' (www.ireland.com/newspaper/ireland/1999/1118/hom28.htm).

It can therefore be seen that it is in fact possible for prosecutors to provide victims ‘and other interested parties’ with the reasons for decisions. The attitude which prevails in some jurisdictions, however, is that the provision of reasons for decisions is a case of ‘all or nothing’ with no median route – that a single principle should govern all cases. While there undoubtedly are legitimate concerns regarding fairness and the good name of suspects, some jurisdictions have seen fit to set a different balance between those interests on the one hand, and the competing interests of the victim and transparency and accountability in public prosecution on the other. The attitude of those jurisdictions in the latter category – which are more open and transparent – might be pithily summarised in a phrase from the Glidewell Report – ‘Sir Humphrey has moved on.’⁷⁰ Jurisdictions including Western Australia, Ontario and the Commonwealth of Australia are striving to be as open as is reasonably possible, while recognising that in individual cases it may not be possible to provide reasons for non-prosecution. Significantly, however, they operate a presumption in favour of the provision of reasons unless in an individual case there are compelling arguments against.

It is often overlooked that the reasons for non-prosecution could be given to the *suspect*, with considerable positive effect. The DPP for the Commonwealth of Australia, for example, operates a system of warning letters which are sometimes issued in cases where a decision is taken not to prosecute. Such warning letters do not have a statutory basis, and an extract from a typical document is included as Appendix B to this Report. It can be seen that warning letters in the Commonwealth of Australia fulfil a role similar to a caution.

Having considered the cross-cutting dilemma which the provision of reasons presents to this inquiry, we now consider the various mechanisms which have been employed to secure the accountability of prosecutors. Many of these mechanisms serve a number of roles, and in themselves bring not alone a degree of accountability, but also for example some assurance of equity and fairness in the prosecution system, the latter being a theme which will be resumed in Chapter 4.

3.6.2 THE ATTORNEY GENERAL

A previous DPP of the Australian State of Victoria, now Mr Justice Coldrey, summarised the essential problems:

It is not suggested that an Attorney General would seek to act other than honourably in making a prosecutorial determination. However, given the potency of these pressures, the processes of evaluation central to decision making may well be affected by considerations (albeit subconscious) extending beyond those appropriate to a specific case...

On a more tangible level, a major problem exists when the prosecutorial discretion must be exercised in controversial or politically sensitive circumstances. There is a real

70 Glidewell, 1998, p. 199, paragraph 26.

potential that such decisions will become subject to distortion or misconstruction if they are drawn into the ambit of party political debate or alternatively, will be perceived as having been motivated by political partisanship. It is not to the point that such assertions and perceptions may be factually groundless. The damage that is created is that the necessary public confidence in the administration of the criminal law will be eroded.⁷¹

Nonetheless, in each of the common law jurisdictions which we examined, with the exception of the USA, the relevant prosecution agency is accountable in some manner to an attorney general. While the wording which describes that accountability can vary from one to another, from a relationship of 'superintendence' to one of 'responsibility to', nonetheless the essence remains the same. Similarly, the relevant attorney general will normally have a power to intervene in individual cases or in prosecution policy or in both. The degree of transparency in such relationships tends to vary between jurisdictions, but the basic structure does not.

For the reasons outlined in Chapter 1, the overtly political arrangements in the USA, both federal and State-level, with elected prosecutors in most jurisdictions, are unique and are singularly inappropriate for Northern Ireland in current times. So also are the arrangements in the Republic of Ireland, although for different reasons which will now be considered.

It was seen in Chapter 1 that the DPP in the Republic of Ireland is invested by statute and by constitutional convention with an extraordinary degree of independence by reference to international comparators, and with few counter-balancing requirements of formalised accountability. Established in 1974, for example, the Office published its first annual report in 1999. Of immediate interest, however, is the relationship between the Irish DPP and the Irish Attorney General. It was always intended by the Irish legislature that the Office of the DPP should be entirely independent of the Government, although the functions of the Office may be effectively suspended, to a greater or lesser extent, on occasion.⁷² This independence was expressly stated to be the intention underlying the legislation. For example, in the Parliamentary debates on the Prosecution of Offences Bill, 1974, the late John Kelly SC TD, then Parliamentary Secretary to the Taoiseach, said:

Furthermore, the Director will not be accountable to or in any way subject to the direction of the Attorney General in relation to the performance of his functions. This differs from the legislation establishing similar offices in England and Wales and in Northern Ireland. ... Instead, subsection (6) of section 2 provides merely for 'consultation' between the Attorney General and the Director in relation to matters pertaining to the functions of the Director. While it is hoped that such consultation will

71 J Coldrey QC, 1996, pp. 2-3.

72 Section 5(1) of the *Prosecution of Offences Act, 1974* provides that the powers of the DPP may by Government Order be performed only by the Attorney General if 'it is expedient in the interests of national security to do so.'

occur on a regular basis, the provisions of the section make it clear that the status envisaged for the Director in this country is different from that of his counterparts in neighbouring jurisdictions.⁷³

The position in the Republic of Ireland, therefore, is that the accountability to which the DPP is subject through the Attorney General is of the explanatory and co-operative variety, characterised elsewhere in this and other Reports as answerability, rather than being subordinate and obedient. It seems to encompass both policy and individual cases. That said, it appears that such statutory consultations are infrequent, perhaps numbering two or three times annually.

A further curiosity in the arrangements in the Republic of Ireland is that the Attorney General is not in any event answerable to the Irish Parliament. While the Attorney General may be a member of Parliament, there is no necessity that this be the case.⁷⁴ Hence, for example, attorneys general often are appointed from the ranks of the Bar. The Irish Attorney General operates in what has been described as a ‘curious half-world’, where the Attorney is a political appointee, ‘privy to government secrets and possibly a parliamentary spokesman for government, [and] is virtually indistinguishable from a minister. Yet unlike ministers he is not personally answerable to parliament for the way he discharges his functions.’⁷⁵ The issue has also been scrutinised by Edwards, who writes that it is ‘remarkable that under the current Standing Orders of its Lower House even if the Attorney General is a member of the Dáil he cannot be questioned as to his actions.’⁷⁶ Of further immediate interest, Edwards continues and asks – ‘With complete independence being conferred upon the Director of Public Prosecutions in Ireland and the elimination of any power of direction or control over the Director’s actions by the Attorney General, who, it may well be asked, is accountable to the Irish Parliament for the decisions taken by the Director of Public Prosecutions?’ Edwards continues – ‘[i]f the experience of other Commonwealth countries [sic], who have adopted into their constitutions a similar model of an unaccountable public prosecutor, is any indicator for what lies in store for the Republic of Ireland it is only a matter of time before the fundamental questions of control and accountability force themselves before its elected Parliament for intense debate.’

73 273 *Dáil Debates* 804-805 (11 June 1974).

74 The only constitutional reference is to the fact that the Attorney General must not be a member of the Government (Article 30.4).

75 J Casey *The Irish Law Officers: Roles and Responsibilities of the Attorney General and the Director of Public Prosecutions*, Dublin: Round Hall Sweet & Maxwell, 1996, p. 109. The Constitution Review Group in its 1996 Final Report recommended no change to the constitutional arrangements whereby the relationship between the Attorney General and the Government is regarded as one based on lawyer-client and for that reason the Attorney is not in himself or herself accountable to the Oireachtas. It is proposed by the Group that the senior law officer be accountable through the Taoiseach. See the Constitution Review Group *Report*, Dublin: Government Publications, 1996, pp. 124-125.

76 J L Edwards *The Attorney General, Politics and the Public Interest*, London: Sweet and Maxwell, 1984, p. 267, referring to Standing Order 32 of 1974. See also Casey, note 208 above, p. 105 *et seq.* The matter is implicit in the phraseology of the standing orders. See now Standing Orders 32, 33 and 36 of 1996, each of which provide only for questions to ‘a member of the Government’, which necessarily excludes questions to the Attorney General.

In Northern Ireland and in most other jurisdictions, the essential dilemma in this regard lies in reconciling the independence of the DPP with political accountability. In England and Wales, for example, some regard the ‘superintendence’ of the DPP by the Attorney General as an encroachment on the Director’s independence. Nonetheless, it is common case amongst officials and commentators that the occasions upon which the Attorney General in England has directly intervened in the work of the DPP are comparatively rare. Similarly, the Attorney General of Canada is empowered to intervene in any particular case, although once again such intervention is said to be rare.⁷⁷ As we mention at a number of points in this Report, however, the perception of independence can be at least if not more potent than its reality.

Australian DPPs have suggested 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 the Director is invested:

Where an attorney general can exercise power, a director is accountable for capricious or corrupt decisions. The Attorney General’s residual or conjoint power is not a threat to the independence of the Director but a check on abuse.⁷⁸

It seems to us that it is concerns about the nature of the relationship rather than its empirical form, which exercise people’s minds; that it is the potential for abuse rather than the reality which raises concern. If it is desired that a DPP be subject to political accountability – and we think he or she should – then safeguards can be put in place to regulate the relationship to ensure that the powers of the Attorney General are always properly used. The key to providing such assurance in modern democratic societies is transparency in the dealings between the Officers and crystal clarity as to whether the obligation of accountability extends only to policy, or to individual cases also, and whether the accountability in question is of a limited explanatory variety, or a potentially more subversive subordinate and obedient variety. For example, it is common in some jurisdictions for directives of policy and in individual cases to be published in an appropriate public document⁷⁹ – typically either tabled in Parliament or appended to an annual report of the Director. As a matter of practice, it might be necessary for directives in individual cases (if they were to be permitted) to be kept confidential to the Law Officers until the relevant case has been finally determined.⁸⁰ Equally, it seems proper to us that directions in respect of individual cases where there is an acquittal should not be made public, although the direction should be available to the acquitted individual.

77 Attorney General of Canada ‘The Duties and Responsibilities of Counsel’, *Crown Counsel Policy Manual*, Ottawa: Attorney General for Canada, 1993.

78 McKechnie, 1996, p. 14.

79 Canadian Law Reform Commission, recommendation 7, see note 122 above. See also the *Director of Public Prosecutions Act 1986* (New South Wales), section 26 of which provides that any guidelines provided by the Attorney General to the DPP shall as soon as practicable be published in the official Gazette and laid before each House of Parliament.

80 Including the exhaustion of all appeals, but ignoring the possibility of a reference by the Criminal Cases Review Commission.

Transparency in a relationship of explanatory accountability, where the DPP is ‘answerable to’ the Attorney General for the due performance of the functions of the Director, combined with the observations on local answerability which we make below, appear to us to satisfactorily reconcile the imperatives of prosecutorial independence and political accountability. It has been recognised that the intense glare of the public eye is in itself a significant check on any temptation towards abuse or misuse of power, and would be an adequate substitute for the power of direction which offends the principle of prosecutorial independence and which undermines its perception. Where subordinate and obedient accountability is owed by a DPP to an attorney general, prosecutorial independence is compromised both in fact and in public perception. The relationship between a prosecutor and an attorney general could be structured in such ways as to remove the relationship of subordination and obedience, and replace it with an explanatory relationship but augmented by greater requirements of transparency in the operation of the prosecutor’s office. Mechanisms such as exist in the State of Victoria and which are discussed below,⁸¹ could impose a statutory obligation to highlight outside of the prosecution organisation any significant dissent on important questions or files. We believe that increased public consciousness and activism would more than adequately compensate for the loss of a power of direction by an attorney general, when the attorney would in any event retain the right to require an explanation from the DPP.

If, however, a preference were to exist in Northern Ireland for a degree of subordinate and obedient accountability in the relationship, then the Attorney General’s role in ensuring that the DPP performed his or her statutory functions satisfactorily should take place in the public eye; the Attorney would in turn be accountable to Parliament or the Assembly, as appropriate. It would be possible to restrict such interventions by the Attorney General to the level of policy alone – New South Wales law, for example, provides that the Attorney General may not impose a guideline in relation to a particular case⁸² – or to allow intervention in individual cases. If directions were to be permitted in respect of individual cases, this could be permitted with a sufficient degree of transparency by either of two arrangements.

Initially, it might be provided that directions from the Attorney to the Director in individual cases should be made public, there being any number of options for securing that end.⁸³ Alternatively, the Attorney’s residual power to take over carriage of any prosecution might be utilised, so that in the event of disagreement between the officers in respect of an individual case, the Attorney would have to take the highly visible step of intervening and taking over the prosecution. Were it thought to be necessary, it might be provided that where the Attorney General does take over a prosecution from the DPP, that this fact be stated in a

81 See paragraph 3.6.10 below.

82 *Director of Public Prosecutions Act 1986*, section 26(3).

83 These would include tabling the directions in Parliament, publishing them in the relevant Gazette, appending them to the DPP’s Annual Report and so forth.

written note to the court, read in open court. To further reduce the potential for actual or perceived political mischief on the part of an Attorney General, legislation could provide that with the exception of the Attorney General's power to take over carriage of any individual prosecution, the Attorney may only issue directions on general policy, and that these should be public documents as described above.

Other, more constitutionally-radical options also exist. These include the depoliticisation of the office of the Attorney General by splitting from the office responsibility for supervision of the public prosecution system. The questions begged by such a proposal, however, are how would the new, quasi-Attorney, differ from the DPP, and would there not then be a duplication of the very problems which the change sought to solve – how would the independence of the quasi-Attorney be guaranteed yet balanced with his or her accountability? We are not persuaded by such suggestions.

In summary, there are strong arguments for diluting the accountability owed by a DPP to an Attorney General from a subordinate and obedient variety to an explanatory variety, so long as that accountability is bolstered by enhanced obligations of procedural openness and transparency.

3.6.3 PARLIAMENT / ASSEMBLY

Statutory requirements upon a number of DPPs to provide their Attorney General with information to enable the proper conduct of the Attorney's public business, including the answering of questions in Parliament, amounts to indirect parliamentary accountability by the DPP. While parliament may not influence a decision before it is made, it may seek an explanation afterwards. McKechnie, the DPP for Western Australia, has said that 'Parliamentary questions, even the incomprehensible ones, are an opportunity for the legislature to require responsibility from a director, without intruding on the decision making of that office.' Typically in common law jurisdictions, parliamentary accountability of a prosecutor will be of the explanatory variety and will be secured through the medium of the Attorney General.

There are, however, exceptions to this generality, and it is possible to have direct accountability of the DPP to a parliament or assembly. It has been seen in the jurisdictions which we have examined that such direct accountability to parliament would raise legitimate concerns regarding the politicisation of the prosecution function and risk undermining one of the rationales for the establishment of such offices to begin with. The placing of the Attorney General in the chain of parliamentary accountability, between the Director and the parliament, is generally seen as a necessary degree of insulation. Nonetheless, direct parliamentary accountability, of the explanatory variety and limited to matters of policy, has recently been introduced in the Republic of Ireland.

Consideration was given in Chapter 2 to the *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997* (Republic of Ireland). That legislation provides that the Irish Committee of Public Accounts may in respect of the DPP and his officers, direct the attendance of persons at the Committee and the production of documentary evidence. The Act limits questioning relating to the DPP to ‘the general administration of the office’, and to discussion of ‘statistics relevant to a matter referred to in a report of and published by the [DPP] in relation to the activities generally of the office.’

While direct parliamentary accountability for prosecutors in common law jurisdictions is possible and while models exist, they are uncommon, the typical arrangement being to channel the relationship through the office of the Attorney General.

3.6.4 THE COURTS

There is a well-developed jurisdiction of judicial review of prosecutors’ discretions in many of the common law jurisdictions examined in this Report, although the detail of the case law varies.⁸⁴ In many countries, for example, the courts will be willing to intervene in the exercise by a prosecutor of his or her powers when they are proven to have been exercised in bad faith or for an improper purpose.⁸⁵ In some jurisdictions such as England and Wales, judicial review is also available to ensure that the DPP adheres to his published policies.⁸⁶ The difficulties most commonly encountered by litigants in the judicial review process, however, are to locate evidence of the alleged wrongdoing or improper exercise of power by the prosecutor – the courts will not entertain ‘fishing expeditions’ by applicants in the discovery process – and to discharge the very high standard of proof which for public policy reasons is demanded by the courts in litigation of this nature. Nonetheless, some applicants have had notable successes.⁸⁷

A further process is worthy of mention. The Commonwealth of Australia jurisdiction provides for a variety of statutory judicial review by means of the *Administrative Decisions (Judicial Review) Act 1977*. We were told that in that jurisdiction, the decision to carry on a prosecution, to give consent to the institution of a prosecution, and to present an indictment are among the prosecutorial powers which are subject to judicial review in the Federal Court under the Act.

Generally, however, the common law jurisdiction to judicially review the exercise of

84 The ambit of judicial review is very restrictive in the Australian jurisdictions – *Maxwell v DPP* (1996) 135 ALR 1.

85 *State (McCormack) v Curran* [1987] ILRM 225 and *H v DPP* [1994] 2 ILRM 285 (both Republic of Ireland); *R v Power* [1994] 1 SCR 601 (Supreme Court of Canada); *C v Wellington District Court* [1996] 2 NZLR 395 (New Zealand).

86 *R v DPP, ex parte Tasmán C* [1995] 1 Cr App R 136 (England and Wales).

87 Consider *R v DPP, ex parte Tasmán C*, *ibid*.

prosecutors' discretions will be sparingly invoked by the courts.⁸⁸ In England and Wales, for example, the recent decision in *R v DPP, ex parte Kebilene*⁸⁹ seems to have constricted the jurisdiction. In that case it was held that a decision of the DPP to consent to a prosecution was not in the absence of dishonesty, bad faith or other exceptional circumstances amenable to judicial review. Nonetheless the existing case law regarding adherence by the CPS to its policies appears to be unaffected by the decision in *ex parte Kebilene*.⁹⁰

While the ambit of the judicial review jurisdiction might be increasingly restrictive in the systems which we examined, since 1989 Canadian prosecutors may be liable in tort for wrongful conduct in the exercise of their functions.⁹¹ It has been suggested that prosecutors in Canada might be liable not only for malicious prosecution, but potentially also for negligent prosecution, unconstitutional prosecution and for a range of torts including abuse of process, conspiracy to injure, and false imprisonment. A senior Canadian prosecutor suggested to us that in this present climate of potential civil liability, 'prosecutors are watching their step very carefully.' This legal position differs from that which exists in England and Wales (where prosecutors do not owe victims a duty of care in negligence),⁹² in the Republic of Ireland (where prosecutors enjoy a public policy immunity from suit),⁹³ and in Australia (where a prosecutor's duty of fairness has been held not to found a cause of action).⁹⁴

We also note that the appellate criminal process to a limited extent provides a forum of accountability in that the prosecutor might in individual cases be required to explain the bases of certain decisions to prosecute and certain choices of charge.

It can therefore be seen that to differing extents in the jurisdictions examined, the process of judicial review and the imposition of civil liability upon prosecutors can provide a degree of accountability. In the context of this discussion, the accountability is what we have styled 'review accountability' in that it is an essentially reactive variant of the subordinate and obedient type. Although a valuable safeguard against the abuse or misuse of prosecutorial power, judicial oversight through the process of judicial review, appeal and the imposition of civil liability to our minds does not in itself satisfy the requirements of accountability. They contribute to the achievement of the objective, but should not be regarded as sufficient in their own right.

88 *State (McCormack) v Curran, H v DPP and R v Power*, note 85 above; see also *Weist v DPP* (1988) 81 ALR 129 (Commonwealth of Australia).

89 House of Lords, 28 October 1999.

90 See *R v DPP, ex parte Tasmir C*, note 86 above.

91 *Nelles v Ontario* [1989] 2 SCR 170.

92 *Elguzouli-Daf v Commissioner of the Metropolitan Police* [1995] 1 All ER 833.

93 *HMW (née F) v Ireland and the Attorney General* Unreported High Court, 11 April 1997.

94 *R v Whitehorn* [1983] 152 CLR 657.

3.6.5 THE MEDIA

McKechnie writes:

A working relationship between the media and a prosecution service is vital for the interests of justice and to maintain the independence of the prosecution service. The public must generally be informed about the work of any government agency, including a prosecution service. It is especially important for a prosecution service to have its work publicised. If sentences are to have any effect of general deterrence then, self-evidently, a sentence will not generally deter unless it is well known.

Prosecutions perform other useful functions besides deterrence. A prosecution can be the means of restoring peace within the community. Allegations of serious misconduct will not be left to fester in secret but will be broadcast. The result – conviction or acquittal – is generally marked by the community as a close of the event, and respected as such. For this reason, the courts insist on open justice, and prosecution services must be responsive to the needs of the media when it seeks to report matters or to explain decisions.⁹⁵

Above all, McKechnie notes:

Trust is necessary before the community is prepared to allow a statutory officeholder a measure of independent judgement. The community cannot trust an officeholder if they do not know anything of the process, reasoning or factors which may influence the officeholder's decisions.

Reference to the prosecutor's relationship with the media as a mode of accountability, in similar vein to the prosecutor's relationship with the police and victims (discussed below), raises consideration of the giving of reasons for a decision. As outlined in our cross-cutting discussion of that issue, we believe that reasons for a decision should wherever possible be given to interested parties. Typically, interested parties will include the investigating officers and the victim(s); occasionally, however, the media will have a sufficient interest to be briefed by the prosecution, as outlined by McKechnie above.

We have highlighted some strong arguments as to why a prosecutor should not generally give reasons for non-prosecution to the media or the public. While the competing interests of the suspect and the public can not be fully reconciled, we believe that little is to be gained from retaining the entrenched position which exists in some jurisdictions and which holds that the giving of reasons to the media is wrong in every case. It certainly can be wrong in some cases, where the effect of the giving of reasons is to publicly label the suspect as a criminal, which by definition would be otherwise than in due course of law. As with so many facets of the prosecution function, however, an extreme example can be used to cloak a policy which is

95 McKechnie, 1996, p. 16.

unsustainable in less extreme cases. Median cases may permit median solutions. Hence, for further example, where the conduct of the suspect for whatever reason did not amount to an offence, then that reason could be offered to the interested parties.

3.6.6 PROSECUTION POLICY

The development of prosecution policy and its publication are essential tools which render a limited degree of accountability. Equally, a written prosecution policy is a cornerstone of independence, because independence is reinforced if the decision maker is able to justify a decision in accordance with previously published material.

Prosecution policies which are in the public domain enhance public confidence in the prosecution function, provide a degree of explanatory accountability and bolster the independence of the relevant agency. We suggest that the more comprehensive they are, the greater will be the return to the agency in each of the indicated terms – public confidence, accountability and independence. Published prosecution policies range from the relatively circumspect such as that of the CPS,⁹⁶ to the exceptionally detailed.⁹⁷

A constant theme in this Report is the importance of transparency and the provision of information. As other commentators have also emphasised, the greatest public concern arises where discretionary powers are exercised ‘behind closed doors’ and where there is inadequate information on the process, its results and the factors which have influenced them. To date the attitude of some prosecution agencies has been to presume that material should be restricted unless a case is made to the contrary. In respect of prosecution policy and the relationship of the prosecution with other agencies, we believe that a reversed emphasis should be adopted – a shift to a mindset of openness and transparency. Thereby it should be presumed that information is the property of the community which the agency serves, and that the community should be denied access to that information only where good reason is shown. To our minds, few ‘good reasons’ can be identified, and the trend in other jurisdictions has been to this effect also.⁹⁸ Indeed, the United Nations *Guidelines on the Role of Prosecutors* in part provide:

96 See the *Code for Crown Prosecutors* (www.cps.gov.uk).

97 See for example the Deskbook of the Federal Prosecution Service of Canada (formerly known as the Crown Counsel Policy Manual). The Deskbook is at the time of this Report being updated, but is available from the website of the Attorney General of Canada (www.canada.justice.gc.ca).

98 Consider for example recommendation 8 of the Canadian Law Reform Commission in its Working Paper 62 (1990), which provides that all directives on policy from the Director to prosecutors should be in writing and should be published as an appendix to the Director’s annual report. The DPP for New South Wales is already placed under such an obligation (*Director of Public Prosecutions Act 1986*, section 15).

In countries where prosecutors are vested with discretionary functions, the law or *published rules or regulations* shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.⁹⁹

It is commonly said that policies which hold that prosecutions for certain offences will not be taken in certain prescribed factual circumstances can not be revealed publicly. This is said to be because to do so would be tantamount to offering a *carte blanche* to prospective offenders who might commit the relevant offence in the confidence that there is a policy against prosecuting them. Such comment overlooks the fact that such policies (if they exist) are likely to be illegal in themselves (in that they fetter the prosecutor's discretion and have as their effect a policy decision not to enforce certain laws). They therefore should not receive the protection of official secrecy. At the level of high principle, it is not for prosecutors by the introduction of a policy to negate the laws of Parliament, and still less is it for prosecutors having done so to hide that fact from the community which they serve. Each case must be considered on its individual merits – that is the minimum expectation which the law requires of any official who is invested with discretionary powers.

While it can be countered that such policies of non-prosecution would enhance consistency in decision-making and thus would improve the equity and fairness of the work of the agency, there are other ways of achieving those objectives but which do not transgress the important principles just mentioned. The issues of equity and fairness will be discussed in Chapter 4.

A further argument often raised against the publication of policies (and for that matter, against the giving of reasons for a decision), is that it would lead to more frequent judicial reviews of prosecution decisions. Implicit in this suggestion is that such a development would be a bad thing. We do not agree. The courts have demonstrated themselves to be capable of sifting applications and quickly distinguishing the meritorious and the unmeritorious. Equally, the courts have consistently demonstrated themselves to be capable of preventing the abuse of their processes by vexatious or ill-founded litigation, and as has been seen, to be relatively intolerant of applications of judicial review of prosecutors' discretions. To carve out one area of public administration, namely the prosecution function, and say as a matter of policy that the courts will not exercise a supervisory jurisdiction to ensure that stated policies are being properly applied, sits ill with the proper role of judicial review of public discretionary powers. Even more objectionable is the suggestion that prosecution policies should be kept secret so as to frustrate the further evolution of such a judicial review jurisdiction.

The production of annual or other periodic reports should also be noted in this context, in that they provide to the community up-to-date factual, legal and statistical information on the prosecution function. Although they can be of limited utility for some purposes – for

⁹⁹ Note 172 above, paragraph 17 (emphasis added).

example they are of little value as vehicles for the giving of reasons for decisions in individual cases – nonetheless the statistical and more general legal information which annual reports contain adds considerable value to the work of the agency in question. At risk of excess repetition, we emphasise again that the provision by public authorities of information to the community has come to be recognised as one of the most significant features of democratic societies in the late twentieth century. Prosecution agencies can not be immune from this trend towards increased transparency and openness.

3.6.7 THE POLICE

Prosecution agencies in common law jurisdictions have a close working relationship with the relevant police service. As noted above, prosecutors will often give reasons to the investigator when a decision is taken not to prosecute or to prosecute on lesser charges than those recommended by the investigator. This relationship is regarded by some prosecutors as a variety of ‘explanatory’ accountability. The previous DPP in the Republic of Ireland, for example, has described this as a ‘form of very real accountability’. He said:

The Director’s Office constantly interacts, very many thousands of times every year, with the Garda Síochána... Any failure on its part to do its duty conscientiously and effectively would quickly produce a strong and understandable reaction from the Garda Síochána...which would have reverberations in government and other quarters, including the media...¹⁰⁰

The relationship between reporting agencies, typically the police, and the prosecution agency does afford a degree of accountability on the part of both agencies, each to the other. While the prosecutor will advise the investigator of the decisions associated with the relevant file and the reasons for them, so also the investigator must answer at the pre-trial stage for his or her actions and inactions in the investigation. For example, the prosecutor might decide that a prosecution can not be brought on the ground of evidential insufficiency, because the actions of the investigator will result in pivotal evidence being excluded at trial. Issues such as this point up the necessity of constant explanation to police of matters of law, evidence and prosecution policy.

3.6.8 VICTIMS

With, until recently, the exception of the Republic of Ireland, victims in common law

100 Office of the DPP, 1998, p. 23, paragraph 9.2.

jurisdictions are generally entitled to have the prosecutor's decision explained to them;¹⁰¹ the practice in most jurisdictions is merely that – a practice as distinct from a statutory procedure. It has been seen that some jurisdictions go further and provide reasons to victims and to the media.¹⁰²

We also note the increasing frequency with which prosecution agencies are being obliged under statute and in extra-statutory codes and charters to keep victims apprised of developments in the case in which they or their interests have allegedly been harmed.¹⁰³

Both of these facets of the prosecution which touch on the roles of victims provide a degree of 'explanatory' accountability.

3.6.9 THE GENERAL PUBLIC

As discussed above,¹⁰⁴ accountability can be considered as subordinate and obedient, or as explanatory and co-operative. Accountability in the latter form has been characterised in the Glidewell Report as 'answerability', and it was endorsed in that 1998 Report as an adjunct to political accountability of the orthodox, subordinate and obedient, variety. Explanatory and co-operative accountability, as was noted by the 1981 Royal Commission on Criminal Procedure, provides an avenue for challenge, for the acquiring of reasoned explanation and for advice and recommendation. Glidewell comments:

Such a system is not accountability at all within a proper definition of that term but provides what Philips referred to as answerability. It would be a conduit for a two-way exchange of views which would inform the general public and keep the CPS abreast of public opinion, its fears and its priorities, whilst at the same time protecting the professional integrity and independence of the CPS. We sought the most appropriate word, believing that 'accountable' was altogether too prescriptive and that 'responsiveness' did not indicate exactly what we had in mind. We consider that 'answerability' comes as near as may be to what we consider should be the posture of the CPS.¹⁰⁵

101 For a recent restatement of the policy of the DPP for the Republic of Ireland against the giving of reasons, see Office of the DPP, 1998, paragraph 8.1 and Appendix 7. The Victims' Charter published in 1999, however, provides that reasons for non-prosecution are given to the investigating police officers, that the DPP 'will have regard to any views expressed by [the victim] when making decisions in specific cases whether or not to prosecute' and that the DPP 'will examine a request for a review of the decision and in appropriate cases carry out an independent internal review' (Department of Justice, Equality and Law Reform, 1999, p. 20).

102 See the discussion above in paragraph 3.6.1 *et seq.*

103 Consider the provisions of the UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, which require in part that judicial and administrative processes should inform victims of the timing and progress of the proceedings and the disposition of their cases.*

104 See paragraph 3.1.

105 Glidewell, 1998, p. 205, paragraph 52.

In our view, to the features of answerability identified by the Phillip's Royal Commission – namely explanatory and co-operative – could be added 'consultative'.

The Glidewell Report recognised the necessity for a less withdrawn stance on the part of the CPS in England and Wales. The Report says in part 'that the CPS, occupying as it does a pivotal role in the criminal justice system, should be exposed to the public to a greater extent than hitherto, provided that such exposure does not compromise its essential independence.'¹⁰⁶

In this vein, it is striking that in few of the many jurisdictions which profess to exercise prosecutorial discretion at least in part based on 'the public interest' (of which Northern Ireland is one), is provision made for consulting 'the public' as to where its interests lie. Knowledge of the 'public interest' is apparently something which prosecutors 'have', and little concern has hitherto been directed to how they have acquired it. In reality, prosecutors are no different from any other members of society, and their 'objectivity' is in reality conditioned by their subjective experiences, cultural identity, gender, age, sexual orientation and so forth. We suggest that the time is overdue for Northern Ireland prosecutors to assume a greater confidence in their independence, and to engage with the community which they serve regarding the needs of the community and its members.

In past years, some would have regarded the suggestion of such public consultation as heretical and unworkable. This is symptomatic of a view which has prevailed with some prosecutors in western jurisdictions, often a pragmatic stance adopted in the face of threats of violence from the community or fears of political bullying in an era of a fledgling office. Hence, the traditional attitude of a public prosecutor, particularly in Northern Ireland and the Republic of Ireland, has been to avoid a public profile, sometimes regarding their obligation to be independent as requiring that they maintain a considerable distance from the public and the public eye. It was seen in Chapter 2 that this is considerably removed from the attitude adopted by prosecutors in the USA.¹⁰⁷

A remarkable seachange, however, may be heralded by proposals in the 1998 Glidewell Report on the CPS. In summary, Glidewell recommends that the 'community strategy groups' which are to be established in England and Wales under the Crime and Disorder Bill should include prosecution policy within their discussions, and that the CPS should 'be aware of reasoned debate in these groups, [should] give and receive views and allow itself to be properly influenced (and, in turn, exert its own influence) within that forum.'¹⁰⁸ Importantly, however, Glidewell notes the danger of compromising prosecutorial independence if the CPS were to be represented on the *committee* of such groups, because of the resultant danger that the members of the Service might be asked or required to vote on individual issues or

106 *Ibid.*, p. 204, paragraph 49.

107 See paragraph 2.12.2 above

108 *Ibid.*, p. 207, paragraph 55.

‘sign-up’ to plans of action. Involvement and integration of that level, however, is beyond the needs of a relationship which is explanatory, co-operative and consultative, and which related only to the issue of prosecution policy.

A suggestion that the public be canvassed as to its views on ‘the public interest’ perhaps will alarm those who are comfortable with the traditional prosecutor’s attitude to public exposure. Public consultation, however, could be a valuable mechanism for taking account of the views of a community in formulating prosecution and wider criminal justice responses to evolving needs. While prosecutors rightly make much of their independence, they should never forget that there is at times only a subtle difference between ‘objectivity’ and arrogance.

The parties to the Agreement identified as one of four aims of the criminal justice system that it ‘be responsive to the community’s concerns, and [encourage] community involvement where appropriate.’ Local or regional criminal justice consultative groups, at which DPP personnel would attend and in the deliberations of which they would participate, would seem an especially appropriate method of satisfying this particular imperative. For the reasons cited in the Glidewell Report and summarised above, we agree that it would not be appropriate for the DPP to be represented on the committee of such organisations.¹⁰⁹

In addition to the benefits which would flow from local answerability, we are impressed with the increased transparency which such local consultative arrangements would bring to the prosecution process and specifically to prosecution decision-making.

3.6.10 INTERNAL STRUCTURES

The structure of prosecution organisations must also provide for internal accountability in the exercise of prosecutorial powers. These are straightforward concerns of appropriate delegation, risk management and quality assurance. For example, arrangements in some jurisdictions include internal requirements to report various decisions to the Director.¹¹⁰ Other arrangements include a formal system of internal appeal, typically applying where an interested party who is aggrieved by a decision not to prosecute, can trigger an internal review of the decision by a new prosecutor of more senior rank than the original decision-maker(s).

Some of the arrangements in the Australian State of Victoria are novel. There are three stages to the relevant process of accountability:

109 A contrast can be drawn between such community consultative groups – with which a relationship of explanation and co-operation would be appropriate for prosecutors but membership by prosecutors inappropriate – and diversion committees – of which we believe prosecutors can properly be members – to the extent that in diversion committees the ultimate decision on prosecution or non-prosecution or diversion should be that of the prosecutor, albeit on the basis of consultations with experts and other interested parties.

110 Australian Commonwealth DPP.

- Initially, the *Public Prosecutions Act* 1994 identifies certain ‘special decisions’. That category includes decisions relating to the bringing of the equivalent of voluntary bills of indictment, the entry of a nolle prosequi after a committal for trial, the entry of a nolle prosequi at any stage of proceedings if against the advice of senior prosecutors, the formulation of DPP’s guidelines on prosecution policy, and decisions ‘of any other kind that, in the opinion of the Director, should be treated as a special decision’.¹¹¹
- The Act then requires that ‘before making a special decision, the Director must convene a Director’s Committee to consider the decision.’¹¹² A Director’s Committee must consist of the DPP, the Chief Crown Prosecutor and either counsel engaged in the trial or the next most senior Crown Prosecutor.¹¹³ The function of a Director’s Committee is to offer advice to the Director on the special decision in relation to which it is convened.
- The decision remains that of the Director, but if he is in the minority, ie if his decision is contrary to those of both of the other members of the Director’s Committee, then the Director is required to furnish the Attorney General with details of the decision and his reasons. That explanation is then tabled in Parliament, although its publication by that means may be suspended if the DPP informs the Attorney General in writing that in the opinion of the Director the publication of the information would prejudice the proceedings.¹¹⁴

It would also seem that organisation structures should provide for review of complaints against prosecutors, and that an ultimate review should be possible by a body such as an inspectorate (see below) or the Human Rights Commission. The United Nations *Guidelines on the Role of Prosecutors* provide in part that ‘Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. *The decision shall be subject to independent review.*’¹¹⁵

Principles of criminal justice management also highlight that the internal structure of a prosecution organisation can enhance its accountability. A self-contained team approach to prosecution, such as that which is employed in Western Australia, lends itself readily to checks of output against pre-ordained criteria. Small, dedicated units with responsibility for a smaller number of files during the entire time that each file spends in the organisation can be more easily held accountable for the conduct of a given aspect of file-work, than can people working on a larger number of files but in a ‘segmented’ fashion.

111 *Public Prosecution Act 1994*, section 3.

112 *Ibid*, section 23(1).

113 *Ibid*, section 23(2).

114 *Ibid*, section 23(6) and (7).

115 Note 39 above, paragraph 21 (emphasis added).

The Glidewell Report recommended the development of such small working units within each CPS area in England and Wales. The recommendation was that CJUs and Trial Units be developed as working groups with specific responsibilities for prosecution. At the time of writing these proposals are being carried forward and are at ministerial level. The proposed CJU has become a joint venture with police sharing responsibility with the CPS for its operation. We believe that units like this are more easily held accountable for their decisions than are individuals in less structured work practices.

3.6.11 INSPECTORATES

Inspectorates are a most valuable method of securing accountability and now are an established feature of public administration. They have since 1996 contributed to the accountability, equity-monitoring and quality-assurance systems in the CPS, and it has recently been announced that an independent inspectorate will be established to investigate alleged miscarriages of justice and accusations of incompetence in the English prosecution service.¹¹⁶ The topic of inspectorates will be considered again in Chapter 4 in the context of their role in ensuring equity and fairness in prosecutions.

The principal justifications for an inspectorate are to further assure public confidence in the integrity of the systems and which are employed and the decisions which are reached, to provide a check on the performance of those whose work is being inspected, to strive towards optimal organisational efficiency and effectiveness, and to play a vibrant role in the promulgation of best practice in the organisation.¹¹⁷

Issues which typically arise in the context of inspectorates include their lines of reporting, whether they should be internal to the organisation being inspected, or external, and whether they should have a majority of 'lay' members, or a minority, or none.

Internal inspectorates act in much the same way as internal auditors act in corporations. In theory, their responsibilities and objectivity mirrors those of the external variety, although it seems unlikely that an internal inspectorate can in fact bring to an inquiry the same degree of objectivity as would a body composed in whole or in large part of external personnel. A suggested advantage of an internal inspectorate is that the personnel whose work is being inspected are more likely to be open and frank with an internal review, the results of which will not generally be broadcast outside their organisation, than they would be with an external review.

External inspectorates generally are created as a separate entity or as a unit within some

116 See *New Law Journal*, p. 1718, 19 November 1999.

117 See for example Glidewell, 1998, p. 200, paragraph 28.

existing over-sighting body.¹¹⁸ By way of example, the Criminal Justice Commission in Queensland has a number of divisions for various specialist inspection and investigation functions. Although to date it has not done so, nonetheless it is empowered under the *Criminal Justice Act* to investigate what amounts to negligence on the part of Crown employees. DPP prosecutors would come within this category.

In respect of the relative advantages and disadvantages to external and internal inspectorates, the DPP for Queensland has written:

If the objective is to have a thorough, unbiased and worthwhile assessment carried out of the professional work of those involved in working up cases and prosecuting them, and of the sound exercise of discretions according to guidelines laid down by the Director of Public Prosecutions then it seems to me that the assessments must be carried out by an external, rather than an internal inspectorate. I say this for two reasons. The first is that there is always a temptation to protect staff and a culture will develop that one really does not have to worry about one's performance standards or ethics. The second is that the very fact that the inspectorate is external would engender in those whose work is to be reviewed a very strong feeling that they must constantly measure up in every respect. 'Good enough' will not be 'good enough'.¹¹⁹

The Glidewell Report considered the options for internal and external inspectorates for the CPS, and resolved on a blend of the features of both. What has been proposed is an internal inspectorate with an independent Chair and a small number of independent lay members, which would report internally to the DPP, but with the annual report of the Chair containing an overview of the work of the inspectorate and its findings over the preceding year and being published as a public document.

3.7 Conclusion

The turmoil of recent decades in Northern Ireland has produced a criminal prosecution process which, whatever its quality, does not provide the degree of transparency and exposure to public scrutiny which has come to be expected in the developed world. As an example, the DPP for Northern Ireland does not publish an annual report. The Belfast Agreement and the innovations which will flow from its implementation offer the Northern Ireland prosecution agencies a valuable opportunity to increase the transparency of their work and the public profile which they adopt. Above all, however, thought should be given to the natural relationship between independence and accountability. In that vein, it should

¹¹⁸ The Police Ombudsman for Northern Ireland could, for example, be recast as a legal ombudsman with divisions for a variety of functions including the investigation of complaints against police and case auditor of the DPP. A role could also be developed for the Human Rights Commission in this and related capacities.

¹¹⁹ Correspondence with the authors.

also be appreciated that the greater the requirements of accountability to which a public officer is subject, the greater the independence of action which the community will tolerate in respect of that officer. Conversely, the lesser the degree of accountability, the lesser will be the community's tolerance of independent action.

Enhanced accountability will to a greater or lesser extent achieve the overall objective of promoting confidence in the system of criminal justice and will as a by-product foster greater consistency in the standards and criteria applied in decision-making. It is frequently only when the possibility of oversight by a review authority looms that the mind of a decision-maker is concentrated on integrity in the decision-making process and, significantly, on uniformity in the application of policy. Even the controversial title of a 1987 UK Government pamphlet betrays this sometimes unwelcome incentive – *The Judge Over Your Shoulder*. Significantly, greater accountability will reinforce community confidence in the independence of prosecutors. Once that considerable leap of faith is taken and cultures of restricted information evolve into more open formats, the situation becomes one of 'win-win' for the agency and the community.

It seems that whatever the justifications for prosecutors' reticence to feature in the public eye in past decades, a new climate of explanation, co-operation and consultation is both possible and necessary.

4 Equity and Fairness

4.1 Introduction

Our approach in this chapter is to identify objectives for a criminal prosecution system which is both fair and equitable, to explore the rationale for striving towards those goals amongst others, and then to consider the mechanisms which might be employed to achieve the identified objectives.

While the interwoven issues of equity and fairness have been dealt with throughout Chapter 2 and at points in Chapter 3, we isolate some themes in this portion of our Report and consider each in greater depth. This, however, is a relatively short chapter, because there is much overlap with the preceding discussion of accountability – it will be seen that measures which secure accountability go a long way to also securing systemic equity and fairness. Brevity, however, should not be misconstrued as a judgement on the relative significance of these issues in the criminal justice process. Rather, we were conscious of the risk of undue repetition of central themes.

As preliminary points, we emphasise that the equity and fairness to which we refer in the context of this Report encompasses equity and fairness to all who come into contact with the criminal justice process, including defendants, victims and witnesses. Further, we emphasise that attempts to ensure procedural equity and fairness will be largely irrelevant unless those procedures are built upon a foundation of just substantive law and rules of evidence.

4.2 Criteria for a Criminal Prosecution System

We have avoided semantic examination of the concepts of ‘equity’ and ‘fairness’ and suggest that there would be broad agreement on their general import. To our minds, a system of public prosecutions should strive:¹

- To be efficient,

¹ In formulating these criteria we have drawn upon the aims of the criminal justice system identified in the Belfast Agreement – see paragraph 1.1 above.

- To be effective,
- To be fair to each person whose interests are affected by a decision,
- To be equitable as between all whose interests are affected by the agency's decision,
- To be independent,
- To preserve and enhance public confidence,
- To be consistent in its decisions,
- To be accountable, and
- To apply open, transparent and documented procedures.

In addition to being a constitutional requirement and an imperative of international agreements to which the UK is party, the assurance of a fair and equitable system of public prosecution enhances the dignity of people, is a requirement of the rule of law and contributes to the legitimacy of the state.

An initial issue is whether the concepts of equity and fairness can be judged objectively or whether they may be judged only subjectively. We believe that although the 'fairness' of a decision is conditioned by and operates in the context of intuitive (subjective) judgement, nonetheless the discretion of a prosecutor must be guided, and on occasion directed, by certain minimum standards and transferable criteria. Those criteria will in turn be informed by a number of sources and high principles, including:

- The substantive law,
- The rule of law,
- Human rights norms,²
- The prevailing social and political ideology of the state (including crime reduction policy),
- Cultural expectations, and
- Economic pragmatism.

The purpose of the objective prosecution criteria will be to translate these high and at times abstract principles into more tangible principles.

At the same time, the identified criteria should be translated into a charter of values and objectives against which the process can be gauged. We note the step taken in the CJRG's 1998 Consultation Paper³ to translate the aspirational nature of the draft aims and objectives

2 Such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

3 Criminal Justice Review Group *Guiding Principles, Values and Objectives in the Criminal Justice System*, Belfast: Northern Ireland Office, 1998, Chapter 2.

of the criminal justice system into tangible and measurable objectives, and regard this as an important step at the level of system-policy, parallel to and complementing the measurable objectives of casework criteria presently being discussed in this Report.

4.3 The Rationale of the Criteria

We rationalise the identified objectives of a public prosecutions system as follows:

4.3.1 EFFICIENCY

Efficiency is relevant to the fairness and equity of a prosecution system. For example, an inefficient system would leave defendants immersed in the criminal justice system for longer than would a more efficient system, and would leave victims' concerns unresolved for longer than would be the case with a more efficient system.

4.3.2 EFFECTIVENESS

Where effectiveness is measured by reference to benchmark objective standards which draw upon variables such as promptness of decision, conviction rate, the percentage of cases where advice is against prosecution, remand delays, and so forth, then the relative fairness and equity of a prosecution system correlate to its relative effectiveness – the greater the system's effectiveness, the greater will be its fairness and equity.

4.3.3 FAIRNESS TO EACH PERSON WHOSE INTERESTS ARE AFFECTED BY A DECISION

It is fundamental to the legitimacy of a system of public prosecutions that it deal fairly with each person in each of the constituencies which it serves – victims, defendants, witnesses, investigators, the media and so forth.

4.3.4 EQUITY AS BETWEEN ALL WHOSE INTERESTS ARE AFFECTED BY A DECISION

It is equally important that a system of public prosecutions operate equitably across all the cases with which it deals and gives the proper weight and consideration to the often

competing interests which are involved. As we have emphasised in Chapter 3, we regard the public interest as the paramount concern, but the interests of all those with a legitimate interest in the matter must be accorded respect and the appropriate degree of influence.

4.3.5 INDEPENDENCE

For the reasons discussed in Chapter 3, we believe that the independence of the prosecutor provides in part an important assurance of the objectivity which he or she can deploy. A prosecutor who lacks independence may operate to an ulterior agenda of his or her master, resulting in partial or biased judgements in a case. Where impartiality is not assured, fairness and equity will be inevitable casualties.

4.3.6 PRESERVATION AND ENHANCEMENT OF PUBLIC CONFIDENCE

Perhaps currently more so in Northern Ireland than in other jurisdictions, there is a need not merely that prosecutions be fair and equitable in fact, but that they be obviously so. To our minds this is crucial to the preservation and enhancement of public confidence in the criminal justice system which in turn will impact upon the view of people regarding the legitimacy of the State.

4.3.7 CONSISTENCY IN DECISION-MAKING

It is a cardinal principle of good public administration that all persons who are in a similar position should be treated similarly.⁴

This observation is no less true of criminal prosecution than it is of social welfare entitlement. Consistency in decision-making underlines the equitable treatment of cases one as compared to another.

4.3.8 ACCOUNTABILITY

The accountability of a criminal prosecution system directly impacts on its equity and fairness because the mechanisms for accountability provide the avenues for challenge to what are suspected to be aberrational decisions and for structured monitoring of the work of prosecutors. Accountability enhances equity and fairness in prosecutions systems because procedures exist to identify and remedy those decisions which are unfair or inequitable. It

⁴ Lord Donaldson MR in *R v Hertfordshire CC, ex parte Cheung* (1986) Times 4 April.

should be noted that the likelihood of detecting such aberrations directly correlates to the effectiveness of the accountability in the given case – the weaker the accountability mechanisms, the less likely are aberrational decisions to be detected.

4.3.9 APPLICATION OF OPEN, TRANSPARENT AND DOCUMENTED PROCEDURES

‘Unwritten rules’ are a threat to the fair and equitable administration of any public service. ‘Secret rules’ can be equally harmful, while those which are both secret and unwritten are reminiscent of Orwell’s *Animal Farm*. Unwritten rules militate against certainty, and certainty of the bases upon which decisions are to be made is key to the consistent application of policy. Secret rules both undermine public confidence in their application, and the effectiveness of accountability procedures. Fairness and equity therefore require that rules and guidelines be certain, and that they be known and accessible. Equally, the processes by which decisions are made and the influences which decision-makers absorb, must be transparent.

4.4 Mechanisms Employed to Achieve Equity and Fairness

In this section, we consider the processes and relationships which can to differing extents contribute to the fairness and the equity of a system of public prosecutions. We have grouped those mechanisms within the following thematic categories:

- The Optics of Fairness and Equity,
- Information – Provision and Analysis,
- Recruitment, Education and Training,
- Efficiency and Effectiveness,
- Regulatory Roles, and
- Procedural Safeguards.

Each will now be considered in turn.

4.4.1 THE OPTICS OF EQUITY AND FAIRNESS

As mentioned above, there is a particular need in Northern Ireland for visibility for measures to assure the community of the equity and fairness of the system of prosecutions. One model discussed in Chapter 3 would be especially useful in this regard, namely that of local answerability of prosecutors in a forum such as the expanded role for the community strategy groups which is proposed in the Glidewell Report on the CPS.⁵

4.4.2 INFORMATION – PROVISION AND ANALYSIS

Information empowers people, a point which we stressed in Chapter 3. It plays a crucial role in ensuring equity and fairness. It does so in two principal manners:

4.4.2.1 The Provision of Information

The provision of information to users of and commentators on the criminal prosecution system, such as suspects and defendants, victims, witnesses and the media, contributes to equity and fairness in the system. It does so by providing the basis for the exercise by the interested party of his or her rights, and the basis for a challenge in the event that issue is taken with a particular decision. Information, to that extent, is the currency of accountability. The provision of information can take a number of forms, including:

- the provision of reasons for a decision,
- the provision of relevant information, for example hearing dates, to the interested parties in a particular case such as defendants, victims and witnesses,
- the provision to relevant parties of information relating to an individual case by mechanisms such as disclosure,
- the provision of general information on the rights and entitlements of interested parties such as defendants, victims and witnesses, on the basis that rights are academic unless they are known to the beneficiary,⁶
- the provision of general explanatory material on the process itself,

5 Glidewell, 1998, p. 207, paragraph 55.

6 For example, the *Freedom of Information Act 1982* in the Commonwealth of Australia requires the DPP to publish particulars of:

- The organisation and functions of the Office
- The manner in which a person may make representations
- Documents made available to the public
- How to access those documents

- the provision of information on the mechanics of the process such as the publication of prosecution codes and guidelines,⁷
- the provision of information relating to the agency's review of its own performance by way of an annual report, and
- the provision of information relating to any external assessment of the agency's performance, such as by way of the report of an inspectorate.

4.4.2.2 The Analysis of Information

Information is also highly relevant to the assurance of equity and fairness in prosecutions when that information is analysed in a scientific manner. For present purposes, that analysis would most usefully be of the composition of the staff of prosecution agencies (for example, sex, sexual orientation, religious or political opinion and so forth), and of casework decisions. Statistical analysis can reveal underlying patterns in decision-making (be that decision-making in the fields of recruitment or casework) which may conflict with the guiding criteria of the agency. Harmful undercurrents in decision-making may become evident if a pattern is identified and, also in scientific fashion, all other reasonable explanations are excluded.⁸ Such analysis can also be proactive, as for example the Racist Incident Monitoring Scheme which is operated in the CPS.

4.4.3 RECRUITMENT, EDUCATION AND TRAINING

As to recruitment, the United Nations *Guidelines on the Role of Prosecutors*, for example, in part oblige states to ensure that:

Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;...⁹

It seems to us, however, that in the context of Northern Ireland it would be inappropriate to require British nationality as a qualification for appointment as a prosecutor.¹⁰

7 As quoted in Chapter 3, the United Nations Guidelines on the Role of Prosecutors in part provide: In countries where prosecutors are vested with discretionary functions, the law or *published rules or regulations* shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution (note above, paragraph 17 (1990) (emphasis added)).

8 Consider for example B Mhlanga *Race and Crown Prosecution Service Decisions* London: TSO, 1999.

9 UN Doc A/CONF. 144/28/Rev. 1 at 189, 1990, paragraph 2(a).

10 In this vein, see *Re Colgan's Application* [1996] NI 24.

Prosecutors should undergo regular training in human rights. Needless to say, as an element of on-going education and training, prosecutors should also have a comprehensive understanding of the procedures and policies applied in their agencies.

The United Nations *Guidelines on the Role of Prosecutors* in part oblige states to ensure that:

Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.¹¹

Continual ethical training is essential to the enduring recognition of their role by prosecutors. They must at all times be just as keenly aware of their ethical responsibilities and their role as ‘ministers of justice’, as they are of the latest developments in substantive law, procedure and evidence. Such education and training will help to nurture a culture of respect for the rights of all parties whose interests are affected by the decisions of prosecutors.

4.4.4 EFFICIENCY AND EFFECTIVENESS

We note the warning of Corns regarding the impact which cut-backs in prosecution funding have on the quality of justice and on the public perception of system equity and fairness. That warning is worth quoting at length:

There are ... limits to ‘efficiency drives’ in the case of the DPP. Prosecution decision-making and structures lie at the very foundation of the criminal justice system and if that decision-making or structures operate, or are perceived to be operating, unfairly or unjustly, then the integrity and legitimacy of the prosecution sector and the criminal justice system as a whole can be threatened...

The role of the prosecutor is not to represent victims, police, or any other specific group but rather, on behalf of the community to conduct appropriate criminal ... proceedings in a fair and impartial manner. The expectation, and indeed, requirement, that the DPP acts on behalf of the community and ‘public interest’ in the name of ‘justice’ allows little, if any, room for financial considerations to drive policies and practices. This is not to say that the DPP should not act efficiently but rather, that seeking to arrive at ‘just’ results and ‘just’ processes is inherently more valuable than efficiency considerations. There is a qualitative difference between prosecutorial decision-making and other aspects of public administration in terms of cost-efficiency considerations. The qualitative difference is that prosecution decisions go to the heart of a liberal democratic society. On the one hand, the public prosecutor stands between the State and the ordinary citizen to protect individuals from unnecessary or

11 Note 9 above, paragraph 2(b).

inappropriate criminal proceedings. All criminal prosecutions can permanently affect the lives of citizens. On the other hand the community expects that wrongdoers will, apart from exceptional circumstances, be prosecuted. To not prosecute undermines the Rule of Law and the degree of protection the community reasonably expects of the State; in order to maintain a free and democratic society. It is suggested these are fundamental considerations which affect the very nature of contemporary society.¹²

In view of the importance of efficiency in the achievement of the goal of quality prosecution decision-making, information technology is now an essential tool in the delivery of a public prosecution service which attains required standards of equity and fairness. Also significant is the issue of inter-agency information technology system compatibility, and experience in all jurisdictions has highlighted the importance of co-operation in system selection, access and content.¹³

4.4.5 REGULATORY ROLES

Equity and fairness in any administrative system can benefit from structured regulation. In the context of a system of public prosecution, however, particular concerns arise in the context of prosecutorial independence, and regulatory measures must accommodate that principle, primarily by requiring of the prosecution agency only explanatory accountability, and through transparency in the dealings between the parties to the relationship.

To our minds, regulatory influences might be grouped within two broad categories. These are regulation by the prosecution agency itself, and external regulation.

12 Corns, 1993, pp. 11 and 13 (footnotes omitted).

13 As we enter the 21st century it would seem inappropriate to consider anything less than a fully integrated justice system. The Integrated Justice Project (IJP) presently being developed for the Province of Ontario in Canada would seem to be an ideal model. Of particular relevance to this study and specific to this chapter is the assertion that the IJP 'will better support fair and consistent treatment of people, including efficient management of their cases' (Background document, 1999 p. 5).

The vision of the Integrated Justice Project (IJP) is to create a modern, effective and accessible justice system. Across the province, information will be entered once, and then will become available to all those who need it, when they need it, wherever they are.

The IJP is a joint initiative among the ministries of the Attorney General, the Solicitor General and Correctional Services and an alliance of four Canadian companies. It involves the ministries' 22,000 employees across Ontario, as well as municipal police forces, judges, private lawyers and the general public ('Background' document, 1999, p. 1).

The project, which began in 1997, is said to be the largest technology-oriented justice project in North America. According to the 'Timelines' document the project is expected to be operational by the end of 2001.

It is also worth noting that Ontario occupies an area greater than France and Spain combined and has justice related employees at 825 locations. By comparison, the Northern Ireland jurisdiction would seem to represent far less of a logistical challenge for the development of such a system whilst having at least as much to gain.

Full details of the IJP can be found at www.integratedjustice.gov.on.ca/00_home.html and associated sites.

4.4.5.1 Regulation by the Prosecution Agency Itself

This would involve, for example, the internal control of delegated authority, the co-ordination of prosecution decision-making to ensure consistency, and the implementation of procedures which require internal reporting to the Director or another senior prosecutor.

The control of delegated authority, which should be a feature of risk-management in any organisation, must be reconciled with internal independence. To our minds, because the power of each individual prosecutor derives from the DPP, therefore the DPP is entitled to regulate the exercise of discretion by prosecutors within his or her office, on the basis that the DPP in doing so nominally is regulating his or her own discretion. As a logical consequence of that principle, any fettering of discretion which would be unlawful were the DPP to apply it to him or herself will be unlawful if it is sought to be imposed on a prosecutor internally in an organisation.

The prosecution agency might also discharge a regulatory role over external agencies, such as over investigators as was discussed in Chapter 3. This might for example be to ensure the propriety of investigative methods or the sufficiency of admissible evidence at a pre-charge stage.

A further variety of regulatory function which a prosecution agency might typically discharge in respect of an external entity would be the regulation of private prosecutions. DPPs frequently, although not universally,¹⁴ have a power to take over private prosecutions. We believe that it is necessary that a DPP have this power to ensure that arbitrary, vexatious or oppressive prosecutions are not launched by private prosecutors. While the courts in exercise of their power to prevent abuses of their process can stay such prosecutions, that would only be at a point in time after the prosecution has reached a relatively advanced stage and perhaps after it has attracted media or other public interest. We note, however, that the power to take over private prosecutions may conflict with the principles of Council of Europe Recommendation No R (85) 11 on *The Position of the Victim in the Framework of Criminal Law and Procedure*. Nonetheless, we believe that it would be intolerable to have two qualities of justice, depending on whether the prosecutor in any given case is a public prosecutor subject to the ethical standards which we have considered previously and who applies the prosecution criteria transparently agreed for that organisation, or a private prosecutor not so constrained save by judicial oversight in the conduct of a particular trial.

We believe that the public prosecutor, in conjunction with the courts, should play a quality-assurance role in respect of private prosecutions. To do so it would be necessary to ensure that the DPP is alerted to all private prosecutions which are commenced. To that effect, the Law Commission of England and Wales has recommended that the DPP in that jurisdiction be notified automatically of all private prosecutions commenced other than by

14 It has been noted that in the Republic of Ireland, for example, there is no statutory or common law power for the DPP to intervene in a summary prosecution unless that prosecution is commenced in the name of the Director.

organisations or agencies ‘licensed’ by him. It is envisaged that the DPP would license prosecutors who the DPP was satisfied were correctly applying prosecution criteria which the CPS would apply.¹⁵ The infringement of the victim’s right of private prosecution which the DPP’s power to take over represents would, we believe, be compensated by the mechanisms of accountability and appeal which we have discussed at a number of points in this Report. We do not suggest that the right of private prosecution be abolished, but merely that it be better regulated.

4.4.5.2 External Regulation of the Prosecution Agency

In this context we recognise three external agencies or entities, some or all of which in our experience play a regulatory role in respect of public prosecution agencies. These are the courts, inspectorates and attorneys general.

The role of the courts by way of the judicial review jurisdiction is in large part to ensure that discretionary powers are not abused. The United Nations *Guidelines on the Role of Prosecutors*, for example, in part provide that ‘In the performance of their duties, prosecutors shall (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination...’¹⁶ It is to the same concerns that the courts will often turn. A brief consideration of the law on discriminatory prosecution¹⁷ will illustrate this principle.

Traditionally, it was thought that the courts had no interest in alleged policies of selective prosecution.¹⁸ However, prosecutors do not enjoy an unbridled discretion, and in the USA, for example, prosecutorial discretion in individual cases has long been held to be subject to the equal protection component of the Fifth Amendment due process clause, so that a decision to prosecute which is based on an arbitrary classification such as race or religion would be illegal.¹⁹ To succeed in such a claim, however, would require the applicant to discharge an onerous burden of proof, in respect of three elements:

- that other violators similarly situated are generally not prosecuted;
- that the selection of the applicant was ‘intentional or purposeful’; and
- that the selection was pursuant to an ‘arbitrary classification’.²⁰

15 Law Commission Report No 255, *Consents to Prosecution* (www.open.gov.uk/lawcomm/library/lcc255/lc255.pdf) 1998, Part VII.

16 Note 9 above, paragraph 13.

17 See generally Gifford ‘Equal Protection and the Prosecutor’s Charging Decision: Enforcing an Ideal’ 1981 vol 49 *George Washington Law Review* 659.

18 *Arrowsmith v Jenkins* [1963] 2 QB 561.

19 *Armstrong v US* Unreported US Supreme Court, 13 May 1996. See also Ashworth, 1996, p. 253 regarding discriminatory practices and mode of trial.

20 *US v Berios* 501 F 2d 1207 (2d Cir 1974).

However, policies of selective prosecution in the USA are not necessarily illegal in consequence of this principle. The US Supreme Court in *Oyler v Boles*,²¹ for example, distinguished between the constitutionally permissible ‘conscious exercise of some selectivity in enforcement’, and a constitutionally impermissible selection ‘deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’ For example, it therefore would appear to be lawful for the revenue authorities to decide not to prosecute those guilty of tax evasion to a specified total sum of money, but unlawful to adopt a policy of not prosecuting tax-evaders who may happen to be part-time employees, as it is well established that the part-time workforce is predominantly female and such a policy would therefore advantage women and implicitly disadvantage men. Were it to be established, however, that an individual prosecution was motivated by a decision based on the suspect’s race, gender and so forth, and where that factor was objectively irrelevant to the substantive offence, that decision would seem capable of restraint as an abuse of process.

A second regulatory influence on a prosecutor will often be an inspectorate. The principle of inspectorates has been considered in detail in Chapter 3, and we are satisfied that their influence on the delivery of an equitable and fair system of public prosecution can be significant. The key issue to be determined for each jurisdiction which decides to introduce inspectorates to their prosecution agencies is whether that inspectorate would have powers merely to require an explanation, or whether its powers would include a power of review and direction. In that vein and for the reasons explained in Chapter 3, we regard any form of subordinate and obedient accountability – of which review accountability is a variety – as being in direct conflict with the prosecutor’s independence. In view of the small size of the Northern Ireland jurisdiction, however, consideration might be given to an inspectorate as an element of a wider criminal justice agency, or perhaps a role for the Human Rights Commission could be developed. If as is evident in the Glidewell Report there were concerns about the efficiency and cost-effectiveness of an external inspectorate for the CPS, such concerns would be considerably accentuated in the context of Northern Ireland.

The relationship between public prosecutors and attorneys general has been considered in Chapter 3, where it was seen that law officers to different extents in different jurisdictions can require prosecutors to explain decisions to the attorney, and in some jurisdictions, if thought appropriate by the attorney, the prosecutor can be directed to change a decision or in advance of a particular decision can be directed to take a particular attitude.

21 368 US 448 (1962).

4.4.6 PROCEDURAL SAFEGUARDS

Substantive law and procedure can contribute significantly to equity and fairness in a system of criminal prosecutions. The principal manner in which this typically is done is by the stipulation of time limits for the accomplishment of different stages of criminal procedure – it is trite to state that justice delayed is justice denied.

A number of models of time limits schemes exist and might be summarised as follows:

4.4.6.1 Scotland

Scotland utilises a rigid statutory scheme to regulate the overall length of time taken to bring the prosecution to trial, with minimal judicial discretion available and then only in a limited range of scenarios. Scottish law²² places an absolute bar on prosecution where the Crown fails to commence the trial of the accused within the prescribed period of time. The Scottish scheme might be considered to be a blend of both custody time limits and overall time limits.

4.4.6.2 England and Wales

England and Wales operates a flexible statutory scheme which currently relates only to the total length of time for which an accused is remanded in custody, although it applies to both prosecutions on indictment and to summary prosecutions. Time limits may be extended with relative ease as compared to the scheme in Scotland. Statutory provision also exists to regulate the overall length of time which may be taken to process a case, but has not as yet been implemented.

4.4.6.3 Northern Ireland

A relatively flexible administrative, non-statutory time limits scheme exists in Northern Ireland for prosecutions on indictment. In view of its non-statutory nature, the Northern Ireland scheme thus prescribes what is in effect merely an aspirational time limit for the accomplishment of the various stages of criminal procedure. Where no judicial sanction lies for failure to meet the time limits, such administrative schemes can at best be regarded as trial runs for statutory codification, and as valuable managerial quality-control devices. Provision exists for statutory time limits in respect of prosecutions for scheduled offences, but these have not yet been invoked.²³

22 *Criminal Procedure (Scotland) Act 1995*.

23 *Northern Ireland (Emergency Provisions) Act 1996*, section 8.

4.4.6.4 The USA

Almost all US states and the US federal jurisdiction have so-called ‘speedy trial’ statutes a feature of which is a statutory time limits scheme with judicial discretion. Where the prosecution fail to meet the stipulated time limit, ‘such charge against that individual ... shall be dismissed or otherwise dropped.’²⁴

4.5 Conclusion

Having reviewed the objectives of a criminal prosecution system and the mechanisms which might be utilised to achieve those objectives, we have in particular noted that there is a large degree of commonality between the imperatives of accountability and those of equity and fairness.

We now conclude this Report in the following chapter.

²⁴ ‘Speedy Trial Act’ 1974, 18 USC Annotated, chapter 208 (sections 3161 - 3174), section 3162(a)(1).

5 Conclusions

5.1 Introduction

Before we set out our conclusions, we wish to comment on various aspects of our research. When we began this research we had a general knowledge of how various criminal prosecution systems functioned. We did not, however, have an insight into the very many small variations that occurred in otherwise similar systems. It has often been said of complex research topics that the devil is in the detail. This proved to be the case in our project. The consequence is that it is probable that some small variations have remained undetected, or unexplained. To whatever extent this has occurred we do not believe the consequences are significant to our commentary or our findings.

Further, the expressed theory of a criminal justice system and its empirical practice sometimes differ. We are alert to this fact and have endeavoured to take into consideration all substantial features of any system that we have investigated – both the rhetoric and the reality. Finally, in reaching conclusions, we are conscious of the substantial differences in some practices across various systems. In this regard, whilst some systems might contain features which *prima facie* appear highly desirable, such features are sometimes inextricably linked to other less desirable features, or even to whole political structures which would be incompatible with present political arrangements in Northern Ireland. In instances of this nature we have discounted, as impracticable, those features in our final comments.

In the sections which follow, the themes of accountability, independence, equity and fairness often merge. It will be appreciated from the body of this Report that they rarely will be self-contained issues and that an enhancement of one often will generate concurrent gains in respect of another. There has been seen to be a particular correlation between accountability-enhancing measures and those which further assure equity and fairness. Where a point is relevant to more than one issue we highlight that fact, but we do not unnecessarily duplicate the material.

In keeping with our terms of reference, this Report does not make recommendations, but instead makes suggestions for the consideration of the CJRG. This chapter summarises those conclusions and suggestions, reforms which to our minds would contribute to satisfaction of

the previously-identified criteria for a criminal prosecution system.² We have below at each appropriate juncture included a reference to the relevant sections of this Report in which the issue is addressed.

5.2 Preliminary Issues

Initially, we emphasise that there is no one foreign model of criminal prosecution that we examined which would in our opinion satisfy all of the requirements of Northern Ireland society.

It is also appropriate at this introductory point to highlight the fact that we do not suggest a move from an adversarial to an inquisitorial model of criminal justice for Northern Ireland. Such a change would be fundamental and would require change to all facets of criminal procedure and not solely that of the prosecution process. To our minds, the impact of any such change would be at best neutral when measured against our identified criteria, and perhaps negative.

This view has implications for our thoughts on any potential role for investigating magistrates or similar – we do not suggest their introduction.³ There is neither precedent, nor does it strike us that there is necessity, in the British and Irish experience for the judiciary to have any greater role in the oversight of investigations and the gathering of evidence than it currently plays, ie no role beyond the consideration of requests for extensions to periods of detention, bail applications and so forth. If, however, the CJRG is persuaded towards an option along the lines of an investigating magistrate or a *juge d'instruction*, the alternative option of extending to prosecutors a role in overseeing the investigative process seems preferable. We say this in knowing conflict with an option which is canvassed below, namely to ensure a clear distinction between investigator and prosecutor. We nonetheless believe that a powerful and proactive, independent and accountable prosecutor with a formal role in supervising investigations is preferable to any blurring of the distinction between investigator and judge which would result from the introduction of investigating magistrates in an adversarial system of criminal justice.

We also highlight at this preliminary point the crucial importance of the optics of equity and fairness, and indeed accountability and independence also, in respect of public confidence in the prosecution process.⁴

2 See Chapter Four. Those criteria are that the system be efficient, effective, fair to each person whose interests are affected by a decision, equitable as between all whose interests are affected by the agency's decision, independent, preserve and enhance public confidence, consistent in its decisions, be accountable, and apply open, transparent and documented procedures.

3 Sections 3.4.1.3 and 3.4.6 above.

4 Section 4.4.1 above.

5.3 Structural Issues

Four principal issues arise for summation at this point.

5.3.1 'OPPORTUNITY' OR 'LEGALITY' MODEL OF CRIMINAL JUSTICE?

We can see no merit in the Northern Ireland criminal justice system moving from a discretion-driven system (the opportunity model) to a system with minimal prosecutorial discretion (the legality model).⁵

5.3.2 RELATIONSHIP OF THE INVESTIGATIVE AND PROSECUTION FUNCTIONS

A central concern in this Report is the relative powers and roles of prosecutor and investigators. While the CJRG will wish to consider what in its view should be the proper role of the modern public prosecutor in Northern Ireland and whether there should remain a residual power of private prosecution,⁶ we have considered in detail the relationship between the investigative and prosecution elements of criminal procedure.

Within the British and Irish socio-political cultures there is strong evidence that the investigative and prosecution functions should be separate. This suggests that police officers should not prosecute save (perhaps) for minor road traffic infractions, and accordingly we suggest that the CJRG consider the complete removal of the prosecution function from the police in Northern Ireland.⁷ In considering an arrangement which clearly demarcated the complementary functions of investigation and prosecution, we suggest that certain other matters be addressed by the Group. These are the introduction of mandatory pre-charge screening by prosecutors as a recognition that the bringing of a charge is a quasi-judicial act,⁸ and whether the DPP should enjoy an enhanced power to direct the police to undertake further enquiries which power would be intended to be utilised with greater regularity.⁹

In the event that the prosecution function is not removed from the police, it seems essential to us that the DPP's power to require the police to notify all crimes of a variety or within classes to be prescribed by the Director should be preserved and perhaps enhanced. We emphasise, however, that we regard the removal of the prosecution function from the police as the preferable option.

5 Section 1.9.5 above.

6 Sections 1.9.3, 1.9.7 and 3.4.3 above.

7 Section 3.4.1.2 above.

8 Section 3.4.1.3 above.

9 *Ibid.*

5.3.3 PROSECUTION TIME LIMITS

We believe that there is merit in statutory prosecution time limits, in terms of the efficiency of the prosecution function and thereby the fairness of the process.¹⁰

5.3.4 NOMENCLATURE

We believe that the name of any new criminal prosecution organisation in Northern Ireland should reflect the attributes of independence discussed throughout this Report, and that the description ‘Department’ is inappropriate.¹¹ ‘Office’ seems a reasonable alternative, and perhaps the word ‘independent’ might also be included. Inclusion of ‘independent’ in the title of a new prosecution organisation, however, risks offering a hostage to fortune, as it implies that there are other prosecution organisations which are not independent.

5.4 Accountability

The issue of accountability is central to this Report, and the following suggestions are made.

5.4.1 A CHARTER OF VALUES AND OBJECTIVES

We see merit in a charter of values and measurable objectives against which the criminal justice process more widely could be gauged.¹² The draft suggested in the CJRG Consultation Paper¹³ is a commendable first step to translate such aspirational values and objectives as feature in that draft statement, into SMART¹⁴ objectives.

5.4.2 THE PROVISION OF REASONS FOR NON-PROSECUTION

Reasons are given for the discontinuance of prosecutions in a number of jurisdictions including some in Canada and Australia. Those reasons are given to investigators as a matter of routine, but frequently also to victims, the media and, by logical extension, to the general

10 Section 4.4.6 above.

11 Section 3.4.2 above.

12 Section 4.2 above.

13 CJRG, 1998, at pp. 9 and 10.

14 Specific, Measurable, Attainable, Results-oriented and Time-based.

public. This is an issue of particular significance for the Northern Ireland jurisdiction where the lack of explanation for decisions taken has on occasion been a cause of public criticism; similar concerns have been evident in the Republic of Ireland. We suggest that the CJRG consider whether prosecutors be facilitated in the provision of reasons to victims and the media to the extent that anything more than a change of culture and ethos is required. Change may, for example, be required in the civil law to bestow qualified privilege on such communications, ie to regard them as privileged communications, in the absence of proof of bad faith on the part of the prosecutor. However, we expressed our belief in the body of the Report that current civil law affords a satisfactory defence.¹⁵

5.4.3 THE ROLE OF VICTIMS

Separate from the issue of the provision of reasons for non-prosecution, we addressed the role of victims in the criminal prosecution.¹⁶ We note with interest the laws of The Netherlands especially, and increasingly also those of Belgium, France and a number of jurisdictions in the USA,¹⁷ which require prosecutors to keep victims fully apprised of the conduct of the case against their alleged offender. A similar goal is apparent in the Republic of Ireland albeit in a non-statutory context.¹⁸

We suggest that the interests of victims should be important considerations in the exercise of prosecutorial discretions, but should not be conclusive.¹⁹ There may, however, be merit in victims having a formalised right of appeal to a judicial forum or to an external inspectorate where the DPP elects not to prosecute or where a prosecution is discontinued.²⁰

5.4.4 THE PROVISION OF INFORMATION

We have noted that the provision of information on an individual case basis is essential to the effective operation of any procedures for accountability, and that the provision of information at the level of prosecution policy also is essential for accountability, but additionally for the purpose of assuring equity and fairness, in particular to victims, to defendants and to witnesses.²¹ Written documents available through regular publishing facilities or in electronic format are well received in many jurisdictions. We note that in some

15 Sections 3.6.1 and 3.6.5 above.

16 Sections 1.9.3, 1.9.7 and 3.4.3 above.

17 See relevant case studies above.

18 Note 101, Chapter Three.

19 Section 3.4.3 above.

20 Sections 3.6.4, 3.6.8 and 3.6.11 above.

21 Sections 3.6.3, 3.6.6 and 4.4.2 above.

jurisdictions this includes practice and procedure manuals. The Canadian federal model and that of the Australian Commonwealth jurisdiction are good examples.²² We suggest at a number of points that an annual report dealing with organisational policy and performance is a basic prerequisite of any agency discharging public powers.

5.4.5 INSPECTORATES

We have discussed the concepts of internal and external inspectorates and suggest their merits in the context of Northern Ireland.²³ We note, however, that in view of the small size of the Northern Ireland jurisdiction an external inspectorate might more realistically be established as an element of a wider Criminal Justice Ombudsman or of the Human Rights Commission. In any event, we believe that an external inspectorate would give greater public credibility to decision-making within the prosecution process.

For its part, an internal inspectorate within the prosecution organisation would help to ensure that policies are applied consistently and would assist the spread of best practice throughout the organisation.²⁴

5.4.6 COMMUNITY CRIMINAL JUSTICE CONSULTATIVE GROUPS

We suggest the merit of community criminal justice consultative groups, which would not have any role in prosecution decisions in individual cases, but which would at frequent periodic intervals be consulted about community priorities for crime prevention and criminal justice management.²⁵ Such groups, in the membership of which we believe prosecutors should not participate, would be important opportunities for prosecutors to keep in touch with the community which they serve and would help to demystify the functions of the prosecution agency. They would thereby produce a return in terms of policy accountability of the explanatory and co-operative variety, while also enhancing the transparency of the process and improving the quality of the decision which prosecutors would make in the application of the public interest test.

22 See note 97, Chapter Three. see also Commonwealth DPP, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, note 37 above.

23 Sections 3.6.4, 3.6.11 and 4.4.5.2 above.

24 Sections 3.6.11 and 4.4.5.1 above.

25 Section 3.6.9 above.

The political accountability of prosecutors is typically said to present the most challenging issue as regards their independence. There seem to be few exceptions to the practice of a DPP being responsible to an attorney general or equivalent for the due performance of his or her duties.²⁶ This suggests that such an arrangement may remain best practice for Northern Ireland, although we now suggest alternatives. In view of the central importance of this issue to this Report, we consider the matter at length.

To our minds, the first issue to be determined by the Group is the variety or combination of varieties of accountability which is appropriate to each of the categories of ‘individual cases’ and ‘policy’, and then to consider the relationships within which that accountability should operate. At present in Northern Ireland, the DPP is subject to subordinate and obedient accountability to the Attorney General in respect both of individual cases and of policy. As we have highlighted, there is a particular need in Northern Ireland for the manifest independence of the prosecutor and the nuances of constitutional convention regarding the independence of the Attorney General when the Attorney is discharging prosecution functions which may be lost in the heat of popular debate. In short, we are conscious that the continued subordinate and obedient relationship between an independent prosecutor and a politically-appointed Attorney General may not be appropriate. This is not a comment on whether there has or has not ever been politically-motivated interference in the work of the DPP – we do not know. We refer only to the interpretation which the general public might place on the arrangements.

We suggest that the balance between accountability and independence of prosecutors in any jurisdiction is determined by the chosen permutation of variety of accountability and its subject-matter.²⁷ A very different balance is struck on the one hand in a jurisdiction where there is subordinate and obedient accountability to an attorney general in respect of policy but explanatory accountability only in respect of individual cases, compared on the other hand to a jurisdiction where the prosecutor’s accountability to the attorney general is subordinate and obedient in all respects. The prosecution process in the former example is insulated – and visibly so – from the political realm to a far greater extent than is the case in the latter. If the interaction between the prosecutor and the attorney general in the hypothetical environment where the attorney general’s power of direction extends only to policy takes place in a transparent manner,²⁸ a viable alternative to present structures emerges. In particular, we note that with explanatory accountability the actual risk of improper interference is no greater than any reasonably self-confident prosecutor could withstand, while the public perception of the relationship also is less harmful than would be the case with accountability of the subordinate and obedient variety.

26 Section 3.6.2 above.

27 Sections 3.2 and 3.3 above.

28 See the New South Wales provisions referred to in note 79, Chapter Three.. Directives regarding prosecution policy could also be appended to an annual report of the prosecution organisation.

If the Group were to favour such a move from subordinate and obedient accountability in respect of individual cases, additional measures might be considered to ensure that prosecutors, loosed in the context of individual cases from the sword of Damocles which the oversight of the attorney general represents, operate reasonably and in accordance with their policies. Such additional measures could include internal and external inspectorates, the process of judicial review, explanatory accountability to community criminal justice consultative groups, possible administrative appeals to bodies such as the Human Rights Commission, and internal procedures such as those in place in Victoria.²⁹ These to us appear to be more than adequate compensation for the removal of subordinate and obedient accountability in respect of individual cases, and if such procedures were launched in an environment of openness in documentation and transparency in procedures, the community might be willing to extend to a prosecution organisation an unprecedented degree of independence. This independence would, we suggest, be subject to Parliament or the Assembly having the 'nuclear option' of removing the Director from office in the event of stated misbehaviour. While we do not regard such a power of removal as a form of accountability,³⁰ we do believe that it is necessary in order to 'complete the circle' of constitutional power in a democracy. We also believe that such a residual power to remove the Director would reserve political concerns to the forum best qualified to deal with them, that the power would by definition be reserved to cases of such concern and import that a prescribed threshold of members of the legislature consider effective 'impeachment' of the Director to be the proper course, and that the matter is fully ventilated in the public domain.

As the Attorney General functions in part as a conduit from the DPP to Parliament, consideration might also be given to direct accountability of the prosecutor to the legislative body, be that in Westminster or in Belfast.³¹ Consideration could for example be given to the introduction of procedures and standing orders which would require the DPP to answer to an appropriate committee of the Assembly of Northern Ireland regarding prosecution policy. Standing orders of the committee could provide that sessions might in exceptional cases be held in private. In all cases, however, detailed minutes of such meetings could be kept and be released to the public at the earliest opportunity. While from the perspective of public confidence and the image of the criminal justice process the only accountability which could credibly exist in such a relationship would be of the explanatory variety and then only in respect of policy, nonetheless we believe that such arrangements would be a retrograde step and we do not advocate them.

29 Section 3.6.10 above.

30 For a contrary opinion see the view of the previous DPP for the Republic of Ireland, discussed in section 2.5.5 above.

31 Section 3.6.3 above.

5.5 Equity and Fairness

Most of our suggestions with relevance to equity and fairness in the prosecution process have been addressed in the preceding section. We highlight in particular the role of inspectorates in part to ensure consistency in decision-making, the courts, the provision of reasons for non-prosecution, the provision to the public of other information on the prosecution process and in particular the detail of policies and statistics regarding the organisation's performance. Other statistical information relating to casework decisions should be monitored by an external body to ensure that no discriminatory trends exist in prosecution practices, as also with recruitment to the prosecution organisation.

We believe that there are strong grounds for institutionalising an express commitment on the part of investigators and prosecutors to human rights norms and due process values, as a term and condition of their office.³² To satisfy such a commitment would require a process of continuous ethical education and training and sociological awareness for those concerned.³³ It is important to remember that the views of the community are a significant component of a prosecutor's awareness of values in the community which he or she serves. These views could be actively canvassed and where appropriate, mindful to independence and professional objectivity, heeded, through the proposals for local answerability via community criminal justice consultative groups suggested above.

In view of this suggestion and the general tenor of much of this Report, we suggest that a comprehensively-resourced policy and research unit is an essential feature of a modern prosecution organisation.

5.6 Openness and Transparency

A constant theme in this Report is the issue of openness and transparency. We believe that in any new prosecution structures in Northern Ireland, the CJRG should consider as a high priority measures which will improve the openness and transparency of the process and of the decision-making upon which it is based. Key reforms could include the provision of reasons for non-prosecution to those with a legitimate interest (including the media), the publication of prosecution policies and guiding documentation, and the publication of a comprehensive annual report.

Above all, however, a switch to a philosophy of openness and transparency in an organisation requires a change of culture. That could be achieved by a process of education and training as advocated in the preceding section, but also important would be the maintenance or

32 Sections 1.9.6 and 4.4.3 above.

33 Section 4.4.3 above.

cultivation of a climate in which independence of thought is respected,³⁴ combined with a clear sense on the part of prosecutors that they provide a public service to all in the community. The previously-mooted community criminal justice consultative groups would be an appropriate vehicle to accomplish that latter end.

5.7 Independence

Issues relating to the independence of prosecutors have been addressed at numerous points in this concluding chapter and will not be repeated here. However, we highlight two issues as being especially worthy of note by the Group at this juncture. First, we raise the issue of whether prosecutors should be allowed to have political affiliations.³⁵ Second, we note that much of the effective goodness which is achieved through a delicate balance of prosecutorial independence and prosecutorial accountability can be undermined by inadequate funding of the prosecution. This would, in our view, adversely affect the efficiency and effectiveness of the organisation and ultimately its equity and fairness.³⁶

5.8 Finally

We have been pleased to work with the CJRG in its important work, and we wish it and its members well in the finalisation of the Group's Report.

34 Section 3.4.4 above.

35 Section 3.4.2 above.

36 Section 3.4.5 above.

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Appendices

A Survey Questionnaire

The standard questionnaire which we formulated for and used in our research is as follows:

[Return Address]

[ADDRESSEE]

[Date]

Dear [Name]

PROSECUTION PROCESSES IN NORTHERN IRELAND

The Northern Ireland Criminal Justice Review Group (CJRG) was established under the terms of the internationally-noted ‘Belfast Agreement’ between the majority of the Northern Ireland political parties, and the UK and Irish governments, signed on 10 April 1998 (www.nio.gov.uk/agreement.htm). Under the terms of the Agreement, the Criminal Justice Review Group must consider the arrangements for the organisation and supervision of the prosecution process, and for safeguarding its independence.

The timescale within which it must do so is very short, with a final report required by Summer 1999. It is widely acknowledged that the work of the Group will be a cornerstone of the on-going Northern Ireland Peace Process. You will therefore appreciate that this research is of a fundamentally important nature. Your co-operation in replying to this questionnaire will for that reason be itself a significant contribution to that Peace Process.

You will note that a key task of the CJRG is to recommend changes to the system and processes of criminal prosecutions in Northern Ireland. A first step in that project is to analyse models and systems in other jurisdictions. We have been asked by the Group to perform this preliminary task, to make recommendations for reform, and to analyse those recommendations in terms of increased fairness, accountability, efficiency and effectiveness

which they would bring to the prosecution system in Northern Ireland. As emphasised, the Belfast Agreement demands that this be achieved within a very short timescale, measured in weeks rather than months. ***This research is therefore of an urgent nature.***

We would therefore be grateful if you would forward to us any general information on the system of prosecutions in your jurisdiction. Specifically, we would be very interested in receiving information relevant to the issues and questions which follow.

1. STRUCTURAL ISSUES

In respect of each question which follows, please where possible supply copies of the relevant law(s).

- 1.1 Are the investigative and prosecution functions in your jurisdiction performed by distinct agencies? Please explain the role of each agency and (where pertinent to an understanding), the historical evolution to the present position.
- 1.2 What is the statutory (or other legal) basis for the roles of agencies in the prosecution process in your jurisdiction?
- 1.3 Please briefly explain the organisational structure and inter-relationship(s) of prosecution agencies in your jurisdiction.
- 1.4 Within the structure described in 1.3, what qualifications are prescribed for appointment to each level?
- 1.5 For how long has your present prosecution arrangement been in place?
- 1.6 If prosecution arrangements in your jurisdiction have changed substantially in recent times (eg within this decade), please advise on:
 - 1.6.1 the reason(s) for the change(s), and
 - 1.6.2 your views on the success (or otherwise) of the change(s).
- 1.7 What formal and informal links exist between police and non-police prosecution agencies in your jurisdiction?

2. PROSECUTION AND POLICE ROLES IN INVESTIGATIONS AND PROSECUTIONS

In respect of each question which follows, please where possible supply copies of the relevant law(s).

- 2.1 Except to the extent dealt with in response to paragraphs 1.1 and 1.3, please outline the role played by your police agency or agencies in prosecutions in your jurisdiction.
- 2.2 At what point of the investigative and pre-trial process in your jurisdiction does a non-police agency normally assume carriage of the case?
- 2.3 Is there a point in the process at which, or a category of offences concerning which, such involvement by a non-police agency is mandatory?
- 2.4 Does your prosecution agency scrutinise police files before a suspect is charged with an offence?
- 2.5 Does your prosecution agency play any role in the determination of detention periods?
- 2.6 Does your prosecution agency scrutinise police files before a suspect is brought before a court (eg for a remand hearing)?
- 2.7 Does your prosecution agency play any role in supervising police investigations? If “yes”, please explain.

3. PROSECUTORIAL INDEPENDENCE AND ACCOUNTABILITY

In respect of each question which follows, please where possible supply copies of the relevant law(s).

- 3.1 If the investigative and prosecution functions in your jurisdiction are performed by agencies which are independent of each other, what laws and structures are in place to ensure that independence? We are particularly interested in structures which enhance prosecutorial independence.
- 3.2 Aside from law and structures, is there a *culture* of prosecutorial independence in your jurisdiction? If so, how is that achieved, while maintaining good working relations with the police in individual cases?
- 3.3 By what means are the prosecution agencies in your jurisdiction held to account?¹ Please explain in detail the arrangements which exist in this respect.

4. EQUITY AND FAIRNESS

In respect of each question which follows, please where possible supply copies of the relevant law(s).

¹ A leading (common law) commentator on criminal justice has said that methods of accountability “include proper scrutiny of general policies, rules and/or guidelines for decision-making, active supervision of practice, avenues for challenging decisions, and openness rather than secrecy at key stages.” (A Ashworth, 1996, p. 43).

- 4.1 What mechanisms exist to ensure that the prosecution process in your jurisdiction is operating equitably and fairly (eg statistical monitoring)?
- 4.2 By reference to what criteria is the equity and fairness of the prosecution system in your jurisdiction assessed?
- 4.3 If different from either or both of the foregoing, what mechanisms exist to assure the public in your jurisdiction that the prosecution process is operating equitably and fairly? Is how is the *perception* of equity and fairness secured, as well as the *reality*?

5. OPENNESS AND ACCOUNTABILITY

In respect of each question which follows, please where possible supply copies of the relevant law(s).

- 5.1 Does your prosecution agency produce an annual (or other regular) report? If so, is this report a public document? If possible, please supply copies of the relevant document(s).
- 5.2 Prosecutors make many decisions, including decisions to prosecute and decisions not to prosecute, and frequently decisions on choice of charge. In your jurisdiction, what mechanisms of appeal are available to those affected by such decisions of prosecutors (eg accused, victims and so forth)?
- 5.3 Do prosecutors in your jurisdiction state reasons for their decisions? If so, to whom are those reasons supplied?
- 5.4 To whom is the head of your non-police prosecution agency answerable? To whom is that latter person ultimately answerable, and by what means?

6. EFFICIENCY AND EFFECTIVENESS

- 6.1 By reference to what criteria is the efficiency of the prosecution system in your jurisdiction assessed?
- 6.2 By reference to what criteria is the effectiveness of the prosecution system in your jurisdiction assessed?

7. PROSECUTORIAL POWERS

In respect of each question which follows, please where possible supply copies of the relevant law(s).

- 7.1 Do prosecutors in your jurisdiction perform any quasi-judicial roles (such as the power to impose prosecutor fines, or to divert from prosecution by way of ‘caution’ or so-called ‘caution +’)?
- 7.2 If the answer to 7.1 is “yes”, please:
 - 7.2.1 Provide details of the relevant power(s), including the text of any relevant law(s) or extra-statutory scheme(s), and
 - 7.2.2 Provide your assessment of the fairness, accountability, effectiveness and efficiency which the relevant power(s) bring to the administration of justice in your jurisdiction. Please indicate how you gauge your assessment.

8. JUDICIAL ROLE(S) IN THE PROSECUTION

In respect of each question which follows, please where possible supply copies of the relevant law(s).

- 8.1 What role(s) (if any) is performed by judicial officers in the pre-trial phase of criminal prosecutions in your jurisdiction?
- 8.2 What access to judicial officers is afforded to those suspected of crime?
- 8.3 What access to judicial officers is afforded to those in police detention?
- 8.4 Does your jurisdiction employ the concept of ‘examining magistrate’ or similar?
- 8.5 Do judicial officers in your jurisdiction play any role in the determination of detention periods?

9. CONCLUSION

- 9.1 What is your assessment of the fairness of the system of prosecutions in your jurisdiction?
- 9.2 What is your assessment of the accountability of the system of prosecutions in your jurisdiction?
- 9.3 What is your assessment of the effectiveness of the system of prosecutions in your jurisdiction?
- 9.4 What is your assessment of the efficiency of the system of prosecutions in your jurisdiction?

- 9.5 While balancing each of the issues just mentioned (fairness, accountability, effectiveness and efficiency), how in your view could the system of prosecutions in your jurisdiction be improved?
- 9.6 Please recommend published texts and papers which deal with the prosecution process in your jurisdiction generally, or which develop any of the issues or themes highlighted above. If you wish to lend such text(s) to us for the period of our research, we undertake to be responsible for its safe return to you and to reimburse your reasonable postage charges.

Please revert to us at any time if you require clarification or further information regarding any issue which we have raised. In view of the short period of time within which this project must be completed, communication by fax is preferred.

We look forward to hearing from you at your early convenience.

Yours sincerely,

Dr Peter Osborne

Dr Keith Bryett'

B Warning Letter from Commonwealth DPP (Australia)

‘DPP letterhead

Dear [Name]

ALLEGED BREACH OF THE SOCIAL SECURITY ACT

This office has received a brief of evidence from the Commonwealth Services Delivery Agency (Centrelink) which alleges that you received a benefit which was not payable.

In particular, it is alleged that while receiving [type of benefit] you were [description of disentitling actions] and failed to notify Centrelink of your (correct) income which was such that you did not qualify for the benefit you received. You will recall that on (date of ROI) you were interviewed by an employee of Centrelink in relation to the allegation.

The allegation, if proven, constitutes an offence under section 1350 of the Social Security Act which carries a maximum penalty of 12 months imprisonment or a fine of \$6,000 or both. The brief of evidence discloses sufficient evidence to support the commencement of a prosecution against you for the alleged offence. However, after consideration of all the surrounding facts and circumstances it has been decided not to prosecute you on this occasion.

This decision not to prosecute you on this occasion may be taken into account should a further brief of evidence be received which discloses sufficient evidence to prosecute you for alleged conduct of a similar kind.

Yours faithfully

[Name]

Senior Assistant Director²

c List of Respondents

In addition to our independent research, we are in particular grateful to the following who either responded to our questionnaire or otherwise supplied information to us.

Board of Procurators-General, The Netherlands
Criminal Law Branch, Department of Justice, Canada
Crown Office and Procurator-Fiscal Service, Scotland
Crown Prosecution Service, England and Wales
Director of Public Prosecutions, Australian Capital Territory
Director of Public Prosecutions, Commonwealth of Australia
Director of Public Prosecutions, New South Wales
Director of Public Prosecutions, Northern Territory
Director of Public Prosecutions, Queensland
Director of Public Prosecutions, Victoria
Director of Public Prosecutions, Western Australia
Federation of Law Societies of Canada
Garda Síochána, Republic of Ireland
Home Office, England and Wales
International Criminal Defense Attorneys Association
Law Commission, New Zealand
Law Reform Commission, Australia
Law Reform Commission, Queensland
Law Reform Commission, Western Australia
Ministry of Justice, Québec
Ministry of the Assistant Deputy Attorney General (Criminal Law Division), Canada
National Council of Lawyers, Australia
Public Prosecutor, Amsterdam (Jan Koers)