

High Level Review Group on the Role of An Garda Síochána in the Public Prosecution System

Report to Government

December 2022

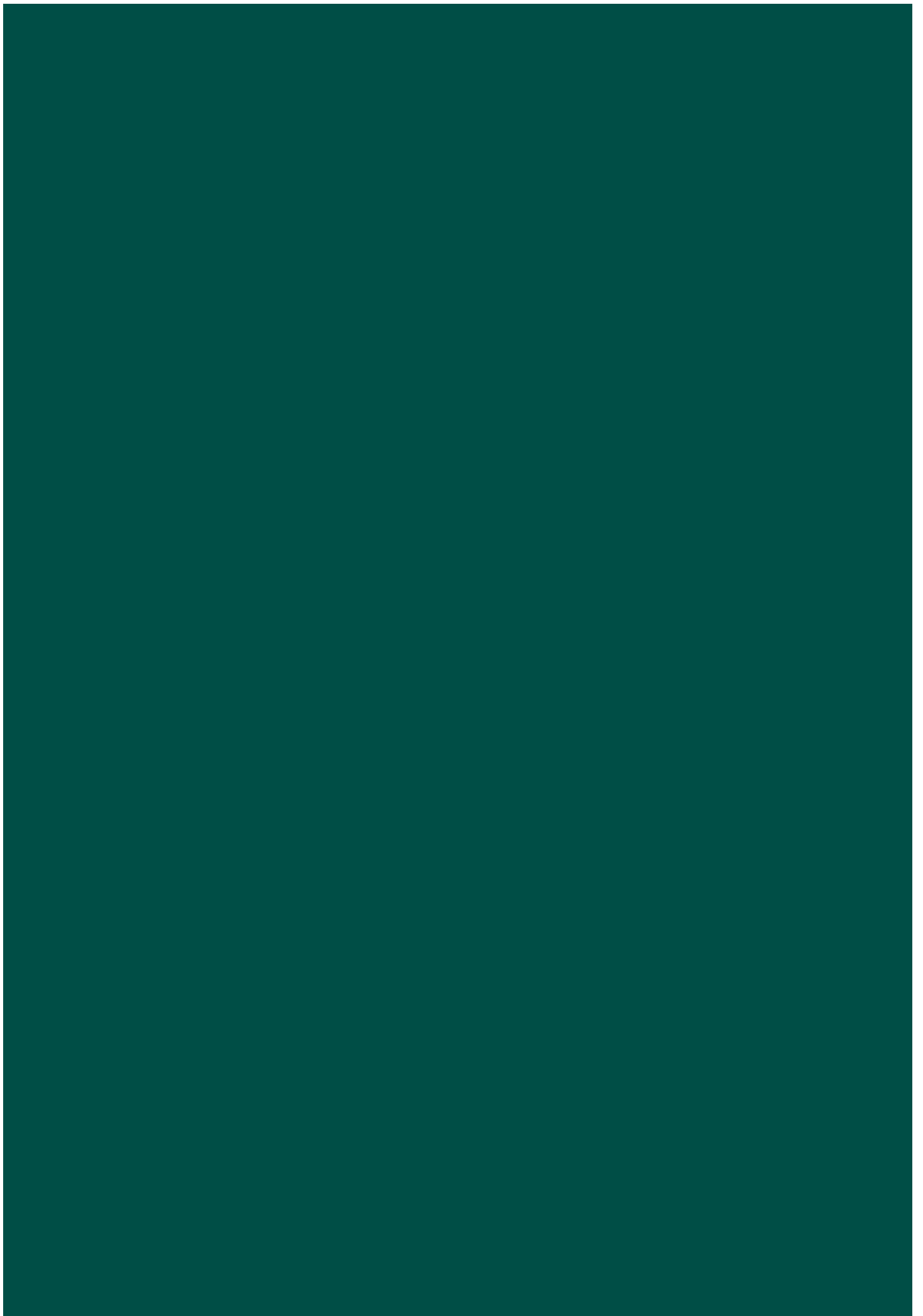


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Executive Summary

The Commission on the Future of Policing in Ireland (CoFPI) published its report in September 2018 outlining a clear vision and roadmap for strengthening policing, security and community safety. The report recommends that all prosecution decisions should be taken away from AGS and the practice of Gardaí prosecuting cases in court should cease.

This recommendation was accepted in principle by the Government, subject to further evaluation of the implications, including for resources. A High Level Review Group ('HLRG') on the role An Garda Síochána in the Public Prosecution System was established in September 2020 to conduct this evaluation. The HLRG was chaired by former Secretary General to the Government, Dermot McCarthy and comprised representatives from relevant stakeholders, including Government Departments, the Judiciary, An Garda Síochána, the Office of the Director of Public Prosecutions, State Solicitors' Association, the NGO sector, academics, and legal practitioners.

Chapter 1 provides an overview of the background to the work of the HLRG, its terms of reference, membership and work.

Chapter 2 provides detail on the role of the Office of the Director of Public Prosecutions, and its role in the Irish public prosecution system. The Office of the Director of Public Prosecutions (ODPP) was established under the Prosecution of Offences Act 1974. The Director is independent in the performance of her functions. The duties of the Director are to enforce the criminal law in the courts on behalf of the people of Ireland, to direct and supervise public prosecutions on indictment (formal written accusations) in the courts, as well as to give general direction and advice to An Garda Síochána (the Irish police force) in respect of their prosecutions work and to give specific direction to AGS in cases where requested.

Chapter 3 provides detail on the role of An Garda Síochána ('AGS') in the Irish public prosecution system, undertaken in the name of the Director of Public Prosecutions. In accordance with section 8 of the Garda Síochána Act 2005 members of AGS may undertake prosecutions in relation to summary cases (less serious cases which can be heard in the District Court) in the name of the DPP. While most prosecutions undertaken by AGS may be in respect of comparatively minor offences, this work represents a major undertaking for the organisation and AGS are responsible for the bulk of prosecution decisions and prosecution presentations at court.

Chapter 4 provides detail on a time and effort research study undertaken on behalf of the HLRG. The time and effort study was carried out by the Department of Justice in conjunction with An Garda Síochána. The study was in response to challenges in quantifying the time and resources involved in AGS carrying out their work on behalf of the DPP in the Irish public prosecution system. This exercise was designed to provide the information required to allow a quantification of the resource requirement at present, and the potential resource implications of any proposed new approach.

Chapter 5 provides detail on an international comparative study undertaken on behalf of the HLRG. The HLRG considered that it should have regard to evolving international standards and best practice in the field of public prosecutions. This research was particularly relevant to the brief of the HLRG as the

Commission on the Future of Policing Ireland ('CoFPI') report had observed that '*most comparable jurisdictions recognise that investigation and prosecution processes should be separate*'. The research took account in particular of the experience of Common Law jurisdictions and those which operate under the general jurisprudence of European victims' rights law or equivalent. Particular attention was paid to the experience of jurisdictions where changes have taken place in the conduct of prosecutions, especially with regard to the role of the police. The research confirmed a growing acceptance of the desirability of separating the prosecution and investigation processes, but did not find any uniform approach to achieving this, or to the appropriate degree of separation. The study also revealed that changes in public prosecution systems can be highly complex, deeply challenging and extremely expensive.

Chapter 6 outlines the policy options explored by the HLRG, the evaluation criteria, and includes the HLRG's reflections on the current public prosecution system. The HLRG considers that while there is scope to improve the operation of our public prosecution system and deepen public confidence, there is much to commend in the current system as well as potential pitfalls in engaging in a large scale reworking of our public prosecutions approach. Chapter 6 sets out the three policy options and proposes a Reform Model aimed at encouraging and supporting the ODPP and AGS to continue and enhance reform measures to ensure greater efficiency, transparency and accountability in the public prosecution system.

Chapter 7 discusses the recommended option, the Reform Model and describes what this process of reform will look like at a high level, recognising that improvements must be iterative given the sensitivity of the subject matter, stresses the challenges in terms of resources faced by the key stakeholders involved, and recommends a high-level implementation plan.

Chair's Foreword:

The effective administration of justice, with a high levels of community safety and protection of human rights, requires that the public confidence in the conduct of public prosecutions be justified. This in turn requires confidence in the probity of decisions to prosecute, in the equal application of the law to all and that all, whether victim or accused, will be dealt with fairly and professionally. The work of our public prosecution system, including the Office of the Director of Public Prosecutions ('ODPP'), and AGS are critical in sustaining that public confidence.

Major changes in the current prosecution model were recommended by the Commission on the Future of Policing in Ireland (CoFPI). That report, published in September 2018, recommended that all prosecution decisions should be taken away from AGS and the practice of police prosecuting cases in court should cease. CoFPI stated that the involvement of Gardaí in prosecutions and the amount of time they spend in court or preparing for court is enormously wasteful of police resources that should be deployed on core police duties. However, they emphasised that this is a secondary but important reason for taking responsibility for prosecutions away from police. The Government accepted the CoFPI recommendation in principle, subject to further analysis with particular regard to the cost implications. The HLRG's task, as articulated in our Terms of Reference, was to consider how to go about implementation of the Government decision, having regard to the resource implications in particular. The HLRG interpreted this mandate as requiring the Group to analyse the rationale given by CoFPI for its recommendation. This led us to have two major pieces of work undertaken - an analysis of the resources, in terms of personnel, committed by AGS to the prosecution of the offences comprehended by the CoFPI recommendations, and a review of relevant international police and trends in respect of the role of police in the prosecution of offences.

We are most grateful to the staff of the Research and Data Analysis Unit of the Department of Justice for their expert and innovative assessment of AGS resources, and to AGS at all levels for facilitating and participating in this pioneering analysis especially the many respondents from within AGS who volunteered their time. The analysis has highlighted the difficulties in accurately costing the radical shift recommended by the COFPI. International experience would indicate that a substantial change along the lines envisaged by the CoFPI report recommendation may not yield the savings anticipated and specifically with regard to AGS may not allow for significant reassignment to 'core policing duties'.

We are grateful to the research team who successfully tendered for and conducted research into international trends and best practice; the product of their work is of the highest quality and has been invaluable in the HLRG's considerations. The main findings of the international research are that there is no 'one-size fits-all' approach internationally, that each jurisdiction reflects its particular circumstance and history, and that competing priorities produce systems which often display tension between different aspects of internationally accepted norms. The researchers' examination of relevant jurisdictions where changes have been made in respect of the role police play in public prosecutions demonstrates that such changes can be challenging and costly and are often an ongoing project of refinement.

The CoFPI recommendation was based on two pillars, one pillar comprised reasons of principle (international best practice, the consistency of justice etc) and the second pillar comprised practical considerations (potential time/cost savings, new administrative burden etc). We developed an analytical framework which formed the basis of the evaluation criteria by which we assessed possible future approaches.

We have concluded that a radical structural change to our public prosecution system as outlined by the CoFPI recommendation is not appropriate at this time. We have instead recommended a Reform Model focused on developing the full potential of our existing public prosecution system. We have selected an approach which builds on developments which are already in train while addressing the weaknesses which we have identified in a way which should substantially achieve the benefits sought by the CoFPI, while retaining the strengths of the present system.

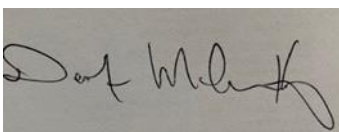
Our recommendation reflects our conclusion that radical change would not result in a major reallocation of AGS resources to core policing duties, while the international research indicates that very few jurisdictions have attempted the full reconfiguration as envisaged by CoFPI, and that those who did have resiled it to greater or lesser degrees, either for cost or for efficiency of process flow reasons.

The Reform Model which we have recommended seeks to secure continued public confidence in our prosecution system by supporting reforms that are in train already and further significant oversight of prosecutions undertaken in the name of the DPP. This approach would, we believe, improve confidence that prosecution decisions are taken for the right reasons, and conducted with the requisite levels of expertise and professionalism.

We propose a high level implementation plan which recognises the sensitivity of the subject area, and the reality that progress must be made on an incremental basis, with actions ranging from the short to long term, each designed to build and reinforce quality and public confidence. The high-level implementation plan acknowledges and supports the independence of the Director of Public Prosecutions and her office, working collaboratively with key stakeholders across the criminal justice system. To reflect this crucial independence, we recommend that the future planning and monitoring of implementation of our recommendation be assigned to an implementation group comprised of the key stakeholders, AGS, the ODPP and the Courts Service. This Group should be chaired by a neutral party, with the requisite authority and reach.

In conclusion, I wish to thank to all the members of the HLRG who contributed their time and expertise so generously. This has not been simple or straightforward task and so I am grateful for the enthusiasm and patience of members as we developed realistic and achievable recommendation that would support the ODPP and AGS in ensuring the quality of, and public confidence in, our public prosecution system.

I wish to express particular appreciation for the staff of the Research and Data Analytics Unit of the Department of Justice for their expert advice and support for our work and to the many members of AGS who participated in the detailed survey which we asked to be undertaken. Finally, I wish to thank and commend the staff of the Department of Justice who worked in the Secretariat to our Group. Their unfailing courtesy and expertise were invaluable in carrying out the task which we were asked to undertake.



Dermot McCarthy

Chair

CHAPTER 1:

Introduction – High Level Review Group (HLRG)

The Commission on the Future of Policing in Ireland (CoFPI) published its report in September 2018 outlining a clear vision and roadmap for strengthening policing, security and community safety. *A Policing Service for our Future* is the Plan to implement the CoFPI Report, which was developed in cooperation with stakeholders from across the public service and, in particular, with the Department of Justice and An Garda Síochána. *A Policing Service for our Future* was approved by Government in December 2018.

A Policing Service for our Future is a living Plan and the Policing Reform Implementation Programme Office – which is based in the Department of the Taoiseach – reviews and updates the Plan as required on a 6 to 9 month basis, thereby maintaining ambitious but realistic commitments, timeframes and milestones.

This commitment to policing reform, was re-emphasised, when in June 2020 the Government agreed its “Programme for Government: Our Shared Future” (‘the Programme for Government’). In the Justice Sector two of the relevant commitments made by the Government were to:

‘Rapidly implement the Report of the Commission of the Future of Policing, while ensuring that there remains a strong and independent public external accountability mechanism for the Garda Commissioner and Garda Leadership Team...

Remove Gardaí from administrative, technical, and other non-core duties, to allow them to focus on policing matters.’

CoFPI Recommendation 20.1 states:

All prosecution decisions should be taken away from the police. The practice of police prosecuting cases in court should also cease.

This recommendation was accepted in principle by Government, subject to further evaluation on the implications, including resource implications, how best it might be achieved, and the timing of implementation. The High Level Review Group on the Role of An Garda Síochána in the Public Prosecution System was set up to conduct this evaluation. The CoFPI Report recommended that prosecution decision should be under the remit of an expanded state solicitor or national prosecution service, and for the practice of An Garda Síochána prosecuting cases should cease, considering that:

- Most comparable jurisdictions recognise that investigation and prosecution processes should be separate;
- Garda members in charge of prosecutions may not be trained to the level of the opposing defence lawyer; and,
- Involvement of Gardaí in prosecutions and the amount of time they spend in court/preparing for court is not an optimum use of police resources that should be deployed on core police duties.

Getting to Work

Establishment of the HLRG

Following consultation with the Office of the Director of Public Prosecutions (ODPP) and the Office of the Attorney General (AGO), the Department of Justice established a High Level Review Group to consider issues arising from the Government's decision in principle to accept the CoFPI's recommendation. The composition of the HLRG was framed to ensure the participation of a wide range of perspectives on the operation of the prosecution system in Ireland.

The membership of the HLRG is as follows:

- Dermot McCarthy: Chair, former Secretary General to the Government and Secretary General of the Department of An Taoiseach
- Judge Paul Kelly: President of the District Court (from March 2021)
- Anne Marie McMahon: Deputy Garda Commissioner
- Paula Hilman: Assistant Garda Commissioner
- Helena Kiely: Chief Prosecution Solicitor, ODPP
- Liz Howlin: Acting Head of Directing Division, ODPP
- Úna McEvoy: Advisory Counsel, Office of the Attorney General
- Maeve Lewis: CEO, One in Four
- Dr Seamus Taylor: Head of Applied Social Studies, Maynooth University
- Séamus Clarke: Senior Counsel (representing Bar of Ireland)
- Vincent Deane: President, State Solicitors Association, State Solicitor Mayo
- John O'Doherty: Senior Member of the Law Society's Criminal Law Committee
- John Kinnane: Assistant Secretary, Dept. Public Expenditure and Reform (from January 2022)
- Marianne Nolan: Assistant Principal Officer, Dept. Public Expenditure and Reform (from February 2022)
- Peter Mullan: Assistant Secretary, Courts Service
- Barry Vaughan: Dept. of the Taoiseach (from January 2022)
- Ben Ryan: Assistant Secretary, Dept. Justice
- Mary O'Regan: Principal Officer, Dept. Justice (from September 2021)
- John Dunphy: Dept. Justice, Secretariat
- Oonagh Ffrench: Dept. Justice, Secretariat (from August 2021)

With thanks also to the following who worked on the HLRG :

- Judge Colin Daly: President of the District Court (from September 2020 to March 2021)
- Ronnie Downes: Assistant Secretary, Dept. Public Expenditure and Reform
- Tracey Germaine: Dept. of the Taoiseach (from September 2020 to February 2022)

- Deborah White: Principal Officer, Dept. Justice, Secretariat (September 2020 to September 2021)
- Yvonne Phillips: Higher Executive Officer, Dept. Justice, Secretariat (September 2020 to August 2021)

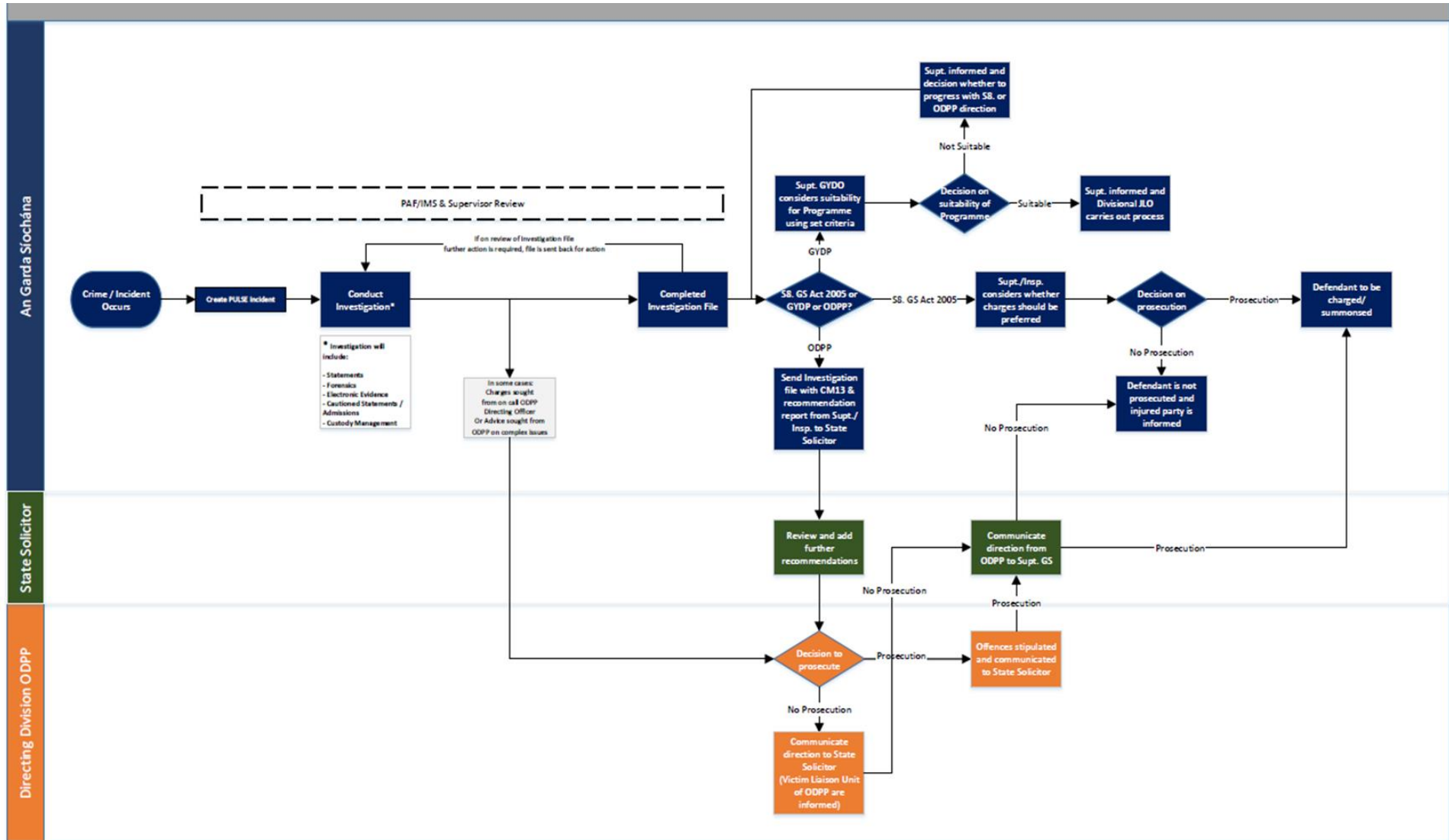
The HLRG was mandated to report to the Government through the Department of the Taoiseach. The terms of reference of the HLRG are:

- To develop a range of options to give effect to the Government decision and to recommend a preferred option for consideration by Government.
- To conduct an analysis of the options considered including detailed assessment of the estimated costs.
- To identify any legislative changes required to give effect to the recommended new arrangements.
- To develop a high level implementation plan.
- To make an interim report to the Government on progress to date by end 2020 and to make a final report in the course of 2021.

Work of the HLRG

The HLRG held its first meeting on 9 September 2020. The Group decided that its work should be grounded in empirical analysis, applying the experience and expertise of its members, to prepare recommendations for the Government. This analysis began with preparing a comprehensive assessment of the operation of the present arrangements for the conduct of criminal prosecutions in Ireland as summarised in **Figure 1**.

Figure 1: Crime/incident to decision to prosecute process flow To Note: reasons for decisions not to prosecute and reviews are not included



In considering the implications of changes to this system recommended by the CoFPI, the Group decided to have particular regard to:

- international best practice and the experience of relevant jurisdictions which had made changes to their prosecution systems over recent years;
- the experience of operating different prosecution procedures in the Dublin Metropolitan Region compared to the rest of the country; and,
- the cost of current practices and policies to serve as a benchmark in evaluating options for change.

A subgroup of the HLRG, chaired by Peter Mullan of the Courts Service, was established to oversee the gathering and analysis of data which would support the deliberations of the Group. This subgroup has identified, with the assistance of the Research and Data Analysis Unit of the Department of Justice, the data to be sought from An Garda Síochána, the ODPP and the Courts Service. This data, was compiled in respect of the period 2014–16 to allow for an end-to-end analysis of a full cycle of cases, to include:

- the volume of offences going through the criminal justice system;
- the average amount of Garda time taken to prosecute summary offences and the resource commitment to each element of the prosecution process;
- the costs arising principally for An Garda Síochána in operating current procedures;
- the resource implications of transferring prosecutions from AGS to other mechanisms.

The compilation of data proceeded with the cooperation of the agencies concerned which was greatly appreciated by the Group. This research involved more than the gathering of statistics, since it required the Research and Analysis Unit to develop a full appreciation of the processes and procedures which are applied by personnel performing all the distinct functions involved in the conduct of prosecutions. This enabled the HLRG to develop recommendations for possible changes in the prosecution system in the light of their impact on the prosecution system as a whole.

The analysis of international experience which would be helpful in guiding the development of recommendations for change was undertaken by consultants under the aegis of the Research and Analysis Unit within a framework approved by the Group. It took account in particular of:

- the experience of Common Law jurisdictions and those which operate under the general jurisprudence of European victims' rights law or equivalent;
- jurisdictions where changes have taken place over recent years in the conduct of prosecutions, especially with regard to the role of the police; and,
- the role of law enforcement and non-policing agencies in prosecutorial regimes, including decisions to prosecute and the conduct of prosecutions.

The Group prioritised the initiation of the data collection and analysis and the international comparative research so that this material would be available on a timely basis to support the work of the Group in completing its terms of reference. It would also will enable the Group to propose an implementation plan for any such recommendations, as required by our terms of reference.

Chapter 2: Overview of the Office of the Director of Public Prosecutions

This chapter sets out the work currently undertaken by the Office of the Director of Public Prosecutions in the Irish public prosecution system. Prosecutorial work carried out by An Garda Síochána, the subject matter of the Commission on the Future of Policing in Ireland (CoFPI) recommendation, is outlined in highlighted panels.

The Office of the Director of Public Prosecutions (ODPP) was established by law under the [Prosecution of Offences Act 1974](#). The Director is independent in the performance of her functions which include:

- enforcing the criminal law in the courts on behalf of the People of Ireland;
- directing and supervising public prosecutions on indictment in the courts;
- giving general direction and advice to An Garda Síochána in relation to summary cases which are instituted and conducted in the name of the Director;
- giving specific direction to An Garda Síochána and other investigative agencies in cases where requested; *and*
- responsibility for election petitions and referendum petitions under the relevant Acts.

The majority of cases dealt with by the ODPP are received from An Garda Síochána. However, some cases are also referred to the Office by specialised investigative agencies including the Revenue Commissioners, Government departments, the Health and Safety Authority, the Competition and Consumer Protection Commission, the Office of the Director of Corporate Enforcement, Garda Síochána Ombudsman Commission, the Environmental Protection Agency and local authorities.

A detailed overview of the Prosecution System in Ireland, including the relevant legislative bases for same, is set out in [Chapter 2 of the Guidelines for Prosecutors](#) (published by the Office of the Director of Public Prosecutions). The Guidelines for Prosecutors and the Code of Ethics for Prosecutors provide guidance for prosecutors on their human rights obligations when carrying out their functions, both in respect of decisions to prosecute and whilst prosecuting in Court. The Director in the exercise of her functions is obliged to comply with obligations under Article 38 of the Constitution, Article 6 of the ECHR and Title VI of the EU Charter of Fundamental Rights, as well as the relevant domestic and EU statutory frameworks. A graphic representation of the Criminal Prosecution Process is set out in [Appendix I](#) of this document.

Total number of files received by ODPP:	2021	2020	2019	2018	2017
Prosecution Files Received	18,237	17,106	15,590	14,849	13,667

The Structure of the Office of the DPP

The Office of the DPP consists of three legal divisions and Specialist units:

1. Directing Division
2. Solicitors Division
3. Prosecution Support Services Division
4. Specialist Units: Sexual Offences Unit and Special Financial Unit

There is also a Corporate Services Division consisting of general civil service grades who provide the organisational, infrastructural, administrative and information services required by the Office. The Office employs 231 people which equates to 222.89 full-time equivalents (FTE) staff. There are 137 (FTE) legal staff and 85.69 (FTE) administrative staff.

A complete organisation chart for the Office of the DPP can be found at [Appendix II](#) of this document.

Overview of the Work of the Three Legal Divisions

Directing Division

The Directing Division consists of prosecutors who examine criminal investigation files and decide whether or not to take a prosecution, and whether a prosecution commenced by An Garda Síochána should be maintained. All cases that it is considered will ultimately proceed on indictment must be submitted. The Directing Division directs summary disposal, on average, in around 33% of cases submitted each year. Criminal Investigation files contain copies of all statements and other evidence, as well as a covering report from the investigating member of AGS and usually his/her Sergeant, Inspector and/or Superintendent, summarising the evidence and expressing a view on whether or not the case should be prosecuted. The covering report and file content of an investigation file follow a format that has been agreed between AGS and ODPP and is set out in Garda HQ directive 67/2005.

The direction which issues indicates the charges, if any, to be brought before the courts. In some cases, further information and investigation may be required before a decision can be made. To prosecute there must be a *prima facie* case - evidence which could, though not necessarily would, lead a court or a jury properly instructed on the relevant law, to decide beyond reasonable doubt that the person is guilty of the offence. Cases are not prosecuted where there is no reasonable prospect of a conviction. In addition, there is a small number of cases every year where a decision is made not to prosecute for public interest reasons. The Guidelines for Prosecutors contain detailed information on how decisions are made.

The prosecutors in the Directing Division also make a range of other decisions, as part of their oversight of prosecution directed including: whether or not to accept pleas of guilty to lesser offences or to bring appeals to higher courts.

Files dealt with by the Directing Division:	2021	2020	2019	2018	2017
Files received for decision whether to prosecute	12,383	12,482	9,825	9,067	8,886
Number of suspects subject of those files	15,746	16,202	12,321	11,668	11,518

Solicitors Division

The Solicitors Division, headed by the Chief Prosecution Solicitor, provides a solicitor service to the Director in the preparation and presentation of cases in the Dublin District and Circuit Criminal Courts, Central Criminal Court, Special Criminal Court, Court of Appeal, High Court and Supreme Court.

The Solicitors Division incorporates the following sections:

- i) District Court Section
- ii) Circuit Court Section
- iii) Superior Courts Section
- iv) Appeals Section
- v) Judicial Review Section
- vi) High Court Bail Applications

Files dealt with by the Solicitors Division:	2021	2020	2019	2018	2017
(excluding indictable trials)					
District Court Prosecution Files	1,790	1,081	1,279	1,104	1,000
Appeals from District Court to Circuit Court	2,011	1,270	2,870	2,947	2,229
High Court Bail Applications	1,887	2,133	1,448	1,559	1,360
Judicial Review Applications	166	140	168	172	192
TOTAL	5,854	4,624	5,765	5,782	4,781

Specialist Units

There are two specialist units with the ODPP:

- I. **Special Financial Unit:** The Special Financial Unit deals with complex financial crimes as well as asset seizing applications and both directs and manages the prosecutions before the Courts.
- II. **Sexual Offences Unit:** The Sexual Offences Unit has responsibility for serious sexual offences. The Unit both directs and manages the prosecutions before the District, Circuit and Central Criminal Courts.

Prosecution Support Services Division

The Prosecution Support Services Division incorporates the following three units:

- I. **Victims Liaison Unit** which is responsible for ensuring that the Office meets its obligations in relation to the support and protection of victims of crime as set out under the [Criminal Justice \(Victims of Crime\) Act 2017](#);
- II. **International Unit** which deals with areas of international criminal law, including extradition, European Arrest Warrants, requests for mutual legal assistance and policy issues on police and judicial co-operation generally; *and*
- III. **Prosecution Policy and Research Unit** which provides legal and policy research, develops prosecution policies advises on legal policy documents referred to the Office and co-ordinates legal knowledge management for the Office - this includes the Library Unit which provides information and know-how services for both legal and administration staff.

A more detailed description of the work of each of the legal divisions and sections of the Office is available on the D.P.P.'s website, www.dppireland.ie/about-us/our-organisation.

Provision of Service outside Dublin

The State Solicitor service is made up of 32 solicitors in private practice who are employed by the DPP on a contract basis, awarded for a term of ten years following open competition. There is generally one State Solicitor per county but in certain counties, State Solicitor areas have been split to take account of factors such as population. For example, County Cork is divided into four areas: Cork City, Cork North East, Cork South East and Cork West.

Pursuant to [section 4A of the 1974 Act](#) the DPP is empowered to direct local State Solicitors to perform, on her behalf and in accordance with her instructions, any function in relation to particular cases.

Role of State Solicitors

State Solicitors are appointed to act on behalf of the Director in the carriage of all legal business referred to them arising from their area in the Circuit Court and to appear in the District Court when requested by the Director. The Circuit Court work involves the management of Circuit Court indictable trials and the prosecution of District Court Appeals before the Circuit Court.

In practice, the State Solicitors receive investigation files from An Garda Síochána, provide an opinion to the DPP on whether they believe a prosecution should be initiated and if so, the relevant charges and venue of trial. The prosecution decision is then made by the DPP. The State Solicitor, upon receipt of

that decision, communicates with the Gardaí and manages any indictable prosecution directed, including the briefing of prosecution counsel assigned to prosecute the case.

Terms of Appointment

State Solicitors are appointed by competitive process. The contract for service is for a 10-year term with longer periods for those appointed by the Attorney General prior to 2005. The payments under the contract comprise four components:

- I. a personal element;
- II. staff costs;
- III. expenses; and
- IV. a contribution to pension.

There are eight bands of payments associated with the contracts which reflect the amount of work in the relevant area or county. The contract provides an adjustment mechanism to ensure that the contract is appropriately resourced to accommodate the work in that area. This takes the form of a workload review and is carried out every three years to reflect the increase or decrease in the work in the particular area. The workload review considers the numbers and complexity of books of evidence prepared for indictable offences, the number of court dates attended and the numbers of District Court Appeals prosecuted over the three-year period to assess whether the payment band is appropriate to the particular contract.

Restrictions on Private Practice

The State Solicitor, partners and employees in his or her firm, are restricted by the contract for services from acting for any party in an election or referendum petition other than the Director. The State Solicitor is also restricted from representing a party or acting in any proceedings which would be in direct conflict with his or her role and duties as State Solicitor including (but not limited to) matters arising from the circumstances of a criminal investigation or prosecution.

Prosecutor for Bodies Other Than the DPP

State Solicitors also prosecute criminal offences in the District Court on behalf of other Government departments, State bodies and semi-State bodies, and are remunerated separately by those bodies for that prosecution work. The State bodies and semi-State bodies on behalf of whom the State Solicitors prosecute include:

- Minister for Agriculture, Food and the Marine;
- Minister for Social Protection;
- Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media;
- ESB;
- An Post;
- Road Safety Authority; and
- Standards in Public Office.

Prosecutorial Decision-Making

Outline of who makes prosecution decisions

Pursuant to [section 4 of the 1974 Act](#) the DPP is empowered to direct legal staff to perform, on her behalf and in accordance with her instructions, any function in relation to particular cases. All legal staff are appointed by the DPP following open competition.

Directing Division and Specialist Units, Office of the DPP

Delegations to carry out the functions of the preferal, continuation or withdrawal of charges and all functions connected with prosecuting criminal cases at trial have been made to the legal staff in the Directing Division. The Directing Division and the Specialist Units make these decisions in relation to files submitted to the DPP from the entire country. There is an on call service for urgent directions.

Solicitors Division and Prosecution Support Services Division, Office of the DPP

The Director has also delegated to these divisions some decision-making in relation to acceptance of pleas, judicial review cases, mutual legal assistance requests, assets seizing, and the review of decisions not to prosecute.

An Garda Síochána

A member of An Garda Síochána cannot institute a prosecution except in accordance with directions issued by the DPP pursuant section 8 of the Garda Síochána Act 2005 which provides that a member may institute or conduct prosecutions in a court of summary jurisdiction but only in the name of the DPP.

Under section 8(4) of the 2005 Act the DPP may issue general directions on the institution and conduct of prosecutions by Gardaí. General Directions (available on www.dppireland.ie) outline the categories of cases in which the decision to institute or continue a prosecution lies solely with the Director, and those cases where An Garda Síochána have been delegated the authority to institute criminal proceedings without reference to the Office of the DPP (see [chapter 7 Guidelines for Prosecutors](#) for more detail).

In practice the decision-making in relation to the majority of decisions to initiate summary criminal prosecutions are made by An Garda Síochána without reference to the ODPP.

Decisions Not to Prosecute - Requests for Reasons & Reviews

Victims Liaison Unit, Office of the DPP

In relation to decisions not to prosecute taken by the DPP, reasons are given and reviews are carried out by the Victims Liaison Unit of the ODPP.

The Number of Requests for Reasons & Reviews Received by the Office of the DPP:	2021	2020	2019	2018	2017
Total requests for reasons received	652	699	649	606	638
Total requests for review of a decision received	215	220	207	196	219

An Garda Síochána

In relation to decisions not to prosecute taken by An Garda Síochána under section 8 of the Garda Síochána Act 2005, reasons are given and reviews are carried out by the relevant Garda Superintendent.

Summary Prosecutions (including District Court Appeals) - Dublin

District Court Section, Office of the DPP

The District Court Section in ODPP deals with District Court matters in the Dublin Metropolitan Area, as well as Dublin District Court appeals to the Dublin Circuit Court. This work involves:

- Preparation and service of Books of Evidence and applications to send an accused forward for trial;
- Providing an advocacy service in the Dublin District Court in respect of more complex matters for summary disposal. These include files where the prosecution decision has been taken by the Directing Division or An Garda Síochána who have submitted the file for representation in the Dublin District Court. Prosecuting all District Court Appeals before Dublin Circuit Criminal Court.

Typical matters where representation in the District Court is provided include:

- Cases involving children;
- Cases involving vulnerable victims or accused persons – these often include fitness to be tried matters and prosecutions for sexual assault, domestic violence, harassment, assault causing harm, threats to kill;
- Evidentially complex cases – i.e. based on phone/internet records or expert evidence;
- Legally complex or technical cases – i.e. fraud and all drink/drug driving prosecutions;
- Prosecutions arising from Investigations by the Health and Safety Authority;
- Prosecutions against a member of An Garda Síochána;

Matters where representation is not provided in the District Court except in unusual circumstances include:

- First appearance before the court to give evidence of arrest, charge and caution;
- Mention dates, adjournments and remands;
- Bail applications before the District Court; and
- Entry of guilty pleas and sentence hearings.

An Garda Síochána

All matters where a DPP Solicitor is not providing representation are presented by a Garda Court Presenter or by the investigating member. An Garda Síochána prosecute the vast majority of summary prosecutions.

Summary Prosecutions (including District Court Appeals) – Outside Dublin

State Solicitors

The contract for State Solicitors provides that the State Solicitor may at the request of the DPP be asked to provide representation at District Court. It is not a core part of their role. State Solicitors are asked to provide representation on behalf of the Director in the District Court for some of the following applications or prosecutions:

- prosecutions against a serving member of An Garda Síochána
- prosecutions arising from investigations by the Health and Safety Authority
- prosecutions arising from investigations by the Revenue Commissioners
- prosecutions of a complex nature where legal assistance is required, e.g. applications for fitness to be tried, legal point in issue

The State Solicitors also deal with all District Court Appeals to the Circuit Court in their respective areas.

An Garda Síochána

All District Court matters outside Dublin are presented by a Garda Court Presenter or prosecuted by the Superintendent / Inspector (other than cases where the State Solicitor has been asked to provide representation as set out above).

Indictable Prosecutions - Dublin

Solicitors Division, Office of the DPP

In all matters proceeding on indictment before the Central Criminal Court, Special Criminal Court, and the Dublin Circuit Criminal Court, the Solicitor Division is responsible for the management and preparation of the prosecution including the service of evidence, disclosure and engagement with the victim. They support the prosecution counsel engaged by the DPP to present the prosecution case in the Circuit Court.

Most advocacy is carried out by Counsel briefed by the DPP who are on a DPP Panel of Counsel.

These matters are dealt with by the Circuit Court Section, Sexual Offences Unit, Superior Courts Section and the Special Financial Unit within the Solicitors Division, as appropriate.

The number of suspects directed to be prosecuted with indictable offences in trial venues:	2021	2020	2019	2018	2017
Dublin Circuit Court	1,927	2010	1,478	1,342	1,359
Central Criminal Court	238	215	185	151	153
Special Criminal Court	22	28	31	32	25

Indictable Prosecutions - Outside Dublin

State Solicitor Service

Local State Solicitors' contractual responsibilities include the management and preparation of indictable prosecutions in the Circuit Criminal Courts in their area. They support the relevant County Prosecutor who is the DPP Counsel to present the prosecution case in the Circuit Court in their respective county. The advocacy is carried out by the County Prosecutor appointed by the DPP.

Circuit Criminal Courts other than Dublin Circuit Criminal Court

Files directed for Prosecution on Indictment in the Circuit Court outside Dublin	2021	2020	2019	2018	2017
Prosecutions by Year of Direction	2,601	2,782	2,396	2,044	2,103

Victims of Crime

Information on the rights, support and protection of victims of crime can be found in chapter 12 of the [Guidelines for Prosecutors](#). There is also a dedicated 'Victims and Witnesses' section of the Office of the DPP's website, www.dppireland.ie/victims-witnesses/ which includes a suite of information booklets, each written in plain language for victims of crime and the public generally. These information booklets include the following:

- Role of the DPP
- Going to Court as a witness
- How we make prosecution decisions
- How to request reasons and reviews
- Making a victim impact statement
- Releasing my counselling notes

The Office of the DPP engages with various victim support groups to victims of crime. Solicitors and State Solicitors meet with victims and families of victims before trials to explain the trial process. The evidence will not be discussed at such meetings.

Furthermore, the DPP has entered into Memoranda of Understanding (MOUs) with a number of agencies who provide support services to victims of crime, in particular those affected by sexual offences. Currently, the DPP has MOUs with the following organisations:

- Athlone (Midland) Rape Crisis Centre
- Dublin Rape Crisis Centre
- Health Service Executive (operated by Tusla)
- One in Four
- Sexual Violence Centre Cork
- Towards Healing
- Tipperary Rape Crisis Centre

The purpose of these MOUs is to reflect a shared understanding and promote a consistent practice between the Office of the DPP and the respective agencies in respect of disclosure of material to the prosecutor in criminal proceedings, and in relation to making such material available to the defence. Where such agreements are in place, prosecutors adhere to and follow the principles and procedures set out in those documents.

Other Prosecution Matters

The following sections/units within the Office of the DPP deal with all Dublin and non-Dublin matters:

Appeals Section

The Appeals Section deals with all indictable appeals to the Court of Appeal from every Circuit Criminal Court, the Central Criminal Court and Special Criminal Courts. The Appeals Section also deals with all appeals in criminal cases from the Court of Appeal to the Supreme Court.

Files dealt with by the Appeals Section	2021	2020	2019	2018	2017
Appeals to the Court of Criminal Appeal	263	285	295	322	278
Applications for Review of Sentence on Grounds of Undue Leniency	36	26	46	49	49

Judicial Review Section

This section deals with all judicial reviews, Article 40 (*habeas corpus*) applications, constitutional and plenary actions, as well as High Court bail applications and appeals. The Judicial Review Section also deals with all appeals in those cases to the Court of Appeal as well as to the Supreme Court.

Files dealt with by the Judicial Review Section	2021	2020	2019	2018	2017
Bail Applications to the High Court	1889	2078	1416	1501	1355
Judicial Review and Article 40 applications	166	140	168	172	192

International Unit

The International Unit deals with all European Arrest Warrants and Extradition applications, Mutual Legal Assistance requests to other states, and policy issues on police and judicial co-operation generally.

Files received by the International Unit	2021	2020	2019	2018	2017
Extraditions	6	10	6	5	5
European Arrest Warrants	45	150	91	89	63
Mutual Legal Assistance Requests	1102	873	602	559	526
The Trade and Cooperation Agreement Arrest Warrant (UK)	41	-	-	-	-

Chapter 3: Overview of the role of An Garda Síochána in the Prosecution System

An Garda Síochána is the policing service for the State, and therefore holds responsibility for the investigation of all criminal matters within the State. This includes investigatory work and participation in the prosecutorial process. The tasks within such prosecutions include managing court appearances, execution of warrants, monitoring of bail and other tasks as outlined in this document.

In addition, the role requires a collaborative and facilitative approach with partner agencies including the ODPP, Chief Prosecution Solicitor/State Solicitor, Courts Services and other statutory bodies.

The advice provided by the ODPP to An Garda Síochána includes the following:

A member of An Garda Síochána may not institute a prosecution except in accordance with section 8 of the Garda Síochána Act 2005 and only in the name of the DPP. Section 8 provides that the DPP may give directions in relation to the institution or conduct of prosecution by An Garda Síochána. The direction from the DPP provides that prosecutions for certain serious offences cannot be instituted without a decision from the ODPP. A further set of offences may have proceedings instituted, but cannot be finalised prior to a decision by the ODPP.

When a crime/offence is reported, the matter is investigated by An Garda Síochána. Following conclusion of the investigation, a decision is made whether to prosecute. Authority for such decisions rests with the Superintendent with responsibility for the geographic/functional area within which crimes are committed or the matter is forwarded to the ODPP for decision in accordance with the direction of the DPP. Investigating Members have authority to institute proceedings in purely summary matters such as road traffic and public order matters. .

Where the suspect is a juvenile (under 18 years), a decision is made by the Garda Youth Diversion Office (GYDO) as to whether the youth is suitable for inclusion in the Juvenile Diversion Programme. Where a youth is deemed unsuitable, a decision to prosecute is taken by the Superintendent with responsibility for the geographic/functional area within which crimes are committed or ODPP as above.

DECISION NOT TO PROSECUTE – REASONS AND REVIEWS

Where a decision is made not to prosecute, the victim is written to informing them of the decision and the process of requesting a review of a decision under Section 10 of the Criminal Justice (Victims of Crime) Act 2017 is outlined to them. They may, within 28 days after receiving the information, submit a request to An Garda Síochána to have the decision reviewed. Where An Garda Síochána receives a request for a review, they will arrange to have the review carried out by a member of An Garda Síochána who is independent of the original decision. The victim will be notified of the decision of the review as soon as practicable. The procedure for informing victims of decisions and the review is governed by HQ Directive No. 10/2016 EU – Victims Directive and Directive No. 11/2016 EU Victims Directive Letters and Request Forms.

HQ Directive No: 044/2022, Discontinuance of District Court Prosecutions by An Garda Síochána, has introduced a process of governance, oversight and accountability for the discontinuance of proceedings

that are instituted by members of An Garda Síochána where such discontinuance is deemed to be necessary, justified or warranted.

Prosecution Initiated – Current Structure

Investigation Commencement

On identification of a crime, the investigation lead is determined by the most appropriate available resource. For minor crimes the investigation tends to be conducted by the first responder or Garda Member to whom it is reported. If the crime is deemed to be more serious in terms of gravity, sensitivity or complexity it will be reassigned by the Crime Owner (Superintendent) to other resources such as:

- Divisional Detective Branch
- Divisional Drugs Unit
- Divisional Protective Services Unit
- Divisional Immigration Resources
- Divisional Roads Policing Unit

For crimes of a national significance / international aspect, these crimes may be reassigned to National Garda Units as follows:

- Garda National Economic Crime Bureau (GNECB)
- Special Detective Unit (SDU)
- Garda National Bureau of Criminal Investigation (GNBCI)
- Garda National Immigration Bureau (GNIB)
- Garda National Cyber Crime Bureau (GNCCB)
- Garda National Drugs and Organised Crime Bureau (GNDOCB)
- Garda National Protective Services Bureau (GNPSB)

According to Garda Policy, stipulated serious crime incidents require the mandatory appointment of a Senior Investigating Officer (S.I.O) who are of Inspector Rank or above. Such appointments are supported with an investigation team.

Investigation File Submission

The Investigating Member proceeds with their investigation to: establish the crime(s), identify suspects(s) and to gather all available and relevant information that can be considered and used as evidence. The investigation process is monitored by the Supervisor of the Investigating Member and by a management review process completed by the Superintendent (Crime Owner).

The gathering of evidence for an Investigation File will generally come under the following headings:

- Witness Statement /Cautioned Statements
- Exhibits
- Forensics
- Electronic Evidence

- Admissions
- Arrest / Custody Management

On completion of the criminal investigation, the Investigation File is forwarded (through a supervisor) to the relevant Superintendent who is the Crime Owner. As outlined in the process chart (**Figure 1**) the Superintendent or an Inspector acting on his/her behalf will determine the following:

1. if the Investigation File is of a suitable standard or has any investigative or procedural issues that need to be further addressed; and,
2. whether the file:
 - A. can be directed on under Section 8 Garda Síochána Act 2005 – General Direction No.3
 - or**
 - B. is required to be forwarded to the Office of the Director of Public Prosecutions (ODPP)
 - or**
 - C. in the case of a child being a suspect can be dealt with by the Director of Garda Youth Diversion Office
 - or**
 - D. Can be dealt with under the Garda Adult Caution Scheme

The following table extracted from PULSE indicates the activity levels in relation to the amount of prosecutions, both summary and indictment, initiated by either charge sheet or summon by An Garda Síochána from 2016. This includes charges directed by the DPP. Figures are operational and may be liable to change. It is important to note that some investigations will remain on-going and so these figures will change over time, this is particularly the case for more recent years.

	2016	2017	2018	2019	2020	2021
Charge Sheets	98,170	101,951	107,739	117,176	115,487	113,215
Summons	264,965	268,615	263,161	269,031	253,789	236,883

A. Section 8 Garda Síochána Act 2005 – General Direction No 3

[Section 8, Garda Síochána Act 2005](#) - provides that the Director of Public Prosecutions can give general or specific directions to An Garda Síochána in relation to the institution and conduct of prosecutions for specified offences to be dealt with summarily. Due to a legal challenge in 2022 regarding the right of audience, Section 8 was amended¹.

¹ DPP (at the suit of Garda Liam Varley) v Ciarán Davitt (2022)

The General Direction gives guidance on when An Garda Síochána:

- I. Must forward an Investigation File to the ODPP for directions
- II. Consent to Summary Disposal for offences directed on the evidence identified in Investigation Files
- III. Should send the file to the ODPP because the case involves an unusual question of law, aroused unusual public interest or the offence(s) may attract a penalty in excess of District Court jurisdiction.

Based on the evidence in the Investigation File and authority being provided through General Direction No.3, a Superintendent, Inspector or Sergeant (limited offences) may direct on certain charges/summons for disposal by summary prosecution in the District Court. This direction is communicated to the Investigating Member to commence prosecution. If a decision is taken not to prosecute, the injured party must be informed (in writing) of this direction.

B. Investigation file required to be forwarded to the Office of the Director of Public Prosecutions (ODPP)

For Investigation Files that require submission to the ODPP, a detailed review of the Investigation File by the reviewing Superintendent or Inspector is completed. Following this, they will add a covering report to the Investigation File which will critique the Investigation File, review the evidence contained within, identify possible criminal offences and make recommendations with supporting rationale for same. This Investigation File, which will contain a completed Form CM13 is forwarded to the local State Solicitor/Chief Prosecution Solicitor for onward transmission to the ODPP.

For serious and/or complex investigations, on occasion a presentation can be requested by the ODPP Directing Officer or offered by the Investigating Member (and his or her team).

Following consideration of the Investigation File, the ODPP will direct:

- Criminal offences to be preferred against suspects(s) or reaffirmation of directions previously received from the on call ODPP Directing Officer
- No prosecution
- Potential gaps in evidence that may need further investigative actions

These outcomes are communicated back to the Superintendent (Crime Owner), through the State Solicitor/Chief Prosecution Solicitor, where prosecution will commence. If a decision is taken not to prosecute, the victim must be informed (in writing) of this direction.

C. Director of Garda Youth Diversion Bureau

The aim of the Garda Youth Diversion Programme is to prevent young people between the ages of 12 and 18 years of age from entering into the criminal justice system. Diverting young people from committing further offences is another intended outcome of the Programme. For some serious crimes young people aged 10 and 11 will be considered for inclusion in the Programme.

Investigation Files are submitted to the Director of the Garda Youth Diversion Programme. The Director's role is carried out by a Garda Superintendent under Section 20 (1) Children Act 2001.

The Director's decision on whether or not to admit a young person to the Diversion Programme is based on a number of factors such as the nature of the offence, the impact of the offence on the community, the views of the victim, and the offending history of the young person.

If a child is deemed suitable for inclusion in the Diversion Programme, the child will be assigned a Juvenile Liaison Officer (JLO) in the child's Garda Division or Garda District in the Dublin Metropolitan Region (DMR). The JLO will administer a caution to the child; this caution can either be informal, formal or restorative. If a formal caution is administered by the JLO, the young person will be placed under the supervision of the JLO for a period of 12 months, during which the JLO will monitor the child's progress in line with a plan they have agreed upon to reduce the likelihood of the child re-offending. Alternatively, if an informal caution is administered, this would normally not involve a period of supervision, though in certain circumstances the child may be supervised for a period of six months from the date of the administration of the caution. The nature of the supervision is decided upon on a case-by-case basis.

Should the Director of the Garda Youth Diversion Programme deem a child not suitable for entering into the programme or if the child refuses to take part in the programme, the Investigation File is returned to the originating Superintendent (Crime Owner). The Investigation File is returned with a signed certificate from the Director noting the child's unsuitability for admission to the Diversion Programme. The Superintendent reassesses whether he/she can direct on it under Section 8, Garda Síochána Act 2005 – General Direction No 3 or if the Investigation File is required to be forwarded to the Office of the Director of Public Prosecutions for direction.

Gardaí initiate a prosecution against a child by way of charge sheet or summons. All DMR prosecutions are brought before the Children's Court in Smithfield. As there is no Court Presenting System in place in the Children's Court, prosecuting members attend Court on all dates to prosecute such cases. In some instances, legal staff from the Office of the Director of Public Prosecutions, if required, will attend Court to prosecute hearings in Dublin.

Outside of the DMR, the location of such courts may vary depending on case volume;

- For Divisions with a lesser number of cases, such cases are held in the family law sittings of the District Court, these cases are presented by Court Presenters when cases are before the courts for mention only, and by way of a Prosecuting Inspector if the case is for Hearing.
- Divisions with larger juvenile case numbers, have designated juvenile court dates. These juvenile court sittings utilise Court Presenters/Prosecuting Inspectors as required.

Juveniles who continue to come to Garda attention have, where possible, Case Managers assigned to co-ordinate and streamline cases. They would generally oversee the imposition of Bail Conditions, engage in the Bail Supervision Scheme and structure any applications by Gardaí to have bail revoked. The Case Manager does not play an active role in the prosecution of cases but would be present to address the Court in relation to the child.

D. Adult Caution

An Adult Cautioning Scheme approved by the Director of Public Prosecutions became operational on 1st February 2006. It was introduced for use by An Garda Síochána as an alternative to prosecuting

adults for certain criminal offences. This scheme may be available as an alternative to prosecution where there is evidence that the person has committed the offence and where the prosecution of such an offence is not required in the public interest. Adult Cautions are not disclosed in Garda Vetting reports and Police Certificates.

There are a number of specific criminal offences to which this scheme can be applied (see Appendix III). It is important to note that the scheme can only be considered for these offences. The decision to administer an Adult Caution rather than commencing a prosecution is taken by the Superintendent (or a Garda Inspector who is acting as the local Superintendent). In deciding whether or not to issue a caution, the following points are considered:

- The public interest
- The views of the victim

Before a caution can be considered or administered the following conditions must be met:

- I. There must be prima facie evidence of the offender's guilt
- II. The offender must admit the offence
- III. The offender must understand the significance of a caution
- IV. The offender must give an informed consent to being cautioned

The nature of the caution is that it should be applied only once to an offender however exceptional circumstances do allow consideration of a second caution to be administered. Adult Cautions are recorded on PULSE.

Court Management Process

Following on from a direction to prosecute being given on an investigation, the Investigating Member may proceed by way of summons or charge sheet. Summonses are utilised more commonly for summary offences, where there is no immediate necessity to have the defendant before the court.

The summons application is created on PULSE by the Investigating Member and is submitted to the Courts Service. This submission is completed electronically, unless the time deadline to prosecute is imminent. In this scenario, the summons application must be printed and lodged with the Courts Service manually. Once received by the Courts Service, the summons is created and sent to An Garda Síochána for service. This summons remains with An Garda Síochána until it is served, either by way of registered post or personal service. Once the summons is served it is lodged with the Courts Service. If it is the case that the summons has expired before service can be achieved, a re-application is submitted by a member of Sergeant Rank and the process recommences.

For matters arising out of the non-payment of a Fixed Charge Penalty Notice, (FCPN), the FCPN office initiate the summons application and forward it to the Courts Service. Once this summons application is received by the Courts Service, the summons is created and forwarded to An Garda Síochána for service, in the usual manner.

Charge sheets are utilised where the defendant is in custody and where there is a need to have the prosecution initiated. This may be due to bail restrictions being required or for other operational reasons. The charge sheet is created on PULSE and printed by the Investigating Member. Once the defendant is charged the charge sheet is lodged with the Courts Service.

Divisional Court Management Office (DCMO)

An Garda Síochána is currently transitioning from a District policing model to a Divisional Functional Area structure. This new Garda Operating Model is a key initiative of '**A Policing Service For our Future**'. In October 2019, An Garda Síochána moved from 6 to 4 Garda Regions. The current 28 Divisions will transition to 19 new Divisions under the new Operating Model over time. Under the Operating Model four Functional Areas will be created in each Division. The Community Engagement, Crime and Performance Assurance Functional Areas will operate under the command of a Superintendent and the Business Services Functional Area will be managed by an Assistant Principal. Five Garda divisions have gone live to date in 2022 with the new operating model namely; Cork City, Kerry, Limerick, Galway and Mayo Roscommon Longford. One of the core responsibilities of the Performance Assurance Functional Area is the management of the Criminal Justice pillar, which has responsibility for the Court Presenting System at a Divisional level. Once fully established in each Division post go live the Divisional Court Management Offices (DCMO) offices will sit under the Performance Assurance Functional Area. The Operating Model will be introduced in An Garda Síochána on a phased basis throughout the remainder of 2022 and through all of 2023.

After a served summons or charge sheet is lodged with the Courts Service, the Prosecuting Member submits a file to the Divisional Court Management Office (DCMO) for preparation for the court date and management thereafter.

For cases pertaining to the District Court, all interaction between the Courts Service and An Garda Síochána is carried out by the DCMO under the Criminal Justice functional area. The current District Court Management Offices only fulfil a local or District role under the relevant Superintendent or District Officer.

The **Divisional** Court Management Office will replace the **District** Court Management Office currently in existence in Garda Districts once each Division moves from a District to a Divisional Structure under the Operating Model. The Divisional Court Management Office will perform a Divisional role.

The management of court files and ensuring that all orders of the court are adhered to are the responsibility of the DCMO. A file will only leave the responsibility of the DCMO if the case is 'sent forward' to a Higher Court. In such circumstances (outlined later in this report), the local State Solicitor/ Chief Prosecution Solicitor will take over all responsibility of the file, liaising with An Garda Síochána as the need arises.

Within the District Court setting, Court Presenters who are of Sergeant rank, carry out the function of presenting the case before the District Court. Court Presenters have been in place in Dublin since 1997

and outside of Dublin since 2013. Court Presenters significantly reduce the need for individual Gardaí to attend the court and have allowed An Garda Síochána to streamline procedures and processes relating to the Court management process.

Court Presenters work directly with the DCMO, and while the preparation work is carried out by the DCMO, the Court Presenters carry out the functions before the District Court. All directions and orders of the Court are managed by the DCMO to ensure a timely and consistent approach with the directions of the District Judge.

Following identification that a suspended sentence imposed by the District Court has been contravened by way of conditions breached, the reactivation of the suspended sentence is requested by the DCMO. The DCMO liaises with the Courts Service and a recall date is arranged (with all parties notified). If the matter refers to Higher Courts, An Garda Síochána carries out this process in consultation with the State Solicitor.

Recording Court Outcomes -Higher and Lower Courts

The process of recording court convictions from the District Court is carried out by the Courts Service. These convictions are automatically relayed to the Garda PULSE system. On a conviction being imposed in a Higher Court, the Conviction order is sent to An Garda Síochána for recording purposes. The DCMO / Investigating member records the conviction on the PULSE system.

Hearing Process – Contested Matters

Prosecuting Officer or Chief Prosecution Solicitors Office

There is a variation between the prosecuting process in Dublin and outside of Dublin. This variation is described below:

Dublin:

Garda Court Presenters are utilised in Dublin District Courts where charged persons appear. Currently additional Court Presenters will be located at summonses courts, but in the interim the Garda who applied for the summons will continue to prosecute their own cases.

On request, the District Court Section in the ODPP deals with District Court matters in the Dublin Metropolitan Area (DMD). The majority of District Court contested hearings are dealt with by the prosecuting Garda. The DPP provides representation in drunk/drug driving and domestic violence cases in the Criminal Courts of Justice, and on occasions, representation in some cases before other outlying DMD courts. Contested drunk/drug driving cases are usually prosecuted by representatives of the DPP's office.

The ODPP prosecute all District Court appeals in the Circuit Court.

Indictable prosecutions within Dublin - in the Central Criminal Court, Special Criminal Court and Dublin Circuit Criminal Court - are managed and prepared by the ODPP who support counsel to present and prosecute the case before the trial court.

Outside of Dublin:

Court Presenters deal with all matters in the District Court. However, should the accused contest the matter in the District Court, a Garda Inspector will present on behalf of the State at the contested hearing

On request, the State Solicitor may represent An Garda Síochána for specific cases at District Court.

The State Solicitors prosecute all District Court Appeals in the Circuit Court.

Outside of Dublin, local State Solicitors are responsible for the management and preparation of indictable prosecutions and support the ODPP Counsel who present and prosecute the case in the Circuit Court.

Legal submissions proffered

Court Presenters and Prosecuting Inspectors will proffer legal submissions to the District Court as the need arises. Should assistance be required, advices can be sought from the local State Solicitor / District Court Section in the ODPP on matters arising.

In the higher trial Courts, such matters will be in the hands of the State Solicitor and ODPP.

Bail Arrangements and AGS role

An Garda Síochána discharge a crucial role when a decision to grant station bail to an accused person is considered as this decision impacts on the liberty of the accused person.

Station / Court Bail

When an accused person is charged with a criminal offence they can be considered for bail. Bail can be granted to an accused person by the Sergeant at a Garda Station or in the District, Circuit or High Court. If appropriate to do so, An Garda Síochána can permit a person to avail of Station Bail to appear on a nominated date at a nominated District Court. This is permitted pursuant to [Section 31 of the Criminal Procedure Act 1967](#). In circumstances where an accused person is not offered Station Bail or it is deemed necessary to apply certain conditions, then they are brought before the District Court. This may be due to a number of factors including: the nature of the crime they committed, whether they are on bail already and their previous offending history. In these cases An Garda Síochána will bring the accused before the Court with a view to objecting to bail under [Section 2 of the Bail Act 1997](#) and/or the [O' Callaghan's Rules](#)². In objecting to bail, An Garda Síochána requests that the accused person is remanded in custody. The grounds for objecting to Bail are:

- that the accused will interfere with witnesses and/or evidence, or that the accused will fail to attend court on the nominated date.

² The People (at the suit of the Attorney General) v Roger O'Callaghan, SC, 1966

- the likelihood that the accused will commit further offence on bail.

Accused breaches conditions of bail

In the event that an accused person fails to attend court on the nominated date, An Garda Síochána may apply for a bench warrant for the arrest of the accused. The bench warrant empowers An Garda Síochána to arrest the accused and bring him/her back before a court where the accused may be charged with a further offence under Section 13 of the Criminal Justice Act 1984.

If an accused person breaches the conditions of their bail, they may also be subject to arrest if the presiding Judge deems the breaches sufficient to revoke their bail. In this situation, An Garda Síochána may apply to the court for an arrest warrant for the accused to bring him/her back before the court.

High Court Bail

The ODPP manages applications for bail before the High Court and Bail appeals to the High Court. High Court Bail is applied for in relation to certain serious offences such as murder or when bail has been refused in the District, Circuit and Special Criminal Court). High Court Bail applications require close communication between An Garda Síochána and the ODPP (High Court Bail Section).

In a High Court Bail application, the ODPP will manage the appeal. The ODPP will instruct prosecution counsel on behalf of the Director to appear. Members of An Garda Síochána will provide evidence in the bail hearing to the High Court in support of their objection to the accused being admitted to bail. It is also the case that in certain circumstances, An Garda Síochána will facilitate the attendance of any witnesses or victims giving evidence in opposing the bail application.

In addition, if an accused person is granted High Court Bail, the ODPP can apply to revoke the bail of the accused if they are in breach of the conditions attached to it. To revoke such bail an application must be made to the High Court by the ODPP.

Execution of warrants

To secure the attendance of defendants or witnesses at Court a Judge can issue a Bench Warrant. Such warrant is a court order issued to An Garda Síochána to bring a defendant before the Court.

It is also a common feature on many warrants that they are endorsed in accordance with [Section 8, Bail Act 1997](#) . This would apply in the less serious offences. This provides An Garda Síochána the authority to re-admit the defendant to bail on condition, with or without a surety or sureties. Such warrants can issue in circumstances whereby a defendant fails to appear; a summoned witness fails to appear; or to have a defendant appear to hear an application to revoke bail.

Criminal Justice (Victims of Crime) Act 2017

The Criminal Justice (Victims of Crime) Act 2017 introduced for the first time statutory rights for the victims of crime and established minimum standards on the rights, supports and protection of victims of crime. The Act is based on three pillars:

1. Right to information – Sections 7-11
2. Protection of victims during investigation and criminal proceedings – Sections 12 - 26
3. Supporting victims through the criminal process – Sections 27-34

Garda Victim Service Offices

There are currently twenty-eight (28) Garda Victim Service Offices (GVSO) in the country. The Victim Service Offices are responsible for communicating with victims of crime, and prioritising their needs for the majority of crimes. For serious crimes such as a sexual crime or homicide, the Investigating Member or Family Liaison Officer maintains contact with the victim. An Garda Síochána ensures victims of crime are kept informed about the progress of their case and the supports available to them. Supporting all victims of crime is now part of every anti-crime strategy.

The Victim Service Offices are the central point of contact for victims of crime and trauma in each Garda Division. They supplement victim support activity, already being undertaken by Investigating Members of An Garda Síochána.

The Garda Victim Service Offices are staffed with dedicated, specially trained personnel who keep victims informed of all significant developments associated with their case. This information is provided by means of mandatory Letters to Victims of Crime and/or personal contact through phone.

There are four types of letters namely:

- Letter 1: A written acknowledgement of the victim's complaint and details of the Investigating Garda Member and the associated PULSE number
- Letter 2: Advises the victim that there have been some developments in the investigation
- Letter 3: Advises the victim to contact the GVSO with regard to the outcome of their case
- Letter 4: Advises the victim that in the absence of further evidence their investigation cannot be progressed at this time

For crimes such as burglary, assault or criminal damage, victims of crime receive a follow-up call from the Garda Victim Service Office to ensure they have all the information they require. They are also provided with crime prevention advice and details for external services available from other State and/or Non-Governmental Agencies. Therefore, when a crime is reported, An Garda Síochána will provide details of independent victim support organisations. These organisations help anyone affected by crime – not just victims and witnesses, but their friends, family and other people caught up in the aftermath.

Conviction and Sentence Appeals-Role of AGS

District Court Appeals

On conviction in the District Court, a defendant can appeal the decision to the relevant Circuit Court. The appeal can relate to the conviction or the penalty imposed by the presiding District Court Judge. A copy of the notice of appeal is served on An Garda Síochána and the Courts Service.

An Garda Síochána are represented by the Chief Prosecution Solicitor/ State Solicitor in the Circuit Courts. The Divisional Court Management Office (DCMO) in consultation with the Investigating Member prepares the appeal file. The appeal file is forwarded to the Chief Prosecution Office / State Solicitor in advance of the hearing of the appeal.

The Chief Prosecution Solicitor / State Solicitor advises An Garda Síochána on the status of the hearing namely, whether the case is proceeding to a full contest or whether the case relates to appealing the severity of the penalty imposed.

An Garda Síochána's role in the appeal process is to provide a copy of the investigation file and up to date information to the relevant Chief Prosecution Solicitor / State Solicitor who will then advocate the position of the Prosecution.

Appeals to the Court of Appeal

In cases before the Court of Appeal (Criminal), the Chief Prosecution Solicitor manage those appeals and instructs prosecution counsel to appear on behalf of the DPP. An Garda Síochána provide any information / evidence related to the appeal and inform the Court of any relevant facts of the appeal where required.

AGS Prosecutions Work and the New Operating Model

An Garda Síochána's new Operating Model is a strategic initiative, as part of "A Policing Service for our Future". It provides a single, consolidated vision of An Garda Síochána's transformation to deliver a more efficient, effective and responsive organisation that is well positioned to meet both current and future policing challenges. It is a key enabler of An Garda Síochána's strategic objective "Keeping People Safe". It augments structures, processes, technology and specialist capabilities, through Divisional, Regional and National designs and process standardisation and optimisation, to enhance the effectiveness of An Garda Síochána's service delivery model.

At Divisional level, the Operating Model reduces the number of Garda Divisions from twenty-eight (28) to nineteen (19) enlarged Divisions. The Model migrates a Division from the current District structure to a Functional Area structure, consisting of the following four Functional Areas: Business Services, Performance Assurance, Crime and Community Engagement (Figure 1). These Functional Areas are at the core of the Model.

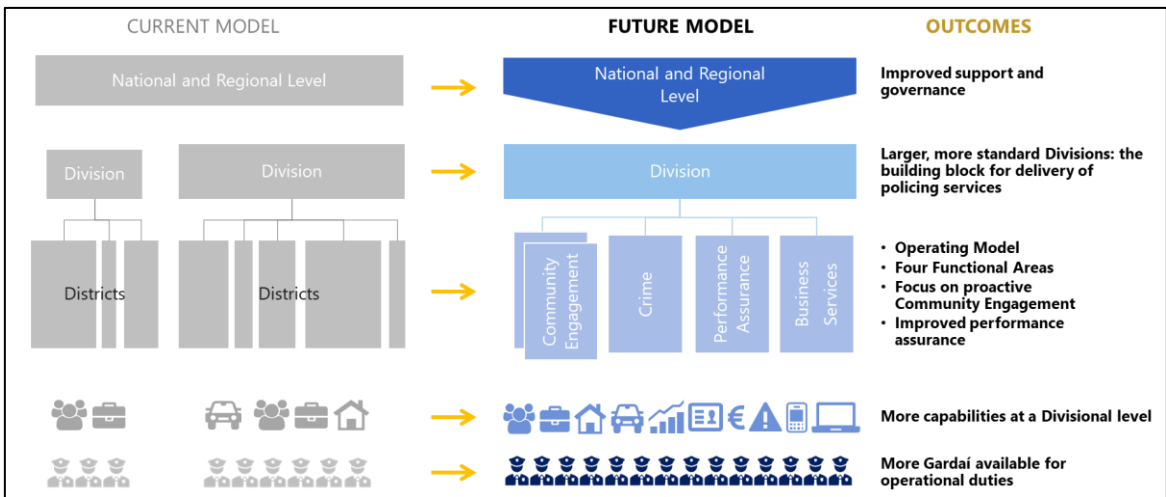
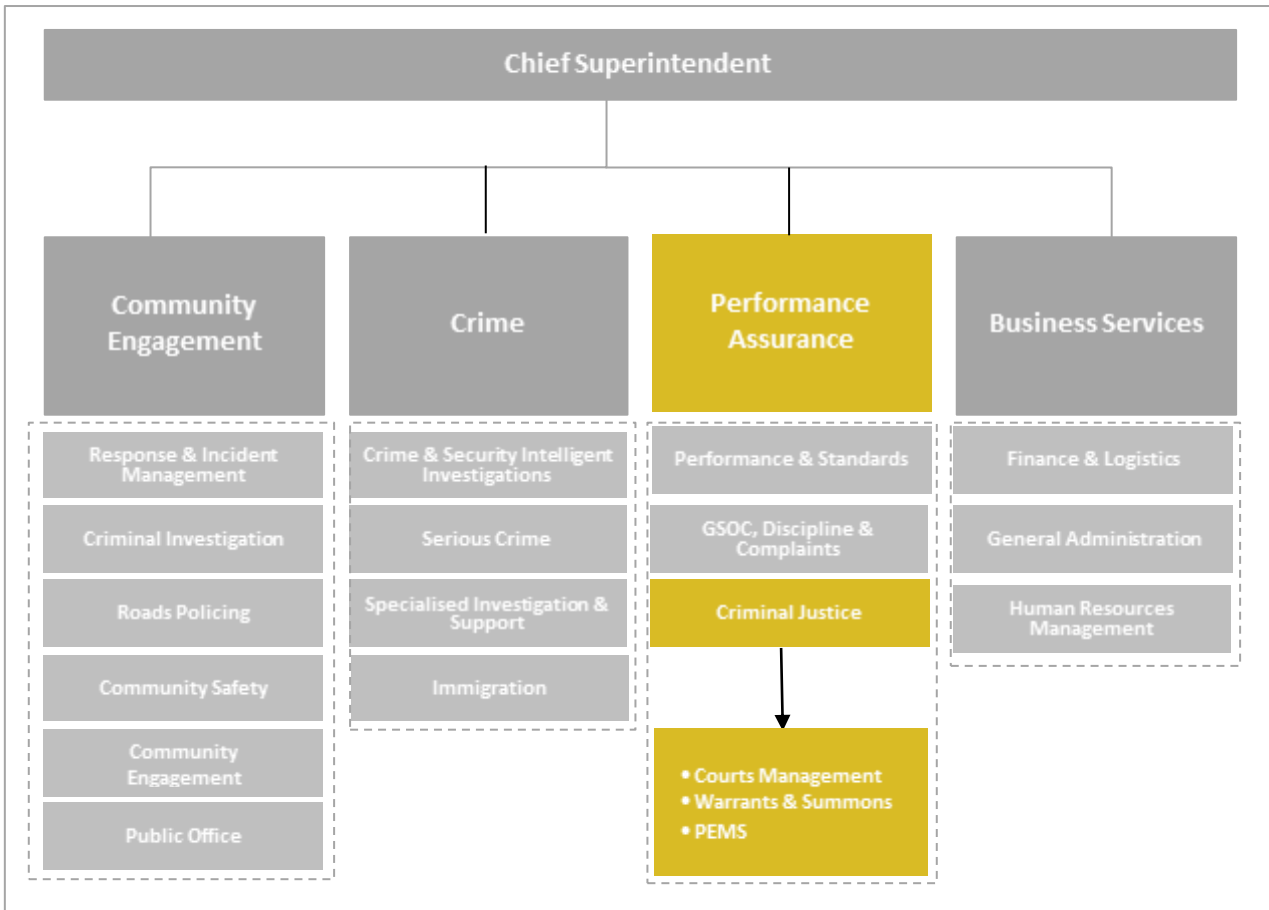


Figure 1: Operating Model – Migration from District to Functional Area Structure

Figure 2 provides an overview of the elements within each Divisional Functional Area.



Within the Divisional Performance Functional Area, there are three elements:

- 1) Performance & Standards,

2) GSOC, Discipline, & Complaints and

3) Criminal Justice (e.g. Divisional Court Management Offices).

The Criminal Justice element will oversee for the Divisions court management, warrants and summons administration and the Property and Exhibit Management System (PEMS). This will involve working closely with the Community Engagement and Crime Functional Areas to ensure effective delivery of services. The key services within the Criminal Justice element, include but not limited to, are:

Court Prosecutions

District Court Appeals

Monitoring licensing applications

Coroner's Court (Inquests)

The DCMO Office will sit under the Criminal Justice Element within Performance Assurance. A Criminal Justice Inspector will lead the Criminal Justice function in the Division. Each DCMO will be allocated an Office Manager, Court Presenters and Administrative Garda Staff to support the administration of court prosecutions, summonses and warrants, court file management, applications for licences granted by the courts and to liaise with State and other external Criminal Justice partners.

Warrants & Summons Administration

The Operating Model, through the Performance Assurance (Criminal Justice) Functional Area, will establish a new Divisional Court Management Office (DCMO) structure in each of the nineteen (19) Divisions. The Divisional Court Management Office will be formally established after the commencement of An Garda Síochána (Functional and Operational Areas) Act 2022. Once established the new Divisional Court Management Offices will be managed by the Superintendent in charge of the Performance Assurance Functional Area. The Superintendent's core functions within the Performance Assurance Functional Area will be subdivided into the following three sections (1) Performance and Standards (2) Discipline and Complaints (including GSOC investigations) and (3) Criminal Justice. The Divisional Court Management Office will sit under the 'Criminal Justice' section within the Performance Assurance Functional Area under the direct supervision of an Inspector. The Criminal Justice section will have Divisional responsibility for the management of the district and circuit courts, warrants, summonses and the Property Exhibit Management Stores (PEMS).

The DCMO will act a single point of contact for the entire Division on all matters pertaining to the 'Criminal Justice' section of Performance Assurance Functional Area.

Figure 3, provides an indicative illustration of the proposed DCMO functions.

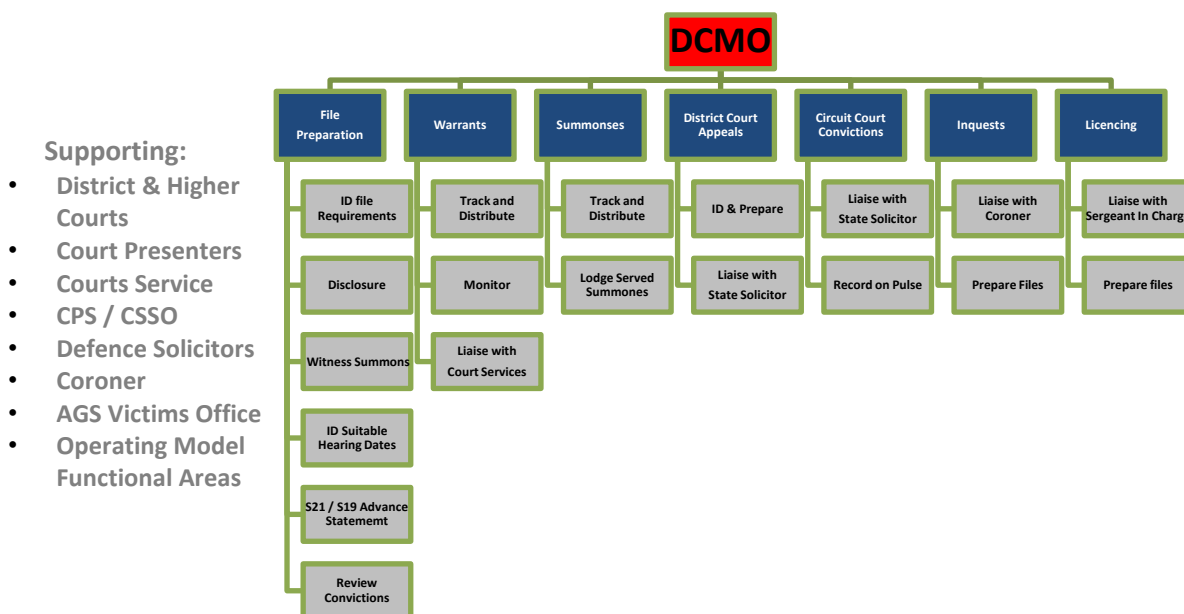


Figure 3: Indicative Functions of the Divisional Court Management Offices (DCMOs)

The new DCMO structure under the Operating Model will deliver the following benefits:

- Dedicated points of contact for court management related matters in each Division
- Consistent delivery of court management services across all the Divisions
- Enhanced quality assurance by dedicated skilled personnel
- Structured oversight by a Performance Assurance Functional Area Superintendent and Inspector, with specific responsibility for the Criminal Justice function, within each Division
- Reduction in the administrative work-load of operational personnel
- Introduction of new national standardised/optimised processes designed to support the Divisional court management functions

An Garda Síochána will implement the new DCMOs, on a Division by Division basis, as part of the phased national rollout of the Operating Model. The Criminal Justice element of the Performance Assurance Functional Area is provisionally scheduled to fully commence in 2023 following the commencement of An Garda Síochána (Functions and Operational Areas) Act 2022.

Chapter 4: Research – Time and Effort

Introduction

1.1 Overview

The Commission on the Future of Policing in Ireland (CoFPI) made a recommendation that:

'...all non-core duties should be reassigned to other agencies. All prosecution decisions should be taken away from the police. The practice of prosecuting cases in court should also cease.'

Our terms of reference required us to focus on the resource implications of implementing this recommendation, which the Government had accepted in principle. In order to carry out an analysis of the resource implications the baseline costs of operating the current prosecution system needed to be established. The parameters of possible alternative arrangements in a new model conforming to the CoFPI recommendation then needed to be estimated and a comparison made. The outcome of that analysis would then feed into the development of options to be assessed by the Group in accordance with our terms of reference.

In effect, this required the Group to consider the cost of the 'business as usual' scenario, where An Garda Síochána (AGS) continue to prosecute. Costs would need to be identified under the headings of (i) decision to prosecute and (ii) the practice of prosecuting cases in court. The analysis of an alternative system would focus on the cost implications of the decision to prosecute and the practice of prosecuting cases in court being moved from AGS to the ODPP and/or the State Solicitors.

The Research and Data Analytics Unit (RDA) in the Department of Justice was asked to explore the resource implications of the current model and a possible alternative system in terms both of human resources and total expenditure. Their examination of the available data revealed that there was no readily available source for this analysis. There was no reliable information on the time committed by members of AGS to the various stages of the investigation and prosecution of crime, which would clearly vary widely by the category of crime as well as the particulars of each case. If this analysis were to be undertaken it would require the compilation of a new dataset based on primary research. The RDA undertook this ambitious exercise through a methodology described in detail below.

Despite the expertise underpinning the design of this exercise and the ready cooperation of the various agencies and the many members of AGS who participated in a detailed survey, the results need to be viewed with caution. The time and effort of members of AGS indicated by the survey results then needed to be categorised into activities which might transfer to ODPP or others in an alternative system and those which would, in all circumstances, remain with AGS. This classification, and the estimation of the resource implications of undertaking the transferred activities in a different setting, necessarily required the making of assumptions which are set out in the text below.

1.2 Objectives

The objectives of the analysis were to:

- (i) Estimate the volume of summary offences going through the Criminal Justice System and its associated expenditure for the 'business as usual' scenario.
- (ii) Estimate the total expenditure, if the decision to prosecute and the prosecution function of summary offences are moved from An Garda Síochána to the ODPP and/or state solicitors.

2. Methodology & Assumptions

2.1 Introduction

This chapter outlines the methodology and assumptions used in the analysis, the research approach, the data collected and the procedures used for data collection.

In order to carry out the analysis, data was collected from An Garda Síochána, the Office of the Director of Public Prosecutions (ODPP) and the Courts Service. Three years of data, from 2014 to 2016 inclusive were sought to ensure that an offence had received an outcome decision. The data supplied was taken from AGS PULSE system, Courts Criminal Case Tracking System (CCTS) and ODPP's Case and Document Management (CDMFT) database³. This gave the volume of summary offences going through the Criminal Justice System.

2.2 Research Questions and Methodology

In order to answer the key question on the difference in cost for a new prosecution system, several key questions were required to be answered;

- What is the volume of offences going through the Criminal Justice System?
- What is the average amount of time, measured in hours, for cases that are prosecuted as summary offences?
- Knowing the above, how much does the prosecution function cost An Garda Síochána?
- How much would it cost to replace this function with a professional prosecution service?

2.2.1 Datasets utilised

The data made available to the RDA for the purposes of the carrying out the analysis were drawn from different datasets. These datasets are:

- AGS PULSE system.
- Courts CCTS system.
- ODPP's Case and Document Management (CDMFT) database.

³ It is important to point out that no personal information was sought or received for this project from any of the relevant stakeholders as it was not required for the analysis.

Both primary and secondary data sources were used. The primary data, including cost data was supplied by the relevant stakeholders. Secondary data was collected from open data, administrative data, and published research.

The offence codes for each dataset was matched to the CSO ICCS crime codes. The RDA have developed a data dictionary which maps the Central Statistics Office (CSO) Irish Crime Classification System (ICCS) codes to different Justice agencies; including An Garda Síochána, The Courts Service of Ireland, Office of the Director of Public Prosecutions and the Irish Prison Service (IPS). The ICCS Codes were used as part of a validation check of the volumes being used in the analysis.

Following on from this, a review of datasets provided was carried out to examine the linkage between An Garda Síochána and The Courts Service of Ireland CCTS data extracts. This involved getting the unique number of PULSE IDs in relation to both AGS and Courts CCTS, conducting a frequency test and measure which values link. The analysis focuses on unique files/cases per year. The data then was subsetting based on Case ID, ICCS Code Abbreviation, Region, Penalty Year etc. in order to carry out the analysis.

2.3 Assumptions

- Three years of data (2014 to June 2016) were examined in order to try and ensure that each offence would have a final outcome (Courts Service). In reality this may not be the case.
- PULSE data, all offences that are in the extract were those where there was a detection and that would be prosecuted by AGS. This gave the volume of offences or the throughput in the system. The analysis only looked at summary offences.
- PULSE does not capture information about decisions not to prosecute. The work undertaken by AGS in providing reasons and reviews for summary decisions is part of the decision making. PULSE does not have data on the number of cases where decisions were made not to prosecute or the number of cases where reasons were given and reviews conducted. This work has not been accounted for in the costings.

Currently PULSE classifies incidents as either detected (proceedings commenced with Suspected Offender) or not detected (No proceedings commenced).

- Only incidents that resulted in proceedings being commenced, where a charge sheet or a summons issued, were included for the analysis. They make up just over 90% of the total number of proceedings brought as per AGS data extract.
- In the alternative system, it is assumed that AGS will continue its role of managing witnesses and liaising with victims.
- In preparing the analysis of costings of the present and possible alternative systems. The assumption is that, in reality, only the following AGS ranks would act as prosecutors on a case:
 - Garda
 - Sergeant
 - Inspector

- For the ODPP, the District Court Section is managed by a Principal Officer Higher Scale (PO1) and assisted by 2 X Principal Officer Standard (PO) and 3 X Assistant Principal Higher (AP1).
- Solicitors are assumed to be recruited as Prosecution Solicitors, and their pay scale starts close to the Administrative Officer Scale and extends to the end of the AP scale.
- The Senior Prosecution Solicitor paygrade is equivalent to Assistant Principal Higher (AP1).
- State Solicitors contracts includes as part of the remuneration package for expenses and staff. That is how accommodation is factored into the contracts at present.
- The Divisional Court Management Offices (DCMO) have not been included in the costings; additional accommodation costs, admin support costs and corporate services costs for ODPP in the event of large increased workload have also not been included.
- There is an assumption that the work currently done in file preparation would be sufficient to support files being reviewed by the ODPP. Because of the potential change in process, it may be that if more cases needed to be sent to the ODPP, this would need to be supported by more comprehensive files being prepared for review by ODPP.

2.4 Limitations

As with any analysis there will be limitations;

- The AGS survey outlined in 3.2 below was a self-selecting survey, albeit that the overall results can be said to be representative. Those who completed the survey were completing the survey retrospectively i.e. over previous three months. This has the potential to generate missed data.
- It was not possible to establish a demarcation of the different processes in each stage, such as time spent liaising with victims, the number of times a file has been checked before a decision on prosecution can be made etc.
- Due to data limitations, the costings was unable to differentiate between cases which were contested or uncontested.
- Respondents were asked to assess the overall workload with respect to different offence types without distinguishing between those cases where the decision to prosecute was made by themselves or by a more senior supervisor; and without distinguishing between the workload involved in contested and non-contested cases. Data is not available in relation to how summary cases are disposed of (and specifically re. the percentage that are the subject of contested hearings.)
- Data is not available in relation to how many cases are decided by the Investigating member and how many are referred to a supervisor for decision.
- There is no one dataset that holds the information required, also there is no way currently of linking multiple datasets, thus there is a discontinuity in the data used for the analysis at the various stages of the project.
- The offence codes for each dataset were matched to the CSO ICCS, this is a subjective process, as a data dictionary needed to be created.
- No accommodation costs have been taken into account in the analysis.
- Additional corporate service support costs or administrative support costs were taken into account in this analysis, except insofar as this is covered by the standard 25% add-on to salary

costs as set out below. However, such costs could be higher than 25% in this case, noting that the ODPP relies on approximately 1 administrative support staff for every 2.5 legal staff employed. Some efficiencies that may be generated in any change from the Business as Usual system have been examined but there may be others that have not been taken into account.

- No transition costs have been taken into account.

3. Business as usual

An Garda Síochána is the policing service for the State, and therefore holds responsibility for the investigation of all criminal matters within the State. Their role includes investigatory work, preparation work and participation in the prosecutorial process. A Member of AGS may not institute a prosecution except in accordance with Section 8 of the Garda Síochána Act 2005 and only in the name of the ODPP. The direction from the ODPP sets out certain serious offences for which prosecutions cannot be instituted without a decision from the ODPP. The majority of cases dealt with by the ODPP are received from An Garda Síochána.

It is important to note that this paper examines offences prosecuted summarily only – those prosecuted by Gardaí under Section 8.

3.1 Overview of costs of existing model

While staff costs are central to any proposed change in prosecution systems there are additional costs that need to be taken into account, such as training costs, additional salary costs, IT costs, accommodation costs etc. These costs can be broadly categorised as direct and indirect costs. Figure 1 below gives a high level overview of direct and indirect costs associated with the work AGS currently undertake in prosecuting offences summarily. It must be noted that this was the only information available for this costing exercise. Only Direct Costs have been included in this costing exercise. Refer to Figure 1 below for a list of Direct Costs.

Figure 1: Breakdown of Direct and Indirect Costs

Direct Costs	Indirect Costs
Pay	Training
PRSI Contributions ⁴	Travel and Subsistence
Imputed pension costs	IT Costs

Source: IGEES Unit, DoJ

Note: Training, IT costs and accommodation costs are not examined in this paper.

⁴ https://www.gov.ie/en/collection/06bf07-prsi-contribution-rates-and-user-guide-sw14/?referrer=https://www.welfare.ie/en/downloads/SW14_19.pdf

Figure 2 outlines the framework used in estimating staffing costs. This framework is based on the Department of Public Expenditure and Reform (DPER)'s Public Spending Code⁵. An average salary cost was worked out for each grade based on the current salaries Circular 22/2017 issued by Department of Public Expenditure and Reform. This was done by taking a cash value midway between the scale minimum and the highest point, or Long Service Increment (LSI), as appropriate.

AGS supplied the annual cost of a Garda, Sergeant, Inspector and Superintendent ranks. The assumptions that they used in order to generate this estimate are as follows:

- Estimated salaries were calculated at the mid - point of the A rate salary scale in operation from November 2021.
- 2021 payroll data to end of October were extrapolated to provide approximate annual payroll costs per rank.
- Allowances were estimated based on data for all Garda members paid through Garda payroll in 2021.
- Employer PRSI was assumed at 11.05% for all employees and is charged on all income (non-taxable elements of some allowances were not considered).
- Unsocial hours allowances earned were estimated on the shift patterns currently in operation and hours worked by members.
- Overtime earned is variable (with the exception of briefing time/parading time). An estimate of the briefing time/ parading time was included.

Figure 2: Framework for Estimating Staffing Costs

	Cost Component	Methodology
A	Pay	Midpoint Range on Salary Scale
B	Direct Salary Cost	Pay + Employers PRSI
C	Total Salary Cost	B + Imputed pension cost
D	Total Staff Cost	C + 25% of A in respect of "overheads"

Source: Public Spending Code, Central Technical References and Economic Appraisal Parameters, DPER

Direct salary cost is defined as the gross wage or salary paid to an individual at the relevant grade, based on the midpoint of pay range, plus the associated employer's PRSI payment. PRSI rates are subject to change under Government policy and the Department of Social Protection (DSP) guidelines were consulted for the most recent rates that pertain to each employee category⁶.

Total salary cost is defined as direct salary cost plus an imputed employer pension contribution⁷. Employing public servants normally results in the creation of entitlements to pensions which are payable

⁵ Public Spending Code, Central Technical References and Economic Appraisal Parameters, DPER

⁶ https://www.gov.ie/en/collection/06bf07-prsi-contribution-rates-and-user-guide-sw14/?referrer=https://www.welfare.ie/en/downloads/SW14_19.pdf

⁷ <https://www.cso.ie/en/interactivezone/statisticsexplained/nationalaccountsexplained/imputedpensioncontributions/>

in the future. The employee currently meets a proportion of the cost through employee pension contributions and additional superannuation contributions. However, the balance is a deferred cost which is borne by the State. In estimating the total cost of employing a civil servant, or a member of AGS, allowance must be made for this deferred cost. The imputed pension contribution is based on gross salary, and not direct salary cost, because employers' PRSI payments are not reckonable for pension purposes.

The estimated pension costs for the cohorts of the Public Service are set out in Figure 3 below.

Figure 3: Standard & Fast Accrual Categories – Cost of Pension less Normal Employee Contributions

	Pre-2004 Cohorts	Post 2004- Cohorts	Post-2013 Cohorts
Civil Servant	29%	24%	8%
Garda	54%	53%	14%

Source: Public Spending Code, Central Technical References and Economic Appraisal Parameters, DPER

Notes:

- It should be noted that these figures represent the cost of pension less normal employee contributions and that no adjustments have been made to allow for Additional Superannuation Contributions (ASC) paid by employees.
- Members of AGS who joined before the 31st March 2004, can retire from age 50, while new entrants after 1st April 2004 can retire from age 55.

Total staff cost is defined as total salary cost plus 25% for overheads, as per the public spending code. Each additional staff member would require office space, materials, use of telephones, computers, postage service etc. DPER estimate that an addition of 25% to direct salary cost is appropriate to reflect these overhead costs. This is a composite figure applicable to the generality of civil service situations and includes, but is not limited to, costs for accommodation, utilities, support and back-office staff, training, travel, etc.

3.2 Time spent prosecuting - An Garda Síochána Survey

Because of the absence of relevant data to support a breakdown of the length of time that members of AGS spent working on each individual offence, it was decided to carry out a survey of AGS members. Following numerous consultations with the relevant stakeholders, the survey was launched and it examined the following high level stages of the prosecution process:

- File preparation and direction to prosecute, where a prosecution decision was made at local level (excluding files sent to the ODPP for direction).
- Prosecution of offences in court, where the time considered was that of the member prosecuting and that of members required to attend as a witness.
- Appeals were looked at, over a twelve-month period, i.e. where the AGS member surveyed was involved in any cases which were appealed.

This gave the average times taken for each category of offences under the following headings;

- File Preparation- this stage involves the time taken to gather evidence for an Investigation File,
- File Review & Direction- this stage involves the time taken to review and make a decision on the Investigation File,
- Case Preparation- this stage involves the time taken for the preparation work for cases prior to their scheduled court date. If there are adjournments, this means that case preparation will have to take place for each corresponding adjournment,
- Case Presentation/Prosecution- this stage involves the time presenting/prosecuting a case in court.

File preparation will remain with AGS as it relates to their core function, the investigation of crime.

In order to support the accuracy of the survey, two initial focus groups and a follow up focus group were held with Inspectors from AGS in order to ascertain if the survey timings were reasonable and representative in their experience. The follow up focus group was held to:

1. To review revised timings from the survey,
2. To better understand aspects of the prosecution process and where the bulk of the participant's time was spent.

The feedback from the first two focus groups suggested that the timings for preparing and presenting prosecutions were too low. This could be due to the distracting effect of outlying cases. These were removed to develop revised timings, with the aim of the third workshop being to explore if these brought timings closer to the norm. These three focus groups allowed greater reliability to the timings, although it must be pointed out that there are inevitable limitations in them, such as arise from variance in the quality of files, communications between Gardaí internally and with court presenters etc. which will have an effect on the timings generated.

3.2.1 Survey analysis

The analysis of the survey responses took into account;

- Garda rank & Civilian Grade
- Region
- District Court Area

In order to carry out any analysis, first the data needed to be examined in order to assess its quality. This meant checking for respondents who only answered a portion of the questions, respondents who provided unrealistic answers (outliers), for example respondents who gave inconsistent responses. Once this was completed, the results were sense checked with practitioners at the focus groups as outlined above. This allowed for as robust set of data as possible given the process limitations.

3.3 Cost of Business as Usual System

A critical component in calculating the costs of the Business as Usual System was the time multiplier as generated per An Garda Síochána Survey. This multiplier allowed total time taken for each offence type

and at each of the ranks under consideration to be calculated per annum. The volume of detected offences used in the analysis was taken from an extract of PULSE (2014 to 2016 inclusive) supplied by AGS. The volume of offences was compared carried out using CSO crime figures for the years under consideration. This allowed a certain level of confidence that the volume of offences was as accurate as possible. This dataset was used in order to work out the volume of offences for following stages of the process;

1. File Preparation &
2. File Review & Direction.

The average time taken per offence at both stages by AGS is estimated from the survey. The total time taken is calculated by multiplying the average time taken by the number of incidents (as per PULSE extract). The next step is turning the total time taken for both the file preparation stage and the file review & direction stage in to Full Time Equivalent (FTEs). To do this, some rationalisation was required on the number of hours an FTE would work, in this case it was **assumed to be 40 hours** for each grade under consideration. In reality this may not be the case due to rostering, over time, different ranks potentially working different hours and other factors. AGS also provided a breakdown of the ranks being used in the analysis by when they started on the force (Pre 2004, Post 2004 and Post 2013). This was required due to different pension arrangements for each cohort described above.

This gave the number of required FTEs. For File Preparation, it was the equivalent of nearly 1,100 FTEs in total for three ranks and for Presenting/Prosecuting it was the equivalent of nearly 1000 FTEs in total for all three ranks. In order to calculate the total staff costs for both stages, the framework for estimating staffing costs as per Figure 2 above was used along with the salary costs supplied by AGS as outlined previously.

The same process was used to calculate the costs for case preparation and case presentation/prosecution with the exception of instead of using the PULSE extract from AGS, an extract from Courts Service was used to calculate the volume of cases that went through the District Courts. Again this was sense checked with the Courts Service's annual reports in order to ensure the greatest level of accuracy as possible was being used.

Figure 4 and Figure 5 below show the Total AGS staff costs with and without appeals included. It is important to note that Preparation Costs will remain with AGS and will not transfer in either model. Please note that the times recorded in the survey for each stage of the process is assumed to be time taken by each individual respondent and not the time taken for the process itself. For example, for reviewing and directing on a file, it is the time taken by the Garda and their supervisor individually and not their combined time for the review and directing process. This was confirmed at the subsequent workshops held with AGS.

The Total Cost in Figure 4 and Figure 5 are made up of, the Total Staff Cost. Total Staff Cost is Total Salary Cost + 25% of "Pay" in respect of "overheads". They also include employer PRSI contributions and pension costs to the employer as per the public spending code.

It is important to remember given the limitations in the data and in its collection that the figures below should only be used to give the magnitude of the potential cost of the Business as Usual System.

Figure 4: Total AGS Staffing Costs excluding Appeals (Decisions not to prosecute not included)

	Garda	Sergeant	Inspector	Total
<i>Preparation Costs</i>	€71,515,239	€56,957,784	€13,758,678	€142,231,701
Reviewing & Directing Costs	€34,892,422	€22,730,050	€32,754,312	€90,376,784
Case Preparation Costs **	€14,565,029	€20,507,784	€25,122,575	€60,195,388
Presenting/Prosecuting Costs	€59,514,434	€41,889,623	€43,347,398	€144,751,455
After Case Costs ***	€44,008,954	€39,861,600	€29,827,096	€113,697,650
Total including Preparation Costs	€224,496,078 *	€181,946,841 *	€144,810,060 *	€551,252,979 *
Total excluding Preparation Costs	€152,980,839 *	€124,989,057 *	€131,051,382 *	€409,021,278 *

Source: IGEES unit, DoJ using AGS data & Public Spending Code, Central Technical References and Economic Appraisal Parameters, DPER

Notes:

- * The Total Costs above are, the Total Staff Cost, this is Total Salary Cost + 25% of "Pay" in respect of "overheads". They also include employer PRSI contributions and pension costs to the employer as per the public spending code. The costings DO NOT capture decisions not to prosecute or the provision of reasons and reviews.
- ** Case Preparation Costs measures the time taken for the preparation work for cases prior to their scheduled court date. If there are adjournments, this means that some case preparation may have to take place for each corresponding adjournment,
- *** After Case costs here are predominately liaising with victims, witnesses etc. This is normally done by the investigating Garda but Sergeant and Inspectors do liaise with vulnerable victims in order to explain the legal outcomes of a case.

Figure 5: Total AGS Staffing Costs including Appeals (Decisions not to Prosecute not included)

	Garda	Sergeant	Inspector	Total
<i>Preparation Costs</i>	€71,515,239	€56,957,784	€13,758,678	€142,231,701
Reviewing & Directing Costs	€34,892,422	€22,730,050	€32,754,312	€90,376,784
Case Preparation Costs **	€14,565,029	€20,507,784	€25,122,575	€60,195,388
Presenting/Prosecuting Costs	€59,514,434	€41,889,623	€43,347,398	€144,751,455
After Case Costs **	€44,008,954	€39,861,600	€29,827,096	€113,697,650

Appeals	€5,974,277	€1,657,658	€376,830	€8,008,766
Total including Preparation Costs	€230,470,355 *	€183,604,499 *	€145,186,890 *	€559,261,744 *
Total excluding Preparation Costs	€158,955,116 *	€126,646,715 *	€131,428,212 *	€417,030,043 *

Source: IGees unit, DoJ using AGS data & Public Spending Code, Central Technical References and Economic Appraisal Parameters, DPER

Notes:

- * The Total Costs above are, the Total Staff Cost, this is Total Salary Cost + 25% of "Pay" in respect of "overheads". They also include employer PRSI contributions and pension costs to the employer as per the public spending code. The costings DO NOT capture decisions not to prosecute or the provision of reasons and reviews.
- ** Case Preparation Costs measures the time taken for the preparation work for cases prior to their scheduled court date. If there are adjournments, this means that case preparation will have to take place for each corresponding adjournment,
- *** After Case costs here are predominately liaising with victims, witnesses etc. This is normally done by the investigating Garda but Sergeant and Inspectors do liaise with vulnerable victims in order to explain the legal outcomes of a case.

4. Alternative System

This section examines the possible costs arising if prosecution decisions were taken away from AGS and the practice of AGS prosecuting cases in court should cease. This option could entail these roles being retained ODPP and State Solicitors/or a new body created for this specific purpose. For this option, the following stages would be passed from AGS to the ODPP:

- The Decision to Prosecute
- Case presenting/prosecution.

File preparation would remain with AGS as it is intrinsically related to the investigation of crime. Also, as part of the quality assurance process, it is assumed that AGS would still review all cases and the AGS decision to prosecute would in reality now become a decision on whether the file was up to the required standard to be sent to the ODPP.

If the alternative model was to operate nationally, either as part of a national prosecution service or an expanded State Solicitor Service, accommodation would be required for the new legal staff and support staff. The cost of "back office" could potentially amount to at least a 50% add on to the lawyer costs when legal administration and all the other corporate service functions are factored in.

State Solicitor contracts currently include as part of the remuneration package provision for expenses and staff, including accommodation. If State Solicitors were to be engaged to do all the District Court work in a particular area it would involve a significant expansion of their offices, additional legal and support staff etc. This would require a renegotiation of the remuneration package, as the current contracts do not provide for routine District Court work.

It should be noted that the preparation costs and after case costs would not move under the recommendation to the alternative model.

4.1 Overview of costs

The same broad approach to estimating the costs of an alternative system was taken as to estimating the costs to AGS of the existing system, as set out in 3 above. This is based on the current Dublin model where, Garda Court Presenters are utilised in Dublin District Courts where charged persons appear. In this model, summons will continue to be initiated by AGS.

4.2 Cost of Alternative System

The Office of the DPP consists of three legal divisions:

1. Directing Division
2. Solicitors Division
3. Prosecution Support Services Division

For this costing exercise, only the Directing and Solicitor divisions will be under consideration.

4.2.1 Directing Division

The Directing Division consists of prosecutors who examine criminal investigation files and decide whether or not to take a prosecution, and whether a prosecution commenced by An Garda Síochána should be maintained. All cases that will ultimately proceed on indictment must be submitted⁸.

The breakdown of files received for decision whether to prosecute from the ODPP annual report was used to work out the average number of suspects per file. The Courts Service annual reports were also used, as they report the annual number of incoming offences and defendants. The average number of incoming offences per defendant can be worked out using the Courts Service annual report. **It must be noted that both these averages are at a high level and will vary on the type of offence under consideration.**

Looking at that volume of offences, AGS currently prosecute approximately 95% of all offences at District Court level.

The first step was to try and work out how many extra files the Directing Division of the ODPP would need to take on in the alternative model. Then the average number of files that current staff levels directed on was calculated. The average number of files directed per staff currently was found to be approximately 450. This was divided into the extra number of files (worked out at approximately 180,000 files). This would imply that approximately 400 extra Directing staff would be required at a cost of over €58m.

This has its estimate limitations, as currently the Directing Division in the ODPP direct on the most serious of offences which will inevitably take longer. Using the average number of files directed on per current staff member also has its limitations as it assumes all the files and their contents are

⁸ Office of the DPP- Submission to High Level Review Group

homogeneous, which in reality will not be the case. As outlined previously, limitations around using the average number of suspects per file and average number of offences per defendant also arise.

Acknowledging that a range of rationalisation factors were applied, refer to Figure 6 below for these and the associated staff costs.

Even using these rationalisation factors, it must be acknowledged that this method has significant weaknesses but, it is considered that it is the best proxy currently available.

4.2.2 Solicitors Division and Specialist Units

The Solicitors Division, headed by the Chief Prosecution Solicitor, provides a solicitor service to the Director in the preparation and presentation of cases in the Dublin District and Circuit Criminal Courts, Central Criminal Court, Special Criminal Court, Court of Appeal, High Court and Supreme Court⁹. There are also a number of specialist units dealing with specific offence types.

The relevant sections are as follows:

- i) District Court Section
- ii) Circuit Court Section
- iii) Superior Courts Section
- iv) Special Financial Unit
- v) Appeals Section
- vi) Judicial Review Section
- vii) Sexual Offences Unit

A similar approach was used to calculate the costs for case preparation and case presentation/prosecution as was carried out for the Directing Division.

Only the files dealt with by the Solicitors Division for District Court prosecution and appeals from District Court to Circuit Court taken from the ODPP annual report was used to work out the average number of suspects per file. *Again Courts Service annual reports were also used, as they report the annual number of incoming offences and defendants*. The average number of offences per defendant can be worked out. **It must be noted that both these averages are at a high level and will vary on the type of offence under consideration.**

The first step was to work out how many extra files the Solicitor's Division of the ODPP will need to prosecute in an alternative model. Then the average number of files that current staff prosecuted was calculated. The average number of files prosecuted per staff currently was found to be just over 170. This was divided into the extra number of files (worked out at approximately 180,000 files). This meant approximately 1,035 extra prosecuting staff would be required at a cost of over €140m.

Again, this has its limitations as currently the Solicitor Division in the ODPP will be prosecuting the most serious/complex of cases (with the exception of the Dublin Metropolitan Area, where the District Court Section of the ODPP deal directly with serious/complex cases) which will inevitably take longer in court. Using the average number of files directed on per current staff member, also has its limitations as it assumes all the files and their contents are homogeneous which in reality will not be the case. As

⁹ Ibid

outlined previously the same limitations around using the average number of suspects per file and average number of offences per defendant will arise.

Acknowledging this we applied a range of rationalisation factors (refer to Figure 6 below) for these and the associated staff costs.

As outlined previously, even using these rationalisation factors, it must be acknowledged that this method has significant weaknesses but, it is considered that it is the best approximation currently available.

Costing is particularly difficult in the absence of any analysis about geographical breakdown. There are various factors around the costs of supporting this work outside of Dublin would need to be the subject of more detailed consideration; for example , State Solicitors contracts do not currently provide an agreed structure for payment for District Court prosecution work and would be the subject of negotiation.

It is important to remember that the number of days that District Courts sit currently or any changes or efficiencies to court sitting days have NOT been examined. Also the number of adjournments per case has NOT been examined.

Figure 6 below shows the total estimated staff cost for an alternative model when rationalisation factors are applied. A rationalisation factor of 0% means that staff direct or prosecute at their current average levels. Insofar as this is the rate for more serious offences, so a rationalisation factor of 10% assumes that they can direct on or prosecute 10% more offences on average. The reason for using a rationalisation factor is they will be receiving less serious offences, as well the types that they receive in the business as usual system, thus they potentially will be able to handle more. The same goes for rationalisation factors of 20 and 30%. Again there are weaknesses in this method, as trying to map the Business as Usual System onto an alternative system is not a straightforward process.

Figure 6: Total Staff Costs applying Rationalisation Factors

Rationalisation Factors	Directing Costs	Prosecuting Costs	Total Staff Cost ODPP	AGS Costs (QA)*	Total Staff Costs
0%	€58,022,329	€139,019,057	€197,041,386	€90,376,784	€287,418,171
10%	€52,747,572	€126,380,961	€179,128,533	€90,376,784	€269,505,317
20%	€48,351,941	€115,849,214	€164,201,155	€90,376,784	€254,577,940
30%	€44,632,561	€106,937,736	€151,570,297	€90,376,784	€241,947,081

Source: IGEEES unit, DoJ

Note:

*As outlined previously, AGS will still have to complete the QA aspect (Review each file) before sending it to the ODPP.

4.2.3 What If Scenario

If the prosecution of certain case types in the District Court was no longer part of the AGS's role, then there is the potential that those involved may have some extra time capacity for operational work. It is difficult however to assess the extent to which Gardaí could be redeployed given the ongoing requirement that Gardaí prepare files, be present in court and engaged with victims - even though they would no longer be prosecuting. In the event that redeployment led to additional crime detection and increased number of files being sent to the DPP, this would lead to a resultant need for increased resourcing for ODPP, although it would of course be a positive policing outcome.

This Chapter sets out the findings of an extensive and ambitious research project to estimate the costs involved in the present system of prosecution of offences by AGS. It required combining data from a variety of sources whose heterogeneity posed a challenge to the formulation of the framework for costing. Estimating the time of Gardaí in, and by extension the cost arising from, the different stages of the investigation and prosecution of crime required participation by Gardaí in an extensive survey and focus groups to produce plausible results. Given the limitations of the process, the resulting order of magnitude of costs must be viewed in the light of the limitations of the exercise. Nevertheless, the Group are satisfied that it was not possible to obtain more accurate information to underpin it's consideration of the resource issues raised in our terms of reference.

With all the necessary caveats, the analysis indicates that a little over €200 million might be saved if AGS were no longer responsible for prosecution of offences in court. However, if these activities were transferred to the ODPP in the alternative model, this would give rise to an additional cost of approximately €82 million. It must be noted that the costing of the 'alternative model' does not take into account the need for IT solutions to be developed, as well as accommodation costs and other indirect costs, together with transition costs which are likely to be considerable. The analysis does not capture the AGS costs associated with decisions not to prosecute or the giving of reasons or the conduct of reviews. Further it does not differentiate between cases dealt with in the District Court by AGS which result in a plea as opposed to contested cases. The latter would require a much greater time investment by the prosecuting guard. Even if Garda time were freed up and this was deployed to other policing activity the beneficial impact would need to be evaluated in the light of additional costs that would be generated in other parts of the criminal justice system from that increased activity.

The estimated costs of developing a new approach to the prosecution of offences are subject to a wide margin of error. Moreover, the international experience is that moving prosecuting work from police officers to professional lawyers is a more costly model. The Group have not therefore concluded that there will be significant savings if the "alternative model" were to be adopted. In fact, what the work of the Research Unit of the Department has demonstrated is that there is insufficient data available to cost a wholesale move of these prosecution functions from the AGS to the ODPP. It has also not proved possible to do this with any accuracy through the extensive research undertaken, notwithstanding the very considerable effort and expertise involved. It is not appropriate to recommend a change of this scale without a good understanding of the potential costs involved and this has not been possible to achieve. From a costs perspective, a more incremental approach where each step of the process can be costed is more appropriate. This is also the more appropriate approach having regard to the research

of the international experience set out in the next Chapter and the overall view of the Group that such a radical approach is also not desirable as set out in chapter 7.

Chapter 5: International comparative study

In considering the implications of changes to the prosecutorial system recommended by CoFPI, the Group decided to have particular regard to international best practice and the experience of relevant jurisdictions which had made changes to their prosecution systems over recent years. The Group was of the view that the analysis of international experience would be helpful in guiding the development of recommendations for change.

Methodology

Bespoke rapid evidence research was commissioned in mid-2021 under the aegis of the Research and Analysis Unit of the Department of Justice within a framework approved by the Group. The research was to take account in particular of the experience of Common Law jurisdictions and those which operate under the general jurisprudence of European victims' rights law or equivalent. Particular attention was to be paid to the experience of jurisdictions where changes have taken place in the conduct of prosecutions, especially with regard to the role of the police. The analysis was to highlight the role of law enforcement and non-policing agencies in prosecutorial regimes, including decisions to prosecute and the conduct of prosecutions.

The research review

The review was undertaken by Professor John Jackson and Paul Mageean (who were awarded the research contract after an open competition). The final submission by the researchers, entitled *An international comparison of the prosecution of crime – the role of police services* (which is available in Appendix IV) provides an analysis of six different jurisdictions. This included outlining what specific role, if any, the police play in the prosecution system of each jurisdiction. The jurisdictions – Northern Ireland, England and Wales, Australia, New Zealand, Scotland and Finland – were all chosen on the ground that they are relatively proximate to Ireland in terms of being common law jurisdictions or having a commitment to the rule of law, democratic and human rights norms and a respect for victims' rights. The research included a review of the literature but also interviews with practitioners who had been involved in conducting prosecution where there had been changes in the process.

The Group is of the view that this research has provided particularly useful insights which have informed and shaped their thinking on possible reform options in the Irish context. Of particular value has been the learning from the longer term impacts of the reform models adopted. The international research has also provided the Group with a benchmark in relation to international best practice against which the Irish system can be compared and contrasted. The key findings of the research are presented below and it should be noted that much of the following text has been taken directly from the research report.

Key findings

In their analysis, Jackson and Mageean noted that the six jurisdictions reviewed reflect the spectrum of differing models of police involvement in prosecution. Of note was that most of the jurisdictions, with the possible exceptions of Scotland and New Zealand, have seen reform in their prosecution arrangements in the last few decades which tends to reflect the drift in international practice towards an enhanced role for independent prosecution services and a dilution in the direct role of the police in prosecution, either by way of taking the decision to prosecute or the presentation of cases in court. However, Jackson and Mageean also noted that it is also clear that most of the jurisdictions continue to

grapple with finding the correct balance between the roles of the prosecutor and the police. They argue that issues of effectiveness and efficiency seem to have assumed almost as much importance as principled arguments on the need for independent review of charges and detached prosecutorial decision-making. Reviews and inquiries of prosecutorial performance (often conducted by specific prosecution or criminal justice inspectorates) are an increasingly regular feature of prosecution practice in all of the jurisdictions.

In reflecting on the six jurisdictions discussed, Jackson and Mageean conceptually identified four distinct models:

The Australian model whereby police charge and summons; conduct summary prosecutions and the public prosecutor institutes or takes over prosecutions in serious cases. New Zealand, which also has the unusual practice of retaining private lawyers as public prosecutors, has arguably a more pronounced version of this model whereby **police retain a considerable prosecution function in summary cases.**

The CPS model in England/Wales whereby the police charge and summons in minor cases and the public prosecutor charges in serious cases. **Public prosecutors review police decisions to prosecute in all but the most minor cases but police retain a considerable prosecution function in terms of deciding which cases not to prosecute.**

The Public Prosecution Service model in Northern Ireland whereby police bring the initial charge in a limited number of cases; all investigation files (including those recommending no prosecution) are sent to the public prosecutor office which also directs summonses and reviews all decisions to charge before the first court appearance. **All decisions to prosecute or not prosecute have been effectively taken by the public prosecutors. Police have lost the prosecution function but retain the investigation function.**

The Scottish/Finnish model whereby there is early public prosecutor 'participation' in some/many police investigations and public prosecutors summons and charge. **Police are not involved in the prosecution function (except in the most minor of cases) and their investigation function is overseen and can in certain cases be directed by public prosecutors.**

It will be recalled that the Commission on the Future of Policing in Ireland (COFPI) gave three reasons for recommending change to the model of prosecutions currently in place in the Republic of Ireland: the need for distance between police and prosecution reflecting practice elsewhere; a concern about the adequacy of the training of police prosecutors; and the impact on police resources. These were matters that featured in discussions in many of the six jurisdictions they considered. For Jackson and Mageean, it seemed clear from the research they conducted and the models outlined above that there are a number of ways in which these concerns can be addressed. These were addressed under the themes of: the scale of change; independence; cost; diversion; planning; file quality; local expertise; impact; victims; and public confidence.

What is the appropriate scale of change?

It is perhaps unsurprising that the interface between police and prosecution in Northern Ireland has seen the most radical change in terms of the six jurisdictions examined. It is the only one of the six that could be described as a “post-conflict” society and many of the issues that led to and sustained the conflict

there related to concerns about the way in which justice, and particularly criminal justice, was administered. As discussed in the Northern Ireland chapter the process leading to the creation of the PPS arose directly from the Good Friday Agreement. There was a political imperative to deliver significant change in Northern Ireland and to support that change with adequate resources. As one Northern Ireland interviewee put it, “resources were not an issue”. To some extent that has remained the case, in that there has not been any serious questioning at a political level of the continued strict demarcation between the police and PPS in terms of prosecutorial responsibility even as public finances have come under increasing pressure.

Jackson and Mageean note in this regard that the issues of concern highlighted in the COFPI report were not of the same character as those extant in Northern Ireland during the conflict there. This was also the case in the other jurisdictions they examined, with the possible exception of England and Wales where there was, in the years running up to the establishment of the CPS, a general concern about the culture of policing and the police being “above the law”, as put to them by one interviewee. Although the momentum for change was slow to build up, the case for an independent prosecution service and for other reforms on the regulation of the police’s investigatory powers recommended by the Royal Commission on Criminal Procedure arose in response to “a whole series of scandals” that centred on “poor police practice”.¹⁰ The need to respond to such a concern with root and branch reform measures does not seem to have been evident in Australia, New Zealand, Finland or Scotland while there have been a series of recent controversies in the Republic of Ireland regarding relating to the Youth Diversion Programme, the Homicide Review, and more recently, the cancellation of 999 calls, arguably these have not been of the same character as the concerns in England and Wales or Northern Ireland.

Independence

As Jackson and Mageean note, it is apparent from the discussion in the opening chapter and in the reflections of the COFPI report that there is an appropriate concern about ensuring a degree of independence between those investigating crime and those prosecuting, both in terms of prosecutorial decision-making and presenting cases in court. The PPS in Northern Ireland gives expression to this concern in its purest form but in each jurisdiction they examined, efforts had been made to find the appropriate balance between these two vital functions.

Scotland

In Scotland, the historic primacy of the office of the Procurator over the police continues to be observed and appears to work well. Indeed one interviewee said the reason why Scotland did not have significant reform of its system was because it worked due to this clear delineation and acceptance of the two distinct roles of prosecutor and police.

England and Wales

The need to have a clear demarcation of responsibility between prosecutors and the police was a central theme in the Royal Commission’s proposal for a new prosecution service in England and Wales and became known as the ‘Philips’ principle, named after its Chair. The CPS were at first given powers

¹⁰ Peter Lewis, former Chief Executive Officer of the CPS, quoted in Rock, *Official History* 224.

merely to discontinue prosecutions begun by the police and while it was in time given statutory charging powers, large numbers of cases continue to be charged by the police with, however, a requirement now that all cases are reviewed by the CPS prior to the first court hearing.

Australia

The systems of police prosecution in Australia have met concerns around independence by giving the DPP powers to take over prosecutions for any offence and by restructuring police forces so as to create more autonomy and separation between the investigative and prosecutorial arms of the police. The DPPs, of which there are 5, have powers to take over the prosecution of any offence instituted by the police and to direct that information in relation to offences they are considering taking over is furnished to them, although these powers are rarely exercised. Police prosecuting departments have also been professionalised by being provided with advocacy training and greater legal support. This has been taken to a new level in Victoria where clear paths of career progression tied to a “Grad Cert” in Police Prosecution have been in place for a number of years and increasing number of lawyers have been recruited into the Police Prosecutions Division from the Victorian government service, the ODDP and private practice.

New Zealand

In New Zealand, a separate office of the police service, the Police Prosecution Service (PPS), fulfils many prosecutorial roles including decision-making and prosecution in court in summary cases and indictable cases up to committal. There were a number of features of this office which appeared to Jackson and Mageean to address concerns about independence, while not requiring the creation of a new or significantly enhanced independent prosecution agency. Many of these were cultural rather than legal. It had among its ranks sworn police officers and externally recruited lawyers. Its prosecutors were split between these two backgrounds at a roughly 50-50 level. It had a sense of itself as a separate service and its employees were reminded that they were officers of the court first rather than employees of the police. It was subject to the Solicitor General’s guidelines in the same way as prosecutorial colleagues in the more senior courts (Crown Law and Crown Solicitors). The Guidelines were considered a “foundational” document. It reported on prosecutorial matters to the Solicitor General.

It had also taken extensive steps to ensure that its prosecutors (whether police or legal) were properly trained (thereby addressing one of the issues raised by COFPI). Its prosecutors were trained to the same advocacy standard as those training to be lawyers and its training more generally was very well regarded. Judges and defence practitioners contributed to it.

The New Zealand experience appeared to Jackson and Mageean to represent perhaps the best of the various “hybrid” systems they examined in terms of defining and maintain a clear dichotomy between the investigative and prosecutorial arms of the police when measured against the COFPI concerns. It was also clearly felt to provide value for money and indeed this was one of the reasons why significant reform to the system, which was considered in a review in 2011, was not recommended.

It was also stressed to both authors that in New Zealand but also in other jurisdictions including, interestingly, Northern Ireland, that independence between agencies should not necessarily mean distance from each other. The PPS in Northern Ireland and the PPS in New Zealand stressed that a close working relationship between the police and prosecution services was not a threat to

independence but in fact had a positive impact on the quality of the work of both organisations, on delay in the system and in better preparation of files for court. This was also the view of the independent inspectorate in Northern Ireland.

A view reflected in England and Wales is that for too long the CPS maintained a physical distance from the police which impacted adversely on working relationships. Attempts have been made over the years to address this by means of duty prosecutors working in larger police stations and by specialist police and CPS teams working together in complex and sensitive cases. But as a recent inspection report on rape cases has found, there is still a tendency for a blame culture to develop when cases have to be dropped.

Cost

As Jackson and Mageean note, cost figured as a salient issue in all the reforms that have been made to take prosecutions away from the police. There is little doubt that in terms of independent prosecutorial decision-making across all criminal cases, Northern Ireland does present a “Rolls Royce” model. However, the resourcing in terms of money and personnel was significant. A basic comparator on the basis of population is possible although that would be in the context of a central DPP’s office taking over all prosecutorial responsibility including removing the State Solicitor system.

Jackson and Mageean also stress that it is not simply a matter of enhancing or creating an independent office or infrastructure to take on the prosecution duties the police currently carry. Inherent in the creation of a new structure will be additional administrative and policy duties which will have to be resourced as well. That obligation may be lessened somewhat if what is eventually done is an enhancement of an existing office, the ODPP, rather than the creation of a new service.

For Jackson and Mageean, it was beyond contention that taking prosecutorial duties from police and awarding them to independent prosecution lawyers will be more expensive. They tried in each jurisdiction to tease out that issue to determine whether their assumption was correct and none of their interviewees demurred from that view. Indeed, in New Zealand, one of the openly articulated reasons for not moving away from the police prosecution model in most cases following a review in 2011 was the value for money of the current system, albeit a system that was also thought to be operating well. Saving costs seemed to be a motivating factor behind the ‘CoPPS’ project in the Northern Territory to ‘civilianise’ summary prosecutions in the Darwin area. But while the police may have benefited financially from the reform, the DPP’s Office found that it had to take on increased administrative burdens which resulted in significant over-spends year on year.

Jackson and Mageean find it noteworthy that although it has continued largely undisturbed since its inception in 2005, there is now even in Northern Ireland the beginning of a recognition that the current system may not be sustainable in the longer term in terms of resources. Leadership in the PPS and the police, and inspections by CJINI, have begun to posit the idea that some classes of cases could be transferred back to the police. Discussions thus far have tended to focus on low level road traffic cases where guilty pleas are anticipated or indicated and where there is little legal complexity and no victim considerations. The devolution of responsibility for such cases to the police would be less likely to compromise perceived independence or bring into play equality of arms concerns.

Other jurisdictions have adopted various models of this “hybrid” approach to the allocation of prosecutorial responsibility. In England and Wales at various stages different classes of cases have been devolved to the police for prosecution. This approach has afforded a degree of flexibility over the years as the categories can be reduced or added to as appropriate, though where defendants indicate that they will contest such cases, the CPS will appear in court to prosecute them. The issuing of fixed penalty notices and the use of the single justice notice procedure introduced in 2015 (whereby defendants have their cases dealt with out of court if they do not respond to notices asking them to submit a plea) have resulted in large numbers of cases bypassing the CPS.¹¹ Such a procedure has proved controversial recently, however, in cases prosecuted under the Covid-19 regulations where a CPS review found that between March 2020 and February 2021 15% of people had been wrongly charged by the police.¹² The authors suggest that this experience points to a case for some independent prosecutorial over-view or audit of cases that are devolved to the police to ensure quality assurance.

Diversions

As Jackson and Mageean note, another way in which the resources of independent prosecutors can be protected is through the increased use of diversion, a pattern they saw across many of the jurisdictions. Various forms of diversion were in use by both police and prosecutors at different levels. Similar vehicles are already in place in the Republic of Ireland. These include the Garda Adult Cautioning Scheme which involves a caution that is administered by a Garda Superintendent or an Inspector acting in that capacity within a Garda station. The offender must agree to accept the caution in writing. As with other jurisdictions examined, this option is only available for certain offences, including theft, disorderly conduct, and possession of cannabis.

Similar to many of the jurisdictions they examined, Ireland also has an alternative to prosecution specifically designed for youth offenders in the Youth Diversion Programme. Established under the Children Act 2001, this programme is for offenders under the age of 18 and involves specially trained Gardaí (Juvenile Liaison Officers) keeping contact with young offenders and their teachers, parents, and guardians etc. The idea behind the Diversion Programme is to allow for young people who commit criminal offences or anti-social behaviour to be dealt with by means of a caution instead of the formal process of charge and prosecution for offences or an anti-social behaviour order. The programme allows for conferences to be held which can mediate between the child and the victim, if appropriate, and draw up an action plan for the child.

As Jackson and Mageean note, the various forms of diversion they encountered as ways of keeping relatively low level offenders away from the formal criminal justice system seemed both inherently positive but also cost-effective. Indeed, they note that it has been so successful in Northern Ireland that the PPS has not reached the envisaged number of cases planned for at its inception. Prosecutors, police and defence practitioners in Northern Ireland have all recognised a reduction in the numbers of cases being processed in the Magistrates’ Courts in recent years. This is attributed in the main to increased use of diversion. In Northern Ireland and New Zealand prosecutors dip sample such cases

¹¹ Estimates suggest that 400,000 people were prosecuted in this way between January and September 2020: see C Saksi, “Magistrates’ courts are in a state of disarray”, *Times*, 1 June 2021.

¹² Justice Select Committee, *Covid and the Criminal Law*, oral evidence, HC 1316, 20 April 2021.

to provide a safeguard against concerns of police misbehaviour. In England and Wales, the DPP has issued Guidance to be followed by the police on the issue of adult and youth conditional cautions and the CPS plays a role in ensuring that the Ministry of Justice's guidelines on simple cautions are applied consistently by having to give consent for cautions in indictable-only cases and by referring to the police cases in which they consider a caution to be the appropriate disposal. Such safeguards are more important as the use of diversion away from the formal system becomes more widespread.

Plan properly and with foresight

Jackson and Mageean note that there are lessons to be learned from other jurisdictions on how reforms should be planned. In England and Wales the "big bang" approach taken to the establishment of the CPS was subsequently subject to much criticism. The areas that did not have prosecuting solicitors' departments in place, such as London, suffered particularly as new lawyers had to be recruited urgently at just the time when there was huge lawyer demand in the City for financial services. In Australia, Jackson and Mageean note how the lack of planning for the CoPPs project led to tensions between the DPP's Office and the police as there was considerable uncertainty over who would take over which responsibilities. These experiences point to the need for reforms to be carefully planned and piloted. Even where the changes were phased and well-resourced, as in Northern Ireland, it appears that major pressure was put on the system in its early years, with one interviewee describing it as "close to collapse". All those interviewed by Jackson and Mageean accepted that the new system has contributed to significant delays in the processing of cases and, while efforts on the part of the PSNI, PPS and others have been made to address this, it has proven a difficult issue to resolve.

Another issue that Jackson and Mageean identified as arising in a number of jurisdictions was how to deploy the expensive resource of independent legally-qualified prosecutors efficiently and to most effect. Most of those they interviewed, whether prosecutors, police or independent inspectors, recognised that there was little merit in having prosecutors review or present in court high volume, straightforward cases where guilty pleas are anticipated. It was also a widely held view that, whether through increased use of diversion or other factors, such volume cases were in fact decreasing and the challenge for prosecutors in almost all jurisdictions now and in the future was likely to focus on how to deal with increasingly complex and sensitive criminal cases involving economic crime, often on a trans-national scale, and serious sexual crime. These resource-intensive cases benefit from the early and constant involvement of prosecutors and also demanded specialisation and close working relationships with the police. This apparent change in the nature of crime has already seen the creation of specialist units in almost all of the jurisdictions examined.

File quality and local expertise/awareness

As Jackson and Mageean note, problems with file quality and loss of local expertise/awareness have also been highlighted as likely consequences of removing prosecutorial duties from the police.

In their review, there was little doubt that file quality in Northern Ireland suffered when police officers no longer had to submit such files to a senior officer to present in court but to a separate independent office. This matter was also raised by interviewees in England and Wales, where inspection reports have consistently raised poor file quality as a problem. Criminal Justice Units (CJUs) staffed by both the CPS and police were introduced on the recommendation of the Glidewell Review to improve file quality but

in the absence of any powers of direction, they ultimately depended on the goodwill of investigating officers to obtain more evidence. Jackson and Mageean note that there appear to be at least three lessons to bear in mind in relation to this. The first is the need to ensure that in a hierarchical service such as the police, files going to a separate prosecution office are signed off by a senior officer to ensure timely submission of files and that they are adequately prepared for submission. The second is that if police targets are being developed in relation to the clearance of cases, these are not limited to the submission of a prosecution file but capture in some way timeliness and quality. A third lesson is that file quality is better when independent prosecutors are involved at an early stage in offering pre-charge advice as happens in certain serious cases when joint teams are involved.

A number of interviewees in various jurisdictions raised a concern with Jackson and Mageean about over-centralisation and a consequent loss of local knowledge of the judiciary and local legal fraternity and the concerns of the local community. As with many of the other matters addressed in their research there were contrary views and it was acknowledged that in the context of Northern Ireland in particular perhaps some of those local links had been too close on occasion. Centralisation does allow for consistency and standard setting and can also afford some efficiencies of scale. One of the motivations for the re-organisation of prosecution services in Finland has been the need to introduce greater consistency and efficiency into prosecutors' work and to ensure that there is greater coordination across the agency in complex cases. While the concern about loss of local knowledge has also been expressed in Scotland, COPFS has continued to have a presence in local offices across Scotland and it is clear that centralisation has been a vital response to increasingly complex criminal investigations. The CPS has undergone a number of reorganisations which have in turn swung from aligning CPS areas with that of local police forces towards greater centralisation and fewer area units. The DPP's charging guidelines in England and Wales, which apply to the police as well as CPS prosecutors, have played a major role in helping to create greater consistency in decision making. To offset the danger of over-centralisation the CPS has developed an inclusion and community engagement strategy and holds regular national and local accountability meetings with various stakeholders to understand people's experiences of the CPS and improve policies.

Impact Assessment

Jackson and Mageean found that while there was little disagreement amongst interviewees with the preference for independent prosecutors, there was little evidence in any of the jurisdictions that the existence of such offices had a measurable impact on human rights or equality. The former is perhaps not surprising as this is difficult to measure and human rights breaches are more readily identifiable than protections. Nonetheless, it remained the view of almost all of those interviewed that a system of independent prosecutors is more likely to protect human rights than not.

With regards to equality data, most jurisdictions did have some equality data collected by the police which suggested over-policing of certain communities in some instances. This is a pattern that seems to be echoed at least to some extent in Ireland according to a recent report from the Irish Human Rights and Equality Commission.¹³ The most common response from those interviewed by Jackson and

¹³ <https://www.ihrec.ie/app/uploads/2021/09/Developing-a-National-Action-Plan-Against-Racism-IHREC-Submission-to-the-Anti-Racism-Committee.pdf>

Mageean was that appropriate data was simply not available in terms of prosecutorial decisions. Either it was not collected or the collection of such data was in its infancy. That is also Jackson and Mageean's understanding of the current position in Ireland. There are legal limitations as to why this data cannot yet be collected. The only credible exception to this was in England and Wales where the CPS publish regular in-house and independent ethnic and gender impact assessments of its decision making. While prosecutors are inevitably downstream partners in the criminal process, the Lammy Review found that the CPS came out best of all criminal justice organisations in terms of equitable decision making which suggests that independent prosecutors can have an ameliorative effect on disparities in the system.

While the CPS stands out as an outlier in terms of collecting and monitoring equality data, one trend that was noticeable to Jackson and Mageean across the jurisdictions considered was the extent to which there is an increasing emphasis on auditing decisions to ensure that there has been compliance with policy. Whether this kind of quality assurance is conducted internally within the organisation, or externally through independent inspectorates, or both, it is an important development in ensuring greater consistency and accountability of decision making.

Victims

In each of the jurisdictions examined, considerable effort has been spent in recent years providing additional information and rights for victims as they interact with the criminal justice system as a whole and the police and prosecution agencies in particular. Victims' Rights Acts have proliferated across the Australian states and territories. In the European jurisdictions examined (including pre-Brexit England/Wales and Scotland) the rights of victims were given statutory expression by legislation following the Victims Directive.¹⁴ In Ireland this legislation took the form of the Criminal Justice (Victims of Crime) Act 2017. This also gives victims the right to be informed of any decision not to prosecute, the reasons for this decision and the right to request a review of the evidence and files that were used to reach this decision. Prosecutors in Ireland are also obliged to have due regard to the rights of victims under Article 10 of the Victims Directive to be heard during and at the conclusion of the criminal process and that "all available relevant evidence and appropriate submissions concerning the impact of the offence on the victim" is presented before the court.¹⁵

Developments in Ireland are in many respects similar to what is happening elsewhere. As with most prosecution agencies they examined, the DPP in Ireland has a Victims Liaison Unit in its Prosecution Support Services Division, the aim of which is to assist victims in providing them with information to allow them to fully participate in the criminal justice process when a decision is made to prosecute or not to prosecute. Importantly, if a decision is made not to prosecute, the Unit will be able to provide the victim (subject to certain limitations) with a summary of the of the reason why that decision was taken, following written request, and arrange for a review of the decision to be carried out. It was noticeable how many prosecution systems now give victims reasons for decisions not to prosecute, at least in more serious cases, and a right of review of such decisions. Certainly in many common law countries this is

¹⁴ Directive 2012/29/EU, the Victims Directive. See Code of Practice for England and Wales presented to Parliament under the Domestic Violence and Victims Act 2014; Victims' Code for Scotland 2018.

¹⁵ Guidelines for Prosecutors, (5th edn), December 2019.

a relatively recent development and in Northern Ireland at least this only came about following adverse comment from the European Court of Human Rights.¹⁶

The Victims Liaison Unit in Ireland also trains both State solicitors and the Gardaí on issues affecting victims. Pre-trial meetings for the victim with a prosecution lawyer are regularly held. This allows the victim to learn about their role within the criminal justice system and gives them the opportunity to learn what will happen in court. This again mirrors evolving practice elsewhere.

An important aspect of the protection of victims' rights is, as referenced above, the provision of reasons when a decision is taken not to prosecute by the prosecutor. However, there is of course an earlier stage than that when many cases do not progress to be considered by a prosecutor because police do not consider there is sufficient evidence to warrant further action. Concern about this gap in protection was recognised in several of the jurisdictions examined. The recent End to End Rape Review in England and Wales found that the decrease in the number of police referrals to the CPS was a reason for the sharp decline in rape prosecutions. In Northern Ireland this concern is addressed through a review of every file but it may be that it could be addressed elsewhere through the sampling of such files by an independent prosecutor or by an independent inspectorate.

Public Confidence

Such data as Jackson and Mageean found or were pointed to in terms of public surveys tended towards support for and satisfaction with independent prosecution offices. According to the findings of the Northern Ireland Life and Times Survey published last year, more than two thirds of survey respondents have confidence that the PPS provides a fair and impartial prosecution service to the people of Northern Ireland. 70.3% of those questioned said they were either very or fairly confident in the fairness and impartiality of the PPS. This was a 6.3 percentage point decrease upon 2019 (76.6%) but similar to the 2018 figure (68.7%). Those surveyed were also asked about the independence of the PPS. Around seven-tenths of all respondents (69.1%) stated that they were confident that the PPS was independent of police, government or any other body. This was the same as in 2019 (69.1%) and a 4.3 percentage point increase on 2018 (64.8%).

Crime surveys from England and Wales have shown increasing levels of public confidence in terms of the CPS's effectiveness in prosecuting people accused of committing crime (up from 47% in 2008-9 to 62% in 2017-18) which are well above the figures on whether the criminal justice system is effective as a whole (up 38% to 53% over the same period).¹⁷ The survey does not include questions on the fairness and impartiality of the CPS or other criminal justice organisations. Overall levels of satisfaction with the fairness of the criminal justice system as a whole have increased over the same period (up from 58% to 69%). However, the Lammy Review found that the criminal justice system had a "trust deficit" in many BAME communities which extended across the courts and prisons and the latest Crime Survey figures show declining levels of confidence in the local police among black people (70% to 64% over the period 2013 /4 to 2019/20).

As Jackson and Mageean note, it would be unwise to draw any hard and fast conclusions on what these data mean for the CPS whose visibility is low amongst the public. But harking back again to the Lammy Review it would seem that the CPS has enjoyed higher levels of confidence than other criminal justice

¹⁶ *McKerr v. United Kingdom* (Application no. 28883/95), 4 May 2001.

¹⁷ *Crime Survey for England and Wales- Report and Data Tables* (2021).

organisations. Whilst it is difficult to know what the precise reasons for this are, the value added of having legally trained individuals make prosecution decisions is likely to be a contributory factor.

Jackson and Mageean note that, in the course of their research, they saw that various models can be adopted to ensure that prosecution decisions are taken fairly and competently, of which having a completely independent prosecution service take all prosecution decisions is only one. There is no “one size fits all” solution that is appropriate for all systems or indeed for all categories of offences. Prosecution systems have to be flexible and to cater for different categories of offences that range considerably in seriousness and complexity. But the experience and benefit of independent legal oversight is one that seems to have been increasingly accepted across all the jurisdictions that they considered.

Chapter 6: Policy Options

Introduction

The Commission on the Future of Policing in Ireland ('CoFPI') report recommended that prosecution decisions be removed from An Garda Síochána ('AGS'), and the practice of AGS presenting prosecutions at court should cease.

The work of the High Level Review Group ('HLRG'), established by Government to examine the CoFPI recommendation concerning prosecutions, produce models and make a recommendation between same to achieve the CoFPI recommendation, has been grounded in its analysis of the rationale given by CoFPI for its recommendation. In considering the CoFPI recommendation the HLRG has identified two main pillars under which the various factors which are relevant to the CoFPI recommendation can be divided, these are:

- A principle based objection to the current role of AGS in the prosecution system; and,
- A focus on resources and the belief that core policing functions would benefit from the release of An Garda Síochána from certain functions, including prosecutions.

Development of the Models/Scale of Change:

The first two points of its Terms of Reference ('ToR') required the HLRG:

- To develop a range of options to give effect to the Government decision and to recommend a preferred option for consideration by Government; and,
- To conduct an analysis of the options considered including detailed assessment of the estimated costs.

The HLRG has had to determine which activities undertaken by An Garda Síochána can properly be considered the work of making prosecution decisions and/or presenting at court. In assessing the CoFPI recommendation the HLRG analysed the complex, multi-task nature of the work involved. The core policing function of investigating crime and gathering evidence would, of course, remain in all circumstances with AGS, as would the preparation of files that form the basis of decisions to prosecute. Through consultation with members of AGS and consideration by the expert members of the HLRG it became clear that there are a number of prosecution related/attendant tasks and activities which are essential for prosecutions, but are separate from the making of prosecution decisions or the presentation of prosecutions at court. Such work involves matters that are of no less importance but are ancillary to the specific focus of the HLRG's work. Work identified in this category includes evidence management, victim and witness management, prisoner/accused management, administrative tasks relating to the conduct of prosecutions and other similar tasks. These tasks are essential for the conduct of prosecutions. They were not cited in the CoFPI recommendation on the transfer of responsibility for prosecutions and the HLRG has concluded that they should not, and realistically cannot, be transferred. They could, however, be managed in ways that enable more effective use of Garda time, through the development of information systems and appropriate delegation to civilian staff.

Accordingly, the HLRG has dedicated significant time and effort in trying to establish an understanding of the practicalities and implications of changing the current model. To support this understanding, the HLRG pursued a novel initiative to calculate, with the aid of a survey of members, the time and effort expended by AGS personnel in work germane to the focus of the HLRG, which is the making of prosecution decisions and presenting prosecutions at court. Thanks to the cooperative engagement of AGS in the development and administration of, and participation in the survey described in Chapter 4 and subsequent focus groups, the HLRG now has a sense of the scale of the Garda personnel commitment to various elements of the prosecution process.

It is clear from the analysis conducted for this report, and in particular the international research, that the scope for 'practical' cost/time savings to release Garda resources to be reallocated to other policing functions arising from any changes recommended by the HLRG is limited. This is because AGS would continue, in any changed model, to have responsibility for the investigation of crimes, the preparing of files to support prosecution decisions, liaison with witnesses and victims. Moreover, it is clear that there would not be any significant savings but rather the moving of costs from one agency to another without resulting in a net benefit for the Exchequer.

In light of this reality regarding resources, the focus of the HLRG necessarily turned to issues of principle, that might inform a decision to recommend one model or another. The HLRG developed an analytical framework, to enumerate a number of key principles, some of which were explicit in the CoFPI Report and some of which are implied such as impartiality, consistency, human rights adherence, quality of decision making, maintaining public confidence, good practice by international standards and the impact on the rights of accused and victims. These principles should guide our analysis and exploration of possible change options.

A key principle is that any recommended changes should not result in less public confidence in the current system. The work of the HLRG has illuminated elements of the current system which are to be commended, and must be carefully protected from inadvertent degradation. The legislative underpinning for the current system is the Garda Síochána Act 2005 which sets out the DPP's statutory power of direction. Pursuant to Section 8 of the Garda Síochána Act 2005 the DPP has directed that certain types of offences should be submitted to the Office for a decision on whether to initiate a prosecution. Section 8 also sets out the types of offences which can be prosecuted by An Garda Síochána. The DPP can amend the s.8 delegation to include or exclude offences as she considers appropriate. Therefore, where a case is prosecuted currently by a member of the Garda Síochána this is done in the name of the DPP and it is possible for the DPP at any stage to assume conduct of those proceedings. This framework underpins the principles of independence which are at the heart of the maintenance of public confidence.

In assessing possible new models, the HLRG has kept in mind how current practices meet standards of good practice that offer assurance to the public. Developments in good practice that have been, or are in the process of being rolled out by AGS through their new Operating Model and other reforms, have been recognised by the Group in the course of its' work. This evolving operating environment has been factored into our considerations. It is also important to recall that while the CoFPI recommendation was grounded in policing considerations, the HLRG must examine and assess all models cognisant of the potential impact on the whole of the public prosecution system.

In considering the important issues surrounding the public prosecution system in Ireland the HLRG is conscious of the complexities and sensitivities concerning the use of language when referring to those involved. Worthy of particular consideration is of course the position of the public parties, including the accused and complainants or victims. To avoid any confusion, where the word victim(s) is used, this is done without imputation as to any legal findings, and at no point should be taken to imply the guilt of any accused individual. When used here, the word victim can in effect be substituted by complainant; however, conscious that many individuals are victims of criminality while never being complainants, and not wishing to impose an overly legalistic interpretation where it may not be helpful, the HLRG believes that it is on balance appropriate to utilise the word victims in the ordinary sense of the word. In coming to this conclusion the HLRG is also mindful of the definition of victim as set out in the European Victims' Rights Directive¹⁸ and in domestic legislation, the Criminal Justice (Victims of Crime) Act 2017. The protections and rights as set out in the Victims Directive 2012/29EU, as implemented by the Criminal Justice (Victims of Crime) Act 2017, apply to persons who have made complaints to An Garda Síochána. After a complaint has been made to AGS, the complainants are victims to whom Directive 2012/29EU, as implemented in domestic legislation, applies and the rights and obligations apply to such investigations and prosecutions.

Evaluation Criteria

The HLRG presents here the criteria by which it has assessed potential models for change as well as the current system.

Independence/Fairness and accountability of prosecution services:

The CoFPI recommendation brings this matter to the fore and its opening sentence underscores the value placed on this principle: 'In one area of the criminal justice system there should be more distance between the police and other elements of the system, namely the courts.' The CoFPI Report recognised implicitly the value of an independent prosecutor and the safeguard that this can provide by ensuring that cases that reach court are based on sufficient evidence. Independence is pursued in turn, as a means of achieving impartiality and fairness. Impartiality and fairness on the part of prosecutors are clearly prerequisites for any properly functioning public prosecution service that serves justice and enjoys public confidence.

Consistency of prosecution services/administration of justice:

An important element of an equitable justice system is the consistency of its application. While appropriate variation and flexibility are required and beneficial, care must be taken to ensure that justice is consistent and that none are disadvantaged on any arbitrary basis.

¹⁸ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

Quality of prosecution services:

Justice and the public interest require that prosecutions are conducted efficiently and effectively so that evidence is well presented and tested while rights of the parties engaged in the process including the accused as well as the victims of crime, are respected.

International Standards and Trends:

Their report observes that ‘most comparable jurisdictions recognise, investigation and prosecution processes should be separate’. Furthermore, the Garda Inspectorate Report of March 2021 agreed with the CoFPI report in this regard stating: ‘as the Commission on the Future of Policing in Ireland has reported it is now widely accepted that the investigation and prosecution processes should be separate.’

The HLRG note that there are two elements involved in situating Ireland’s public prosecution system amongst its peers. The first is to determine appropriate international standards. These include legal standards, including human rights obligations as well prosecution guidelines produced by international organisations. Examples of international standards include the United Nation’s Guidelines on the Role of Prosecutors; the International Association of Prosecutors (IAP) published ‘Standards of professional responsibility and statement of the essential duties and rights of prosecutors’ and the Council of Europe’s Recommendation on the role of public prosecution in the criminal justice system. The HLRG notes that while these Guidelines are primarily of a non-binding nature and are not over-prescriptive as to how standards for prosecutors should be implemented, they are important examples of an emerging body of international standards in this field.

The second important element involved is to identify relevant international trends. Besides the published standards and guidelines, the HLRG’s commissioned international research provides important examples of evolving international trends, as well as divergent approaches, including from New Zealand, as noted in Chapter 5.

The international research however also illustrates that the separation of prosecutorial and investigatory functions is not a simple matter, or one without potential downsides. The international research makes clear that jurisdictions which have engaged in reform in line with the international trend of separating prosecutorial and investigatory functions continue to ‘*grapple with finding the correct balance between the roles of the prosecutor and the police*’. Although the particular reasons for the continuing adjustments vary in each jurisdiction, the HLRG observes that this unsettled institutional architecture reflects the interdependence which exists between police and prosecutors. This interdependence is not a weakness, but the reality of investigating and prosecuting crime. This is evident to the HLRG in respect of the current public prosecution system in Ireland, where it has been observed for example, that participation in prosecutions can help build expertise in Garda members when carrying out their investigation functions. Moreover, the international research also demonstrates the potential pitfalls that can be encountered when the balance is lost, and structural independence is privileged at the expense of essential interdependence; such as can be seen in deterioration in file quality. Therefore, in seeking to serve the appropriate independence between the investigatory and prosecutorial functions, the real and unavoidable interdependence between these functions must be acknowledged and a solution sought that strikes the right balance.

Impact on Involved Parties

While the CoFPI report does not explicitly reference the position of the accused or of victims given their role and attendant rights in prosecutions, it is implicitly a major consideration in assessing prosecution models.

Possible cost/time savings benefits:

The involvement of Gardaí in prosecutions and the amount of time they spend in court/preparing for court is in the view of the CoFPI Report 'enormously wasteful of police resources that should be deployed on core police duties. This is a secondary but important reason for taking prosecutions away from police'. The HLRG must therefore consider in the round the resource implications of any options, and not merely from AGS perspective.

Administrative burden:

Any recommendation involving change will result in an administrative challenge, both in terms of managing the change itself, and administering the new model.

Financial costs:

Any recommendation will have an impact on public expenses, with some potential recommendations having significant associated implementation and operational costs.

Reflections on the current system

Before setting out the shape of potential replacement models it is appropriate to recall the strengths and weaknesses of the current system by reference to the principles that the HLRG have adopted. The HLRG observe that in as much as the weaknesses identified require addressing, these strengths are worthy of protecting in any updated public prosecution system.

Independence/Impartiality and accountability of prosecution services:

The vast majority of cases prosecuted by AGS are taken in the name and under the authority of the Director of Public Prosecutions. Independence for prosecutors is a key principle underpinning the rule of law in the international standards set by the Council of Europe, the UN and the International Association of Prosecutors. The independence of the Director of Public Prosecutions is set out in section 2(5) of the Prosecution of Offences Act 1974 which states: "The Director shall be independent in the performance of his functions". The HLRG notes that the Director of Public prosecutions can delegate authority to initiate or conduct prosecution offences pursuant to Section 8 of the Garda Síochána Act 2005. The Director can amend, rescind and vary the delegation.

It is a matter for the Director to decide what functions she should outsource and what work is to be performed by staff of the Office of the DPP e.g. State Solicitors are contracted to act on her behalf in

Circuit Courts outside of Dublin; Junior and senior counsel are also engaged by the Director to represent the Director in trial courts.

The DPP is not subject to any external direction in the exercise of her functions and has statutory authority to direct how prosecutions taken in her name are to be conducted. The importance of independence, fairness and impartiality is stressed in the Code of Ethics issued by the DPP and which is binding on prosecutors, including AGS.

While both AGS and the ODPP are independent in the carrying out of their functions, the criticism of our public prosecution system by the CoFPI as currently constituted is based on the lack of separation between the investigatory and prosecutorial functions when the AGS are prosecuting summarily. This arises as a consequence of the power of AGS, who have primary responsibility for the investigation of crimes, to make prosecution decisions and to present prosecutions in court on behalf of the ODPP. The concern is that owing to their involvement in the investigation, AGS may not be sufficiently independent and/or objective when making prosecution decisions.

As regards accountability, the HLRG recalls that both organisations are accountable in different ways. The ODPP is accountable to the Committee on Public Accounts for administrative and statistical matters in accordance with section 67(7) of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013. The Director of Public Prosecutions is also accountable to the courts for her decisions.

AGS are subject to several layers of public accountability, including through the work of the Policing Authority, the Garda Inspectorate, the Garda Síochána Ombudsman Commission, and via the Commissioner's accountability to the Oireachtas through its committees, including the Public Accounts Committee in his role as Accounting Officer. Like the DPP, where Gardaí prosecute they are also accountable to the courts.

The weaknesses of current accountability arrangements were highlighted in a report published by the Garda Inspectorate in March 2021 entitled 'Countering The Threat of Internal Corruption' This review of counter-corruption structures, strategies and processes in the Garda Síochána' noted that 'unlike any of the other police services benchmarked for this report, Garda members have a wide discretion under statute to institute criminal proceedings in the State'. The Garda Inspectorate report also noted an underdeveloped framework for accountability in this respect. Given that AGS conducts their prosecution work in the name of the Director of Public Prosecutions another weakness of the current system in terms of accountability is a relative lack of publicly available information in relation to the operation and administration of Section 8 of the Garda Síochána Act 2005.

Consistency of prosecution services/administration of justice:

The HLRG notes that while not seeking to undermine the important capacity of justice actors to respond appropriately to local considerations and to be flexible, the ODPP and AGS make considerable efforts to ensure a consistency of prosecution services and the administration of justice nationally. For example, the ODPP provides training to Court Presenters, as well as providing guidance documents and updates on relevant cases through the Garda Portal. Of particular importance in this regard are the ODPP's published Guidelines for Prosecutors. The guidelines set out in general terms the principles which should guide the initiation and conduct of prosecutions.

Also of relevance are the ODPP published Code of Ethics. The main aim of this Code of Ethics is to promote and enhance those standards and principles recognised as necessary for the proper and independent prosecution of offences. The Code of Ethics sets out the standards of conduct and practice expected of prosecutors working for, or on behalf of, the Director of Public Prosecutions including members of AGS.

Nevertheless, the Garda Inspectorate report from March 2021 noted challenges to achieving consistency. The report noted that within AGS, local practices had developed across the country, *'the Inspectorate examined a representative sample of recent garda prosecution files at District Court level. In general, local practices had developed around the handling and supervision of cases in each of the garda divisions visited'*.

A particular challenge to securing consistency is that aspects of the prosecution system are different in Dublin than outside Dublin. In Dublin solicitors in the ODPP provide representation in the more serious cases in the District Courts whereas outside Dublin this advocacy work is provided by AGS.

State Solicitors conduct District Court appeals and indictable matters in the Circuit Court on behalf of the Director outside Dublin. They do not prosecute in the District Court, save for exceptional circumstances when specifically requested to do so by the DPP. This differs from Dublin, where prosecutors in the ODPP prosecute many cases in the District Court as outlined in Chapter 2.

Quality of prosecution services:

The adaptability and flexibility of the current system, allowing for a tiered response based on the nature and seriousness of the offence, is a significant strength. The management of prosecutions by reference to the gravity of the offence or to circumstances which give rise to unusual complexity, enables appropriate expertise to be brought to decisions to prosecute and to the conduct of prosecutions themselves. By the use of directions under Section 8¹⁹, the DPP has the capacity to reflect changing conditions and particular circumstances in determining that prosecutions require the approval or direct participation of her office, while enabling decisions and prosecutions of a routine nature to rest with AGS. In turn, AGS have the capacity to introduce internal measures to improve quality in the conduct of prosecutions, such as through the courts presenter system and through training. They have the option of referring issues to the ODPP for advice or direction. The HLRG notes that the current system, involving locally based law enforcement officers and on occasion local legal professionals, has advantages in terms of deploying local knowledge. This is particularly relevant in the operation of the juvenile diversion programme and the adult caution scheme where locally based Gardaí are involved. The participation in prosecutions by members of AGS also enhances their expertise and skill set.

Notwithstanding the adaptability and flexibility of the current system, there are significant challenges to ensuring quality prosecution services throughout the country.

This is clearly articulated in the CoFPI recommendation when it notes: *'we heard in the course of our consultations that Gardaí in charge of prosecutions may not be trained to the level of the opposing defence lawyer.'* Notwithstanding the training and guidelines provided to all prosecutors, whether

¹⁹ DPP (at the suit of Garda Liam Varley) v Ciarán Davitt (2022). Section 8 was amended on foot of legal challenge regarding right of audience.

members of AGS, State Solicitors or working directly for the ODPP, the longstanding ‘equality of arms’ criticism persists. Prosecuting members of AGS cannot be expected to have the breadth and depth of legal knowledge and experience that academically and professionally qualified lawyers possess. While the provision of comprehensive training, and experience in the role can greatly aid prosecuting Gardaí, cases of particular complexity or in fields of rapidly developing case law may lead to a disadvantaged prosecution team.

The Garda Inspectorate report from March 2021 identified ‘*significant gaps in the supervision and management of Garda members and a high volume of prosecution cases that were discontinued at court*’. Furthermore, the report noted that ‘*there was limited oversight by supervisors such as sergeants or inspectors of cases prosecuted directly by Garda members*’. Both of these observations are concerning. The Garda Inspectorate noted that: ‘*It was not unusual for cases to be discontinued at court because of nonattendance of Garda members and with little if any explanation. This was found in 13% of cases examined. While some cases were referred to local management for their information, there was no consistent process for ensuring that cases were reviewed to identify why the prosecution had failed.*’

However as has been stated previously the new DCMO Operating Model will provide structured oversight by a Performance Assurance Functional Area Superintendent and Inspector, with specific responsibility for the Criminal Justice function, within each Division

There are many valid reasons why a “high volume” of cases may be discontinued at court. For example, a Garda may bring a suite of summonses against an accused arising out of a single incident, such as a road traffic stop. Summonses for having no insurance, failing to produce insurance, failing to display an insurance disc (and ditto for licence, tax and NCT) can lead to 10 or more summonses appearing in court. When disposing of the matter, most District Judges will record a conviction on the most significant one(s), and strike out the remainder. The statistics will not show this. This also happens with public order cases and many others. Cases can also be struck out following the payment of money to a charity by the defendant. Judges frequently do this to avoid giving the defendant – especially young or first time offenders – a criminal record.

International Standards and Trends:

The international comparative study presented in Chapter 5 demonstrates that, while there is increasing coalescence around principles of what constitutes best prosecutorial practice, in terms of independence, accountability etc. it cannot be said that there is any uniform approach. Rather, this is an area that remains in a state of evolution. It is also clear that local considerations, whether historic or geographic, are important and valid factors in the shape of public prosecution systems internationally. Ireland’s current system is, therefore, not at odds with international standards or best practice, and may rather reflect another more or less valid variation, one shaped by our history and circumstance.

Impact on Involved Parties

The public prosecution service is an important undertaking in the interest of the general population and thus is rightly the subject of scrutiny and examination of its impact on society generally. The public

prosecution service also has very personal and direct impacts on specific members of the public should they be involved either as an accused person or as a victim.

The HLRG acknowledges that both AGS and the ODPP take their commitment to providing quality service to victims seriously and are mindful of the impact of their actions on victims. Under the current system, both AGS and the ODPP liaise with victims and provide them with information to same.

In respect of the ODPP, the prosecution solicitor will work with the Gardaí to keep the victim up-to-date about developments in the case. In the most serious cases, such as sexual offences or other crimes of violence, the Office of the DPP will offer the victim, or the family of a victim who has died, a pre-trial meeting. In many other cases, the victim may ask for a pre-trial meeting which will be facilitated. The HLRG notes the content of the ODPP's published Victims Charter and that the ODPP publish a number of information booklets for victims.

In respect of AGS, the AGS provides services to victims in a number of different ways. In particular, the HLRG notes the work of the 28 Victim Service Offices who work to ensure victims of crime are kept informed about the progress of their case and the supports available to them. The HLRG also notes the published AGS Victims Charter and the information booklets for victims of crime of available from AGS.

AGS and the ODPP also give reasons for decisions not to prosecute and conduct reviews of such decisions at the request of the victim.

A properly functioning public prosecution service requires that prosecutors respect the rights of the accused so as to ensure public confidence in the system and rule of law generally.

The HLRG acknowledges that both the ODPP and AGS are committed to conducting prosecutions in a manner which complies with and upholds the rights of accused individuals; the ODPP's Code of Ethics, and Guidelines for Prosecutors are of relevance in this regard. The HLRG also note that the ODPP provides information for the public on their website.

The HLRG notes that as part of the reforms arising from the Commission on the Future of Policing in Ireland Report the Minister and Department of Justice are in the process of updating the legislative framework grounding the powers of AGS. Under the published General Scheme of the Garda Síochána (Powers) Bill 2021 approved by Government the new legislative framework will have a strong focus on human rights. This includes both the rights of suspected or accused persons, as well as the human rights of all members of society to live free from violence, abuse, crime and fear. Notably, under the new 2021 Bill, statutory codes of practice for members of AGS are to be developed.

Issues around gaps in record keeping, particularly surrounding reasons for not taking prosecution cases, as well as a lack of documented and transparent procedures around the operation and administration of the Section 8 delegation by An Garda Síochána highlighted by the report of the Garda Inspectorate, do not serve to build public confidence.

Applying the Analytical Framework

To guide our analysis, we developed a number of options for change, as required by our Terms of Reference, so that their pros and cons could be considered not least by reference to resource implications.

1. Minimal Model
2. Reform Model
3. Maximal Model

1. Minimal Model

The Minimal Model represents the least change, while still changing to a certain degree, the current system. The emphasis of the Minimal Model is on ancillary activities which can offer some assurance to the public about the probity of the system.

Minimal Model Outline

An Garda Síochána retain the power to make prosecution decisions on behalf of the DPP as articulated in the delegation made in accordance with Section 8 of the An Garda Síochána Act 2005 ('the 2005 Act').

All members of An Garda Síochána continue to be empowered to present prosecutions at court on behalf of the DPP, in line with Section 8 of the 2005 Act.

Enhanced mandatory training (to include regular refresher training) for AGS to be supported by ODPP to reduce so called inequality of arms.

Enhanced and documented oversight procedures of AGS prosecution work to be supported by ODPP, to be achieved through case review sampling.

Enhanced record keeping by relevant stakeholders to include AGS, the Courts Services and the ODPP.

The divergence in approach between the Dublin Metropolitan Region and the remainder of the country is maintained.

Discussion

The Minimal Model seeks to accentuate what is positive in the current system and reflects a cautious approach to change. Notwithstanding the attempts made through the AGS time and effort survey and the subsequent focus groups, to map the costs of moving prosecution functions from the AGS, it is not clear that the release of Garda personnel from prosecution activities would be significant, even if the CoFPI recommendation was fully implemented. This is particularly relevant to those elements of work which may be considered 'prosecution work' by members of AGS but will in any situation remain the responsibility of AGS as the State's sole law enforcement agency. Such activities include managing witnesses, evidence management, liaison with victims as appropriate and appearing in court to give evidence.

Modifications to the current system short of implementation of the CoFPI recommendation would still have value. Enhanced training and record keeping by AGS can go to alleviating concerns regarding the so called 'equality of arms' concerns and oversight issues. The equality of arms issue needs to be viewed in the context of the majority of cases prosecuted by Gardaí in the District Court resulting in pleas of guilty. The relatively small proportion of District Court cases which go to contested hearing means that the equality of arms argument may have less force than might appear at first sight. However, the argument undoubtedly arises in many contested cases.

Oversight can be further enhanced through greater record keeping, sampling by the ODPP of cases prosecuted on their behalf by AGS, increased training and provision of policy guidance. The recommendations under this minimal approach would require only changes within, rather than to the model. The ODPP would continue to keep directions under Section 8 under review. Improved data and oversight would assist the ODPP with this and support further transparency around decisions to delegate.

It is also important to note that the HLRG's work is taking place during a period of substantial organisational reform with AGS. Many of these organisational reforms also stem from the CoFPI report from which the HLRG's own work arises. Principal among these changes is the transformation of AGS to the new Operating Model, which involves rationalising of the number of Garda divisions amongst other reforms. This new and emerging 'status quo' offers both challenges and opportunities in terms of making modifications to the current system.

Potential Cost/Resource Implications

There is a cost to increased training, standard setting and oversight. The cost will depend on the extent of these measures. New resources would focus primarily on reviewing/sampling Garda prosecutions and to provide the capacity to the ODPP to prosecute more cases as appropriate. However relatively speaking the cost/resource implications are more limited due to minimal change in approach.

Legislative Impact

Nil, the changes being minor, required amendments to the current system can be achieved by non-legislative means

North/South Parity

The systems employed on either side of the border remain effectively as distinct as they are presently.

2. Reform Model

The Reform Model represents modest but significant change. The Reform Model does not completely achieve the recommendations of CoFPI, but includes changes to the current system which seek to build on existing strengths and buttress against any potential weaknesses identified in a manner which while not conforming to the letter of CoFPI's recommendations do meaningfully seek to achieve the spirit.

Reform Model Outline

It is envisaged that the Reform model would initially involve the steps set out in the minimal model outlined above but the ultimate goal of the reform model is more ambitious and includes the following:

AGS retain responsibility for prosecution decisions in respect of many minor offences on behalf of the DPP. Rules around who in AGS may make prosecution decisions would be clarified, to ensure the requisite level of authority, accountability and experience.

AGS retain responsibility for the presentation of prosecutions at court, to be supported by enhanced oversight and training from the ODPP.

The DPP will use the available data and information to identify any additional types of cases that should be submitted to the office for a decision on whether to initiate a prosecution and/or provide legal representation in the District Courts both in Dublin and outside Dublin where appropriate and seek resourcing for this

The DPP will consider how best to support the prosecution service across the country to give effect to the prosecution of additional types of cases by the Director.

DPP oversight of the exercise of prosecutions functions by AGS in its name to be substantially enhanced. This could include mandatory case sampling, record keeping, statistic gathering and publication, and regular structured auditing.

More transparency and consistency around the categories of District Court cases to be prosecuted by the ODPP

Discussion

The work of the HLRG has identified strengths of the current system which are worthy of protection, and may be particularly vulnerable to accidental degradation from radical reform. The Reform Model acknowledges the shortcomings of the current system, and embraces the objectives which lie at the heart of the CoFPI recommendations, while tailoring the actual changes to maintain the strengths of the current system.

The Reform Model will identify specific types/categories of cases which are best moved from AGS to the ODPP in terms of responsibility for making prosecution decisions and pursuing prosecutions at court.

The Reform Model puts greater emphasis on oversight arrangements within AGS, and between AGS and the ODPP. This would include greater formalisation, and measures to enhance the transparency of this process. This point is of particular pertinence as such measures would provide a basis for assurance that where decisions to prosecute remain with AGS, this is operated impartially and professionally.

The Reform Model requires greater clarity from AGS, the ODPP, and the Courts Service as to how they will work together collaboratively to eliminate the many information gaps that currently exist. Improved record keeping can offer assurance to the public and a baseline of data by which the success or failings of the reformed model can be judged.

Improved data will enable more accurate costings of what will be involved in moving some of the prosecution work undertaken by the AGS to the ODPP.

The Reform Model would build on ongoing developments in AGS re oversight generally, in particular the development and roll out of the new Operating Model which has emerged since (and in some circumstances on foot of) CoFPI. The new Operating Model through the Performance Assurance (Criminal Justice) Functional Area will establish a new Divisional Court Management Office structure in each of the nineteen (19) Divisions. The new DCMO structure under the Operating Model will deliver the following benefits:

- Dedicated points of contact for court management related matters in each Division
- Consistent delivery of court management services across all the Divisions
- Enhanced quality assurance by dedicated skilled personnel
- Structured oversight by a Performance Assurance Functional Area Superintendent and Inspector, with specific responsibility for the Criminal Justice function, within each Division
- Reduction in the administrative work-load of operational personnel
- Introduction of new national standardised/optimised processes designed to support the Divisional court management functions

An Garda Síochána will implement the new DCMOs, on a Division by Division basis, as part of the phased national rollout of the Performance Assurance (Criminal Justice) Functional Area, provisionally scheduled to commence in 2023.

The Reform Model incorporating the benefits of the AGS reforms, is in line with several peer jurisdictions where reforms of a similar nature have taken place, reducing the degree of authority/responsibility held by members of police in respect of prosecution decisions/presentations at court, which still allowing police officers to prosecute low-level offences, with enhanced oversight, for instance New Zealand, and in certain Australian jurisdictions. The HLRG can also point to the experience in NI and England and Wales where more ambitious reforms are currently being refined in a fashion that will see the police retain or regain prosecution authority for minor offences.

Potential Cost Implications

The Reform Model will have cost implications, over and above the costs that will be involved in the initial phase of increased data gathering, and training etc as set out in the minimalist model. The additional costs inherent in the Reform Model include increasing the capability of the ODPP to take on a greater volume of files and to fund the prosecution of additional categories of District Court Cases. This will involve additional staffing and/or increased state solicitor costs as well as accommodation costs.

Legislative Impact

Some legislative amendment may be required as this model is progressively implemented.

North/South Parity

The systems employed on either side of the border will continue to diverge in practice but the reform undertaken should ensure parity in terms of the human rights standards.

3. Maximal Model

The Maximal Model represents the largest change considered. The Maximal Model takes as its starting point the direct application of the recommendations of the CoFPI report.

Maximal Model Outline

AGS ceases to have any authority to/responsibility for making prosecution decisions regardless of the particulars of the offence involved. Direct responsibility for all prosecution decisions is returned to the ODPP, Section 8 of the 2005 Act to be repealed.

AGS cease to have any authority to/responsibility for presenting prosecutions at court. All presentations of prosecutions at court formerly (at present) undertaken by AGS to be presented by an expanded ODPP and/or State Solicitors service.

Divergence between DMR and the remainder of the country eliminated (as a consequence of the removal of AGS from the process).

Discussion

The Maximal Model applies the plain meaning of the CoFPI recommendations. While this direct adoption of the CoFPI approach offers appeal to the Maximal Model, it masks the reality that such a change is neither simple nor, from the evidence to hand, cost effective.

The Maximal Model's principal strength is that it will unambiguously achieve the recommendation of the CoFPI report as it related to prosecutions. The Maximal Model would, or is likely to achieve, many of the criteria the HLRG has itself identified: independence, consistency, international best practice.

The experience of the system in Northern Ireland, which the HLRG's international research piece explored in detail, is an exemplar of reform of this nature and scale. The Maximal Model would largely seek to replicate an existing system operating effectively in a peer jurisdiction.

While costs were specifically identified as a secondary consideration by the authors of the CoFPI report, the changes involved in the Maximal Model are extensive in scale and would likely have similarly significant attendant costs. On this point, it is observed that the international research indicated that the Northern Ireland model was a very expensive approach. The particular circumstance in Northern Ireland which gave rise to their reform, and the specific model adopted in that jurisdiction, required that their new public prosecution service be developed and implemented with virtually no reference to concerns of cost. The HLRG note that even in Northern Ireland there is tentative exploration of the possibility of reforming their approach to allow very minor crimes be prosecuted other than by the Public Prosecution Service of Northern Ireland. Importantly, the HLRG also notes that the international research, which included a close examination of the reforms undertaken in NI, indicates that there is no universally

applicable solution and rather that jurisdictions continue to find varying solutions reflecting their disparate needs and legal traditions.

The challenges of pursuing the maximal model would be considerable. The international research shows that even in Northern Ireland *'where the changes were phased and well-resourced'*, it appears that major pressure was put on the system in its early years with one interviewee describing it as *"close to collapse"*. All interviewees accepted that the new system has contributed to significant delays in the processing of cases and, while efforts on the part of the PSNI, PPS and others have been made to address this, it has proven a difficult issue to resolve. File quality, a crucial factor in successful and timely prosecutions was also imperilled, *'there is little doubt that file quality in Northern Ireland suffered when police officers no longer had to submit such files to a senior officer to present in court but to a separate independent office.'* Similarly, in England and Wales *'inspection reports have consistently raised poor file quality as a problem.'* In England and Wales to counteract this trend Criminal Justice Units (CJUs) staffed by both the Crown Prosecution Service and police were introduced on the recommendation to improve file quality but it should be noted that *'in the absence of any powers of direction, they ultimately depended on the goodwill of investigating officers to obtain more evidence'*.

These experiences offer important lessons for the HLRG in developing models and making a recommendation, as well as possible approaches. Firstly, it appears that there is a need to ensure that in a hierarchical service such as AGS, files going to a separate prosecution office ought to be signed off by a senior officer to ensure timely submission of files and that they are adequately prepared for submission. Secondly, if police targets are being developed in relation to the clearance of cases, these are not limited to the submission of a prosecution file but capture in some way timeliness and quality. A third lesson is that file quality is better when independent prosecutors are involved at an early stage in offering pre-charge advice as happens in certain serious cases. Taken in sum these lessons indicate that on top of the extremely expensive resourcing required to establish the new all lawyer prosecution service, any anticipated savings arising for the police function may be much lower than initially imagined due to the need to maintain extensive oversight and monitoring procedures. AGS would therefore remain heavily involved in the prosecution system.

Cost/Resource Implications

The research conducted for the purpose of this report has demonstrated how difficult it is to assess the costs of moving all prosecution functions from the AGS to the ODPP. It has simply not been possible to cost this with any level of accuracy. International experience would suggest that there would be significant cost implications both in short term and longer term to resource the expanded ODPP (and/or State Solicitors Service)

Legislative Impact

Amendments to primary legislation possibly required.

North/South Parity

The systems on either side of the border will now broadly mirror one another in form.

Chapter 7: Recommended option and High Level Implementation Plan

In the previous chapter we outlined three options which we developed for consideration, as required by our terms of reference. We also outlined the criteria by which we approached the evaluation of these options, and our conclusions from applying them to each option.

In this chapter, we outline the reasons for recommending the middle, Reform Model option for consideration by the Government. We also outline in broad terms an Implementation Plan for giving effect to our recommended option.

Selecting the Reform Model

The Maximal Model

Having regard to the difficulties in calculating the cost and resource implications, as discussed in Chapter 4, as well as the potential loss of certain strengths of the current prosecution system of implementing the radical reform recommended by the CoFPI, the HLRG does not recommend the Maximal Model.

Furthermore having reviewed international best practice and examined emerging international trends in the approach to public prosecutions, as discussed in detail in Chapter 5, the HLRG has concluded that the radical reform of the public prosecution system is not necessary to ensure that Ireland's public prosecution system aligns with international best practice. Nor is such change necessary to ensure that Ireland's public prosecution system is kept in line with international trends in approaches to public prosecution. In fact, as evidenced by the experience of jurisdictions that have engaged in radical reform, there has been a tendency to unwind changes so as to provide for prosecution by police, it can be argued that to pursue a full implementation of the CoFPI recommendation would be out of step with international practice and trends.

The Minimal Model

In the course of its work, the HLRG has become aware of ongoing reforms in and around the public prosecution system, and consideration was given to simply endorsing these ongoing reforms, the so-called 'Minimal model'. Included amongst these are reforms that also have their basis in other recommendations from the CoFPI report, such as the development of the Operating Model within AGS and the associated Divisional Court Management Offices (DCMOs).

The HLRG however is conscious of opportunities to enhance the public prosecution system and particularly of the desire of key stakeholders in that system to ensure that it is administered to the highest standards possible. The HLRG notes the intention of the ODPP to enhance its capacity to quality assure prosecutions undertaken by AGS in the name of the DPP, subject to additional resources being provided for this purpose.

In turn the HLRG acknowledges the limitations faced by key stakeholders in trying to ensure that the current public prosecution system continues to operate effectively and enhancing quality assurance. In particular, the HLRG is conscious of the resourcing challenges faced by the ODPP, and observes that the ODPP's budget is already entirely consumed in providing the service they do today.

As such, the HLRG knowing that more can be done, and that the key stakeholders involved, ODPP and AGS, with appropriate additional investment, acknowledge the need to do more to ensure the quality and efficiency of the public prosecution system, did not consider that the Minimal model was in the longer term a sufficient response and that a more ambitious reform model is more appropriate for recommendation.

That said, the HLRG considers that the steps outlined in the "minimalist model", including enhanced training and record keeping represent important initial steps that will ultimately support the development of the more comprehensive reform model (set out below) and should be supported by investment.

Confirming the Reform Model

Having considered both the Maximal and Minimal Models, the HLRG has concluded that neither radical change as recommended by CoFPI, nor the relatively modest reform steps outlined in the minimal model is appropriate. The HLRG recognising both the potential to improve our current public prosecution system and the challenges faced by key stakeholders in delivering system-wide change, therefore recommends the Reform Model.

Our recommended option takes a systemic approach to the question of how prosecutions should be conducted. While the desirable independence of prosecution and policing functions are properly reflected in the independence of the DPP and AGS, their roles, together with the courts and the legal profession, form a system by which justice is served and rights are vindicated. It is appropriate, therefore, that a systems approach be taken. From that perspective, what is required is that the structures, processes and policies that are operated across this system are consistent and, together, deliver effective outcomes for society. Our recommendations therefore seek to ensure that the individual elements of the prosecution system are aligned and that cooperation between them is enabled to be both efficient and effective.

Our recommendations are directed both to the individual elements of the system as they develop and implement their own policies and programmes, and to the Government, insofar as the legislative and organisational framework for the prosecution system and, crucially, the resources committed to its operation, are concerned. In framing our recommendations we have had regard to the stated goals, strategies and operating principles of the ODPP and AGS in particular, so that they build upon the direction of travel which these organisations have adopted, while proposing concrete steps by which more effective systemic outcomes, particularly with regard to public confidence in the prosecution system, can be achieved.

The Reform Model

Prosecutions under the Reform Model

Prosecution decisions

In light of the cost, resource and potential disruption implications of alternatives the HLRG recommends that AGS retain general responsibility for prosecution decisions in respect of high volume, low level offending, minor offences prosecuted at the District Court on behalf of the DPP.

The HLRG recommends that the ODPP be supported in considering amendments to the S.8 delegation to identify additional types of cases that should be submitted to the Office for decision on whether to initiate a prosecution and provide legal representation in the District Courts, both in Dublin and outside Dublin. Identification of additional types of cases will require analysis of information from AGS and the courts to ensure appropriate capacity and investment are allocated to ODPP to ensure such a service can be provided on a national basis.

Conducting prosecutions at court

We recommend that AGS retain responsibility for the conducting of prosecutions in court. The HLRG recommends that ODPP be supported in considering whether certain categories of District Court cases should be prosecuted directly by the ODPP/State Solicitors instructed by the Director, to ensure consistency and taking into account the complexity of prosecuting certain offences across the country. The ODPP is not currently funded to provide legal representation at District Court level on a national basis.

The HLRG recommends that the ODPP be supported in considering how best to support the prosecution service across the country to give effect to the prosecution of additional types of cases by the Director.

Oversight of prosecution functions exercised by AGS in the name of the ODPP

We recommend that the ODPP be supported in substantially enhancing oversight of the exercise of prosecution functions by AGS in the name of DPP. It is envisaged that this would include development of protocols around agreed standards relating to decision making and representation within AGS, as well as protocols relating to the audit and quality assurance processes e.g. around timeliness for provision of data to facilitate case sampling, statistics gathering and publication, and regular structured auditing.

Reform Model supporting Key Stakeholders

The work of the HLRG and this report illuminate clearly that neither a radical departure from our current public prosecution system nor simply endorsing the comparatively limited reforms already in train will achieve the best result possible for the public prosecution system and the public whom it serves.

The challenge is to take steps to ensure public confidence in the probity of prosecution decisions that substantially will still need to be conducted by AGS. Therefore, the Reform Model is focused on developing the full potential of the existing system, and supporting the expansion of ongoing

improvements, while acknowledging the reality in which the public prosecution system must operate in Ireland. The HLRG considered whether there were processes or systems in place at present and whether there are processes or systems being developed at present that would facilitate the quality function envisaged as part of the Reform Model. We have concluded that there are not²⁰, and their development is at the least of the Reform Model which we recommend.

The Internal Lens; monitoring and supervision by AGS

The Reform Model, which we recommend, should support AGS, who already envisage the organisation taking a much more active management role on the initiation and conduct of prosecutions in the name of the DPP. It is recommended that AGS under the Reform Model to achieve greater oversight of and enhanced support for those who are making prosecution decisions, and conducting prosecutions at court, including 'court presenters'. Thereby addressing the matters highlighted in the Garda Inspectorate report. One of the primary vehicles to achieve this objective will be the Performance Functional area under the Operating Model.

The HLRG notes the AGS Statement of Strategy 2022 – 2024, in particular the 'Sustainable Change and Innovation' pillar of same which commits that organisation to '*Inspiring and sustaining a culture of continuous improvement, enhancing innovation and responsiveness to changes*²¹. Accordingly, the Reform Model, which we recommend, supports AGS in the introduction of enhanced record keeping and regular internal review in respect of prosecution decisions, including the recording of reasons for a non-prosecution decision, and other disposals. This enhanced record keeping should enable more effective supervision and monitoring of initiation and conduct of prosecutions undertaken by AGS in the name of the ODPP and thus enable AGS to identify any challenges or shortcomings in good time, allowing for corrective action to be taken thereby enhancing '*overall change capacity and capability across the organisation*' in line with AGS Statement of Strategy 2022 -2024.

The Reform Model, which HLRG recommends, should also support AGS in ensuring that members are provided with the requisite support to fulfil their responsibilities in respect of the public prosecution system to the highest level. To this end the HLRG recommends that AGS be supported in considering, developing and deploying: a structural basis for enhanced training in respect of public prosecutions work; a career progression pathway for those members of AGS specialising in prosecutions work, up to and including internal legal support. This will be achieved through the currently planned expansion of the DCMOs and Court Presenter system. The HLRG notes the '*People and Purpose*' enabler from the AGS Statement of Strategy 2022 – 2024 that identified developing '*enhanced and more efficient ways of enabling learning, development and information-sharing throughout the organisation*' as a priority.

²⁰ While the Criminal Justice Operational Hub is now live, it is currently limited to specific message exchanges and the ODPP is not a participant in it. Should the ODPP become a participant, and the Hub's remit is expanded to allow for the type of data sharing set out here, it could become part of the solution into the future.

²¹ Strategy Statement 2022 – 2024; An Garda Síochána, June 2022; pg. 13; available at <https://www.garda.ie/en/about-us/publications/policing-plans/strategy/an-garda-siochana-strategy-statement-2022-2024-english.pdf>

The Reform Model should support AGS in achieving the desired outcome from the AGS Strategy that ‘Garda personnel have the appropriate training, information and supports they need to succeed in their role’²².

To reinforce the enhanced supervision and monitoring activities of AGS, and to ensure that these additional safeguards and enhanced record keeping activities can be undertaken in the most effective and efficient means possible the HLRG recommend that AGS develop and deploy the appropriate IT architecture. The AGS Statement of Strategy 2022 – 2024 identifies ‘information led policing’ as a key enabler. The Reform Model should therefore support AGS in achieving the priorities thereunder: creating ‘an information and technology ecosystem, increasing our capacity to provide consistent information across all levels of An Garda Síochána’, creating ‘a culture which recognises the central importance of data as an organisational asset, managing it in an ethical manner’.²³

The External lens; quality assurance by the ODPP

Side by side with this internal lens focused on building capacity and confidence in AGS, the Reform Model also seeks to enhance the external component which will reinforce improved practices within AGS. The Reform Model therefore acknowledges the need to have a counterpart to the internal process to further support consistency throughout the system. The Reform Model points to the ODPP as the appropriate body with the legal authority and functional capacity to review, audit and assess prosecution decisions and the presentation at Court of prosecutions taken by AGS in the name of the DPP. This involves a number of strands that should enable decision makers to be clearer about trends in the types of prosecutions and their outcomes, to identify categories of offences that the DPP may want to prosecute directly or others that might be considered suitable for prosecution, in her name, by others instructed by the Director.

It is clear that those prosecutions taken by AGS under the Section 8 delegation would benefit from the oversight and enhanced support of the ODPP quality assurance processes. The HLRG are clear that the ODPP requires investment and support to pursue its objectives in this area, and that this important additional capacity cannot be provided from existing resources. Similarly, there will be a requirement for investment in AGS in the areas of personnel, training and ICT to deliver this and the previous recommendations. The HLRG notes the ODPP Strategy Statement 2022 – 2024, in particular ‘Strategic Goal 1: Service’ under which the ODPP is committed to delivering ‘an excellent and trusted criminal prosecution service’²⁴. In line with this goal, the Reform Model should support the ODPP in building a capacity to ‘sample’ prosecution decisions and presentations, taken in the name of the DPP, to assess the degree of compliance with the Prosecution Guidelines to assist the ODPP in ‘ensuring strong case management and quality assurance processes’²⁵. In addition, the results of the AGS monitoring and supervision will be important source of information for the ODPP oversight activity.

²² *ibid*; pg. 15; available at <https://www.garda.ie/en/about-us/publications/policing-plans/strategy/an-garda-siochana-strategy-statement-2022-2024-english.pdf>

²³ *ibid*; pg. 19; available at <https://www.garda.ie/en/about-us/publications/policing-plans/strategy/an-garda-siochana-strategy-statement-2022-2024-english.pdf>

²⁴ Strategy Statement 2022 – 2024; Office of the Director of Public Prosecutions, June 2022; pg. 11; available at <https://www.dppireland.ie/app/uploads/2022/06/Strategy-Statement-2022-2024-eng.pdf>

²⁵ *ibid*; pg. 9

The HLRG acknowledges the need for an effective IT solution that would allow prosecution decisions made by AGS in the name of the DPP to be ‘sampled’ and reviewed in a timely and efficient manner by the ODPP. This should involve the resourcing of systems and staffing to support case management and statistical analysis as well as a capacity to review case disposals via all the categories that would be appropriate for such an oversight mechanism. In this regard the HLRG notes ‘*Strategic Goal 2: Digital*’ from the ODPP Strategy Statement 2022 – 2024 which commits that organisation to ‘*invest in our digital and ICT capability to drive efficiency*’²⁶. The HLRG recommends support for ODPP in reviewing the extent to which their case management systems are supporting their service needs, as well as utilising their data and information to anticipate trends, emerging needs and issues to shape and improve the delivery of the prosecution service in line with the ODPP Strategy Statement 2022 - 2024.

Collaboration and cooperation

The foregoing discusses how the Reform Model would support the internal enhanced supervision and monitoring activities of AGS and the external enhanced quality assurance activities of the ODPP as they relate to the initiation and conduct of prosecutions by AGS in the name of the DPP. The Reform Model requires close collaboration and cooperation between these two pillar stakeholders in respect of such prosecutions. Therefore, the Reform Model, which we recommend, should support AGS and ODPP in establishing a new degree of collaboration and cooperation. This recommendation accords fully with both the AGS Strategy Statement 2022 – 2024 and the ODPP Strategy Statement 2022 – 2024. The AGS Strategy identifies ‘*Partnerships*’ as a key enabler and commits AGS to ‘*engage and sustain strategic, collaborative partnerships to continually strengthen our knowledge*’²⁷. The ODPP Strategy includes ‘*Strategic Goal 3: Collaboration*’ which commits that organisation to ‘*strengthen collaboration and influence change to improve the criminal justice system*’²⁸. The Reform Model would support both organisations in achieving this improved collaboration and cooperation through the development of an interoperable IT solution between ODPP and AGS as it pertains to relevant public prosecutions work, aligning with the commitment to ‘*extend data sharing, electronic file exchange and other data and ICT initiatives with key stakeholders*’²⁹ from the ODPP Strategy. The Reform Model should also achieve greater cooperation and collaboration between the ODPP and AGS in respect of training for AGS members exercising their functions in respect of prosecutions carried out in the name of the DPP by supporting them in providing ‘*support and training to the investigative agencies who submit files to the Office of the DPP*’³⁰.

²⁶ Ibid, pg. 12

²⁷ Strategy Statement 2022 – 2024; An Garda Síochána, June 2022; pg. 16; available at <https://www.garda.ie/en/about-us/publications/policing-plans/strategy/an-garda-siochana-strategy-statement-2022-2024-english.pdf>

²⁸ Strategy Statement 2022 – 2024; Office of the Director of Public Prosecutions, June 2022; pg. 13; available at <https://www.dppireland.ie/app/uploads/2022/06/Strategy-Statement-2022-2024-eng.pdf>

²⁹ Ibid; pg. 13

³⁰ Ibid; pg. 11

High Level Implementation Plan

If the recommendation of the HLRG is accepted in principle there will then be a range of issues that will need to be considered in much more detail e.g. the detail and design of the enhanced training, supervision and monitoring within AGS, enhanced external quality assurance mechanism by the ODPP, the required IT solutions to facilitate this and the categories of offences which may revert to the ODPP for decision and/or prosecution. In this regard, the HLRG identifies that there is a requirement for a significant investment in the development of ICT resources to support both an improved internal quality management process within AGS and an external quality assurance mechanism overseen by the ODPP. These matters are beyond the remit of the HLRG and this report. Moreover, information gathered by the ODPP in the course of its audit and quality assurance work into the future will also help to inform decisions around the delegation. Such detailed analysis is primarily a matter for the ODPP and is outside of the remit of this report.

It is also clear that there will need to be significant investment in the development of ICT resources to support both an improved internal quality management process within AGS and an external quality assurance mechanism overseen by the ODPP. Further detailed analysis is needed to assess what categories of data are available and what other categories of data are needed to inform these processes, as well as the optimum processes for transferring the relevant data.

In order to support collaboration and cooperation between the two pillar stakeholders, AGS and ODPP, the HLRG proposes the following high level implementation plan to take forward implementation of the Reform Model. We recommend that due to the realities of implementing technical solutions and the fact that each strand of this model will inform the others (e.g. the audit activity of the ODPP will inform decisions around delegation; information from the AGS supervision activity should inform ODPP and AGS steps in relation to standard setting and training), that the Reform Model should be implemented on an incremental process. This High Level Implementation Plan recognises the reality that in order to reach the overall objectives of the Reform Model, including seamless, broad functionality IT interconnection between the ODPP and AGS, time, resources and information will be required.

The Steps

1. Establishment of Implementation Group on Summary Prosecutions Reform
2. Review of AGS and the Courts Service data for selected categories of offences
3. Review of current guidelines and training in place relevant to Garda prosecution function.
4. Small scale, low/no tech sampling
5. Identifying and extracting relevant data from Garda and the Courts Service systems
6. Look for 'ad hoc' automation opportunities
7. Full automation and visibility.

Each step in the recommendations/high level implementation plan naturally informs the next, building on the data required to enable the following step, until the overall objective can be achieved. Indicative timelines are provided below for each step, however the timeline for each step is subject to the preceding step, and all are conditional upon the detailed design to be developed.

1. Establishment of Summary Prosecutions Reform Steering Committee

The HLRG's remit was necessarily restricted to high-level consideration and the laying out of a High Level Implementation plan. Given the number of issues to be considered, and the need to move forward in a spirit of collaboration and cooperation it is recognised that there is a need to have an implementation phase where issues relating to data, scope and resourcing are considered in a detailed way. The HLRG must acknowledge the important independence of the DPP and her office. At the same time, both the DPP and the AGS agree there is a need to establish a mechanism to drive forward the detailed design and implementation of the Reform Model and to monitor progress against established milestones. We recommend establishment of a Summary Prosecutions Reform Steering Committee (SPRSC) to be assigned responsibility for the future detailed planning and design as well as the monitoring of the implementation of the Reform Model. To ensure the fostering of the required collaboration and cooperation the HLRG recommend that the Implementation Group be comprised of the key stakeholders, AGS, the ODPP, the Courts Service and the Department of Justice. The Courts Services play an important role in relation to data collection. In addition, collaboration with the Courts in relation to the listing of criminal cases will be key to ensuring efficiencies around prosecution representation. It is also recognised that the Department of Justice play an important role in supporting reform initiatives in the justice sector. It is recommended that this implementation group should be chaired by an independent party, with the requisite authority and reach.

Timeline: short term, 0-6 months.

2. Small scale, low/no tech sampling

Following the establishment of the SPRCS the High Level Implementation plan envisages that the next step would involve the design of an auditing/review process involving the sampling of cases/files from the AGS by the ODPP. This step is included in recognition of the need to ensure public confidence in the activities of AGS in the public prosecution system, particularly cognisant of the likely delay in realising the overall objective of seamless IT interconnection between the AGS and ODPP. The HLRG notes that the resource implications of this step should not be underestimated and additional investment will be required particularly given the dearth of enabling technology and extant provision for the exercise of a quality assurance function in this fashion within AGS and in particular the ODPP. The HLRG emphasise that this step must be seen as just that, a step along the implementation plan and not a permanent solution. In the absence of supporting technical capacity, the HLRG believes that manual based sampling will not achieve the aims of the HLRG, ODPP or AGS in the long term.

Timeline: medium term, plus 6 months to 1 year

3. Identifying and Extracting relevant data from Garda systems

The HLRG recommend that the next step in the implementation plan is for the SPRSC to undertake an exercise to identify and extract relevant data from Garda systems to enable the design and development of a comprehensive quality assurance process. This identification and extraction exercise we recommend should also capture cases that do not proceed to prosecution. This exercise should capture what data is held, where it is held, by whom it is held and its quality. The data that will be extracted will

be used by ODPP to identify investigation files to be submitted by AGS for review as part of the quality assurance process.

This step recognises the reality that in order to be able to make improvements that benefit and support the public prosecution system (thereby improving the standards and public confidence in same) it is necessary to utilise data to enable monitoring and supervision at the first line by AGS and quality assurance activities at the second line by the ODPP. In particular, data from AGS is necessary to inform the ODPP as to what the potential sampling size is and to identify what sampling should be prioritised.

Timeline: medium term, plus 6 months to 1 year

4. Interim solutions for data identification and transfer

ODPP and AGS discussions have identified structured data on PULSE which can be transferred to ODPP securely. Further detailed consideration is needed to identify the relevance of the available data to the audit activity and also to identify what data is not currently available that will be useful/required. Following comprehensive identification of relevant data held by AGS, the HLRG recommend that the Implementation Group examine in detail opportunities to improve the efficiency and security of extraction and transmission to ODPP in line with the current Strategy Statements of both AGS and ODPP.

The HLRG recommends this step as part of the High Level Implementation plan so that any remaining data silos can be identified and data can be analysed so the Implementation Group can identify what are key pieces of data that can usefully be provided to the ODPP. This interim level of data identification will enable a better understanding of what specific data will be required, and what form and level of access will be required between AGS and ODPP. To this end, ODPP and AGS have agreed to a test-run to see if the information identified will provide ODPP with the data necessary to quality assure prosecution decisions. It has been agreed that this test-run will be run on all offences for Cork City for the first six months of 2019. It is recommended that the Implementation Group examine the results of this pilot, and use same to inform the detailed design required for the achievement of the final step. It is anticipated that this will be an incremental approach where the amount of data provided by AGS will increase over time. It is also acknowledged that ICT processes relating to the transfer of data is simply an enabler and the ODPP will need to develop processes and systems around the conduct of these audits and put in place the necessary staffing with appropriate skills to do this work.

Timeline: medium term, 1 to 3 years

5. Full automation and visibility

The HLRG's ultimate recommendation, and final stage in the High Level Implementation plan is the provision of full automation and visibility between AGS and the ODPP in respect of the data identified as being required to support the goals of the Reform Model. It is recommended that this end stage should at a minimum enable, in a fully automated way, the ODPP to audit/quality assure prosecutions including the ability to interrogate cases/files and to identify and analyse categories of offences for their own internal planning purposes. It is recommended that this should therefore also include the facility to look at files/cases (including where there was a decision not to prosecute) by offending type, using

relevant criteria and the ability for the ODPP to select the ones that they want to look at and generate these automatically. In order for the ambitions of the Reform Model to be achieved in practice the HLRG recommend that the Implementation Group produce a detailed design for an automated, broad functionality IT interconnection between the ODPP and AGS³¹. The HLRG emphasise again that without this requisite functionality a quality assurance process will not be effective or practical in the long term. The Implementation Group is recommended as the appropriate implementation monitoring mechanism to drive forward the implementation of this long term goal.

Timeline: long term, up to 5 years

Note that the foregoing focuses on putting in place adequate ICT capability to support the monitoring and oversight element of the reform model. In tandem with this the HLRG recognises that there are a range of other activities that will need to be undertaken to advance the reforms identified in both the minimal and reform models – including actions relating to standard setting and training.

Further Considerations:

Resources

The HLRG emphasise that each step in the High Level Implementation plan has significant resource implications and underscore that this project can only be meaningfully commenced if there is a commitment to resource it. It is noted that the resources go beyond technical resources, and that there will be consequential human resourcing demands, financial and contractual implications. It is noted that even early steps, involving small scale-low tech sampling represents a ‘new ask’ of the ODPP, and particularly in the absence of enabling technology the resource implications of this ask should not be underestimated. The HLRG underscore that progressing along the recommendations pathway will require forward planning and a sustained commitment to the investment of the requisite resources, whether human or capital. We make the recommendation in the knowledge that, significant as the resources required may be, they are very significantly less than a radical restructuring of the prosecution system would require.

Mapping and Ongoing work in the Criminal Justice Sector (CJS)

The HLRG is conscious of ongoing work in the broader CJS that has as its focus the development of a complete and accurate mapping of the journey of individuals throughout the entirety of the CJS. It is observed that while this activity is certainly beyond the remit and requirements of the specific task of the HLRG, such an exercise will be of benefit to AGS, ODPP and policy makers in future. In particular, the HLRG observe that a broad mapping exercise and the ability to follow an individual’s journey throughout the entirety of the criminal justice system would be particularly beneficial in the identification of trends and supportive of analysis and quality assurance activities in respect of non-prosecution decisions. It was agreed that while such a global, end-to-end tracking of individuals’ journeys through the criminal

³¹ A consultancy firm may be engaged in the future to produce this detailed design

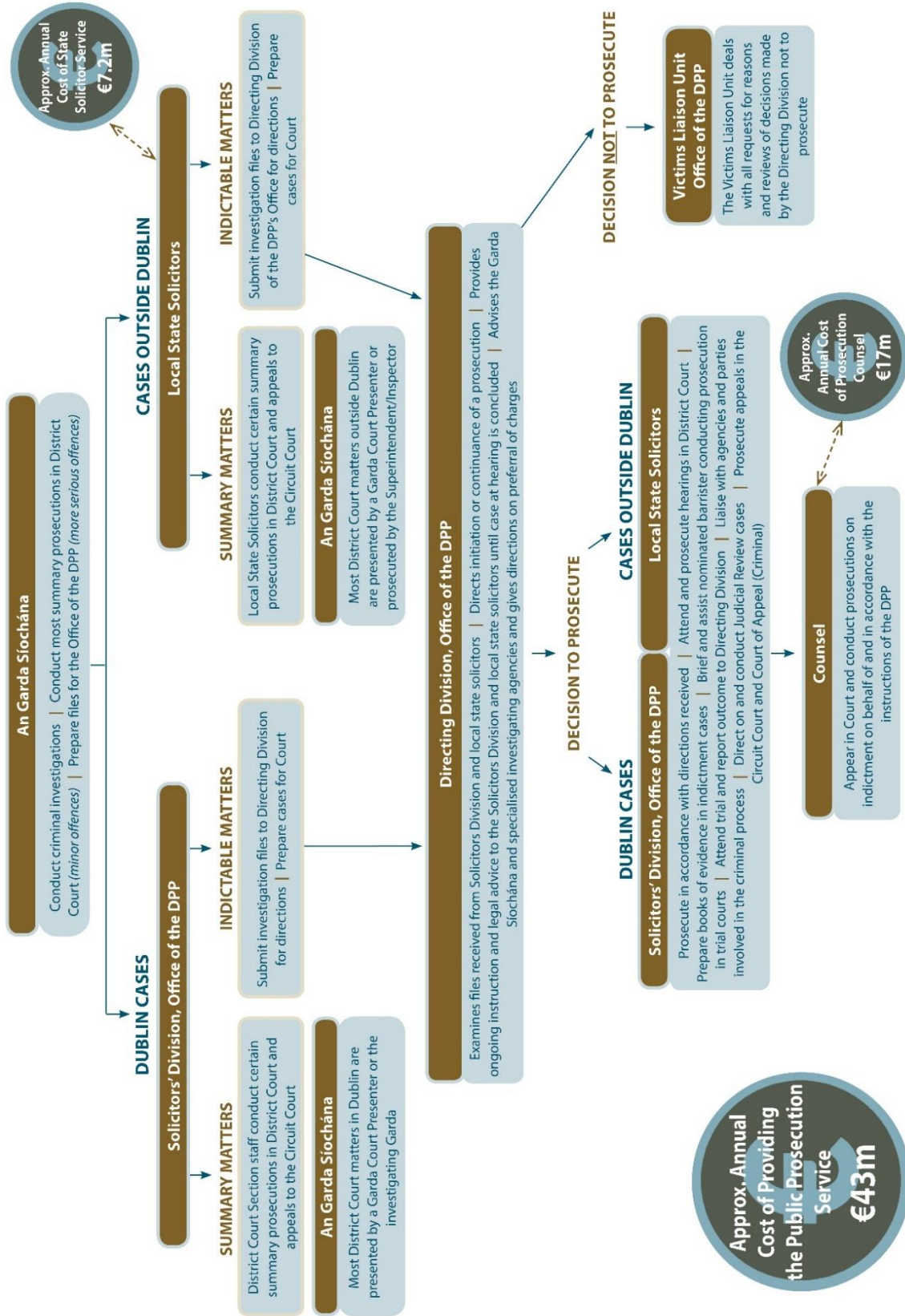
justice system goes beyond the remit and capacity of the HLRG, the HLRG recognises the value of such an exercise and would recommend that relevant projects, such as the ‘Data as a Driver’³² working group, be supported and given appropriate priority.

Policy Options

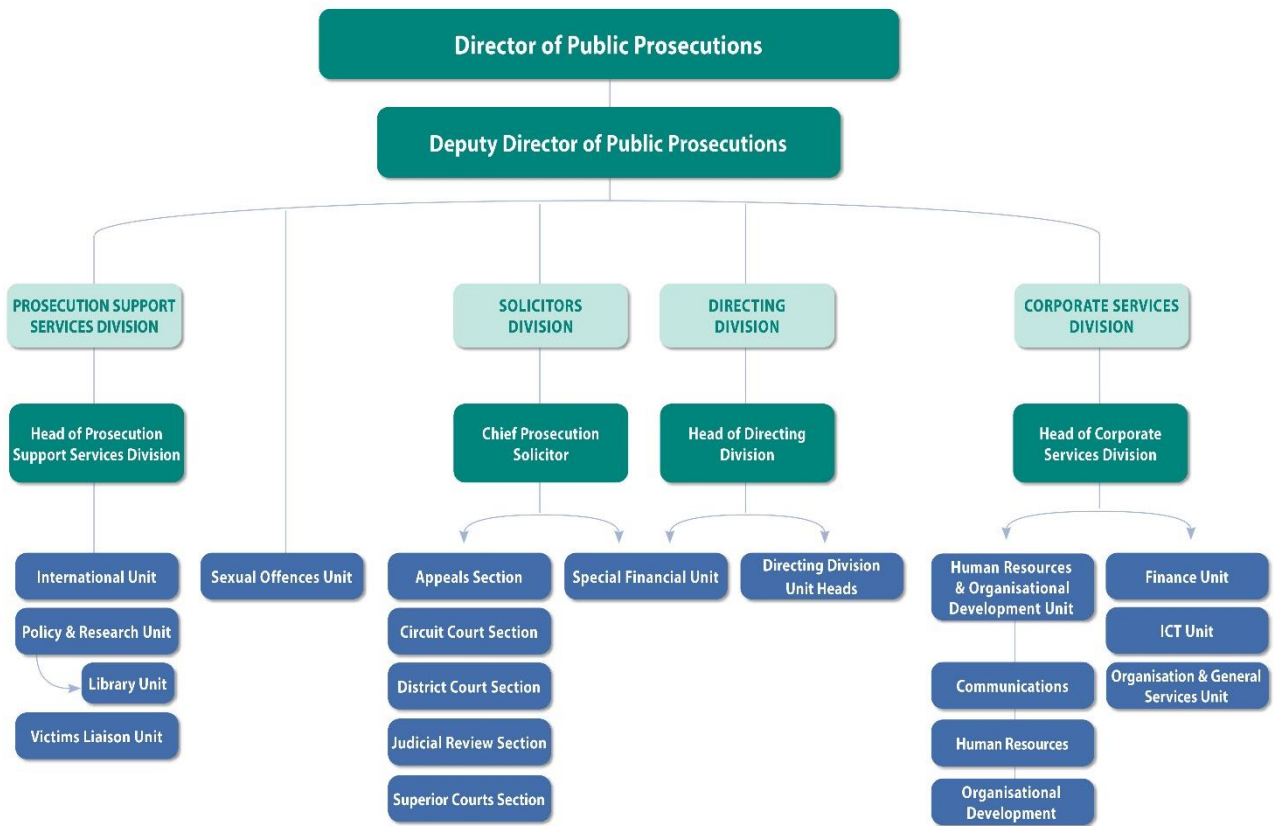
We have framed our recommendations in the context of the current legal and institutional framework governing the prosecution of summary offences. Our review of international trends has highlighted that in other jurisdictions the search for efficient and effective resolution of minor criminal matters has seen increased recourse to (a) diversion schemes, such as cautioning of adults and diversion of juveniles away from the criminal justice system, as well as (b) the adoption of fixed penalty notices which, in many cases, avoid the need for a formal prosecution. Such alternative disposal routes, however, require appropriate levels of oversight and external quality assurance, underpinned by effective information systems. While it is the HLRG view that such developments fall outside our terms of reference, we highlight the potential for progress in this direction. A policy of greater disposal of cases outside the prosecution system would be facilitated by the quality assurance measures which we put forward in the Reform Model.

³² “Data as a Driver” working group has members from all the criminal justice agencies and the CSO as well as people from the Department of Justice.

APPENDIX I: Criminal Prosecution Process in Ireland



APPENDIX II: Office of the DPP Organisation Structure



Appendix III : Adult Cautioning Scheme – Schedule of Offences

Adult Cautioning Scheme – Schedule of Offences

Criminal Justice (Public Order) Act 1994

Section 4: Intoxication in a public place

Section 5: Disorderly Conduct in a public place

Section 6: Threatening, abusive or insulting behaviour in a public place

Section 8: Failure to comply with direction of a member of An Garda Síochána

Section 9: Wilful Obstruction

Section 11: Entering building etc. with intent to commit an offence

Section 13: Trespass in a manner likely to cause fear*

Section 21: Failure to comply with Garda directions controlling access to certain events*

Section 22: Surrender and seizure of intoxicating liquor

Criminal Justice (Theft and Fraud Offences) Act 2001

Section 4: Theft (where the value of the property concerned is less than €1,000)

Section 8: Making off without payment (where the value of the payment is less than €1,000)

Section 17: Handling stolen property (where the value of the property concerned is less than €1,000)

Section 18: Possession of stolen property (where the value of the property concerned is less than €1,000)

Intoxicating Liquor Act 2003

Section 6: Offences by a drunken person

Section 8: Disorderly conduct

Non-Fatal Offences Against the Person Act 1997

Section 2: Assault (Assaults on a member of An Garda Síochána shall be forwarded to the Director of Public Prosecutions)

Criminal Damage Act 1991

Section 2: Damaging Property (where the value of the property damaged is less than €1,000)

Section 3: Threat to damage property

Dublin Police Act 1842

Section 14(12): Nuisances in Public thoroughfares (applies to Dublin Metropolitan (Court) District Only)

Intoxicating Liquor Act 1927

Section 17: Persons on licensed premises during prohibited hours

Licensing Act 1872

Section 12: Public Drunkenness

Summary Jurisdiction (Ireland) Amendment Act 1871

Section 8: Offensive or riotous conduct in a theatre or other place of public amusement (applies to Dublin Metropolitan (Court) District only)

Misuse of Drugs Act 1977

Section 3: Possession of cannabis or cannabis resin a controlled substance. Commonly referred to as 'simple possession' or possession for personal use*

Casual Trading Act 1995

Section 3: Casual trading without a licence or contrary to the terms of the licence*

*Denotes offences introduced on the 14th December 2020.

Appendix IV : International Research Study

AN INTERNATIONAL COMPARISON OF THE PROSECUTION OF CRIME – THE ROLE OF POLICE SERVICES

Acknowledgments

In order to gather information and elicit attitudes towards police prosecutions reforms, the authors reached out to various stakeholders and carried out a series of interviews with experienced prosecutors, members of criminal justice inspectorates and others. These included interviews with the DPP and Deputy DPP of Northern Ireland, the DPP of New South Wales, the DPP and Managing Summary Prosecutor for the Northern Territory, an Assistant DPP at the Commonwealth Office of the DPP in Australia, a Deputy Solicitor General and Head and Deputy Head of the Police Prosecution Service in New Zealand, a senior prosecutor in the Crown Prosecution Service, a State Prosecutor in the National Prosecution Authority in Finland, the Chief Inspector of the Northern Ireland Criminal Justice Inspectorate, the Deputy Chief Inspector and a former Chief Inspector of HMCPSI and a Deputy Crown Agent Crown Office and Procurator Fiscal Service in Scotland. Various DPP Offices, Inspectorates and Police Prosecution Departments also provided us with valuable information. We would like to thank all those who gave up their time to assist in the project. We would particularly like to thank Nick Cowdery QC, Tuuli Eerolainen, Cerys Gibson, Aoife Mageean, Lisa West and Stephen Wooler who went out of their way to hunt down materials for us. Tuuli Eerolainen also kindly commented on a draft of the Finland chapter. We would also like to thank those officials in the Department of Justice who worked with us on this project. Any errors or misapprehensions in the report are entirely our own responsibility.

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Northern Ireland

England and Wales

Australia

New Zealand

Scotland

Finland

Conclusion

INTRODUCTION

In the criminal justice continuum that stretches from investigation of cases through to sentencing and punishment, prosecution has been described as that portion of the continuum which begins after the conclusion of the investigation and proceeds through to cases being brought to court following investigation.³³ Although it has been increasingly recognised that prosecution is a vital function which stands at the heart of the rule of law, there has been no unanimity across jurisdictions as to who should carry this function out. Historically, there has been a significant difference between common law countries where prosecutions have been traditionally initiated either by victims or by the police in an adversarial system and civil law countries where public officials had a virtual monopoly on prosecutions, within an inquisitorial system.

Looking today across many diverse criminal justice systems, however, it is notable how in many systems the prosecution function is shared between the police and public prosecutors with no one body having a monopoly over it. In their study of different prosecutions systems over 20 years ago, Bryett and Osborne took New Zealand and France as two extremes in a spectrum where at one extreme the police exercise considerable autonomy over the prosecution function and at the other extreme the public prosecutor dominates the function. In New Zealand, the police not only conducted the investigation but they decided on what charges, and then prosecuted them in the lower courts totally independent of any input from legal professionals. In France, by contrast, the public procureur in the 'ministère public' controlled the investigation, determined any charge arising from the investigation and prosecuted in the courts. But in most of the other jurisdictions they examined the role played by the police and the public prosecutor in the prosecution process lay somewhere in between these two extremes.

This paper arises out of the recommendation of the report of the Commission on the Future of Policing in Ireland (COFPI) that all prosecution decisions should be taken away from the police and the practice of police prosecuting cases in court should cease. In order to inform deliberations on the implementation of this recommendation, the authors were commissioned to examine six different jurisdictions identified by and agreed with the Department of Justice and provide a detailed examination of the prosecutorial model in each of the jurisdictions. This will include outlining what specific role, if any, the police play in the prosecution system of each jurisdiction. The jurisdictions – Northern Ireland, England and Wales, Australia, New Zealand, Scotland and Finland – were all chosen on the ground that they are relatively proximate to Ireland in terms of being common law jurisdictions or having a commitment to the rule of law, democratic and human rights norms and a respect for victims' rights. Before coming to these jurisdictions, we make some remarks about the international context and the COPFI recommendations.

International standards

Within the last 20-30 years there has been much greater international attention given to the prosecutorial role and this has had an influence in determining what input the police should have in the prosecution function. In the closing decade of the 20th century international bodies addressed for the first time the basis on which prosecutors should carry out their functions. In 1990 the UN produced its Guidelines on the Role of Prosecutors; in 1999 the newly formed International Association of Prosecutor (IAP) published its *Standards of professional responsibility and statement of the essential duties and rights of*

³³ K Bryett and P Osborne, *Criminal Prosecution Procedure and Practice: International Perspectives* (Criminal Justice Review Group, 2000) 77.

prosecutors and in 2000 the Council of Europe produced its Recommendation on the role of public prosecution in the criminal justice system. This may be seen as part of a growing need for all actors who operate in the criminal justice system to comply with minimum human rights standards, maintain the rule of law and engender public confidence. These instruments refer frequently to the need for impartiality, fairness, objectivity and consistency in carrying out the prosecution function and to the fact that these standards can only be safeguarded if prosecutors are enabled to act with independence.³⁴

While these instruments are non-binding on states and are not over-prescriptive as to how standards for prosecutors should be implemented, recognising that there are very different prosecuting traditions within states, the standards emphasise the distinctive role of the public prosecutor in carrying out the prosecution function. Thus the UN Guidelines stated that the guidelines had been formulated principally with public prosecutors in mind although they state that they apply equally, as appropriate, to prosecutors appointed on an ad hoc basis. The IAP standards were formulated specifically by a committee of high-ranking professional prosecutors and the European Recommendation refers in its title to “public prosecution” and is addressed to public prosecutors. More than this, the standards themselves point to qualities such as objectivity and impartiality that may be considered better safeguarded by legally trained professionals rather than by police officers who may not be legally trained. The UN Guidelines, for example, state that it is essential to ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training.³⁵ The need for public prosecutors to be legally trained is also implied in the European Recommendation that public prosecutors should scrutinise the lawfulness of police investigations at the latest when deciding whether a prosecution should commence or continue and monitor the observance of human rights by the police.³⁶ The footnote in the explanatory memorandum to the Recommendation states that the form of words chosen was a compromise designed to reflect the farthest that certain common law systems could agree to and the minimum that other systems could accept.³⁷ But the recommendation hints strongly towards public prosecutors being detached from the police in carrying out this role.

The explanatory memorandum to the European Recommendation points to a trend at least within Europe towards using public prosecutors when it states that all the Council of Europe member states possess a public prosecuting authority, known variously as the “state prosecutor”, the “prosecuting attorney” or the “public prosecutor” although there are differences in the role played according to whether this is a long established or a new institution.³⁸ As an indication of the dynamic shift towards an extended role for public prosecuting authorities it also stated that the status and role of the Public Prosecutor has also evolved considerably, reflecting the scale of the reforms undertaken in many member states over the last ten years. The Recommendation refers to the “core tasks” of the public prosecutor as being to decide whether to initiate or continue prosecutions; to conduct prosecutions before the courts; and to appeal or conduct appeals concerning all or some court decisions.³⁹ The explanatory memorandum lists

³⁴ For further commentary on these standards, see B Hancock and J Jackson, *Standards for Prosecutors: An Analysis of the UK National Prosecuting Agencies* (IAP, 2006) and *Standards for Prosecutors: An Analysis of the National Prosecuting Agencies: Ireland, New South Wales (Australia), The Netherlands and Denmark*.

³⁵ See Preamble to the UN Guidelines.

³⁶ See European Recommendation Rec 21.

³⁷ *Ibid* 28.

³⁸ *Ibid* 13.

³⁹ *Ibid* Rec 2.

a number of other tasks on which there was not a consensus as to whether they should be assigned to public prosecutors. These include implementing national crime policy while adapting it, where appropriate, to regional and local realities; conducting, directing or supervising investigations; seeing that victims are effectively assisted; and deciding on alternatives to prosecution. But we shall see that since the Recommendation was adopted, there has been a further evolution towards assigning some of these tasks to public prosecutors. The adoption of the “Budapest Guidelines” on Ethics and Conduct for Public Prosecutors by the Conference of Prosecutors General on 31 May 2005, affirming the “key role” that public prosecutors play in the criminal justice system and setting out standards of conduct expected of all prosecutors working for or on behalf of a public prosecution service may be seen as an indication of the growing significance that public prosecutors themselves attach to their role.

Although the drift at international level points to a more expansive role for public prosecutors, it should not be thought that this necessarily means there is no longer a role for the police to play in the prosecution function. While there is much emphasis in the international instruments on the need for prosecutors of all types to be independent in discharging their duties and on the crucial role they play in contributing to a fair and equitable criminal justice system, there is also a recognition that prosecutors play a crucial role in ensuring the effective protection of citizens against crime and of the importance of close cooperation between prosecutors and the police.⁴⁰ In some member states such as France the police are placed under the authority of the public prosecutors, but in states where the police is independent of the public prosecutor, the European Recommendation states that effective measures should be taken to guarantee that there is appropriate and functional cooperation between the Public Prosecution and the police.⁴¹

Cooperation is needed if resources are to be used efficiently. The need for close cooperation has arguably intensified in the years since this Recommendation as pressures have mounted for prosecutors to become more accountable for the decisions they take to protect the public and for both police and prosecutors to pay greater attention to the interests of victims.

We shall see that the need for prosecutors to act independently in making prosecution decisions and at the same time to work closely with the police in order to achieve successful prosecutions, can lead to a tension in the prosecutorial role. This is particularly evident in the case of new prosecution services which need to establish their independence but also to work cooperatively with the police in order to be effective. The need for effectiveness and efficiency also raises questions as to how much control the police should be given over decisions not to proceed with cases. The prosecution function arguably extends as much to decisions not to proceed with cases after investigation as to decisions to proceed. But there are questions of resources over how far public prosecutors should be involved in overseeing police decisions to take no further action in cases they have investigated. We address this matter further in a number of the jurisdictional chapters below.

The COFPI Recommendations and the Irish Context

It is unclear the extent to which the trend towards the primacy of independent public prosecutors taking prosecutorial decisions in Europe and further afield influenced the recommendations of the COFPI report. The report did reference the need for “more distance between the police and other elements of

⁴⁰ See UN Guidelines, Preamble.

⁴¹ European Recommendation 23.

the system, namely the courts” when it recommended that “all prosecution decisions should be taken away from the police and given to an expanded state solicitor or national prosecution service.” However, as noted above, the report also recommended that the “practice of police prosecuting cases in court should cease”. This recommendation appears to have been based on information given to the Commission that suggested prosecuting Gardaí “may not be trained to the level of the opposing defence lawyer. Some Gardaí have undoubtedly become skilful prosecutors through experience, but this should not be their job and it does not justify taking them away from front line duties. Moreover, as most comparable jurisdictions recognise, investigation and prosecution processes should be separate”.

The report writers then identify what they refer to as a secondary reason for this recommendation which is that it is “enormously wasteful” of police resources that should be deployed on core police duties.

The context of the COFPI recommendations was a system in the Republic of Ireland with mixed responsibilities for prosecution decision-making and the presentation of cases in court as between the Gardaí, the State Solicitors and the office of the DPP. The primacy of the Gardaí in the investigation of reported crime is clear as is their responsibility to determine whether a suspect will be arrested. The DPP itself has no investigative function and the investigation of crime is carried out exclusively by the Gardaí or other specialised authorities, depending on the crime.

However, in terms of decisions on prosecution, while the Gardaí may institute prosecutions in summary cases they do so under a delegated power from the DPP and in the name of the DPP.⁴² The Director, whose office was established by statute in 1974, therefore retains primary responsibility for all prosecutorial decisions. The 1974 Act conferred on the Director responsibility for prosecuting both on indictment and summarily. In reality, however, in the significant majority of the summary cases which the Gardaí will prosecute, a senior officer will review the file and decide what charges will be brought without reference to or direction from the DPP (though see below).

In indictable cases, the Gardaí will prepare a file for submission to the DPP and it is the Director who will decide whether to prosecute and for what charges. In these cases, a file will be sent to the DPP from the investigating Garda and a prosecutor in the Directing Division of the DPP will examine the file and decide whether there is enough evidence to bring the case before the court or whether any prosecution started by the Gardaí should carry on or be discontinued or whether the charge should be amended. In cases where the Gardaí Síochána identify a suspect and there is evidence to support a prosecution, they should send a file to the DPP even where they are not recommending a prosecution.

It is unclear to what extent COFPI examined the practices described above or how they may have impacted upon their thinking. They do not reference the significant geographical differences in approach between Dublin and the rest of the State. In Dublin, DPP prosecutors will appear in all criminal court proceedings, including in appropriate cases in the District Court, to represent the Director in which the Gardaí are not prosecuting. They will discharge all of the prosecutorial duties associated with bringing a case including attending trials and liaising with victims and their families. In the rest of the Republic however, the Director will be represented by 32 local State Solicitors. There is a State Solicitor for each county with some of the larger counties having a number of such appointees. The State Solicitors are lawyers in private practice who undertake this work on a contractual basis and who represent the

⁴² Section 8 Garda Síochána Act 2005.

Director in accordance with their instructions. They will carry out a solicitor's function for the DPP in indictable cases in their area but will also occasionally prosecute cases in the District Court which involve a novel or complex area of law or where the defendant is a member of An Garda Síochána. The Gardaí will appear in court in the vast majority of summary offences.

General directions from the DPP

As discussed above, even where the Gardaí appear in court to present a prosecution case, they do so under the delegated authority of the DPP. This authority is exercised in part through the use of General Directions. General Direction Number 3, dated November 2011, contains a range of detailed guidance for members of An Garda Síochána about their prosecutorial role and responsibility.

For instance, the Direction outlines:

that subject to Direction of the DPP the Gardaí may institute and present any criminal case in the District Court, whether summary or indictable in the name of the DPP;

the classes of cases in which the DPP reserves to itself the decision whether to prosecute or not including all offences of a sexual nature and cases involving serious allegations against members of An Garda Síochána;

the (relatively wide) circumstances in which Gardaí can prosecute a summary case without the submission of a file to the DPP but with the caveat that file submission should be considered if the record of the individual, the number of charges or other aggravating factors suggest summary disposal may be inappropriate;

Police are also reminded to seek the advice of the office of the DPP in cases which they consider to be complex or unusual. The Direction also emphasises the primacy of DPP Directions over any internal police guidance.

In addition the Guidelines for Prosecutors issued by the office of the DPP apply not just to DPP lawyers, state solicitors and counsel instructed by the DPP but also to prosecuting Gardaí.⁴³

It is clear therefore that the current system emphasises the legal responsibility of the independent office of public prosecutions for prosecutorial decision-making even when delegating that responsibility to the police in a significant number of cases. This type of approach was not unusual in the six jurisdictions we examined with the focus of most countries being on how to strike the correct balance between police and prosecutors.

It is time now to turn to the six particular jurisdictions to determine what role, if any, the police play in the prosecution function and what models appear to emerge from the jurisdictions in terms of police prosecution. In each jurisdictional model we have included a short background section, a description of the present prosecution arrangements, and a short reflective note on ongoing or potential reform of the current arrangements.

⁴³ <https://www.dppireland.ie/app/uploads/2021/01/Guidelines-for-Prosecutors-5th-Edition-eng.pdf>

NORTHERN IRELAND

Background

There have been a number of different prosecution models in operation in Northern Ireland since partition but the office of the Director of Public Prosecutions (DPP) was established in 1972. This followed the Hunt Commission into Policing, established following the outbreak of the conflict in Northern Ireland, which recommended that responsibility for prosecutions be taken from the then Royal Ulster Constabulary (RUC) and given to a newly established independent prosecution office akin to the Scottish system. While the Scottish aspect of this recommendation was subsequently dropped, the Northern Ireland government and the British government (following the proroguing of Stormont in 1972) accepted that an independent office of public prosecution should be established which would assume responsibility for the prosecution of more serious cases.

The Prosecution of Offences (Northern Ireland) Order 1972 established the office of the Director of Public Prosecutions. The Order gave the DPP a wide discretion in terms of what categories of cases he decided to prosecute. The statutory presumption was that the DPP should prosecute indictable matters but also “such summary offences or classes of summary offences as he considers should be dealt with by him.”⁴⁴ In succeeding years this meant that the DPP prosecuted only about 20% of cases and the remaining cases, which were prosecuted in the Magistrates Court and consisted of relatively minor matters, were left in the hands of the police. The 20% of cases prosecuted by the DPP included all Crown Court matters and a smaller number of summary offences which tended to be those that might give rise to some public controversy.

This system continued largely unchanged until the report of the Criminal Justice Review in 2000. The Review, which was established under the terms of the Good Friday Agreement, had terms of reference requiring it to undertake a wide-ranging review of the criminal justice system in Northern Ireland. One particular aspect, however, was to consider the “arrangements for the organisation and supervision of the prosecution process and for safeguarding its independence.”

The Review, after receiving extensive evidence by way of written submissions and meetings, made a large number of recommendations for change to the existing prosecution arrangements. The central recommendation was for a new public prosecution office to be established which would have responsibility for deciding if a prosecution should commence and also to undertake all prosecutions. The role of the police in prosecuting cases in the Magistrates Court was to cease. In the future the role of the police would be to investigate and report to the independent prosecution office.

Therefore, some 30 years after the 1972 Order which established the office of the DPP, the new Public Prosecution Service (PPS) was established by way of the Justice (NI) Act 2002. The PPS was to be headed by a Director and Deputy Director of Public Prosecutions. The PPS began its operations in 2005. The statutory structure established by the 2002 Act remains largely intact.

Present Prosecution Arrangements

The relevant sections of the 2002 Act (sections 29-39) set out the core functions of the Public Prosecution Service. According to the Explanatory Notes accompanying the statute, it “will be the

⁴⁴ Article 5(3) of the Prosecution of Offences (Northern Ireland) Order 1972.

responsibility of the Prosecution Service to undertake all prosecutions for both indictable and summary offences committed in Northern Ireland that were previously the responsibility of the Director of Public Prosecutions for Northern Ireland or the police.” The DPP is under a duty to take over all prosecutions instituted by the police. The DPP is also to institute criminal proceedings himself where he considers it appropriate. The right to institute private prosecutions remains, although it is open to the Director to take over any privately instituted prosecution. In addition the DPP is required to give advice to the police in Northern Ireland on prosecutorial matters.

In law and in practice therefore the police play no role in the prosecution of offences in Northern Ireland. However, that does not mean that they play no role in the charging of an accused.

There are primarily two mechanisms by which a suspect can be brought before the courts in Northern Ireland, by charge or by summons. If a charge is brought against an accused, the police will decide on the charge to be brought generally without recourse to the PPS. Charging, as opposed to issuing a summons, is generally undertaken because the police may wish the person to be remanded in custody by the court or the police wish bail conditions to be imposed by the court, and so an individual may be charged, kept in police custody and produced at court the following morning. However, it is important to note that even in such cases where the police take the decision about what the initial charge should be, before the accused is produced in court the charge must be considered by the PPS and the first appearance in court and all subsequent appearances are undertaken by the PPS. The charge may be confirmed, amended or indeed withdrawn following this early consideration by the PPS.

In cases where the accused is brought to court by way of summons, the charge included in the summons is determined by the PPS following the submission of a police file.

In all cases the police retain investigative responsibility. It is their responsibility to then submit an investigation file to the PPS. In that file the police will make a recommendation as to the charge they consider appropriate but it is for the PPS to decide what charge is actually brought and they are in no way bound by the police recommendation although they will take it into consideration. The DPP does have the power under sections 35(4) and (5) of the Justice (NI) Act 2002 to require the provision of information from the police in relation to any ongoing investigation or criminal act. The explanatory notes to the Act make clear this does not constitute a power on the part of the Director to supervise the conduct of the police investigation.

Similarly if a charge is to be amended or withdrawn later in the process that is a matter solely for the PPS. As a matter of practice they will seek to consult with the investigating officer if that is practicable.

The police retain investigative independence. However, in more serious cases the police will often seek pre-charge advice from the PPS before charge and indeed sometimes before arrest. However, the PPS does not in any sense direct the investigation.

There are no differences in approach in terms of prosecution based on geographic regions in Northern Ireland. There are a small number of local PPS offices but the practice and policy of the PPS is consistent across the jurisdiction.

Diversion and No Prosecution Recommendations

In terms of diversion from the criminal justice system, the police have a number of alternative disposals at their discretion including Community Resolution Notices (CRNs). These files are not sent to the PPS but following a recommendation from Criminal Justice Inspection Northern Ireland (CJINI)⁴⁵, a statutory inspectorate with responsibility for inspecting all criminal justice agencies in Northern Ireland including the PPS and the PSNI, the PPS provides a quality assurance role by sampling a number of these cases on a regular basis.

The police can also deal with cases by way of immediate caution with the permission of the PPS. This can be done by telephoning a PPS prosecutor. If authority is given a skeleton file is subsequently submitted.

The PPS can also divert cases even when files have been received and the evidential test for prosecution has been met. This takes place mainly in youth cases where youth conferencing is an alternative option to prosecution. In these cases the PPS must get the views of the police to determine if such a diversion is appropriate. In addition in some cases the PPS can decide to deal with a case by way of caution.

It is important to note that the police must submit a file to the PPS even where they are recommending no prosecution. According to figures from the PPS such files account for 30% of files submitted. The threshold for submission of a police file is very low, in essence where any evidence exists to link the suspect to the offence. When the PPS review no prosecution files, they agree with the police assessment in 95% of cases but in 5% they disagree and direct prosecution. This amounts to hundreds of cases on an annual basis and can include some serious cases.⁴⁶

Bail

The PPS appears in all bail applications and it decides on the appropriate response to such applications. It will very often base this attitude on the view of the investigating officer, especially in the early stages of the case. However, it was emphasised to us⁴⁷ that it will exercise independent judgement on the issue of bail and, if it appears to the prosecutor that the concerns of the police around issues such as accommodation etc have been addressed, s/he will often agree to bail even where the police disagree.

Victims

The PPS has a Victim and Witness Care Unit (VWCU) which seeks to provide information and assistance to victims and witnesses throughout the trial process. This unit is staffed jointly by PPS and PSNI staff. It provides information at certain identified points of the criminal process and will also provide support by way of identifying if special measures are required for witness protection. A representative of Victim Support is embedded within the Unit.

⁴⁵ <https://www.cjini.org/TheInspections/Inspection-Reports/2015/January---March/Police-Use-of-Discretion-Incorporating-Penalty-Not>

⁴⁶ Interview with NI DPP and Deputy DPP.

⁴⁷ Ibid.

The operation of the VWCU is guided by an extensive Victims and Witnesses Policy document and underpinned by the Northern Ireland Victims Charter which was given statutory effect in 2015⁴⁸. This provides victims with the right to be informed of developments at various stages including details of any bail application, decision to prosecute or not and any decision to change or reduce charges.

Reviews of any decision not to prosecute are available as of right for any victim and reasons are given in more serious cases for decisions not to prosecute.

In terms of assistance at court, Victim Support has a presence in court venues to assist victims and the NSPCC is present to assist child victims.

A recent inspection by CJINI,⁴⁹ while supporting the retention of the VWCU and recognising the importance of the work it undertakes, recommended a sharper focus on care provision services for victims, noting an overly administrative focus currently. It also recommended a more central role for Victim Support within the VWCU. Perhaps surprisingly, given the fact that the Victims Charter has been on a statutory footing since 2015, it also noted a lack of knowledge among victims of the help they were entitled to receive from the various elements of the criminal justice system including the PPS.

Impact and Equality

In terms of the protection of human rights, we did not find any evidence (and Northern Ireland interviewees were not able to identify any) that the existence of an independent prosecution office had impacted positively on the protection of human rights of those coming into contact with the criminal justice system. The interviewees did express the view that this was likely to be the case but, in common with the other jurisdictions we examined, this was a difficult matter to evidence.

The Attorney General in Northern Ireland does occasionally issue human rights guidance to the various agencies within the criminal justice system, including the PPS, under section 8 of the Justice (Northern Ireland) Act 2004 which states that the Attorney General shall “*issue, and as he thinks appropriate from time to time revise, guidance to organisations to which this section applies on the exercise of their functions in a manner consistent with international human rights standards relevant to the criminal justice system.*” This was viewed as an important mechanism to reinforce human rights protections across the criminal justice system.

In terms of any evidence of differential impact on individuals from different ethnicities/community backgrounds, there was again little evidence available. Despite the fact that all public bodies in Northern Ireland have been under a duty to promote equality of opportunity in the carrying out of their functions since the Section 75 equality duty was introduced by way of the Northern Ireland Act 1998, large parts of the criminal justice system have been slow to develop appropriate mechanisms to gather much less analyse such information. The PPS only has access to age and gender data. The police have begun to gather some data but it is not provided to the PPS in any meaningful way. A report from CJINI in 2018⁵⁰ made a series of recommendations to address system wide gaps in equality data but little progress appears to have been made to date.

⁴⁸ Justice (NI) Act 2015.

⁴⁹ <https://www.cjini.org/TheInspections/Inspection-Reports/2020/July-September/Victims-Witness>

⁵⁰ <https://www.cjini.org/getattachment/f2f58a1f-a9f3-449f-a684-567b6db4c667/report.aspx>

Reform and Reflection

The establishment of the PPS and its assumption of prosecutorial decision-making in all criminal cases was a radical transformation in the way the criminal justice system worked in Northern Ireland. It was a direct result of the recommendations of the Criminal Justice Review and the Good Friday Agreement. There was a clear political imperative to mark a departure with the past and the resourcing of the new office was, at least in the days of its establishment, not a significant concern.

Indeed the new PPS saw a significant enhancement of the staffing levels of the office in comparison to its predecessor the office of the DPP. The office of the DPP had at its end of existence 41 lawyers and a total staff of 120. The PPS now has 120 lawyers and a staff of over 400, a tripling in size. In addition to the additional caseload given to the PPS, we were also told about the inevitable administrative, managerial and policy development duties that form part of the creation of a new or significantly enlarged prosecution service and which draw senior prosecutors away from the central tasks of decision-making and prosecution.

It was expected, based on pre-PPS numbers and projections that the new office would be dealing with perhaps as many as 80,000 cases per annum. In fact this number was never reached with the peak being just over 60,000. Nevertheless despite this and the phased and piloted introduction of the PPS, a number of interviewees in Northern Ireland referenced how difficult the early years of the new system were. One former PSNI interviewee closely involved in prosecutorial work at the time, described how the system was close to collapse following the transition. It was widely accepted that the changes contributed to additional delays in the processing of cases, particularly those in the Crown Court and that those delays persist to some extent. This was in spite of the very significant resourcing of the transition and a widespread political recognition of the need for change referred to above.

It appears that one of the main reasons for the projected increase in PPS cases not being reached has been the increased use of diversion primarily by the police. This is also a trend seen in other jurisdictions and, in addition to its inherent benefits, is a way to reduce case numbers and therefore costs for the PPS and indeed the criminal justice system as a whole. As referenced above, the PPS continues to exercise a quality control supervision over these decisions by dip sampling them on a regular basis, a safeguard against any potential police misbehaviour.

In interviews with the Director and Deputy Director of Public Prosecutions in Northern Ireland, there was a recognition that it may be difficult to sustain resourcing of the office at the current level indefinitely. When asked to reflect on ways in which things could have been done differently or might be in the future, a number of Northern Ireland interviewees discussed the possibility of the police taking back control of prosecutions in lower level cases. There was a particular focus on volume crime specifically road traffic offences. It is estimated that of the 30,000 or so summary cases that the PPS deals with every year, about 30-40% are road traffic matters. In a 2016 report by Criminal Justice Inspection Northern Ireland⁵¹, the then Chief Inspector of Criminal Justice suggested that his report highlighted opportunities to streamline how the prosecution of lower level road traffic offences was carried out in Northern Ireland. He referred to the adoption in England and Wales of a centralised Traffic Court system which allowed for uncontested or guilty plea cases to be prosecuted for certain offences, without the need for

⁵¹ <https://www.cjini.org/TheInspections/Inspection-Reports/2016/July---September/DRIVING-CHANGE>

prosecutors or defendants to be present. The Chief Inspector said that "*Decisions and evidence presented in this way as 'police-led prosecutions' were found to reduce delays, reduce the number of road traffic cases going before a Magistrate's Court, increase the number of convictions and deliver financial savings.*" Although this recommendation has not yet been implemented, it appeared to us that it enjoys widespread support among those we interviewed in Northern Ireland as a way in which pressure on the Public Prosecution Service (PPS) and court lists could be reduced, enabling Magistrates' Courts to focus attention on cases where motoring offences were contested along with other more serious motoring and criminal matters.

It was felt that requiring PPS lawyers to handle such straightforward cases referred to above added little value. It was rarely the case that such cases involved victims or a level of complexity that required handling by qualified prosecutors. It was suggested to us that if there were concerns about police having the sole decision-making role in these cases, an oversight or quality control mechanism could be established similar to that which obtains in relation to diversion which could provide sufficient reassurance.

Those who are leading the PPS were also acutely aware of and sensitive to the increasing complexity of criminal prosecution of offences at the higher end of the criminal calendar. Experienced prosecution lawyers are a valuable and expensive resource and a number of interviewees referred to the fact that they should be deployed where they can have most significant impact. Requiring them to deal with volume low level crime with a high incidence of guilty pleas was generally not regarded as optimum deployment of this vital resource.

In this context a number of interviewees remarked upon the importance of prosecutors and police working closely together both pre and post charge in more serious investigations. While it was recognised that independence of the PPS should not be compromised, it was not felt that working closely together threatened such independence even in the sensitive context of Northern Ireland. The Serious Crime Unit (SCU) where police and prosecutors do work together was highlighted as an example of this. The SCU works mostly on the particularly complex casework associated with murder and serious sexual crimes, enabling the sharing of best practice and consistency of approach. The SCU assesses the quality of the files received from PSNI and provides guidance and support to PSNI investigating officers.

A concern echoed by a number of interviewees in Northern Ireland about the transition to the PPS and away from police prosecution was a loss of local expertise and knowledge, a concern that may be heightened in a larger jurisdiction such as the Republic. While acknowledging that there were risks in relationships becoming too close between local police, lawyers and judiciary, it was felt that the centralisation of both personnel and decision-making had perhaps gone too far.

As referred to above, Northern Ireland has a unified system of criminal justice inspection. The PPS and the PSNI are among the agencies subject to inspection by CJINI. There has however only been one single agency inspection of the PPS since it was established and that was in 2008. However, both organisations and the relationship between them have been subject to thematic inspections over the succeeding years. A number of recurring themes have emerged as issues in addition to the report on the handling of volume traffic cases referred to above. These include in particular the provision of timely case files by the police that are of sufficient quality to be considered for prosecution. A 2015 inspection

by CJINI on File Quality and Disclosure⁵² found that “*poor quality files lead to increased costs, court adjournments, avoidable delay and in the worst cases, prosecutions being discontinued, all of which weakens public confidence in the justice system.*” The inspection found that one third of case files were either of an unsatisfactory or poor standard. It recommended the establishment of a team with representatives of both organisations to deal with issues such as investigative standards, bail management and forensic strategy, case management and disclosure

The same inspection also identified serious concerns around disclosure processes where information is shared with defence legal teams. A file review carried out as part of this inspection revealed that disclosure was dealt with satisfactorily by police in only 23% of Crown Court cases.

A number of Northern Ireland interviewees attributed the reduction in police file quality at least in part to the removal of the prosecutorial responsibility from the PSNI. It was explained that the level of supervision of the preparation of files reduced when the files were being submitted to the PPS rather than to a prosecution inspector. This had an impact in and of itself but also, given the hierarchical nature of the police, it was suggested that investigating officers were less likely to strive to get things right first time in the submission of a file, not to a more senior officer, but to an independent prosecutor. A culture appeared to develop, at least in the first years of the transition, whereby files would be prepared and then submitted to the PPS not in the expectation that they were correct, but rather to discover what steps still had to be taken to perfect the file. This culture and the process it led to of regular requests for further information (RFIs) inevitably contributed to increased delay in the system.

Avoidable delay has been one of the main concerns in relation to the performance of the criminal justice system in Northern Ireland. As an attempt to address this, closer working arrangements between the police, the PPS and defence representatives were piloted in what was known as the Indictable Cases Pilot (ICP) from 2015. Significant results were achieved although it was not felt the resources necessary to roll this out across NI on a permanent basis were in place.

We discussed above the significant number of no prosecution files submitted to the PPS by the police every year, accounting for around 30% of files submitted. There has been some discussion between the police and the PPS about the possibility of the requirement for the police to submit no prosecution files to be relaxed although to date the PPS has resisted this suggestion. As an alternative “no prosecution clinics” have been established to assist police in streamlining the amount of work that has to go into the submission of a no prosecution file. These clinics are staffed jointly by the PPS and the police.

⁵² <https://www.cjini.org/TheInspections/Inspection-Reports/2015/October---December/File-Quality-and-Disclosure>

ENGLAND AND WALES

Background

Until the 19th century the prosecution of criminal offences in England and Wales was mainly the responsibility of the private citizen, although legal historians have shown that justices of the peace played an important role in helping citizens prepare the prosecution.⁵³ In the 19th century the introduction of police forces led to the police taking on the role of prosecution. Pressure mounted throughout the 19th century for the appointment of public prosecutors but the most that was achieved was the appointment of a Director of Public Prosecutions in 1879 to “initiate, undertake and carry on” a small number of cases of particular difficulty where the public interest was held to be affected.⁵⁴ Other than these cases which included murder cases, cases referred by government departments and cases involving charges against the police, all prosecutions that were investigated by the police came to be known as ‘police prosecutions’ and police officers were employed to conduct such prosecutions in the magistrates’ courts which came to be known as ‘police courts’.⁵⁵

Throughout the 20th century, pressure continued to mount for a system of public prosecution that would take prosecution out of the hands of the police. Not all prosecutions were brought by the police. The principle of private prosecution enabled citizens still to prosecute cases themselves and various private and public bodies came to prosecute so-called ‘regulatory offences’. But the bulk of prosecutions remained the responsibility of the police. By 1984 31 of the 43 police forces in England and Wales were assisted by prosecuting solicitors’ departments to supply legal advice, appear in the magistrates’ courts and brief counsel in the Crown Court. But these departments developed in a haphazard fashion without any statutory basis and although their role and relations varied and depended on local circumstances, the police considered that they had the final say as to whether there was to be a prosecution.⁵⁶

It is commonly considered that the main catalyst for change was an inquiry by Sir Henry Fisher, a former High Court judge, into the Confait case in which three boys had had their convictions for murder and arson quashed by the Court of Appeal on the ground that they had made unreliable confessions.⁵⁷ The Fisher report criticised a number of failings in the police investigation and the prosecution arrangements, concluding that once a person has been charged, there was no one outside the police who regarded it as his duty to “spur the police on” to follow lines of enquiry which might be inconsistent with the original charging decision.⁵⁸ In 1981 the Royal Commission on Criminal Procedure (RCCP), under the chairmanship of Sir Cyril Philips, recommended that there should be a new prosecution service and in 1985 the Prosecution of Offences Act (POA) established the Crown Prosecution Service (CPS) headed by the Director of Public Prosecutions.⁵⁹ As a result England and Wales moved from a situation where

⁵³ J Langbein, “The Origins of Public Prosecution” (1993) 17 Am J Legal History 313.

⁵⁴ Prosecution of Offences Act 1879.

⁵⁵ See P Rock, *The Official History of Criminal Justice in England and Wales, vol II* (2019) 209 (hereafter Rock, *Official History*).

⁵⁶ *Ibid* 204-211.

⁵⁷ *R v. Lattimore, Salih and Leighton*, Court of Appeal unreported, 17 October 1975.

⁵⁸ *Report of an inquiry by the Hon Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6.* (1977) HC 90. (Fisher report), para 2.30.

⁵⁹ Royal Commission on Criminal Procedure (RCCP), *Report* (1981) Cmnd 8092.

almost all prosecutions were carried out by or at the behest of the police to one where the responsibility for prosecuting cases investigated by the police was vested in a new national prosecution service.

Present prosecution arrangements

Although the administrative arrangements governing the new Service have changed in the years since the CPS was created, the legislative framework has remained much the same. Under section 3(2) of the POA, it shall be the duty of the DPP to “take over the conduct of all proceedings” which have been instituted by the police. An exception is made in the case of “specified proceedings” which fall within any category specified by order by the Attorney-General. The cases which are exempt from compulsory taking over by the DPP were originally confined to various minor road traffic offences but have since been expanded to include other offences such as criminal damage, disorderly behaviour, failure to give a sample for testing Class A drugs, harassment, shoplifting where the value of goods is less than £200 and, most recently, offences under the coronavirus restrictions.⁶⁰ These exemptions do not apply in cases where defendants contest guilt and evidence is heard by a court.⁶¹

The requirement under section 3(2) of the POA means that the police send files to the CPS in every case where they consider that the evidential test for prosecution has been met. But the CPS has no power to direct the police to investigate any matter, nor does the DPP have a power equivalent to that of the DPP in Northern Ireland to require the provision of information from the police in relation to any ongoing investigation or criminal act. The POA does give the DPP the power to give, to such extent as he considers appropriate, advice to police forces on all matters relating to criminal offences but there is no duty on the police under the Act to refer cases to the CPS for advice (POA s 3(2)(e)). The CPS told us in interview that early advice is taken up in serious or sensitive cases. It has been routine in cases such as counter-terrorism or gross negligence manslaughter but it is not routine in every case.⁶² The CPS is now encouraging early advice in rape cases and in particularly sensitive cases. The discretion is with the police to come when they want advice and the CPS is now seeing a significant uptake in the use of early advice. Although the DPP’s Charging Advice makes it clear that the police should only refer cases to the CPS which meet the evidential test for prosecution,⁶³ we were told that in reality the CPS does get sent cases that do not meet this test and the police can come and seek advice in cases on which they then decide to take NFA. But the CPS do not regard it as their role to review cases in which the police consider there should be no further action.

It is important to note that the police retain the power to lay an ‘information’ (summons) or to charge in certain cases. ‘Laying’ an information involves a police officer stating that the defendant has allegedly committed an offence before a magistrates’ or justices’ clerk as a result of which a summons will be issued and served on the defendant. The police also originally retained the power to charge all cases but in 2003 the CPS was given greater power to determine charges under a scheme known as ‘statutory charging’. The Criminal Justice Act 2003 amended the Police and Criminal Evidence Act 1984 (the principal Act - known as PACE - to emerge from the RCCP’s recommendations along with the POA) to

⁶⁰ See Prosecution of Offences Act 1985 (Specified Proceedings) Order 1999, Prosecution of Offences Act 1985 (Specified Proceedings) (Amendment) Orders 2012, 2014 and 2020 and Prosecution of Offences Act 1985 (Specified Proceedings) (Coronavirus) (Amendment) Order 2021.

⁶¹ Prosecution of Offences Act 1985 (Specified Proceedings) (Amendment) Order 2018.

⁶² Interview with CPS.

⁶³ See *Charging (The Director’s Guidance) - sixth edition December 2020*.

enable the DPP to issue guidance on certain categories of case which should be referred to the CPS before charge and what information would be required in relation to any such cases (sections 28-30 and Schedule 2). Once a case is referred, the decision whether to charge is made by the CPS. Such decisions have to be made on the basis of a review of the evidence and not on an oral report and are communicated to the police in writing. These statutory charging arrangements led to the presence of a duty prosecutor in larger police stations and a scheme called 'CPS Direct' to provide out-of-hours access to CPS charging advice.

Today, however, very few prosecutors work in police stations and face-to-face meetings between police and prosecutors have largely been replaced by a process-driven case management system in which different CPS lawyers become involved at different stages of the process. The categories of cases requiring statutory charging have also changed over the years. Originally, the DPP's Guidance required that the CPS take all charging decisions at the outset in respect of indictable only and triable either way offences, whereas many lesser summary offences could continue to be charged by the police with a continuing power to seek guidance from the CPS. Revisions of the Guidance have subsequently extended the range of cases in which the police can continue to charge suspects without referring the file to the CPS. The latest Guidance states that the police may charge:⁶⁴

Any summary only offence, irrespective of plea;

Any offence of retail theft (shoplifting) or attempted retail theft, irrespective of plea, provided it is suitable for sentence in the magistrates' court; and

Any either way offence anticipated as a guilty plea and suitable for sentence in magistrates' court;

Provided that this is not:

a case requiring the consent to prosecute of the DPP or Law Officer;

a case involving a death;

connected with terrorist activity or official secrets;

classified as Hate Crime or Domestic Abuse under CPS Policies;

a case of harassment or stalking;

an offence of Violent Disorder or Affray;

causing Grievous Bodily Harm or Wounding, or Actual Bodily Harm;

a Sexual Offences Act offence committed by or upon a person under 18;

an offence under the Licensing Act 2003.

Although the number of cases charged by the police has expanded, the latest DPP guidance to the police lays down the criteria to be met before charges can be brought.

⁶⁴ <https://www.cprts.recindibg.ccvhe.ps.gov.uk/legal-guidance/charging-directors-guidance-sixth-edition-december-2020>, Annex 1.

Suspects who are charged are either bailed or detained to appear before the next available court hearing. CPS prosecutors now always appear in court to present cases, however we were told that in practice non-legally trained associate prosecutors employed by the CPS or paid agents appear in minor cases where there is going to be a guilty plea.⁶⁵ Under an initiative known as Transforming Summary Justice which was introduced in 2015 to reduce delays in the magistrates' courts, the CPS are required to review all cases prior to the first court hearing, whether they were charged by the police or the CPS and regardless of what the plea is going to be.

Bail

The police make all decisions relating to bail up until the defendant's appearance in court. However, we were told that the CPS become involved when there has been a charge and it will make recommendations to the police before the defendant appears in court.⁶⁶ The police give the CPS the information on which to base a recommendation and there will sometimes be discussions with the police. Once the case reaches court, the CPS will make the decision whether to oppose bail after discussion with the police.

Victim support

The police/CPS Witness Care Units which are predominantly police staffed units provide information and support to victims and witnesses in cases progressing through the criminal justice system. The Units liaise with CPS prosecutors to make sure victims and witnesses have the support they need to help them to give their best evidence and they inform the CPS on whether to apply for special measures for witnesses. A recent inspection found that the CPS Areas usually handle witness care correspondence efficiently and effectively.⁶⁷

Under the Victims Communication and Liaison (VCL) scheme, which replaces the former Direct Communication with Victims Scheme and encourages greater interaction with victims, the CPS communicates with victims when making a decision not to charge, to discontinue a charge or to substantially alter a charge, explaining the reasons for doing so.⁶⁸ Victims must also be informed about the Victims' Right to Review scheme. In cases where the decision not to prosecute is made during a charging consultation with the police, the police are responsible for informing the victim of the decision but otherwise the communication must come from the CPS via Victim Liaison Units which have been established for managing the scheme and act as a 'one-stop shop' for communications after a case has been finalised. The CPS also offer meetings in cases involving a death, serious sex offences and hate crime cases.

Diversion

Generally, police officers may issue simple cautions or youth cautions without consulting the CPS. However, section 17(2) of the Criminal Justice and Courts Act 2015 prohibits the police from giving a

⁶⁵ Interview with HMCPSI..

⁶⁶ Interview with CPS.

⁶⁷ HMCPSI, *The CPS's handling of police witness care correspondence* (2021).

⁶⁸ See <https://www.cps.gov.uk/legal-guidance/victim-communication-and-liaison-vcl-scheme> update 30 Jan 2020.

simple caution for an indictable-only matter unless the CPS agree. When a case is referred to the CPS for charging, the decision whether the suspect should be charged or cautioned falls to the CPS. Under the Criminal Justice Act 2003 a new form of conditional caution for adult offenders was introduced which could only be activated by the CPS and in 2008 conditional cautions were also introduced for young persons. Since 2012 the police have been able to offer conditional cautions without referral to the CPS in all but indictable-only offences but they must follow DPP guidance in doing so.⁶⁹

The new Police, Crime, Sentencing and Courts Bill: Part 6 aims to abolish simple cautions and provide nationally for only two form of out-of-court disposals: a diversionary caution and a restorative caution, both essentially a conditional caution.⁷⁰ Under clause 77, diversionary cautions can only be used for indictable only offences in “exceptional circumstances” and with consent of the DPP.

Impact assessment

The Equality Act 2010 imposes a general duty on public authorities including the CPS, to have due regard to all that they do to eliminate discrimination, harassment and victimisation and to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. The relevant protected characteristics are: age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

Since 1991 the Government has been required to publish statistical data to assess whether any discrimination exists in how the Criminal Justice System treats people based on their race, sex or another improper ground.⁷¹ The Lammy Review which looked comprehensively at case outcomes for BAME individuals throughout the criminal justice system of England and Wales commended the CPS for its track record of publishing in-house and independent ethnic and gender impact assessments of its decision making.⁷² The CPS publishes data on its website on prosecution decisions and defendants’ characteristics according to age, gender and ethnicity and it publishes quarterly data on the outcomes of prosecutions according to the same characteristics.⁷³ It warns against placing full reliance on these data. The information is derived from the CPS case management system, and as with any large scale recording system, data is subject to possible errors in entry and processing. Moreover, the data on gender, race and ethnicity are incomplete because the CPS depends on the police to obtain its information on defendant characteristics and the ethnic background in particular is not captured by the police in many cases. On its website the CPS states that it is working with the police to improve the equality data on victims and defendants captured in the police Digital Case File, which is then transferred to the CPS. This is a long term project, which will lead to significant improvements in the capacity of the

⁶⁹ Legal Aid, Sentencing and Punishment of Offenders Act 2012: s.133. See DPP Guidance, *Conditional Cautioning* (2019) <https://www.cps.gov.uk/legal-guidance/conditional-cautioning-adults-dpp-guidance#:~:text=1%20A%20Conditional%20Caution%20may,aimed%20at%20reparation%2C%20rehabilitation%2C%20punishment>. DPP Guidance, *Conditional Cautioning: Youths* (2019) <https://www.cps.gov.uk/legal-guidance/conditional-cautioning-youths-dpp-guidance#:~:text=A%20Youth%20Conditional%20Caution%20may%20be%20appropriate%20where%20the%20decision,aimed%20at%20reparation%2C%20rehabilitation%2C%20or>

⁷⁰ See C Gibson, “Out of Court Disposals: Setting out the Two-Tier Framework” <https://bscpolicingnetwork.com/2021/05/17/out-of-court-disposals-setting-out-the-two-tier-framework/>

⁷¹ Criminal Justice Act 1991 section 95.

⁷² *The Lammy Review* (2017) 21.

⁷³ <https://www.cps.gov.uk/publication/cps-data-summary-quarter-1-2020-2021>)

CPS to understand disproportionality in CPS decision-making across defendants, victims and all protected characteristics.

The Lammy Review found that although there was disproportionality in the CPS case load which is determined by police arrest rates, overall the charging decisions taken by the CPS were broadly proportional, although there were exceptions in rape and domestic abuse cases.⁷⁴ The latest statistics on the CPS website bear out this general conclusion although there were higher proportions of black defendants prosecuted for robbery and drug offences which was a reflection of the cases sent to the CPS from the police. Recent statistics from the Ministry of Justice demonstrate that 23% of people prosecuted were from a BAME background and BAME defendants were more over-represented in prosecutions for robbery (39%), drug offences (39%), and possession of weapons (31%).⁷⁵ But this would seem to be due again to arrest rather than charging decisions.

While the Lammy Review concluded that there were discrepancies in CPS decision making which had to be addressed, of all the criminal justice agencies the CPS came out the best in terms of equitable decision making. The Review attributes a number of reasons for this, including its willingness to open itself up to external scrutiny, its policy of internal random case reviews and its diverse work force. Another factor not considered in the report is the effect of having independent, legally trained individuals taking decisions. It is difficult to draw definitive conclusions on what these data illustrate in terms of whether prosecution decisions should be made by independent prosecutors or police. In interview with us, the CPS pointed to the fact that CPS decisions that have been subject to judicial review have been supported by the courts.⁷⁶

Reform and Reflection

Planning and costs

Since the creation of the CPS there has been more than one major reorganisation of the Service and many reports have been critical of its performance. The comment in one of the early reports that the “CPS did not begin life in very auspicious circumstances” may be regarded as an under-statement.⁷⁷ The way in which the new service came into being indeed may serve as an object lesson in how *not* to achieve successful reform. Rather than adopting a staged approach, the Service was created in one “big bang”. The legislation creating the Service (the POA) was enacted in 1985 and from the outset we were told there was pressure to get it up and running by 1986 to coincide with the abolition of the six large metropolitan county councils in England so that the prosecuting solicitors employed by them could be re-deployed into the new Service.⁷⁸ If abolition had occurred prior to the establishment of the CPS, there would have been a vacuum. In the event, the Service began operations in the metropolitan areas in April 1986 and in the rest of the country in October 1986 and it was all very rushed.

⁷⁴ Lammy Review, 17.

⁷⁵ Ministry of Justice, *Statistics on Race and the Criminal Justice System 2018* (2019).

⁷⁶ Interview with CPS.

⁷⁷ Home Affairs Committee, *Fourth Report: Crown Prosecution Service* (1990), vol 1, HC 118, vii.

⁷⁸ Interview with Stephen Wooler who worked on the implementation of the POA and later became the first Chief Inspector HMCPSI.

Without piloting and planning, the Service was also inadequately funded from the start with limited resources to provide for the recruitment of new prosecuting lawyers who were needed in the so-called “white areas” where there were no prosecuting solicitors and prosecuting had been entirely in the hands of the police. At the end of six months the Service had recruited 1250 lawyers (of whom more than half (760) were ex-prosecuting solicitors) and almost 3500 staff overall but this was to prove to be somewhere between a quarter and a half of the staff needed.⁷⁹ The staff and funding problems can be attributed to a number of factors ranging from estimates on the part of those in the Home Office proposing the new Service which played the costs down (one of the costings suggested that the CPS would actually save money); the genuine difficulty in calculating the costs which had to disentangle the cost of the previous arrangements from the cost of police services as a whole; and the general economic and political background of an ailing UK economy in the early 1980s and a government under Mrs Thatcher ideologically committed to ‘rolling back’ the state.⁸⁰ Although funding and staff increased in the 1990s (when at its peak there were in 1995, 6400 staff and 2,200 lawyers⁸¹), the CPS has been dogged over the last decade of austerity by another funding crisis which has seen its overall budget cut by 30% in real terms and its overall staff reduce from 7745 in 2010-11 to 5684 in 2018-19.⁸²

Given the continuing squeeze on CPS budgets, the question arises whether there are certain types of cases where independent prosecution is unnecessary. The HMCPSI interviewee questioned whether there was any added value in the CPS prosecuting guilty pleas in the magistrates’ courts. Their role in such cases was simply that of a “post box” and there had been conversations about the police taking back such cases.⁸³ To an extent this was already happening as more and more cases were being taken out of CPS hands. In 2003 we were told the CPS prosecuted 1.4 million cases; the annual figure is now more like 600,000.⁸⁴ It was suggested that the question whether independent prosecution was necessary in such cases depended on whether there would be confidence in the police prosecuting them. There should be no need for uniformed officers to appear in court to do this if paid agents were employed to present prosecutions on the police’s behalf. At the time of the introduction of the CPS, there was a concern about the culture of policing and there was a need for an independent prosecution service to come in and take over the police prosecution role. But that may no longer be necessary in guilty plea cases.

Roles

Another factor which has inhibited the CPS’s delivery of an effective and efficient prosecution system has been the difficulty in defining what its relationship with the police should be. Part of the difficulty has lain in a conceptual confusion over what its role should be in making the decision to prosecute.

⁷⁹ See National Audit Office (1989).

⁸⁰ See Rock, *Official History* 444-448.

⁸¹ See Glidewell, *Review of the CPS* (1998).

⁸² See Att-Gen’s evidence to the House of Commons Justice Select Committee, *The Law Society Gazette*, 23 January 2019; CPS Annual report 2010-2011 and 2018-19. With an additional £85M investment from the Government, the CPS is now embarked on the “most ambitious recruitment campaign” in its history to employ an additional 390 prosecutors and 100 operational delivery staff: see CPS Annual Report 2019-20.

⁸³ Interview with HMCPSI.

⁸⁴ The latest annual report (2020-21) states that 319,938 cases were prosecuted in the magistrates’ courts and 50,477 cases prosecuted in the Crown Court.

<https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Annual-Report-and-Accounts-2020-21.pdf>

Although it has always been a *police* prosecution agency rather than a national prosecution agency,⁸⁵ from the beginning it was conceived as an agency that needed to stand at arms' length from police. The Royal Commission on Criminal Procedure envisaged a complete separation of function between the police as investigators and the new Service as a body of independent prosecutors. The underlying principle of the new arrangements was that "someone with legal qualifications makes the variety of decisions necessary to ensure that only properly selected, prepared and presented cases come before the court".⁸⁶ But from the beginning, the 'Philips' principle was compromised by permitting the police to retain the power to initiate the prosecution and thereby remain the key gatekeepers of the prosecution process.⁸⁷ The retention of this power led critics to argue that the CPS role was one of *decision-reverser* rather than one of *decision-maker*.⁸⁸ Moreover, in respect of those cases that were passed on to the CPS, the prosecutors remained wholly dependent on the police file to make their decisions without a statutory power to request further information. The result was that it was unable to bring any independent scrutiny at an early point into the weaknesses of cases put forward for prosecution, which was the problem identified in the Fisher report and was the principal catalyst for the genesis of the CPS.⁸⁹

Relationships

Apart from conceptual confusion over what the role of the CPS should be, there was also an institutional resistance on the part of both the police and the CPS towards cooperating closely together to achieve successful prosecutions. The Philips Commission recognised that the "system is one which depends upon cooperation, with checks and balances operating within a framework in which all are seeking the same objectives".⁹⁰ But the power given to the CPS to discontinue prosecutions was a factor that inhibited cooperation and created difficult relationships from the outset as it dispossessed the police of its power. This resentment was compounded by an insistence on the part of the CPS that in order to preserve its independence relationships should be kept physically distant in stark contrast to the "comfortable if not cosy relationship" they had had with the county prosecuting solicitors".⁹¹ As one former DPP put it, "suddenly a steel curtain came down between the two services."⁹² CPS prosecutors distanced themselves physically from the police by setting up offices that were removed from police stations in contrast to the social and physical closeness between the police and prosecuting solicitors.⁹³ According to Stephen Wooler, "there were stories of managers saying you must not socialise with the police in any shape or form even at arms' length; that did not help at all".⁹⁴ One of the big lessons Wooler said he took away from the establishment of the CPS was:⁹⁵

⁸⁵ A Sanders, "The CPS – 3 Years On" (2016) *Criminal Law Review* 82, 84.

⁸⁶ RCCP, para 7.6.

⁸⁷ R White, "Investigators and Prosecutors or, Desperately Seeking Scotland: Re-formulation of the 'Philips' Principle" (2006) 69 *Modern Law Review* 143.

⁸⁸ See eg A Sanders, "Prosecution Systems" in McConville and Wilson (eds), *The Handbook of the Criminal Justice Process* (2002) 149, 158.

⁸⁹ Rock, *Official History*, 428.

⁹⁰ RCCP, para 7.8.

⁹¹ Sir Allan Green, former DPP quoted in Rock, *Official History* 496.

⁹² *Ibid* quoted in Glidewell, 37.

⁹³ Rock, *Official History*, 496.

⁹⁴ Interview with Stephen Wooler.

⁹⁵ Email from Stephen Wooler, 29 June 2021.

“the extent to which prosecutorial independence was over-played in some areas with detrimental effect on the working relationships – the two organisations became so distant as to be disjointed. There has to be an appreciation that independence is as much a state of mind as anything else. Independence must not be at the expense of necessary inter-dependencies and there has to be a proper collaborative working relationship with either side respecting the authority of the other as regards the aspects for which it is responsible.”

Over time a series of reviews recommended that a closer relationship should develop which would give the CPS earlier and more influential involvement in the prosecution process.⁹⁶ A number of steps have been taken over the years to promote greater efficiency and cooperation.

Statutory charging

Probably the most significant structural reform that has taken place since the creation of the CPS has been the move to put the CPS more on to the ‘front foot’ by giving them responsibility for charging. In 2001 the Auld Review recommended that in all but the minor, routine cases, or where there is a need for a holding charge, the CPS should determine the charge and initiate the prosecution.⁹⁷ Although this recommendation was implemented, as mentioned above, DPP guidance has extended the range of cases in which the police can still charge without referral to the CPS. The implementation of this reform went through a number of iterations and was not smooth but the CPS regard it as a positive development to the benefit of the police, the CPS and victims and witnesses.⁹⁸ As the CPS interviewee put it, it is much better to get the decision to charge right from the beginning rather than to have decisions made by the police which have to be discontinued. A joint inspection by HMCPSI and HMIC in 2008 pointed to the benefit of statutory charging, with weak cases being discontinued earlier and CPS charging decisions of good quality.⁹⁹ Another benefit was that it strengthened working relationships between the police and the CPS and was a contributing element to the development of a prosecution team ethos. On the other hand, there were costs and the complex booking arrangements for meetings between prosecutors and police led to inefficiencies, wasted time and delays. Although it would seem that statutory charging has given prosecutors more leverage over the police in terms of what needs to be done to strengthen cases, there is still a frustration at the CPS end that it is left to the police to decide whether to follow up on this and when cases are not prosecuted because they are too weak, it is the CPS which gets criticised.¹⁰⁰ An illustration of this may be found in recent criticism made by the Victims’ Commissioner for England and Wales that the “root of the problem” for the drop in rape prosecutions since 2015-16 “lies at the door of the CPS”,¹⁰¹ when the Government’s *End to End Rape Review* found that the reasons for this were complex and far-ranging and were attributable as much to the police as the CPS (with 37% fewer rape cases being referred to the CPS by the police in 2019-20 since 2015-16).¹⁰² The CPS interviewee told us that the CPS does what it can to work with the police through the strength of relationships that have been built up in the more serious cases but *“it is quite difficult for a prosecutor to have the responsibility for prosecuting without any power to get the police to do what*

⁹⁶ See eg Runciman, Narey, Glidewell, Auld Reviews.

⁹⁷ Auld LJ, *Review of the Criminal Courts of England and Wales* (2001) ch 10, para 44.

⁹⁸ Interview with CPS.

⁹⁹ HMCPSI and HMIC, *Joint Thematic Review of the New Charging Arrangements* (2008).

¹⁰⁰ Interview with CPS.

¹⁰¹ “CPS accused of betraying rape victims as prosecutions hit record low”, *Guardian*, 22 July 2021.

¹⁰² R George and S Ferguson, *Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales* (2021) 39.

needs to be done.” Without expressing a view as to whether the CPS should have such a power, she said that if one is looking at a prosecution system, the question whether there should be a power of direction is one that should be taken into account.

Specialist teams

Another positive development has been the use of specialist teams of prosecutors in more complex cases and sensitive cases. From the 1990s specialist police teams have worked closely with specialist prosecutors in counter-terrorism, organised crime and other sensitive cases, pre-charge advice has been sought and prosecutors made the effective decision to charge even before statutory charging was introduced. Today in addition to the 43 regional teams prosecuting cases locally and CPS Direct which provides charging decisions on priority cases 24 hours a day, there are three specialised central casework divisions within the CPS: International Justice and Organised Crime, Special Crime and Counter-Terrorism and Serious and Complex Fraud. We were told that relationships are stronger between police and prosecutors when they are built on early advice and specialist teams in the more serious cases play an important part in this.¹⁰³ The CPS is increasing resources for its specialist Rape and Serious Sexual Offences (RASSO) units so they are equipped to deal with more cases, more quickly. A recently published joint inspection report, however, found that there was a need for both the police and CPS to fundamentally change their approach to working together on rape cases to build trust and secure justice.¹⁰⁴ The report found that early investigative advice has been under-used and was only requested in 12 out of 90 cases. Overall, there was a tendency for the police and CPS to blame each other for the low conviction rates in these cases and this suggested a lack of true acceptance of the fundamental need for joint ownership of the problems, and for a collaborative response to the systemic issues identified. The Police-CPS joint national RASSO (rape and serious sexual offences) action plan 2021 aims to develop a collaborative approach, providing additional guidance on early investigative advice and reasonable lines of enquiry so that strong cases are built from the start.

HMCPSP

The establishment of HMCSPI in 2000 has been another positive development which has helped to drive up standards of decision making. Over the years there have been numerous reports on the performance of CPS areas and on general themes which have highlighted a number of shortcomings in matters such as disclosure, the quality of police files, statutory charging and transforming summary justice. A continuing theme in many of the reports has been the poor quality of police files. An inspection on the Transforming Summary Justice initiative in 2017 found that the ability of the CPS to manage and progress cases efficiently was hampered by the quality of the police file and only 39.6% of files complied with the National File Standard.¹⁰⁵ A later composite report across all CPS areas found that differences in the quality of police files affected outcome, so that 42.6% of files fully met the expected standard in successful outcomes while only 34.8% met the standard in unsuccessful outcomes.¹⁰⁶ The difference was even more marked in Crown Court cases (with 44.1% fully met in successful cases and 30.9% in

¹⁰³ Ibid.

¹⁰⁴ Criminal Justice Joint Inspection, *A Joint Thematic Inspection of the Police and CPS's Response to Rape* (2021). <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/joint-thematic-inspection-of-police-and-cps-response-to-rape-phase-one.pdf>

¹⁰⁵ HMCPSP, *Business as Usual? Transforming Summary Justice: Follow-up Report* (2017).

¹⁰⁶ HMCPSP, *Area Assurance Programme Composite Report* (2019) 67.

unsuccessful cases). File submissions were better in sensitive cases (43.0% fully met) than in non-sensitive cases (37.8%).

We were told that the extent to which inspectorates are able to bring about change depends upon the receptiveness of those at the head of the organisation and the scope they have for making change.¹⁰⁷ An Inspectorate is most effective when it works across the whole criminal justice system as it does in Northern Ireland and when there is a structure that is capable of picking up on the recommendations and implementing them across all of the agencies. One of the weaknesses of a single inspectorate is that it can highlight deficiencies which are not the responsibility of just one organisation. A good example provided by the HMCPSI when we spoke to them was the poor quality of police files.¹⁰⁸ It would seem that the CPS does have some influence on file quality. According to the composite report mentioned above, the police file was weaker when the police or CPS Direct charged, and strongest when CPS Areas delivered charging decisions. But the HMCPSI interviewee told us that much ultimately depends on the police commitment to build quality files. When Criminal Justice Units (CJUs) were originally introduced, the idea was that specialist police officers would be resourced to build files for prosecution. One of the problems was that the units did not have powers of direction over investigating officers but a persistent problem has been that the units have been poorly resourced. Although CJUs suffered particularly during the past decade of austerity, poor resourcing also had to be seen against the background of police performance targets which concentrate on detection and clear-up rates rather than on successful prosecution rates. But these are matters that HMCPSI and the CPS cannot influence.

¹⁰⁷ Interview with Stephen Wooler.

¹⁰⁸ Interview with HMCPSI.

AUSTRALIA

Background

The predominant legal jurisdictions in Australia so far as criminal prosecutions are concerned are the six states (New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania), the two territories (Northern Territory and the Australian Capital Territory) and the federal jurisdiction of the Commonwealth. The majority of prosecutions are for offences against State or Territory laws but there are also prosecutions for federal Commonwealth offences, a large part of which concern organised crime, terrorism and other crimes which pose significant threats to the whole Commonwealth. There is, however, no system of dedicated federal courts for criminal prosecutions and offences against the Commonwealth are largely dealt with by constituting a federal court in a State or Territory.

Traditionally, overriding control over prosecutions rested on the figure of the Commonwealth Attorney General and the respective Attorneys General of the states and territories. In practice, however, decisions to prosecute were mainly made by police forces.¹⁰⁹ In the states and territories the police also conducted summary prosecutions. When the police charged an indictable offence they conducted the committal proceedings but indictable offences committed to the superior courts came under the control of the Attorney General who could make decisions on no bills and nolle prosequi.

In the late 20th century pressure mounted for the creation of independent Directors of Public Prosecutions with their own offices in order to remove prosecutions from the political process. There was a recognition that Attorneys General were unmistakably

political creatures and it was considered in everybody's interest, including that of politicians, that a person independent of the political process should make prosecution decisions.¹¹⁰ The Crown Advocate's office in Tasmania established an independent prosecution authority for that State as early as 1973.¹¹¹ The first Australian DPP was established in Victoria in 1982 and other Australian jurisdictions followed suit.¹¹² As a result each state, territory and the Commonwealth now has its own independent DPP responsible for the prosecution of serious offences in the Supreme and District courts. But although pressure also mounted for the conduct of prosecutions to be taken out of the hands of the police in summary cases,¹¹³ with the exception of the Commonwealth and ACT, the police have continued to conduct summary prosecutions in the majority of cases.

¹⁰⁹ For historical background see C Corns, "Police Summary Prosecutions in Australia and New Zealand: Some Comparisons" (2000) 19 *University of Tasmania Law Review* 280, 286-90 (hereafter Corns, "Police Summary Prosecutions"); C Corns, "Police Summary Prosecutions: The Past, Present and Future", *History of Crime, Policing and Punishment* (1999).

¹¹⁰ See website of the ACT DPP https://www.dpp.act.gov.law/about_the_dpp/history.

¹¹¹ See D Bugg, "The Role of the DPP in the 20th Century", *Judicial Conference of Australia*, Melbourne, 1999.

¹¹² The Commonwealth in 1983, Queensland in 1984, New South Wales in 1986, Tasmania in 1986, Northern Territory in 1990, Western Australia 1991, ACT in 1991 and South Australia in 1992.

¹¹³ K Bryett and P Osborne, *Criminal Prosecution Procedure and Practice: International Developments* (2000), 61.

Present prosecution arrangements

The prosecution arrangements in all the Australian states, territories and the Commonwealth remain broadly similar.¹¹⁴ The police investigate and decide whether to bring the initial charge or summons and public prosecutors in the DPP's offices cannot instruct the police in these matters. Where the police decide after investigation not to proceed with a case, that is their decision and there is no review by the DPPs. Unlike CPS prosecutors in England and Wales, however, the DPPs do have powers to direct or request information relating to offences they go on to prosecute or are empowered to take over, although we were told these are only rarely exercised.¹¹⁵

There are also protocols in place for prosecutors in the DPP's Offices to be asked to give 'pre-charge' advice on an appropriate charge, although the police are not bound to act on the advice given.¹¹⁶ We were told that the Commonwealth ODPP plays a particularly important role in advising the police in complex investigations such as in drug smuggling, human trafficking and terrorism cases so that timely operational decisions can be made.¹¹⁷ Many of these investigations involve surveillance and the ODPP would be involved in these decisions. Pre-charge advice improves the quality of the brief of evidence that the ODPP gets and raises the prospect for conviction. Sometimes in cases where there is no need to arrest, the police will send a brief of evidence with a recommendation to prosecute which the ODPP will assess before the police decide to charge. The police will only send to the ODPP cases that they want to prosecute but section 11 of the Commonwealth DPP Act gives the DPP a wide power to give directions or issue guidance to the Federal Police Commissioner and other persons who investigate or prosecute offences against the laws of the Commonwealth. We were told that a previous Director was concerned that tax frauds were being dealt with in a civil way and, without giving a direction or issuing guidance, made it known that such cases were to be prosecuted.¹¹⁸

There is some variation between the jurisdictions in so far as matters prosecuted by the police and those prosecuted by the DPP are concerned. The DPPs in the Commonwealth and in the ACT are unique in that their prosecutors appear in all levels of the courts from magistrates' courts to the High Court, including the Federal Court, and are involved at all stages of the prosecution process including mentions, bail, summary matters, committals, trials and appeals.¹¹⁹ This differs from other jurisdictions where the DPP deals with offences that will be tried in the superior courts (and some limited summary only offences) but the police prosecutors deal with the bulk of summary matters in the magistrates' or local courts. So, for example, in New South Wales section 7 of the DPP Act 1986 states that one of principal functions of the DPP is "to institute and conduct, on behalf of the Crown, prosecutions (whether on indictment or summarily) for indictable offences in the Supreme Court and the District Court". Section 8 of the Act states that the ODPP may also institute and conduct committal proceedings for indictable offences, proceedings for summary offences and summary proceedings for indictable offences that may be dealt with summarily in the Local Courts. But we were told that the ODPP only institutes proceedings

¹¹⁴ For a rather out-dated summary see Bryett and Osborne, *ibid*, 57-61.

¹¹⁵ See, eg, DPP Act 1986 ss 16 and 17 (NSW), Public Prosecutions Act 1982 ss 27, 28 (Victoria), DPP Act 1983 s 13 (Commonwealth).

¹¹⁶ ODPP NSW, *Prosecution Guidelines* chapter 12 <https://www.odpp.nsw.gov.au/prosecution-guidelines>

¹¹⁷ Interview with Commonwealth ODPP. See also Commonwealth DPP, *Annual Report* (2019-20).

¹¹⁸ Interview with Commonwealth ODPP.

¹¹⁹ <https://www.cdpp.gov.au/prosecution-process>

for summary offences in very limited circumstances agreed by a memorandum of understanding with the police, such as where a serving police officer is a defendant, where a defendant has been charged with child sexual assault, a high profile case or one of legal significance. The numbers of such cases are rare, approximately 100-150 cases per year.¹²⁰ Other jurisdictions also provide for the DPP to conduct summary cases in limited circumstances. With regard to the variety of offences that may be dealt with summarily or on indictment, we were told that the police refer these offences to the ODPP in order to determine whether the case should be heard in the local court or committed for trial in the District Court and if the decision is that the local court has sufficient jurisdiction, it will be sent back to the local court for the police to prosecute.¹²¹ There appears to be some variation between the jurisdictions on who takes responsibility for appeals in summary cases. These are conducted by the ODPP in New South Wales whereas lawyers within the Police Prosecutions Division conduct these in Victoria.

The exact point at which the DPP takes over cases that are triable in the superior courts has varied. In some states the DPP carried out all committals that were to go to the superior courts,¹²² while in others they carried out some of the committals.¹²³ But the trend today, certainly in New South Wales, where committal proceedings have been abolished, seems to be in favour of the DPP taking over cases they will prosecute as soon as possible after charge. We were told that where the police prefer charges for serious offences, the DPP's Office will require an adequate brief from the police - something that will give it a reasonable understanding of what the case is about - and a prosecutor (who will ultimately also run the trial if the case proceeds) will review the charges laid by the police and as a result of a recent legislative change the ODPP is required to certify the charges that are going to proceed.¹²⁴ The police will attend the court for the first or second mention but as soon as the prosecutor certifies the charges, the DPP's Office will take over the case and make all decisions relating to it. The police and victims must be consulted on any decision to discontinue prosecutions or to withdraw charges but the final decision rests with the prosecutor.

In Western Australia the ODPP takes over matters which will ultimately be prosecuted in the superior courts while those matters are still before the summary court (pre-committal).¹²⁵ This is because it enables the ODPP to have oversight of such matters at an early stage, and enhances the possibility of resolution pre-committal. In Queensland the ODPP currently has carriage of some indictable matters in the Brisbane, Southport and Ipswich Magistrates' Courts which is part of a pilot, of some years now, to get the ODPP involved early in the prosecution of indictable matters to ensure more efficient progress to the superior courts.¹²⁶ In Ipswich a protocol agreed with the Queensland Police Prosecutions means that all offences that must be heard on indictment, or where defence or prosecution elects indictment, are transferred to the ODPP after the first mention in the Magistrates' Court.

Although the effect of this division of labour is that the police prosecute the majority of summary offences and the DPP prosecutes the most serious offences, it would be misleading to characterise the DPPs'

¹²⁰ Interview with DPP NSW.

¹²¹ Ibid.

¹²² Victoria, WA and NSW: Corns, "Police Summary Prosecutions".

¹²³ Qd, Tas and NT: Corns: *ibid.*

¹²⁴ Interview with DPP NSW. See Criminal Procedure Act 1986 as amended on April 2018.

¹²⁵ Email from ODPP WA, 16 August 2021.

¹²⁶ Email from ODPP Qd, 9 September 2021.

role as concerned solely with serious cases as the DPP has power in many jurisdictions to take over any prosecutions. In New South Wales, for example, the Director has an important power under section 9 of the DPP Act 1986 to take over the prosecution of *any* offence (whether it is an indictable or summary offence) that has been instituted by a person other than the Director.¹²⁷ Once the DPP takes over a case, it remains in the hands of his or her Office and a decision may be made to discontinue it in accordance with the tests for deciding whether to prosecute.¹²⁸ DPPs' Guidelines in various states set out fairly limited circumstances when the DPP may take over a prosecution commenced by the police which include taking account of the seriousness of the offence, the complexity of the case and the views of the police.¹²⁹

Bail

In all jurisdictions the police will make the initial decision whether to grant bail in cases that they have been charged and they will decide in summary cases whether to oppose bail at court. In New South Wales where a brief is sent to the DPP after the police have charged, the police will be involved in the initial bail determination by the local court justice but as soon as the prosecutor certifies the charges, the DPP's Office will decide whether to support bail applications. We were told that there are some data which suggest that there are a significant number of cases where the police refuse bail but shortly afterwards the local court magistrate grants bail.¹³⁰ The police tend to be very cautious about granting bail and this is a matter that is presently being looked at with a view to reform. When the DPP's Office takes over the case and there is a renewed bail application, the Office will determine what the police's view and the victim's view is but their views are not determinative of what position the Office will take.

Victim/witness care

A number of jurisdictions have Victims' Rights Acts which establish the right of victims to be kept informed about the progress of their cases and to be treated with courtesy and respect. The New South Wales DPP told us that there has been a greatly expanded Witness Assistance Service (WAS) which is part of the ODPP. The Service is populated by psychologists and social workers who have close contact with victims and vulnerable witnesses in the serious cases the DPP prosecutes and who assist them through the trial process whilst being well trained in terms of the obligations of the prosecution service to make full disclosure.¹³¹ There are other sources of support for victims such as the Victim Support scheme and there are also private agencies that offer support but victims and witnesses will always be offered support through the WAS. The Commonwealth ODPP also operates a WAS and certain cases involving vulnerable witnesses such as human trafficking require a mandatory referral to the service.

The DPP's Guidelines in the various states and the Commonwealth are quite prescriptive in terms of the contact prosecutors should have with victims: including keeping them fully informed about the

¹²⁷ Cf also Public Prosecutors Act 1994, s. 22(10)(b) (Vict) which gives the DPP the power to take over and conduct any proceedings in respect of any summary or indictable offence if he or she considers it desirable to do so.

¹²⁸ See ODPP NSW, *Prosecution Guidelines* chapter 1.2 <https://www.odpp.nsw.gov.au/prosecution-guidelines>

¹²⁹ See, eg, *ibid*, chapter 7; *Policy for the DPP Victoria* chapter 8 para 56.

¹³⁰ Interview with DPP NSW.

¹³¹ *Ibid*.

progress of the case and taking their views into account before making important decisions about the case and matters that might affect their well-being such as a defendant getting out on bail. Victims are entitled to reasons when cases are discontinued and to be informed about a Right of Review.

Diversion

None of the DPPs in the states and territories exercise any diversionary powers which are matters for the police. The DPPs do not get involved largely because diversion is not really an option in the kinds of more serious cases they deal with. There are therapeutic models of justice in drugs cases but these are matters for the court. In federal cases where the Commonwealth DPP prosecutes in summary cases, the Office may become involved in diversion after charge when the defence raise it. A meeting will be convened and the DPP's Office will make the decision where there should be diversion from prosecution.¹³²

Impact assessment

Australia is a highly multi-cultural society with large populations from West Africa and Asia and we were told that there have been concerns about whether certain groups are targeted by the police and about bias in the criminal justice system.¹³³ We were informed that in NSW the Bureau of Crime, Statistics and Research which is a statistical and research agency within the Department of Communities and Justice collates information from the police and the courts in order to examine issues such as the over-incarceration of indigenous peoples and the impact of ethnicity and gender on types of offences.¹³⁴ At the federal level we were told that there are agencies such as sentencing advisory groups and the Australian Crime Commission which intersect with the police, the ODPP and other agencies to obtain information from databases.¹³⁵ The ODPPs could glean information from the cases that come in from the police relating to age, gender and, if revealed in the brief of evidence, ethnicity but the Offices do not themselves collect, collate and publish such data.

Although the ODPPs do not monitor the equity of decision making, there been steps taken to monitor performance in other ways. The Commonwealth ODPP told us that it is required to conduct performance reporting to ensure compliance with policy and to quality assure the services that are provided and this has expanded to include efficiency measures.¹³⁶ The DPP Offices are not subject to a system of independent inspection akin to the HMCPSI in England and Wales or the Criminal Justice Inspectorate in Northern Ireland. We were informed that this was an issue that was discussed recently when a Royal Commission was inquiring into institutional responses to child sexual abuse but ultimately no recommendations were made for an independent inspectorate. It is noteworthy, however, that the Commission did recommend that each Australian Director of Public Prosecutions should establish robust and effective internal audit processes to audit their compliance with policies for decision-making and consultation with victims and police.¹³⁷

¹³² Interview with Commonwealth ODPP.

¹³³ Ibid.

¹³⁴ Interview with DPP NSW.

¹³⁵ Interview with Commonwealth ODPP.

¹³⁶ Ibid.

¹³⁷ Royal Commission on Institutional Responses to Child Sexual Abuse (2017). See https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_recommendations.pdf

Reform and Reflection

Both before and after the establishment of the DPPs numerous Royal Commissions and Inquiries across the states and the Commonwealth called for the prosecution function to be taken out of the hands of the police.¹³⁸ Some of the newly appointed DPPs also called for this to happen as did some Police Commissioners in the states and territories as well. A number of arguments were made against the use of police prosecutors and in favour of independent prosecution services taking over their role.¹³⁹ Principled arguments focused on the need to ensure the fairness, objectivity, independence, impartiality and integrity of the prosecution process, on the fundamental conflict of interest where the same agency is responsible for both the investigation and prosecution of the same criminal matter and on the fact that prosecution is not a core policing function.

There was also concern expressed in some states and territories about the quality and standard of prosecutions by some police. In 1997 the Royal Commission into the New South Wales Police Service was critical of police prosecutors and recommended that police prosecutions be transferred to the office of the DPP. In the same year a major review into the investigative and prosecutorial practices of the Western Australian police force was critical of the quality of prosecution practices and the DPP and the Police Commissioner made a joint submission that the Office of the DPP take over police prosecutions. The current DPP in the Northern Territory told us that when he arrived in the Northern Territory in 1984, police prosecutors were experienced police officers who were more knowledgeable about summary matters such as road traffic legislation than most lawyers but this changed and a mismatch of personnel came to work as police prosecutors.¹⁴⁰ In the 1990s the magistracy expressed concerns about the quality of advocacy and preparation of the prosecution case and made submissions that the DPP should take over the role of police prosecutions.¹⁴¹

Despite all these calls for reform, the traditional police summary model has remained intact except in the Commonwealth and the ACT. Various explanations have been suggested as to why there has been no appetite for any fundamental reform across the states and territories which would transfer all police prosecuting functions to the DPPs.¹⁴² One key reason would seem to be that summary prosecutions have not been high on the political agenda. Although as mentioned strong views in favour of reform have been expressed by certain stakeholders, others including certain Police Associations have been opposed to change. Police submissions to various Inquiries have emphasised the benefits of the status quo in terms of police having lengthy experience in prosecutions, superior liaison skills with other police and an ability to process large numbers of cases on a routine basis. Another factor has been concern

¹³⁸ See, eg, Commission to Inquire into New South Wales Police Administration, *Report by Mr Justice Lusher of the Commission to Inquire into New South Wales Police Administration*, Government Printer, Sydney, 1981, 258; Royal Commission of Inquiry into Drug Trafficking, *Final Report*, Australian Government Publishing Service, Canberra, 1983, 620; Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, Brisbane, 1989, 238; Criminal Law and Penal Methods Reform Committee of South Australia, *The Second Report of the Criminal Law and Penal Methods Reform Committee of South Australia: Status Report: Criminal Investigation*, Attorney General's Department, Adelaide, 1990, 174; Royal Commission into the New South Wales Police Service, *Final Report*, Sydney, 1997.

¹³⁹ See Corns, "Police Summary Prosecutions", 301-2.

¹⁴⁰ Interview with DPP Northern Territory and Managing Summary Prosecutor.

¹⁴¹ Corns, "Police Summary Prosecutions".

¹⁴² *Ibid.*

over the financial implications of transfer to the DPP and uncertainty over whether the total amount spent on prosecutions would increase or decrease if a transfer were implemented. A particular financial burden that would have to be met in a number of Australian states and territories such as Queensland, Western Australia and the Northern Territory if the prosecution function were completely removed from the police would be the cost of prosecutors covering the vast distances involved. It was pointed out to us that prosecutors would have to travel to remote areas to prosecute cases where there are police officers and local courts as it would not be cost-effective to establish prosecution offices.¹⁴³

In the absence of any root and branch transfer of summary prosecutions to the DPP Offices, reforms have been incremental and piecemeal. Two approaches have been adopted. One has been to professionalise the existing police prosecution arrangements and the other has been to ‘civilianise’ summary prosecutions in a more gradual manner.

Professionalisation of police prosecuting departments

We were told that the model adopted in many states and territories has been to make police prosecutors independent from police investigators by creating specialist prosecution departments within the police force and to provide advocacy training for them.¹⁴⁴ This restructuring has sometimes included engaging civilian lawyers to work alongside police prosecutors in what has been called an “integrated” model.¹⁴⁵ This is the model that came into being in the Northern Territory in 1998 when police prosecutors began to work alongside DPP solicitors under the supervision of the DPP. Within the last decade Victoria the Police Prosecutions Division has been embedding lawyers from the Victoria Public Service, the ODPP and the Victoria Bar to provide support for them so that the Division now comprises 477 police prosecutors and 139 lawyers.¹⁴⁶

The police prosecutors in the Victoria Police are drawn from the general police employee pool but are physically set apart from frontline police in a separate Division within the Legal Services Department and, generally, share different physical workplaces to those of frontline police and detectives. They are required by policy to apply the same tests in determining whether charges are to proceed to prosecution or to be discontinued, as the Director of Public Prosecutions (Victoria) sets. Previously, police prosecutors who were of the view that a particular charge or charges did not meet these tests, were required to obtain instructions from the police investigator about discontinuance. In about 2009 this link was broken by police internal policy so that prosecutors are empowered to make those decisions absent the views or authority of the investigator. They are still required to obtain the views of any victims involved in the case and their supervisor within the Prosecutions Division is required to authorise that course of action.

The lawyers in the Victoria Police are comprised of a legal practice group (LPG) of police prosecutors who have gone on to become legally qualified, a police lawyers’ group (PLG) whose work includes dealing with complex family violence matters and a senior advocacy team (SAT) of highly experienced senior advocates established in 2018 to provide professional and effective representation and advice in high profile, high risk and complex matters. The SAT advocates also offer formal and informal advice

¹⁴³ Interview with DPP NSW.

¹⁴⁴ Interview with Commonwealth ODPP.

¹⁴⁵ Corns, “Police Summary Prosecutions”, 298.

¹⁴⁶ Response from Victoria Police received through the Commonwealth ODPP. The following paragraphs are based on information provided in this Response.

and mentoring to police prosecutors to assist them in the prosecution of their matters and play a pivotal role in training and developing other police prosecutors.

Upon arriving at a prosecutions unit, police prosecutors are enrolled in the POL87115 Graduate Certificate in Police Prosecution ('Grad Cert'), which is a nationally recognised vocational qualification, designed by all jurisdictions in Australia through the ANZPAA (Australia and New Zealand Police Advisory Agency). Lawyers who are recruited into the PLG of the Police Prosecutions Division from the Victoria Public Service must also enrol in the Graduate Certificate. We were told that the integration of the Victoria Public Service lawyers with the Police Prosecutor cohort has resulted in a well-versed workforce of legally qualified and specialist Prosecutors.

Gradual civilianisation

There have also been some gradual moves towards civilianisation of summary prosecutions. In 1998 as a result of the recommendation of the Woods Royal Commission that police summary prosecutions be transferred to the DPP's Office in New South Wales, the DPP took over all police prosecutions in one outer Sydney and one country court (Campbelltown and Dubbo) for 6 months in a bid to make the change, progressively, across the state.¹⁴⁷ An independent panel monitored the change and in 1999 reported the DPP to be superior on all criteria but the government refused to make funds available and the initiative died.¹⁴⁸ In Western Australia at about the same time, there was also momentum behind a similar reform.¹⁴⁹ The government of the day convened a working group to assess it, and Cabinet accepted the desirability of transferring police prosecutions into the DPP but no change eventuated.

A more sustained effort to implement civilianisation took place in the Northern Territory in 2013 when the Attorney General directed the DPP to civilianise the police prosecution department in the Darwin region. The civilianisation of the Police Prosecutors Unit (known as the "CoPPs project") resulted in the DPP taking over all prosecutor appearances in the Court of Summary Jurisdiction and Youth Justice Court, all bail and arrest matters and mentions and all administrative duties related to these functions.¹⁵⁰ We were told that the decision took place against the background of some unrest between the Police Association, the Commissioner of Police and the government.¹⁵¹ The newly elected government found itself torn between the need to make savings and the need to respond to the Police Association's demand that it needed more police numbers. The Commissioner of Police supposedly claimed that it would cost less to employ civilian lawyer prosecutors than police prosecutors and the government latched on to this idea. The project took place without any advanced planning or any proper attempt to determine what the cost would be. A lump sum was allocated for the project which fell far short of what the actual costs were. The operational costs in terms of travel for witnesses and victims etc were far more than expected and the ODPP was never given the corps of prosecutors it required with the result that complex matters had to be briefed out to private counsel. As a result at the end of each year, the DPP's budget was grossly overspent. There was also a lot of contention over who should pay for what and the ODPP found itself burdened by poor quality briefs and taking on responsibility for matters that

¹⁴⁷ Email from Nick Cowdery QC (DPP NSW 1994 - 2011), 18 May 2021.

¹⁴⁸ Ibid.

¹⁴⁹ Email from WA ODPP, 16 August 2021.

¹⁵⁰ See DPP Northern Territory annual report 2013-14:
https://dpp.nt.gov.au/__data/assets/pdf_file/0005/574097/2013-2014.pdf.

¹⁵¹ Interview with DPP Northern Territory and Managing Summary Prosecutor.

were really for the police. The police are now bound by DPP's Guidelines on Prosecution and a service level agreement (SLA) between the DPP and the Police Commissioner has finally come to fruition which sets out clearly who has what responsibilities, who pays for what and who makes the final decision on matters such as whether a charge proceeds.

Reflecting on the experience, we were told that there were two "take-home" messages for Ireland if it is thinking of making changes towards civilianisation.¹⁵² First of all, there has to be an understanding of the costs involved so that the ODPP is not "duped on resources", bearing in mind the administrative costs required to pay for the considerable increase in administrative work that will need to be done. Secondly, there needs to be a SLA from the 'get-go' that clearly sets out who bears what responsibilities and costs.

A broader lesson was that any civilianisation project has to be thought through. It is somewhat ironic that just at the point when finally an SLA has come into effect, the police have been having second thoughts about the desirability of the whole CoPPS project. Their view now appears to be that they have lost a lot of experience by giving up the role of police prosecution. When there were police prosecutors at the coal-face in court, they could convey to other members of the police force their learning from the court and thereby perform a useful informal educational role and the feeling now was that they have lost this valuable skill-set. As a result the Deputy Police Commissioner is due to report shortly on whether the police ought to move back into the prosecutorial arena. To the DPP, this was indicative of a failure to think through the repercussions of the project in the first place.¹⁵³ His view was that civilianisation was a much better option than summary police prosecution but that there should be a limited role for the police to appear in bail and arrest matters and they should also appear in the Youth Court as police officers are better suited than civilian lawyers to dealing with young offenders and are more open to the creative solutions needed in such cases.

¹⁵² Ibid.

¹⁵³ Ibid.

NEW ZEALAND

Background

The early history of the prosecution system in New Zealand reflected its colonial relationship with Britain and largely followed developments there. Following the establishment of a police service in New Zealand in the mid-19th century the police became involved in the presentation of cases at court in addition to the investigation of crime, a practice that has continued to the present day. In more serious cases prosecutions were undertaken by Crown solicitors or prosecutors. A practice emerged of appointing private practitioners to these roles. New Zealand did not develop and still does not have a centralised prosecution system and its system for prosecuting criminal cases today still mirrors to a large extent the dichotomy between police and Crown Solicitor prosecution outlined above.

Present Prosecution Arrangements

The Attorney-General is responsible to Parliament for all public prosecutions and the Solicitor-General superintends the prosecution system on behalf of the Attorney-General. Under the Solicitor-General, the office that supports him/her and the Attorney General is known as Crown Law. Crown Law is in effect the government legal service.

Crown Solicitors

In terms of the prosecution of criminal cases there are broadly-speaking two elements to the prosecution system with Crown Law having responsibility for the oversight of both. The first involves the prosecution of the relatively small number of serious criminal prosecutions. This is done through the use of private lawyers, known as Crown Solicitors, to undertake public prosecution work.

The Crown Solicitors hold warrants to conduct indictable prosecutions and also conduct some summary prosecutions on behalf of various enforcement agencies including the police. Each warrant relates to a particular geographical area, usually a High Court centre. The warrants give the Crown Solicitors personal responsibility for filing indictments, conducting indictable prosecutions and appearing on appeals from summary prosecutions in their geographical area. The Crown Solicitors' power to file indictments is confirmed by Section 345(2) of the Crimes Act 1961, which states that only Crown Solicitors and the Attorney-General may file an indictment.

There are currently 15 Crown Solicitors in New Zealand, who hold 17 warrants. Each is a partner within a law firm. The lawyers within these firms assist each Crown Solicitor in exercising their prosecution related responsibilities. These lawyers must be formally recognised by the Solicitor-General and categorised as junior, intermediate or senior counsel under the Regulations before they can undertake this work.

It used to be the case that Crown Solicitors invoiced Crown Law for the work that their firms undertook pursuant to their warrants. However, following criticism of the lack of robust financial management of this system in the Spencer Review in 2011,¹⁵⁴ Crown Solicitors now receive a budget for the year which

¹⁵⁴ <https://www.crownlaw.govt.nz/assets/Uploads/Reports/prosecution-review-2011.pdf>

cannot be exceeded. This means that if the volume of work increases mid-year it must still be delivered within the current budget.

Crown Law manages the Crown Solicitors and their performance in a number of ways. Appointments under warrant are for ten years at which point the incumbent Crown Solicitor may apply again. There are detailed terms of appointment for Crown Solicitors which set out expectations on the part of Crown Law and the circumstances in which appointment could be terminated¹⁵⁵. Crown Law also receives monthly reports from each Crown Solicitor detailing the work that has been done including types of cases, outcomes etc. In addition the Crown Solicitors are subject to the various Solicitor General Prosecution Guidelines¹⁵⁶, and these were described to the authors as the “primary mechanism” for accountability of Crown Solicitors¹⁵⁷.

Insights into the practice and performance of individual Crown Solicitors are also obtained by Crown Law by way of its involvement in various appeals. Crown Law appears in appeals by criminal defendants in the Court of Appeal and must also approve any prosecution appeal of any decision including the granting of bail. Carrying out this work allows them a regular and detailed perspective on the work of individual Crown Solicitors.

Crown prosecutions i.e. those to be undertaken by the Crown Solicitors are determined by reference to Crown Prosecution Regulations 2013. These enumerate four categories of offences, with category 4 being the most serious. Crown prosecutions cover these category 4 offences and offences where the defendant elects for jury trial. The cases in categories 1 and 2 and some category 3 offences where there is a guilty plea or defendant does not elect for jury trial are generally prosecuted by the Police Prosecution Service (PPS).

The Police Prosecution Service (PPS)

The Police Prosecution Service (PPS) conducts almost all of the prosecutions in the summary jurisdiction that are initiated by the Police and also indictable prosecutions prior to committal for trial. There are also additional agencies and prosecutors who conduct prosecutions in various specialised fields (see below).

The PPS is a nationwide prosecution service within the police and was established in 1999 following a number of reports by the Law Commission on prosecution arrangements in New Zealand.¹⁵⁸ It is administratively separate from the criminal investigation and uniform branches of the police (although see below under Reform) and therefore enjoys a degree of autonomy from the police. There are almost 400 staff (including between 220 and 235 prosecutors) within the PPS. They are spread between a national office in Wellington and 41 offices throughout the country, servicing over 60 district courts. The prosecuting staff include sworn Police officers with law degrees, sworn Police officers without law degrees and non-sworn lawyers. The prosecution team is made up of qualified lawyers and police sergeants in roughly equal numbers.

¹⁵⁵ <https://www.crownlaw.govt.nz/assets/Uploads/Terms-of-Office-Crown-Solicitors.pdf>

¹⁵⁶ <https://www.crownlaw.govt.nz/publications/prosecution-guidelines/>

¹⁵⁷ New Zealand interviewee.

¹⁵⁸ <https://www.lawcom.govt.nz/our-projects/criminal-prosecution>

The PPS has responsibility for managing all prosecution processes in the summary jurisdiction after initial charges are laid by Police investigators. This role includes conducting summary prosecutions right through until sentencing and indictable prosecutions up until the point of committal for trial. In practice, this means that the PPS conducts the vast majority of the prosecutions in the summary jurisdiction each year. The PPS also conducts proceedings for Youth Court prosecutions, advocates for Police at coroners' inquests, and administers the Police Adult Diversion Scheme.

Investigation and Charging

The police investigate all criminal matters. In addition, the police initiate the vast majority of all summary and indictable prosecutions in New Zealand. The current process is that the initial decisions relating to whether to prosecute and what charges to lay are made by the officer-in-charge of the case. If a decision is made to prosecute then the officer-in-charge will select the charge(s) and draft the information(s). These decisions will then be reviewed by a supervisor prior to the information(s) being filed in court. Ordinarily the officer-in-charge will not consult with a prosecutor before laying the initial charge(s) in court. This is largely for practical reasons given the sheer volume of cases processed by the Police and the need to lay charges promptly. However, if the matter that is being considered is a serious matter the decision as to charge is generally undertaken following consultation with the relevant Crown Solicitor. Indeed the practice in such serious cases would be for the police to ask the Crown Solicitor to visit the scene of the crime and review the evidence. In other cases consultation will not take place unless the police seek specific advice. The legal position is clear however; it is a matter for the police to decide on the initial charge.

After the laying of the initial charge(s), the case will be transferred to the PPS for a review of the decision to prosecute and the choice of charge(s). If the case is then to proceed by way of indictment, the Crown Solicitor will conduct a further review of these decisions after committal for trial.

At the first appearance in court, a police prosecutor will appear even in the most serious cases. In an appropriately serious category the file will then transfer to the Crown Solicitor or remain with the PPS.

Crown Solicitors do not therefore as a rule make the initial decisions about what charges should be laid in criminal cases; and they cannot discontinue proceedings except generally in open court, by either withdrawing charges or by not entering evidence. In most cases, Crown Solicitors first become involved after there has been a committal for trial. Trial commences at some point in time after that, depending upon court resources. In practical terms therefore, Crown Solicitors only get access to the case file some months or perhaps years after the initial police investigation and the laying of the original charge or charges.

As referred to above, in a small number of serious cases, Crown Solicitors provide advice to police at the investigatory stage on the legality of proposed police actions for instance. This reflects concerns around the need to protect human rights during police investigations. Nevertheless, advice from Crown prosecutors to police officers about the investigation proper, during the investigation itself, while available is rarely sought.

Following the investigation and receipt of the file, Crown Solicitors examine the case and will often communicate with the officer in charge of the police investigation requesting additional evidence. This means that such involvement by the Crown Solicitor may not take place until a significant time after the

completion of the investigation and only under pressure from the courts which are trying to progress trials.

Decisions for no further action are generally taken by the investigating officer but there are exceptions. Under the Solicitor General Guidelines, allegations of sexual violence must be reviewed by Crown Law or a Crown Solicitor. In addition, as a matter of practice, police would often seek such a review in other cases if they felt they were likely to be controversial.

Following the passage of the Criminal Procedure Act in 2011 the responsibility of the Solicitor-General for all public prosecutions was put on a statutory footing. One of the central ways in which s/he exercises that responsibility is through the production of prosecution guidelines, the latest iteration which was published in 2013. These are binding on all those involved in public prosecutions including the PPS.

Other prosecution agencies

In addition to the Crown Solicitors, the Serious Fraud Prosecutors Panel was established by Section 48 of the Serious Fraud Office Act 1990. This section requires the SFO to use Panel members for all of its proceedings relating to serious or complex fraud. This includes the conduct of all prosecutions initiated by the SFO, which are all indictable. The Panel members are appointed by the Solicitor-General after consultation with the Director of the SFO. They are all senior lawyers, many of whom are Crown Solicitors and/or have experience in commercial law and civil proceedings.

Victims

In all serious crimes a victim liaison officer will be appointed by the police.

In terms of the prosecution system, victims have been given extensive rights to information and consultation under the Victims' Rights Act 2002. Whether decisions to reduce charges or discontinue the case are taken by the PPS or the Crown Solicitor the victim is consulted and informed. Reasons will also be provided. If the case is diverted the victim will also be informed and consulted.

However, the decision as to reducing or discontinuing the charge or diverting the case remains for the prosecutor alone following consultation with the victim.

New Zealand also has a free nationwide victim support counselling service for victims of crime. There is also a system of victims' advisers at court venues to provide assistance to victims.

There is also an office of Chief Victims Adviser in New Zealand which was established in 2015.

The police must also inform victims of the outcome of certain court hearings and bail applications.

Impact Assessment

There is little or no evidence of any impact of the current prosecution arrangements on human rights or equality. There is a concern about systemic bias on the part of the police within the criminal justice system to Maori citizens but this is being addressed within the justice sector as a whole rather than through a prosecutorial prism. There is no *evidence* available of any differential impact at the prosecutorial level. In addition there is no data to suggest any differential impact as between PPS and

Crown Solicitor decisions. It was acknowledged that this may well be because of a lack of data as opposed to there being no issue.¹⁵⁹

Diversion

There are a range of diversions which can be undertaken by the police themselves with no reference to the PPS or Crown Solicitor although discussions often take place. These are a decision not to take any further action (with the exception of sexual offences – see above); the issuing of a verbal warning with no record; the issuing of a verbal warning with a record; a formal warning; or a referral to a community justice/restorative just panel which seeks a therapeutic outcome to a case. All of these are pre-charge disposals.

Post-charge, the PPS can refer cases to young adult (25 and under) courts which, if the defendant admits guilt, can outline a plan for the defendant to engage in risk reduction/therapeutic activity within a certain timeframe. If the defendant completes the plan, the charge is then formally withdrawn.

Bail

Bail hearings are dealt with either by PPS prosecutors or Crown Solicitors depending on the nature of the charge and the level of court where the hearing is being held. Police would generally be consulted about their view but the attitude taken in court is for the relevant prosecutor.

There is a concern about high rates of remand prisoners in New Zealand. Approximately 3000 of a prison population of just over 8000 are remand prisoners.

Reform and Reflection

There was an extensive Review of Public Prosecution Services in New Zealand in 2011 but it did not recommend any fundamental change to the arrangements.¹⁶⁰ A model similar to that which was in place in England and Wales with the Crown Prosecution Service (CPS) was considered but rejected. The report did highlight the continued absence of a central decision-making process which the report author suggested underscored the importance of comprehensive guidelines. That then led to the 2011 Criminal Procedure Act referred to above and the codification of the responsibility of the Solicitor-General for all public prosecutions. In turn that led to the revised 2013 version of the Solicitor General's Prosecution Guidelines which set out consistent standards for the conduct of all public prosecutions including those undertaken by the PPS.

There is still some concern at the continued practice of police prosecutions by the PPS with one commentator noting that while Crown Solicitors are independent of the police, prosecution by police prosecutors cannot be regarded as truly objective.¹⁶¹ However there appeared, insofar as we were able to detect, widespread satisfaction with the role of the PPS. Despite it being formally part of the police, it had successfully inculcated a separate independent culture which appears to have gone some way to address any serious concerns as to its independence. Part of this at least stems from it being subject

¹⁵⁹ New Zealand interviewee.

¹⁶⁰ <https://www.crownlaw.govt.nz/assets/Uploads/Reports/prosecution-review-2011.pdf>

¹⁶¹ N Stone, Improving New Zealand's Prosecution System: a practical reform proposal to avoid miscarriages of justice <http://www8.austlii.edu.au/nz/journals/WkoLawRw/2012/4.pdf>

as well as the Crown Solicitors to the 2013 Solicitor General Prosecution Guidelines, as referred to above. Indeed the current head of the PPS described the Guidelines in interview as their “foundational document”¹⁶² and the office reports to the Solicitor General’s office on the conduct of its prosecutions while reporting to the police on other matters including HR. There is no legislative basis for the office but, according to those interviewees we spoke to, the PPS are regarded as being zealous of their independence of their police colleagues. They are encouraged to exercise independent judgment with regards to decisions as to appropriate charging and bail. Their training emphasises that they are officers of the court first and police employees second. However, they are generally located in police stations separate from but close to investigative colleagues.

Training was identified as one of the critical ways in which concerns around both independence and professionalism were addressed in the PPS. Training courses are run on a national basis to ensure consistency and the courses are so well regarded that other government legal agencies have asked for their staff to be permitted to attend.¹⁶³ Judges and defence practitioners contribute to the training.

PPS prosecutors also attend advocacy courses similar to those undertaken by those wishing to qualify as lawyers in New Zealand. This is to ensure they are as well prepared for the presentation of cases in court as their defence colleagues.

The PPS is viewed as offering a career structure within but separate from the police. Generally prosecutors stay within the PPS. According to interviews we conducted, deployment of PPS prosecutors is done with regards to experience rather than the professional background of the prosecutors involved (police or legal).

It was reported to us that surveys of judges which are undertaken each year report positively about the performance of the PPS and that defence practitioners are also generally content with the professionalism and competence of PPS prosecutors.

When the Spencer review reported in 2011, following its review of Public Prosecution Services, it examined the PPS model and compared it to other options. It concluded that not only did the PPS provide a high quality professional service, it did so in a cost efficient way. This latter point was reinforced to us at interview.

The PPS, in addition to its annual budget, also has a discretionary budget which allows it to seek advice or representation from a Crown Solicitor in a case of particular complexity of where a police officer is being prosecuted. The PPS would not undertake such a prosecution.

¹⁶² Interview with Head of PPS.

¹⁶³ New Zealand interviewee.

SCOTLAND

Background

The distinct nature of the Scottish legal system is reflected in the historic office of Procurator Fiscal which dates back to the Middle Ages. The statutory Procurator Fiscal Service was created by the Sheriff Courts and Legal Officers (Scotland) Act in 1927. From that point Procurators Fiscal were deemed to be employed by the civil service and had to be legally qualified. They were also placed under the control of the Lord Advocate. In 1945 the office of the Crown Office and Procurator Fiscal Service (COPFS) was created. That office was and is responsible for making decisions about and bringing prosecutions in almost all criminal cases in Scotland.

The Lord Advocate is head of the system of criminal prosecution (and investigation of deaths) in Scotland, and is assisted in his work by the Solicitor General for Scotland. Together, they are referred to as the Scottish Law Officers. In the context of the devolution arrangements in 1998, section 44(1) of the Scotland Act 1998 provides that both the Lord Advocate and Solicitor General for Scotland shall be members of the Scottish Government. The range of roles performed by the Scottish Law Officers requires them to be free from political interference and independent in taking decisions about criminal prosecutions, but also to act as legal advisers to the Scottish Government. The Scotland Act 1998 seeks to protect the independence of the Scottish Law Officers in various ways, including providing that any decision made by the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths is taken independently of any other person (and thus not subject to normal rules on collective ministerial decisions) and providing that an Act of the Scottish Parliament cannot remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths.

Present Prosecution Arrangements

Under the direction of the Lord Advocate, the COPFS is Scotland's prosecution service, with responsibility for the prosecution of crime (including decisions on whether criminal prosecution is appropriate in individual cases), the investigation of sudden, suspicious or unexplained deaths and the investigation of complaints of criminal conduct by police officers in the course of their duties.

The Crown Agent is the head of legal staff in the COPFS and also the principal legal adviser to the Lord Advocate on prosecution matters. Prosecution cases are undertaken by lawyers based at the Crown Office in Edinburgh and a network of local procurator fiscal offices across Scotland.

In the Crown Office, advocate deputes make decisions about proceedings in serious cases, advise on complex and sensitive matters, prosecute cases in the High Court and appear for the Crown in criminal appeals (in both the High Court and Sheriff Appeal Court). Although advocate deputes have traditionally been experienced practising members of the Faculty of Advocates, solicitor advocates and procurators fiscal are also eligible for appointment. Advocate deputes provide advice on whether there should be proceedings on indictment (i.e. under solemn criminal procedure) in both the Sheriff (intermediate) courts and the High Court. The High Court deals with a tiny percentage of cases – just 0.6% in 2015/16. 5% of cases in the same year were dealt with on indictment in the Sheriff Court while 59% were dealt with at the Sheriff Court summarily. The Justice of the Peace (lower) court dealt with 35% of cases.

In the local Procurator Fiscal offices, procurators fiscal and procurator fiscal deputies (both legally qualified civil servants) are responsible for decisions on whether to prosecute (subject to the role of advocate deputies in relation to serious cases) and for prosecuting cases in the sheriff and justice of the peace (intermediate and lower) courts.

It is for COPFS to decide whether to prosecute, what charges should be brought, and in which court any prosecution should take place. The police will include draft charges in the report to the Procurator but it is for the independent prosecution service to determine the charges are properly drafted and related to the evidence submitted.

As indicated above, it is also for the procurator fiscal to decide whether to prosecute under summary or solemn procedure. Where a procurator fiscal considers that a case may be sufficiently serious for prosecution under solemn procedure (i.e. before a sheriff and jury or in the High Court), the fiscal sends a report to Crown Office, where Crown Counsel will decide the procedure to be used and the appropriate court. Certain very serious crimes, including murder and rape, must be prosecuted in the High Court.

Unlike in other UK jurisdictions, the Procurator Fiscal does have an investigative role and can direct the police in relation to their investigation. This is in part a reflection of the historic role of Procurators Fiscal. The police in Scotland are under a statutory obligation to comply with instructions given by a prosecutor in relation to the investigation of crime.¹⁶⁴ While directions are in practice rarely issued, the power still exists and Procurators Fiscal do tend to direct investigations in more serious cases where the Procurator Fiscal and the police work closely together. In the significant majority of less serious cases police are left to investigate without direction from the Procurator.

In addition to the power to direct investigations, the Procurator Fiscal has the power to apply for warrants for searches or arrests from the courts. In addition in serious cases where the Procurator Fiscal has reasonable suspicion that a suspect has committed a crime s/he may place the accused before the court on an initial charge or “petition”. A petition can also be applied for when an accused is not in custody in order to bring the person before the courts. The petition allows the Procurator Fiscal to require any person to attend for an interview so that a precognition can take place. Failure to attend is a criminal offence.

Decisions not to prosecute are also taken by the Procurator Fiscal although these are in relation to cases which have been submitted in reports to the Procurator Fiscal by the police. The decision to take no proceedings will be appropriate where there is insufficient evidence or where it is not in the public interest to take action. It was stressed to us that the police do not have the power to decide not to prosecute in a particular case.¹⁶⁵ Such a decision is for the Procurator alone. However, it appears a distinction is drawn between a prosecutorial decision and a decision by the police not to submit a file. The police enjoy a wide discretion to deal with minor crimes as they see fit without recourse to the Procurator. In addition if the police are of the view that there is insufficient evidence to justify a report to the Procurator that is their prerogative. The Procurator will only then get involved if a complaint is subsequently received from for example a victim of a crime and the Procurator may then direct the police to provide a report and may also direct further steps to be taken. In reality however, in serious or controversial cases, the police will regularly consult with the Procurator in cases where they have a

¹⁶⁴ Section 17(3) Police and Fire Reform (Scotland) Act 2012.

¹⁶⁵ Scottish interviewee.

concern about the sufficiency of the evidence and further investigative steps may be directed by the Procurator.

There appears to be little tension between the police and the prosecutor in terms of their roles perhaps unlike some of the other jurisdictions we examined. One of the reasons suggested for this to us¹⁶⁶ was that, given the historic nature of the office of Procurator Fiscal, the more modern creation of a police service had adapted to that office as it developed. There is now and always has been a very clear distinction between the police and the prosecutor in terms of their respective roles. While the police are responsible for the investigation of crime they discharge that role subject to the direction of the Procurator and are comfortable with that relationship. While, as mentioned above, the power of direction to compel the police to do something they do not agree with in terms of an investigation is rarely used, its long-standing existence appears to have set the tone for the relationship between the two agencies.

Diversion and Marking

A range of diversionary options exist and can be utilised by the Procurator Fiscal. These include warnings and fines. Fines can be used in any case which could be tried in a District Court or in relation to a range of road traffic offences. In addition and in appropriate cases, the Procurator Fiscal could divert accused persons from the formal criminal justice system to a social worker, psychiatrist, psychologist or mediator for the purposes of treatment and/or support. Further diversionary options exist in relation to children accused of committing criminal offences.

When the procurators fiscal receive reports of crimes from the police and other relevant investigating agencies (and there are a wide range of such bodies in Scotland), COPFS allocates the report to a prosecutor for the process known as “marking”.

There are three main outcomes of the “marking” process. The fiscal may mark the case for no proceedings because it appears that no crime was in fact committed, there is insufficient evidence or s/he may determine it is otherwise not in the public interest to proceed. In 2015-16, no action was taken in around 26,400 (12%) of reported cases. An alternative to or diversion from prosecution can be considered as the most appropriate way to deal with the case. In 2015-16, around 44,100 cases were marked for fixed penalties or fiscal fines, 13,200 for warnings, and 13,500 for diversions of other types; for instance a social work programme intended to address the offending behaviour. Finally, the fiscal may accept the charge(s) set out in the police report and/or amend any police charge and mark the case for prosecution. In 2015-16, proceedings against some 116,800 people were instituted.¹⁶⁷

Bail

In recent years there has been a modification of the traditional Scottish system whereby police had little discretion around releasing a suspect without reference to the Procurator Fiscal. There was a concern that too many suspects were being remanded in custody. Now, the police can decide to release a suspect if the suspect undertakes to appear at court on a given day not more than 28 days in the future. Even though the suspect is providing the undertaking this process is actually described as the police giving an undertaking to the suspect. It was stressed to us¹⁶⁸ that this process was not the equivalent

¹⁶⁶ Scottish interviewee.

¹⁶⁷ <https://www.gov.scot/publications/criminal-proceedings-scotland-2015-16/>

¹⁶⁸ Scottish interviewee.

of releasing a suspect while investigations continue. In these cases the police have decided to report the case to the Procurator but in the opinion of the police the suspect does not have to be held in custody before their first court appearance. The police can also attach conditions to the release of the suspect which remain in force until the court appearance.

In deciding whether to give an undertaking the police must comply with guidelines on this provided by the Lord Advocate on this topic.

When the suspect appears at court, the police will have provided a file to the Procurator who can decide at that point to change the conditions, to withdraw the case or to continue with the prosecution.

Bail decisions are ultimately of course a matter for the court including in cases where the suspect is brought to court directly by the police without having been released pending their first appearance. The attitude on the part of the prosecution to bail will be determined by the Procurator both at the first appearance and subsequently. It seems that the police will only be consulted with regards to matters including the views of the victims etc rather than being asked for their view on bail per se.

Victims

There are what are called VIA (Victim Information and Advice) staff in the Procurator's offices. They will be involved in certain identified cases due either to the seriousness of the charge or the vulnerability of the victim. An individual prosecutor may also call upon VIA staff if there is a concern in a particular case.

There is however no single point of contact for victims across the criminal justice system.

There is also statutory provision¹⁶⁹ for review of prosecutorial decisions in certain cases and the provision of reasons for decisions not to proceed with a prosecution.

Victim Support Scotland have a presence at court venues across Scotland and the Scottish Court Service also has a witness service which provides assistance to all witnesses including victims.

Impact Assessment

It was not possible to identify the impact of the current system on the protection or vindication of human rights. It was pointed out to us that Scotland has not gone through a significant reform of its prosecutorial arrangements and there was therefore nothing to compare the current system to in terms of its impact. It was also suggested that the absence of any apparent public discourse on the reform of the current system suggested a degree of public satisfaction with its operation.

In terms of equality data, while some information is gathered by Police Scotland, COPFS does not have any data on the cases it prosecutes in terms of ethnicity or other equality indicators.

Reform and Reflection

There are currently 36 procurator fiscal offices spread across the country. In 2012, procurator fiscal offices were grouped into three regional federations (East, North and West). This structure replaced

¹⁶⁹ Victims and Witnesses (Scotland) Act 2014.

previous arrangements based on 11 prosecutorial areas. The change supported a move to greater specialisation, with some procurators fiscal and their deputies focusing on particular areas of work.

COPFS is now divided into three functions:

Local Court – handling all summary and sheriff solemn cases. The function is managed nationally but delivered locally through a geographical structure based on the six sheriffdoms. Each of six sheriffdom business units is headed by a senior prosecutor who has responsibility for all cases prosecuted in justice of the peace and sheriff courts within that area. The Local Court function also includes a national case processing unit (based at two hubs in Stirling and Paisley) with responsibility for the initial decisions in relation to summary level crime reports

Serious casework – dealing with the preparation and presentation of High Court cases. Case preparation is dealt with by the High Court division in Crown Office and at four major case preparation locations (Edinburgh, Glasgow, Dundee and Aberdeen). The units within this division cover a broad range of work, including wildlife & environmental crime, international cooperation, serious & organised crime and the Scottish Fatalities Investigation Unit.

Operational support – deals with Business Services and Policy and Engagement.

There has been some criticism of COPFS in recent years regarding an over-centralisation of decision-making and therefore a loss of local autonomy.¹⁷⁰ This has been reflected in a central “marking” system. In particular there has been a view expressed that such a system has negatively impacted diversions from prosecution in that a lack of local knowledge sometimes meant opportunities for such referrals were being lost. The rationale for the trend towards centralisation has been to drive up standards and consistency of approach within the service. It has also at least in part reflected the nature of the crimes that prosecutors are now being asked to deal with. We were told that, in line with reports from most of the other jurisdictions, volume crime was decreasing as a part of the daily work of prosecutors due to diversion and other factors and increasingly time was being spent on the prosecution of serious sexual offences and complex economic crime. These latter matters were so complex that they demanded the creation of specialist teams of prosecutors who would have responsibility for these cases no matter where they arose in Scotland.

In addition the Justice Committee of the Scottish Parliament in a 2017 report on the role and purpose of COPFS expressed concern at the under-resourcing of the service and the delay or “churn” in the processing of criminal cases. This report and the concerns expressed led at least in part to a significant increase in resourcing for COPFS in recent years. The number of staff has risen from around 1600 to more than 2000 and the number of prosecutors from around 500 to around 700.¹⁷¹ This is in a country with a population of approximately 5.5 million, not significantly more than the population of the Republic of Ireland. It is also interesting to note that in terms of an overall staff complement, the latest figure for the CPS in England and Wales is a total of 5684, just a little more than three times the staff level of COPFS for a population more than ten times as large.

¹⁷⁰ https://archive2021.parliament.scot/S5_JusticeCommittee/Reports/JS052017R09Rev.pdf

¹⁷¹ Scottish interviewee.

COPFS is subject to inspection by the HM Inspectorate of Prosecution in Scotland which publishes regular reports on thematic matters but also inspection of particular local offices.

There has also been some public discourse in recent years on the position of the Lord Advocate. This arose in the context of the Alex Salmond case when questions arose as to the appropriateness of the Lord Advocate being both the chief prosecutor and a Scottish government minister. However, it appears that there is little public criticism of the current prosecutorial arrangements more generally and little appetite for significant change.

FINLAND

Background

In common with other European systems, Finland has a long tradition of public prosecution. However, there was also a practice whereby public prosecutors worked inside the police organisation in rural areas. Another feature of the Finnish system is that if the police decide not to investigate or the public prosecutor decides not to prosecute, victims or injured parties are able to bring a private prosecution themselves.

Until almost the end of the 20th century overall responsibility for prosecution in Finland was under the control of the Chancellor of Justice and crimes were prosecuted by two types of prosecutor: procurators fiscal or public prosecutors who worked in cities and old towns and police deputies who worked in rural areas and newish towns. The latter could be either lawyers or police officers. The rural police prosecutors were not considered properly independent as they were accountable to police chiefs and a consensus emerged that Finland should establish a completely independent and unified national prosecution authority. On 1 December 1996 the Finnish Prosecution Service was established within a system of jurisdictional district offices which consisted of 13 district prosecutor's offices, 60 district prosecution departments and the Prosecutor's Office of Åland. On 1 December 1997 the Office of the Prosecutor General was established to act as the central administrative body of the agency separate from the Ministry of Justice. The units of the Finnish Prosecution Service were reorganised into 16 joint authorities on 1 March 2003 and the Service was separated from the jurisdictional district offices (which were subsequently abolished) on 1 April 2007 and 15 local prosecutor's offices were established. Since then the number of prosecutor's offices dropped to 13 on 1 January 2011, to 11 on 1 January 2014 and on 1 October 2019 the offices merged to form a single nationwide agency called the National Prosecution Authority.¹⁷²

Present prosecution arrangements

Unlike common law systems where criminal investigations are entirely the responsibility of the police, in Finland criminal investigations are conducted by the police under the direction of the head investigator but the prosecutor also "participates" in the criminal investigation.¹⁷³ Public prosecutors do not direct investigations except where a police officer is a suspect in the offence in which case the public prosecutor serves as the head investigator.¹⁷⁴ But the police must comply with any request by the prosecutor to conduct an investigation.¹⁷⁵ When the police notify the prosecutor of an investigation, they must keep the prosecutor informed of the progress of the investigation.¹⁷⁶ The prosecutor may order the police to clarify matters relating to the investigation such as the suspected offence, the circumstances in which it was committed, the damage caused by it and the benefit obtained from it, the parties as well as other circumstances necessary for the consideration of prosecution and of the sanction to be imposed as a consequence of the offence.¹⁷⁷ In complex cases, the police will ask for a public

¹⁷² See Act on the National Prosecution Authority 32/2019.

¹⁷³ Criminal Investigation Act (805/2011), ch 1 s. 1(2).

¹⁷⁴ Criminal Investigation Act (805/2011), ch 1, ss. 1 and 2.

¹⁷⁵ Ibid ch 5, s 2

¹⁷⁶ Ibid ch 5, s 3(1).

¹⁷⁷ Ibid ch 5 s 2(1).

prosecutor to be nominated to the case. After the investigation is concluded, the case is transferred to the prosecutor unless there is no evidence against anyone (or the action does not constitute a crime).

The prosecutor makes the decision to prosecute in all cases other than very minor cases such as road traffic offences. In these latter cases the police have the power to impose a fine to be confirmed by the prosecutor. In certain cases (for example young persons who have used drugs) prosecutors may require offenders to meet in the prosecutor's office to try to impress on them the importance of not re-offending but there is no obligation on prosecutors to do this. The prosecutor decides whether charges should be brought to court or whether to issue a summary fine.¹⁷⁸ So-called "victim" or "complainant" offences (which are petty offences including minor assaults) in general need the consent of the victim to prosecute.

It is important to note that decisions to prosecute are not made collectively by the National Prosecuting Authority but individually by prosecutors within the Authority. Other prosecutors, no matter how senior, including the Prosecutor-General, cannot influence the decisions of individual prosecutors. If the Prosecutor General or the Deputy Prosecutor General wish to change the decision, they have to take over the case from the original prosecutor who took the decision.

Bail

Bail is not available in Finland. However, it should be noted that the Coercive Means of Investigation Act places tight restrictions on the use and length of custody. During the course of an investigation, the prosecutor should be notified where the police are seeking coercive measures including whether to seek the remand of a suspect or to institute a travel ban.¹⁷⁹ When the investigation is finished, the prosecutor decides whether any further criminal investigation measures are necessary such as questioning or whether to request remand or institute a travel ban.¹⁸⁰

Diversion

The number of cases disposed of by mediation has increased in Finland since the 1980s. Mediation is primarily, but not solely, used in the case of juvenile offenders. The police or prosecutor make decisions as to whether mediation is appropriate and the police also have the power to caution offenders for minor offences.

Support for victims

The police and prosecutors play a supporting role for victims. The police must inform victims of their right to be afforded legal assistance or other support. The Ministry of Justice has entrusted Victim Support Finland with a public service obligation to provide and produce public support services for victims of crime under the EU Victims' Rights Directive from 2018 to 2027. These services are intended for all victims of crime and their families. Generally, it is the police rather than prosecutors who have to keep victims informed about the progress of their cases. Prosecutors do not meet with victims and witnesses directly but they take part in special measures for taking evidence from vulnerable victims, for

¹⁷⁸ Criminal Investigation Act (805/2011), ch 10 s. 2(1).

¹⁷⁹ Coercive Measures Act (806/2011) ch 3 s 2; ch 5 . 4.

¹⁸⁰ Criminal Investigation Act (805/2011), ch 5. s 2(2). Coercive Measures Act (806/2011) Ch 5. S.2(2), s 4(1).

example, pre-trial recordings of children's evidence. Prosecutors may also present claims for compensation to the court on behalf of victims. They have a duty to inform victims of decisions not to prosecute and to give reasons for their decisions. Victims may file a complaint to the Office of the Prosecutor General, who then decides whether there should be a charge and, if so, assigns a different prosecutor to prosecute it. If the prosecutor decides not to prosecute, victims may bring charges themselves and in some cases (for example, victims of serious violent crime or sexual crime) they will be granted free legal aid.¹⁸¹

Impact assessment

Information is not collected on whether prosecution decisions have a differential impact on certain categories of persons and there is no duty on prosecutors to monitor the impact of decisions in terms of human rights and equality. We were told that there is quite a high degree of public confidence in the independence and impartiality of the prosecution system.¹⁸²

There is no independent inspection system. However, state prosecutors in the Office of the Prosecutor General are given the task of evaluating how certain types of cases have been handled.

Reform and Reflection

The most significant reform of the Finnish prosecution service were the changes in 1996 and 1997 to create one unified prosecution service and a new position of Prosecutor General. As mentioned above, the trigger for change was the need to create a service that was truly independent of the police. We were told that it seemed to be driven internationally rather than by any public concern about the system within Finland.¹⁸³ It is no accident that the changes came at a time when international standards for prosecutors were being promulgated which emphasised the importance of prosecutorial independence.

The most recent organisational changes culminating in the 2019 Act on the National Prosecution Authority have been prompted by the need to streamline the system and create greater efficiency. The new National Prosecution Authority consists of the Office of the Prosecutor General as its central administrative unit and five Prosecution Districts: Northern Finland, Eastern Finland, Southern Finland, Western Finland and Åland.¹⁸⁴ At the centre of the organisation are the Prosecutor-General, the Deputy Prosecutor-General and state prosecutors who occasionally may prosecute cases pursued by the Office of the Prosecutor General (for example, in high profile cases) and who prepare cases for the Prosecutor-General where complaints have been made about a prosecutor's decision. Each district is led by a Chief District Prosecutors and in each district there are District Prosecutors, Specialised District Prosecutors, Senior Specialised Prosecutors and Junior Prosecutors. The new system is designed to improve the standard of prosecutors' work and allow for more flexible use of resources.

A new nationwide system of Senior Specialised Prosecutors who specialise in one of the three broad areas of financial crime, crimes against persons and safety and security in general has been introduced

¹⁸¹ See Criminal Procedure Act 689/1997 ch 1, s 14.

¹⁸² Interview with State Prosecutor.

¹⁸³ Ibid.

¹⁸⁴ See <https://syyttajalaitos.fi/en/the-national-prosecution-authority>

to ensure greater cooperation across the agency in complex cases. Senior Specialised Prosecutors are based in specific Prosecution Districts, but they prosecute the most complex cases relating to their respective areas of expertise regardless of where they are based. Support functions have been centralised and plans have been drawn up for the development of a training system that promotes specialisation.

As mentioned above, there is generally a quite high degree of public confidence in the independence of the prosecution system. The budget for the National Prosecution Authority comes from the Ministry of Justice but the Ministry plays no role in making or superintending prosecution decisions. There is presently some debate as to whether there should be a guarantee in the Constitution which would safeguard the independence of the judiciary and the new National Prosecution Authority. This debate was prompted by some recent worrying examples of state interference with these bodies in some member states of the EU. A constitutional guarantee would help to ensure that this never happens in Finland.

CONCLUSION

The six jurisdictions discussed above reflect the spectrum of differing models of police involvement in prosecution discussed in our introductory remarks. It is of note that most of the jurisdictions, with the possible exceptions of Scotland and New Zealand, have seen reform in their prosecution arrangements in the last few decades which, in our view, tends to reflect the drift in international practice towards an enhanced role for independent prosecution services mentioned in the introductory chapter and a dilution in the direct role of the police in prosecution, either by way of taking the decision to prosecute or the presentation of cases in court. However, it is also clear that most of the jurisdictions continue to grapple with finding the correct balance between the roles of the prosecutor and the police. It also seems that issues of effectiveness and efficiency have assumed almost as much importance as principled arguments on the need for independent review of charges and detached prosecutorial decision-making. Reviews and inquiries of prosecutorial performance (often conducted by specific prosecution or criminal justice inspectorates) are an increasingly regular feature of prosecution practice in all of the jurisdictions.

In reflecting on the six jurisdictions discussed, it seems to us that there are conceptually at least four distinct models:

The Australian model whereby police charge and summons; conduct summary prosecutions and the public prosecutor institutes or takes over prosecutions in serious cases. New Zealand (which also has the unusual practice of retaining private lawyers as public prosecutors) has arguably a more pronounced version of this model whereby police retain a considerable prosecution function in summary cases.

The CPS model in England/Wales whereby the police charge and summons in minor cases and the public prosecutor charges in serious cases. Public prosecutors review police decisions to prosecute in all but the most minor cases but police retain considerable prosecution function in terms of deciding which cases not to prosecute.

The PPS model in Northern Ireland whereby police bring the initial charge in a limited number of cases; all investigation files (including those recommending no prosecution) are sent to the public prosecutor office which also directs summonses and reviews all decisions to charge before the first court appearance. All decisions to prosecute or not prosecute have been effectively taken by the public prosecutors. Police have lost the prosecution function but retain the investigation function.

The Scottish/Finnish model whereby there is early public prosecutor 'participation' in some/many police investigations and public prosecutors summons and charge. Police are not involved in the prosecution function (except in the most minor of cases) and their investigation function is overseen and can in certain cases be directed by public prosecutors.

It will be recalled that the Commission on the Future of Policing in Ireland (COFPI) gave three reasons for recommending change to the model of prosecutions currently in place in the Republic of Ireland: the need for distance between police and prosecution reflecting practice elsewhere; a concern about the adequacy of the training of police prosecutors; and the impact on police resources. These were matters that featured in discussions in many of the six jurisdictions we considered. It seems clear from the research we have done and the models outlined above that there are a number of ways in which these concerns can be addressed. It will be a matter for others to determine what changes will be made in order to address these concerns in the context of the Republic of Ireland. In this chapter we reflect on

how these concerns have been addressed in other jurisdictions and on what lessons have been learned in making change. A number of themes emerged in the course of our research and interviews: the scale of change; independence; cost; diversion; planning; file quality; local expertise; impact; victims; and public confidence.

What is the appropriate scale of change?

It is perhaps unsurprising that the interface between police and prosecution in Northern Ireland has seen the most radical change in terms of the six jurisdictions we examined. It is the only one of the six that could be described as a “post-conflict” society and many of the issues that led to and sustained the conflict there related to concerns about the way in which justice, and particularly criminal justice, was administered. As discussed in the Northern Ireland chapter the process leading to the creation of the PPS arose directly from the Good Friday Agreement. There was a political imperative to deliver significant change in Northern Ireland and to support that change with adequate resources. As one Northern Ireland interviewee put it to us, “resources were not an issue”. To some extent that has remained the case in that there has not been any serious questioning at a political level of the continued strict demarcation between the police and PPS in terms of prosecutorial responsibility even as public finances have come under increasing pressure.

We note in this regard that the issues of concern highlighted in the COFPI report were not of the same character as those extant in Northern Ireland during the conflict there. This was also the case in the other jurisdictions we examined with the possible exception of England and Wales where there was in the years running up to the establishment of the CPS a general concern about the culture of policing and the police being “above the law”, as put to us by one interviewee. Although the momentum for change was slow to build up, the case for an independent prosecution service and for other reforms on the regulation of the police’s investigatory powers recommended by the Royal Commission on Criminal Procedure arose in response to “a whole series of scandals” that centred on “poor police practice”.¹⁸⁵ The need to respond to such a concern with root and branch reform measures does not seem to have been evident in Australia, New Zealand, Finland or Scotland and, while there have been a series of recent controversies in the Republic of Ireland regarding practice in relation to matters like the Youth Diversion Programme, the Homicide Review and more recently the cancellation of 999 calls, arguably these have not been of the same character as the concerns in England and Wales or Northern Ireland.

Independence

It is apparent from the discussion in the opening chapter and in the reflections of the COFPI report that there is an appropriate concern about ensuring a degree of independence between those investigating crime and those prosecuting, both in terms of prosecutorial decision-making and presenting cases in court. The PPS in Northern Ireland gives expression to this concern in its purest form but in each jurisdiction we examined, efforts had been made to find the appropriate balance between these two vital functions. In Scotland the historic primacy of the office of the Procurator over the police continues to be observed and appears to work well. Indeed one interviewee said the reason why Scotland did not have significant reform of its system was because it worked due to this clear delineation and acceptance of the two distinct roles of prosecutor and police. The need to have a clear demarcation of responsibility

¹⁸⁵ Peter Lewis, former Chief Executive Officer of the CPS, quoted in Rock, *Official History* 224.

between prosecutors and the police was a central theme in the Royal Commission's proposal for a new prosecution service in England and Wales and became known as the 'Philips' principle, named after its Chair. But the CPS were at first given powers merely to discontinue prosecutions begun by the police and while it was in time given statutory charging powers, large numbers of cases continue to be charged by the police with, however, a requirement now that all cases are reviewed by the CPS prior to the first court hearing.

The systems of police prosecution in Australia have met concerns around independence by giving the DPPs powers to take over prosecutions for any offence and by restructuring police forces so as to create more autonomy and separation between the investigative and prosecutorial arms of the police. The DPPs have powers to take over the prosecution of any offence instituted by the police and to direct that information in relation to offences they are considering taking over is furnished to them, although these powers are rarely exercised. Police prosecuting departments have also been professionalised by being provided with advocacy training and greater legal support. This has been taken to a new level in Victoria where clear paths of career progression tied to a "Grad Cert" in Police Prosecution have been in place for a number of years and increasing number of lawyers have been recruited into the Police Prosecutions Division from the Victorian government service, the ODDP and private practice.

When challenged as to how its system of police prosecution meets the concerns around independence, the answers we received in New Zealand were of significant interest perhaps especially as its system mirrored to some extent that which currently obtains in the Republic of Ireland. In New Zealand, a separate office of the police service, the Police Prosecution Service (PPS), fulfils many prosecutorial roles including decision-making and prosecution in court in summary cases and indictable cases up to committal. There were a number of features of this office which appeared to us to address concerns about independence while not requiring the creation of a new or significantly enhanced independent prosecution agency. Many of these were cultural rather than legal. It had among its ranks sworn police officers and externally recruited lawyers. Its prosecutors were split between these two backgrounds at a roughly 50-50 level. It had a sense of itself as a separate service and its employees were reminded that they were officers of the court first rather than employees of the police. It was subject to the Solicitor General's guidelines in the same way as prosecutorial colleagues in the more senior courts (Crown Law and Crown Solicitors). The Guidelines were considered a "foundational" document. It reported on prosecutorial matters to the Solicitor General.

It had also taken extensive steps to ensure that its prosecutors (whether police or legal) were properly trained (thereby addressing one of the issues raised by COFPI). Its prosecutors were trained to the same advocacy standard as those training to be lawyers and its training more generally was very well regarded. Judges and defence practitioners contributed to it.

The New Zealand experience appeared to us to represent perhaps the best of the various "hybrid" systems we examined in terms of defining and maintain a clear dichotomy between the investigative and prosecutorial arms of the police when measured against the COFPI concerns. It was also clearly felt to provide value for money and indeed this was one of the reasons why significant reform to the system, which was considered in a review in 2011, was not recommended.

It was also stressed to us both in New Zealand but also in other jurisdictions including, interestingly, Northern Ireland, that independence between agencies should not necessarily mean distance from each

other. The PPS in Northern Ireland and the PPS in New Zealand stressed that a close working relationship between the police and prosecution services was not a threat to independence but in fact had a positive impact on the quality of the work of both organisations, on delay in the system and in better preparation of files for court. This was also the view of the independent inspectorate in Northern Ireland.

A view reflected in the England and Wales chapter is that for too long the CPS maintained a physical distance from the police which impacted adversely on working relationships. Attempts have been made over the years to address this by means of duty prosecutors working in larger police stations and by specialist police and CPS teams working together in complex and sensitive cases. But as a recent inspection report on rape cases has found, there is still a tendency for a blame culture to develop when cases have to be dropped.

Cost

Cost figured as a salient issue in all the reforms that have been made to take prosecutions away from the police. There is little doubt that in terms of independent prosecutorial decision-making across all criminal cases, Northern Ireland does present a “Rolls Royce” model. However, as can be seen from the discussion in the Northern Ireland chapter, the resourcing in terms of money and personnel was significant. A similar departure in the context of the Republic of Ireland is likely to be at least as expensive if not more so. A basic comparator on the basis of population is possible although that would be in the context of a central DPP’s office taking over all prosecutorial responsibility including removing the State Solicitor system.

It is also important to remember that it is not simply a matter of enhancing or creating an independent office or infrastructure to take on the prosecution duties the police currently carry. Inherent in the creation of a new structure will be additional administrative and policy duties which will have to be resourced as well. That obligation may be lessened somewhat if what is eventually done is an enhancement of an existing office, the DPP, rather than the creation of a new service.

It seemed to us beyond contention that taking prosecutorial duties from police and awarding them to independent prosecution lawyers will be more expensive. We tried in each jurisdiction to tease out that issue to determine whether our assumption was correct and none of our interviewees demurred from that view. Indeed in New Zealand, one of the openly articulated reasons for not moving away from the police prosecution model in most cases following a review in 2011 was the value for money of the current system, albeit a system that was also thought to be operating well. Saving costs seemed to be a motivating factor behind the ‘CoPPS’ project in the Northern Territory to ‘civilianise’ summary prosecutions in the Darwin area. But while the police may have benefited financially from the reform, the DPP’s Office found that it had to take on increased administrative burdens which resulted in significant over-spends year on year.

It is noteworthy that although it has continued largely undisturbed since its inception in 2005, there is now even in Northern Ireland the beginning of a recognition that the current system is not sustainable in the longer term in terms of resources. Leadership in the PPS and the police, and inspections by CJINI, have begun to posit the idea that some classes of cases could be transferred back to the police. Discussions thus far have tended to focus on low level volume road traffic cases where guilty pleas are

anticipated or indicated and where there is little legal complexity and no victim considerations. The devolution of responsibility for such cases to the police is less likely in our view to compromise independence or bring into play equality of arms concerns given the relatively uncontroversial nature of these classes of cases.

Other jurisdictions have adopted various models of this “hybrid” approach to the allocation of prosecutorial responsibility. In England and Wales at various stages different classes of cases have been devolved to the police for prosecution. This approach has afforded a degree of flexibility over the years as the categories can be reduced or added to as appropriate, though where defendants indicate that they will contest such cases, the CPS will appear in court to prosecute them. The issuing of fixed penalty notices and the use of the single justice notice procedure introduced in 2015 whereby defendants have their cases dealt with out of court if they do not respond to notices asking them to submit a plea have resulted in large numbers of cases bypassing the CPS.¹⁸⁶ Such a procedure has proved controversial recently, however, in cases prosecuted under the Covid-19 regulations where a CPS review found that between March 2020 and February 2021 15% of people had been wrongly charged by the police.¹⁸⁷ While there is a strong argument on cost grounds for devolving low level cases on to the police, in our view care needs to be taken in drawing the line between these and more serious cases which should be reviewed by legally qualified prosecutors and there should be some independent prosecutorial over-view or audit of cases that are devolved to the police to ensure quality assurance.

Diversion

Another way in which the resources of independent prosecutors can be protected is through the increased use of diversion, a pattern we saw across many of the jurisdictions. Various forms of diversion were in use by both police and prosecutors at different levels. Similar vehicles are already in place in the Republic of Ireland. These include the Garda Adult Cautioning Scheme which involves a caution that is administered by a Garda Superintendent within a Garda station. The offender must agree to accept the caution in writing. As with other jurisdictions we examined, this option is only available for certain offences, including theft, disorderly conduct, and possession of cannabis.

Similarly to many of the jurisdictions we examined, Ireland also has an alternative to prosecution specifically designed for youth offenders in the Youth Diversion Programme. Established under the Children Act 2001, this programme is for offenders under the age of 18 and involves specially trained Gardaí (Juvenile Liaison Officers) keeping contact with young offenders and their teachers, parents, and guardians etc. The idea behind the Diversion Programme is to allow for young people who commit criminal offences or anti-social behaviour to be dealt with by means of a *caution* instead of the formal process of charge and prosecution for offences or an anti-social behaviour order. The programme allows for conferences to be held which can mediate between the child and the victim, if appropriate, and draw up an action plan for the child.

The various forms of diversion we encountered as ways of keeping relatively low level offenders away from the formal criminal justice system, seemed both inherently positive but also cost-effective. It has

¹⁸⁶ Estimates suggest that 400,000 people were prosecuted in this way between January and September 2020: see C Saksi, “Magistrates’ courts are in a state of disarray”, *Times*, 1 June 2021.

¹⁸⁷ Justice Select Committee, *Covid and the Criminal Law*, oral evidence, HC 1316, 20 April 2021.

been so successful in Northern Ireland that the PPS has not reached the envisaged number of cases planned for at its inception. Prosecutors, police and defence practitioners in Northern Ireland have all recognised a reduction in the numbers of cases being processed in the Magistrates' Courts in recent years. This is attributed in the main to increased use of diversion. In Northern Ireland and New Zealand prosecutors dip sample such cases to provide a safeguard against concerns of police misbehaviour. In England and Wales the DPP has issued Guidance to be followed by the police on the issue of adult and youth conditional cautions and the CPS plays a role in ensuring that the Ministry of Justice's guidelines on simple cautions are applied consistently by having to give consent for cautions in indictable-only cases and by referring to the police cases in which they consider a caution to be the appropriate disposal. Such safeguards appear to us to be essential as the use of diversion away from the formal system becomes more widespread.

Plan properly and with foresight

There are lessons to be learned from other jurisdictions on how reforms should be planned. In England and Wales the "big bang" approach taken to the establishment of the CPS was subsequently subject to much criticism. The areas that did not have prosecuting solicitors' departments in place such as London suffered particularly as new lawyers had to be recruited urgently at just the time when there was huge lawyer demand in the City for financial services. In the Australia chapter we documented how the lack of planning for the CoPPs project led to tensions between the DPP's Office and the police as there was considerable uncertainty over who would take over which responsibilities. These experiences point to the need for reforms to be carefully planned and piloted. Even where the changes were phased and well-resourced as in Northern Ireland, it appears that major pressure was put on the system in its early years with one interviewee describing it as "close to collapse". All interviewees accepted that the new system has contributed to significant delays in the processing of cases and, while efforts on the part of the PSNI, PPS and others have been made to address this, it has proven a difficult issue to resolve.

Another issue which arose in a number of jurisdictions was how to deploy the expensive resource of independent legally-qualified prosecutors efficiently and to most effect. Most of those we interviewed, whether prosecutors, police or independent inspectors, recognised that there was little merit in having prosecutors review or present in court high volume, straightforward cases where guilty pleas are anticipated. It was also a widely held view that whether through increased use of diversion or other factors such volume cases were in fact decreasing and the challenge for prosecutors in almost all jurisdictions now and in the future was likely to focus on how to deal with increasingly complex and sensitive criminal cases involving economic crime, often on a trans-national scale, and serious sexual crime. These resource-intensive cases benefited from the early and constant involvement of prosecutors and also demanded specialisation and close working relationships with the police. This apparent change in the nature of crime has already seen the creation of specialist units in almost all of the jurisdictions we examined. It seems to us that whatever new structures are adopted in the Republic of Ireland, they must take cognisance of the changing landscape of crime, investigation and prosecution.

File quality and local expertise/awareness

Problems with file quality and loss of local expertise/awareness have also been highlighted as likely consequences of removing prosecutorial duties from the police.

There is little doubt that file quality in Northern Ireland suffered when police officers no longer had to submit such files to a senior officer to present in court but to a separate independent office. This matter was also raised by interviewees in England and Wales where inspection reports have consistently raised poor file quality as a problem. Criminal Justice Units (CJUs) staffed by both the CPS and police were introduced on the recommendation of the Glidewell Review to improve file quality but in the absence of any powers of direction, they ultimately depended on the goodwill of investigating officers to obtain more evidence. There appear to be at least three lessons to bear in mind in relation to this. The first is the need to ensure that in a hierarchical service such as the police, files going to a separate prosecution office are signed off by a senior officer to ensure timely submission of files and that they are adequately prepared for submission. The second is that if police targets are being developed in relation to the clearance of cases, these are not limited to the submission of a prosecution file but capture in some way timeliness and quality. A third lesson is that file quality is better when independent prosecutors are involved at an early stage in offering pre-charge advice as happens in certain serious cases when joint teams are involved.

A number of interviewees in various jurisdictions raised a concern about over-centralisation and a consequent loss of local knowledge of the judiciary and local legal fraternity and the concerns of the local community. As with many of the other matters addressed in this paper there were contrary views and it was acknowledged that in the context of Northern Ireland in particular perhaps some of those local links had been too close on occasion. Centralisation does allow for consistency and standard setting and can also afford some efficiencies of scale. One of the motivations for the re-organisation of prosecution services in Finland has been the need to introduce greater consistency and efficiency into prosecutors' work and to ensure that there is greater coordination across the agency in complex cases. While the concern about loss of local knowledge has also been expressed in Scotland, COPFS has continued to have a presence in local offices across Scotland and it is clear that centralisation has been a vital response to increasingly complex criminal investigations. The CPS has undergone a number of reorganisations which have in turn swung from aligning CPS areas with that of local police forces towards greater centralisation and fewer area units. The DPP's charging guidelines in England and Wales which apply to the police as well as CPS prosecutors have played a major role in helping to create greater consistency in decision making. To offset the danger of over-centralisation the CPS has developed an inclusion and community engagement strategy and holds regular national and local accountability meetings with various stakeholders to understand people's experiences of the CPS and improve policies.

While perhaps beyond the remit of this paper, it did occur to us that the introduction of the new Operating Model for An Garda Síochána may provide a template for any new prosecutorial structure in the service if such a structure were to be retained within the police. This may have the added benefit of fitting into a new state wide structure for the police but also being sufficiently devolved to allow for a development or retention of local knowledge while drawing on specialist knowledge from the centre.

Impact Assessment

While as a matter of principle there was little disagreement amongst interviewees with the preference for independent prosecutors, there was little evidence in any of the jurisdictions that the existence of such offices had a measurable impact on human rights or equality. The former is perhaps not surprising

as this is a difficult thing to measure and human rights breaches are more readily identifiable than protections. It remains our view and that of almost all of our interviewees that a system of independent prosecutors is more likely to protect human rights than not.

With regards to equality data, most jurisdictions did have some equality data collected by the police which suggested over-policing of certain communities in some instances. This is a pattern that seems to be echoed at least to some extent in Ireland according to a recent report from the Irish Human Rights and Equality Commission.¹⁸⁸ The most common response from interviewees was that appropriate data was simply not available in terms of prosecutorial decisions. Either it was not collected or the collection of such data was in its infancy. That is also our understanding of the current position in Ireland despite section 42 of the Human Rights and Equality Act having been in force since 2014. The only credible exception to this was in England and Wales where the CPS publish regular in-house and independent ethnic and gender impact assessments of its decision making. While prosecutors are inevitably downstream partners in the criminal process, the Lammy Review found that the CPS came out best of all criminal justice organisations in terms of equitable decision making which suggests that independent prosecutors can have an ameliorative effect on disparities in the system.

While the CPS stands out as an outlier in terms of collecting and monitoring equality data, one trend that was noticeable across the jurisdictions we considered was the extent to which there is an increasing emphasis on auditing decisions to ensure that there has been compliance with policy. Whether this kind of quality assurance is conducted internally within the organisation, or externally through independent inspectorates, or both, it is an important development in ensuring greater consistency and accountability of decision making.

Victims

In each of the jurisdictions that we examined, considerable effort has been spent in recent years providing additional information and rights for victims as they interact with the criminal justice system as a whole and the police and prosecution agencies in particular. Victims' Rights Acts have proliferated across the Australian states and territories. In the European jurisdictions we examined (including pre-Brexit England/Wales and Scotland) the rights of victims were given statutory expression by legislation following the Victims Directive.¹⁸⁹ In Ireland this legislation took the form of the Criminal Justice (Victims of Crime) Act 2017. This also gives victims the right to be informed of any decision not to prosecute, the reasons for this decision and the right to request a review of the evidence and files that were used to reach this decision. Prosecutors in Ireland are also obliged to have due regard to the rights of victims under Article 10 of the Victims Directive to be heard during and at the conclusion of the criminal process and that "all available relevant evidence and appropriate submissions concerning the impact of the offence on the victim" is presented before the court.¹⁹⁰

Developments in Ireland are in many respects similar to what is happening elsewhere. As with most prosecution agencies we examined, the DPP in Ireland has a Victims Liaison Unit in its Prosecution Support Services Division, the aim of which is to provide victims with all of the information they need

¹⁸⁸ <https://www.ihrec.ie/app/uploads/2021/09/Developing-a-National-Action-Plan-Against-Racism-IHREC-Submission-to-the-Anti-Racism-Committee.pdf>

¹⁸⁹ Directive 2012/29/EU, the Victims Directive. See Code of Practice for England and Wales presented to Parliament under the Domestic Violence and Victims Act 2014; Victims' Code for Scotland 2018.

¹⁹⁰ Guidelines for Prosecutors, (5th edn), December 2019.

when a decision is made to prosecute or not to prosecute. Importantly, if a decision is made not to prosecute, the Unit will be able to inform the victim of the reasons why, following written request, and arrange for any appeals or reviews to the decision to be carried out. It was noticeable how many prosecution systems now give victims reasons for decisions not to prosecute, at least in more serious cases, and a right of review of such decisions. Certainly in many common law countries this is a relatively recent development and in Northern Ireland at least this only came about following adverse comment from the European Court of Human Rights.¹⁹¹

The Victims Liaison Unit in Ireland also trains both State solicitors and the Gardaí on issues affecting victims. Pre-trial meetings for the victim to meet with a prosecution lawyer are often held. This allows the victim to learn about their role within the criminal justice system and gives them the opportunity to learn what will happen in court. This again mirrors evolving practice elsewhere.

An important aspect of the protection of victims' rights is as referenced above the provision of reasons when a decision is taken not to prosecute by the prosecutor. However, there is of course an earlier stage than that when many cases do not progress to be considered by a prosecutor because police do not consider there is sufficient evidence to warrant further action. It seems to us that some means of independent review of such cases is an important practical safeguard for victims' rights and the concern about this gap in protection was recognised in several of the jurisdictions we examined. The recent *End to End Rape Review* in England and Wales found that the decrease in the number of police referrals to the CPS was a reason for the sharp decline in rape prosecutions. In Northern Ireland this concern is addressed through a review of every file but it may be that it could be addressed elsewhere through the sampling of such files by an independent prosecutor or by an independent inspectorate.

Public Confidence

Such data as we found or were pointed to in terms of public surveys tended towards support for and satisfaction with independent prosecution offices. According to the findings of the Northern Ireland Life and Times Survey published in June this year, more than two thirds of survey respondents have confidence that the PPS provides a fair and impartial prosecution service to the people of Northern Ireland. 70.3% of those questioned said they were either very or fairly confident in the fairness and impartiality of the PPS. This was a 6.3 percentage point decrease upon 2019 (76.6%) but similar to the 2018 figure (68.7%). Those surveyed were also asked about the independence of the PPS. Around seven-tenths of all respondents (69.1%) stated that they were confident that the PPS was independent of police, government or any other body. This was the same as in 2019 (69.1%) and a 4.3 percentage point increase on 2018 (64.8%).

Crime surveys from England and Wales have shown increasing levels of public confidence in terms of the CPS's effectiveness in prosecuting people accused of committing crime (up from 47% in 2008-9 to 62% in 2017-18) which are well above the figures on whether the criminal justice system is effective as a whole (up 38% to 53% over the same period).¹⁹² The survey does not include questions on the fairness and impartiality of the CPS or other criminal justice organisations. Overall levels of satisfaction with the fairness of the criminal justice system as a whole have increased over the same period (up from 58% to 69%). However, the Lammy Review found that the criminal justice system had a "trust deficit" in

¹⁹¹ *McKerr v. United Kingdom* (Application no. 28883/95), 4 May 2001.

¹⁹² *Crime Survey for England and Wales- Report and Data Tables* (2021).

many BAME communities which extended across the courts and prisons and the latest Crime Survey figures show declining levels of confidence in the local police among black people (70% to 64% over the period 2013 /4 to 2019/20).

It would be unwise to draw any hard and fast conclusions on what these data mean for the CPS whose visibility is low amongst the public. But harking back again to the Lammy Review it would seem that the CPS has enjoyed higher levels of confidence than other criminal justice organisations. Whilst it is difficult to know what the precise reasons for this are, the value added of having legally trained individuals make prosecution decisions is likely to be a contributory factor.

We began this paper by noting the significance that has been attached over the last three decades to having legally trained professionals make prosecution decisions. In the course of our research, however, we saw that various models can be adopted to ensure that prosecution decisions are taken fairly and competently, of which having a completely independent prosecution service take all prosecution decisions is only one. There is no “one size fits all” solution that is appropriate for all systems or indeed for all categories of offences. Prosecution systems have to be flexible and to cater for different categories of offences that range considerably in seriousness and complexity. But the experience and benefit of independent legal oversight is one that seems to have been increasingly accepted across all the jurisdictions that we considered.

20th September 2021

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Appendix V : Glossary

Abbreviations used:

AGS: An Garda Síochána

CCTS: Criminal Case Tracking System - District Courts database

CDMFT: Case and Document Management - DPP database

CJS: Criminal Justice System

CJU: Criminal Justice Unit

DC: District Court

DoJ: Department of Justice

DPP: Director of Public Prosecutions

FTE: Full Time Equivalent

ICCS: Irish Crime Classification System

ODPP: Office of the Director of Public Prosecutions

RDA: Research & Data Analytics unit, Department of Justice

