A Review of the decision by the Public Prosecution Service in October 2011 not to prosecute Mr Gerry Adams TD

By the Attorney General for Northern Ireland
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1. Introduction

1.1 On October 7 2013 the Director of Public Prosecutions, Mr Barra McGrory QC, 'the DPP', announced that he had asked the Attorney General for Northern Ireland to review the decision by the Public Prosecution Service, 'PPS', in October 2011 not to prosecute Mr Gerry Adams TD. The DPP recognised the considerable public interest surrounding the PPS decision of October 2011, expressed "confidence in the evidential decision taken prior to his appointment", and indicated that the Attorney General "will be given full access to all materials that he considers necessary in order to complete this review".

1.2 Later on October 7 2013 my office announced that I had agreed to "review the PPS handling of the file relating to Gerry Adams TD" following the request from the DPP. In the announcement it was indicated that I expected to complete the review within two weeks from the date on which all relevant material had been received.

1.3 In a letter of October 8 2013 the DPP confirmed that all relevant materials would be furnished to me as soon as possible. The DPP further indicated that members of staff involved in the decision of October 2011 would make themselves available for discussion if I wished to speak to them.
1.4 On October 10 2013 under cover of a letter bearing that date from the Senior Assistant Director I received a file of papers relating to the decision not to prosecute Gerry Adams. These papers (with the exception of a transcript of Gerry Adams’s evidence given at Belfast Crown Court on April 22 2013) formed part of, and had been helpfully extracted from, the larger PPS file relating to Liam Adams. Later on October 10 2013 I received the full PPS file relating to Liam Adams.

1.5 Following queries raised by colleagues on my behalf I received PPS File 648247/2012 and the Crown Room file relating to the prosecution of Liam Adams – both on October 14 2013. PPS File 648247/2012 is an example of the PPS approach to a possible prosecution under section 5 of the Criminal Law Act (Northern Ireland) 1967 in the context of an allegation of rape. The Crown Room file consisted of the papers relating to, and arising from, the two sets of Crown Court proceedings against Liam Adams.

1.6 On 23 October, I caused further enquiries to be made of the PPS in relation to one statement contained in the PPS Crown Room file. A reply was received on 28 October 2013. The PPS response led me to seek further material from the PPS on 4 November. The material sought was provided to my office on 6 November 2013.

1.7 While in private practice as a solicitor, the DPP had advised Gerry Adams on matters relating to the allegations against Liam Adams. Very properly, the DPP took no part in the proceedings against Liam Adams other than to the very minor extent noted or discussed in paragraphs 4.49 – 4.50 and 6.42 – 6.44 below. I wish to thank the DPP and his colleagues who have given me all necessary assistance in making materials available and responding to requests for information.
2. Scope of this review

2.1 In this review it is not my function to consider whether or not Mr Gerry Adams TD should be prosecuted for the offence of withholding information under section 5 of the Criminal Law Act (Northern Ireland) 1967 or whether or not he should have been prosecuted for this offence. The effect of section 41 of the Justice (Northern Ireland) Act 2002 is that the Attorney General for Northern Ireland no longer has any role in the initiation of public prosecutions.

2.2 This is a non-statutory review of the process of decision-making within the PPS that culminated in a decision taken on or about October 27 2011 that Mr Gerry Adams TD should not be prosecuted under section 5 of the Criminal Law Act (Northern Ireland) 1967. In this review I look at whether or not the PPS followed its own procedures, and whether or not its handling of the existing or potentially available evidence was satisfactory.

2.3 I begin this review by outlining the nature of the offence set out in section 5 of the Criminal Law Act (Northern Ireland) 1967 including its common law background. This is followed by a summary chronology of events, and a discussion of the effect of certain changes in legislation, after which I turn to an analysis of the materials provided to me, and my conclusions.

3. Section 5 of the Criminal Law Act (Northern Ireland) 1967

3.1 In its current form, section 5 of the Criminal Law Act (Northern Ireland) 1967 reads as follows:
“(1) Subject to the succeeding provisions of this section, where a person has committed a relevant offence, it shall be the duty of every other person, who knows or believes—

(a) that the offence or some other relevant offence has been committed; and

(b) that he has information which is likely to secure, or to be of material assistance in securing, the apprehension, prosecution or conviction of any person for that offence;

to give that information, within a reasonable time, to a constable and if, without reasonable excuse, he fails to do so he shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment according to the gravity of the offence about which he does not give that information, as follows:—

(i) if that offence is one for which the court is required by law to sentence an offender to death or to imprisonment for life or to detention during the pleasure of the Governor of Northern Ireland, he shall be liable to imprisonment for not more than ten years;

(ii) if it is one for which a person (of full age and capacity and not previously convicted) may be sentenced to imprisonment for a term of fourteen years, he shall be liable to imprisonment for not more than seven years;

(iii) if it is not one included above but is one for which a person (of full age and capacity and not previously convicted) may be sentenced to imprisonment for a term of ten years, he shall be liable to imprisonment for not more than five years;
(iv) in any other case, he shall be liable to imprisonment for not more than three years.

3.2 The offence of withholding information under section 5 of the Criminal Law Act (Northern Ireland) 1967 is a statutory successor to the common law offence of misprision of felony. As the editor of the last edition of Russell on Crime noted, the law of misprision of felony remained vague for some time as can be seen from Lord Westbury's confusion of misprision of felony with compounding of felony in Williams v Bayley (1866).

3.3 Following a lengthy period of doctrinal uncertainty, misprision of felony received extensive consideration by the House of Lords in the 1961 case of Sykes v DPP. In his speech Lord Denning identified four elements of the offence: (1) the accused must know that a felony has been committed by someone else; (2) as a result of his knowledge the accused was under a duty to disclose to proper authority all material facts known about the offence and will have breached that duty by concealing or keeping secret his knowledge without necessarily doing anything active; (3) failure to perform the duty when there is a reasonable opportunity to do so is a common law misdemeanour; and (4) the preceding three elements were subject to 'just limitation' and non-disclosure might be due to a claim of right made in good faith, giving as examples, lawyer and client, doctor and patient, clergyman and parishioner.

3.4 Sykes represented a fundamental restatement of the law on misprision of felony. Writing in 1964 JW Cecil Turner observed:

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3 [1962] AC 528
"The effects of this restatement of the offence of misprision of felony remain to be experienced. If it were seriously observed by shopkeepers alone, it can safely be estimated that the strain on the courts of summary jurisdiction in the large cities would be increased to breaking point."\textsuperscript{4}

3.5 The Criminal Law Revision Committee in its Seventh Report on Felonies and Misdemeanours (Cmd. 2659) recommended the abolition of the distinction between felonies and misdemeanours and considered it to be objectionable:

(a) that a person should be criminally liable for not reporting to the police any minor offence of which he might happen to know

(b) that dishonesty was not an element in the omission to give information; and

(c) that the offence of misprision of felony contained no clear limitations in relation to offences committed by near relatives.

The Committee recommended that the only case which needed to be provided for was one in which a person accepts or agrees to accept a consideration in exchange for not disclosing information to the authorities. The Criminal Law Act 1967 gave effect to these recommendations for England and Wales. It abolished the distinction between felonies and misdemeanours (section 1(1)) and provided that in all matters in which a distinction was formerly drawn between them the law and practice were to be assimilated to that formerly applicable to misdemeanours (s.1(2)). From the coming into force of the Criminal Law Act 1967, misprision of felony ceased to exist as an offence in English law.

\textsuperscript{4} JW Cecil Turner \textit{Russell on Crime} (12\textsuperscript{th} edition) (London, 1964) p. 171
3.6 In Northern Ireland the law on this matter is substantially different from the law in England and Wales. In Northern Ireland the old common law offence of misprision of felony now has statutory form. On the second reading of the Bill that would become the Criminal Law Act (Northern Ireland) 1967, in the Northern Ireland House of Commons, the Attorney General described the main purpose of the Bill as the abolition of the distinctions between felony and misdemeanour\(^5\). Speaking of Clause 5 (1) he said:

"Clause 5 (1) proposes to impose a duty on persons to give any information which they know or believe is likely to secure or to be of material assistance in securing the apprehension, prosecution or conviction of any other person for that offence. Any person who fails to discharge this duty would be liable to penalties according to the nature of the arrestable offence."\(^6\)

3.7 It should be emphasised that in England and Wales (unlike Northern Ireland) the Criminal Law Act 1967 does not contain any provision reproducing that element of misprision of felony that consists only of withholding information from the police. During the Committee Stage of the Criminal Law Bill in the House of Lords, resisting an amendment from Viscount Colville of Culross, Lord Stonham observed that,

"[w]hen the Criminal Law Revision Committee considered this, they thought there were not enough grounds to retain this [withholding information] as an offence. ... The Committee said there were obviously objections to making a person criminally liable for not

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\(^5\) Parliament of Northern Ireland Parliamentary Debates (Commons) Volume 65, column 1829 (March 8 1967).

\(^6\) ibid. column 1835
reporting to the police any minor offence of which he may happen to know, and with that view the Government agree?7.

It is not without significance that while (initially) wishing to amend the Criminal Law Bill to retain misprision of felony Viscount Colville at the same time expressed concern about the potential criminal liability of relatives that could arise from a broader obligation to report to police. His preferred solution to this difficulty was to entrust the decision on whether or not to prosecute to the (English) Director of Public Prosecutions?8. In any event, as noted in paragraph 3.5 above misprision of felony no longer exists as an offence in the law of England and Wales.

3.8 As originally enacted section 5 of the Criminal Law Act (Northern Ireland) 1967 used the phrase ‘arrestable offence.’ The term “arrestable offence” was defined by section 2(1) of the 1967 Act which, in its original form, provided as follows:

“The powers of summary arrest conferred by the following subsections shall apply to offences for which the court is required by law to sentence the offender to death or to imprisonment for life or to detention during the pleasure of the Governor of Northern Ireland, or for which a person (of full age and capacity and not previously convicted) may, under or by virtue of any enactment, be sentenced to imprisonment for a term of five years, and to attempts to commit any such offence; and in this Act, including any amendment made by this Act in any other enactment, “arrestable offence” means any such offence or attempt.”

3.9 From 1 January 1990, Schedule 6 of the Police and Criminal Evidence (NI) Order 1989, ‘the 1989 Order’, provided that the

7 Hansard HL Deb 24 November 1966.
8 Ibid.
term "arrestable offence" used in section 5 would have the meaning assigned to it by Article 26 of the 1989 Order. The effect of this amendment was that the range of offences to which section 5 was applicable was defined as: (a) those offences for which the sentence was fixed by law (e.g. murder), (b) for which a person of 21 years or over could be sentenced to a sentence of imprisonment for five years, or (c) a small number of offences specified in Article 26(2) of the 1989 Order.

3.10 Subsequently the phrase "arrestable offence" was replaced by the phrase 'relevant offence', that phrase being substituted by Paragraph 13 (2) of Schedule 1 to the Police and Criminal Evidence (Amendment) Order 2007 with effect from 1 March 2007. The definition of 'relevant offence' is supplied by Paragraph 13 (1) (b) of the same schedule and is (a) an offence for which the sentence is fixed by law or (b) an offence for which a person of 21 years or over may be sentenced to imprisonment for a term of five years (or might be so sentenced but for the restrictions imposed by Article 46(4) of the Magistrates' Courts (Northern Ireland) Order 1981).

3.11 The effect of the legislative changes described in paragraph 3.9 and 3.10 above can be summarised as follows. Any offence committed at a time when the maximum sentence applicable to that offence was less than five years (in the case of a person aged 21 years or over), was, at no time, either an "arrestable offence" or a "relevant offence" within the meaning of the 1967 Act, unless it was committed at a time when that offence was specifically included in Article 26(2) of the 1989 Order. In this regard it must be noted that the offence of committing an act of gross indecency with or towards a child contrary to section 22 of the Children and Young Persons Act 1861 was never so specified in Article 26(2).
3.12 Establishing whether or not a relevant offence or an arrestable offence has been committed is a pre-condition for liability under section 5 of the Criminal Law Act (Northern Ireland) 1967. In the unreported decision of the Court of Appeal in *R v Rock* (June 29 1990) Murray LJ observed:

"It is absolutely clear from the wording of this latter section [section 5 of the Criminal Law Act (Northern Ireland) 1967] that liability in any person can only arise if an arrestable offence has actually been committed by someone else."\(^9\)

3.13 PPS File 648247/2012 offers the example of a file in which three decisions not to prosecute were taken. These decisions turned in large measure on the difficulty in establishing that a relevant offence (rape) had been committed.

4. Chronology

4.1 **21 January 1987**
Mrs Sarah Adams and her daughter Áine attended at Grosvenor Road RUC Station. A written statement of complaint was taken from Áine Adams by D/Con Lowry. Áine was examined by Dr Jefferson at 19.15.
At that time Liam Adams was believed to be ordinarily resident in Donegal.

4.2 **23 January 1987**
A Child Abuse and Neglect Case Conference about Áine Adams was held with Police in attendance.

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\(^10\) Ibid at 54
11 February 1987
Sarah and Áine Adams attended at Grosvenor Road RUC station and Sarah Adams spoke with D/Con Lowry. Mrs Adams stated that she and Áine could not “stick the pressure” and were both moving to Scotland. Mrs Adams denied that there was any pressure from her husband’s family. Mrs Adams elaborated by saying the future pressure in the event of her husband’s arrest and trial meant that Áine could not “go ahead” with such proceedings. Mrs Adams was asked if she wished to withdraw the allegations against her husband to which she replied, “no.” She affirmed the truth of the allegations and stated that she still wished police to proceed to interview her husband regarding the allegations. She further stated that Áine would not be willing to attend court or to give evidence. Mrs Adams was asked if she wished to make a written statement to this effect but she refused to do so. There is no record of Áine having expressed any views at the meeting of 11 February.

March 1987
According to the statement of Gerry Adams dated 21 October 2009, Gerry Adams, along with Áine and her mother, confronted Liam Adams in Buncrana, Co. Donegal about his sexual abuse of Áine.

Circa March 1987
Liam Adams was believed to make regular trips to Derry. His details were circulated by police for the purposes of facilitating his arrest.

13 April 1987
The allegations against Liam Adams and the relevant evidence were discussed by senior police and the DPP. It was agreed that,
as matters then stood, there was insufficient evidence available to prosecute Liam Adams.

4.7 14 April 1987
A police investigation file was submitted to DPP with the recommendation that Liam Adams be prosecuted for the offence of incest.

4.8 8 May 1987
A written DPP communication issued to senior police stating that, given the state of the file, it was inappropriate that any direction should issue from the DPP.

4.9 12 May 1987
A letter was sent on behalf of the Chief Constable to the Sub- Divisional Commander affirming, inter alia, that, should Liam Adams be apprehended in Londonderry or elsewhere within Northern Ireland, he should be interviewed in connection with the incest allegations.

4.10 Remainder of 1987
No further relevant events took place during this time save that on 14 October 1987 it was confirmed that Liam Adams's details had been circulated via the Police Gazette.

4.11 1988-1990
Police kept matters periodically under review. In 1989 police believed that Liam Adams then resided in Dublin.

4.12 3 October 1989
The maximum sentence for indecent assault on a female contrary to section 52 of the Offences Against the Person Act 1861 was
increased from two years to ten years by Article 12 of The Treatment of Offenders (Northern Ireland) Order 1989.

4.13 1 January 1990
Article 26 and Schedule 6 of the Police and Criminal Evidence (NI) Order 1989 came into force. From this date the term “arrestable offence” in section 5 of the Criminal Law Act (Northern Ireland) 1967 has the meaning assigned to it by Article 26 of the Police and Criminal Evidence (NI) Order 1989. From this date, the offence of withholding information under section 5 of the Criminal Law Act (NI) 1967 can only be committed in respect of an offence the penalty for which is fixed by law or for which a person of 21 years or over can be sentenced to a term of five years imprisonment or an offence listed within subsection (2) of Article 26.

4.14 1990-November 1992
No relevant events took place during this time. Police still believed that Liam Adams remained ordinarily resident in the Republic of Ireland.

4.15 2 November 1992
It was reported internally by RUC that Liam Adams’s current address in the Republic of Ireland was unknown. There is a note bearing this date that his “description and details of the alleged offences have been circulated to the Gardai Siochana on computer.”

4.16 1992-early 1999
There were no reports of any sightings of Liam Adams and there were no other relevant events during this period.
4.17 **January 1999**

D/Superintendent Cooke contacted the CARE team in Grosvenor Road PSNI station inquiring if the then current whereabouts of Áine Adams were known.

4.18 **1 March 1999**

CARE team Detective Inspector confirmed that Áine Adams had not been located.

4.19 **11 March 1999**

D/Superintendent Cooke wrote to the office of the DPP. In this letter it was outlined that attempts to locate Liam Adams in this jurisdiction had been unsuccessful and that it was believed that Áine Adams and her mother had moved to Glasgow in late 1987, police contact with them had not been maintained and recent inquiries had failed to reveal their whereabouts.

D/Superintendent Cooke recommended to the DPP that a direction of "No Prosecution" should issue.

4.20 **7 May 1999**

A direction of "No Prosecution" was issued on behalf of the DPP.

4.21 **Unknown date in 2000**

In his evidence in the trial of Liam Adams, Gerry Adams alleged that in 2000 an admission had been made to him by Liam Adams that he had molested Áine, interfered with her or sexually assaulted her.

4.22 **28 July 2003**

The maximum sentence for Gross Indecency with or towards a Child was raised from two years to ten years from this date by virtue of Article 22 of the Criminal Justice (Northern Ireland) Order 2003.
4.23 4 January 2006
Aine Tyrrell (née Adams) contacted PSNI and stated that she wished to reactivate the sexual abuse inquiry into Liam Adams.

4.24 January-April 2006
There were a series of contacts between CARE (Woodbourne); CARE (Newtownabbey); CJU (Woodbourne); and CID Grosvenor Road in relation to the investigation into Liam Adams.

4.25 6 December 2006
Aine Tyrrell gave evidential interviews with police.

4.26 15 February 2007
Liam Adams was arrested by police. He was later released pending report.

4.27 February 2007
Social Services requested that Liam Adams vacate his family home pending the outcome of the PSNI investigation. No forwarding address was provided to Social Services.

4.28 1 March 2007
The Criminal Law Act (Northern Ireland) 1967 was amended with effect from this date by virtue of Article 15(4) of, and paragraph 13 of schedule 1 to, the Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007. Prior to this date, the offence of withholding information could be committed in relation to any arrestable offence. With effect from this date the offence could only be committed in relation to a “relevant offence.” The term “relevant offence” is now defined as an offence for which a person who is over 21 years of age could be sentenced to at least five years imprisonment.
4.29  **12 March 2007**
A further video evidential interview of Aíne Tyrrell was conducted.

4.30  **20 June 2007**
Gerry Adams made a written witness statement to investigating police. This statement does not include an account of the admission allegedly made to him in Dundalk by Liam Adams in or about 2000. He alleged that he was made aware, by Aíne and her mother, that her father had "interfered with her and sexually abused her." He denied knowing the detail of the allegations. The statement referred to him confronting Liam with the allegations at a meeting in Buncrana. He could not recall the date of this meeting but knew that it was in the eighties, when Aíne was a teenager and that he had no reason to dispute that it was on the 9 March 1987 as put to him by the police.

4.31  **23 July 2007**
A police investigation file in respect of Liam Adams was submitted to PPS by police.

4.32  **31 July 2007**
The file was allocated to a PPS lawyer for a decision.

4.33  **17 October 2007**
A request for further information issued from PPS to PSNI.

4.34  **8 January 2008**
A PPS decision was taken to prosecute Liam Adams.

4.35  **9 January 2008**
Papers were sent to the case preparation section within PPS for preparation of committal papers against Liam Adams.
4.36 **February 2008**
An “alert” was placed on the ICIS system for Liam Adams
Police carried out “external agency checks” in an attempt to locate Liam Adams

4.37 **March 2008**
Committal papers were made ready. These could not be served as the whereabouts of Liam Adams were then unknown.

4.38 **2 February 2009**
The main provisions of the Sexual Offences (NI) Order 2008 came into effect replacing the offences of rape contrary to common law, indecent assault on a female contrary to section 52 of the Offences Against the Person Act 1861, incest, unlawful carnal knowledge of a girl under 14 years of age and gross indecency with or towards a child with new statutory offences.

4.39 **21 October 2009**
Gerry Adams made a second statement to police in which he alleged that Liam Adams admitted to him that he had sexually assaulted Aine. He said that this admission was made by Liam shortly before he absconded. A handwritten note in the statement initialed “GA” appears to indicate that this admission was made between 2003 and 2005.

4.40 **18 January 2010**
PPS decided that the case against Liam Adams should proceed by way of a European Arrest Warrant.
4.41 **26 January 2010**
A European Arrest Warrant was issued under section 142 of the Extradition Act signed by Fiona Bagnall, District Judge, as the issuing judicial authority.

4.42 **3 October 2011**
Mr Justice Edwards of the Irish High Court decided that the objections raised by Liam Adams to the European Arrest Warrant could not be upheld and he ordered that Liam Adams be surrendered to the authorities in Northern Ireland.

4.43 **18 October 2011**
Liam Adams was refused leave to appeal to the Supreme Court against the decision of the High Court to surrender him to the authorities in Northern Ireland.

4.44 **24 October 2011**
A Minute was sent by D/Chief Inspector Alan Little to the PPS. This Minute disclosed D/CI Little’s opinion that the evidence indicated that Gerry Adams’s knowledge of what had happened to Áine did not amount to knowledge of a “relevant offence.” He also indicated that a prosecution would not be in the public interest.

4.45 **3 November 2011**
Liam Adams appeared in court in Northern Ireland after being extradited to Northern Ireland on 2 November 2011.

4.46 **28 November 2011**
Liam Adams was returned for trial to Belfast Crown Court by Belfast Magistrates Court.
10 February 2012
Liam Adams’s application to stay the criminal proceedings against him as an abuse of process was refused by His Honour Judge Burgess sitting in Belfast Crown Court.

16 February 2012
Liam Adams was arraigned and pleaded not guilty to all charges.

Late June/Early July 2012
Senior Counsel for the PPS advised the PPS that Liam Adams’s legal representatives had raised questions about the credibility, reliability and truthfulness of the account given by Gerry Adams. Senior Counsel took the view that it would be prudent for the police to approach the DPP with a view to establishing what he had been told by Gerry Adams in 2007, taking a statement to reflect this and providing it to the defence. The rationale for this request appears to have been that if his statement did not support Gerry Adams’s version of events, the DPP could have been called as a witness for the defence or, if the DPP’s account did support the account given by Gerry Adams, the DPP could be called as a rebuttal witness by the prosecution in the event that Gerry Adams’s truthfulness was attacked by the defence at trial.

August 2012
The solicitor acting for Liam Adams writes to the DPP requesting a meeting to discuss what the DPP was told by Gerry Adams in relation to Liam Adams’s case in June 2007. A solicitor acting for the DPP writes to the solicitor for Gerry Adams asking whether he is prepared to waive legal privilege in relation to the relevant solicitor-client consultations. Gerry Adams’s solicitor replies on 20 August confirming that he is prepared to waive solicitor-client privilege in respect of this matter. Subsequently the DPP makes a statement concerning the consultations held with Gerry Adams in
2007. On 30 August the solicitor acting for the DPP writes to the solicitor for Liam Adams advising that the DPP had made a statement to police and that disclosure of that statement could be sought through the PPS.

4.51 **September 2012**
The Solicitor for Liam Adams writes to the DPP’s solicitor on 25 September renewing his request for a meeting with the DPP. The DPP’s solicitor responds the following day declining such a meeting and asserting that there was nothing which the DPP could usefully add to the statement which he had made to the police and which had, by this time, been served on the solicitors for Liam Adams by way of disclosure.

4.52 **9 April 2013**
Liam Adams’s (first) trial began before Her Honour Judge Philipott QC and a jury. The case for the prosecution was outlined to the jury.

4.53 **18 April 2013**
Gerry Adams made two additional statements to police. One dealt with the attempts of Gerry Adams to arrange a meeting between Liam Adams and Áine. The second statement dealt with the admission made by Liam Adams to Gerry Adams while they were walking together in Dundalk in 2000.

4.54 **25 April 2013**
Liam Adams’s (first) trial was stopped by the Trial Judge before verdict with the jury being discharged.

4.55 **16 September 2013**
Liam Adams’s (second) trial began before Her Honour Judge Philipott QC and a jury.
4.56 **1 October 2013**

Liam Adams was convicted of all ten counts on the indictment by majority verdict.

5. The effects of certain changes in legislation

5.1 Some of the effects of the changes in the law discussed in paragraphs 3.8 to 3.11 and noted in the above chronology at paragraphs 4.12, 4.13, 4.22 and 4.28 are worthy of particular attention. These effects can, perhaps, best be shown through three illustrative examples.

5.2 *Example 1.* In June 1980 A becomes aware that B has indecently assaulted C in that month. A informs B and C that he knows of B’s actions against C. A does not inform the police of what he knows about the indecent assault within a reasonable time. A’s reason for not informing the police is that A likes B but does not particularly like C. In 1980 the maximum sentence for indecent assault was two years imprisonment.

5.3 In example 1. A cannot be prosecuted for the offence of withholding information under section 5 of the Criminal Law Act (Northern Ireland) 1967 after the lapse of the reasonable time period in 1980. This is because, in 1980 (and until 3 October 1989, when the maximum sentence of imprisonment was increased from two to ten years) the offence of indecent assault on a female was not an “arrestable offence” for the purposes of section 5 of the 1967 Act.

Even if A continues to withhold evidence from the police in relation to the indecent assault committed in 1980 after 3 October 1989, he still cannot be prosecuted. This is because the
offence in relation to which he is withholding information is not an offence for which a person aged 21 years or over could be sentenced to five years imprisonment, as the maximum sentence applicable in 1980, when the indecent assault was committed, was two years imprisonment.

5.4 Example 2. In June 1990 A becomes aware that B has indecently assaulted C in that month. A informs B and C that he knows of B’s actions against C. A does not inform the police of what he knows about the indecent assault within a reasonable time. A’s reason for not informing the police is that A likes B but does not particularly like C. In 1990 the maximum sentence for indecent assault committed in that year was ten years by virtue of Article 12 of The Treatment of Offenders (Northern Ireland) Order 1989.

5.5 In example 2. A can be prosecuted for the offence of withholding information under section 5 of the Criminal Law Act (Northern Ireland) 1967 after the lapse of the reasonable time period in 1990. At the time that the indecent assault was committed by B against C the offence clearly fell within the definition of “arrestable offence” provided by Article 26 of the 1989 Order. If A continues to withhold the relevant information from the police after the change of law introduced in March 1 2007\(^\text{11}\), he continues to commit the section 5 offence since (by reason of the available penalty of ten years imprisonment) the offence of indecent assault committed in June 1990 was an ‘arrestable offence’ and is still a ‘relevant offence’.

5.6 Example 3. In June 1980 A becomes aware that B has had sexual intercourse several times during that month with his (B’s) daughter C who is then aged twelve. A knows this because C informs him of

\(^{11}\) Article 15(4) of, and paragraph 13 of schedule 1 to, the Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007
these incidents and when A asks B about them B makes partial admissions. As a result of what he hears from B and C, A believes that B has had sexual intercourse with C. A does not inform the police of what he knows about B’s conduct towards C within a reasonable time. A’s reason for not informing the police about B’s conduct towards C is that A does not want to become involved in any potential criminal proceedings. In 1980 the maximum sentence for incest was, by virtue of section 1 of the Punishment of Incest Act 1908, seven years imprisonment.

5.7 In example 3. A can be prosecuted for the offence of withholding information under section 5 of the Criminal Law Act (Northern Ireland) 1967 after the lapse of the reasonable time period in 1980. The possibility of prosecution for the section 5 offence is unaffected by the changes of law introduced on 1 January 1990 and on March 1 2007, since (by reason of the available penalty of seven years imprisonment) the offence of incest committed in June 1980 was at all times prior to 1 March 2007 an ‘arrestable offence’ within the meaning of section 5 and continues, after that date to be a ‘relevant offence’.

5.8 From all three examples it is clear that the manner in which the term “arrestable offence” in section 5 of the Criminal Law Act (Northern Ireland) 1967 has been defined since 1967 has a large impact on the ability of the PSNI and PPS in 2013 to deal with cases where the offence whose existence is known about or believed in, attracted, at the time of its commission, a sentence of less than five years imprisonment. In the area of sexual offending the offences likely to give rise to most difficulty are those of indecent assault and committing an act of gross indecency with or towards a child contrary to section 22 of the Children and Young Persons Act (Northern Ireland) 1968. The maximum sentence for indecent assault on a female contrary to section 52 of the
Offences Against the Person Act 1861 was raised from two years to ten years by Article 12 of The Treatment of Offenders (Northern Ireland) Order 1989 with effect from October 3 1989. Before that date the maximum was two years imprisonment. In the case of the offence under section 22 of the Children and Young Persons Act (Northern Ireland) 1968, the maximum sentence remained two years imprisonment until as late as 2003 when the sentence was increased to ten years.

5.9 Offences of indecent assault committed before October 3 1989 cannot in law amount to either an "arrestable offence" or a "relevant offence" for the purposes of a prosecution under section 5 of the 1967 Act because the maximum period of two years imprisonment applicable before this date precludes such an offence from being either an "arrestable offence" or a "relevant offence".

6. Consideration by the PPS in 2011

6.1 It is clear from a Minute dated October 25 2011 from MD to the Acting Deputy Director that, while the PPS received two PSNI reports dated October 23 and 24 considering the potential criminality of Gerry Adams, there was no separate file submitted by PSNI to the PPS reporting Gerry Adams as a suspect on the charge of withholding information under section 5 of the Criminal Law Act (Northern Ireland) 1967. The written materials evidencing PPS consideration of whether or not Gerry Adams should be prosecuted under section 5 of the 1967 Act form part of the larger PPS file on Liam Adams. Normal PPS practice is that when formal consideration of whether another person should be prosecuted or not occurs in the context of an existing file then the
name of that other person is added to the file. The standardised procedure within the PPS in such circumstances is that if, following consideration, no prosecution is to occur in the light of the evidence as it then stands, the person whose name has been added to the file is informed in writing that in light of the existing evidence the PPS has decided not to prosecute him or her. Such notification would also be given to the person or persons in respect of whom the file was originally opened. Gerry Adams’s name was not added to the file and he received no notification that he would not be prosecuted. Indeed, it does not appear that he was ever informed by PSNI that he was being reported to the PPS.

6.2 In the PSNI report from T/DI Wallace of 23 October 2011 the final paragraph reads as follows:

"Therefore at this stage I do not believe that there is sufficient evidence to prosecute Gerry Adams for withholding information as we are not in a position to prove that he knew a relevant offence had occurred, he was aware that sexual offences had occurred but of an unspecified nature and we would not be able to prove beyond reasonable doubt that he knew that Liam raped Aine".

6.3 DCI Little’s PSNI report of October 24 2011 gives the author’s opinion that “there is insufficient evidence for withholding information”. DCI Little goes on to request that if there is PPS disagreement about evidential sufficiency that “consideration be given as to whether a prosecution is in the public interest”.

6.4 In MD’s Minute to the Acting Deputy Director there is a discussion of the nature of the offence under section 5 of the

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12 By way of example, PPS file 648247/2012 contains three such letters.
13 It should be noted that rape was not the only relevant offence that should have been considered here – see paragraph 6.6 below.
Criminal Law Act (Northern Ireland) 1967 and, in particular, the nature of a ‘relevant offence’ under that provision. On this MD concludes, accurately, (paragraph 9 of the minute) that a ‘relevant offence’ is “an offence with an available sentence of 5 years to someone aged 21 years or more”.

6.5 This definition of a relevant offence is of considerable significance. During the period during which the primary offences were committed by Liam Adams the maximum available sentence for both indecent assault and gross indecency with a child was two years imprisonment. If, for example, Gerry Adams knew or believed that Liam Adams had committed indecent assault during the time when the maximum available sentence was two years imprisonment (and it was abundantly clear that he so knew or believed) this alone would not now support a prosecution under section 5 of the 1967 Act given the current definition of ‘relevant offence’ and the original definition of ‘arrestable offence’.

6.6 The relevant analysis must, therefore, be centred on whether or not the evidence supports a conclusion that Gerry Adams knew or believed that his brother Liam had raped Áine (now) Dahlstrom or committed incest with her or had unlawful carnal knowledge of her when she was under fourteen years old.\footnote{The maximum sentence available for incest is seven years and for both of rape and unlawful carnal knowledge of a girl under fourteen years of age the maximum sentence is life imprisonment.}

6.7 MD’s conclusions on whether or not the available evidence supports the conclusion that Gerry Adams knew or believed that his brother Liam had raped Áine Dahlstrom or had unlawful carnal knowledge of her when she was under fourteen years old are in paragraph 8 of the Minute of October 25 2011. In view of its importance I set this out in full below.
“8. It is evident from GA in both his statements as well as those from the IP and her Mum that GA was aware of sexual abuse allegations made by the IP against the suspect for a significant number of years prior to making his statement. However I consider that there is insufficient evidence available that he “knew” the nature of same extended to rape or UCK.”

6.8 MD makes reference (paragraph 7 of the Minute of October 25 2011) to page 99 of the transcript of the interview of March 12 2007 saying that Aine Dahlstrom “confirms to interviewing officers that she ‘discussed the nature of the abuse’ with GA but provides no more specific detail about same”. The exchange between Aine Dahlstrom and interviewing police officers on page 99 of the transcript is highly important and I set out the relevant passage below:

“[Police Officer] But you and Gerry would’ve discussed the nature of the abuse.
Aine Tyrell Yeah
[Police Officer] And em what had happened.
Aine Tyrell Yeah
[Police Officer] To you
Aine Tyrell Yes definitely
[Police Officer] Ah hm
[Page 100]
Aine Tyrell Definitely.”

6.9 While it is true that on page 99 (and just overleaf on page 100) Aine Dahlstrom does not give details of the offences Liam Adams had committed against her, and does not set out the detail of any words spoken to Gerry Adams about those offences (“he’s not a psychologist”), she is emphatic that she told him what was done
to her by her father which, on any reckoning, included the offences of rape, incest and unlawful carnal knowledge.

6.10 Although MD’s Minute of October 25 2011 refers to the first transcribed interview between Aine Dahlstrom and police on December 6 2006 (see paragraph 6) no specific page references are given. On pages 85-6 of the transcript, discussing the confrontation that took place in Buncrana with Aine Dahlstrom, her mother, Gerry Adams, and Liam Adams the exchange runs as follows:

“Aine Tyrell And I told him [Liam Adams] to his face that he did and at that time that’s all we could have done.

[Police Officer] Ok and what level of information did you give to your father that night, what he did.

Aine Tyrell Oh I told him what he did, I told him.

[Police Officer] And your mother and Gerry Adams were there when you gave him that.

Aine Tyrell Yeah and I told him what he did, but he did, I think the phrase I [page 86] used was he put his thing in me and I says I never done that in my life…”

6.11 From this passage it seems clear that Aine Dahlstrom is describing an exchange during which she accused her father of rape or unlawful carnal knowledge of a child under fourteen in the presence of (1) her father, (2) her mother and (3) Gerry Adams. If Gerry Adams believed what his niece was saying as a result of being present at this exchange then he will have believed in the existence of an “arrestable offence” for the purposes of section 5 of the Criminal Law Act (Northern Ireland) 1967.

6.12 The statement dated February 5 2007 from Sarah Marie Campbell (the mother of Aine Dahlstrom) also refers to the
confrontation that took place in Buncrana in 1987. In MD’s Minute of October 25 2011 (paragraph 6) one reads “although the IP’s Mum refers to GA being present it is not completely clear that he was”.

6.13 In my view the evidence of Aine Dahlstrom as it stood when the PPS considered it in 2011 called, at the very least, for clarification. For obvious and understandable reasons, the evidential focus of the police inquiry at that time had been on the offences about which Aine Dahlstrom had complained, namely the serious sexual offences committed against her by her father. The evidence that had emerged of the possible commission of the offence of withholding information under section 5 of the Criminal Law Act (Northern Ireland) 1967 by Gerry Adams and which found its place on the PPS Liam Adams file was, it seems to me, simply a by-product of the Liam Adams investigation. The analysis of whether or not Gerry Adams had committed the offence of withholding information under section 5, in the light of what he knew or believed had been done to Aine Dahlstrom by Liam Adams, seems to have had its context in the evidential demands of the Liam Adams prosecution, in respect of which Gerry Adams was, in the first trial of Liam Adams, a witness.

6.14 The PPS found itself during this time in an unenviable position with respect to how it should approach the question of whether or not Gerry Adams should be prosecuted for withholding information under section 5 of the Criminal Law Act (Northern Ireland) 1967. While it might be theoretically possible to treat Gerry Adams as a witness for the purposes of the prosecution, have him appear as a witness at trial, and only after any trial consider whether or not he ought, himself, to be prosecuted for the offence under section 5, this would be regarded as highly unusual. Indeed, to treat Gerry Adams as a witness and to use
him for that purpose in order to give evidence of matters pertaining to his knowledge of the offence, in circumstances where the PSNI and PPS had made a conscious decision to defer consideration of the matter until after they had deployed him as a witness, might well have rendered any subsequent attempt to prosecute him for an offence under section 5 of the Criminal Law Act (Northern Ireland) 1967 liable to be stayed as an abuse of process.

6.15 While the PPS was preparing for the trial of Liam Adams it would have been possible to have actively explored the potential criminal liability of Gerry Adams under section 5 by requiring that further inquiries be made by the PSNI with Aine Dahlstrom about what she told Gerry Adams of Liam Adams's behaviour towards her and with Sarah Marie Campbell about what Aine Dahlstrom said in Gerry Adams's presence about what Liam Adams had done to her. It would also have been possible for PSNI to interview Gerry Adams under caution about his state of knowledge or belief about what Liam Adams had done to Aine Dahlstrom.

6.16 While these steps might all have been possible – and, if the offence of withholding information under section 5 of the Criminal Law Act (Northern Ireland) 1967 was the principal consideration, would, in my view, have been required – their occurrence might well have been considered unusual when the primary concern both of the PSNI and the PPS was the proper preparation and presentation of the case against Liam Adams for far more serious offences.

6.17 In the Minute of October 25 2011 MD concludes by offering comments on whether or not prosecuting Gerry Adams for withholding information under section 5 of the Criminal Law Act
(NI) 1967 would be in the public interest (in the event that the acting Deputy Director disagrees with the Minute's principal conclusion of evidential insufficiency). MD's conclusion is that prosecuting Gerry Adams for withholding information would not be in the public interest. On receipt of MD's Minute the acting Deputy Director produced a short Minute for the acting Director. This is undated but must have been produced on or before October 26 2011 since it contains a manuscript endorsement of the acting Director bearing that date. Enclosed with the Minute were five sets of documents. These were:

A. The police reports by T/D/Inspector Wallace and DCI Little dated October 23 2011 and October 24 2011 respectively;
B. Two witness statements by Gerry Adams dated June 20 2007 and October 21 2009;
C. Three witness statements by Aine Dahlstrom dated October 25 2007, October 18 2011 and October 18 2011;
D. A witness statement by Sarah Marie Campbell dated February 5 2007;
E. MD's Minute of October 25 2011.

6.18 In his Minute the acting Deputy Director advised that he had discussed the case with senior counsel "albeit in the margins of another meeting" and that having considered the materials set out at A to D above "senior counsel has come back to me this morning. He advises that the evidential test is not met".

6.19 I note that neither the acting Director nor senior counsel appear from the acting Deputy Director's Minute to have been provided with the two transcribed interviews of December 6 2006 and March 12 2007. This is unfortunate. It is perhaps particularly unfortunate as respects senior counsel who did not have access to MD's Minute which would, at least, have alerted senior counsel
to the existence of these interviews and could have triggered a request to see them. As appears above these transcribed interviews are important in disclosing Aine Dahlstrom's clear understanding that Gerry Adams was aware of what Liam Adams had done to her, and, of particular relevance, that he had engaged in conduct constituting rape, unlawful carnal knowledge of a child under fourteen years, and incest.

6.20 Accurately, the acting Deputy Director summarises the conclusion of the MD Minute as recommending no prosecution "on both evidential and public interest grounds". The acting Deputy Director, similarly, concludes "that on the available evidence the Test for Prosecution is not met, both in regard to the Evidential Test and, even if the Evidential Test was met, further in regard to Public Interest Test. There is no impediment to Gerry Adams being a prosecution witness."

6.21 Having considered the acting Deputy Director's Minute the acting Director endorses it with a manuscript note as follows:

"Thank you for your minute. I am content that decisions as to prosecution are taken in accordance with the attached minute."

6.22 The acting Deputy Director's Minute is further endorsed with a manuscript note dated October 27 2011 addressed to MD; this reads as follows:

"(1) Thank you for your Minute of 25th
(2) See below and overleaf.
(3) Available to discuss if need be – otherwise proceed as agreed."

6.23 By section 37 (1) of the Justice (Northern Ireland) Act 2002 the Director of Public Prosecutions must prepare a Code of Practice for Public Prosecutors and other barristers and solicitors to
whom he assigns the conduct of criminal proceedings. Section 37 (2) of the 2002 Act requires that the Code of Practice include a code of ethics and section 37 (3) of the 2002 Act requires that the Code of Practice give guidance on general principles to be applied, inter alia, “in determining, in any case, whether criminal proceedings should be instituted”.

6.24 Part 4 of the PPS Code for Prosecutors produced under section 37 (1) of the 2002 Act deals with prosecution decisions. Paragraph 4.1.1 of the Code reads as follows:

“Prosecutions are initiated or continued by the Prosecution Service only where it is satisfied that the Test for Prosecution is met. The Test for Prosecution is met if:

I the evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and

II prosecution is required in the public interest – the Public Interest Test.”

6.25 It will be apparent that the same word ‘test’ is used not only for the overall Test for Prosecution but also for the two elements within it – the Evidential Test and the Public Interest Test. For ease of reading here, I refer to these as the two sub-tests. Paragraph 4.1.2 requires that each sub-test be separately considered and passed before a decision to prosecute can be taken; Paragraph 4.1.2 also requires that the evidential sub-test be satisfied before the public interest sub-test is considered. It reads as follows:

“Each aspect of the Test must be separately considered and passed before a decision to prosecute can be taken. The Evidential
Test must be passed before the Public Interest Test is considered. The Public Prosecutor must analyse and evaluate all of the evidence and information submitted in a thorough and critical manner."

6.26 A consideration of the Minute of MD of October 25 2011 and the Minute of the acting Deputy Director through the prism of Paragraph 4.1.1 and Paragraph 4.1.2 leads to the conclusion that Paragraph 4.1.2 of the Code for Prosecutors was not complied with. If it had been considered by MD and the acting Deputy Director that the evidential sub-test was not met then not only was there no need to consider whether the public interest sub-test was met but the necessary pre-condition for public interest consideration under Paragraph 4.1.2 of the Code for Prosecutors did not exist.

6.27 A general issue may arise over whether the Code for Prosecutors makes universally apt provision for that class of offences (historically, usually indicated by the requirement that the consent of the Attorney General or the Director of Public Prosecutions be given to any prosecution) in which it is acknowledged by the legislature that particular care is required in deciding whether or not to prosecute.

6.28 It can be imagined that there might be cases in which it becomes very quickly and readily apparent that the public interest will be strongly – perhaps even overwhelmingly – against any prosecution. In such a case it may be seriously questioned whether the evidential steps that would be ordinarily required (for example, where a dominant or compelling public interest was not quickly and readily apparent) should be taken, if, no matter how strong the evidence supporting prosecution, the public interest against a prosecution would always trump evidential strength.
6.29 For the offence under section 5 of the Criminal Law Act (Northern Ireland) 1967, however, where both its existence and seriousness turn on knowledge or belief in the existence of a particular offence it is arguable that in the general run of cases the order of consideration set out in the Code for Prosecutors should be followed. It may be that it cannot be possible to make an informed judgment about what the public interest requires in the general run of cases under section 5 of the Criminal Law Act (Northern Ireland) 1967 until all relevant and ascertainable facts have been established. On the other hand, it may be that special considerations apply where what is at issue is the sexual abuse of children, particularly where this occurs in an intra-familial setting.

6.30 In the police report of October 24 2011 from DCI Little there is an amalgam of evidential assessment and public interest consideration. In this report one reads as follows:

"Should there not be agreement in relation to whether or not Mr Adam’s [sic] knowledge amounted to a relevant offence I would request that consideration be given as to whether a prosecution is in the public interest. The Attached statements indicate that Mr Gerry Adams was extremely supportive of Aine and whatever route she chose to take. The investigation to date would suggest that Mr Gerry Adams has, quite rightly, had Aine’s welfare at the forefront throughout.

This is a similar situation to that found during many investigations into familial abuse where it is clear that there is some sort of indecency allegations within the family. The primary consideration must always be the welfare and support of the victim."
As such I feel that should the PPS disagree with my opinion that there is no evidence to support that Gerry Adams had knowledge of a ‘relevant’ offence then serious consideration must be given to whether or not it would be in the public interest to progress such a prosecution.

The impact and long term effects of setting a precedent such as this, particularly in a relatively high profile case, would have a significantly detrimental effect on other victims being able to disclose incidents of abuse.”

6.31 Setting to one side any question about the accuracy of the observation that Mr Adams had the welfare of his niece “at the forefront throughout” as DCI Little suggests, and on which I express no view, there appears to be force in DCI Little’s observation that in cases of intra-family abuse it is common for some knowledge or belief to exist but not necessarily precise knowledge about the nature of the abusive behaviour.

6.32 It seems clear, for example, that there were persons other than Gerry Adams within the matrix of personal and family relationships to whom Áine Dahlstrom made disclosures of sexual abuse committed against her by Liam Adams.

6.33 There is no doubt that the police view, as expressed by Detective Chief Inspector Little in his Minute dated 24 October 2011 was that a prosecution of Gerry Adams for an offence under section 5 would not be in the public interest, even if the PPS were to take the view that the evidential test was met. As he put it, “The impact and long term effects of setting a precedent such as this, particularly in a relatively high profile case, would have a

15 Áine Dahlstrom would be the authoritative source of information on the extent of her uncle’s past and present concern for her welfare.
significantly detrimental effect on other victims being willing to disclose incidents of abuse.”

6.34 In general it might be thought that a further (and possibly more realistic) concern than that complainants might be deterred from coming forward is that a prosecution of a person to whom disclosures of sexual abuse had been made for an offence under section 5 of the Criminal Law Act (Northern Ireland) 1967 might have a severely deterrent effect on the willingness of witnesses to come forward with evidence that the victim had told them of the abuse at an early stage prior to the making of a complaint to the police. Such evidence has always had a particular importance in the trial of historical sexual abuse cases.

6.35 In such cases, it is often discovered that the victim will not have reported the abuse to the police for many years after the offences occurred. The victim is then very often confronted with the suggestion that he or she has concocted the allegations against the defendant long after the event for reasons of animosity. For this very reason the law has for very many years permitted the prosecution to adduce the evidence of a witness to whom the victim had related an account at the first reasonable opportunity. This rule of law, which related only to sexual offences was an exception to the rule against hearsay, and where such evidence was admitted it was relevant only to the consistency of the victim’s complaint. Since the changes to the law of hearsay made by the Criminal Justice (Evidence) (NI) Order 2004, such evidence is arguably even more important as, where it is admitted in a criminal trial, its relevance is no longer limited to proving the consistency of the complaint.

6.36 Every potential witness who has been told by a victim of sexual abuse which amounts to a “relevant offence” and who has
believed the victim, but does not inform a constable within a reasonable time, might be considered to have engaged in behaviour penalised by section 5 of the Criminal Law Act (Northern Ireland) 1967. What must be set against this, however, is the considerable public interest in prosecuting offences of sexual abuse, particularly those committed against children, and it is clearly very important that witnesses who are in a position to give such evidence of “recent complaint” should be free to give that evidence. It is, therefore, not at all surprising that Detective Chief Inspector Little should be concerned by the message which would be sent out by the prosecution of a witness for withholding information after (on one view) coming forward to police with important information albeit belatedly.

6.37 An argument that the requirements of the public interest are distinctive in cases of historic sexual abuse (and particularly intra-familial sexual abuse) receives some support from practice. As part of this review, I wished to see examples of PPS consideration given to prosecutions for withholding information in sexual cases. The PPS were able to provide me with one file in which consideration had been given to prosecuting three individuals (who were not family members of either the victim or the accused). This file resulted in a decision not to prosecute any of the three individuals for evidential reasons. The PPS were unable to provide me with any example of a case in which an individual had been prosecuted for withholding information in relation to a historical sexual offence.

6.38 In general the gravity of the offences of rape and unlawful carnal knowledge of a girl under fourteen years of age are such that exceptionally strong public interest considerations would be required to displace the presumption that the public interest normally requires a prosecution where there is sufficient evidence
to prosecute a person for withholding information in relation to such an offence. A classic example here would be a person who observes offences being committed but takes no action to assist either the victim or the offender.

6.39 Any judgment of what the public interest requires where what is at issue is a relevant sexual offence against a child will be coloured by context. If disclosures are made to a person in conditions of confidentiality\textsuperscript{16} or if a person against whom evidence exists to support a prosecution under section 5 may also be a witness for the prosecution in the trial of the original offence or offences on which the prosecution for withholding information depends for its existence, the public interest may tell against prosecution under section 5. The public interest may be relatively easy to discern when the evidential value of the witness is high; when the evidential value of the witness is low, evaluation of the public interest may be more difficult.

6.40 In this case, an obvious step in establishing the facts on which both the evidential judgment and the public interest judgment could be made would have been to ascertain directly from Aine Dahlstrom what and when she told Gerry Adams about the sexually abusive behaviour of Liam Adams towards her. If Aine Dahlstrom indicates that she made Gerry Adams aware of behaviour amounting to rape, unlawful carnal knowledge, or incest, then an obvious next step would have been to interview Gerry Adams under caution about these matters. This may well have had the effect however of causing further delay in the trial of Liam Adams, and increasing the consequent anxiety and distress of the victim.

\textsuperscript{16} Disclosure in circumstances of confidentiality may well constitute a 'reasonable excuse' for not reporting; see \textit{Russell on Crime} (12\textsuperscript{th} edition) pp. 170-1
6.41 What is set out in the preceding paragraph applies throughout the matrix of Aine Dahlstrom's family and personal relationships. If Aine Dahlstrom indicated, for example, that she informed other family members of sexually abusive behaviour by Liam Adams towards her, and those family members believed her but took no action within a reasonable time to inform the police of what they knew or believed had been done by Liam Adams, the position of those family members, subject to issues such as age, cannot readily be distinguished from the position of Gerry Adams.

6.42 In the course of pre-trial preparation it seems that Senior Counsel for the prosecution considered it necessary to request that the DPP make a statement in relation to the issue of what he was told by Gerry Adams in 2007. Prior to that point, the DPP had, given his earlier involvement as Gerry Adams's solicitor, quite properly played no role in the case. Senior Counsel's request arose as a result of the assertion by Gerry Adams, contained in his statement dated 21 October 2009, that he had made his solicitor aware in June 2007 of the matters dealt with in his 2009 statement, including presumably the fact that Liam Adams had admitted to sexually assaulting Aine.

6.43 It appears that in requesting that this statement be made Senior Counsel was contemplating that the DPP would potentially be called either as a rebuttal witness for the prosecution (in the event that his account supported that of Gerry Adams and that Liam Adams's defence lawyers attacked the truthfulness of Gerry Adams's account at trial) or as a witness for the defence (in the event that his account did not support the account given by Gerry Adams.) However, at the time that this request was made legal privilege in relation to this conversation had not been formally waived by Gerry Adams and no such statement could
have been made by the DPP without an approach being made to Gerry Adams seeking a waiver of legal professional privilege.

6.44 While the DPP dealt with this request entirely appropriately by instructing his own legal representative to inquire from the solicitor for Gerry Adams, whether he was prepared to waive legal privilege attaching to the conversations between the DPP and Gerry Adams, it is perhaps unfortunate that the DPP was placed in this position. While it might be argued that failure to address this issue would have permitted counsel for Liam Adams to comment on the absence of such evidence, requests for the waiver of legal privilege should only be made when absolutely necessary. It does not appear to me that the question of what Gerry Adams told his solicitor in 2007 reached this threshold.

7 Conclusions

7.1 As indicated in the first section of this review, my role is to consider whether the PPS, in deciding not to prosecute Mr Gerry Adams TD, properly followed its own procedures and whether proper consideration was given to all of the available or potentially available evidence. It is not my function to decide afresh the question of whether Mr Adams should be prosecuted for the offence of withholding information. This decision is entirely a matter for the PPS.

7.2 In this case, the PPS did not follow the normal procedures which usually apply in a case in which the need to give consideration to prosecuting an additional suspect arises in the context of an existing file. In such circumstances where no separate file is submitted by the police, it is the usual practice of the PPS to request that police add the individual concerned to the police file
as a suspect. The suspect will ordinarily be interviewed by police or at least will be spoken to and advised that he or she is being reported to the PPS with a view to prosecution. The addition of the individual as a suspect to the PPS case management system will create a requirement to send a notification to the suspect of the outcome of the PPS decision as to prosecution or no prosecution. None of this happened in the present case. The consideration given to whether or not Gerry Adams should be prosecuted took place in a more informal way, with the focus of the PPS being on the question whether he could be properly deployed as a prosecution witness. Indeed, if in this case, the decision not to prosecute had been formally notified to Gerry Adams, the manner in which the consideration took place would have ensured that the first time that he would have been aware that the PPS were considering prosecuting him would have been after the decision had already been taken.

7.3 While the process described above may reflect the normal processes in most cases, no files were provided to me which showed that such a process had been initiated in any other family abuse disclosure case. It appears that Gerry Adams may have been subjected to a greater degree of scrutiny before being cleared for use as a prosecution witness than has hitherto occurred when a family member has come forward with analogous information. Although evidence from family members of a complaint or complaints by the victim is a commonly encountered feature of historical sexual abuse cases, no files were provided to me by the PPS which demonstrated that the test for prosecution had been considered in relation to witnesses analogous to Gerry Adams.

7.4 In this case the PPS correctly formed the view that the evidential test for prosecution could not be satisfied in relation to Gerry
Adams for the section 5 offence unless there was evidence capable of proving, to the criminal standard of beyond reasonable doubt, that he knew that the offence committed by Liam Adams was not merely indecent assault or gross indecency, but that an offence had been committed which carried a maximum sentence of at least five years imprisonment.

7.5 Having reviewed the transcripts of the interviews of Áine Dahlstrom (in particular those passages referred to at paragraphs 6.8 and 6.10 of this report), and the statement of Sarah Campbell, I am of the opinion that there was sufficient evidence that Gerry Adams was aware of the nature of the abuse to merit a request being made by the PPS for further police investigation or clarification. While Áine Dahlstrom was not, in her statements and interviews, specific about what she had told Gerry Adams in relation to her father's sexual abuse of her, it is clear from her interview that she was quite definite in her interview with police on December 6 2006 that she had told him what her father had done to her. Furthermore she told police specifically that her mother and Gerry Adams were present when she accused Liam Adams of "putting his thing in me."

7.6 While the role of the PPS is not to investigate crime, I consider that there was sufficient information regarding Gerry Adams's state of knowledge to at least merit obtaining a further statement from Áine Dahlstrom concerning the issue of what she had told her uncle. I have little doubt that, had the only offence under consideration been the section 5 offence, a decision information request would undoubtedly have issued to the police asking that this course of action be taken. Furthermore, if such a statement were to have confirmed that Áine Dahlstrom was robustly asserting that her uncle was aware that she had been raped, it seems to me unlikely that a decision in respect of the evidential
sub-test could have then been made in advance of Gerry Adams being interviewed under caution by police. In short, while the PPS may have been correct in asserting that the evidential test for prosecution was not met on the basis of the evidence on the police file, there was certainly sufficient evidence to suggest that the evidential test might well ultimately be met and that any doubt as to whether the test was or was not met could have been resolved, in particular, by taking clarificatory statements from Aine Dahlstrom and Sarah Campbell and, if necessary by asking the police to interview Gerry Adams under caution.

7.7 The PPS Code for Prosecutors requires that decisions in relation to the evidential sub-test and the public interest sub-test are taken separately and sequentially and that in particular the evidential sub-test must be satisfied before the public interest sub-test is even considered. On the basis of the evidence on file, it appears to me that the PPS decision that the evidential sub-test was not met was perhaps premature. There was certainly some evidence on the police file that indicated knowledge on the part of Gerry Adams that the abuse perpetrated against his niece amounted to rape or unlawful carnal knowledge and yet no action was taken to clarify this issue.

7.8 Although the PPS Code for Prosecutors confirms that "the evidential test must be passed before the public interest test is considered", in this case the PPS, despite having concluded that the evidential sub-test was not satisfied, went on to consider the public interest test in the alternative and concluded that the public interest test was not met. Such a consideration of the public interest test does not comply with paragraph 4.1.2 of the Code for Prosecutors.
7.9 The PPS, having decided to consider the public interest test in breach of paragraph 4.1.2 of the Code for Prosecutors, concluded that a prosecution would not be in the public interest. As discussed at paragraphs 6.33-6.35 above, cases concerning allegations of historic sexual abuse, more than almost any other type of prosecution, rely on the willingness of witnesses to come forward and give evidence in court concerning matters which have been known to those witnesses for many years. Very often those witnesses will have had knowledge of the commission of a serious criminal offence for many years without ever having reported the matter to the police.

7.10 The papers furnished to me do not disclose why the PPS concluded that a prosecution of Gerry Adams would not be in the public interest. While I believe that the public interest would not be well served by helping to create an environment unfavourable to witnesses coming forward, it would be for the PPS to determine whether this would be among the consequences of a decision to prosecute Gerry Adams. If such an environment were created – and this need be no inevitable consequence of a decision to prosecute Gerry Adams – witnesses with potentially valuable evidence would wonder whether they might be prosecuted for not having come forward at an earlier stage, and might fail to cooperate with police and the PPS. If a decision to prosecute Gerry Adams helped create such an environment this might be considered to be entirely contrary to the interests of victims of serious sexual abuse generally. On the other hand, it would be open to the PPS to conclude in any particular case that this unhelpful consequence would not result from a decision to prosecute for the offence under section 5 of the Criminal Law Act (Northern Ireland) 1967.
7.11 The current text of the Code for Prosecutors raises the issue of whether the PPS should, at least in certain limited circumstances, be permitted to consider the public interest test in advance of, or alongside, the evidential test. The question of whether a prosecution is in the public interest is far more likely to require serious consideration in potential prosecutions for the offence of withholding information than in most other criminal offences. That public interest considerations would play a particularly important role in relation to this type of offence is reflected in the fact that it was originally enacted that no proceedings should be instituted for the section 5 offence except by or with the consent of the Attorney General.

7.12 In many cases, and in particular in cases involving allegations of historic sexual abuse, information brought to the attention of police by individuals concerning their knowledge of the fact that the abuse was taking place may be of enormous probative value in prosecuting persons for extremely serious criminal offences. It strikes me that it should be open to the PPS to make a public interest decision that such persons should be treated as witnesses and not treated as suspects by the PSNI or prosecuted without first having to take all those steps necessary in order to ascertain whether the evidential test is or is not satisfied. In many situations, for the prosecutors to insist, for example, that a potential witness must be interviewed under caution in relation to an offence of withholding information might well have the effect of reducing the willingness of the potential witness to co-operate with the police and prosecution. It is difficult to see how such a course would serve the public interest.

7.13 In so far as the Code for Prosecutors requires that the public interest test should not be considered until the evidential subtest is assessed as satisfied, this would appear to me to render it
difficult for the PPS to take common sense decisions in cases of sexual abuse to treat an individual as a witness and not to prosecute for withholding information while at the same time complying with the Code for Prosecutors.

7.14 Consideration, therefore, should be given to whether the Code for Prosecutors could be amended to allow the PPS to take such decisions where it is clear from the outset, or very quickly becomes clear, that the public interest in treating an individual as a witness would greatly outweigh the public interest in prosecuting that individual for withholding information. While I can readily understand that the PPS may be nervous about the prospect of diluting the test for prosecution in any way, it would, I think, be possible to limit the situations in which such a course could be taken and also to provide for the safeguard that any decision where the public interest test was applied in advance of the evidential test should only be taken at a specified senior level within the PPS.

7.15 In the absence of such an amendment to the Code for Prosecutors, it appears to me that the PPS will be vulnerable to suggestions that, in deciding to treat as a witness an individual who has come forward with information in circumstances where the information has not been disclosed to police within a reasonable time, they have failed to apply the Code for Prosecutors – as happened in this case. It was, I think, premature to say in the circumstances of this case that the evidential sub-test for prosecution was not met, in circumstances where there were indications from the evidence on file that Gerry Adams may have been aware of the nature of the abuse. In order to properly determine this issue it would have been necessary to obtain clarification from Áine Dahlstrom as to what she had told him and, if she was firm in her assertion that he had been told that
sexual intercourse was involved, it would have been necessary to interview Gerry Adams under caution.

7.16 However, it appears clear to me that the PPS Code for Prosecutors should in such circumstances have the flexibility to allow for consideration of the public interest in advance of the evidential test. Clearly those who come forward with important information in serious cases should not routinely be treated as suspects in relation to offences of withholding information as this could only be contrary to the public interest in prosecuting offenders for, in particular, serious sexual offending.

7.17 As I have indicated earlier, it is not for me to determine whether Gerry Adams should be further investigated nor whether or not, in the light of any further investigation, he should be prosecuted in relation to the offence of withholding information. In deciding whether such further steps should be taken it is important to note that frequently, in cases involving historical sexual abuse within families there is, as was observed by DCI Little, some degree of knowledge of the offences on the part of family members and others. This case was, perhaps, no different in that respect from many others. It is of obvious importance that Gerry Adams should not be treated any differently than any other member of the public in an analogous situation.

John F Larkin QC
Attorney General for Northern Ireland