

INDEPENDENT REVIEW OF
THE PROSECUTION OF
RELATED SEXUAL ABUSE AND
TERRORISM CASES

REPORT

6 May 2015

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1. INTRODUCTION

A. Background to this Review

- 1.1. We have been asked by the Director of Public Prosecutions for Northern Ireland, Barra McGrory QC (“**the DPP**”), to conduct an independent Review of the handling and conduct by the Public Prosecution Service in Northern Ireland (“**PPS**”) of two linked prosecutions involving sexual abuse and terrorist-related charges.
- 1.2. The cases in question are:
 - (1) *R v Morris* (“**the sexual abuse case**”, PPS Ref 529808); and
 - (2) *R v Morris, Wilson, Wright, Finucane and McCrory* (“**the membership case**”, PPS Ref 569455).
- 1.3. The cases were instigated by three complainants, who in early 2010 made reports of alleged sexual abuse dating between 1997 and 2000. Charges were laid between 2010 and 2012. The cases were eventually split into three trials. Owing to various matters, none of the trials had been heard by the start of 2014. Ultimately, all three complainants withdrew their evidence, citing frustrations with the court process and the prosecution. Verdicts of not guilty were entered in respect of all charges.
- 1.4. On 28 October 2014, this Review was announced.¹ Its Terms of Reference were made public on 5 December 2014.²
- 1.5. This Report was submitted to the DPP on 6 May 2015.

B. Terms of Reference

- 1.6. The Terms of Reference set by the DPP for this Review are:
 - (1) Consideration of all aspects of the handling and conduct of the prosecutions by the PPS;
 - (2) Consideration of all relevant files relating to the prosecutions;
 - (3) Conduct of all relevant interviews with whomsoever the Reviewer requires; and
 - (4) Identification of any recommendations to improve the services of the PPS.
- 1.7. In accordance with the Terms of Reference, this Review is concerned only with the handling and conduct of the cases by the PPS. This Report therefore addresses the decisions and actions of the prosecution team; namely PPS staff and prosecuting counsel. It is not within our remit to review the decisions or actions of the Police Service of Northern Ireland (“**PSNI**”), the courts or any other body, and we have not done so.

¹ PPS, News Release (28 October 2014), available at <http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/PPS%20Press%20Office/News%20Release%20PPS%20Review%20Tuesday%2028%20Oct%202014.pdf>.

² PPS, News Release (5 December 2014), available at <http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/PPS%20Press%20Office/NEWS%20RELEASE%20SIR%20KEIR%20STARMER%20%20Dec%205%202014%20.pdf>.

C. Methodology

- 1.8. We were given access to both hardcopy and electronic case files by the PPS. The files were extensive, including seventeen lever-arch files of hardcopy materials and numerous electronic folders and sub-folders on the PPS Case Management System (“CMS”). We read and took into account all materials included in the case files, including notes, correspondence, internal and external email communications, counsel’s advices, interview transcripts, statements, indictments, court records and other documents.
- 1.9. We read and took into account the role descriptions of PPS staff who were responsible for conducting and/or managing the cases under review.
- 1.10. We also took into account the PPS policies relevant to the cases, namely:
 - (1) *Code for Prosecutors* (Revised 2008);³
 - (2) *Policy for Prosecuting Cases of Rape* (December 2010);⁴
 - (3) *Victims and Witnesses Policy* (March 2007);⁵
 - (4) Victims and Witnesses Care Unit, information leaflet, *Keeping You Informed* (undated);⁶
 - (5) *Special Measures at Court for Vulnerable and Intimidated Witnesses* (undated).⁷
- 1.11. We conducted interviews with PPS staff and counsel who were responsible for the handling and conduct of the prosecutions. Once we had reached draft conclusions, we gave PPS staff and counsel the opportunity to see the excerpts of the draft conclusions that concerned them and invited them to provide comment and correct any inaccuracies. This process is standard government protocol in a review such as this. We took into account the responses of PPS staff and counsel before finalising this Report.
- 1.12. We met the complainants in the cases at the outset of the Review and at periodic intervals thereafter.
- 1.13. A case review such as this, by its very nature, is undertaken with the benefit of hindsight. There is, of course, a degree to which events may be more easily understood in retrospect. It cannot be said with certainty whether the outcomes of these cases would have been different if particular decisions had been taken differently. For these reasons, we have focused on questions of process, principle and policy in order to analyse why the prosecutions proceeded in the way they did, what might have been done differently, and how the services of the PPS might be improved in future.

³ Available at <http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Code%20for%20Prosecutors/Code%20for%20Prosecutors%20Revised%202008%20FINAL.pdf>.

⁴ Available at <http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Publications/Prosecution%20Policy/Policy%20for%20Prosecuting%20Cases%20of%20Rape.pdf>.

⁵ Available at <http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Publications/Prosecution%20Policy/Victims%20and%20Witnesses%20Policy.pdf>.

⁶ Available at [http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/VWCU%20Leaflet%20\(web\).pdf](http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/VWCU%20Leaflet%20(web).pdf).

⁷ Available at <http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Publications/Special%20Measures%20Leaflet.pdf>.

- 1.14. In preparing this Report, a number of important and sensitive matters have been borne in mind having regard to the level of public interest that has surrounded these prosecutions. First, this Review concerns criminal charges that were not proved in court. Second, this Report observes statutory anonymity requirements and reporting restrictions put in place during the course of the prosecutions to protect the identity of certain individuals. The complainant Mairia Cahill (“MC”) is referred to by name because she has waived anonymity. The other two complainants have not waived anonymity and are therefore referred to as “AA” and “BB”. Third, the Terms of Reference require a review of the conduct of the case by the PPS as a whole; accordingly, this Report describes the roles played by the members of the prosecution team and does not name individual staff or counsel.
- 1.15. In this report, the terms “complainant” and “victim” are used interchangeably to the extent that the documents we have considered use those terms interchangeably and/or apply broadly to “victims and witnesses”.

D. Structure of this Report

1.16. This Report is structured as follows:

- **Part 1: Introduction;**
- **Part 2: Overview of the Cases** provides a brief high-level synopsis of the genesis, overall structure and major steps in the progression of each case;
- **Part 3: The Prosecution Team** sets out the role of each member of the prosecution team;
- **Part 4: Chronology of Key Facts** comprises a narrative chronology of the most significant developments in the cases under review;
- **Part 5: Analysis of Issues** considers the most significant issues arising from the handling and conduct of the prosecutions by the PPS;
- **Part 6: Findings** sets out our findings in relation to the handling and conduct of the prosecutions by the PPS; and
- **Part 7: Recommendations** makes a number of recommendations to improve the services of the PPS.

2. OVERVIEW OF THE CASES

- 2.1. As noted in **Part 1** above, the cases under review are *R v Morris* (the sexual abuse case) and *R v Morris, Wilson, Wright, Finucane and McCrory* (the membership case).
- 2.2. Because of the complexities of the two cases and interrelationship between them, the analysis in this Report would be difficult to understand without a brief high-level overview of the genesis, overall structure and major steps in the progress of each case. That is the purpose of this Part. Specific dates and further detail are provided in **Part 4, Chronology of Key Facts**. Analysis of the prosecution's conduct and handling of the cases is contained in **Part 5, Analysis of Issues**.

A. The allegations

- 2.3. The cases began in early 2010, when three complainants (MC, AA and BB) reported to the PSNI allegations of sexual abuse dating between 1997 and 2000. All three complainants were children at the time of the alleged abuse. The alleged perpetrator in each of the three cases was Martin Morris.
- 2.4. Police conducted 'Achieving Best Evidence' ("ABE") interviews with each of the complainants. AA⁸ and BB⁹ alleged acts of sexual assault; MC alleged acts of sexual assault and acts of rape.¹⁰
- 2.5. MC alleged that during 1999-2000 her allegations against Morris were 'investigated' by four individuals whom she believed to be from the IRA:¹¹ Briege Wright, Seamus Finucane, Padraig Wilson and Maura or Agnes McCrory.¹² MC said that she was taken to meetings where she was asked to recount her allegations and to engage in a face-to-face confrontation with her alleged abuser.¹³
- 2.6. In her ABE, MC alleged that it was an "open secret" that Morris was a volunteer for the IRA.¹⁴ She later made a statement dated 22 November 2011 giving more detail about why she believed that to be the case.¹⁵ In her ABE, MC also referred to an alleged incident during 1997 when Morris and a man named Joe McCullough suggested that she involve herself in moving guns around the area.¹⁶ MC later made a statement dated 15 May 2013 in which she described that incident in more detail.¹⁷
- 2.7. In their ABE interviews, AA¹⁸ and BB¹⁹ each alleged that they had been visited by two women and asked about their allegations against Morris.
- 2.8. Further evidence was obtained following the complainants' reports. Officers of the PSNI took statements from each of the complainants' parents and from a number of other persons to

⁸ ABE, 23.2.10, Interview 1, 32 ff.

⁹ ABE, 10.3.10, 8-9, 17-28, 35 ff.

¹⁰ ABE, 7.4.10, Interview 1, 11, 16-17; Interview 2, 36, 40-43; Interview 3, 2; ABE, 13.4.10, Interview 5, 2-4.

¹¹ ABE, 7.4.10, Interview 3, 13 ff.

¹² ABE, 7.4.10, Interview 3, 14, 17, 28, 55. MC confirmed in a further statement dated 30 April 2013 her understanding that Maura McCrory and Agnes McCrory were the same woman.

¹³ ABE, 7.4.10, Interview 3, 60 ff.

¹⁴ Ibid, Interview 1, 24.

¹⁵ Statement of MC dated 22.11.11.

¹⁶ ABE, 7.4.10, Interview 1, 24-25.

¹⁷ Statement of MC dated 15.5.13.

¹⁸ ABE, 23.2.10, Interview 2, 2, 4, 5-8.

¹⁹ ABE, 10.3.10, 75.

whom early reports of the alleged abuse had been made.²⁰ Medical notes and counselling notes were obtained. MC produced supporting evidence, including her diary from the relevant time, contemporaneous notes and a letter regarding the ‘investigation’ addressed to the IRA Army Council.

B. Investigation and arrest

- 2.9. Two separate police investigations were opened by the PSNI in early 2010: the first in respect of the allegations of sexual abuse, and the second in respect of the alleged ‘investigation’ by the IRA.
- 2.10. PSNI records indicate that the police investigations were conducted separately.²¹ The Public Protection Unit (“**PPU**”) investigated the alleged sexual offences and alleged IRA membership of Morris. The Serious Crime section of the Crime Operations unit (“**C2**”) investigated the alleged IRA offences and related offences of those alleged to have been involved in the ‘investigation’ into the sexual abuse. The PSNI arrest strategy, recorded in the police log, was first to arrest and interview Morris for the sexual abuse offences and then to make decisions in relation to the membership allegations against Morris and the other four persons involved.²²
- 2.11. Morris was arrested on sexual abuse charges in April 2010. He was further arrested for being or professing to be a member of a proscribed organisation in June 2010. The other accused in the membership case were arrested in October 2010 on various charges of membership of a proscribed organisation, arranging a meeting to support or further the activities of a proscribed organisation, and intimidation.

C. The charges

- 2.12. Morris was charged by the PSNI with six offences:
- (1) rape, gross indecency and indecent assault in relation to MC;
 - (2) gross indecency and indecent assault in relation to AA; and
 - (3) indecent assault in relation to BB.²³
- 2.13. The Amended Statement of Complaint in the sexual abuse case,²⁴ on which Morris was arraigned, expanded the original six charges to 22 charges of a similar nature.
- 2.14. The Statement of Complaint in the joint membership case charged the accused as follows:²⁵
- (1) Wilson, Wright, Finucane and McCrory with one charge of belonging or professing to belong to a proscribed organisation;
 - (2) Wilson with two charges of arranging or managing a meeting to support a proscribed organisation;

²⁰ Police log dated 25.3.10, 22.4.10, 23.4.10, 27.4.10, 19.5.10, 28.7.10.

²¹ PSNI, Outline of case, 29.

²² Police log dated 27.4.10.

²³ Charge Sheet, 29.4.10.

²⁴ Statement of Complaint, 14.9.10.

²⁵ Statement of Complaint, 5.12.11.

- (3) Wright, Finucane and McCrory jointly with one charge of intimidation and one charge of arranging or managing a meeting to support a proscribed organisation;
- (4) Wright and Finucane jointly with one charge of arranging or managing a meeting to support a proscribed organisation;
- (5) Wright and McCrory jointly with one charge of arranging or managing a meeting to support a proscribed organisation;
- (6) Finucane with one further charge of arranging or managing a meeting to support a proscribed organisation.

2.15. Additionally, Morris was charged with belonging or professing to belong to a proscribed organisation.²⁶

2.16. Joe McCullough was not arrested, questioned or charged in relation to MC's allegations concerning him in her ABE and in her statement dated 15 May 2013.

D. Progression of the cases

2.17. As detailed in **Part 4, Chronology of Key Facts**, the sexual abuse case initially proceeded ahead of the membership prosecutions. A decision to prosecute was made in September 2010. The sexual abuse case was returned for trial in the Crown Court in July 2011 and Morris was arraigned in September 2011. It was listed for trial three times during the following year. None of those dates was effective.

2.18. PPS decisions to prosecute in the joint membership case took significantly longer. Decisions to prosecute were made in December 2011 in respect of Wilson, Wright, Finucane and McCrory,²⁷ and in May 2012 in respect of Morris.²⁸ The case remained before the Magistrates' Court for a further 15 months. During that time, most of the witnesses in the membership case withdrew their evidence, for reasons that will be explained.

2.19. Meanwhile, on 8 October 2012, the court granted a defence application for the membership case to be heard before the sexual abuse case. This meant that the sequencing of the two trials was reversed, and the sexual abuse case was adjourned indefinitely. In June 2013, AA²⁹ and BB³⁰ each withdrew their evidence in the sexual abuse case, citing delay and other frustrations.

2.20. In September 2013, the membership case against all five accused was returned for trial in the Crown Court.

2.21. In January 2014, the membership case against Morris was severed from the membership case against the other four accused, meaning that there were to be three trials, in the following order:

- (1) The membership charge against Morris;
- (2) The membership, meetings and intimidation charges against Wilson, Wright, Finucane and McCrory; and

²⁶ Notification of Public Prosecutor Decision to Police Service of Northern Ireland, 21.5.12, 2.

²⁷ Statement of Complaint, 5.12.11.

²⁸ Notification of Public Prosecutor Decision to Police Service of Northern Ireland, 21.5.12, 2.

²⁹ Statement of AA dated 7.6.13.

³⁰ Statement of BB dated 7.6.13.

(3) The sexual abuse charges against Morris in respect of MC.

- 2.22. The membership case against Morris was listed for trial on 14 April 2014. On that day, MC attended court with an unsigned withdrawal statement. She was particularly concerned that her statement dated 15 May 2013 regarding Joe McCullough had not been served on the defence. Having made some enquiries, Leading Counsel confirmed that the statement had been served. MC was then persuaded by Leading and Junior Counsel to continue with the case. Subsequently, MC saw Joe McCullough coming out of the lift at court. Leading Counsel was informed that Joe McCullough was in attendance, intending to testify for the defence. On that basis, Leading Counsel advised MC that the case no longer had reasonable prospects of success.³¹ MC withdrew her evidence, and the prosecution offered no evidence. MC subsequently withdrew her evidence in the other two cases.
- 2.23. The reasons why the prosecutions progressed in the way they did, and the issues arising from how they were handled, are further described and analysed in **Part 4** and **Part 5** of this Report.

³¹ Leading Counsel, file note, 14.4.14.

3. THE PROSECUTION TEAM

- 3.1. The PPS staff responsible for conducting and/or managing the cases under review were, from most senior to most junior:
 - (1) The Acting Director of Public Prosecutions;
 - (2) The Deputy Director of Public Prosecutions;
 - (3) The Senior Assistant Director (Regions);
 - (4) The Belfast Regional Prosecutor;
 - (5) The Senior Public Prosecutor (Directing Officer) and the Senior Public Prosecutor (Lead Disclosure Lawyer) (these last two being at the same level of seniority).
- 3.2. Leading and Junior Counsel were briefed in the cases from an early stage. As reflected in **Part 4, Chronology of Key Facts**, on 24 November 2010, Leading Counsel was briefed in the sexual abuse case. On 23 June 2011, different leading counsel was briefed in the membership case. Subsequently, on 9 September 2011, the brief in the membership case was transferred to the same Leading Counsel as in the sexual abuse case by authority of the Acting Director. Counsel are regarded as Public Prosecutors acting on the instructions of the PPS.³² Senior PPS staff described them as being part of the prosecution team.³³
- 3.3. While the positions of Directing Officer and Lead Disclosure Lawyer were held by the same individuals throughout the duration of both cases, the position of Regional Prosecutor was held by three different members of staff over that time.
- 3.4. The Senior Assistant Director for the Central Functions (who later became Deputy Director of Public Prosecutions) became involved to a limited extent in some of the decision-making in the cases under review, although she did not in that capacity have formal line management responsibilities for the Directing Officer or the Belfast Regional Prosecutor who had conduct of the case.
- 3.5. Barra McGrory QC became DPP on 7 November 2011 but recused himself from involvement in these cases.
- 3.6. The duties required of persons in each of the relevant positions appear either in the applicable legislation or in role descriptions and job analyses for the relevant period. These have been provided to us by the PPS.
- 3.7. The following table sets out the position of each team member and the aspects of their role that are relevant to this Review.

³² Justice (Northern Ireland) Act 2002, s 36(3).

³³ Interview with Deputy Director, 11.3.15, note on file.

POSITION	ROLE AND DUTIES
Acting Director	<ul style="list-style-type: none"> Acting head of the Public Prosecution Service. Has statutory powers and functions under Part 2 of the Justice (Northern Ireland) Act 2002.
Deputy Director	<ul style="list-style-type: none"> Appointed by the Attorney General for Northern Ireland as deputy head of the Public Prosecution Service. Has statutory powers and functions of the Director under Part 2 of the Justice (Northern Ireland) Act 2002 but must exercise them subject to the Director's direction and control.³⁴
Senior Assistant Director (Regions)	<ul style="list-style-type: none"> Responsible to the Deputy Director for the overall performance of the Regional offices,³⁵ including <i>"the quality of legal decisions taken"</i>, <i>"quality of advice given and cases presented"</i>. Responsible for providing <i>"strategic leadership and direction to the Regions"</i> and <i>"direction and leadership"</i> to staff.³⁶ Uses <i>"professional judgment"</i> to <i>"provide advice and assistance to legal staff on complex legal issues and high profile cases"</i>,³⁷ including a requirement <i>"on a daily basis to demonstrate his/her legal ability and competence by advising and guiding other legal professionals on the most high profile and sensitive cases."</i>³⁸ Responsible for providing <i>"a weekly Forward Look briefing to the Director and Deputy Director on cases which raise very serious public issues, novel, unprecedented and complex legal issues ... and those which have the potential to affect the reputation of the PPS and public confidence in it."</i>³⁹
Belfast Regional Prosecutor	<ul style="list-style-type: none"> Responsible for <i>"all criminal prosecutions in the Belfast Region, the quality of decisions taken, the timeliness of decisions, advice given and the quality of case presentation"</i>.⁴⁰ Responsible for <i>"providing direction and leadership"</i> to staff,⁴¹ including allocation of work to Senior Public Prosecutors, providing <i>"advice and guidance on complex legal issues"</i> and on <i>"high profile cases"</i>⁴² and quality assurance of prosecutorial decisions. Also responsible for providing <i>"advice and direction to Counsel at the Crown Court"</i>.⁴³ Takes responsibility for the making of prosecutorial decisions in serious cases⁴⁴ and has <i>"the final decision making say in the most serious cases."</i>⁴⁵ Responsible for <i>"escalating the most serious, contentious and high profile cases to the Senior Assistant Director, Deputy Director or Director"</i>⁴⁶ for <i>"support and guidance"</i>.⁴⁷ <i>"Many of the cases the postholder deals directly with have a high media profile and a high level of public interest."</i>⁴⁸

³⁴ Justice (Northern Ireland) Act 2002, s 30(4).

³⁵ PPS, Job Description, Senior Assistant Director Regions (August 2012), [2.1].

³⁶ Ibid, [7.1]; see also [2.3].

³⁷ Ibid, [8.2].

³⁸ Ibid, [10.2].

³⁹ Ibid, [8.3].

⁴⁰ PPS, Job Description, Regional Prosecutor – Belfast Region (October 2012), [7.2].

⁴¹ Ibid, [2.2].

⁴² Ibid, [8.2].

⁴³ Ibid, [8.2].

⁴⁴ Ibid, [6.3], [8.2].

⁴⁵ Ibid, [2.1].

⁴⁶ Ibid, [8.4].

⁴⁷ Ibid, [7.2].

⁴⁸ Ibid, [8.5].

<p>Senior Public Prosecutor/ Directing Officer</p>	<ul style="list-style-type: none"> • Responsible for decisions to prosecute,⁴⁹ preparation of committal papers and trial papers,⁵⁰ and for all legal correspondence and communications prior to trial.⁵¹ • Required to consider <i>“all aspects of each case while maintaining the ability to consider the wider context and any considerations. This is particularly important since the files allocated to the role holder are usually high profile and involve serious classes of offence [such as] ... rape and other sexual offences against adults and children.”</i>⁵² This requires the Senior Public Prosecutor to <i>“proactively resolve any identified problems pertaining to a particular case”</i>.⁵³ • Provides <i>“detailed legal advice and guidance along with authoritative recommendations which includes analysis, directions and briefings to Counsel, Clients, Senior Colleagues and Stakeholders, in relation to serious criminal proceedings. This process involves the role holder outlining their reasoned arguments and being prepared to respond to difficult and often complex legal judgments. This requires the role holder to possess the ability to proactively anticipate lines of defence and develop rebuttal arguments..”</i>⁵⁴ • <i>“The role holder’s casework decisions invariably include a risk analysis process, in which excellent judgment has to be employed ... The planning, scope and strategy for the [m]anagement, presentation and running of a case in Court rests entirely with the role holder.”</i>⁵⁵ • <i>“Regional Prosecutors, Senior Assistant Director, Fellow Senior Prosecutor[s], Counsel and colleagues, knowledge and experience of Criminal Law, practice, procedures, previous casework ... are the main source of guidance available to the role holder.”</i>⁵⁶
<p>Senior Public Prosecutor/ Lead Disclosure Lawyer</p>	<ul style="list-style-type: none"> • <i>“Discussion, superintendence and monitoring of casework in the Crown Room”</i>.⁵⁷ Responsible for <i>“[d]ischarge of continuing disclosure in Crown Court cases”</i>⁵⁸ including <i>“measured, robust and reasonable responses”</i> to unreasonable demands for disclosure by defence.⁵⁹ • <i>“Obligations to victims in accordance with PPS Policy ... to be more accessible to injured parties and meet with them (and where appropriate, with police) in order to explain decisions in cases and answer questions in appropriate terms (and language). This shall often be in a fraught atmosphere and at short notice. I frequently have to give carefully drafted written explanations of decisions and outcomes to victims; their relatives and guardians; their Solicitors; ... Failure to deal honestly and professionally with victims and/or their representatives can easily result in the sustaining of considerable reputational damage to the PPS”</i>.⁶⁰ <i>“Failure to deal conscientiously, empathetically and professionally with victims diminishes not only their faith and confidence in the PPS but in the Criminal Justice system generally. A victim, almost exclusively, shall have his view of ‘the system’ coloured by the sole case in which he is the victim. A disgruntled victim, who feels ill-served by the Prosecution authority (quite apart from lodging a complaint against the PPS) may vent his grievances via the media.”</i>⁶¹ • Responsible for <i>“[r]eporting on matters of particular interest or significant importance in Crown Court cases to the Regional Prosecutor, or, in his absence to the Senior Assistant Director”</i>.⁶² In the Job Analysis Questionnaire, the incumbent recorded: <i>“I have</i>

⁴⁹ PPS, Job Description, Senior Public Prosecutor (July 2008), [2.1].

⁵⁰ Ibid, [2.3].

⁵¹ Ibid, [2.5].

⁵² Ibid, [6.2].

⁵³ Ibid, [6.2].

⁵⁴ Ibid, [6.3].

⁵⁵ Ibid, [7.2].

⁵⁶ Ibid, [8.1].

⁵⁷ PPS, Business Improvement Team, Job Analysis Questionnaire, Senior Public Prosecutor – Lead Disclosure Lawyer (undated), [2.3].

⁵⁸ Ibid, [2.3].

⁵⁹ Ibid, [8].

⁶⁰ Ibid, [2.4].

⁶¹ Ibid, [2.11].

⁶² Ibid, [2.3].

	<i>guidance available from the Regional Prosecutor; Senior Assistant Directors; the Director and various Senior Prosecution Counsel.”⁶³</i>
Leading Counsel	<ul style="list-style-type: none"> • Instructed by the PPS to conduct criminal proceedings.⁶⁴ • Instructed by the PPS to advise on law and procedure. • <i>“[H]as all the powers of a Public Prosecutor but must exercise them subject to any instructions given to him by a Public Prosecutor.”⁶⁵</i>
Junior Counsel	<ul style="list-style-type: none"> • Instructed by the PPS to conduct criminal proceedings.⁶⁶ • Provides assistance to Leading Counsel. • <i>“[H]as all the powers of a Public Prosecutor but must exercise them subject to any instructions given to him by a Public Prosecutor.”⁶⁷</i>

⁶³ Ibid, [2.10].

⁶⁴ Justice (Northern Ireland) Act 2002, s 36(2).

⁶⁵ Ibid, s 36(3).

⁶⁶ Ibid, s 36(2).

⁶⁷ Ibid, s 36(3).

4. CHRONOLOGY OF KEY FACTS

- 4.1. The duration of these cases was lengthy and each case generated a large volume of material. We have reviewed and considered all of the material on the PPS case files. Most of the communications, actions and decisions of the prosecution team over the relevant period are not material to the analysis and findings in this Report.
- 4.2. For these reasons, it would be neither workable nor helpful to set out in detail every communication, action and decision of the prosecution team over the four-year period.
- 4.3. Accordingly, the following Chronology sets out only the most significant developments in the cases under review.

Key:

- R v Martin Edward Morris (PPS Ref 529808)*
- R v Wilson, Wright, Finucane, McCrory and Morris (PPS Ref 569455)*
- Events affecting both cases

DATE	DESCRIPTION
21.1.10	MC made a report to the PSNI of allegations of sexual abuse by Morris. ⁶⁸
6.2.10	AA made a report to the PSNI of allegations of sexual abuse by Morris. ⁶⁹
23.2.10	AA gave two ‘Achieving Best Evidence’ (“ ABE ”) interviews. ⁷⁰
10.3.10	BB made a report to the PSNI of allegations of sexual abuse by Morris and gave an ABE interview. ⁷¹
7.4.10, 13.4.10	MC gave a series of ABE interviews. ⁷²
28.4.10	Morris arrested in relation to the alleged sexual abuse.
29.4.10	Morris interviewed by the PSNI. He denied the allegations of sexual abuse ⁷³ and made no comment in relation to the alleged IRA-related aspects of the case. ⁷⁴ Morris charged by the PSNI with six offences. ⁷⁵
22.6.10	Morris arrested in relation to alleged membership.
17.8.10	Assistant Director of the Central Casework Section met with PSNI to discuss approach to prosecution of membership offences, which was the subject of an investigation separate to the sexual abuse case.
19.8.10	Full file in sexual abuse case sent by PSNI to PPS (Belfast Regional Section).
20.8.10	Sexual abuse file allocated to a Senior Public Prosecutor in the Belfast Regional Section, who thereby became Directing Officer.

⁶⁸ Police log dated 21.1.10.

⁶⁹ Police log dated 6.2.10.

⁷⁰ ABE, 23.2.10.

⁷¹ Police log dated 10.3.10; ABE, 10.3.10.

⁷² ABE, 7.4.10, Interviews 1-4; ABE, 13.4.10, Interview 5.

⁷³ Morris, Record of interview, 29.4.10, Interview 1, 2; Interview 2, 23-26; Interview 3, 22-29; Interview 4, 1-12.

⁷⁴ Ibid, Interview 1, 20-22; Interview 2, 10; Interview 4, 13-24.

⁷⁵ Charge Sheet, 29.4.10.

14.9.10	PPS decision to prosecute taken by Directing Officer. Amended Statement of Complaint expanded the original six charges to 22 charges. ⁷⁶
4.10.10	Seamus Finucane arrested on membership charges.
5.10.10	Padraig Wilson arrested on membership charges.
11.10.10	Agnes McCrory arrested on membership charges.
13.10.10	Breige Wright arrested on membership charges.
24.11.10	Directing Officer determined, in consultation with Senior Assistant Director (Regions), that it was likely that the sexual abuse committal papers would need to be edited to remove IRA-related evidence. MC indicated she was not prepared to proceed if the papers remained edited at that stage. ⁷⁷
24.11.10	Directing Officer instructed Leading Counsel to “ <i>consider the papers at this stage and meet with the [injured party] to discuss the best way to present the evidence in this case</i> ”. ⁷⁸
3.12.10	Consultation between Leading Counsel, Directing Officer, MC and her solicitor. Separate consultation held with BB and her parents.
13.12.10	Leading Counsel provided written advice on presentation of evidence in sexual abuse case.
16.12.10	Full file in membership case sent by PSNI to PPS (Belfast Regional Section).
19.1.11	Membership file allocated to the same Directing Officer as in the sexual abuse case.
24.5.11	Directing Officer prepares initial advice on prospects in membership case. ⁷⁹
23.6.11	Directing Officer initially briefed separate leading counsel to advise in the membership case. ⁸⁰
5-6.7.11	Mixed committal in sexual abuse case. AA and BB called as witnesses. District Judge found a <i>prima facie</i> case without MC having to give evidence. Morris was returned to the Crown Court for trial.
18.7.11	PPS served notice of intention to adduce evidence of bad character. ⁸¹
9.8.11	MC telephoned the PPS and relayed a number of concerns to Senior Assistant Director (Central). Senior Assistant Director (Central) invited MC to put her concerns in writing. ⁸²
12.8.11	MC letter to Senior Assistant Director (Central) setting out 14 issues of concern regarding the PPS handling of the case.
16.8.11	Morris arraigned on 22 sexual abuse charges at Belfast Crown Court. He pleaded not guilty.
24.8.11	Consultation between Senior Assistant Director (Central), MC, another member of PPS staff and a friend of MC’s. ⁸³ MC’s concerns discussed.
9.9.11	Direction of Proofs prepared by Junior Counsel indicating that bad character evidence was “not required”. ⁸⁴
9.9.11	Directing Officer transferred the brief in the membership case to the same Leading Counsel as in the sexual abuse case. This was authorised by the Acting Director via the Senior Assistant Director (Central), as a result of the consultation between the Senior Assistant Director (Central) and MC on 24.8.11. Instructions requested advice “ <i>as to the prospect of conviction in this case both with regard to the recommended offences and any other possible offence, such as attempted intimidation</i> ”. ⁸⁵

⁷⁶ Statement of Complaint, 14.9.10.

⁷⁷ Directing Officer, Note for file added 10.11.14.

⁷⁸ Email from Directing Officer to Leading Counsel, 24.11.10.

⁷⁹ Directing Officer, Analysis, 24.5.11.

⁸⁰ Letter from Directing Officer, 23.6.11.

⁸¹ Letter from Directing Officer, 18.7.11.

⁸² Senior Assistant Director (Central), Note, 9.8.11.

⁸³ Note of consultation on 24.8.11, 25.8.11.

⁸⁴ Direction of Proofs, 9.9.11, [6].

15.9.11	Acting Director issued Certificate for non-jury trial in the sexual abuse case. ⁸⁶
2.11.11	Leading Counsel provided written advice on prospects of conviction in the membership case.
16.11.11	Consultation between Directing Officer, Leading Counsel, MC, a PSNI officer and a friend of MC's. ⁸⁷
22.11.11	MC made a further statement ⁸⁸ in which she described the events and statements that led her to believe that Morris was a member of the IRA.
24.11.11	Leading Counsel's updated advice concluding that there was sufficient evidence to prosecute Morris for belonging or professing to belong to a proscribed organisation.
13.12.11	Four accused in the membership case charged variously with membership, arranging meetings and intimidation. ⁸⁹
23.1.12	First date proposed for trial of the sexual abuse case.
21.2.12	Acting Director issued Certificate for non-jury trial in the membership case. ⁹⁰
5.3.12	Sexual abuse case listed for prosecution application to add membership charge against Morris to the sexual abuse indictment. Application did not proceed. ⁹¹
16.4.12	Second date listed for trial of the sexual abuse case.
26.4.12	Deputy Director gave consent for the membership prosecution in respect of five defendants including Morris. ⁹²
21.5.12	PPS notified PSNI of decision to prosecute Morris for the offence of belonging or professing to belong to a proscribed organisation. ⁹³
25.6.12	Amended Statement of Complaint added Morris to the joint membership indictment served with the committal papers. ⁹⁴
21.8.12	MC enquired with PPS about lifting reporting restrictions in the membership cases. ⁹⁵
30.8.12	Prosecution applied to have reporting restrictions lifted. This was opposed by the defence. Written arguments ordered.
31.8.12	Police log recorded that AA and BB wanted reporting restrictions to stay in place but MC wanted them lifted. ⁹⁶ It became clear that up until this point, AA, BB and other witnesses had apparently been unaware that their evidence was intended to be used to support the membership case as well as the sexual abuse case.
September 2012	A number of witnesses withdrew from the membership case.
17.9.12	Consultation between MC, Directing Officer, Lead Disclosure Lawyer, Leading Counsel, Junior Counsel, officers of the PSNI and a representative from Women's Aid. ⁹⁷ MC raised concerns and indicated she was on the verge of withdrawing from both prosecutions. ⁹⁸

⁸⁵ Letter from Directing Officer to Leading Counsel, 9.9.11.

⁸⁶ Director's Certificate for non-jury trial (PPS Ref 529808), 15.9.11.

⁸⁷ Directing Officer, Note of consultation, 16.11.11.

⁸⁸ Statement of MC dated 22.11.11.

⁸⁹ Statement of Complaint, 5.12.11.

⁹⁰ Director's Certificate for non-jury trial (PPS Ref 569455), 21.2.12.

⁹¹ Law Clerk note, 5.3.12.

⁹² Deputy Director, Consent to prosecute membership offences under the Northern Ireland (Emergency Provisions) Act 1996, 26.4.12.

⁹³ Notification of Public Prosecutor Decision to Police Service of Northern Ireland, 21.5.12.

⁹⁴ Amended Statement of Complaint, 25.6.12.

⁹⁵ Email from MC to Directing Officer, 21.8.12.

⁹⁶ Email from Lead Disclosure Lawyer to MC, 10.9.12.

⁹⁷ Directing Officer, Note to Deputy Director, 18.9.12, [14].

⁹⁸ Ibid, [18].

19.9.12	Directing Officer emailed MC to inform her that the prosecution would not apply to lift the reporting restrictions. ⁹⁹
27.9.12	Mention in the sexual abuse case attended by Leading Counsel. Defence written application to have the membership case heard prior to the sexual abuse case.
4.10.12	Oral argument heard on reporting restrictions, with a barrister for MC arguing in favour of lifting reporting restrictions and the PPS arguing that they should stay in place.
5.10.12	PPS staff informed by PSNI that AA and BB would be withdrawing their complaints in the sexual abuse case if the order of the trials was reversed. ¹⁰⁰
8.10.12	Third date listed for trial of the sexual abuse case. Judge ordered that the membership case should be heard before the sexual abuse case.
11.10.12	District Judge ruled that the original reporting restrictions in respect of the five accused should be lifted. ¹⁰¹
12.10.12	PSNI enquired with PPS on behalf of AA and BB whether their sexual abuse complaints could be severed from MC's.
13.11.12	AA and BB's legal representatives wrote to PPS making a complaint about the handling of their cases. ¹⁰²
25.11.12	Consultation between Belfast Regional Prosecutor, Directing Officer, Leading Counsel and Junior Counsel. Counsel provided advice on reconsideration of management of case.
12.12.12	Consultation between Belfast Regional Prosecutor, Directing Officer, Junior Counsel, AA, BB and their legal representatives. It was agreed to proceed if at all possible with all three complainants and to return to the court to ask for the abuse case to be heard first. ¹⁰³
8.1.13	Consultation between Leading Counsel, Directing Officer, MC, her solicitor and a PSNI officer. MC was advised that the papers would be edited.
30.1.13	Prosecution skeleton argument in support of the application to have the sexual abuse case heard first.
15.2.13	MC indicated she would not proceed in the sexual abuse case with the evidence in edited form.
12.4.13	Directing Officer proposed that prosecution seek leave to sever the complaints of AA and BB, to be heard before the membership case, leaving MC's allegations to be dealt with at the conclusion of the membership case. ¹⁰⁴ Leading Counsel agreed.
16.5.13	Prosecution applied to split the bill of indictment in the sexual abuse case.
20.5.13	The Recorder declined to sever the cases or to alter the timetable. ¹⁰⁵ He confirmed that the membership trial should proceed first. ¹⁰⁶
7.6.13	AA ¹⁰⁷ and BB ¹⁰⁸ formally withdrew from the sexual abuse case.
2.9.13	The membership case did not run as a contested committal. All five defendants were returned for trial in the Crown Court by the District Judge.
8.11.13	No bill applications heard on behalf of Wilson, Finucane and Morris.

⁹⁹ Email from Directing Officer to MC, 19.9.12.

¹⁰⁰ Email from PSNI to Lead Disclosure Lawyer, 5.10.12.

¹⁰¹ File note, 11.10.12.

¹⁰² Letter to PPS, 13.11.12.

¹⁰³ Directing Officer, Note of consultation, 12.12.12.

¹⁰⁴ Email from Directing Officer to Leading Counsel, 12.4.13.

¹⁰⁵ Junior Counsel, Note of Ruling, 20.5.13.

¹⁰⁶ Ibid, 20.5.13.

¹⁰⁷ Statement of AA dated 7.6.13.

¹⁰⁸ Statement of BB dated 7.6.13.

22.11.13	No bill application granted in respect of Wilson on one count. No bills applications refused in respect of Finucane and Morris.
21.1.14	Membership case against Morris severed from the membership case against Wilson, Wright, Finucane and McCrory, without opposition from the prosecution.
14.4.14	Date listed for trial of the membership case against Morris. MC attended with an unsigned withdrawal statement. She was initially persuaded to continue with the case. Leading Counsel was informed that Joe McCullough was in attendance intending to testify for the defence. On that basis he advised MC that the case no longer had reasonable prospects of success. ¹⁰⁹ MC withdrew her evidence. No evidence was offered.
1.5.14	MC recorded two further withdrawal statements in relation to the remaining trials. ¹¹⁰
8.5.14	Not guilty verdicts were entered in respect of all accused. ¹¹¹

¹⁰⁹ Leading Counsel, file note, 14.4.14.

¹¹⁰ Statements of MC dated 1.5.14.

¹¹¹ Law Clerk note, 8.5.14.

5. ANALYSIS OF ISSUES

- 5.1. As explained in **Part 1, Introduction**, in conducting this Review we have considered all aspects of the handling and conduct by the PPS of the prosecutions in question, by reference to the hardcopy and electronic documents and interviews with and written responses of PPS staff and counsel. As indicated in **Part 4, Chronology of Key Facts**, over the course of the prosecutions many actions were taken and decisions were made that do not raise issues material to the findings made in this Review.
- 5.2. On the basis of the materials reviewed, we consider that there are nine core issues that are relevant to the way the prosecutions progressed and that may warrant further consideration by the PPS with a view to the improvement of services. Those issues are as follows:
- (1) General conduct of the cases;
 - (2) Case planning and strategy;
 - (3) Management and delineation of roles;
 - (4) Approach to editing in the sexual abuse case;
 - (5) Decisions to prosecute and joinder in the membership cases;
 - (6) Delay in listing the sexual abuse case;
 - (7) Sequencing of the trials;
 - (8) The weakening of the prosecution case and failure to reassess the merits;
 - (9) Communication with victims and witnesses.

A. General conduct of the cases

- 5.3. The cases reviewed were difficult, unusual and complicated. In particular, we were told by senior PPS staff that these were probably the first cases to reach the PPS involving allegations relating to an internal IRA investigation of alleged sexual abuse.¹¹²
- 5.4. The most difficult and critical issue in terms of law, procedure and evidence was how the two prosecutions should fit together. The prosecution team was faced with the challenge of how to deal in the sexual abuse case with the evidence relating to IRA membership and the ‘investigation’.
- 5.5. The issue of IRA-related evidence arose prominently in the complaint by MC, but was less prominent in the complaints by AA and BB. It transpired in September 2012 that AA and BB did not wish to pursue the membership allegations at all. This meant that there were competing issues and interests not only between the sexual abuse prosecution and the membership prosecution, but also within the sexual abuse prosecution itself.
- 5.6. It is apparent from the materials reviewed that members of the prosecution team showed concern to fulfill their professional duties. The Directing Officer was committed to the cases throughout, engaged in many detailed communications with counsel and MC, responded

¹¹² Interview with Deputy Director, 11.3.15, note on file.

quickly to issues and escalated certain issues to her superiors (including the Belfast Regional Prosecutor). The Senior Assistant Director (Central) was responsive to contact made by MC, arranged to meet with her and engaged with the concerns raised. Leading Counsel and Junior Counsel responded quickly to issues, maintained communications with the PPS and attended numerous consultations.

Finding 1: The cases reviewed were each difficult and complicated. They presented real challenges to the prosecution team. Members of the prosecution team showed concern to fulfill their professional duties, including their duties to MC, AA and BB.

- 5.7. Nothing in the material we have considered or the interviews we have conducted suggests that PPS staff or prosecuting counsel were improperly motivated in relation to the decisions and actions that we have considered in this Report.

Finding 2: There is no evidence in the material reviewed to suggest that decisions or actions of members of the prosecution team were improperly motivated.

B. Case planning and strategy

- 5.8. The complicated and unusual nature of these cases was apparent from an early stage, based on a number of factors:

- (1) In respect of each complainant, the allegations concerning sexual abuse and the allegations concerning membership and the ‘investigation’ stemmed from the same ABE evidence. When the complainants made their allegations to the police, their central focus was on the alleged sexual abuse. They did not make two sets of allegations as such; they were simply giving their account of sexual abuse.
- (2) As the result of an operational decision made by the PSNI at some stage between the making of the original allegations in early 2010 and Morris’s arrest on 28 April 2010, the sexual abuse allegations and the membership allegations were investigated by separate police teams and therefore proceeded according to separate timetables.
- (3) The sexual abuse case involved allegations about what happened 10 years prior to the date of reporting and depended on the recollection of three separate complainants, all of whom were children at the time of the alleged abuse.
- (4) The facts and issues in the sexual abuse case and membership case were entwined. The questions of (a) why the complainants had endured the alleged abuse for so long and (b) why they had not reported their allegations to police earlier were live issues from the beginning of the sexual abuse prosecution. The issue of the “10 year gap” in reporting was mentioned by defence counsel at a bail hearing on 11 May 2010 as a point they intended to take.¹¹³ Leading Counsel, in his first written advice in the sexual abuse case on 13 December 2010, “*was prepared to accept that references to the defendant being a member of the ‘punishment squad’ within the PIRA might conceivably be relevant to issues such as why the complainant did not speak sooner – and references to the ‘investigation’ equally so*”.¹¹⁴ Explaining these issues was not possible unless evidence relevant to the membership case was admitted in the sexual abuse case.
- (5) The membership case was itself highly sensitive and, as noted above, probably the first of its kind to reach the PPS. On 17 August 2010 the Assistant Director of the Central

¹¹³ Transcript of bail hearing, 11.5.10, 6.

¹¹⁴ Letter from Leading Counsel to Directing Officer, 13.12.10.

Casework Section at the PPS met and discussed the membership case with investigating officers from the PSNI. His file note, which was attached to the membership case file, noted that “*it appeared that there were likely to be some difficulties from an evidential point of view*” and that “*Police mentioned tensions between the two investigations*”.¹¹⁵

- (6) Under ordinary circumstances, the sexual abuse case would have been dealt with by a Regional office of the PPS and the membership case would have been dealt with by the Central Casework Section, which had particular expertise in dealing with terrorism cases. Both cases appear to have been allocated to the Directing Officer in the Belfast Regional office without further consideration by the Regional Prosecutor or the Senior Assistant Director (Regions) about how and where they might be best dealt with.
 - (7) Initially, at least, the sexual abuse case was going to be a jury case, while the membership case was going to be a non-jury case.
 - (8) Unless the cases were all tried together, which was not envisaged, the sequencing of the trials was always going to be a fundamental issue affecting both the prospects of success overall and the prospects of the complainants being prepared to support the cases and give evidence.
- 5.9. In complicated, sensitive and/or unusual cases, it is generally recognised as good practice for prosecutors to engage in proactive case management, including through the use of case plans. While it cannot be expected that a case plan will anticipate every issue that may arise, it will ensure that obvious issues are thought through and will increase the likelihood that problems can be anticipated and averted. In recent years, the Crown Prosecution Service in England and Wales has introduced internal policy intended to ensure more proactive case management of difficult and complicated cases. This includes case planning, case tracking and measures to facilitate management of progress of cases by senior staff, including case management panels.
- 5.10. During the relevant period, the PPS did not have a policy or guidance requiring case plans (or their equivalent) in difficult and complicated cases. Several members of staff referred us to a document entitled ‘Forward Look’, which was in operation during the life of these cases. This document was a list of significant cases that was circulated to senior management and to the Communications team on a monthly basis. We note that the Senior Assistant Director (Regions) was responsible for providing “*a weekly Forward Look briefing to the Director and Deputy Director on cases which raise very serious public issues, novel, unprecedented and complex legal issues ... and those which have the potential to affect the reputation of the PPS and public confidence in it.*”¹¹⁶ We have been given access to some editions of the ‘Forward Look’ which contained references to the cases under review.
- 5.11. However, it appears that the ‘Forward Look’ was in practice used primarily by the Communications team. It was in list format and did not include any strategic element. It did not appear to require any specific follow-up action from senior management. It was no substitute for clear policy and guidance on case planning.
- 5.12. In our view, the fact that the PPS did not have a policy or guidance requiring case planning in difficult and complicated cases was an organisational shortcoming.
- 5.13. Having said that, we consider that the difficulties and complexities of these cases were obvious. Whether or not there was a policy requiring case planning, it would have been prudent for the Directing Officer, the Regional Prosecutor and/or Leading Counsel to agree and record a case plan, strategy or overall vision for the direction of the cases. Some degree of

¹¹⁵ Assistant Director of the Central Casework Section, File note, 17.8.10.

¹¹⁶ PPS, Job Description, Senior Assistant Director Regions (August 2012), [8.3].

case planning and strategic thinking was necessary in order to fulfill the Directing Officer's duties to manage cases, conduct risk analysis, anticipate lines of defence and proactively resolve identified problems.¹¹⁷ The PPS role description for Regional Prosecutor makes clear that strategic leadership was required from the Regional Prosecutor in a case involving novel aspects and potentially high levels of public interest.¹¹⁸ In addition, it is inherent in the duties of Leading Counsel to add strategic thinking in cases serious enough for them to be instructed.

5.14. In particular, a case plan could have addressed the following:

- (1) Anticipated legal/evidential complexities and proposed approach, including:
 - (a) The structure of the indictments;
 - (b) How the IRA-related evidence would be dealt with in the sexual abuse case;
 - (c) Identification of which witnesses would be needed to support each charge;
- (2) Anticipated procedural complexities and proposed approach, including:
 - (a) Sequencing of the trials;
 - (b) The impact of guilty/not guilty verdicts in each trial on the prospects of success for each other trial;
- (3) Areas and/or individuals for further investigation;
- (4) Process for making key decisions and responsibility for sign-off; and
- (5) Timescales.

5.15. On the materials reviewed, it does not appear that these matters were thought through and resolved at an early stage. In our view, they should have been considered. One opportunity for such consideration was in early 2011, when the membership case was referred to the PPS and advice sought on prospects of conviction. Consideration was not undertaken at that time.

Finding 3: There was insufficient case planning in these cases. This was partly due to an organisational shortcoming in relation to policy and guidance and partly due to a lack of strategic thinking and management by the prosecution team.

C. Management and delineation of roles

5.16. At various stages the cases under review had input from the Directing Officer, the Lead Disclosure Lawyer, the Regional Prosecutor, the Senior Assistant Director (Central), the Deputy Director, the Acting Director, Leading Counsel and Junior Counsel.

5.17. In the management and conduct of these cases, PPS staff were required to fulfill the duties and management responsibilities set out in their role descriptions. While the Directing Officer was responsible for the day-to-day running and management of the case, the Regional Prosecutor bore responsibility for “*all criminal prosecutions in the Belfast Region, the quality of decisions taken, the timeliness of decisions, advice given and the quality of case presentation*”.¹¹⁹ He

¹¹⁷ PPS, Job Description, Senior Public Prosecutor (July 2008), [6.2], [6.3], [7.2].

¹¹⁸ PPS, Job Description, Regional Prosecutor – Belfast Region (October 2012), [8.2].

¹¹⁹ Ibid, [7.2].

was required to “*provide[] advice and guidance on complex legal issues*” and to take personal responsibility for decisions on the most serious and complex cases.¹²⁰ His duties were particularly engaged in cases with a high public profile.

- 5.18. Having been allocated two difficult and complicated cases with overlapping issues and multiple complainants and defendants, the Directing Officer was entitled to managerial support, guidance and endorsement of key decisions. It does not appear that this was provided by the three Regional Prosecutors who occupied the post during the prosecutions. There is barely any audit trail of their involvement, management, supervision or guidance in these cases.
- 5.19. When interviewed, each of the Regional Prosecutors told us that they had not given thought to how these particular cases should be managed and that they relied on the Directing Officer to raise issues. They did not recall whether the cases had been the subject of handover discussions.¹²¹ Two of the Regional Prosecutors told us that they believed the Senior Assistant Director (Central) (later Deputy Director) had oversight of all major decisions in the cases.¹²² In fact, she was less involved than they thought. The current Regional Prosecutor told us that he took a decision not to be involved in the case because of the size of the file, because the Deputy Director was involved, and because Leading Counsel had been briefed.¹²³ If the Regional Prosecutors thought the Senior Assistant Director (Central) (later Deputy Director) had oversight of all or any major decisions in the cases, they should have discussed it with her and/or with the Senior Assistant Director (Regions); none recalled doing so.¹²⁴
- 5.20. The Directing Officer had turned to the Regional Prosecutors for advice on difficult issues, including editing in the sexual abuse case and the decision to prosecute in the membership case. The respective Regional Prosecutors do not appear to have followed up on these issues. Each Regional Prosecutor should have appreciated the complexities inherent in these cases and their potential to attract a high level of public interest. Management of the cases and the taking or endorsement of key decisions fell within their remit. They should each have turned to more senior managers for support and guidance where necessary. Simply to allocate the cases to the Directing Officer and then to rely on her to raise issues rather than to build in proactive oversight was a failure of management.
- 5.21. The delineation of roles in these cases diverged in two important respects from ordinary management structures. First, the Senior Assistant Director (Central) (later Deputy Director) had been contacted by MC in August 2011 and had met with her regarding her concerns, and had subsequently been involved in some decision-making in the cases. Second, the Directing Officer remained involved in the case after it had been returned to the Crown Court.
- 5.22. The involvement of the Senior Assistant Director (Central) (later Deputy Director) changed over time. Initially, in August 2011, she was involved simply because MC contacted her. She cannot be faulted for meeting MC in August 2011 and for trying to deal with the issues that MC raised. However, as Senior Assistant Director (Central), she had no line management responsibilities for the Directing Officer. Her involvement therefore introduced a layer of confusion. She told us that she had briefed the Acting Director, the Senior Assistant Director (Regions) and the Directing Officer about her meeting with MC but had not made a written

¹²⁰ Ibid, [6.3].

¹²¹ Interview with former Regional Prosecutor, 1.4.15, note on file; Interview with former Regional Prosecutor, 1.4.15, note on file; Interview with Regional Prosecutor, 1.4.15, note on file.

¹²² Interview with former Regional Prosecutor, 1.4.15, note on file; Interview with Regional Prosecutor, 1.4.15, note on file.

¹²³ Interview with Regional Prosecutor, 1.4.15, note on file.

¹²⁴ Interview with former Regional Prosecutor, 1.4.15, note on file; Interview with former Regional Prosecutor, 1.4.15, note on file; Interview with Regional Prosecutor, 1.4.15, note on file.

record.¹²⁵ In the circumstances, it would have been preferable if she had made a note of these briefings.

- 5.23. For his part, the Senior Assistant Director (Regions) should have appreciated at that stage (if he had not already) that the three cases were difficult and complicated and taken a more hands-on approach to managing the issues and risks. In particular, he should have discussed with the then Regional Prosecutor how the case was to be handled.
- 5.24. Once the Senior Assistant Director (Central) was promoted to Deputy Director, she decided that a Director's Consent should issue for prosecution in the membership case.¹²⁶ She also requested a briefing from the Directing Officer in relation to the discrete issue of reporting restrictions.¹²⁷ The Deputy Director does not appear to have been further involved or to have been alerted to issues in the case by the Regional Prosecutor or the Senior Assistant Director (Regions). It was the responsibility of the Regional Prosecutor at the time to know what arrangement was in place for the making of key decisions in the cases. Indeed, the Regional Prosecutor should have been the one asking for input from his superiors, given the novel aspects of the cases. Instead, the management of the cases went around him rather than through him.
- 5.25. The usual process within the PPS at that time was that the Directing Officer would release a case to the Lead Disclosure Lawyer in the Crown Room once it was committed to the Crown Court. The Lead Disclosure Lawyer then liaised with counsel in preparing the case for trial. In these cases, however, the Lead Disclosure Lawyer took some responsibility for the cases, but the Directing Officer remained involved in some (though not all) decision-making. The reason for the continued involvement of the Directing Officer was her knowledge of the matter and her relationship with the complainants, particularly MC.¹²⁸
- 5.26. This unusual arrangement was probably sensible in the circumstances. However, without a clear delineation of roles, it introduced confusion into the process. Sometimes the Lead Disclosure Lawyer took the lead on issues; sometimes the Directing Officer took the lead. Lines of communication between personnel, counsel and MC were determined on an *ad hoc* basis.
- 5.27. The most damaging effect of this confusion was the fact that the Directing Officer appears not to have been involved in, or even to have known about, the decision in October 2012 not to oppose the defence application to have the membership cases heard before the sexual abuse cases.
- 5.28. Although both the Directing Officer and the Lead Disclosure Lawyer bear some responsibility for the failure to delineate their roles in these cases, ultimately it was for their line manager, the Regional Prosecutor, to satisfy himself that sensible and workable arrangements were in place. Each of the individuals who occupied the role of Regional Prosecutor during the time when these cases were being prosecuted did not do so.

Finding 4: The roles of some members of the prosecution team were not defined with sufficient clarity, particularly where they differed from usual management structures. The respective Regional Prosecutors failed to provide active management and oversight of the cases.

¹²⁵ Interview with Deputy Director, 1.4.15, note on file.

¹²⁶ Deputy Director, Consent to prosecute membership offences under the Northern Ireland (Emergency Provisions) Act 1996, 26.4.12.

¹²⁷ This was provided by the Directing Officer on 18.9.12.

¹²⁸ Interview with Directing Officer, 9.3.15, note on file; Interview with Lead Disclosure Lawyer, 10.3.15, note on file.

D. Approach to editing in the sexual abuse case

- 5.29. Early on in the progress of the sexual abuse case, the question arose as to how to deal in the sexual abuse trial with evidence relating to the alleged membership offences, in particular the alleged ‘investigation’ and those who were said to have conducted it. These allegations were referred to at some length in the MC’s ABE evidence. To address that issue, the Directing Officer discussed the matter with the former Regional Prosecutor (by then the Senior Assistant Director (Regions)) in November 2010. It was decided to edit the committal papers.¹²⁹ This included redacting parts of the ABE interviews and having some witness statements retyped to omit certain details.
- 5.30. A subsequent file note¹³⁰ records that problems arose when police asked MC’s parents to sign their edited statements. MC’s parents refused to sign the edited statements. MC was, in the Directing Officer’s words, “*unhappy that the case proceed without the totality of her evidence*”¹³¹ and “*was not prepared to proceed with her allegation if the papers remained edited at this stage*”.¹³²
- 5.31. Given the practical difficulties involved in presenting the evidence in the sexual abuse case and the gravity of MC’s concerns, the Directing Officer instructed Leading Counsel, who had considerable expertise in sexual abuse prosecutions, at an early stage. She was right to do so in the circumstances. In an email setting out instructions to Leading Counsel dated 24 November 2010, the Directing Officer indicated that:
- “The [injured party] refers to a number of other people as being members of the IRA and taking part in the investigation. These are unsubstantiated allegations and are potentially defamatory. I discussed with [the Regional Prosecutor] how best to deal with this evidence and edited the papers accordingly.”*¹³³
- 5.32. The instructions asked Leading Counsel to “*consider the papers at this stage and meet with the [injured party] to discuss the best way to present the evidence in this case*”.¹³⁴ The Directing Officer forwarded the edited and unedited papers to Leading Counsel.
- 5.33. The approach to editing taken by the Senior Assistant Director (Regions) and the Directing Officer, and in the Directing Officer’s subsequent instructions to Leading Counsel, appears to have proceeded on the premise that parts of MC’s evidence may be defamatory and necessarily required editing. Whether the evidence was defamatory was irrelevant, as witnesses who make allegations against other persons in the course of criminal proceedings are immune from civil action.¹³⁵ The only issue was whether it was admissible.
- 5.34. On 3 December 2010, a consultation was held between Leading Counsel, the Directing Officer, MC and her solicitor.¹³⁶ MC raised her concerns about editing. It was decided that the papers would be served unedited but that editing “*would be considered by counsel at trial and appropriate action taken*”.¹³⁷

¹²⁹ Interview with Directing Officer, 9.3.15, note on file; Email from Directing Officer to Leading Counsel, 24.11.10.

¹³⁰ Directing Officer, Note for file added 10.11.14.

¹³¹ Ibid.

¹³² Directing Officer, Notes of consultation, 6.12.10.

¹³³ Email from Directing Officer to Leading Counsel, 24.11.10.

¹³⁴ Ibid.

¹³⁵ *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, 264-265; *Marrinan v Vibart* [1963] 1 QB 528, 535 per Sellers LJ; *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435, 456 per Lord Clyde.

¹³⁶ Directing Officer, Notes of consultation, 6.12.10.

¹³⁷ Letter from Leading Counsel to Directing Officer, 13.12.10.

5.35. Later on the same day, a separate consultation was held with BB and her parents, who were apparently content for the case to proceed on the basis of the edited papers.¹³⁸

5.36. In a letter dated 13 December 2010,¹³⁹ Leading Counsel recorded his advice on the evidence as follows:

“I confirm that my advices during the consultations with the victims were to the effect that at trial only relevant and admissible evidence would be led. In that regard it seemed to me unlikely that the material sought to be retained within the committal bundle by one of the victims, could be used in support of the case, although I was prepared to accept that references to the defendant being a member of the ‘punishment squad’ within the PIRA might conceivably be relevant to issues such as why the complainant did not speak sooner – and references to the ‘investigation’ equally so. It was explained that these matters would be considered by counsel at trial and appropriate action taken.”

5.37. It does not appear to us that this advice provided a conclusive view or clear position on “*the best way to present the evidence*” as a matter of law. Leading Counsel on the one hand expressed the view that it was unlikely that the edited material could be used, but on the other hand was “*prepared to accept*” that the membership and investigation evidence “*might conceivably be relevant to issues*” such as delayed reporting. It is not clear which of these was, in his view, the correct and preferable approach.

5.38. In any event, both the Directing Officer and Leading Counsel were content to leave the matter unresolved on the basis that it would be considered by counsel at some later stage. It is recognised that the decision to leave the matter unresolved was taken in order to assuage MC and to reduce the likelihood that she may withdraw her evidence. However, in our view, leaving the matter unresolved without analysing the applicable principles was a mistake.

5.39. It would have been preferable to conduct a proper legal analysis of the applicable principles, including possible avenues of admissibility, in order to determine what options existed for presentation of the evidence. In our view, given that the complainants would almost certainly have to explain in the course of any trial why they had endured the alleged abuse for so long and why their complaints to the police were not made until some 10 years after the events, it was likely that aspects of the membership and investigation evidence would be relevant in the sexual abuse case.

5.40. In this respect, it would have been preferable if Leading Counsel’s advice had addressed the following issues:

- (1) Whether the Directing Officer was right in her view that editing was necessary at all;
- (2) Whether the evidence, or part of it, would be characterised as ‘bad character’ evidence under the provisions of the Criminal Justice (Evidence) (Northern Ireland) Order 2004;
- (3) If the answer was ‘yes’ in respect of all or part of the evidence, whether that evidence was nonetheless admissible.

5.41. A proper analysis of the legal position would have revealed the possible options for the presentation of the evidence and would have provided a sound legal basis to assess the strengths and weaknesses of those options. A strategic decision could then have been taken on how to proceed, having regard to MC’s views.

¹³⁸ Directing Officer, Notes of consultation, 6.12.10.

¹³⁹ Letter from Leading Counsel to Directing Officer, 13.12.10.

- 5.42. It appears to us that there was strong case for seeking to adduce some or all of the membership and investigation evidence using the avenues of admissibility referred to above. If inclusion of the evidence were disputed, that argument should have been put before the court and a ruling should have been sought from the judge. This would have allowed for clear planning of how the evidence was to be presented.
- 5.43. On 18 July 2011, following committal, the PPS served notice of intention to adduce evidence of defendant’s bad character,¹⁴⁰ relating in part to the alleged IRA connections and activities of the accused. It appears that no ruling was ever made on this application. Reference to the bad character application was omitted from the Direction of Proofs prepared by Junior Counsel on 9 September 2011, which indicated that bad character evidence was “*not required*”.¹⁴¹
- 5.44. Junior Counsel explained to us that she had not included reference to bad character because she considered the ‘investigation’ evidence to be “*admissible subject to relevance*” at common law, relying on the case of *R v Pettman* (unreported, 2 May 1985). *Pettman*, per Purchas J, is the common law authority for the admissibility of important explanatory evidence now reflected in the Criminal Justice (Evidence) (Northern Ireland) Order 2004, as follows:
- “Where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence.”*
- 5.45. Junior Counsel’s explanation thus suggests that, on her analysis, editing may not have been inevitable. Had issues of admissibility and bad character evidence been properly analysed at the time, a more robust approach could have been taken from the outset while having regard to MC’s position.

Finding 5: There was a failure by senior PPS staff and counsel properly to analyse how to treat the membership and investigation evidence in the sexual abuse case.

E. Decisions to prosecute and joinder in the membership cases

- 5.46. According to the relevant role descriptions, the Directing Officer was responsible for decisions to prosecute,¹⁴² with oversight from the Regional Prosecutor, who had “*the final decision making say in the most serious cases.*”¹⁴³
- 5.47. As set out in paragraph 4.1.1 of the PPS *Code for Prosecutors* (Revised 2008), the Test for Prosecution is met if:
- (1) *The evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction — the Evidential Test; and*
 - (2) *Prosecution is required in the public interest — the Public Interest Test.*

¹⁴⁰ Letter from Directing Officer, 18.7.11.

¹⁴¹ Direction of Proofs, 9.9.11, [6].

¹⁴² PPS, Job Description, Senior Public Prosecutor (July 2008), [2.1].

¹⁴³ PPS, Job Description, Regional Prosecutor – Belfast Region (October 2012), [2.1].

5.48. In May 2011, the Directing Officer carried out a detailed analysis of the available evidence to support possible charges in relation to membership and the ‘investigation’.¹⁴⁴ In relation to Wilson, Wright, Finucane and McCrory, the Directing Officer considered the offences of perverting the course of justice, withholding information and membership offences. The Directing Officer concluded that there was not a reasonable prospect of conviction for any of those offences for any of the suspects.¹⁴⁵

5.49. The Directing Officer included an ‘Addendum’ in respect of Morris in her analysis.¹⁴⁶ There she concluded that there was not a reasonable prospect of conviction of Morris for membership or for professing to be a member of the IRA.¹⁴⁷ She further noted:

*“It is considered that even if there is a reasonable prospect of conviction for membership/professing to be a member, separate prosecution is not warranted. Should the accused be convicted of the sexual offences, this feature of the case will be an aggravating factor which will be taken into account in sentencing.”*¹⁴⁸

5.50. Although not expressed in this way, the Directing Officer’s analysis seemed to indicate that, in her view, prosecution of Morris for membership charges did not meet either limb of the Test for Prosecution. In the above-quoted paragraph, the Directing Officer seemed to conclude that even if it did meet the Evidential Test, separate prosecution was not strictly necessary and that tactically Morris’s alleged membership would be better dealt with in the sexual abuse proceedings without the formality of a charge.

5.51. The Directing Officer handed her analysis to the Regional Prosecutor on 24 May 2011.¹⁴⁹ On 22 June 2011, the Regional Prosecutor made a handwritten note stating:

*“Thank you. We have spoken. We have agreed that we will seek the advices of senior counsel in this matter.”*¹⁵⁰

5.52. Having initially briefed other counsel, the Directing Officer forwarded instructions and papers to Leading Counsel on 9 September 2011.¹⁵¹ The instructions requested advice *“as to the prospect of conviction in this case both with regard to the recommended offences and any other possible offence, such as attempted intimidation”*.¹⁵² The Directing Officer attached, among other documents, her note to the Regional Prosecutor dated 24 May 2011.

5.53. Leading Counsel sent his opinion to the Directing Officer on 2 November 2011.¹⁵³ Leading Counsel’s advice relied on the statements of a number of witnesses, namely MC, AA, BB and family members of each. In summary, Leading Counsel advised that:

- (1) There was insufficient evidence to demonstrate that the accused took steps to pervert the course of justice;
- (2) There was insufficient evidence to support a charge of withholding information;

¹⁴⁴ Directing Officer, Analysis, 24.5.11.

¹⁴⁵ Ibid, [69].

¹⁴⁶ Ibid, Addendum.

¹⁴⁷ Ibid, [75].

¹⁴⁸ Ibid, [77].

¹⁴⁹ Ibid, 24.5.11.

¹⁵⁰ Ibid, Handwritten annotation, 22.6.11.

¹⁵¹ Letter from Directing Officer to Leading Counsel, 9.9.11.

¹⁵² Ibid, 9.9.11.

¹⁵³ Leading Counsel, Opinion, 2.11.11.

- (3) Relying on the judgment of Hart J in *R v Shoukri and Ors* [2007] NICC 22, the use of the words ‘our’ and ‘we’ by the accused was capable of supporting the inference that they were identifying themselves with the IRA;
- (4) Again based on the judgment of Hart J in *Shoukri*, seeking to sustain morale and effectiveness is part and parcel of showing support for a proscribed organisation in respect of the offence of holding a meeting to support a proscribed organisation. On that basis, Leading Counsel believed that “*prosecution would be appropriate in respect of a limited number of identified meetings*”;
- (5) Leading Counsel’s overall conclusion was that “*there is an arguable — albeit difficult — case*”.

5.54. On 7 November 2011, the Directing Officer wrote to Leading Counsel pointing out that his advice had not considered the offence of membership specifically in respect of Morris.¹⁵⁴ On 8 November 2011, the Directing Officer met Leading Counsel and he agreed to revert to her in relation to both the Morris membership issue and the offence of intimidation. The Directing Officer sent both Leading Counsel’s original advice and a summary of the meeting to the Senior Assistant Director (Central).¹⁵⁵

5.55. On 16 November 2011, a consultation was held between the Directing Officer, Leading Counsel, MC, an officer of the PSNI and a friend of MC’s.¹⁵⁶ The membership offences were discussed, including MC’s allegation in her ABE that Morris “*made no secret*” of his IRA membership. MC again raised the issue of Joe McCullough. Following that consultation, MC furnished a further statement dated 22 November 2011¹⁵⁷ in which she described the events and statements that led her to believe that Morris was a member of the IRA. That statement was provided to Leading Counsel.

5.56. On 24 November 2011, Leading Counsel provided his updated advices in relation to Morris.¹⁵⁸ In summary, Leading Counsel advised that:

- (1) From MC’s statement dated 22 November 2011, “*it is clear that she is saying that [Morris] specifically professed membership, to her, on more than one occasion*”,¹⁵⁹
- (2) Because this statement had not been served as part of the committal bundle it could not be taken into account at the ‘No bill’ stage of proceedings;
- (3) However, in his view, MC’s ABE evidence that Morris “*made no secret*” of his membership meant that “*there is sufficient on the papers to allow this charge to go forward*”.¹⁶⁰

5.57. Leading Counsel gave some advice as to joinder, but did not specifically apply the legal test for joinder to the charges. Leading Counsel indicated that the membership charge against Morris could be joined to the sexual abuse case on the basis that “*the fact of the IRA membership is relevant to the reasons why [MC] submitted to abuse for so long, and kept silent for so long and therefore it comes into the sexual abuse case, and explains aspects of*

¹⁵⁴ Email exchange between Directing Officer and Leading Counsel, 7.11.11.

¹⁵⁵ Email from Directing Officer to Senior Assistant Director (Central), 8.11.11.

¹⁵⁶ Directing Officer, Note of consultation, 16.11.11.

¹⁵⁷ Statement of MC dated 22.11.11.

¹⁵⁸ Leading Counsel, Further Opinion, 24.11.11.

¹⁵⁹ *Ibid*, [2].

¹⁶⁰ *Ibid*, [4].

importance".¹⁶¹ Leading Counsel concluded that if a judge disallowed that course, the membership charge against Morris could be prosecuted as part of the joint membership case.¹⁶²

- 5.58. On 5 December 2011, the Directing Officer forwarded Leading Counsel's further advices to the Senior Assistant Director (Central), indicating that the membership charge against Morris could be added to the sexual abuse indictment.¹⁶³
- 5.59. The issue was not raised again until 27 February 2012, a week before the formal application to join the charge was listed in court on 5 March 2012. On that day, Junior Counsel emailed Leading Counsel expressing concern about whether the membership count could properly be joined to the sexual abuse count. Junior Counsel believed that the membership charge against Morris could not be said to meet the test for joinder; that is, to be "*founded on the same facts*"¹⁶⁴ as the sexual abuse. Leading Counsel agreed it was "*simply too remote*".¹⁶⁵
- 5.60. On 29 February 2012, it was agreed between counsel and the Directing Officer that it would be safer not to make the joinder application.¹⁶⁶ On 5 March 2012, the Court was advised that the prosecution was not proceeding with its application to add the membership charge to the sexual abuse indictment.¹⁶⁷
- 5.61. On 8 March 2012, the Directing Officer advised the Senior Assistant Director (Regions) that the membership charge against Morris would be added to the joint membership indictment.¹⁶⁸ The basis given for meeting the test was that "*if Morris had not been a member the IRA would not have commenced the investigation*".¹⁶⁹
- 5.62. On 26 April 2012, consent was given by the Deputy Director of Public Prosecutions (formerly Senior Assistant Director (Central)) for the prosecution of five defendants including Morris for membership offences.¹⁷⁰ On 21 May 2012, notification was given to police of the PPS decision to prosecute Morris for the offence of belonging or professing to belong to a proscribed organisation.¹⁷¹ An amended Statement of Complaint adding Morris to the joint membership indictment was served on 25 June 2012 with the committal papers.¹⁷²
- 5.63. The joinder of Morris to the joint membership case eventually came undone in January 2014 when Leading Counsel acceded to a defence application to sever Morris from the indictment.¹⁷³ Severance was accepted on the basis that the evidence used to support the membership charge against Morris (i.e. MC's evidence that he "*made no secret*" of his membership and her witness statement dated 22 November 2011 explaining this allegation) was different to that used to support the membership charges against the other four defendants (i.e. MC's evidence about the 'investigation').¹⁷⁴
- 5.64. Four issues emerge from these events.

¹⁶¹ Ibid, [3].

¹⁶² Ibid, 24.11.11, [4].

¹⁶³ Email from Directing Officer to Senior Assistant Director (Central), 5.12.11.

¹⁶⁴ Email from Junior Counsel to Leading Counsel, 27.2.12.

¹⁶⁵ Email from Leading Counsel to Junior Counsel, 27.2.12.

¹⁶⁶ Email from Leading Counsel to Directing Officer, 29.2.12.

¹⁶⁷ Law Clerk note, 5.3.12.

¹⁶⁸ Email from Directing Officer to Stephen Burnside, 8.3.12.

¹⁶⁹ Ibid.

¹⁷⁰ Deputy Director, Consent to prosecute membership offences under the Northern Ireland (Emergency Provisions) Act 1996, 26.4.12.

¹⁷¹ Notification of Public Prosecutor Decision to Police Service of Northern Ireland, 21.5.12, 2.

¹⁷² Amended Statement of Complaint, 25.6.12.

¹⁷³ Email from Junior Counsel to Directing Officer, 18.1.14.

¹⁷⁴ Email from Junior Counsel to Leading Counsel, 21.1.14.

(i) Decision to prosecute: joint membership case

- 5.65. The charges in the joint membership case rested on a fairly thin basis. Even if the legal definition of the offences in relation to meetings “*to support or further the activities of a proscribed organisation*” was technically wide enough to cover the purported ‘investigation’, this appears to have been somewhat removed from the original intention of Parliament when it passed the provisions of the Terrorism Act 2000. This made the case not only complicated and sensitive but also, on its facts, unusual. In addition, Leading Counsel put the prospects of success in the joint membership prosecution as no more than “*arguable*” and acknowledged immediately that it was “*difficult*”. His analysis relied on inferences from individuals’ use of words such as ‘our’ and ‘we’ in relation to evidence that would not necessarily be easy to adduce.
- 5.66. In all the circumstances, Leading Counsel’s advice that the joint membership case should proceed should have been the subject of further consideration by the PPS. In particular, the impact on the sexual abuse case of bringing the joint membership charges should have been properly considered. The decision to prosecute should have been made or at least endorsed by a senior member of staff. The Regional Prosecutor was aware of the issues in the case and the fact that Leading Counsel had been instructed. Having read the Directing Officer’s analysis and agreed with her that the advice of counsel should be requested, the Regional Prosecutor appears not to have made any note of his further involvement. It is not clear whether he saw Leading Counsel’s advice, whether he agreed with the advice or what view he took of the Test for Prosecution. He should have flagged the case for endorsement of a decision to prosecute. Alternatively, the Directing Officer could have referred the case back to the Regional Prosecutor once she had read Leading Counsel’s advice.

(ii) Decision to prosecute: Morris membership case

- 5.67. In respect of the membership charge against Morris, the Directing Officer’s initial view suggesting that, even if the Evidential Test was made out, the matter should not be the subject of a separate charge, was not followed up. Counsel was instructed to advise only on prospects of conviction, but it would have been preferable if he had considered from a tactical perspective how the membership prosecution may affect and interact with the sexual abuse prosecution, given the issue had been raised in the Directing Officer’s analysis. The Regional Prosecutor, again, appears not to have seen counsel’s advice or recorded any view or input on the Test for Prosecution. As in the joint membership case, he should have flagged the case for endorsement of a decision to prosecute.
- 5.68. In our view, the Directing Officer was right to raise the issue of whether prosecution of Morris for membership was warranted given the context of the sexual abuse charges. In this respect, prioritisation of the issues was required. MC, AA and BB had complained of sexual abuse and consideration should have been given to whether the Morris membership charges strengthened or weakened the sexual abuse case. Analysis of this issue by the PPS and counsel should have included consideration of sequencing of the trials, the evidential overlap, and the impact of a guilty or not guilty verdict in the sexual abuse case on the Morris membership charge and vice versa. As it was, the Morris membership case was pursued without proper regard to its potential impact on the sexual abuse case.

(iii) Consideration of joinder: Morris membership case

- 5.69. It was plain from Leading Counsel’s initial advice that the membership case against Morris was different to, and in many respects separate from, the joint membership case against Wright, Wilson, Finucane and McCrory. The evidence relied on in each case was separate. The case against the four accused relied on their involvement in the ‘investigation’. The case

against Morris relied on MC's account of why she understood, based on a number of other statements and events, that he was a member of the IRA.

- 5.70. In his initial advice on membership offences against Morris on 24 November 2011, Leading Counsel expressed a somewhat unformed view in relation to the joinder of the charge. As noted above, he indicated that the membership charge against MM could be joined to the sexual abuse case, but if a judge disallowed that course it could be prosecuted as part of the wider membership case. It would have been preferable to have thought through the issue of joinder more carefully from the start.
- 5.71. The prosecution changed its position on joinder of the membership charge against Morris a number of times. First it was intended to join the charge to the sexual abuse indictment. When it was determined that the charge did not meet the basic test for joinder, it was decided to join it to the joint membership indictment. That too was abandoned when the prosecution acceded to the defence severance application.
- 5.72. These incidents are indicative of a failure on the part of the prosecution properly to think through the issue of joinder and the structure of the indictments from the outset. It would have been preferable for Leading Counsel to apply the test for joinder in respect of each possible structure of the charges at an early stage in order to determine the best approach as a matter of law and procedure.

(iv) Delay in the decisions to prosecute

- 5.73. Because of the time taken to request, deliver and consider advice and for the prosecution team to determine its initial position on joinder, the delay between allegation and the decisions to prosecute was too long: almost two years for the joint membership case and two years and four months in the single membership case.

Finding 6: The decision to proceed with the membership charges was not taken and endorsed at a sufficiently senior level in the PPS. Nor was sufficient consideration given by PPS staff and counsel to the potential impact of the membership cases on the sexual abuse case.

Finding 7: The question of joinder in relation to the membership charge against Morris was not properly thought through by PPS staff and counsel.

Finding 8: The time taken to reach decisions to prosecute in the membership cases was too long.

F. Delay in the listing of the sexual abuse case

- 5.74. Following Morris's arraignment on the sexual abuse charges on 16 September 2011, a trial date of 23 January 2012 was proposed. This was vacated during the same hearing.¹⁷⁵ It is not clear why it was ever contemplated, as it was manifestly inconvenient for two of the complainants.
- 5.75. The next listing was fixed for 16 April 2012.¹⁷⁶ Given it had already been moved back once, the April date should have been considered by all to be a firm fixture. The reason why the trial

¹⁷⁵ Law Clerk note, 16.9.11.

¹⁷⁶ Email from Paralegal to PPS, 28.9.11.

did not proceed on that date is not known; court records indicate that it was vacated “By Direction of Judge”.¹⁷⁷

- 5.76. By 23 April 2012, the case had been re-listed for 8 October 2012.¹⁷⁸ This was a further six-month delay. Once the PPS had this information, a stronger stand could have been taken against the delay. For example, enquiries could have been made about why the case had been pushed back and whether it was possible to relist it earlier than October.
- 5.77. On 27 September 2012, 11 days before the third listing for trial, Leading and Junior Counsel attended a mention before the Judge.¹⁷⁹ By that date, it was imperative for the complainants that the trial went ahead on 8 October 2012.
- 5.78. During that hearing it was noted that Leading Counsel was unavailable for the first two days of trial, as he was appearing in the Court of Appeal.¹⁸⁰ From the Law Clerk’s note of the hearing, it does not appear to have been pressed by the prosecution that the trial should go ahead in the week commencing 8 October 2012, either with a short two-day delay or with preliminary matters to be dealt with during the first two days in the absence of senior counsel.¹⁸¹
- 5.79. This may have been due to the fact that the defence raised the issue of outstanding disclosure requests dated 19 and/or 20 September 2012 to which they claimed no response had been received from the prosecution, as well as third party applications that had not yet been made.¹⁸² A letter from defence lawyers dated 19 September 2012 containing a number of disclosure requests and a letter dated 20 September 2012 requesting the prosecution to take steps to obtain materials from third parties both appear in the prosecution’s paper files. Each letter is stamped as having been received by the PPS on 20 September 2012. From the files, it is not entirely clear whether enquiries were made with police regarding these specific requests. The Lead Disclosure Lawyer does not remember dealing with them.¹⁸³
- 5.80. If the letters were received in good order, it was incumbent on the Lead Disclosure Lawyer to respond to these requests and to provide Leading Counsel with instructions. It appears that this was not done. It would have been preferable if Leading Counsel had objected firmly to adjournment of the trial on the basis of last-minute disclosure requests by the defence which, as the Judge pointed out, had not been made for a full year after arraignment,¹⁸⁴ and which in any event could have been addressed before the listed date for trial.
- 5.81. The defence also raised an issue which appears never to have been raised before, namely that the membership trial should be heard before the sexual abuse trial. Leading Counsel later noted that a three-page written application was submitted,¹⁸⁵ though this application did not appear on the prosecution file to which we were given access (a matter returned to below). The defence argument appears to have been put on three bases:

- (1) That the defendant hoped to rely in the sexual abuse case on the evidence of the four ‘investigators’, but their evidence may incriminate them in the membership case;¹⁸⁶

¹⁷⁷ ICOS record.

¹⁷⁸ Email from Paralegal to Junior Counsel, PSNI and Leading Counsel, 24.4.12.

¹⁷⁹ Law Clerk note, 27.9.12.

¹⁸⁰ Email from Leading Counsel to Lead Disclosure Lawyer, 27.9.12.

¹⁸¹ Law Clerk note, 27.9.12.

¹⁸² Ibid.

¹⁸³ Interview with Lead Disclosure Lawyer, 10.3.15, note on file.

¹⁸⁴ Ibid.

¹⁸⁵ Email from Leading Counsel to Lead Disclosure Lawyer, 27.9.12.

¹⁸⁶ Law Clerk note, 27.9.12.

(2) That the same statements had been served in both cases and that “*All issues deeply entwined. Conviction could be unsafe if court relies on material it shouldn’t have*”;¹⁸⁷ and that, in particular,

(3) It was MC’s case that she tolerated the abuse because of who the defendant was, and that “*If this is a line defence want to take – may come into sex abuse trial*”.¹⁸⁸

5.82. The Law Clerk’s note suggests that the Judge did not initially appear swayed by these arguments and expressed concerns about delay in the sexual abuse trial. The delay caused by reversing the trials was likely to be very significant, as the membership case was still at pre-committal stage and because there was an automatic right of appeal in non-jury cases which would have lengthened the duration of the membership prosecution.¹⁸⁹ Leading Counsel submitted that the issues could be separated between trials and that “*Issues of membership trial do not need to be aired during abuse case*”.¹⁹⁰

5.83. The trial was stood out of the list for 8 October 2012 and instead listed for mention on that date.

Finding 9: The overall delay in the sexual abuse prosecution was unacceptable. It was regrettable that the listing date of the sexual abuse trial was postponed on a number of occasions and that delays were not more robustly opposed.

G. The reversal in sequencing

5.84. The period 17 September 2012 – 8 October 2012 was, in our view, a significant period in the life of the cases under review. A number of important communications were sent between members of the prosecution team during that time, precipitating a series of further events.

5.85. After the mention on 27 September 2012 detailed above, Leading Counsel emailed the Lead Disclosure Lawyer, copying the police liaison officer at the PSNI as well as Junior Counsel.¹⁹¹ The Directing Officer was not copied in to this email.

5.86. Leading Counsel referred to a three-page written application for adjournment submitted at the hearing on behalf of the defence, but did not attach a copy of that application to his email, assuming it would be sent separately to the PPS.¹⁹² Leading Counsel noted that the defence had made “*oral submissions amplifying the written argument for adjournment*”.¹⁹³ He stated that the defence had indicated that MC would be cross-examined on her lack of early report. As a result, he said, the IRA membership issue was “*squarely within the abuse trial*”.¹⁹⁴ He said:

“The complainant will be driven to say she was afraid of the accused because of the membership, and she did not go to the authorities sooner because of the trauma occasioned by an IRA investigation.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Email from Leading Counsel to Lead Disclosure Lawyer, 27.9.12.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

If that is the case, then there is in my view and that of [Junior Counsel] some substance to the point made in the written application to adjourn – namely that if a subsequent IRA membership trial ends in an acquittal; any conviction in this abuse case that relied in part on evidence of membership, might later be regarded as unsafe”.

- 5.87. Although noting that the case would be based on MC’s *belief* rather than objective fact, Leading Counsel indicated that “*however I still consider that there may be merit in the point made by defence that logically, the membership trial might be best commenced first*”.¹⁹⁵
- 5.88. Leading Counsel indicated that he wanted to reflect on the matter and that he would ask Junior Counsel to do the same. He went on to advise the Lead Disclosure Lawyer that the victims would need to be informed that there could be significant delay in the sexual abuse case if the judge agreed with the defence,¹⁹⁶ as the membership case was still pre-committal. He indicated that Junior Counsel would attend court on 8 October 2012, as he was unavailable.¹⁹⁷
- 5.89. The police liaison officer wrote to the Lead Disclosure Lawyer later the same day, 27 September 2012, indicating that he had informed the complainants that the trial would not be going ahead on 8 October 2012.¹⁹⁸ On 5 October 2012, the police liaison officer wrote a further email to the Lead Disclosure Lawyer stating that, following discussions on 4 October 2012, he understood that AA and BB “*are anxious of the delay in their abuse case and if the trial is put into second place, behind the terrorist cases, they will be withdrawing their complaints*”.¹⁹⁹ Twenty minutes later, the Lead Disclosure Lawyer forwarded that email to both counsel.²⁰⁰
- 5.90. It appears that Leading Counsel and Junior Counsel discussed the matter over the weekend before the hearing on 8 October 2012.²⁰¹ Although there is no note of these discussions, in an email to Leading Counsel dated 8 October 2012 Junior Counsel acknowledged that a decision to switch the trials “*will put in jeopardy whether [AA and BB] will give evidence in the abuse case*”.²⁰²
- 5.91. On 8 October 2012, Junior Counsel attended the mention in the sexual abuse case. There is no transcript of the hearing and the Law Clerk’s note of the hearing is not clear.²⁰³ In an email from Junior Counsel to Leading Counsel on 8 October 2012, Junior Counsel reported that “*while not conceding the point, I accepted the court’s view that it would seem appropriate to hear the membership case first*”. Similarly, in an email exchange with the Directing Officer dated 10 January 2013 about a defence suggestion that a transcript of the hearing of 8 October 2012 be obtained, Junior Counsel said “*there was no need for this in that the prosecution had not argued against the original plan to hear the membership case first*”.²⁰⁴ This is further reflected in a skeleton argument filed by the prosecution dated 30 January 2013 dealing with the listing of the case, which noted at [4]:

“It is accepted by the prosecution that there was no real opposition to the defence application to have the order of the trials changed at this hearing. While their

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Email from PSNI to Lead Disclosure Lawyer, 27.9.12.

¹⁹⁹ Email from PSNI to Lead Disclosure Lawyer, 5.10.12.

²⁰⁰ Email from Lead Disclosure Lawyer to Leading Counsel and Junior Counsel, 5.10.12.

²⁰¹ Email from Junior Counsel to Leading Counsel, 8.10.12.

²⁰² Ibid.

²⁰³ Law Clerk note, 8.10.12.

²⁰⁴ Email from Junior Counsel to Directing Officer, 10.1.13.

*application was not agreed to without some argument, it was accepted that this might be the better way.*²⁰⁵

5.92. It appears from these records that the prosecution effectively conceded, or at least did not oppose, the argument about sequencing of the trials at the hearing of 8 October 2012. The court reversed the order of the trials. From that date on, the sexual abuse case was held back pending the trial of the membership cases.

5.93. On 9 October 2012, MC emailed the Lead Disclosure Lawyer in the following terms:

“I wanted to write to you to bring to your attention that yet again, I have had no communication from anyone in the PPS, despite the agreement at the recent meeting that I would be kept informed of developments.

I am referring to the recent developments in relation to the Morris case, and specifically the fact that the delay now means that evidence looks likely to be withdrawn. I received a phonecall from [a PSNI officer] yesterday to inform me that apparently last week there were legal arguments around the fact that the membership case should be heard first, and that the Morris trial has been put off with no indication of a date for trial.

*Could you confirm if this is the case, what the legal arguments were, and given the fact that this has put some of the witnesses in the position where they are considering withdrawing, whether the PPS intends to challenge this?”*²⁰⁶

5.94. The Lead Disclosure Lawyer replied to MC’s email on 12 October 2012, stating as follows:

“It is regrettable that you are disappointed at ‘no communication from anyone in the PPS’. I had discussed ‘developments’ with [the police liaison officer] and I knew he was going to explain matters to you with regard to the recent ‘mention’ in the Crown Court. I know [the officer] would have explained things to you fully – he is an experienced detective. This information did not require duplication to you from me and, in any event, [the Directing Officer] or myself was available to provide any clarity to you if required.

Effectively, the Court has decided that the ‘membership’ case shall proceed prior to Morris’ case. While this will be of scant consolation to you, there is a rationale for this. Prosecution Counsel did argue that Morris’ case should proceed first. Defence Counsel argued that any reference to IRA membership in Morris’ case should be removed from the papers if the case was to proceed. I can tell you that if that was done the Prosecution view is that such would severely undermine elements of Morris’ [abuse] case and imperil our prospects of conviction.

While I stress that the Defence argument was not conceded in argument by Prosecution Counsel, the argument that the membership case should proceed first had force and the Judge accepted that. Thus the Trial date ... was ‘vacated’.

*While obviously appreciating that this is a blow to you, [AA and BB] in Morris’ case, the PPS does not have a sustainable argument with which to challenge the stance the Court has taken. While I cannot predict with precision, I have to tell you that this shall result in postponement of Morris’ abuse case for a considerable time.*²⁰⁷

²⁰⁵ Prosecution Skeleton Argument, 30.1.13.

²⁰⁶ Email from MC to Lead Disclosure Lawyer, 9.10.12.

²⁰⁷ Email from Lead Disclosure Lawyer to MC, 12.10.12.

- 5.95. On 13 November 2012, AA and BB’s legal representatives wrote to the PPS raising “grave concerns” about the decision to allow the membership case to be heard before the sexual abuse case.²⁰⁸ This prompted a consultation between the Regional Prosecutor, the Directing Officer, Leading Counsel and Junior Counsel on 25 November 2012.
- 5.96. Counsel were instructed to reconsider the management of the case in light of developments in the membership case. In their two-page note dated 25 November 2012, counsel stated that “it seems almost inevitable that the abuse case involving [MC] will have to wait until after membership case is concluded”.²⁰⁹ Counsel indicated that the “ultimate choice” lay with MC as to whether she “want[ed]” to keep the ‘investigation’ evidence in the case or keep AA and BB in the case. This was an invidious position for MC to be put in, given the difficulties she faced in giving her account if the investigation evidence were excluded.
- 5.97. The prosecution team met AA, BB and their lawyers on 12 December 2012. It was decided at that consultation that the prosecution would return to the court with a proposal that all three sexual abuse complaints should be heard first. This meant that counsel would need significantly to alter the position they adopted before the court on 8 October 2012. They would also have to rely heavily on editing.
- 5.98. Leading Counsel anticipated that any evidence that could possibly lead the court to rely in any way on allegations of membership or the ‘investigation’ would need to be removed. Leading Counsel’s proposals for stripping the case back to what was in his words “sexual abuse simpliciter”²¹⁰ were severe. Leading Counsel’s proposed edits would have excluded evidence of MC’s fear, the investigation, MC’s subsequent mental health issues, and the lack of early reporting.
- 5.99. The prosecution’s approach, which was an attempt to unite the three complaints, had the opposite effect. While AA and BB were largely content with the proposed editing, which affected their evidence to a minimal degree, MC, predictably, was not. She refused to proceed as a witness on the basis of the edited material.
- 5.100. It was then decided that an application should be made to sever the trials so that AA and BB’s complaint could be heard first. Given the significance that counsel had, rightly, placed on the fact that there were three complainants in the sexual abuse case, this step would necessarily weaken the case. The application to sever was refused by the Court²¹¹ and all three sexual abuse complaints remained stuck behind the membership trial. At this point AA and BB, wholly frustrated, took the decision to withdraw.
- 5.101. A number of significant issues arise from these communications and events.

(i) The decision not to oppose the defence application

- 5.102. It is clear from Leading Counsel’s email dated 27 September 2012 that he considered the defence application to reverse the trials had some merit. In that email, he indicated that he wanted to reflect on the matter with Junior Counsel. There is no evidence that at any stage between 27 September 2012 and the hearing on 8 October 2012 he informed anyone within the PPS of his conclusion that the prosecution should offer no real opposition to the defence application. Such discussions as may have taken place appear to have been between counsel over the weekend preceding the mention on 8 October 2012. There is no evidence that the PPS was informed of the concluded outcome of counsel’s deliberations.

²⁰⁸ Letter to PPS, 13.11.12.

²⁰⁹ Note from Leading Counsel and Junior Counsel, 25.11.12.

²¹⁰ Email from Leading Counsel to Directing Officer, 30.1.13.

²¹¹ Junior Counsel, Note of Ruling, 20.5.13.

5.103. In our view, Leading Counsel should have informed the PPS of his proposed course of action before Junior Counsel adopted the position she did in court on 8 October 2012.

5.104. The application to change the sequencing of the trials had the potential to have very real and damaging consequences for these cases. It is true that there may have been some risk if the sexual abuse cases went first that a later acquittal on the membership charges might undermine the safety of that conviction, depending on the evidence the court relied on. Counsel was right to recognise that risk. In our view, it was a low risk for the reasons set out below:

- (1) First, the basis for MC's delayed reporting to police was her *belief* about Morris's reputation and activities. To the extent that it was relevant, that would not require a finding that Morris was *in fact* a member of the IRA.
- (2) Secondly, a finding that there is reasonable doubt that one charge or another is made out may be based on a range of different factors, many or most of which would not impact on another case on a different charge in which evidence is given and assessed separately. There may have been a risk of undermining a sexual abuse conviction if the Judge made a severe credibility finding against MC in the second case, but that is a risk in respect of any person who testifies in more than one criminal trial. In view of the prosecution case, which was based on an assessment that MC was a credible and reliable witness, it was a low risk.
- (3) Thirdly, any difficulty with MC's testimony would have been mitigated by the strength of having three mutually reinforcing complaints together in the sexual abuse case.

5.105. Moreover, both Leading and Junior Counsel knew that a decision to reverse the order of the trials would not only introduce considerable further delay in the sexual abuse case but would also be likely to "*put in jeopardy*" whether AA and BB would give evidence in the abuse case. Leading Counsel had repeatedly recognised the fact that having all three complainants together in the sexual abuse case was a key strength. The prospect that AA and BB would withdraw their complaints introduced a serious risk to the prospects of a conviction in the sexual abuse case.

5.106. There were grounds for strongly opposing the defence argument and submitting that the sexual abuse case should be prioritised, as it had been since the beginning of the case, not only by the court but by police and prosecutors, as follows:

- (1) It was a case concerning the alleged sexual abuse of multiple complainants who were children at the time. The sexual abuse was, at least for the complainants, by far more central and more serious than the membership offences. The case involved charges of rape – the most serious sexual offence that can be committed.
- (2) The sexual abuse case was trial-ready; in fact it was on its third listing for trial and had already been delayed. The membership case had not even been committed and was still making its way through the Magistrates' Court.
- (3) The further delay in the sexual abuse case that would be occasioned by a reversal in sequencing would be significant and, for the time being, indefinite. The defendants in the membership case would have an automatic right to appeal the judge's verdict in a non-jury trial and, that right having been exercised, the appeal would further defer the sexual abuse case.
- (4) In order for the interests of MC, AA and BB to be protected, it was imperative that the sexual abuse case be tried with all reasonable expediency. It was very likely that two

complainants would withdraw on grounds of delay if the trials were reversed, causing irretrievable damage to the prosecution case.

(ii) Failure to consult

- 5.107. Before counsel came to a final decision not to put these arguments, involving the PPS in the decision-making process and consulting with the victims was not just desirable, it was essential. The delay that would be occasioned by the decision, the likelihood that AA and BB would withdraw, and the strategic issues it would create for the future of the prosecutions meant that counsel should have requested instructions on the matter from the PPS and confirmed agreement at an appropriate level of seniority that their approach was the correct and preferable one. Given that counsel did not do this, the Lead Disclosure Lawyer should have recognised the significance of the issue raised in Leading Counsel’s email on 27 September 2012 and reported it to the Regional Prosecutor for consideration and guidance.²¹²
- 5.108. In addition, the prosecution team should have consulted with the victims in advance of the decision. The victims were entitled to an explanation from the lawyers prosecuting the case about: (a) the fact that the defence application to reverse the trials had been made; (b) counsel’s preliminary view on the merits of the application and his reasons for holding that view; (c) counsel’s assessment of the likely consequences of adopting his preliminary view; (d) other options for progressing the cases in light of the defence application. Equally, counsel could not properly come to a concluded view about the best way forward without knowing the views of the victims on these matters.
- 5.109. In his email dated 27 September 2012, Leading Counsel stated that that the victims would need to be informed that there could be significant delay in the sexual abuse case if the judge agreed with the defence. In our view, merely informing the complainants of a likely delay was insufficient.
- 5.110. Whether or not counsel recommended a consultation, it was in any event incumbent on the Lead Disclosure Lawyer to insist on a consultation. This was required by the PPS *Victims and Witnesses Policy*, in particular the requirement to keep victims informed of key milestones in the progress of the prosecution,²¹³ along with the general requirement in the Standards of the International Association of Prosecutors to consider the “*views, legitimate interests and possible concerns*” of victims.²¹⁴ Meeting with victims to explain decisions and answer questions was also, on his own acknowledgment, a central feature of the role of Lead Disclosure Lawyer.²¹⁵
- 5.111. Both Leading Counsel and the Lead Disclosure Lawyer should also have borne in mind the PPS *Policy for Prosecuting Cases of Rape* (December 2010), which applies equally to “*all other types of sexual offences*” (page 2 [1.6]). At page 20 [9.2], under the heading “*Avoiding Unnecessary Delay*”, the policy states:

“Where possible, the PPS will make sure that cases of rape are not delayed without good reason and will do its best to ensure that the victim is kept informed of the reason for any significant delay in the proceedings.”

- 5.112. At page 36 [14.4] under the heading “*Training and Quality Assurance*”, the policy provides:

²¹² PPS, Business Improvement Team, Job Analysis Questionnaire, Senior Public Prosecutor – Lead Disclosure Lawyer (undated), [2.3], [2.10].

²¹³ PPS, *Victims and Witnesses Policy* (March 2007), 16.

²¹⁴ Incorporated in PPS, *Victims and Witnesses Policy* (March 2007), 5.

²¹⁵ PPS, Business Improvement Team, Job Analysis Questionnaire, Senior Public Prosecutor – Lead Disclosure Lawyer (undated), [2.4], [2.11].

“Barristers instructed to prosecute on behalf of the PPS are subject to the PPS standards as to level of service. They must have a clear understanding of the Policy and are required to have regard to and act in accordance with the Policy.”

5.113. AA and BB’s reactions to the reversal of the trials are described above. As for MC, it appears that she was not informed of developments at all. In her email to the Lead Disclosure Lawyer dated 9 October 2012, she reminded him of the recent agreement that she would be kept informed of developments and enquired as to the nature of the legal arguments made on sequencing and whether the prosecution intended to oppose them. The Lead Disclosure Lawyer’s response intimated that no communication had been required from the PPS regarding these matters. Given the background and history of this case, the approach taken by the Lead Disclosure Lawyer in his correspondence with MC fell short of the requirement in his role description to deal with victims conscientiously, empathetically and professionally.

Finding 10: The decision not to oppose the defence application to reverse the sequencing of the trials was a significant step. Leading Counsel should have provided his concluded views on the issue to the PPS and sought instructions in advance of the hearing on 8 October 2012. Leading Counsel and the Lead Disclosure Lawyer should have invited a consultation with MC, AA and BB before the decision was made, but failed to do so.

H. The weakening of the prosecution case and failure to reassess the merits

5.114. It is clear that over the prolonged period of their progress towards trial, there was a significant weakening of the prosecution evidence in each case. The most significant elements of this weakening were:

- (1) The unresolved editing issues;
- (2) The decision of witnesses to withdraw from the joint membership case;
- (3) The reversal in sequencing leading first to the attempted splitting of the three complainants and then to the withdrawal of AA and BB;
- (4) The narrowing of the evidence in the single membership case to a point where it relied solely on MC and ultimately led to it being severed and listed as the first trial;
- (5) The failure to appreciate the significance and prepare for the evidence concerning Joe McCullough.

5.115. MC raised the issue of Joe McCullough’s role a number of times in consultation with the prosecution team; she regarded it as a key piece of evidence in both the sexual abuse case and the membership case. Her statement dated 15 May 2013 was forwarded to Leading Counsel by the Directing Officer on 23 May 2015.²¹⁶ In her covering note, the Directing Officer noted that a policy decision was awaited in relation to the police investigation of the allegations relating to Joe McCullough.²¹⁷

5.116. This evidence was potentially significant. It was at least clear that a failure to arrest, interview and possibly charge Joe McCullough would need to be justified if the evidence were raised and relied on in court. In those circumstances, the prosecution should have taken a more active role in pressing the PSNI for a decision in respect of Joe McCullough. Leading Counsel certainly should have been aware in advance of the trial date whether he sought to rely on the

²¹⁶ Directing Officer, Note to counsel, 23.5.13.

²¹⁷ Ibid.

statement of 15 May 2013 and whether it had been served on the defence. The consequences of this failure for the prosecution case materialised on the day of Morris's trial, as outlined above.

5.117. In the circumstances that presented in these cases, there was an obvious need to keep the prospects of success under close review. Given in particular the interdependency of the cases, the delay, the splitting and sequencing, the withdrawal of witnesses at key stages and the other weaknesses identified, not only would it have been good practice to have re-reviewed the merits, it was critical.

5.118. MC made numerous requests for a re-review of the merits in the membership prosecutions. On 29 January 2014, MC emailed the Directing Officer indicating that:

*"It is my view that the cases have been weakened to such an extent now that proceeding with them is ... ludicrous. Expecting me to go ahead and give evidence in trials where the outcome is by default pre-determined due to the weakness in the prosecution case and test for membership required, before it has begun is in my view, scandalous."*²¹⁸

5.119. Staff at the PPS, by that stage, appeared to appreciate the risk. On 30 January 2014, the Directing Officer received an email from the then Regional Prosecutor.²¹⁹ They had discussed how MC might be encouraged to give evidence. The Regional Prosecutor noted that *"there could easily be acquittals"*. His proposal was that MC could give evidence in the first trial and, depending on the outcome, then take a decision on whether to give evidence in the remaining trials: *"Let case No 1 run. If there is a conviction it may strengthen case 2 (and then 3) or might even lead to guilty pleas in cases 2 and 3. If no 1 is an acquittal then we can discontinue 2 and 3."*²²⁰

5.120. On 10 April 2014, four days before the trial of Morris for membership, the Directing Officer emailed Leading Counsel regarding redactions to the evidence proposed by the defence. She asked: *"In addition if the papers are further redacted leading to a further diminution [sic] in the evidence to be lead I would be grateful for your considered views as to whether there remains a reasonable prospect of the court finding that Morris professed to be a member of the IRA."*²²¹ Leading Counsel replied noting that some but not all of the redactions were appropriate, but did not provide views on merits.²²²

5.121. No formal reassessment of merits occurred in any of the cases. This was a material failing. As a result, MC was asked to give essentially unsupported evidence on the narrower membership case in the first of three trials. This was not only far removed from the sexual abuse about which she had originally complained but also arguably the weakest of the cases.

5.122. In her withdrawal statement, MC indicated that she made *"a criminal complaint in April 2010 and it is now April 2014"*. As one of her reasons for withdrawal, she stated:

*"I believe that the evidence that the Prosecution was relying on to secure a conviction initially was strong. However, due to various factors, this evidence has been weakened to such an extent that I am of the opinion that the prosecution would no longer be able to secure a conviction based on the evidence they now intend to rely on in this case. This is the worst possible outcome and is extremely distressing."*²²³

²¹⁸ Email from MC to Directing Officer, 29.1.14.

²¹⁹ Email from Regional Prosecutor to Directing Officer, 30.1.14.

²²⁰ Email from Regional Prosecutor to Directing Officer, 30.1.14.

²²¹ Email from Directing Officer to Leading Counsel, 10.4.15.

²²² Email from Leading Counsel to Directing Officer, 11.4.15.

²²³ MC, Statement dated 1.5.14.

Finding 11: Each case became weaker over time. Key witnesses pulled out, evidential leads were not pursued and the strength of having three complainants in the sexual abuse case was lost. There was a failure to reassess the merits of proceeding with each case at critical points.

I. Communication with victims and witnesses

- 5.123. Overall, the prosecution team, especially the Directing Officer, engaged quite extensively with MC. However, the approach to communication was sometimes inconsistent and reactive. There were times when MC was not kept properly informed of developments. She raised concerns about this on a number of occasions. Promises that communication would improve went unfulfilled. As for AA and BB, they expressed dissatisfaction that they had almost no communication with the prosecution themselves throughout the four years of the cases, although there had been two consultations with BB and some communication with their legal representatives.
- 5.124. There were, in particular, two major failings in communication which affected the eventual viability of the cases. First, notwithstanding the structure of the two indictments, a number of the witnesses were not informed that their evidence was to be used in support of the membership case as well as the sexual abuse case. We were told that the usual practice is that witnesses whose statement of evidence is served on the committal bundle are notified by the PSNI that they are required.
- 5.125. When, at the end of summer 2012, AA, BB and a number of other witnesses discovered, during discussion of reporting restrictions with the PSNI, that they were to be relied on as witnesses in the membership prosecutions of all five defendants, they were distraught. It appears that the PPS may bear only limited responsibility for this failing, as the witnesses' statements were included in the evidence and there was no indication from police that they were reluctant.
- 5.126. Second, there was the major failure to communicate and consult on the sequencing issues as set out above.

Finding 12: Communication with victims and witnesses was variable and at times inadequate. Failures to communicate contributed to a loss of faith by MC, AA and BB in the conduct and handling of the cases by the PPS.

J. Conclusion

- 5.127. Based on the analysis above, we draw the following further conclusions.

Finding 13: In view of the foregoing findings, we find that MC, AA and BB were let down by the PPS's handling and conduct of the cases.

Finding 14: Given the significant failings in this case, it was almost inevitable that first AA and BB and then MC would pull out of the process. Each of them was prepared to support their allegations at the outset, but as their cases became increasingly weakened and delayed, their willingness to continue understandably diminished.

6. FINDINGS

6.1. In considering “*all aspects of the handling and conduct of the prosecutions by the PPS*”, we have made the following findings:

- **Finding 1:** The cases reviewed were each difficult and complicated. They presented real challenges to the prosecution team. Members of the prosecution team showed concern to fulfill their professional duties, including their duties to MC, AA and BB.
- **Finding 2:** There is no evidence in the material reviewed to suggest that decisions or actions of members of the prosecution team were improperly motivated.
- **Finding 3:** There was insufficient case planning in these cases. This was partly due to an organisational shortcoming in relation to policy and guidance and partly due to a lack of strategic thinking and management by the prosecution team.
- **Finding 4:** The roles of some members of the prosecution team were not defined with sufficient clarity, particularly where they deviated from usual management structures. The respective Regional Prosecutors failed to provide active management and oversight of the cases.
- **Finding 5:** There was a failure by senior PPS staff and counsel properly to analyse how to treat the membership and investigation evidence in the sexual abuse case.
- **Finding 6:** The decision to proceed with the membership charges was not taken and endorsed at a sufficiently senior level in the PPS. Nor was sufficient consideration given by PPS staff and counsel to the potential impact of the membership cases on the sexual abuse case.
- **Finding 7:** The question of joinder in relation to the membership charge against Morris was not properly thought through by PPS staff and counsel.
- **Finding 8:** The time taken to reach decisions to prosecute in the membership cases was too long.
- **Finding 9:** The overall delay in the sexual abuse prosecution was unacceptable. It was regrettable that the listing date of the sexual abuse trial was postponed on a number of occasions and that delays were not more robustly opposed.
- **Finding 10:** The decision not to oppose the defence application to reverse the sequencing of the trials was a significant step. Leading Counsel should have provided his concluded views on the issue to the PPS and sought instructions in advance of the hearing on 8 October 2012. Leading Counsel and the Lead Disclosure Lawyer should have invited a consultation with MC, AA and BB before the decision was made, but failed to do so.
- **Finding 11:** Each case became weaker over time. Key witnesses pulled out, evidential leads were not pursued and the strength of having three complainants in the sexual abuse case was lost. There was a failure to reassess the merits of proceeding with each case at critical points.

- **Finding 12:** Communication with victims and witnesses was variable and at times inadequate. Failures to communicate contributed to a loss of faith by MC, AA and BB in the PPS conduct and handling of the cases.
- **Finding 13:** In view of the foregoing findings, we find that MC, AA and BB were let down by the PPS and counsel.
- **Finding 14:** Given the failings in this case, it was almost inevitable that first AA and BB and then MC would pull out of the process. Each of them was prepared to support their allegations at the outset, but as their cases became increasingly weakened and delayed, their willingness to continue understandably diminished.

7. RECOMMENDATIONS

7.1. The Review has been asked to identify any recommendations to improve the services of the PPS. Based on the findings set out in **Part 6** above, we make the following recommendations:

- **Recommendation 1:** The PPS should introduce policy and/or guidance to improve case planning and strategic thinking in difficult and complicated cases.
- **Recommendation 2:** A flagging system for difficult and complicated cases should be introduced to highlight risks and ensure proper lines of accountability to senior management, including the Deputy Director and Director where necessary.
- **Recommendation 3:** When deviating from usual management structures, senior team members should take the lead in defining roles clearly.
- **Recommendation 4:** The PPS should introduce standard clauses in all instructions to prosecuting counsel making clear what is expected of them, what responsibilities they have and their role in decision-making.
- **Recommendation 5:** Measures should be introduced to improve the recording of decisions and consultations by the PPS and counsel.
- **Recommendation 6:** The PPS *Victims and Witnesses Policy* should be reviewed in light of this report, in particular with a view to improving communications and consultations with victims on major decisions.
- **Recommendation 7:** Once the PPS *Victims and Witnesses Policy* has been reviewed as recommended above, all staff should be required to undergo training on the requirements of the reviewed policy.
- **Recommendation 8:** All PPS staff and counsel working on rape and serious sexual abuse cases should be required to undergo training on the PPS *Policy for Prosecuting Cases of Rape*.
- **Recommendation 9:** All PPS staff and prosecution counsel should be reminded of the continuing obligation to keep the prospects of conviction under review, particularly when there are significant developments in the case.
- **Recommendation 10:** Between six and 12 months from the date of this Report, the DPP should commission a review of the implementation of these recommendations.

7.2. We are informed by the PPS that a number of changes have already been made or agreed over the past year with a view to addressing some of the issues arising from these cases, including:

- (1) A new policy on case management for difficult and complex cases including numerous case management mechanisms;
- (2) An instruction to legal staff and Panel Counsel in respect of consulting with victims and witnesses, especially in serious sexual abuse cases;
- (3) Relevant additions to the Terms of Engagement with the Bar for the 2015 panel selection competition, including discussion of significant strategic decisions with the Directing Officer and consultation with victims and witnesses in the event of delays to the listed date of trial;

- (4) An instruction to staff in respect of the recording and filing of notes in relation to key actions on prosecution files;
- (5) Commencement of a review of the PPS *Policy on Victims and Witnesses*;
- (6) Training to staff on the PPS *Policy on Victims and Witnesses* and on rape and child sexual exploitation cases;
- (7) An amendment to the *Code for Prosecutors* highlighting the obligation to keep the Test for Prosecution under review.

7.3. We welcome these steps. It remains a matter for the DPP to review the existing changes and satisfy himself as to whether they meet, in whole or in part, any of our recommendations, and to determine what further action is required, as well as commissioning the review recommended in **Recommendation 10**.

REVIEWERS

Sir Keir Starmer KCB QC

Keir Starmer QC is a barrister and was the fourteenth Director of Public Prosecutions in England and Wales and the sixth head of the Crown Prosecution Service from 2008-2013. He was a member of the Sentencing Guidelines Council from 2008-2010 and a member of the Sentencing Council from 2010-2013.

Keir was called to the Bar in 1987, became a Queen's Counsel in 2002, and was joint head of Doughty Street Chambers from 2005-2008. From 2003-2008, Keir was the human rights advisor to the Policing Board in Northern Ireland. In that capacity he worked with the Policing Board to ensure that the Police Service of Northern Ireland complied with its obligations under the Human Rights Act 1998.

Keir is an Honorary Fellow at St. Edmund Hall, Oxford University and holds honorary doctorate degrees from a number of universities. He is the author and editor of numerous books and articles about criminal law and human rights.

Keir was appointed Knight Commander of the Order of the Bath (KCB) in the 2014 New Year Honours for services to law and criminal justice.

Katherine O'Byrne

Katie O'Byrne is a barrister at Doughty Street Chambers. She was called to the Bar in 2013 and previously practised as a solicitor in Australia (qualified 2009). She was an associate to the Hon. Justice Kenneth Hayne AC of the High Court of Australia and an assistant legal officer at the International Criminal Tribunal for the Former Yugoslavia. She has experience working as a researcher on various law reform initiatives.

Katie holds an LLM from the University of Cambridge and has lectured in the Juris Doctor program at the University of Melbourne Law School. She is the author and editor of several publications on international law, public law and human rights.