



A Review of the Role and Practices of the Crown Prosecution Service in Cases Arising from a Death in Custody

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Introduction

- 1.1 As Attorney General, one of my most important roles is to superintend the Director of Public Prosecutions in the exercise of his functions as head of the Crown Prosecution Service; and to answer to Parliament for the efficient and effective conduct by the Crown Prosecution Service of the prosecution process.
- 1.2 There can be few prosecuting decisions more important than whether to charge a person with having unlawfully caused the death of another. To charge unjustly may be to impose on an innocent person and his family an unwarranted trial. To fail to charge may mean a serious crime — and any unlawful killing is a serious crime — goes unpunished. Either may lead to a loss of confidence in the rule of law and the administration of justice.
- 1.3 Where the death has occurred whilst the deceased was in custody or at the time of an arrest, this decision may, for a number of reasons, be difficult or controversial and sometimes both. A death in custody is a tragedy in any circumstances. But as Professor Gus John pointed out during the course of my review, it takes on added significance when the person who has died belongs to a group which considers itself as having had historically strained relationships with the police and other institutions of the criminal justice system.
- 1.4 As His Honour Gerald Butler QC said in 1999 when reporting, at the request of the then Director of Public Prosecutions, on the quality of decision making by the CPS into deaths in custody¹:

“If a prosecution is wrongly brought (by that I mean where there is no realistic prospect of a conviction) the consequences can be catastrophic for the person prosecuted and his family. If a prosecution is not brought when it should be, then the family and friends of the deceased will suffer a deep sense of grievance, accompanied by a loss of confidence in the criminal justice system. Further, there is a powerful public interest in the prosecution of police officers who have committed an offence of such gravity.”
- 1.5 It is essential therefore that the prosecuting decisions in these cases are taken in accordance with the best and most appropriate practice. Moreover, it is important that the CPS commands confidence that their decisions to prosecute or not to prosecute are reasonable and accurate; that they have been taken objectively on the basis of the best evidence by an independent person with the required degree of expertise and experience; and that they are not affected by bias or by improper pressure from any source.
- 1.6 Since my appointment as Attorney General I have in a number of cases become acutely aware of the profound impact on the families of the deceased when a decision is taken not to prosecute a police or prison officer arising from the circumstances in which the deceased met his death while in custody.
- 1.7 As HH Gerald Butler QC also pointed out, whereas all the checks and balances of the criminal trial process are available to a person who is accused of a crime, and the trial process takes place openly in court, there are few checks and balances available to those aggrieved by a decision not to prosecute. The CPS does of course take complaints and representations seriously and has reviewed decisions in individual cases on receiving representations from the family of a deceased person. But the only legal proceedings open to a family to challenge a decision are proceedings to apply for judicial review in the High Court, which are difficult to mount; or, as a last resort, a private prosecution.
- 1.8 It is therefore especially important to be confident that the approach to prosecutions is right. So I decided, with the full support of the Director of Public Prosecutions, to conduct this review, which I announced by Parliamentary Answer on 13 December 2001. Its purpose was to consider the present practices of the Crown Prosecution Service and to assess whether any changes needed to be made. If changes were needed, the Director of Public Prosecutions and I committed ourselves to implementing them. I also hoped that the consultation process and the findings of this review would themselves make a real practical contribution towards increasing the level of public confidence in prosecution decision-making and practices in this field.

¹ Inquiry into Crown Prosecution Service decision-making in relation to deaths in custody and related matters: “The Butler Report”

The consultation process

- 1.9 The consultation exercise also fitted in with my overall commitment to assist the CPS in its approach to our diverse communities, following critical statements such as that in the Denman Report which examined, at the request of the CPS, the record of the CPS in relation to discrimination and equality of opportunity in its internal employment policies and practices. All ten of the recommendations made by Sylvia Denman in July 2001 have now been achieved. I established shortly after taking office a Race Advisory Group to advise me in my superintendence role on these sensitive and important areas. Their expert guidance and wise advice has been of great assistance to me and to the CPS. Although considerable work has been done, the CPS, in partnership with other criminal justice agencies, still has a way to go in order successfully to secure public confidence from all sections of our diverse communities.
- 1.10 My concern in the review was to focus on the fundamental approach and practices of the CPS, for which I have Ministerial responsibility. The review could not cover areas outside my responsibilities such as police practices or matters relating to the inquest process. I fully understand the viewpoint of those who felt that a much wider review was and is called for. Such a review would have been a much more complex exercise involving a variety of different government interests. I wanted to focus on the area of my own responsibilities, which I could achieve with a view to making a tangible difference.
- 1.11 Because the background to the review was a known public concern in some quarters about the way in which some deaths in custody have been investigated and prosecuted, or about decisions not to prosecute, I was anxious to draw on the experience of many of those who have personal knowledge of the process. A very wide range of people have taken time to contribute to this review, ranging from those with professional experience in the field such as lawyers, medical professionals and coroners, to many people whose lives have been affected at a personal level, because a family member lost his or her life, and the groups which support their interests, as well as groups working to safeguard the rights of all citizens such as Liberty and the Commission for Racial Equality. I have also had the views of experienced prosecuting lawyers from across the Crown Prosecution Service.
- 1.12 The purpose of the review has been to make a real difference to the handling of future cases, and a number of changes to be implemented are set out in this report. But it does not follow from this that cases were wrongly decided in the past. Each of the cases subject to complaints from a family or their lawyers has already been through the process, sometimes several times, of review and re-review. I concluded that no additional purpose could be served by initiating yet a further review of these individual cases. However, the experience of these cases has informed my conclusions in this review.

- 2.1 The review commenced with my public announcement of its terms in Parliament in December 2001. On 27 February 2002 I invited a number of families who had suffered a loss through a death in custody to meet with me to explain their concerns. I am very grateful to them for having attended. Letters were then sent to a large range of interests indicating the nature of the project and the process that would be followed and inviting them to contribute in due course.
- 2.2 I issued a consultation paper in May 2002, which was sent to a number of potential consultees and made available on my Department's website. This was followed by two events: a small consultative workshop attended by a range of interests was used as a tool to identify how best to approach a larger seminar, which was held a few weeks later on 21 May. The seminar was attended by over 80 people. Professor Gus John acted as the facilitator.
- 2.3 I subsequently received 37 written responses to the Consultation Paper.
- 2.4 The review has taken me longer to complete than I expected at the outset, but this has had the advantage of enabling me to take account of a number of developments which took place after the Deaths in Custody Consultation Paper was published, including Liberty's report "Deaths in Custody: Redress and Remedies" published in March this year; a report of a fundamental review commissioned by the Home Secretary, Death Certification and Investigation in England, Wales and Northern Ireland, published in June; and the Review of Forensic Pathology Services in England and Wales, published by the Home Office in March (Cm 5831). In completing the review I have continued to consult closely with the Director of Public Prosecutions, and with members of the Casework and Policy Directorates and the Equality and Diversity Unit of the Crown Prosecution Service. During this period I have not delayed implementing some of the changes, which have already been made in consultation with the Director.
- 2.5 I have seen all the written responses to the consultation paper. I found the seminar an extraordinary event for which I am much indebted to Professor Gus John, who elicited views from a wide range of interests, some of which were opposing, and on a very wide range of questions in such a way that all those who wished to speak were able to do so. The goodwill that has been shown to me by all those who have contributed to the review has served to strengthen my resolve to take action on all matters that I believe to be appropriate and feasible, within the need to preserve the impartiality of those taking prosecution decisions in these cases.

The background

- 3.1 The Consultation Paper issued as part of this review set out the background to the exercise. It is worth highlighting the key points.

The role of the Crown Prosecution Service

- 3.2 In our legal system, the police have the responsibility for investigating allegations of criminal conduct and for starting criminal prosecutions. It is the role of the CPS to take those cases over and to prosecute them. The CPS is responsible for pursuing prosecutions in the vast majority of the criminal cases that come before the courts in England and Wales each year: some 1.4 million cases. Under our present system the police are also responsible for deciding whether to bring a charge and what charge to prefer.
- 3.3 The CPS reviews every case presented to it and has the power to stop (or discontinue) a case if a prosecution is not justified; it also has the power to decide the appropriate charge(s) when cases proceed. It is therefore ultimately a prosecuting lawyer independent of the investigation who takes the decision to prosecute.
- 3.4 In a number of cases each year, the CPS either decides not to proceed with a prosecution that has already been started by the police; or advises the police not to bring proceedings in the first place. The more serious and difficult the case, the more likely it is that the police will seek advice, if they can, before bringing charges.
- 3.5 The CPS is responsible for the selection of the correct charges and for the conduct of court proceedings by advocates, whether CPS lawyers or members of the independent professions (a barrister or a solicitor advocate).
- 3.6 The general principles underpinning the key decisions taken by CPS prosecutors are set out in the Code for Crown Prosecutors. This is dealt with in more detail below.

The investigation of deaths in custody

- 3.7 Article 2 of the European Convention on Human Rights (ECHR) provides the following protections:
- 1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
- 2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:*
- a. in defence of any person from unlawful violence;*
 - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
 - c. in action lawfully taken for the purpose of quelling a riot or insurrection.*
- 3.8 In addition, Article 2 provides for a procedural obligation to investigate deaths where, arguably, there has been a breach of the principal obligation in Article 2.
- 3.9 Arrangements are in place for investigations to be conducted by the police wherever appropriate. The full arrangements as they stood during this review were set out in section two of the Consultation Paper. Perhaps the most significant development since then is the establishment of the Independent Police Complaints Commission (the IPCC) by the Police Reform Act 2002. The IPCC is due to become operational in April 2004 and I refer to their role in more detail later in this report.
- 3.10 The purpose of this section of the review was not therefore to test the arrangements for investigation generally (as these fall outside the CPS's sphere of responsibility). The role of the CPS in those investigations was, however, a relevant issue.

Advice by the Crown Prosecution Service

- 3.11 Under section 3(1)(c) of the Prosecution of Offences Act 1985, one of the duties of the Director of Public Prosecutions is "to give, to such extent as he thinks appropriate, advice to police forces on all matters relating to criminal offences".
- 3.12 The Crown Prosecution Service has no power to direct the police to conduct an investigation, nor to direct the police to follow any particular line of inquiry, nor to obtain any particular piece of evidence. Neither do the police have the power to direct the CPS to prosecute. If the police commence criminal proceedings in an individual case, it is the CPS that ultimately decides whether those proceedings should continue or not.
- 3.13 In the context of investigations into deaths in custody, the police invariably seek CPS advice as to whether there is sufficient evidence to bring criminal charges for any criminal offence. At that stage the investigation is complete so far as the police (and where relevant the Police Complaints Authority ("PCA")) are concerned. If the CPS asks for a further line of inquiry to be followed up, or for evidence to be probed further, there is no obligation on the police to comply with the request, though in practice it would be unusual in this type of case for a request to be refused.
- 3.14 During the investigation it is open to the investigating officer to seek advice from the CPS, if the officer decides it is needed. Under current arrangements that is the officer's decision alone, reflecting the operational independence of the police and CPS from one another. However, the Criminal Justice Bill contains provisions that are intended to make a major shift of emphasis towards pre charge advice from the CPS in the vast majority of cases and the CPS, rather than the police, taking the decision to charge. These provisions have been piloted very successfully by the police and the CPS in a number of areas around the country.

Inquest Process

- 3.15 A further mechanism for investigation is the inquest. The arrangements for inquest proceedings, as they currently stand, were also set out in the consultation paper.
- 3.16 Not every death results in an inquest. Under section 8(1) of the Coroners Act 1988 an inquest **must** be held if:
- There is reasonable cause to suspect that the deceased died a violent or unnatural death; or
 - The deceased died suddenly and the cause is unknown; or
 - The death took place in prison; or
 - An inquest is required under some other statute.
- 3.17 The inquest must be held with a jury if the death occurred in prison; or while in police custody; or if it resulted from an injury caused by a police officer in the purported exercise of his duty; or in certain other circumstances such as where the circumstances of the death affect the health and safety of the public or a section of the public.
- 3.18 The purpose of the inquest is limited to determining who the deceased was and how, when and where he died. Its purpose is not to determine the criminal liability of an individual; and indeed, a coroner's inquest is specifically prohibited by section 11 of the 1988 Act from purporting to find an individual guilty of murder or manslaughter.
- 3.19 In order to standardise verdicts across the country there are twelve verdicts from which the coroner is encouraged to choose. It is for the coroner to decide, on the evidence he or she has heard, which of these verdicts it is open to the jury to reach. Of those twelve, two require the jury/coroner to be satisfied of the verdict beyond reasonable doubt. These are unlawful killing and suicide.
- 3.20 The recent report of a fundamental review commissioned by the Home Secretary, entitled "Death Certification and Investigation in England Wales and Northern Ireland", published in June 2003 makes a number of recommendations for change, which are currently being considered.

The numbers of deaths in custody

4.1 The most recent statistics published by the Home Office's Police Leadership and Powers Unit for the year April 2001-March 2002 are available on the Home Office's website at www.homeoffice.gsi.gov.uk entitled "Deaths in Police Custody: Statistics for England and Wales, April 2001 to March 2002". In 2001-2002:

- 70 people died in police custody or otherwise following contact with the police (14 more than the previous year, owing to an increase in the number of deaths resulting from car or motorcycle crashes).
- 7 of the people who died in these circumstances were from black and minority ethnic communities.
- Of those 70 deaths:
 - 16 involved intoxication by alcohol and/or drugs
 - 31 were caused by fatal car or motorcycle crashes
 - 5 resulted from deliberate self-harm
 - 3 involved incidents in which police fired fatal shots

Deaths in police custody or otherwise with the police

	Total numbers of deaths in police custody or otherwise with the police	Numbers of deaths of members of ethnic minority communities including those classed as "other"
1998/1999	67	12
1999/2000	70	9
2000/2001	53	11
2001/2002	70	7

Deaths in prison custody

4.2 The figures for deaths in prison custody for the period 1999-2003 were as follows, according to the classifications used by the Prison Service:

Year	Self inflicted deaths	Natural causes	Homicide	Outside prison	Accidental
1998-1999	83	57	4	1	2
1999-2000	91	53	1	1	0
2000-2001	77	58	2	6	1
2001-2002	75	62	0	5	0
2002-2003	105	67	0	0	2
Total	431	297	7	13	5

4.3 Some of these deaths in custody occurred in hospitals or hospices. The "outside prison" deaths are those of people who were on temporary release or were absconders.

4.4 There have been no deaths due to force, for example involving control and restraint methods, used by prison officers since 1995.

4.5 The Casework Directorate has been dealing with approximately 12-15 cases per year arising from the circumstances in which an individual died while in police or prison care or custody. Those are the cases which gave rise to a police investigation into potentially criminal conduct arising from the circumstances of the death. Such investigations may examine the role of doctors as well as police or prison officers.

The elements of proof

- 5.1 The point has been powerfully and repeatedly made in the course of my review that in no recent case has a prosecution successfully been brought for a homicide arising from a death in custody. That fact is striking. However it does not inevitably follow that the reason is, as some suggest, that prosecutions are not brought when they ought to be. In recent times there have in fact been four prosecutions involving a total of 12 defendants. In all four cases the defendants were acquitted². Nor is it fair or accurate to assume that in cases in which a person dies in custody a crime must have been committed by an officer or officers in connection with the death.
- 5.2 In the consultation paper I included a brief note setting out the elements of each of the offences most likely to be under consideration when assessing the evidence in a case arising from a death in custody. In this section of my report I thought it right to return to the framework of the law to highlight the evidential issues that most often arise and the reasons why there may be no realistic prospect of conviction for a criminal offence, or why no offence may have been committed at all despite the fact that a person has died. I should add that the law is complex and there are many nuances. This note can be no more than a sketch, to try to highlight some of the common evidential problems that arise in these cases.
- 5.3 In a criminal case, the prosecution must prove its case so that the jury is sure that the accused is guilty of the offence charged. That means that the prosecution must, by putting evidence before the court, prove each element of the offence or offences charged. The prosecution must also be able to prove the identity of each person or persons responsible. There are legal rules regarding the circumstances in which, in law, more than one person can be held responsible for an offence.
- 5.4 Generally speaking, the accused does not have to prove any aspect of his or her case. If he or she puts forward a defence the prosecution must be able to disprove it if a conviction is to be secured.

Unlawful act manslaughter

- 5.5 Where death results from an unlawful and dangerous act of the defendant the offence of manslaughter may have been committed³.
- 5.6 A number of ingredients are essential. They are described in “Criminal Pleading, Evidence and Practice”, Archbold, 2003 as follows:
- The killing must be the result of the unlawful act of the accused (though not his unlawful omission);
 - The unlawful act must be an act, such as an assault, which all sober and reasonable people would inevitably realise must subject the victim to, at least, the risk of some harm resulting from it, albeit not serious harm;
 - It is immaterial whether or not the accused knew that the act was unlawful and dangerous, and whether or not he or she intended harm. The mens rea or state of mind required is that appropriate to the unlawful act in question (such as assault);
 - “Harm” means physical harm.
- 5.7 Key to this offence is that a cause of the death must be an unlawful act by the defendant; that is to say, an act which is itself a crime. An unlawful act is a different concept from a lawful act undertaken badly (I deal with the different offence of manslaughter by gross negligence below). If there were evidence that death was the result of unlawful violence (such as a beating), that unlawful violence would be the appropriate basis of charge.

²In one of them I have asked the Court of Appeal to consider the correctness in law of some aspects of the trial judge’s ruling.

³*DPP v Newbury* [1977] A.C. 500 at 506, 507, the House of Lords approving the following dictum in *R v Larkin* [1943] 1 All ER 217: “Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter.”

- 5.8 In a death in custody case, an officer or officers may well have used force. But the use of force is not automatically an unlawful assault. An officer or officers may have restrained a prisoner or subjected him or her to a blow from a truncheon in pursuance of lawful powers of arrest or detention. In cases involving a death in custody, it will usually be claimed that force was used in pursuance of lawful powers; and there may also be a claim of self defence, namely that the officer had to use reasonable force to defend him or herself against a prisoner acting violently in resistance. In such cases the use of force is unlawful if it was not in fact used in pursuance of lawful powers, or the officer(s) had no genuine belief that it was being so used; or if the degree of force used by the officer in the circumstances as he or she believed them to be was excessive.
- 5.9 Self-defence is a complete defence to a charge of homicide or any other battery. If a person honestly believes that he (or another) is, or is about to be, attacked, he or she may take proportionate action to defend him or herself or that other person. The law accepts that in determining whether a person has only taken such steps as were reasonably necessary in self-defence, he or she cannot “weigh to a nicety” in the heat of the moment the exact measure of his necessary defensive action.
- 5.10 If there is some evidence of self-defence, even if it is not raised by the defendant, the judge must still direct the jury that it is for the prosecution to prove, beyond reasonable doubt, that the defendant did not act in self-defence.
- 5.11 Where a defence is raised by the accused in interview, or there is evidence which raises that issue on the face of the papers, the prosecutor knows that the burden will fall on the prosecution to disprove it. In practice, this means that the prosecutor will look to see if there is evidence, such as from witnesses, medical evidence or statements by the accused, from which a jury could reasonably be asked to infer that the prosecution case is true and the defence case is not true.
- 5.12 In cases where there is no direct [independent] eye-witness evidence of what occurred, or where there is credible evidence of the need for some force to effect an arrest or detention, I can see that the available evidence may well in some cases fall short of providing grounds on which a jury could be satisfied that the prosecution case is true.
- 5.13 Medical evidence might show that the degree of force used was significantly greater than the officer(s) claim that they used, and/or greater than that which they claim was necessary. But whether such evidence is in fact forthcoming in an individual case is another matter. If the jury is not sure that the prosecution’s case is true, it must acquit.

Gross negligence manslaughter

- 5.14 I am advised by the Crown Prosecution Service that it is less usual for unlawful act manslaughter to be relevant in a death in custody case. It is more commonly the offence of manslaughter by gross negligence that falls to be considered.
- 5.15 In this type of case, manslaughter is committed where the death is caused (or partly caused) by gross negligence on the part of the suspect or defendant.
- 5.16 The elements of this offence (the facts to be proved) were clarified by the House of Lords in *Adomako* (1995) 1 AC 171. Essentially there are four tests to be satisfied:
- Did the defendant owe the deceased a duty of care?
 - Was the defendant in breach of that duty?
 - Was that breach of duty a cause of the death (even if not the only or most important cause)?
 - If all three of these conditions are satisfied, the final question is whether the breach is to be characterised as gross negligence and therefore a crime?
- 5.17 In the context of a trial, it is primarily for the jury to decide whether, having regard to the risk of death involved, the defendant’s conduct was so bad in all the circumstances as to amount to a criminal act or omission:⁴ The way this test was described in a leading case, *R v Bateman* (1925) 19 Cr App R 8, was as follows:
- “The facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.”*

⁴*R v Adomako*, ante, following *R v bateman*, 19 Cr.App.R 8, CCA, and *Andrews v DPP* [1937] A.C. 576, HL.

- 5.18 The first element is rarely a cause of difficulty in practice, I am told by the Crown Prosecution Service. Whether a duty of care exists between the accused and the deceased victim is essentially a question for the general civil law. But it does not generally present a difficulty in this category of case because police officers who are arresting a suspect, and custody officers detaining a suspect, owe a specific duty of care to their prisoner.
- 5.19 A duty of care in the context of an offence of manslaughter means that the individual must not expose those in his or her care to a risk of death that a reasonable person would have foreseen. The level of harm that must be foreseeable is a risk of death, and not merely a risk of injury or even serious injury: *Adomako* (1995) 1 AC 171; *R v Singh (Gurphal)* [1999] CLR 582, cited (obiter) in *Lewin v CPS* [2002] EWCA 1049 (Admin). This contrasts with unlawful act manslaughter, where, as noted above, the unlawful act must be such that all sober and reasonable people would inevitably realise must subject the victim to, at least, the risk of some harm resulting from it, albeit not serious harm.

Proving the cause of death

- 5.20 Proving that the act of the defendant was a cause of the death can genuinely be problematical. In all homicide cases it is necessary for the prosecution to be able to prove to the criminal standard — beyond reasonable doubt — that the defendant's act or omission was a more than minimal cause of the death.
- 5.21 In the case of unlawful act manslaughter this means that the prosecution must be able to show that the unlawful act of the accused was a more than minimal cause of death. In the case of gross negligence manslaughter, it means that the prosecution must be able to prove that the gross negligence of the accused was a more than minimal cause of death. In other words, the accused's act or omission must always be provably linked to a more than minimal cause of death.
- 5.22 The Crown Prosecution Service has advised me that there is in many cases a critical problem in establishing to the necessary standard — beyond reasonable doubt — that the act (or omission) complained of was a cause of the death.
- 5.23 In some instances the cause of death can be ascertained reasonably clearly (e.g. a person killed by shooting). But in others it is not so easy to identify. Death may not be an instant event, more a series of processes where death is the final result. In such circumstances, pathologists may not identify an individual cause of death but may describe the cause as “multifactorial”. Where this occurs, the prosecution must be able to show that one of those causes (as long as it can properly be described as “more than minimal”) was the result of the actions or inaction of an identifiable person.
- 5.24 These problems can be multiplied where there are several expert pathologists expressing opinions. In any case, but particularly in a case involving a death in custody, a number of the parties involved may instruct separate pathologists to provide an opinion on the cause of death. Their opinions may differ. One may provide the necessary causal link to the action/inaction of the suspect, but another may identify a factor which points away from the suspect's act as being a cause of death at all. Other pathologists may simply be unable or unwilling to provide an opinion as to whether an act or failure to act was a cause of death, albeit stating that it *may* have been.
- 5.25 Where differing opinions are expressed and the experts concerned are equally eminent and authoritative and reliable, unless there is some common sense basis, such as by drawing on other evidence, to prefer one opinion over the other, there is unlikely to be any realistic prospect of being able to prove that the act or omission of the suspect was a cause of the death. If this cannot be shown, it does not matter whether any of the other elements of the offence are present. There will be insufficient evidence to establish an essential ingredient of the offence, and thus insufficient evidence to provide a realistic prospect of conviction.
- 5.26 The courts have made it clear that “scientific”⁵ proof of the cause of death is not required. However, in any case of homicide the Crown must still be in a position to prove, beyond reasonable doubt, that the accused's act or omission did contribute to the cause of the death of the deceased.
- 5.27 I recognise this problem. It may affect a number of cases.

- 5.28 Establishing that the negligent act or omission was criminally gross or reckless can be difficult in cases in which a number of events may have taken place and a number of people have had some dealings with the deceased. Assuming that the chain of causation is not broken, and an act which was a more than minimal cause of death can be attributed to a particular individual, the prosecutor must still prove that the suspect's act(s) or omission(s), which may have been fairly minor, involved a foreseeable risk of death so as to take on the quality of grossness or recklessness. In this context, the question for the jury is whether, having regard to the risk of death involved, the conduct of the suspect was so bad in all the circumstances as to amount in their judgement to a crime.
- 5.29 The impartiality and expertise of forensic pathologists in establishing the causes of death are critical to enabling inquest juries and criminal courts to reach just verdicts. It is beyond the scope of my review to comment on the present structure of the provision of forensic pathology. I record, however that the Home Office recently commissioned an independent review of the provision of pathology services. The report of that review and its recommendations were published on 17 March 2003. In response to the report the Government announced a package of measures to modernise and improve forensic pathology services by introducing national standards and strengthening the regulatory framework within which pathologists work. The package includes
- An extra £5.6m over the next three years to train an additional 30 forensic pathologists
 - An initial investment of £10m to help set up regional centres
 - The introduction of national training and competence standards setting out objective criteria government what forensic pathologists are required to do
 - A new Home Office accreditation process
 - Strengthened quality assurance systems
 - Improved disciplinary procedures.
- 5.30 In announcing these measures the Minister noted that forensic pathologists do a difficult job in extremely traumatic circumstances. As he rightly said, “*It is critical to the interests of justice that forensic pathologists deliver a consistently high quality service which commands the confidence and the respect of the public and everyone working in the criminal justice system*”.
- 5.31 These measures are therefore to be welcomed.

Other possible offences

- 5.32 Even if no offence of manslaughter is shown on the evidence, other offences may be considered for prosecution depending on the facts and circumstances. One example is described below.

Misconduct in a public office

- 5.33 Misconduct in a public office is a common law offence. The offence may be committed when a holder of a public office deliberately abuses his or her power or neglects to perform a duty imposed either at common law or by statute. The act or omission must be without reasonable excuse or justification. In addition the culpability of the public officer must be of such a degree that the misconduct is calculated to injure the public interest so as to call for condemnation or punishment.
- 5.34 In a case of neglect the prosecution must show that the defendant acted wilfully: mere inadvertence is insufficient.

⁵Perhaps more accurately described as “mathematical proof”, ie beyond any doubt.

Summary of conclusions

- 6.1 During the course of my review I have met on a number of occasions with the families of those who have died in custody. I sympathise enormously with them for their loss, made the more grievous often by a belief that the circumstances of the death have not been properly made public and that wrongdoers have not been brought to account. They have impressed me with their dignity and the sincerity of their concerns about the circumstances in which their loved ones died and the investigations and decisions which followed. These concerns are, I have no doubt, genuine.
- 6.2 I have also been impressed by the conscientiousness of the CPS lawyers who have had the responsibility of making the decisions in these cases and the care taken by them in reaching their decisions. I believe that in making the decisions that they have taken they have done so diligently, applying their experience and skills objectively to the evidence before them. I do not believe, for example, that any have in their decisions been motivated in any way by any hostility towards the victim or family or bias in favour of the police. It is worth recalling that the Casework Directorate alone prosecuted 79 police officers in 2000 and 62 officers in 2001, for offences ranging from perverting the course of justice, assault, sexual offences, homicide and a fatal road traffic accident. These numbers included officers prosecuted for corruption arising out of a major investigation in London. In 2002 the Directorate prosecuted 42 police officers, including 17 for perverting the course of justice. I was pleased to note that the Liberty report recognises the expertise and experience of those in the CPS who handle these cases.
- 6.3 More subtle considerations are suggested, such as that the CPS, when considering the question of whether a realistic prospect of conviction has been shown, take into account the likelihood that a jury would have a tendency to accept the evidence of a police officer or prison warder. I am assured that this is no part of the decision making process. On the contrary the Code for Crown Prosecutors makes clear that whether there is a realistic prospect of conviction on the evidence is an objective test, based on whether a jury or bench of magistrates, properly directed, is more likely than not to convict.
- 6.4 I have also seen that the CPS decisions include clear external review. For example, in one case two different reviewing lawyers looked at the case and two separate counsel.
- 6.5 Nonetheless, it was clear to me that there was not confidence in the decisions which had been made. In my review I have attempted to identify the areas where there may be deficiencies in the practices of the CPS and where there is room for improvement in the way that these cases are handled.
- 6.6 Having explained the scope and purpose of this exercise and the legal framework within which Crown Prosecution Service lawyers approach cases and take their decisions, I have reached a number of conclusions that have formed the basis of changes which are being, or have already been, implemented with the support of the Director. In some cases the changes affect fundamental aspects of current practice.
- 6.7 The core themes that emerged from the review and in relation to which changes are being implemented clustered around the following:
- The role of the CPS during the criminal investigation;
 - How the Crown Prosecution Service can best deliver high quality, efficient and timely decision-making that commands public confidence;
 - How the CPS can communicate more effectively with the families of people who die in custody where there is a criminal investigation into the circumstances in which that person died, and the role of the family during the decision-making process.
- 6.8 The following measures are being or have been implemented:
1. The CPS definition of deaths in custody, which will identify those cases that will be subject to the special internal procedures set out in this report, will be brought into line with that of the Home Office where police-related deaths are concerned. The definition so far as it relates to deaths in prison custody will remain the same.

2. Whilst any deaths in custody that are referred to the CPS for advice or prosecution will continue to be dealt with by the Casework Directorate (as recommended in the Butler review), the pool of Crown Prosecution Service lawyers taking decisions in death in custody cases will be widened to speed up the decision making process and to enable the most senior lawyers in the Service, including the Director personally, to advise on and to take decisions in individual cases. In order to increase the available lawyers involved, steps are or will be taken to:
 - Enable good lawyers below Senior Civil Servant level in the Casework Directorate to take decisions; and
 - Alter the current arrangements for decision-making to allow greater input by senior lawyers into the most critical casework decisions that the Service faces. I announced this change in the House of Lords on 27 February 2003 col. WA47.
3. The pool of counsel instructed to advise will be widened.
4. The Independent Police Complaints Commission will become fully operational in 2004. As it will have the role and capacity to undertake some investigations in-house, including death in custody cases, the Crown Prosecution Service is discussing with the IPCC how it proposes to carry out its functions in these cases and how the relationship with the Crown Prosecution Service will operate, particularly in relation to early advice.
5. A wide-ranging training programme for all those who take decisions in death in custody cases has been commenced.
6. A new package of measures to increase the transparency of the decision making process and to involve families more. This will mean earlier meetings between the case lawyer and the family, better arrangements for keeping the family informed of progress and increasing their opportunity to have input during the decision-making process.
7. More proactive case management systems: there is already a scheme to facilitate proactive case tracking and management to case plans agreed at the outset.
8. The Director of Public Prosecutions is taking an new enhanced role in overseeing all cases arising from a death in custody.
9. The Casework Directorate, supported by the Equality and Diversity Unit of the CPS, will take steps to engage with the community, not only through special interest and campaign groups but through the legal community, the media and members of the public more widely.
10. Statistical information will be compiled that will enable the CPS to demonstrate its performance, identify any patterns and identify any scope for improvement.
11. As best practice, reviewing lawyers in death in custody cases will continue to attend relevant parts of any inquest in the case to view crucial evidence being given.
12. The CPS will publish a booklet to explain to families where the Crown Prosecution Service fits into the process and what they can expect from the CPS.

Definition of deaths in custody

- 7.1 The CPS currently works to a definition of “death in custody” which is not identical to that used by the Home Office in respect of police-related deaths. As a result of this review, however, the Director and I have agreed that, with one exception, the CPS definition should be brought into line with that of the Home Office where police-related deaths are concerned. The definition so far as it relates to deaths in prison custody will remain the same, and will relate to those who die in prison where the acts or omissions of an agent of the prison authority may have been a more than minimal cause of death (thus distinguishing these from cases of self harm and incidents between prisoners resulting in death).
- 7.2 The exception relates to traffic-related deaths. In the view of the CPS, a clear distinction should be drawn between police traffic-related deaths and other deaths related to police action. The police service has the legal power to restrain citizens and deprive them of their liberty. Where the detention or restraint may have led to death, close scrutiny of the exercise of those powers and the physical manner in which they were implemented is essential, not just in the investigation but also in the review process by the CPS. A special degree of training and expertise justifies handling those cases in a different manner from other cases because the issues these cases often raise are not encountered routinely in CPS Areas other than the Casework Directorate.
- 7.3 Prosecutions arising from the circumstances of death in a road traffic incident are within the experience of most CPS lawyers, but despite this decisions in such cases – which are themselves always extremely sensitively handled - are often taken by the Chief Crown Prosecutor or another senior and experienced lawyer within the Area. Apart from the possible exception of “pursuit” cases, no issues are raised in these cases which are not present in similar ‘civilian’ cases prosecuted by Areas. Whether a person is driving dangerously or carelessly is a review decision taken on a daily basis in Areas, including in relation to ambulance and fire-service drivers without criticism as to the location or grade of the decision-maker.
- 7.4 The Home Office definition in addition to fatal road traffic incidents, includes:
- Fatal shooting incidents involving the police
- This only includes people who die where police officers fire the fatal shots.
- Deaths in police custody
- This includes people who die who have been arrested or otherwise detained by the police and deaths occurring whilst a person is being arrested or taken into detention.
- Deaths during or following other types of contact with the police
- This includes people who die during or after some form of contact with the police which did not amount to detention and there is a link between that contact and the death.
- 7.5 A definition is needed because special arrangements for CPS decision-making apply to all death in custody cases referred to the CPS; for example such cases are not dealt with by the CPS Area where the events took place, but are transferred to the Casework Directorate which is part of the headquarters of the Crown Prosecution Service.

The key themes

- 8.1 I turn to the key themes of my review.

Theme 1: Early advice to the police

- 8.2 During the investigation it is open to the investigating officer to seek advice from the CPS, if the officer decides that he or she needs it. Under current arrangements that is the officer's decision alone, reflecting the operational independence of the police and CPS from one another.
- 8.3 During the review many people made the point that early involvement by the independent prosecutor in advising during the investigation is essential, as a safeguard to ensure that all relevant evidence and information is identified and gathered. One suggestion made at the seminar was that a CPS prosecutor would go to a prison or police station as soon as a death, thought to be suspicious, occurred, to give advice at the outset.
- 8.4 The reason for this suggestion was in part a concern that assumptions may be made at the outset by the police or prison service that no crime has taken place. This might prevent the police from pursuing a line of enquiry or protecting and preserving vital evidence, hindering an independent investigation and in due course an effective prosecution decision or prosecution. Immediate independent advice, it is argued, might help to prevent such assumptions and might dispel those criticisms.
- 8.5 But there are important questions around the precise role that the CPS would be expected to play, how this would fit with the statutory roles of the police and CPS and with the roles of bodies such as the PCA and, from April 2004, the Independent Police Complaints Commission; and the resource implications and practicalities.
- 8.6 The CPS gives early advice in an increasing number of cases. With the recent moves to a closer working relationship with the police and moves to increase early involvement in major crime and international cases, CPS advice during investigations is set to rise. The CPS is currently implementing co-located criminal justice units across the country, and is piloting and planning to roll out Sir Robin Auld's recommendation (in his Review of the Criminal Courts of England and Wales, published in October 2001) that the CPS should assume responsibility for deciding on the charges at the outset of a prosecution. The “premium service” approach adopted in the Street Crime Initiative is another example of this shift of emphasis.
- 8.7 The advantages of early legal advice include:
- Reducing the risk that operational decisions, such as those about methods of obtaining evidence, will detrimentally affect the admissibility of evidence at trial; and
 - Being able to advise on lines of investigation that are necessary to secure relevant evidence, whether pointing towards or away from the guilt of any individual or individuals under suspicion.
- 8.8 The police invariably seek CPS advice as to whether there is sufficient evidence to bring criminal charges for any criminal offence in death in custody cases. At that stage the investigation is complete so far as the police (and where relevant the PCA) are concerned. If the CPS asks for a further line of inquiry to be followed up, or for evidence to be probed further, there is no obligation on the police to comply with the request, though in practice it would be unusual in this type of case for a request to be refused.
- 8.9 The CPS actively supports and pursues its increased involvement in providing legal advice pre-charge. This has recently been considered in relation to the Police Reform Act 2002, which created the Independent Police Complaints Commission. The Act envisages an independent in-house investigation by the IPCC in some cases and in others, an investigation managed or supervised by the IPCC.
- 8.10 The Independent Police Complaints Commission, established under the Police Reform Act 2002, will replace the Police Complaints Authority on 1 April 2004. The new organisation will be given a wide range of powers, over and above those currently available to the PCA.
- 8.11 The IPCC will have its own body of investigators with all the necessary powers to investigate serious matters of police misconduct separately from the police, whether or not a complaint has been made.

- 8.12 Complainants will be given new rights of appeal to the IPCC against police decisions about the handling of their complaint and new rights to information. The IPCC will be the guardian of the new system and it will have to fulfil a statutory function of securing appropriate independence in the system and ensuring a system is maintained that has the confidence of the public.
- 8.13 To achieve this the IPCC will:
- Have its own investigative teams with the necessary police powers to allow it to investigate serious matters of police misconduct separately from the police;
 - Manage or supervise police investigations;
 - Be able to consider and uphold appeals from complainants;
 - Monitor and report on the complaints system and be responsible for spreading best practice.
- 8.14 If the IPCC was itself present at the outset of an investigation into a possibly suspicious death and was satisfied as to the investigation, the additional value of a CPS presence would need to be identified.
- 8.15 The expertise of CPS lawyers lies in prosecuting cases and understanding how a prosecution case as it is presented in court is built and tested.
- 8.16 It is in any event unlikely that CPS attendance would be necessary at every death in police or prison custody, as the figures in paragraph 4.1 and 4.2 show. The vast majority of cases do not result in any suggestion that the prison or police investigation has been improper or inadequate. It may be difficult then to identify the criteria for calling in the CPS, particularly at an early enough stage to make a difference to the preservation of evidence.
- 8.17 The role of the CPS in giving early advice is focused on the true role of the CPS as potential prosecutors. However, it must be right that the value of consultation becomes greater the earlier it is sought.
- 8.18 The Crown Prosecution Service and the Independent Police Complaints Commission are currently working on an operational agreement as to how the two organisations will work together in cases being investigated or supervised by the IPCC. This will need to include the arrangements for obtaining advice from the Crown Prosecution Service during the investigation. Depending on the extent to which the IPCC takes over the investigation of deaths in (police) custody from the police and the extent to which such investigations continue to be conducted in some cases by the police under the IPCC's supervision, the CPS may then need to revisit with ACPO the arrangements that are already in place for ensuring that early advice is sought and given in appropriate cases, to ensure that best practice in deaths in custody cases is fully reflected. Whilst, therefore, I do not propose asking the CPS at the moment routinely to attend at the scene immediately, the question of early attendance at the scene by the CPS should be kept under review as the new arrangements with IPCC develop. I propose that the CPS encourage the relevant investigators to seek early advice in all cases where an investigation is underway.

Theme 2: High quality decisions taken objectively on the evidence by an independent person with the required degree of expertise and experience who is not affected by bias or by improper pressure from any source.

- 8.19 This theme was the central focus of the Review and will be the subject of what I hope will be seen, over time, to be far-reaching changes of approach within the CPS
- 8.20 The overarching aims of the changes that the Director will be implementing are:
- To ensure that the prosecutor with responsibility for a case is highly competent, well trained and fully aware of the context in which his or her decision is being taken;
 - To ensure that those advising the prosecutor as independent counsel are similarly equipped and that they do so within a reasonable time;
 - And to reduce significantly the delays that have been experienced in taking decisions in some cases. The CPS cannot significantly alter the timetable to complete the investigation, but it can ensure that it takes its own decisions within a reasonable time.
- 8.21 The scope for changing the management of decision making and training can be limited by resource considerations, depending on how priorities are managed. In agreeing the way forward set out below, the Director has concluded that the changes we have agreed can be implemented within existing resources.

The CPS prosecutor responsible for the case

- 8.22 The CPS has been following the arrangements for internal decision making that were recommended by His Honour Gerald Butler QC in his Report published in 1999. Because he was keen to keep decision making within what is now the Casework Directorate, due to the experience of the lawyers in that unit and the desirability of keeping decision making to those with experience of handling this kind of case, he recommended that decisions should only be taken by lawyers at a particular grade or above (now described as SCS: Senior Civil Servants).
- 8.23 In practice, that confines the pool of regular decision makers to the three Heads of Division within the Casework Directorate, all of whom have heavy management responsibilities, and a further SCS lawyer who has no additional management responsibilities. The arrangements envisage that the Director, Casework and in some cases the Director of Public Prosecutions will personally take the prosecution decision.
- 8.24 These lawyers have openly expressed concern about their ability to commit themselves to taking decisions as quickly as they would like when they have many other competing demands on their time, including other death in custody cases.
- 8.25 One of the consequences of restricting the number of lawyers able to take the decision is therefore delay to the decision making process. One of the criticisms emerging in the consultation was excessive delay in reaching decisions. I agree that this is a matter of great concern, especially as the family will be waiting to hear a decision which is so important to them. I regard it therefore as important to reduce the time taken for decision-making in these difficult but important cases. I also accept the recommendation made that to deal with this requires an increase in the number of case lawyers trained and designated to handle cases of death in custody. I also have already implemented (see 8.33-8.47 below) a way of speeding decision making.
- 8.26 Many people during the review were less worried about the decision-making prosecutor having to be at a particular grade, and were more concerned to ensure that the prosecutor had the right skills and competencies. This seems to me to be the right approach. There are many highly competent and experienced lawyers in the Crown Prosecution Service just below SCS level and at SCS level outside the Casework Directorate. The questions are how to identify and select them, and how best to manage the caseload to ensure that high quality decisions are taken within a reasonable time by people who are well trained for the task.

A separate unit to handle all death in custody cases?

- 8.27 The Director and I have looked at whether there should be a discrete unit within the CPS with special responsibility for dealing with cases arising from deaths in custody (and perhaps some other cases as well). One aspect to the thinking of those who support the idea is that a discrete unit would not have the usual responsibilities for prosecuting other cases. The thinking is that this might help to dispel the perception that because the CPS and the police work together, the CPS must be reluctant to prosecute police officers who commit crimes. It is also argued that such a unit should be representative of the community and engage with the community in an open way.
- 8.28 The Director and I agree that there is much to be gained from ensuring that those who take decisions in these cases are properly equipped to do so in terms of their skills and training; and that experience and best practice should be shared by an identified group of people with responsibility to conduct these cases as well as they can. We also accept that the CPS has in the past been less proactive in engaging with the wider community than it could perhaps have been, and that this cannot have helped to challenge public perceptions of the way the CPS thinks and operates.
- 8.29 Consistent with the encouragement given to Chief Crown Prosecutors to take a proactive approach to engaging with the local community in their Areas, the Director and I agree that the Casework Directorate itself has a role, supported by the CPS's Equality and Diversity Unit, in engaging with the community, not just through special interest and campaign groups but through the legal community, the media and members of the public more widely.
- 8.30 As for confining the lawyers selected and trained to handle these cases to a specialised unit, the Director and the Director, Casework do not see this as a viable option in management terms. Managing caseloads when resources are tight demands flexibility in the deployment of skilled lawyers and the administrative back up they need.
- 8.31 Having therefore carefully discussed the matter with the Director, we propose that Casework Directorate should continue (as H.H. Gerald Butler QC proposed) to deal with such cases but that its abilities should be enhanced by additional training and the other measures I outline below.
- 8.32 The next question, then, is how.

Criteria for selection of reviewing lawyer for cases involving a death in custody

- 8.33 The CPS has always recognised the importance of taking sound decisions in cases, particularly those involving allegations of serious misconduct by police and prison officers. It is for this reason that cases involving deaths in custody are reviewed and prosecuted by the lawyers in the Casework Directorate. Here the lawyers can develop and share their experience and expertise.
- 8.34 The Casework Directorate has a rigorous selection policy for lawyers who wish to transfer into it from Areas so that it will only accept those of the highest calibre.
- 8.35 In his review published in 1999, H.H. Gerald Butler QC recommended that all decisions not to prosecute in cases involving a death in custody should only be taken by a person who is a member of the Senior Civil Service. That recommendation was accepted by the then Director and has been the basis of such decisions ever since. In my consultation paper it was stated that there were only six members of the SCS to take such decisions and that included the Director himself.
- 8.36 The present Director wishes to expand that pool for a number of reasons. Delay in reaching a decision was of significant concern to those who responded to the consultation paper and the Director shares those concerns. Although there is an inevitable delay while an investigation is carried out, when the CPS receives the file every piece of evidence has to be considered. The Director is aware that in some instances, the very small numbers of those who are reviewing these cases has been a factor in the delay in reaching a decision, particularly where several cases are under review at the same time.
- 8.37 I share the Director's view, that it is not the grade of the lawyer which is important, but the expertise and experience that the lawyer possesses. Clearly those who have reached a senior position in the Service will have demonstrated their casework ability but I am persuaded that there is great merit in widening the pool to include lawyers in the Casework Directorate who are immediately below the SCS.

- 8.38 This additional group, which would currently total a maximum of fourteen, is located in offices in London, York and Birmingham and would provide sufficient flexibility to ensure that cases allocated upon receipt are reviewed as speedily as possible. In this way I am assured that delay can be kept to a minimum.
- 8.39 In agreeing to this expansion of the pool, it is essential that all those who are taking these decisions are fully trained, to equip them to analyse evidence, identify further lines of enquiry, liaise with the families and their representatives as well as being fully conversant with the law and practice in what has been shown to be a highly complex area of criminal law.
- 8.40 The Director has agreed that a robust training programme should be instigated to cover these matters and that the pool should only be widened to include those who, in his opinion, have demonstrated the competencies required to review such cases.
- 8.41 Work is now in hand to set up that training programme and the Director will provide me with progress reports on its development.
- 8.42 In addition there is also now a new approach to decision-making to assist the most senior and experienced lawyers in the CPS to take decisions in the most complex and serious cases. In future, where the case papers are particularly voluminous, the decision-maker may be assisted by another experienced lawyer, who will provide the decision-maker with a detailed analysis of the case, drawing attention to the key issues on which the decision must depend. The decision-maker may rely on this analysis, together with the essential evidence in the case papers and supplemented by such other evidence as the decision-maker considers appropriate in applying the tests set out in the Code for Crown Prosecutors and exercising his or her professional judgement.
- 8.43 This approach marks a change from the procedures put in place following the Butler Report. The recommendations in that report referred to the need for the decision-maker to read "the whole of the relevant documentation". The effect has been that the most senior lawyers in the CPS such as the Director himself have been largely precluded by their other commitments from taking decisions in some of the Service's most serious and important casework. The new approach will allow a more effective use of their time and will thus enable greater input by the most senior lawyer into the most critical casework decisions that the Service faces. I announced this change in the House of Lords on 27 February 2003 col. WA47.

Managing the caseload effectively

- 8.44 During the review the importance attached to the State's carrying out its responsibilities under Article 2 of the ECHR has been at the forefront of my mind.
- 8.45 As part of the changed arrangements for decision-making and its more proactive approach to engaging with the community, the Casework Directorate will strengthen its approach to ensuring that cases are handled well and within a reasonable time. The Director, Casework, already has a scheme that assists him to ensure that all cases are proactively tracked and managed to case plans agreed at the outset. Where advice is sought from counsel, this also needs to meet agreed time targets, set case by case. Counsel wishing to advise in these cases are expected to commit themselves to providing advice within the timescale set in the case plan. Information about the progress of cases is provided to the Director, Casework on a monthly basis so that he can ensure that delay is kept to a minimum.
- 8.46 Effective case tracking allows for consistent, proactive management and the compilation of statistical information that will enable the CPS to demonstrate its performance, identify any patterns and identify any scope for improvement.
- 8.47 It was clear from the seminar that delay adds to the distress of the deceased person's family. It is, therefore, essential to eradicate unnecessary delays from the process wherever possible.

The pool of independent counsel

- 8.48 At present, at the recommendation of His Honour Gerald Butler QC in his 1999 Report, the Crown Prosecution Service seeks independent legal advice from a senior member of the Treasury Counsel panel based at the Old Bailey or leading counsel (a QC), where the prosecuting lawyer considers that there is insufficient evidence to prosecute for a criminal offence. This is intended to act as a safeguard and a check except where "*it is plain beyond any reasonable doubt that there is no realistic prospect of conviction*". Treasury Counsel are highly experienced prosecuting counsel, who prosecute the most difficult and serious cases that come for trial before the Central Criminal Court or elsewhere.

- 8.49 I have been persuaded that the Crown Prosecution Service should no longer confine itself to senior members of the panel and QCs, but should feel free to instruct suitable counsel from any Chambers.
- 8.50 The CPS is always interested in widening the field of experience of those whom it employs to prosecute cases, whether they are Crown Prosecutors or independent counsel. Expertise in particular aspects of criminal law as well as in other different but related legal fields, such as health and safety legislation or personal injury work (negligence), can complement prosecution work by bringing with it a different perspective on difficult evidential and procedural problems.
- 8.51 I have asked the Crown Prosecution Service to consider how best to increase the pool of suitable experienced and able counsel who are equipped to advise in cases arising from a death in custody. I am aware of the steps that have been and are being taken by the Director, Casework to make full use of the wide range of experience and expertise to be found among independent counsel. I am asking the Director to keep me informed of how these steps progress.

Training

- 8.52 The Crown Prosecution Service has now put in place an innovative training programme for all lawyers who take or will take prosecution decisions in death in custody cases. The first course was held on 3 July 2003 and course content will continue to be developed. Many contributors to the review had valuable comments to make about the value of training in relation to a number of different aspects of death in custody cases.
- 8.53 Training inevitably needs to cover the legal and evidential aspects of these cases that are of most importance, and will need to be very challenging in that respect, but I consider the programme should also include:
- The context in which prosecution decisions are commonly made, including equality and diversity awareness training;
 - Demonstrations of and discussions about restraint techniques and police policy;
 - The conduct of inquests;
 - Pathology;
 - Communicating with the family, including an understanding of the effects on the family when a relative has died in custody, and what this means in terms of understanding how best to communicate with the family and their representatives;
 - Explaining prosecution decisions, both in writing and in meetings.
- 8.54 The first of the courses invited a respected coroner, a pathologist and a speaker from SAMM (Support After Murder and Manslaughter) to speak about their respective areas of expertise so far as this is relevant to the work of the CPS in death in custody cases. The programme also contains demonstrations of legal restraint holds as currently practiced, from police instructors from the Metropolitan Police force training school at Hendon, and a session by experienced police officers explaining how officers are trained to deal with situations in which firearms are deployed. Future training days will include input from the Police Complaints Authority (and no doubt, in due course, the IPCC).
- 8.55 The content of the training programme will need to be developed further in consultation with the Equality and Diversity Unit and the Policy Directorate of the CPS, to include all the aspects that I regard as important, but I see the commencement of the programme as a very welcome development arising from my review.

Theme 3: Communicating with the family

Early contact with families of victims

- 8.56 The CPS prosecutes on behalf of the public at large and not in the interests of an individual. But as the Code for Crown Prosecutors makes clear, Crown Prosecutors should always take account of the consequences for the victim of the decision whether to prosecute and any views expressed by the victim or the victim's behalf.
- 8.57 The concept of trust is central to the exercise of the authority to prosecute and not to prosecute. Accountability means little in the absence of some form of obligation to report, answer, explain and/or give reasons. But accountability becomes extremely complex and difficult once it comes to the giving of reasons, access to information and when dealing with competing interests.
- 8.58 In the past, the CPS has adopted a reserved approach to giving reasons why a decision not to prosecute has been reached. That approach has changed in recent times as part of a wider agenda of giving more respect to the interests of victims in the criminal justice process.
- 8.59 The reasons for this historically were summarised in the Consultation Paper.
- 8.60 The CPS policy on victims and witnesses has been developed over a number of years. For some considerable time now in cases involving a death where a prosecutor has concluded that there should not be a prosecution, he or she will meet the family of the deceased on request, to explain the decision. Where there has been a death of a person in the custody of the state and an inquest jury has returned a verdict that the deceased was unlawfully killed, there is a reasonable expectation that there would be a prosecution of any person who could be identified as responsible. If the Crown Prosecutor concludes that there is insufficient evidence to prosecute he will give reasons for that decision. This follows the approach identified in *R v Manning and Melbourne* (2000) 3 WLR 463.
- 8.61 The Consultation Paper also summarised progress on the CPS Direct Communications with Victims initiative. The CPS has, over the past eighteen months, introduced its Direct Communications with Victims initiative, which involves a wider category of cases than those where a person has died. Where a charge is discontinued, or substantially altered, the prosecutor in the case will write to the victim and inform him or her of the decision and reasons for the decision. In cases involving death, sexual offences, child abuse or racial aggravation, the prosecutor will offer the victim a meeting to discuss the reasons for discontinuing the case or substantially altering the charges. The factors affecting the extent of the detail that the prosecutor can go into when giving reasons is address in more detail below; but as the then Lord Chief Justice stated in *R v DPP ex parte Manning and Melbourne*,
- “the Director will reach his decision as to the provision of reasons and their extent, having weighed the applicability of public interest considerations material to the particular facts and circumstances of each individual case.”*
- 8.62 The Direct Communication with Victims initiative has been piloted in a number of Areas. Rollout of the programme was completed and it is expected to be implemented nation-wide by October 2002.
- 8.63 It also identified the constraints on how much information can sometimes be discussed, having regard, for instance, to the rights of others, including privacy rights under Article 8 of the ECHR.
- 8.64 Most respondents agreed that the decision to communicate the reasons for a decision not to prosecute is a difficult balancing act to maintain having regard to issues of confidentiality, sensitivity and Article 8 rights.
- 8.65 The new approach of the CPS to transparency and accountability has been broadly welcomed. Respondents urged the greatest clarity possible so that the decision can be understood. The CPS is taking such concerns into account.
- 8.66 The review, however, has led me to consider at what other stages contact with the family should take place. At present the first face-to-face contact between the CPS and the victim's family will often be at a meeting whose purpose is to explain a decision not to prosecute. Such a meeting will almost certainly take place in an emotionally charged atmosphere in which it will be very difficult to establish mutual trust and understanding. Trying to explain an unwelcome decision in such circumstances can be very difficult.

- 8.67 It was suggested during the review that a more positive relationship between the CPS and the family could be encouraged if a first meeting took place at a much earlier stage and if a subsequent meeting were to take place before the final prosecution decision has been taken. The first meeting could take place as soon as the CPS had received notification from the police of an investigation that could lead to a prosecution. The role of the CPS could be explained, as well as how decisions are reached and how the criminal process works. The family could be asked whether they had any pressing concerns at that early stage or information they felt might be relevant. Agreement would be reached on the next steps and keeping the family informed of developments. Such a meeting should help to build trust and confidence by making the prosecution process more transparent.
- 8.68 The benefits to the family of an early meeting are clear. They would have an identifiable point of contact within the CPS; they would have a better understanding of what the CPS has to consider when making its decisions; they would have an opportunity to ask questions about the prosecution process as well as to inform the CPS of anything they felt ought to be added or taken into account. As a result of this early contact, the CPS would be better placed to deal with difficult issues at future meetings and address any additional concerns the family might raise.
- 8.69 I agree that an early meeting is a worthwhile step. I propose it should happen in all cases where CPS becomes involved in therefore a death in custody case.
- 8.70 Having an initial meeting is not, however, on its own enough. It is important, following this first meeting, to keep the family informed on a regular basis as to the progress of the case. This could be achieved in liaison with the appropriate police officer (either the Family Liaison Officer or the officer in charge of the investigation). The CPS currently keeps the family or their representatives informed, in writing or by telephone, of the progress of the case, the likely date on which a decision will be reached and of significant developments such as requests for additional evidence or a decision to ask counsel to advise.
- 8.71 A significant issue is whether a further meeting should normally be offered before the final prosecution decision is taken. The CPS general practice until now has been not to offer a meeting to the family until after a decision not to prosecute has been taken and for the purpose of explaining the reasons for that decision.
- 8.72 Whilst this is in itself an important step, and consistent with the CPS's new policy of Direct Communication with Victims, it has been objected that this is too late. Often, it is said, families will have a detailed knowledge of the case, such as the factual basis in which an inquest verdict was reached and that they will be anxious to have had a full opportunity to put these points across to the prosecutor before a final decision whether to prosecute or not has been made.
- 8.73 On the other hand there may be danger in a course which could lead to excessive pressure being put on the independent prosecutor to take a particular decision.
- 8.74 My conclusion is that, whilst these dangers are real, the advantages of a meeting outweigh the disadvantages. I propose therefore that once the CPS has begun to review the evidence received from the police, but before the final prosecution decision is taken, a further meeting should normally be offered to the family. The purpose of this meeting would be to explain the issues in the case, the elements of the offences that have to be proved and to go into more detail about the evidential requirements of the Code for Crown Prosecutors in the context of the particular case. The prosecutor will need to be alert to the risk of being persuaded into a decision against his or her better judgement and to handle the situation with tact and sensitivity. It is important that he or she is not improperly influenced by any views the family might express as to the strength of the evidence. On the other hand, where a family has additional information or a new perspective to offer on the case that are relevant to the prosecutor's decision on evidential sufficiency, it is perfectly legitimate, and indeed right, for a prosecutor to take these into account before reaching a final decision.
- 8.75 I accept that in many cases, there will be legal or professional reasons why Crown Prosecutors will have to be circumspect in discussing the details of the evidence with family members. In some cases it may be possible to be more open about the facts and circumstances of the case with family members while the case is still being considered. Prosecutors will nonetheless need to be alert to potential difficulties that could arise from open and frank discussion and will need to identify and manage the risk, for example, of prejudice to any proceedings in which a member of the family will be giving evidence.

- 8.76 The approach I have described, that is an early first meeting between the CPS and the family followed by a subsequent meeting prior to the final decision being taken, would be entirely consistent with the State's Article 2 responsibilities, which mark out cases arising from a death in custody for special treatment. I saw during the Review that such meetings would be welcomed by families, because they would provide an opportunity to ensure that any concerns the family may have about aspects of the investigation or the facts as they understood or interpreted them, or perhaps even new information or sources of evidence in some cases, could be conveyed to the prosecutor. Families may well have a different perspective to bring to bear on the events surrounding the death.
- 8.77 I recognise that conducting such meetings may not be straightforward. By the time the CPS becomes involved in a case, families may have had meetings with a variety of different organisations in connection with the death of their family member, from the police family liaison officer, to those connected with the inquest, lawyers and doctors, each with different roles to play but all focusing on the events surrounding the death. The CPS will need to learn how best to communicate in an effective and sensitive way. But on balance, and with the Director's agreement, I believe that this is the right way forward. Time will tell us whether we are right about this and this is an aspect of casework practice that will need to be kept under review.
- 8.78 For such meetings to work there will need to be a clear understanding between the family and the CPS of their respective roles. The purpose of each meeting, the parameters within which the facts and issues in the case can be discussed and the extent to which the family might be asked to contribute will need to be carefully explained each time, perhaps supplemented by a written note issued in advance of the meeting.
- 8.79 Ultimately, the prosecution decision that is taken must be that of the CPS prosecutor applying his or her professional judgment in accordance with the Code for Crown Prosecutors. It is not the decision of the family or their lawyer who, albeit required to give impartial advice to his or her client, is at the end of the day instructed by the family to serve the family's perceived interests.
- 8.80 Prosecutors will need to be astute – and supported by their managers in this – to recognise that such meetings and subsequent contacts with the family may expose them to forceful expressions of extreme grief and anger. While experienced prosecutors can be expected to be robust and to recognise what is relevant and what is not relevant to a prosecution decision, it would be wrong to ignore the pressures that can sometimes be felt or brought to bear in a stressful situation for all concerned. Potential defendants and the wider public are entitled to expect prosecutors to remain impartial and be seen to remain impartial in order to ensure that sound evidential decisions are taken. Therefore, as part of the implementation of this part of the review, the CPS will establish arrangements designed to ensure that prosecutors are properly trained and supported in taking on this role and that the parameters of all meetings with families are made clear from the outset.
- 8.81 Once a decision has been taken, the CPS will continue with its practice of writing to the victim's family explaining in as much detail as possible the reasons for that decision, and offering another meeting if a further detailed explanation is required. The purpose of such a meeting would be limited to providing this more detailed explanation. It will not be for the purpose of reversing the decision at that stage.
- 8.82 Subsequently, the CPS always reviews the evidence again after an inquest, taking into account any new material arising from the inquest. The CPS will notify the family by letter of the outcome of that review, again offering a meeting to explain the decision in the event that the original decision remains unchanged.

Informing families of decisions

- 8.83 At the seminar the point was made that families have in the past felt that their interests have been disregarded when the CPS gives them warning of the decision about prosecution in advance of any public announcement, but not significantly so. They have been notified at the same time as those under suspicion, a day or so before the public announcement is made. It was argued that families need time to assimilate and discuss the decision and would like to have an opportunity to discuss it with the CPS before it becomes "firm" through a public announcement.
- 8.84 Provided that both parties are notified at the same time, I am not persuaded of the need for any delay prior to the decision becoming public. Indeed, once the decision is known to the parties there can be no guarantee that it will not become public immediately.

Explaining decisions not to prosecute

- 8.85 Decisions to prosecute are not followed by an explanation to the victim's family of the reasons for prosecuting. Proceedings commence and the family is entitled to be present at all hearings and to know of any significant decisions affecting the conduct of the case.
- 8.86 Decisions not to prosecute in a case arising from a death in custody are explained in writing, whether or not this is then supplemented by a face-to-face meeting.
- 8.87 I have referred before to the intention to ensure that prosecutors receive supplementary training as to how best to convey their reasons to the family.
- 8.88 One of the lawyers who routinely represents families in these cases suggested that prosecutors should disclose the contents of their own internal review notes when notifying them of a decision not to proceed. This would of course demonstrate the thoroughness with which prosecutors consider cases. But there are disadvantages attached to such disclosure that in my view compellingly tell against such a practice, and the Director and I agree that it should not be implemented. It is for the prosecutor to decide how best to explain to the family the prosecution decision that he or she has taken. The decision whether or not to prosecute can involve the interests and reputations of the witnesses, of the victim and the accused or suspect. As I have noted, prosecutors must balance a number of considerations in deciding how best to explain their decisions, and will seek to minimise the risk of trial by media without the safeguards which criminal proceedings are designed to provide.
- 8.89 The review note cannot meet the requirements of a number of different functions or a number of different audiences. Families are entitled to a properly prepared explanation, which may not need to be anything like as long as the review note itself so long as it conveys the important reasons for the decision in a way that is sensitive to them and to their interests.
- 8.90 It is important that these processes are well understood by the public. Victims and families have a right to know what they can expect from the CPS. I have therefore agreed with the CPS that it will publish a booklet that explains to families where the CPS fits into the process and what they can expect from the Service.

Theme 4: Quality assurance

- 8.91 The arrangements for decision making in cases of deaths in custody within the Crown Prosecution Service are designed to secure a high quality of decision-making, with adequate safeguards.
- 8.92 First, decisions are only taken by lawyers in the Casework Directorate. They are not taken by lawyers in the 42 Areas of the CPS. This aims to maximise the experience of the decision makers. Secondly, decisions in these cases are currently taken within the Casework Directorate only by very senior lawyers at SCS (Senior Civil Servant) level. This may range from one of the Heads of the three Divisions of the Casework Directorate to the Director himself. Finally, the system has built into it the safeguard that where the initial reviewing lawyer concludes that there is insufficient evidence to prosecute for a criminal offence, unless it is plain that there is no realistic prospect of conviction, independent counsel is instructed from the Treasury panel based at the Old Bailey ("Treasury" counsel is a misnomer: this is a panel of highly experienced criminal counsel who prosecute for the Crown in all the most serious cases tried at the Old Bailey) or from the list of Queen's Counsel. In addition, in difficult cases the case is also the subject of discussion among the SCS lawyers. Review notes in complex cases are considered by a colleague.
- 8.93 From the perspective of the CPS as an organisation — and in the opinion of His Honour Gerald Butler QC who recommended the procedures — these arrangements are sufficient to provide assurance as to the correctness of the decision.
- 8.94 But successive layers of review within the organisation, supplemented by advice from counsel drawn from a small pool of individuals, does not necessarily dispel a public perception in some cases that the wrong decision, or at least a questionable decision, has been taken. Tackling the public perception and improving public confidence led to a certain amount of support during the review for a further decision-maker or body to have a role in decision-making independently from the Crown Prosecution Service, and independently also from counsel instructed to advise the CPS. Each of these solutions was offered as a way of either "proving" that the CPS decision was right, by endorsing it or ensuring that the decision was reconsidered.
- 8.95 I was far from convinced from the outset that adding further links to the chain of decision-making was wise, particularly because it seemed to me to be wholly foreseeable that any such individual or body would soon itself become identified with controversial decisions not to prosecute, the decisions would still not be immune from judicial review and such a process would add to the time taken to reach final decisions.
- 8.96 However, recognising that there was some support for introducing a further independent element into the decision-making process I have carefully considered the models proposed. Three options were suggested:
- (a) Remove the decision making function from the CPS altogether and contract out the decision-making to another body or private firms of solicitors.
 - (b) Appoint an independent supervisory lawyer such as a retired judge, either to act as some form of appellate remedy if the family wishes the decision to be reviewed again; or as a further check.
 - (c) Refer decisions not to prosecute to a panel of independent lawyers (not specified who).
- 8.97 The argument in favour of removing the responsibility for prosecuting deaths in custody entirely from the CPS is that the relationship between the CPS and the police is too close to ensure a robust approach to prosecuting police.
- 8.98 As Liberty records in its own review the main allegation being made is not that individual CPS lawyers are guilty of bias but that the institutions are so intertwined that their interests are too close.
- 8.99 From my discussions with the Director and the CPS lawyers involved in the decision making process, I do not believe that there is any basis in reality for these allegations. On the other hand, I am equally clear that some have this perception and that the CPS reputation is affected as a result and that some decisions, properly taken, attract suspicion and mistrust. I have therefore carefully considered whether that risk to reputation justifies in itself the major step of taking this class of prosecution away from the CPS and, if not, what other steps are justified.

- 8.100 There are, in my judgement, very strong arguments against removing such prosecutions entirely from CPS. The CPS was created to provide a national independent prosecuting service under the supervision of the Director of Public Prosecutions, himself under the superintendence of the Attorney General who is accountable to Parliament for the decisions taken. It is a good model. To pass decisions of such importance to private lawyers (one model suggested) would be a retrograde step. To establish a wholly new body to deal just with these cases would require a very strong justification indeed. It would throw up many issues, of funding, organisation, staffing and accountability.
- 8.101 This idea in fact received very little support in the review. It was floated as an idea by Liberty but not supported by anyone else. There seemed to me to be a widespread wish to ensure that the public prosecutor should perform this function on behalf of the public. Liberty's own review does not now put this idea forward positively whilst keeping the issue open for the future.
- 8.102 I do not consider either that the third option, a committee of lawyers thought to represent the various conflicting interests, would provide a proper safeguard for families, suspects, the public or for the CPS. It may well not be regarded as impartial. A panel of other professionals would not necessarily agree or formulate compatible/consistent reasons; nor would they bear any responsibility for the consequences of their advice/decision; nor would there be any guarantee that they would understand the importance of applying the Code and the prosecutor's ethics in the same way as the CPS lawyer is obliged to do. This would be prosecution or non prosecution by unaccountable committee, which must be unacceptable. In organisational terms it would muddy the clear accountability for decision-making in each case that His Honour Gerald Butler QC saw as so desirable; and legally the decision would still have to remain that of a Crown Prosecutor (under the Prosecution of Offences Act 1985).
- 8.103 I have therefore rejected this idea.
- 8.104 The Director himself indicated at the seminar on 21 May 2002 however that he would give some thought to the second option an appeal remedy. The suggestion was that there may be some merit in considering the appointment of a recently retired senior judge to conduct a quality check on any decisions not to prosecute in cases where a death in custody had taken place. The decision would not focus on the decision-making process but on whether the decision was "correct".
- 8.105 We could both see some advantages to the idea:
- Such a procedure might provide the victim's family with a feeling that there was independent scrutiny of the CPS decision other than that of counsel;
 - Assuming that the judicial figure supported the decision of the reviewing lawyer, greater "weight" might be attached to the CPS decision, which could be of some assistance in any further judicial reviews and over time might improve confidence in the CPS generally.
- 8.106 On the other hand, we could also see that:
- An "appeal" would probably become the norm, pressed for by anyone dissatisfied with a decision not to prosecute.
 - Under the "Butler" guidelines there is already an independent consideration of the evidence by counsel.
 - There could still be judicial reviews of decisions not to prosecute.
 - In due course — or perhaps even from the outset - if the judicial figure agreed with the decision made by the reviewing lawyer, his or her endorsement might itself be discounted as coming from a person who also represented part of the "establishment", or simply because the dissatisfied person was unhappy at the decision
 - The procedure would build further delay into the system of review.
- 8.107 In the end, we formed the view that introducing a further external element into the decision-making process (over and above independent counsel) would not necessarily improve public confidence any more than the involvement of independent counsel seems to assist in this regard.
- 8.108 However, following my discussions with the Director, we have agreed that he should assume a special enhanced oversight in relation to cases arising from a death in custody. The current arrangements already provide for the Director personally to take the prosecution decision in appropriate cases (see paragraphs 8.22-8.43). His oversight of the remaining cases will give him a superintending role designed to provide additional assurance over and above all the other special measures, described in part 8 of this report; which are designed to ensure high quality decision-making.

- 8.109 I believe that this approach would have the advantage that the Director of Public Prosecutions, the most senior lawyer in the Service with much experience of prosecutions, would adopt a personal role in all death in custody cases, which would ensure consistency of approach and increase public confidence that these difficult decisions are being taken appropriately. The fact that the Director is undertaking this role should indicate the seriousness with which both he and I view these cases, and we believe it would be preferable to the other options that were advocated.
- 8.110 However, I want to keep this system under review to see that it does add value to the decision-making exercise and that it does not create intolerable burdens for the Director. In exercising his oversight role it would be unrealistic to expect him to master all the papers as I would expect the decision-maker to do (and of course he will be the decision-maker in some cases). His personal workload would not permit this. The result would be to slow cases down, which is contrary to the overall aim we have. Accordingly the reviewing lawyer in each of these cases will need to take care to ensure that the Director's attention is drawn to the essential issues in the case, and the key documents and evidence.

Theme 5: The Code for Crown Prosecutors and Guidance to Prosecutors

8.111 The Code for Crown Prosecutors is a published document issued by the Director of Public Prosecutions giving guidance to the Crown Prosecution Service about the general principles to be applied when making decisions about prosecutions. Because the Code is intended to be a relatively short and straightforward document which stands alone, the Crown Prosecution Service supplements its general guidelines with any more specific guidance that prosecutors may need, through the medium of CPS Legal Guidance (which has now been published on the CPS's website, which can be found at www.cps.gov.uk).

The evidential test

8.112 Recognising that some of those who were consulted about prosecution decisions might argue that a different, lower standard, should be applied by the CPS to make it more likely that prosecutions would be brought, the consultation paper included a lengthy discussion of the reasons why a uniform test is applied and the unfair consequences of having different tests in different cases.

8.113 Under section 10 of the Prosecution of Offences Act 1985, which sets out the powers and duties of the Director of Public Prosecutions and the Crown Prosecution Service, the DPP is required to issue a Code for Crown Prosecutors setting out the general criteria guiding prosecution decision-making. A decision which is made contrary to the tests in the Code leaves that decision open to judicial review (*R v DPP ex parte C* (1995) 1 Cr App R 136).

8.114 The latest edition of the Code was issued in 2000, after wide internal and external consultation.

8.115 Paragraph 2 of the Code states that “*Crown Prosecutors must be fair, independent and objective. They must not let any personal views about ethnic or national origin, sex, religious beliefs, political views or the sexual orientation of the suspect, victim or witness influence their decisions. They must not be affected by improper or undue pressure from any source*”.

8.116 The independence of the prosecuting lawyer is regarded as an important safeguard to ensure that a prosecution is only started or continued when the criteria in the Code for Crown Prosecutors are satisfied.

8.117 As the Code for Crown Prosecutors makes clear, the decision whether or not to prosecute an individual is an important one, which carries consequences for everyone concerned. A decision to prosecute can have a profound effect on the accused; and a decision not to prosecute, especially in circumstances in which it is believed or asserted that the decision is or may be erroneous, can affect public confidence in the integrity and competence of the criminal justice system.

8.118 The Code for Crown Prosecutors sets out two fundamental criteria that should govern the decision whether to prosecute. These are: first, that there is sufficient evidence to provide a realistic prospect of conviction (“the evidential test”). If there is no realistic prospect of conviction, a prosecution must not go ahead, no matter how important or serious the case. According to the Code, it is not the role of the CPS simply to give cases a public airing regardless of the strength of the evidence. But equally, the CPS does not look for the same standard of proof as a jury would need to find before it can convict. That would be too high a standard and would tend to usurp the role of the court. According to the Code, if the prosecutor considers that a conviction is more likely than an acquittal, there is a realistic prospect of conviction.

8.119 If there is a realistic prospect of conviction, the Crown Prosecutor goes on to consider whether a prosecution is needed in the public interest (“the public interest test”). This review will not deal in detail with the public interest aspect of the decision, because in the kind of case under consideration it would be most unusual for a prosecution of a police or prison officer not to take place if there were sufficient evidence to provide a realistic prospect of convicting an individual for a criminal offence arising from the circumstances of a death in custody. In other words it will, save in exceptional cases, be in the public interest where there is sufficient evidence of criminal conduct causing death.

8.120 It has been suggested from time to time, especially in high profile cases, that the CPS should recognise a category of case that should be prosecuted even though there is assessed to be insufficient evidence to provide a realistic prospect of conviction. The argument for this is said to be that if the offence is very serious the public interest in holding a trial in open court is strong.

8.121 His Honour Gerald Butler QC strongly rejected this argument, on the basis that such an approach would lead to unfairness. It was also rejected after the most recent public consultation on revisions to the Code for Crown Prosecutors.

8.122 The Code for Crown Prosecutors has been redrafted on several occasions, most recently in 2000 when the document was the subject of extensive internal and external consultation. The basis for the evidential test under the Code remains the same as it was when the CPS was established. The Butler Report also rejected the proposition that the test should be lowered.

8.123 It follows that where the CPS is considering an allegation that a police or prison officer has committed a criminal offence, the Code tests applied are the same as for any other case.

8.124 The Consultation Paper specifically asked the question whether there should be a different, and lower, evidential test in cases of deaths in custody. There was little, if any, support for such an approach. It would mean, if adopted, applying a different standard for one category of suspect (police officers or prison officers), from any other. It would also imply that it would be right to subject those people to the burden of a prosecution even if there was not (in the meaning of the Code) a realistic prospect of conviction. That seems in principle unfair to them and incompatible with a consistent application of the principles of justice.

8.125 I do not, therefore, propose an alteration of the present evidential test, namely that the prosecutor should be satisfied that “there is sufficient evidence to provide a realistic prospect of conviction”.

Credibility and Reliability of Witness Evidence

8.126 A number of respondents raised, however, the question of how the test was applied in practice.

8.127 Weighing evidence is not a precise science. The more evidential material there is to consider, the more scope there is for individuals to differ in the weight they attach to particular pieces of evidence. Crown Prosecutors have to reach reasoned and reasonable decisions on the totality of the evidence when assessing whether there is a realistic prospect of conviction.

8.128 Given the test for prosecution which applies, the extent to which a prosecutor makes an assessment of and takes into account the perceived credibility or reliability of witnesses can be a controversial aspect of any decision to prosecute.

8.129 Some may argue that where apparently credible witnesses conflict on the vital issues in any prosecution case, the CPS should “let the court decide”, whether or not the prosecutor objectively considers that there is a realistic prospect of conviction.

8.130 Witnesses who say contradictory things will not necessarily always be equally reliable or believable. And if Crown Prosecutors do not have enough information to assess whether a conviction is more likely than an acquittal, they ought to identify what else they need to know and ask for it, before taking a decision.

8.131 On the other hand, the differences in the evidence may not be material to the case the prosecution would be putting. They may be the kind of differences that are to be expected. For example, conflicts in eye witness evidence of fights, struggles, or other disorder will very often differ on minor points, but may be consistent on the essentials.

8.132 In the written responses and at the seminar some individuals expressed the view that the CPS, far from taking too little care in the way it considered the sufficiency of evidence, was taking too much care; and as a result was adopting an over-analytical approach that tended to focus on the weaknesses rather than the strengths of the case, which perhaps led to viable but difficult cases being thought too weak for prosecution.

8.133 One specific aspect of this concern was the way in which the CPS was thought to be assessing whether there was a realistic prospect of conviction in cases in which there were conflicts in the evidence of witnesses.

8.134 It is worth recalling the following principles:

(1) It is the job of prosecutors to take difficult cases to trial. It would be contrary to the public interest if the only cases prosecuted were those near certain to lead to a conviction. If that were the approach many offenders would escape being brought to justice. If, however, prosecutors bring weak cases, where there is no realistic prospect of conviction to trial, trial judges will have no hesitation in stopping those cases and criticising the prosecution.

- (2) Credibility is an issue which may need to be considered by the prosecution in reaching the judgement whether there is a realistic prospect of conviction in a given case. Whilst credibility will not need to be assessed in every case, it will be in some cases because the prosecutor is having to decide if the available evidence is admissible in law and is reliable. This is clearly set out in the Code for Crown Prosecutors.

5.3 “When deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used and is reliable. There will be many cases in which the evidence does not give any cause for concern. But there will also be cases in which the evidence may not be as strong as it first appears. Crown Prosecutors must ask themselves the following questions:

(a) *Is it likely that the evidence will be excluded by the court? There are certain legal rules which might mean that evidence which seems relevant cannot be given at a trial. For example, is it likely that the evidence will be excluded because of the way in which it was gathered or because of the rule against using hearsay as evidence? If so, is there enough other evidence for a realistic prospect of conviction?*

Is the evidence reliable?

(b) *Is there evidence which might support or detract from the reliability of a confession? Is the reliability affected by factors such as the defendant’s age, intelligence or level of understanding?*

(c) *What explanation has the defendant given? Is a court likely to find it credible in the light of the evidence as a whole? Does it support an innocent explanation?*

(d) *If the identity of the defendant is likely to be questioned, is the evidence about this strong enough?*

(e) *Is the witness’s background likely to weaken the prosecution case? For example, does the witness have any motive that may affect his or her attitude to the case, or a relevant previous conviction?*

(f) *Are there concerns over the accuracy or credibility of a witness? Are these concerns based on evidence or simply information with nothing to support it? Is there further evidence which the police should be asked to seek out which may support or detract from the account of the witness?*

- (3) Prosecutors should not, however, ignore evidence because there are doubts about its reliability. This too is set out in the Code for Crown Prosecutors:

5.4 *Crown Prosecutors should not ignore evidence because they are not sure that it can be used or is reliable. But they should look closely at it when deciding if there is a realistic prospect of conviction”.*

- (4) Prosecutors also need to have regard to the availability of defences.

Defences

(a) The current practice of Crown Prosecutors in assessing the prospects of conviction is to have regard to any lines of defence that are clearly available to, or that have been indicated by, the suspect or defendant.

(b) Crown Prosecutors would be expected to look for any available evidence that rebuts that defence as well as supports it. A mere assertion on the part of the accused or a witness which simply contradicts the prosecution case should not in itself necessarily be sufficient to undermine the case to the extent that it should not proceed.

(c) Crown Prosecutors should not anticipate a line of defence in the absence of an indication on the papers. But they should consider whether there are further reasonable lines of inquiry that should be pursued which may strengthen or weaken the prosecution case.

- (5) The test for prosecution is not whether a conviction is certain, or even almost certain, but whether, on the available evidence, there is a *realistic prospect of the conviction* of an individual for an offence. According to the Code for Crown Prosecutors, a realistic prospect of conviction means that it is more likely than not that a jury that has been properly directed will convict. It is an objective test, not a subjective one. So it is not the role of the prosecutor to second-guess what a jury will in fact do. For example, a belief that juries are reluctant to convict police officers is not a legitimate factor to take into account when deciding whether, on an objective basis, there is sufficient evidence to justify a prosecution.

- (6) In assessing the prospects of conviction, prosecutors must consider the totality of the evidence. They cannot pick and choose what evidence to take into account depending on how consistent it is with the putative prosecution case. But equally, focusing unduly on the weaknesses of a case and on conflicts of evidence may obscure its overall strengths.

8.135 I have considered with the Director whether anything could usefully be added to the Code for Crown Prosecutors that could further clarify the approach to credibility. We could see presentational advantages in doing so, but no advantages that had real substance. The Code for Crown Prosecutors already sets out clear guidance on the question as to how the admissibility and reliability of evidence is to be approached as noted above.

8.136 I do not therefore see benefit in further or revised guidance. It would indeed not be desirable because of the risk that the guidance itself may become over analytical or encourage an overly analytical approach to assessing the strength of the evidence. However, I consider it important that decision-makers focus clearly on these propositions and am ensuring that the Crown Prosecution Service discusses these issues as part of the new training programme referred to in this paper.

8.137 In addition, on 1 May 2003 with the Director I launched a three-month public consultation as to whether or not prosecutors should be permitted to interview prosecution witnesses before trial to assess their reliability and credibility. Currently, with the exception of expert witnesses and some vulnerable witnesses, prosecutors do not meet witnesses before the trial. The consultation period ends on 21 July. If the results of the consultation were to allow such examination, it could well affect the decision in certain cases. Some have already suggested it could, for example, result in a more optimistic view of the credibility of a witness weak on paper.

Expert evidence

8.138 The topic of expert evidence requires particular attention. The overriding point to note is that where there is a conflict of expert evidence on a key issue, such as the cause of death, there will always be difficulty in persuading a court that there is a sound basis for conviction. Evidence must of course establish the elements of the crime beyond reasonable doubt.

8.139 It follows that there will always be an issue which the court will have to consider where conflicting evidence exists, whether it be between experts instructed by the Crown or between experts for the Crown and experts retained by the defence.

8.140 Where the Crown has conflicting evidence in its possession then that must be disclosed to the defence.

8.141 This conflicting material will have to be brought before the court in some way or another. The Crown does not have an entirely free hand as to what evidence it calls. Evidence must be called in accordance with the interests of justice (see *R v Russell-Jones*). Sometimes the Crown will have no choice but to call evidence which conflicts. For example, where one witness who gives evidence of assistance to the prosecution relies on earlier examinations, for instance at an autopsy, which he himself did not attend, then it will be necessary to call those others even though that may result in their opinions being put before the jury by the prosecution though inconsistent with the prosecution case. In any event the Crown, acting in the interests of justice, should not simply pick and choose experts where no-one expert is more worthy of belief than another.

8.142 In some cases it may be appropriate to notify the identities of other experts who have given conflicting views to the defence and leave it to them to call those witnesses. However this will certainly not always be the case and it may be unreasonable to require the defence to call those witnesses where their case is only in parts helpful to the defence. There is a case, however, for considering if, in limited but appropriate cases, the court can be persuaded to use its own powers to call witnesses so that such persons are not seen by the jury as either “Crown witnesses” or “defence witnesses” and so that both sides are able to cross-examine.

- 8.143 There is a further issue which has arisen; whether it is appropriate to hold conferences of experts at which the different experts to be called by the prosecution meet to discuss their points of view. All experts, whether called by the prosecution or the defence, are there to assist the court by giving their own independent and objective opinions based on their observations and expertise. An expert ought not to be seen as an advocate for the case of the party who has chosen to retain and call him or her. Furthermore it is not in the interests of justice that differences between experts are only ventilated in the courtroom. If an expert, for example, has overlooked an issue, it is better that this is known and the effect on any opinion already given is known at an early stage. If the result is that when faced with this fact the expert is going to revise his opinion to the point where he or she is no longer giving evidence that he or she is of the view, to the criminal standard, of certain facts, it is only a waste of time and money, as well as increasing the burdens of delay for the family of the victim and for those accused, for that point to be delayed. Moreover, where experts of different disciplines are to be called, understanding the way that their evidence fits together may be important to isolating the issues for the court.
- 8.144 So in principle, whilst I am aware that views differ, including within the CPS, as to holding witness conferences, I do not share the view that they should never be allowed. It should be a matter for the judgement of the trial team. On the other hand, in taking that decision the trial team (a) should be alive to the dangers of tainting the evidence of the experts e.g. that one expert may be encouraged to change his or her view simply because of peer pressure and (b) should be alive to the need for a very careful record to be kept of the meeting.

The public interest test

- 8.145 Where there is sufficient evidence to justify a prosecution (the case passes the evidential test set down in the Code — see above) the Code provides that “a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those in favour”.
- 8.146 I have given consideration, with the Director, to whether the Code should explicitly refer to Article 2 of the European Convention on Human Rights and the State’s obligations established by case law.
- 8.147 Article 2 provides for a procedural obligation upon the State to investigate deaths where, arguably, there has been a breach of the principal obligation in Article 2. The nature and scope of the duty to investigate has most recently been considered by the courts in *R on the application of Amin*, and *R on the application of Middleton against the Home Secretary* [2002] EWCA Civ. 390.
- 8.148 There is a strong case for ensuring that guidance and training should ensure that an understanding of the State’s obligations under Article 2, as established in Strasbourg and UK jurisprudence, is embedded in the minds of prosecutors dealing with these cases.
- 8.149 I have also considered the case for incorporating something of the flavour of Article 2 obligations into the Code. I am not persuaded that a reference to Article 2 itself is necessary.
- 8.150 I have, however, considered whether to introduce a specific public interest factor relating to prosecutions arising from the circumstances of a death in custody.
- 8.151 There is already a general presumption in favour of prosecution, unless public interest factors against prosecution clearly outweigh those in favour (paragraph 6.2). The offence, if made out, would plainly be a grave one which it is in the public interest to prosecute. In addition, the Code already regards the following as factors tending in favour of prosecution:
- 6.4.d – “the defendant was in a position of authority or trust”.
 - 6.4.h – “the victim of the offence was vulnerable...”
- 8.152 I have concluded therefore that the Code should not be amended to refer specifically to Article 2 obligations and that existing public interest guidance is satisfactory.
- 8.153 Guidance to prosecutors relating to the handling of cases arising from a death in custody, and their training, will ensure that prosecutors are kept updated about jurisprudence on Article 2 and the State’s obligations.

The relevance of an inquest verdict of unlawful killing to any subsequent prosecution decision

- 8.154 During the review there was general agreement that a verdict of unlawful killing does not in itself prove that the evidence justifies a prosecution for manslaughter or murder. It was pointed out by those closely involved in inquests that no individual is charged with a particular offence before an inquest jury, and the jury knows that a verdict of unlawful killing will not affect the liberty of the individual or individuals who may be thought to be responsible: they are not convicted of anything, nor will they be sentenced as part of the inquest process. There are also different rules about who can call witnesses and address the jury than apply in a criminal trial. An inquest is not an adversarial process in which a “prosecution” case is tested against a “defence” case. Unlike a criminal trial, an inquest does not attribute blame to individuals. For these and other reasons an inquest is quite a different process from a criminal trial.
- 8.155 The Director and I do agree with two strong points arising from the question about inquest verdicts however.
- 8.156 First, if a prosecutor concludes that despite the verdict of unlawful killing there is insufficient evidence to prosecute anyone for a criminal offence arising from the death, a high degree of explanation is called for.
- 8.157 Secondly, the value of an inquest will in practice most often lie in the effect of testimony given in person by the witnesses. The inquest therefore provides an opportunity for the prosecutor to see and hear the witnesses give their evidence in the coroner’s court.
- 8.158 I have concluded that it should continue to be best practice by reviewing lawyers in the CPS in death in custody cases to attend relevant parts of any inquest in the case to view crucial evidence being given.
- 8.159 The CPS already acknowledges the potential relevance of inquest proceedings to its prosecution decisions in its policy of a further review of any decision not to prosecute, following an inquest. This re-review takes into account any relevant evidence that has emerged at the inquest and any conclusions reached by the jury.
- 8.160 Any indication of the way in which the jury may have accepted or rejected the evidence, or the effectiveness with which witnesses gave evidence, could assist the prosecutor’s assessment of whether there is a realistic prospect of conviction (that is, whether a jury is more likely than not to convict). Attending the inquest and observing the proceedings first hand can only assist this process.

Evidence of racial (or religious) aggravation

- 9.1 One of the issues raised in the course of the review was the question of the ways in which racial (or religious) aggravation may be a factor in such cases. In this context the relationship between Section 153 of the Powers of Criminal Courts (Sentencing) Act 2000 (formerly s.82 of the Crime and Disorder Act 1998) and the ordinary rules of evidence and procedure needs careful examination.
- 9.2 The Court of Appeal has made it clear that when an offence is shown to be racially or religiously motivated that motivation is an aggravating feature of the offence (that is to say, a factor that increases the seriousness of the offence).
- 9.3 Section 153 provides that if an offence is racially or religiously aggravated the court must treat that fact as an aggravating factor. Moreover, the court must state in open court that the offence was so aggravated.
- 9.4 The meaning of “racially or religiously aggravated” is set out in section 28 of the Crime and Disorder Act 1998. In summary, racial aggravation may take the form of either racial or religious motivation or the demonstration towards the victim of hostility based on his or her membership of a racial or religious group.
- 9.5 Section 153 does not apply when the court is passing sentence for an offence which specifically requires proof of “racial or religious aggravation”. These offences were enacted by the Crime and Disorder Act 1998 as amended by the Anti-terrorism, Crime and Security Act 2001 (for example, racially aggravated assault). These offences carry higher maximum penalties than the equivalent “basic offence”, that is the offence in its non-aggravated form.
- 9.6 In addition to helpful and thoughtful comments received, I have obtained the advice of leading counsel. The following is my view.
- 9.7 In certain offences (sections 29-32 of the Crime and Disorder Act 1998) racial or religious aggravation is now an element of the offence. But these are not the offences which are likely to be charged in deaths in custody cases. These will be murder, manslaughter or misconduct in public office. In these offences there are a number of ways in which the question of racial or religious aggravation may need to be considered by the judge or jury or both. Each needs special consideration. It is worth setting out some of the consequences of the enactment of s.153(2) upon the trial of offences which come within its ambit.
- (1) The racial or religious aggravation will not be a matter upon which the jury will reach a verdict.
 - (2) The judge and the parties will not know whether the jury did in fact find the racial or religious aggravation proved.
 - (3) The only public “verdict” on this element will be reached by the judge after a jury has convicted of the simple offence.
- 9.8 This is the position of course with many aggravating or mitigating features of an offence which may emerge at trial, whether relevant to motive/intent or the factual background to the offence.
- 9.9 Where the offences charged are other than the specific offences under s.153 of the Crime and Disorder Act, (which is likely to apply in death in custody cases), the Crown may seek to prove to the criminal standard that the offence was accompanied by a demonstration of hostility to the victim because of his or her membership of a particular race, religion, etc. (s.28(1)(a) of the Crime and Disorder Act 1998). Here the jury may or may not decide that the offence was so aggravated. What matters is:
- (a) Whether the jury are sure of the defendant’s guilt of the offence charged and, if so
 - (b) Whether the judge is satisfied as to the racial/religious aggravation and therefore obliged to state that finding in open court.
- 9.10 Likewise the Crown may set out to prove to the criminal standard that the offence was motivated by such feelings: section 28(1)(b). Here too the jury may or may not so decide — it may help them on questions of identity (motive), joint enterprise, or intent — but what matters is:
- (a) Whether the jury are sure of the defendant’s guilt of the offence charged and, if so,
 - (b) Whether the judge is satisfied as to the racial/religious aggravation and therefore obliged to state that finding in open court when sentencing.

- 9.11 In both these situations the evidence will no doubt be apparent from the papers and the Crown should make clear its intention to lead such evidence at the outset so that the defendant is clear as to the case he or she has to meet. This is so whether the racial aggravation is an integral part of the Crown’s evidential case against the accused or not.
- 9.12 In other cases the Crown may have no compelling evidence of s.28(1)(a) aggravation — demonstration of hostility — and no direct evidence of s.28(1)(b) — motivation.⁶
- 9.13 In “ordinary” cases of homicide the Crown is often in a position to say: We cannot be sure why the accused killed his or her victim. He or she may have done so:
- Because he/she stood to gain financially from his/her death
 - Because he/she and the victim had quarrelled recently
 - Because he/she believed the victim had been unfaithful
 - Because he/she had always held the victim responsible for e.g. the death of a child
 - Or because of more than one of these motives, or none of them.
- 9.14 Because the existence of a motive is relevant the Crown is always entitled to lead any evidence — and to cross-examine the accused — which may assist the jury to decide a material issue whether of identity, intent etc.
- 9.15 Even when the Crown does not feel justified at the beginning of the case in opening or leading evidence of a particular motive such evidence may emerge during the trial. For example, the defendant may, by something he says or his demeanour or use of language during his own evidence — or by evidence led on his or her behalf — lead the jury and/or the judge to infer that he or she was racially motivated. Alternatively the defendant may claim that he or she had no conceivable motive to act as the Crown claims and/or that he or she had every motive not to have done so. In such a case the Crown would be entitled to explore the possibility of a motive including a racial or religious one. In such cases it will of course be for the judge to decide whether or not he or she is satisfied on the evidence that aggravation has been proved and the sentencing provisions of s.153(2) apply.
- 9.16 The question arises whether the existence of the statutory provision on racial aggravation means that the position of the Crown and the court should be different than it is when other motives or aggravating features are considered. I believe that so far as possible it should not. It would be wrong if Parliament’s desire to emphasise the then existing common law principle that the courts should increase sentences for racially aggravated offences should leave defendants better off than they are in respect of other non-statutory aggravating features such as breach of trust or the vulnerability of victim through age or mental disability etc.
- 9.17 Accordingly, even if the Crown is not in a position to prove racial aggravation to the criminal standard at the outset of the trial it should be possible:
- (a) For the Crown to make racial aggravation part of its case as one of a number of possible motives whether to assist in positive proof of the offence or to rebut a defence raised by the defendant or on his behalf, where there is some evidence from which the inference could be drawn;
- and/or
- (b) For the judge in sentencing to find that such racial aggravation existed, provided of course the defence has been given notice by the judge of the intention to consider the issue.

⁶Offences of gross negligence manslaughter for instance may be committed without motive — as by a complete and culpable failure to see a serious and obvious risk of death. They may also be committed with a motive — as by realising the serious and obvious risk of death and taking it in whole or part because of the victim’s race etc. In such cases however race may have been a motive.

Summary

- 9.18 When considering a case involving a death in custody Crown Prosecutors should approach their review on the basis of the principles contained in the Code for Crown Prosecutors.
- 9.19 Where the prosecutor believes that there is evidence of racial aggravation sufficient to meet the evidential criterion in the Code for Crown Prosecutors the prosecutor should either:
- (a) If appropriate charge the defendant under 29, 30, 31 or 32 of the Crime and Disorder Act 1998, or,
 - (b) In other cases, open the case and lead such evidence so that the judge may come to a conclusion under s.153 PCC(S) Act 2000.
- 9.20 Where there is no overt act bringing the offender within section 28(1)(a), prosecutors should carefully consider whether there is surrounding evidence from which a jury could legitimately draw the inference that the defendant was motivated by racial or religious hostility within section 28(1)(b). If there is evidence that the offence was so aggravated, such evidence should be included as part of the Crown's case.
- 9.21 In cases of homicide or wilful misconduct arising from a death in custody, where the prosecutor believes at the outset that there is some evidence of racial or religious aggravation, the prosecution may lead it if it is relevant to proof or disproof of a relevant issue in the case.
- 9.22 Where evidence of racial or religious aggravation emerges during the trial, the prosecutor may pursue such evidence if relevant to proof or disproof of a relevant issue.
- 9.23 In all such cases it is for the Judge to be satisfied so as to feel sure of racial aggravation before applying the provisions of Section 153(2) PCCA.
- 9.24 In cases where the Crown's case has alleged that the offence was racially or religiously aggravated, upon the defendant's conviction, the prosecutor should seek an indication whether the trial judge is satisfied that racial or religious motivation has been proved, in order that the judge can state in open court that the offence was so aggravated under section 153(2).g.

Concluding remarks

- 10.1 Even though I have not felt able to accept all the recommendations made to me during this review, I have considered them all carefully and in many cases have explained my thinking in this report. I believe that the changes that the Director of Public Prosecutions has put in place, or will be putting in place, following this report will all make their contribution to improved public confidence, high quality and more efficient decision-making, and the adoption and continuing development of best practice.
- 10.2 The CPS has shown a real willingness to facilitate, and to contribute to, the opening up of their work in these cases to external consultation as well as to internal debate. Their support, and that of the Director, Sir David Calvert-Smith QC, has played a pivotal role in bringing about the process of change marked by this report. I am confident that the Service will continue to review these practices from time to time to ensure that death in custody cases are handled to the highest standards that relatives and the public are entitled to expect.

The Rt Hon The Lord Goldsmith QC
Her Majesty's Attorney General
15th July 2003