3. Statement by The Attorney General regarding historic child abuse prosecutions

3.1 Mr. W.J. Bailhache Q.C., H.M. Attorney General:

I have made no statement about the 11 cases in which I have recently directed that there should be no further action at present and which were the subject of a media report last week. It is not generally my practice to comment in relation to decisions not to prosecute. That practice was only departed from recently because decisions had been taken in relation to cases which were already in the public domain. I do expect to make a sufficiently detailed statement, however, at the end of the investigation once all decisions have been taken and there can be no impact on potential prosecutions. As at present advised I expect that position to be reached by about the beginning of September. Members will remember my earlier statements that right at the beginning of the investigation I appointed an experienced private sector Crown Advocate to act for the prosecution. He had instructions to prosecute no matter who the prospective accused might be if the evidential test was met, unless he thought that there was some exceptional public interest factor that ought to be brought to my attention. However, if the independent lawyer thought the evidential test was not passed, his decision was not to be the end of the matter. He was required to submit a detailed written opinion which, with the appropriate case file, would be reviewed by a senior lawyer in my department with extensive experience in the Crown Prosecution Service in the U.K. The file would also have a high level review by me personally. The private sector Crown Advocate has invariably in these cases had a preliminary opinion from a barrister in London as well before he completed his work. In the 11 cases referred to, therefore, 4 lawyers have independently reached the view that the evidential test was not passed. Though it is not their decision in every one of those 11 cases, the police have agreed that the evidential test is not met and have agreed, therefore, with the decision not to prosecute. I put the system in place generally with regard to prosecution decisions in this investigation to ensure that those decisions were not only taken fairly but could be seen to be taken fairly. The same evidential test is applied here as in the United Kingdom. Prosecution decisions are taken dispassionately and not emotionally. It is not the case that complainants are entitled to their day in court at the expense of the public. The existence of the evidential test recognises that beginning a prosecution is a serious matter for the witnesses, for the accused and for the public. If it is not more likely than not on all the evidence which is properly admitted before a court, that a conviction will be secured, it is not right to prosecute. I see an awful lot of negatives there. Perhaps I can put that the other way around. It is only right to prosecute if it is more likely than not, on all the evidence which is properly admitted before a court, that a conviction will be secured. Over the next 6 weeks I expect decisions will be taken in respect of the outstanding files, some of which are with my department, some with the independent lawyers and some still with the investigating police officers. This will take place during the recess, but that is by chance and I wanted to bring Members up to date with the position before the summer break is upon us. I would like to add this in relation to the question of civil claims as there appears to be some misunderstanding about my role in this respect. If there is civil liability on the part of the public towards a claimant, it is no part of a Minister's duty nor part of the attorney's duty to take steps improperly to defeat that claim and thereby save public money. Secondly, although I believe there was little risk of conflict in my office handling civil claims after the criminal cases had been concluded, I recognised in the middle of last year that there was a risk of mischief makers wrongly asserting that decisions in criminal cases had been influenced by our dealing with the civil claims. Accordingly, I spoke with, and later wrote to, the Chief Executive to ask him to procure private sector representation for Ministers facing such claims. This has been done. Thirdly, although the Council of Ministers had the historic child abuse investigation as a regular agenda item during its meetings last year, I almost invariably absented myself from those discussions. This was both because I thought there was nothing at that stage for Ministers to determine and partly because I wanted to keep my own role quite separate from Ministerial involvement. Finally, Ministers will need advice at some point, not on individual claims but on structural matters such as the terms of reference for any committee of inquiry or whether there

should be established a redress board or a claims commission or some such. I do not see any conflict in the law officers giving this advice however, as I hope is obvious from what I have said already, the question of conflicts or perceived conflicts is kept under review and if, at a future date, that looks like causing a problem we will take steps to deal with the matter appropriately.

3.1.1 Deputy S. Pitman:
I will ask the Attorney General does he not see a conflict acting as a judge as to whether or not he should be pursuing States employees and former employees and then acting as chief adviser to the Council of Ministers?

The Attorney General:
I would ask the Deputy to repeat the questions. I just did not hear most of it.

Deputy S. Pitman:
The Attorney General has decided not to prosecute for various reasons any former or current States employee who has been involved in these child abuse cases. He is also chief adviser to the States. Does he not see there is a conflict?

The Attorney General:
I am not sure I have got much to add to the statement I have just made. No, I do not think there is a conflict because the decisions which have been taken in relation to prosecutions first of all have been taken in the first instance by the independent private sector Crown Advocates. Only if they have decided the evidential test is not met is it referred to my department where it is reviewed, first of all, by one of my senior criminal lawyers and then by me, personally, as a high level review. In the cases concerned so far, in every case not only have all 4 lawyers thought that the evidential test was not met, but also the police have thought the evidential test was not met. Insofar as that is concerned, it seems to me to be perfectly clear. As I am not advising Ministers on the civil claims, the second part of the Deputy's question simply does not arise.

3.1.2 The Deputy of St. Martin:
I draw reference to the third paragraph for the Attorney General where the Attorney General says: "I appointed an experienced private sector Crown Advocate to act for the prosecution. He had instructions to prosecute no matter who the prospective accused might be if the evidential evidence was met unless they thought there was some exceptional public interest factor that ought to be brought to my attention." Could the Attorney General explain what exceptional circumstances may lead to no prosecution being taken?

The Attorney General:
I think the statements that I have made previously were that if the evidential test were passed we could be satisfied that the case could go ahead. It would be very, very rare indeed that any public interest factor would determine that there should not be a prosecution, but I think the example I have given previously is that if one were faced with a person who, on established evidence, was in the last week or month of their life, it might not be appropriate to prosecute.

3.1.3 Senator B.I. Le Marquand:
Is the Attorney General able to confirm that the test as to whether not to prosecute namely the evidential test is a high test and whether it could not be defined as requiring more than a 50 per cent chance that 10 out of 12 jurors in the case of a jury trial will be sure that the person is guilty?

The Attorney General:

Yes, I thank the Minister. The test as I have always expanded it is more likely than not that a court or court would convict, but of course that does mean because of the rules of criminal trials that one has to persuade 10 of the 12 members of a jury in a jury trial, at least, that they must be sure, they must be satisfied beyond all reasonable doubt that events happened as the prosecution asserts.

3.1.4 Deputy M. Tadier:
First of all I would just like to thank the Attorney General because I believe the second part of his speech is effectively an answer to question 17 on the order paper yesterday which I submitted and which could not be answered due to a lack of time. So I do acknowledge that on the part of the Attorney General. The question I would like to ask though is in particular reference to 2 words which are slightly alarming on the back sheet, second bullet point. There is a reference to 'mischief makers' and it says: "Wrongly asserting that decisions in criminal cases have been influenced by our dealing with civil claims." There is a slightly different context. I would just like to get a confirmation from the Attorney General that he does not believe that anybody who questions a conflict of interest, be they a politician or a member of the public, or questions the process is necessarily a mischief maker?

The Attorney General:
I am certainly not been intending to accuse the Deputy by asking the question yesterday of being a mischief-maker, if that is the point.

Deputy M. Tadier:
It was not so much me, but just in general terms to emphasise that there can be more than one motivation for questioning processes.

The Attorney General:
I agree entirely that there are frequently more than one motivation. **[Laughter]**

3.1.5 Deputy R.G. Le Hérissier:
At the risk of asking the Attorney General to over-generalise, could he outline to the House, based on his review of experiences in other comparable jurisdictions, what are the factors that make for a successful prosecution in this particular category of cases?

The Attorney General:
It is well-known that historic abuse prosecutions are difficult because there frequently is any lack of direct corroborative evidence. Where one has an investigation these days for an offence such as rape, for example, usually you would expect to get some forensic evidence, DNA evidence, or whatever it happens to be, which is some independent corroborative evidence and of course if one is looking at an investigation of circumstances which took place a long time ago, that sort of evidence is unlikely to be available. It is possible that you can have what is regarded as similar fact evidence where there are a series of complaints by more than one person against the same suspect or accused, where the law allows the evidence given on one charge to support the complaint in relation to another charge, but those circumstances do not apply always and certainly in the cases we have looked at so far the lawyers have taken the view that it has generally not been possible to adduce similar fact evidence. When I say so far, in the cases where we have decided not to prosecute. So, the absence of any independent evidence is usually a prime difficulty and I put it that way because of the way the Minister for Home Affairs put it to me a moment ago, that you have to persuade 10 out of 12 jurors that they should be sure that the events happens as the prosecution claim because if one is left at the end of the day with a complainant who gives evidence very fluently that the allegations are correct, that the assault or rape or whatever it is took place, and the accused gives evidence just as fluently that it did not, and that is the only evidence which the jury have to face, it is quite difficult at that point to take

the view that any reasonable jury could be sure beyond reasonable doubt that the accused had committed the crime. So, that is very often the problem which is faced in deciding whether or not to prosecute.

3.1.6 Deputy P.V.F. Le Claire:
If I can ask this of the Attorney General; this statement talks about non-prosecution of 11 cases. Could I ask, because I am a big foggy on this and I am sure some Members probably are as well, there certainly have been some prosecutions in my understanding and I wondered how many there have been and how many were active.

The Attorney General:
There have been 3 persons charged so far. One of those persons was subject to 2 trials and was convicted in both trials. The second one changed his plea and admitted guilt, and the third one is coming up for trial in August. I cannot say, at the moment, whether there will be further prosecutions; there may or may not be. As I have indicated in the statement there are a number of files still outstanding either with the police or with the independent lawyers, or in my office.

3.1.7 Deputy M. Tadier:
I was going to ask the same question, but perhaps a supplementary on that basis. Could the Attorney General confirm whether the number is greater than those that have been dropped, or if it is significantly less, or perhaps even just give us an actual number of how many are outstanding. I believe it is in the public interest and that the public would like to know this.

The Attorney General:
I think there are about - so give me a margin of 20 per cent - 12 files outstanding.

3.1.8 Deputy R.G. Le Hérissier:
Could the Attorney General say that even though the evidence may not have met the tests that he has earlier defined, have there been instances where enough evidence has been brought forward that while it may not be put to a criminal trial it could be used, for example, in disciplinary proceedings?

The Attorney General:
The usual rule is that evidence which you obtain in the course of a criminal investigation is not available for other purposes, unless it is made plain to the witness, at the time of giving the statement, that the statement might be used for other purposes. Of course there is no reason why the witness should not be approached again later and asked if they consent to that statement being used for other purposes, but there is an assumption that the witnesses will be prepared to assist the police for the purposes of criminal investigation, but might take a different view if it is in relation to another purpose and that is why the consent is, I think, an important part of that process