CHAPTER 11

Decisions on Prosecutions

11.1 In order to assist us to determine, as required by Term of Reference 13:

i. Whether those responsible for deciding on which cases to prosecute took a professional approach; and

ii. Whether the process was free from political or other interference at any level;

we instructed independent leading counsel in London. Nicholas Griffin QC was asked to, and did, examine eight sample prosecution files and to give an opinion[1] on the approach to and decisions made in each case by those involved in case preparation and decision making.

11.2 It does not, in fact, matter whether Nicholas Griffin QC would have come to the same prosecuting decision in any particular case. We recognise that, in fields such as this, where professional judgement has to be exercised, two competent individuals may reasonably reach different views. What Nicholas Griffin QC was reviewing was the professional competence of those involved in the decision-making process.

11.3 Most, but not all, of the decisions reviewed were made during the course of Operation Rectangle and are a representative sample of the working practice of the prosecuting authority. The eight prosecution files were:

- WN279 and WN281
- Jane and Alan Maguire
- WN7
- WN491
- WN246
- WN335
- Les Hughes
- Anthony Watton.

[1] WD008989

11.4 In summary, Nicholas Griffin QC concluded that the decisions were appropriately and properly taken. Nicholas Griffin QC agreed, when asked in evidence, that, even if he would have reached a different decision in any particular case, it did not follow that the original decision was not made in a professional manner.[2] The question is whether the decision made in each case was made professionally, without undue influence, and with a correct application of the law to the facts. It is our role to take into account the evidence of Nicholas Griffin QC, and all other relevant evidence, and come to our own conclusion on these issues.

The prosecution system

11.5 The Attorney General (AG) is the principal legal adviser to the States of Jersey, as well as being the head of the prosecution service. This dual role (as seen in the other Crown Dependencies) has been the subject of some criticism.

11.6 The nature of the role was reviewed by Lord Carswell, and his conclusions were set out in his independent review in 2010. He concluded, among other things, that Jersey had been well served by a succession of distinguished Crown Officers and that the Law Officers' Department (LOD) should continue to be responsible for prosecutions.

11.7 The current Bailiff of Jersey, William Bailhache QC (who was AG from February 2000 until November 2009), was aware of the challenges posed by his multi-faceted role during Operation Rectangle:

> *"I was always conscious of potential conflicts and if a conflict of interest did arise, this was easily solved by delegating responsibility. If necessary, advocates from the private sector would be instructed to act. As Attorney General, I could not distance myself from my duty to take prosecution decisions but I could delegate other areas of work."*[3]

11.8 All prosecutions in Jersey are brought in the name of the AG. A Crown Advocate is a Jersey qualified advocate appointed by the AG to act on his behalf as a prosecutor.

[2] Day 133/9, 13–21
[3] WS000701/45–6

11.9 John Edmonds joined the LOD in June 2008, as Head of the Serious Crime Section. He was an experienced prosecutor who had practised until that time exclusively in England. He had no connections at all to Jersey. LOD was restructured in October 2009 and John Edmonds became Director of the Criminal Division – a post he still held when he gave evidence to the Inquiry.[4]

11.10 The Inquiry's focus in relation to Term of Reference 13 was whether the decision-making process involved any impropriety or was affected by any political or other interference. We were assisted by John Edmonds' evidence in that regard:[5]

> *"Q. Throughout the time that you were involved in decision-making in Operation Rectangle, whether you were making the decisions yourself or considering the decisions of others, did you ever feel uncomfortable professionally with what was being done?*
>
> *No, never.*
>
> *Q. What would you have done if you had?*
>
> *A. Well, as you have indicated, I had no ties with Jersey. My family, children, grandchild, mother and my wife's father are all in the UK; we would have gone back.*
>
> *…*
>
> *Q. Were you aware that there were politicians who were very concerned that the publicity associated with Rectangle was damaging the Island's reputation both as a financial centre and as a tourist centre?*
>
> *A. Yes, I was aware that that type of view was being expressed, yes.*
>
> *Q. Did that have any influence on decision-making within the Law Officers' Department?*
>
> *A. Absolutely not.*
>
> *Q. Was it ever discussed within the Law Officers' Department?*
>
> *A. I don't remember that topic being discussed, but there was never any discussion about how this is going to impact on Jersey other than how will it impact on Jersey if we don't do this right.*
>
> *Q. What was the answer to that question?*

[4] Day 126/5–10

[5] Day 126/57–59

> *A. That we had to do the right thing. We had to ensure that allegations were rigorously investigated and that we were making decisions that we hoped would withstand objective scrutiny."*[6]

John Edmonds also summarised the position as follows:[7]

> *"The role of the Attorney General requires him to provide legal advice to the States of Jersey … In normal circumstances I do not believe that there is a conflict with the Attorney General's various roles. Shortly after I arrived in Jersey in 2008 the Attorney General identified a potential conflict arising from his department providing legal advice to the States of Jersey in relation to the civil claims made by historic abuse survivors. The issue and potential conflict was that the Attorney General might be required to make a decision about whether to prosecute an individual in respect of whom a civil claim was to be made. To avoid such perceived conflict, the Attorney General indicated to the States that he would not provide advice to the States in relation to any redress scheme. Consequently the work in relation to this advice went to an external Jersey-based firm. In my experience any such potential conflicts are routinely identified and managed before any problems arise."*

11.11 During the course of his evidence, John Edmonds was asked whether it was possible that the AG might not have wanted to prosecute child abuse cases in order to protect the wider reputation of Jersey. He replied:

> *"It isn't what happened. I'm entirely clear that all Attorney Generals for whom I worked take a very serious view of serious criminal offending, including child abuse, and would want to prosecute. It seems to me to be clear that Jersey was going to be judged not so much by what had happened in the past, because one can't change the past, the way Jersey is going to be judged, or was going to be judged, was how it dealt with it. To cover it up, to try and pretend it hadn't happened wasn't going to make it go away because as a tactic that might work for a couple of years, but it will come back again, so what was important was how we dealt with it … there and then."*

11.12 Prosecution decisions in Jersey are made in accordance with the same two stage test that has for many years been applied in England and Wales. This was set out in writing when the UK Crown Prosecution Service (CPS) first came into being in 1986. The Code for Crown Prosecutors requires an objective assessment of the evidence, addressing the question: is a conviction more likely than not? If the evidence passes that test, there is then a subjective assessment of the public interest, namely: is it in the public

[6] Day 126/57–59
[7] WS000698/7

interest that this offender/offence be prosecuted? This test was set out for Jersey lawyers in the Code for Prosecutors, issued in 2000 by Sir Michael Birt QC, AG from 1994 to 2000.

11.13 Nicholas Griffin QC noted:[8]

> *"The Code on the Decision to Prosecute in Jersey is dated January 2000. I have not been provided with information to show what was applied before this date. However, it is clear from the documents I have seen that the dual evidential and public interest test was being used by the Law Officers' Department before 2000."*

The evidential test

11.14 William Bailhache QC was asked about various factors that a prosecutor would consider when determining whether the evidential test was met. He said that the reliability of a witness was a factor to be considered. If there were mental health issues or alcohol or drug problems the prosecutor would be sensitive to the possibility that those problems had been caused by abuse. Nevertheless "*you have to persuade a jury to convict despite (those problems) rather than because of them".*[9] He also said that the presence of corroborative evidence would mean that credibility issues were of less significance.[10]

11.15 Sir Michael Birt QC said:

> *"the credibility of any witness is a factor and various matters can go into credibility, for example if somebody has a criminal record as long as your arm and is guilty of lots of offences of dishonesty that may affect their credibility in the case so it's something you weigh in the balance but you certainly don't say "we're not going to prosecute because our witness has behavioural or psychological problems".*[11]

The public interest test

11.16 John Edmonds said[12] that the Centeniers had sometimes found it difficult, when applying the two-stage test on whether to prosecute, to distinguish between private interest and public interest. By way of example, some Centeniers were not, he said, prosecuting in domestic violence cases

[8] WD008989/17
[9] Day 128/6–10
[10] Day 128/15
[11] Day 131/33
[12] Day 126/19–21

because a conviction would cause the man to lose his job. In the view of the LOD that was a matter of private, not public interest. He said that the Force Legal Advisers all provided regular training for Centeniers.

11.17 William Bailhache QC was asked about the public interest test in the context of Operation Rectangle. He said:

> *" … One of the major public interest factors in favour of prosecution, where the evidential test was passed in Rectangle, was the need to demonstrate that the justice system in Jersey took seriously the complaints which were made and therefore my own approach was that we would prosecute, if the evidential test was passed, unless there were really important public interest reasons not to do so".*[13]

11.18 DI Alison Fossey, in a report drafted in 2010, said that in all cases in which the Operation Rectangle sub-group decided to take no further action, the decision was made on the basis that the case failed the evidential test. She said that no case was halted on public interest grounds.

11.19 Nicholas Griffin QC identified three cases in which he thought that the public interest test was a factor in the decision not to prosecute. The first was a case in which a member of staff at HDLG, WN491, was accused of having flicked boys with wet towels in the shower. The second involved a boy having chocolate mousse poured over his head by a member of staff (WN246), and the third was the Les Hughes case. He therefore believed DI Alison Fossey's assertion to be incorrect.[14] He noted that, in an Advice that dealt with a number of allegations including the chocolate mousse incident, Crown Advocate Baker said that the evidential test was not met in any of the cases, but went on to consider the public interest test in the chocolate mousse case. Nicholas Griffin QC said that the basis on which Crown Advocate Baker reached his view was therefore not clear in that case; however, *"if someone tells me in fact it was on the basis of the evidential test, then that's fine".*[15]

11.20 William Bailhache QC's recollection was that decisions not to prosecute were in every case made on evidential, and not public interest, grounds.[16] He

[13] Day 128/16–18
[14] Day 133/40–1; WD008989/14
[15] Day 133/41
[16] Day 128/65–6

added that, in some cases, such as that of WN491 (see below), the public interest test may have been relevant to the evidential test. Those circumstances arose, by way of example, when it was likely that a jury would think the assault, even if proved, too trivial and/or too old to justify conviction. In such a situation, the basic facts would pass the evidential test, since the prosecution could prove facts amounting to an assault; however, the essential evidential test – whether the prosecutor thinks it more likely than not that a jury would convict – would not be passed.[17] He gave similar evidence in respect of the chocolate mousse incident.

11.21 In his oral evidence, Nicholas Griffin QC gave the following response to William Bailhache QC's evidence on this issue:

> *" … Where he is talking about considering whether something actually is a criminal offence then that clearly is an application of the evidential test and so there's no difficulty about that. Where he's talking about proportionality and that type of thing, that seems to me to be consideration of a public interest type of factor: whether the kind of sentence that might follow would be minimal, that type of thing. So those would be the first two observations that I have. I think one of the issues is the extent to which it is appropriate when you're conducting the evidential test to take into account what view a jury might take of particular offences that have been charged and it seems to me one has to be careful when one gets to that kind of stage, and there is a case that is referred to by Crown Advocate Baker in one of his advices, I think it's in 491's case, which sets things out I think quite helpfully, and Mr Baker refers to it, but it's the case of R (on the application of B) against the DPP, it is a case from 2009, and what Lord Justice Toulson does in that case is to consider an appropriate approach for a prosecutor when deciding whether the evidential test is passed and the type of approach that he thinks is less appropriate and he favours a merits based approach and this is what he says:*
>
> > *'A prosecutor should imagine himself to be the fact-finder and ask himself whether, on balance, the evidence was sufficient to merit a conviction, taking into account what he knew about the defence case.'*
>
> *Now, that seems to me to mirror very well what you see for the evidential test in the Attorney General's Code. He then goes on to reject a predictive approach and that is based on past experience of similar cases, and it seems to me where you have a prosecutor saying 'In my experience no jury is going to convict for this type of thing', that's the predictive approach that one really shouldn't follow and it seems to*

[17] Day 128/69–70, 73

> *me that the Attorney General's Code and the equivalent CPS Code in England and Wales is easy to understand when one applies first the evidential test and only gets to the public interest test once one has decided the evidential test is passed. It becomes much more confusing where you are sort of trying to consider the two of them together and I don't think that's appropriate.*
>
> *… May I go on to say this though: even if I'm wrong and even if there is a way in which that type of public interest factor can be considered at the same time as the evidential test, I don't think that that applies in the cases that I have looked at here, because what Lord Justice Toulson has said is that there may be cases where there is good evidence and strictly speaking the evidential test is passed, but that a jury won't convict for example on moral grounds. I don't think that's the type of case that we are dealing with here so – and we may come on to the towel flicking allegations – I don't agree that these are minor allegations of horseplay that no jury would convict on, so on the basis of the facts in this case I also disagree."*[18]

11.22 In his oral evidence, William Bailhache QC was referred to Stephen Baker's observation in his Advice on the chocolate mousse incident:

> *"While this incident would of course be humiliating for a child and is technically an assault, I have no hesitation in saying that in my view it would not be in the public interest to prosecute for this matter. Indeed it would expose the prosecution to ridicule, particularly in the context of a child abuse inquiry into serious physical and sexual abuse."*[19]

11.23 William Bailhache QC said:

> *"I think any prosecutor would not want to charge if he thought the prosecution would look ridiculous, I'm sure that's true."*[20]

11.24 Referring specifically to the chocolate mousse incident, Nicholas Griffin QC said:

> *"I think it causes great difficulties if you are trying to do both [the evidential test and the public interest test] at the same time. In the chocolate mousse case, which we may come on to, it seemed to me a reasonable conclusion to decide that the evidential test hadn't been met and he talks about the previous conviction of the complainant in that case, which may -- not definitely, but may be a factor that would be conclusive, so that would be an evidential reason not to prosecute.*
>
> *The public interest reason not to prosecute would be that this was a very minor matter, years before, and would lead to a very minor,*

[18] Day 133/27–9
[19] WD008989/166
[20] Day 128/133

> *nominal sentence and that seems to me, if you have decided that there is the evidence, would be the public interest reason not to prosecute, but you would come to that after you had decided whether there was sufficient evidence.*
>
> *There was one other point that was raised in the quote that you have just read out and that is the fact that relatively minor offences might be disclosed in the context of a major investigation into very serious sexual abuse and whether that in itself is something that it is appropriate to take into account in deciding whether to charge and I think I have seen that in more than one of the cases that I have looked at. It seems to me that the fact that criminal offences are disclosed in the context of an inquiry looking into something else is not of itself a reason not to pursue them. There may be other reasons not to pursue them, but the fact that a common assault comes out of a murder investigation isn't of itself a reason not to pursue the common assault and I think the Attorney General, or one of them, actually makes a similar point in relation to the towel flicking allegations."*[21]

11.25 In his AG's Review of 2008, William Bailhache QC addressed one aspect of the public interest question in the following way:

> *"Before leaving the historic child abuse investigation, I would like to add this. While there have been some complaints of serious offences having been committed, the investigation has covered an enormous amount of ground, and perhaps has gone rather wider than was first intended when it was originally conceived. Certainly the completed investigation files which lawyers have had to consider in the context of deciding whether or not to prosecute have quite frequently revealed complaints of alleged assault which would have been at the lowest end of the scale even if the case files had been produced a week after the incident in question. Complaints of slaps to the head, being flicked with a wet towel, or being made to take cold showers and the like are so far divorced from the public's perception of the nature of this enquiry that it is right to say that at least in relation to a significant number of the case files received, the complaints, even if capable of being proved to the criminal standard, which in most cases has not been thought possible, are not matters which are suitable for the criminal courts even today, let alone 30 years after the event."*[22]

11.26 Nicholas Griffin QC, in his oral evidence to the Inquiry, summarised his view on the application, during Operation Rectangle, of the evidential and public interest tests:

> *"other than the cases where I have pointed out that I think there may be a conflation or an inappropriate application of the test, it seems to*

[21] Day 133/35–36
[22] WD009064/133

me they were correctly applied and I should add this: some of these cases were very difficult from a lawyer's point of view and some of the advices I have seen have been impressive in certain respects and may I give an example? Where Crown Advocate Baker is talking about whether the various different complainants' evidence in the towel flicking allegation[23] *are mutually corroborative I think he does that in a very – that's a difficult concept applied in the context of a difficult case – and he has done that I think very well. So there are examples of very good application of expert legal opinion to the cases and I think there are some that are less strong".*[24]

The charging decision

11.27 The decision on whether to charge a suspect usually lies with the Centenier, although the AG may exercise his power to commence proceedings in the Royal Court by "Direct Indictment".[25]

11.28 John Edmonds did not believe that the Centeniers' lack of legal training had ever caused a problem in decision-making: "*The Centeniers know that they can always go to a legal adviser (within the Law Officers' Department) if they are unsure."*[26]

11.29 He said that the AG had issued guidance in respect of specific offences to assist Centeniers in their decision making. In respect of domestic abuse, which includes the physical and sexual abuse of children, a zero tolerance approach was advocated. If the evidential test were met, prosecution would always be in the public interest unless there were exceptional circumstances.

In Operation Rectangle, charges were brought by Centeniers only after the cases had been scrutinised by lawyers. Certain cases earlier than Operation Rectangle were also reviewed by lawyers before a decision was made whether or not to advise a Centenier to charge. We have not seen evidence of any Centeniers, without the input of lawyers, refusing to charge alleged perpetrators of child abuse.

[23] Please see the discussion, at paragraph 11.105 below, about the case of WN491

[24] Day 133/36–37

[25] WS000698/4/13

[26] Day 126/13

The procedure in Operation Rectangle

11.30 William Bailhache QC told the Inquiry that, as AG, he was consulted by Lenny Harper on 7 January 2008 and given details of the number of victims and suspects who had been identified.

11.31 William Bailhache QC realised that the LOD would need to secure external Crown Advocates as independent prosecutors to work on the Rectangle cases, partly because of the scale of the investigation, partly because of the expertise of these Crown Advocates', and partly to avoid conflicts arising, if an external Crown Advocate were instructed to prosecute in one case and defend in another. Crown Advocate Baker of Baker Platt was therefore instructed to prosecute the Rectangle cases.

11.32 It was agreed that if Crown Advocate Baker (or one of his team) advised that there should be a prosecution, then a Centenier would charge a suspect. If the advice was that the suspect should not be charged, the file had to be forwarded to the LOD for review by the AG.

John Edmonds said that there was a good working relationship between Baker Platt and the LOD, with meetings taking place most weeks.[27]

11.33 William Bailhache QC said that the sensitive cases involving allegations against States employees would be referred to him. In any case where the Crown Advocates advised against charging, they had to draft an Advice Note so that the case could be considered by the AG, John Edmonds and sometimes external counsel. When the Operation Rectangle Gold Group was established, following the arrival of David Warcup in August 2008, a sub-panel of that group was created to consider whether to prosecute in each case. Members of the sub-group included John Edmonds, SOJP representatives, independent Crown Advocate Stephen Baker and UK barrister Simon Thomas. The sub-group applied a matrix system in order to identify and prioritise the strongest cases.[28]

[27] Day 126/34–35
[28] Day 128

11.34 Nicholas Griffin QC commented that the sub-panel was a “high-level" one in terms of its members and that the prioritisation system was, in his view, a proper one.[29]

11.35 In March 2009, the LOD suggested to DSupt Michael Gradwell that the SOJP alone should make decisions in cases that did not meet the threshold test for prosecution so that the expense of advices from Baker Platt could be avoided. DSupt Michael Gradwell replied:

> *“I would prefer to persist with the current prosecution team approach because of where we are now and how we have got into this position. Due to the history I think it is important that legal advice is sought in all these cases, despite there being an obviousness to some of the decisions.”*[30]

DSupt Michael Gradwell’s view prevailed.

11.36 One of the questions that we had to address was whether the retirement of Lenny Harper and the arrival of David Warcup and Michael Gradwell led to a change in the police approach and, specifically, whether David Warcup and Michael Gradwell (or anyone else) then acted with a view to closing down Operation Rectangle. The sub-group considered cases in which the SOJP had not yet done much work, in order to decide whether prosecution should be pursued. John Edmonds said that while the police had a large number of issues with which to deal he had no impression that they were trying to close things down:

> *“It was a question of trying to deal with things appropriately”.*[31]

He did not recall any instance of a significant dispute between the SOJP representative and the lawyers as to the future of any investigation.

We consider that the approach of the SOJP to Rectangle prosecutions remained essentially the same throughout the history of the operation; the police wished to prosecute alleged offenders where there was evidence to justify prosecution. There was no attempt, following the arrival of David Warcup and Michael Gradwell, improperly to close or reduce the scope of the

[29] Day 133/17–18
[30] WD00900/15
[31] Day 126/68

investigation. Inevitably, the operation had to come to an end at some point, and they had to manage that process; however, we have no doubt that, throughout the length of the operation, all policing and prosecuting decisions were made conscientiously and properly. We note that DSupt Michael Gradwell insisted on having legal advice, even when the decision not to prosecute seemed obvious.

Specific cases considered by Nicholas Griffin QC

WN279 and WN281

11.37 This case involved allegations of cruelty and physical assault on the part of WN279 and WN281, Houseparents at a FGH. The allegations related to events in the period from 1967 to 1977, when WN279 and WN281 were in their late 20s to late 30s. Other aspects of the case are considered above.

11.38 The complainants were three foster children who lived at the Home. In summary, the allegations were that there was a vicious regime of discipline and brutality at the FGH, with frequent beatings by both WN279 and WN281. There were numerous allegations of the foster children being lined up for physical punishment, with either WN279 or WN281 smacking the children, hitting them with a plastic cricket bat, or using a belt. Other complaints included children being hit round the head and beatings with a hairbrush.

11.39 The allegations were denied and contradicted by other children resident in the Home.

11.40 A dispute arose in June 2008 between the SOJP and the LOD as to whether WN279 and WN281 should be charged. The police wished to charge WN279 and WN281, and Lenny Harper expected that they would do so, having understood that the lawyers advised that charges should be brought.[32]

11.41 Following the arrest of WN279 and WN281, Simon Thomas advised that he wished to wait until the suspects had been interviewed, and then consider charges in the light of anything said in interview. His advice in that regard was correct.

[32] Day 122/48–85

11.42 Andrew Smith, a police officer who served with Operation Rectangle, gave a statement to the Inquiry but was not called to give oral evidence. He said that it was never the practice for lawyers to agree to charge a suspect before the person had been interviewed, and that it was his "*vivid recollection"* that Simon Thomas did not commit to charging WN279 and WN281 before their arrest.[33] The dispute became public, with both the SOJP and the AG issuing press statements to explain their respective positions. The parties involved rightly accept that this disagreement was damaging to the relationship between police and prosecutors.[34] Crown Advocate Baker was right to be concerned that a public dispute was possibly fatal to any prosecution.

11.43 On 14 August 2008, the AG, John Edmonds, Crown Advocate Baker and Simon Thomas attended a meeting with DS Alison Fossey and other police officers to discuss the case. They agreed to postpone a decision on charging pending the decision by one final witness as to whether she was prepared to make a statement.[35]

11.44 Ultimately, the decision was taken not to charge WN279 and WN281. John Edmonds told the Inquiry that he was clear that the decision was made properly and appropriately. Even with hindsight, he had no concerns about the way in which the decision was made.[36] In his witness statement he said:

> *"Unfortunately, the States of Jersey Police press statement made by Lenny Harper in June 2008 had made the environment much more challenging for those investigating and advising on the case involving WN279 and WN281. A lot of our time was spent fielding interest from various media outlets, both in the UK and Jersey. Consequently, time that could have been devoted to the decision-making process was given to media management. While I am confident that we made the right decisions, the time spent in responding to media enquiries slowed down the process at times."*[37]

11.45 In his oral evidence he said that media distractions did not influence the decision making.[38] We accept his evidence in that regard.

[33] WS000712/2–5
[34] WD009000/347
[35] WD009000/358
[36] Day 126/112
[37] WS000698/39/117
[38] Day 126/114

11.46 Nicholas Griffin QC reached the following conclusions in respect of this investigation:[39]

> *"**2.75 I do not consider that a professional approach was taken by the police in the preparation of the WN281, WN279 case file.***
>
> *2.76 On the basis of the documents I have seen, it would appear that DCO Harper's forthright interventions were significant and unhelpful. He responded angrily to Simon Thomas's [Law Officers' Department] apparently reasonable suggestion that a little more time should be taken to consider charges. The senior officer had even instructed his officers to get the Centenier in to charge, notwithstanding the advice of Simon Thomas to delay. DCO Harper's approach no doubt contributed to the highly pressured atmosphere in which the other police officers and the lawyers had to operate.*
>
> ***2.77 I conclude that Crown Advocate Baker's Opinion did not address the evidence or the credibility of the complainants in a sufficiently balanced way.***
>
> *2.78 The difficult relations between the States of Jersey Police and the lawyers may account for the rather one-sided assessment of the evidence by DCO Harper on the one hand and by Crown Advocate Baker in his Opinion on the other. DCO Harper's endorsement of the police report of 16 July 2008 reads more as making a case for prosecution than a balanced analysis. Crown Advocate Baker's 5 August 2008 Opinion reads more as a case against prosecution than the comprehensive and transparent opinion he said he was providing.*
>
> *2.79 The evidential situation was not as clear-cut as the analysis in Crown Advocate Baker's opinion suggested. That opinion was at odds with Simon Thomas's early description of the case as being 'finely balanced'. Crown Advocate Baker's assessment of the complainant's credibility was devastating but omitted reference to important information not least the police view that each would be a credible witness.*
>
> *2.80 However, I also conclude that the conclusion reached by Crown Advocate Baker, that the evidential test was not passed in the WN281 and WN279 cases, was reasonable and appropriate given the problems that existed with pursuing the allegations.*
>
> *2.81 Even when one takes a more balanced approach to the evidence and to the issue of the complainants' credibility, there remained real problems with the case, which I have outlined above. This is not a reflection on the complainants' veracity; it is an acknowledgement of the difficulties that existed and their effect when the evidential test was correctly applied.*

[39] WD008989/52–54

2.82 I conclude that the process by which the decision regarding prosecution was made by the Attorney General was appropriate and professional in the circumstances.

2.83 On the basis of the documents that I have seen, it is right to say that the Attorney General in reaching his decision that the evidential test was not met had not simply relied on what Crown Advocate Baker set out in his Opinion. The Attorney General took the opportunity to consider matters further at a case conference on 14 August 2008, at which both the police and the lawyers were present. It was only after this that he came to a final conclusion that no prosecution would take place. I therefore conclude that he properly considered whether this case should be prosecuted, notwithstanding the deficiencies in Crown Advocate Baker's opinion. Note that the case conference

(a) included the key personnel (DC Mark Newman, DS Andy Smith, DS Alison Fossey, DC Shane Evans, Simon Thomas, Steve Baker, John Edmonds, Attorney General);

(b) its stated intention was to allow the Attorney General to reach a balanced decision;

(c) the note of the conference suggest that he was looking beyond the Baker Advice; and

(d) the decision reached was justifiable on the evidence."

11.47 Crown Advocate Baker was invited by the Inquiry to respond to the criticism that his assessment of the issue of witness credibility was not sufficiently balanced. Crown Advocate Baker notes that there was no criticism by Nicholas Griffin QC of the conclusion reached, namely that the allegations in this case did not pass the evidential test. He maintained that his assessment of credibility was justified and said that he fact that no mention was made of the officer's belief as to the witness's credibility "*in no way sustains the suggestion it lacked appropriate balance or objectivity".*[40]

11.48 We agree with Nicholas Griffin QC's analysis and conclusions in the cases of WN279 and WN281. This case highlights a lack of clarity about who was to make charging decisions. We are satisfied however that those considering the charges against WN279 and WN281 acted professionally, despite failings in the preparation of the file. We believe that Crown Advocate Baker's Advice did give at least the impression that his consideration was not balanced, but we take his point that no criticism was made of the ultimate conclusion he

[40] WS000737

reached. We further recognise in particular that the complaints were contradicted by other witnesses who, as children, had been resident in the Home at the same time as the complainants; this would have caused significant problems in any prosecution.

11.49 WN279 was too unwell to give evidence before the Inquiry. WN281 did give oral evidence and denied all the allegations against him and WN279.

11.50 It is clearly arguable from the above that the cases of WN279 and WN281 could have been better handled. However, we have seen no evidence to suggest that any of the decisions taken either by the police or the prosecutors were influenced by any political considerations.

11.51 We also have to consider whether the decisions were taken professionally and competently. We did not hear evidence from Simon Thomas, and are unable to come to a view as to how it was that Lenny Harper understood that a decision to charge had been made before WN279 and WN281 were arrested. However that understanding arose, it is in the nature of complex criminal investigations both that misunderstandings may occasionally arise or decisions may have to be re-visited. We consider that the Advice by Simon Thomas to delay a charging decision until after the police interview was clearly correct, whatever the position had been before that point.

11.52 For the reasons given above, we conclude that the Advice given by Crown Advocate Baker was of an appropriate professional standard; he reached a conclusion properly open to him, although it is regrettable that he did not deal expressly with the counter-balancing arguments.

11.53 We have concluded that the decision taken at the case conference not to prosecute was taken professionally and conscientiously, and that all relevant factors were properly considered.

Alan and Jane Maguire

11.54 This case concerns allegations made by former residents at Blanche Pierre FGH in Le Squez. The allegations arose in the period from 1980 to 1990. A detailed account of events is set out in Chapter 4.[41]

11.55 The Houseparents were Jane Maguire and her husband Alan Maguire. Alan Maguire was not employed by Children's Services but played a role in the running of the Home.

11.56 The allegations were of a regime of repeated and significant physical abuse, including beatings, hitting with a wooden spoon, making the children stand for hours on end as punishment, and washing their mouths out with soap. A number of the allegations were corroborated by entries in a Home Diary (1986–1989) in which the Maguires recorded some of the punishments exacted on the children. Several allegations of sexual abuse by Alan Maguire were also made, but did not result in any charges.

11.57 Allegations of abuse were investigated by Children's Services in 1990, after two former employees became increasingly concerned at the manner in which the children were treated. They approached Children's Services and the Maguires were interviewed. The Maguires made some admissions, including the use of some corporal punishment and washing the children's mouths out with soap. The Maguires were asked to leave Blanche Pierre, and Jane Maguire took up another post in Children's Services. The police were not involved at that stage.

11.58 The first police involvement was in 1997, as a result of an intervention by Children's Services. This coincided with an anonymous threatening letter being sent to Alan Maguire, about which he contacted the police.

11.59 An investigation was then launched, resulting in several complainants and witnesses being interviewed.

11.60 Charges were eventually brought and a committal hearing took place on 8 June 1998. The Magistrate rejected a submission of no case to answer on the

[41] WD007628/328

part of Jane Maguire, and the case was remitted to the Royal Court for trial. Sir Michael Birt QC, the then AG, told the Inquiry that he had no involvement in the case at the time of the hearing before the Magistrate.

11.61 A summary of the circumstances, and the difficulties faced by the prosecution, was set out in a memorandum to the AG from the Force Legal Adviser, Ian Christmas, on 9 October 1998.[42] In that memorandum, Ian Christmas said:

> *"Despite the seriousness of what was alleged, I had grave reservations at the prospect of conviction firstly because of the quality of the victims as witnesses and their age at the time of the allegations, and secondly because of the vagueness of the evidence, the inconsistencies and sometimes absence of corroboration. It was the view of Children's Service and the Police that having steeled themselves to make these complaints, these young victims needed to put these experiences behind them and to be given an opportunity to support a criminal prosecution.*
>
> *The decision, therefore, to prosecute was made without any great optimism that the charges would succeed, but with every hope that the very process by which the allegations came to light and the fact the proceedings were investigated, would allow the victims to come to terms with their past and have confidence that the Jersey authorities had not swept the complaints under the carpet."*[43]

11.62 John Edmonds, in his oral evidence to the Inquiry, was asked to comment on the review, and said:

> *" … It was an inappropriate application of the Code for Crown Prosecutors … I think that's an abrogation of our responsibility as prosecutors, to make decisions on that basis. It's not fair on the witnesses because one provides them with expectations about the state of the case and they will be put through a trial process which is never, or rarely, a satisfactory experience for witnesses, and one can't lose sight of the responsibility one has to suspects, not to put them on trial where there is not a realistic prospect of conviction".*[44]

11.63 Sir Michael Birt QC, in his evidence to the Inquiry, agreed with John Edmonds' view.[45]

11.64 The prosecution was subsequently dropped, the stated reason being that the evidential test was not passed. At the same time, Alan Maguire alleged that

[42] WD009000/369
[43] WD009000/371
[44] Day 126/116
[45] Day 131/9

he was terminally ill with cancer and had a very limited life expectation. (In fact, he survived until 2009.) The Inquiry was provided with documents which set out the prosecutors' decision-making process at that time.[46] The documents included the medical report submitted on Alan Maguire's behalf.

11.65 Sir Michael Birt QC told the Inquiry that it was not common, but not unique, for a prosecution to be abandoned following committal.[47] Subsequently, in 2008, Crown Advocate Baker wrote an Advice in which he said that the prosecution should have been left to take its course.[48] Sir Michael Birt QC disagreed with that view; he said that the prosecution should have proceeded if, and only if, the prosecution considered the evidential test to be met. Since Ian Christmas had raised in his memorandum his concern that the evidential test was not met, the case had to be reviewed.[49]

11.66 Sir Michael Birt QC said that he did not remember the details of the case. He would have read Ian Christmas' memorandum but probably not any of the underlying documents; he would simply have allocated the case to a Crown Advocate.[50] He was shown the medical report submitted on behalf of Alan Maguire. While that did not assist his recollection of the case, he thought that the contemporaneous documents showed that the lawyers decided that the evidential test was not met; Alan Maguire's illness was not a factor in the decision not to pursue the prosecution. He said that he did not know what would have happened had the evidential test been met; Alan Maguire's condition might then have been considered in deciding whether there was a public interest in prosecuting.[51] In a letter dated 6 November 1998 Crown Advocate Binnington (to whom the case had been assigned) wrote:

> *"I have reached the conclusion that it would not be in the public interest for this prosecution to continue further. I reach this conclusion on a review of the evidence … ."*[52]

[46] WD008667/1–55
[47] Day 131/15
[48] WD007233/324
[49] Day 131/16–18
[50] Day 131/20
[51] Day 131/56–58
[52] WD008667/33

and he enclosed a detailed memorandum analysing the evidence in respect of each charge.[53] On review of this memorandum, it would appear that many of the charges, even on Crown Advocate Binnington's analysis, were substantiated.

11.67 Sir Michael Birt QC thought that the reference to the "*public interest*" was an error, since Crown Advocate Binnington went on to apply the evidential test.[54]

11.68 The ultimate decision not to prosecute was taken by Sir Michael Birt QC on 11 November 1998, following a meeting that he held and which was attended by Crown Advocate Binnington, Ian Christmas, Marnie Baudains from Children's Services and two police officers.[55] Sir Michael Birt QC said that it was not usual for him to convene a meeting following receipt of a Crown Advocate's advice; he assumed he had done so because he wanted to satisfy himself that the advice was correct.[56]

11.69 Sir Michael Birt QC, in evidence to the Inquiry, said that, having recently re-read the documents, the characterisation by Crown Advocate Binnington of the evidence in respect of two of the charges (involving washing children's mouths out with soap) as "*extremely weak*"[57] was put "*too strongly*"; the entries in the House Diary and Alan Maguire's own admission provided evidence to support those charges. Sir Michael Birt QC said that he would have tested the views of Crown Advocate Binnington at the November 1998 meeting, but could not recall what was said.[58] He did not think that he would have had the entire file, but would have been reliant on Crown Advocate Binnington's memorandum.[59]

11.70 Sir Michael Birt QC was asked whether, despite his lack of recollection, he thought that the consideration of the case had been approached with an open mind:

[53] WD008667/36
[54] Day 131/79
[55] WD008667/56, 58–59
[56] Day 131/76–77
[57] WD008667/33
[58] Day 131/74–75
[59] Day 131/81

> *"I do. I would say that as strongly as I'm able to and indeed I think it comes through in the note, which says 'no one dissented from this view although naturally there was sadness that this decision had to be taken.'"*[60]

11.71 When his attention was drawn to the report of Nicholas Griffin QC, who concluded that Sir Michael Birt QC had made a proper decision but added that he would have made a different one, Sir Michael Birt QC said:

> *" … clearly when you look at it, it was even then a finely balanced decision. I think that's evidenced by the nature of the memorandum, from Advocate Binnington in particular, who had done a much more thorough review than Ian Christmas -- at any rate the memo was more detailed; the fact that I called a conference clearly suggests to me now that I was uncertain of what the right course was at the time and I think as Mr Griffin says and I would certainly accept: this was a finely balanced decision and inevitably when you get to that sort of stage one prosecutor might say yes and another prosecutor might say no. It's almost the archetypal case where things are close to the margin. So I accept that some other prosecutor might have reached a different decision, but what I would say strongly is that I looked at the evidence at the time that I had, I considered the advice I had, evidence and everything else, and I applied the evidential test as I saw it, and I stand by it being a reasonable decision, one which was open on the facts; I don't say it was the only decision".*[61]

11.72 One of the former residents made a further complaint in 1999 – this time of sexual abuse. This complaint did not result in any charges.

11.73 The case was reviewed as part of Operation Rectangle and the witnesses were re-interviewed. The complainants remained willing to give evidence in the terms set out in their original statements, as did the other potential prosecution witnesses (save one who had died).

11.74 Meanwhile, the Maguires had moved to France. The AG was consulted in 2008 on the question of whether they should be prosecuted. The advice of Crown Advocate Baker was that a prosecution should proceed. Usually, under the practice developed for Operation Rectangle prosecuting decisions, the AG would not be consulted if the advice were to proceed. However, in this instance the circumstances were unusual; prosecutors had to consider the

[60] Day 131/82; WD008667/58

[61] Day 131/87–88

significance and implications of the fact that a previous AG had offered no evidence.

11.75 In a memorandum dated 15 July 2008, in which he sought John Edmonds' advice, William Bailhache QC set out his concerns about the previous decision to offer no evidence. His instinctive view was that the defendants and the public should be able to rely on a decision of a Law Officer and should not expect any successor to resile from that decision, unless it were manifestly wrong or new information had come to light. He set out his opinion that neither of those exceptions appeared to be present in the Maguires' case.[62]

11.76 John Edmonds, in a response dated 21 July 2008, stated that a careful examination of any new evidence would be required, in order to determine whether it could be said to be significant new evidence sufficient to justify charging. He thought that any charges based upon evidence that was available in 1998 would be caught by the original decision not to proceed (and therefore might be regarded as an abuse of process).[63] He then provided an analysis of any changes in the evidence since 1998.[64] His conclusion was that the new evidence did not have a material effect on the overall evidential sufficiency.[65]

11.77 At that point, the AG took advice from First Senior Treasury Counsel in London, Mark Ellison QC. He told the Inquiry that he did so, first, because he knew that the SOJP were very anxious that the Maguires should be prosecuted; secondly, if he did end up supporting the decision of his predecessor not to proceed, he wanted to have an answer to those who claimed that he was just supporting the previous AG as a fellow member of an "*old boys' club*"; thirdly, he knew that the case had been the subject of one of Stuart Syvret's complaints to the Ministry of Justice, and he thought that there was a possibility of the subject being reopened. He also recognised that he, reviewing a decision of a previous AG and perhaps concerned that his own

[62] WD009017/616, Day 128/138
[63] WD009017/622, WS000701/75–77
[64] WD007627/2
[65] WD007627/5/13

decisions might be reviewed, might be "*too close*" to make an objective decision.[66]

11.78 William Bailhache QC said that he also tried (although failed) to see the AG and the SG (of England) but obtained a view from the Principal Legal Adviser to the Crown Prosecution Service.[67] William Bailhache QC told the Inquiry: *"It was a difficult case and I just wanted to consult as widely as I could about it."*

11.79 Mark Ellison QC concluded:

> *"25. Assuming that the circumstances cannot be brought within the availability of a formal plea of autrefois acquit,*[68] *the strength and nature of the representation made by the prosecution in 1998, that there was insufficient evidence to justify the case proceeding despite the Magistrate having committed the defendants for trial, was such that an abuse of process application on the basis that it would not be fair or a proper use of the court process to allow the prosecution to reinstitute proceedings ten years later is highly likely to succeed unless there were the most exceptional circumstances, such as very compelling and completely new evidence capable of removing the reasons for the 1998 decision and having a good reason for not having been available before.*
>
> *26. The material provided to me clearly falls far short of providing any such exceptional justification.*
>
> *27. In my assessment the material provided indicates that it would not be proper for the Attorney General to seek to reinstitute criminal proceedings against Alan or Jane Maguire.*
>
> *28. Even if such compelling new evidence were to exist and proceedings might therefore be properly reinstituted, or if there was new evidence capable of supporting a fresh charge or charges, there is still a significant risk that the prosecution would be unable to counter the inevitable abuse of process application based more generally upon the impact of delay on possibility of holding a fair trial, resulting in proceedings being stayed."*[69]

11.80 The AG also obtained an Advice from Richard Latham QC, of 7 Bedford Row, London, as to whether Alan Maguire should be prosecuted for sexual offences (which were not charged in 1998, although the evidence in respect of all but one complainant was available). He concluded that the evidential test was not

[66] Day 128/140–141

[67] Day 128/141–142, 149; WD009017/662

[68] A plea of previous acquittal, preventing prosecution

[69] WD009017/640

met and also referred to the risk of an abuse of process argument. He stated that the public interest test would be satisfied if the evidential test were met. He referred, in general terms, to the pressure to give a complainant his or her day in court but said that to compromise the evidential test to allow tenuous cases to proceed was improper. He also added the following warning:

> *"28. I am well aware that there is a similar pressure manifest in Jersey as a result of a number of investigations into historical allegations of child abuse. To litigate this case and fail, and particularly to fail at the stage of an examination of whether or not mutual corroboration existed, would be a very unsatisfactory resolution of this file. The adverse ramifications of the inevitable attendant publicity might put at risk any subsequent stronger cases which have yet to be considered."*[70]

11.81 William Bailhache QC told the Inquiry that this advice was the same as that given to him earlier in the year by Crown Advocate Baker with which he agreed, that the strongest cases should be brought first because, if this did not happen, there was a real risk that all of the prosecutions would fail.[71]

11.82 William Bailhache QC said that, having received all of this advice, he believed that he had explored sufficiently the prospect of prosecution. However, at a case conference in September 2008, DSupt Michael Gradwell asked for more time to go to France to interview the Maguires. An admission of guilt might have amounted to the special circumstances needed to reopen the prosecution. William Bailhache QC said that he therefore agreed to give the police the opportunity to try to arrange an interview. He understood that, in the event, Alan Maguire refused to see the police.[72]

11.83 Michael Gradwell told the Inquiry that the case conference took place very soon after he had arrived in Jersey. The Law Officers proposed that there should be no further action. However, Michael Gradwell realised that the Maguires had not been interviewed and that there were other lines of enquiry that could be pursued. He persuaded the Law Officers to give the SOJP more

[70] WD009017/659
[71] Day 128/148
[72] Day 128/147–148

time to conduct further enquiries. He told this Inquiry that it was very easy to persuade the Law Officers to agree to this course.[73]

11.84 The case was considered again on 9 March 2009, at a meeting attended by William Bailhache QC, Crown Advocate Baker, John Edmonds, DSupt Michael Gradwell and DI Alison Fossey. The AG by this point had to decide whether to seek the Maguires' extradition from France, and had invited comments from the police. The police were aware that the AG's instinct at this stage was not to pursue a prosecution.

11.85 The AG raised again his concern at the prospect of overturning a decision of a previous AG when he could not say that that decision was clearly wrong: *"If there were five or six complainants here who might feel that they had had a raw deal at the instance of the criminal justice system, the position was far worse for all those people who in the future might be told that no action would be taken against them, because they would not be sure whether to believe it or not. The state of uncertainty which would be introduced into the public mind as a result of knowing that the Attorney General could, on a whim, change a decision of a previous Attorney General seemed to me to be very undesirable from a public policy perspective."*[74]

11.86 The AG also told the meeting that he believed that abuse of progress arguments "*would be very strong indeed*". He did say, though, that had he been taking the decision afresh, with "*no previous baggage*", then he probably would have prosecuted.[75]

11.87 In his evidence to this Inquiry, William Bailhache QC emphasised that, while he would probably have prosecuted, *"sometimes these are fine judgment calls. This was one of those cases where different people would take different views … You can't say either [he or his predecessor] was right or wrong on it"*.

11.88 John Edmonds, in his statement to the Inquiry, said:

> *"I have been asked whether the decision not to prosecute the Maguires was influenced by anticipated arguments of abuse of process or by*

[73] Day 111/99–200
[74] WD009017/672–673
[75] WD009017/673

embarrassment at the prospect of overturning the decision of Michael Birt QC. The decision not to reinstitute proceedings against Alan and Jane Maguire was all about making the right decision. If the right decision meant having to overturn the previous Attorney General's decision and having to deal with an abuse of process argument, then we would have done that. You cannot be swayed by public opinion; the easy decision would have been to prosecute, since that was, in many ways, the line of least resistance. One should not take a decision on the basis that is the easy decision; we have a public responsibility and are paid to make difficult decisions. In short, we have to make the decision that is right and which will survive objective scrutiny."[76]

11.89 No further charges resulted from Operation Rectangle, and the Maguires were never brought to trial. They remained in France until Alan Maguire's death in 2009.

11.90 Michael Gradwell told the Inquiry that he believed that the decision not to prosecute was a proper one; his recollection was that it was, though, the opinion of all involved that the Maguires should have been prosecuted at the time of the first investigation in 1998.[77]

11.91 Michael Gradwell told this Inquiry that, in all of his discussions with the Law Officers and legal teams about proposed prosecutions, although the lawyers would have formed a view of the case, they were always open to discussion. He had no concerns that they were acting anything other than professionally.[78]

11.92 Nicholas Griffin QC, independent leading counsel, reached the following conclusions in respect of the Maguire case:[79]

"Conclusions: 1997 to 1998 investigation

3.93 I conclude that the preparation of the case file was carried out to a professionally competent standard by the Police.

3.94 The relevant chronology for these purposes was as follows. In May 1997, the Children's Services contacted Police Headquarters about suspected child abuse by Jane Maguire. Alan Maguire was also suspected of child abuse. In the same month, Alan Maguire reported to the police a threatening letter he had received. Thereafter, WN76 came forward with her complaints and other ex-residents and staff were

[76] WS000698/46/138
[77] Day 111/100–101; WS000658/35
[78] Day 111/108–109
[79] WD008989/96–103

spoken to. In December 1997, Ian Christmas was first alerted to the investigation and in February 1998 time-barred cruelty charges were formulated, probably by Ian Christmas. New assault charges were substituted in April 1998. The focus of the charges was on certain aspects of alleged physical abuse. Allegations of sexual abuse were not charged. The committal took place in June/July 1998. In August 1998 A/PS Troy provided his report and in September 1998 Ian Christmas's office received what he described as the 'case file'. Clearly, Ian Christmas had been in receipt of evidence and information prior to this to allow him to advise about and formulate the charges. In October 1998, he provided his memorandum and in November 1998, Crown Advocate Binnington provided his letter and review.

3.95 The Police had obtained significant evidence, had liaised with the Legal Adviser about charges and had submitted a case file post committal for consideration by Ian Christmas and also Crown Advocate Binnington, which permitted them to conduct a further review of the evidence at that stage. On the basis of the information available to me, I therefore conclude that the police had properly and professionally prepared the case file and forwarded it for consideration.

3.96 The roles played by Ian Christmas and Crown Advocate Binnington and the Attorney General's decision to discontinue the case have been the subject of criticism by others who came to consider the case after them:

3.96.1 In a May 2008 report, DCs Holmes and Newth concluded that the Attorney General's 1998 decision to halt the prosecution had been wrong and even that: "Clearly, based solely on the information to hand questions must be raised as to the motivation of prosecution of this case to succeed as on the face of it, despite clear difficulties with the case the prima facie evidence was there for this matter to go to trial". Their report was endorsed in manuscript by Deputy Chief Officer Lenny Harper. His comments included that: 'I agree with all that the reporting officers have "flagged up" and consider that a great injustice was perpetrated on the victims in this case. This will just be exacerbated should the system fail again … '

3.96.2 In his July 2008 Advice, Crown Advocate Baker was also critical of the approach taken in 1998: 'These charges had been committed to the Royal Court. Undoubtedly the procedure should have been left to take its course. The intervention by Ian Christmas will not be easy to justify. The opinion prepared by Crown Advocate Binnington in 1998 appears to conflate the public interest and evidential tests and places some reliance on what was thought then to be the extremely limited life expectancy of Mr Maguire, a prophecy which has not come to pass.'

3.96.3 In March 2009, John Edmonds, Principal Legal Adviser at the LOD [Law Officers' Department], considered that: 'We are handicapped by the 1998 decision. If this came to us as a new case, I believe that we would identify those complainants who appeared credible and

prosecute both the physical and sexual abuse allegations which they made'.

3.97 I have considered that these criticisms are valid in part and that the approaches of Ian Christmas and Crown Advocate Binnington were flawed.

***3.98 I conclude that Ian Christmas was unclear about the correct tests to apply when considering the question whether to prosecute**.*

3.99 As I noted in the introduction, the Code on the Decision to Prosecute came into existence only in January 2000. I have not been provided with information to show precisely what happened before that date. However it is clear from other documents from 1998, that the Law Officers' Department was at that time using and applying the dual evidential and public interest test. See, for example the Attorney General's File Note of 11 November 1998 in Alan and Jane Maguire's case. It recorded the conclusion that there was 'insufficient evidence to have any realistic prospect of a conviction' in that case and further noted that the 'public interest test only came into effect where there was sufficient evidence'.

3.100 Ian Christmas had proceeded with charges against Alan and Jane Maguire in the face of what he took to be weak evidence in order to provide the complainants with a form of catharsis and to avoid the suggestion of a cover-up. If he really did have 'grave reservations as to the prospect of conviction' and made the decision to prosecute 'without any great optimism that the charges would succeed' he was clearly applying the wrong evidential test in order to let the case proceed charge and committal.

3.101 I conclude that Ian Christmas gave insufficient thought to the appropriate charges to bring to reflect the physical abuse allegations.

3.102 Time-barred offences were incorrectly charged initially, reflecting an unfocused approach from the start. Thereafter, assault charges were brought which reflected the stronger evidence in some cases but not in others which included certain weaker allegations that arguably did not meet the correct test.

3.103 I conclude that the decision not to charge allegations of sexual abuse was justifiable in the circumstances and when the correct evidential test was applied.

3.104 This is for the reasons given in the advices of Crown Advocate Baker and Richard Latham QC.

3.105 I conclude that Crown Advocate Binnington confused the evidential and public interest tests when considering whether the prosecution should proceed post-committal.

3.106 Crown Advocate Binnington's letter to the Attorney General indicated confusion in his mind about the proper application of the separate evidential and public interest tests. He had said: 'it would not be in the public interest for this prosecution to continue further. I reached this conclusion on a review of the evidence ….'

3.107 He had placed reliance on the public interest factor of Alan Maguire's health, on the basis of medical reports that cannot now be found[80] *and in circumstances where Alan Maguire went on to live for another decade.*

3.108 I have reached different conclusions from Crown Advocate Binnington in my assessment of the strength of the evidence in respect of certain of the charges. I have concluded that some passed the evidential test (e.g. involving the use of soap).

3.109 I acknowledge that the body of evidence in support of Alan and Jane Maguire presented difficulties to a prosecution. In my opinion, they were not necessarily insurmountable. So, for example, it may be that the Blanche Pierre regime changed for the worse over time, explaining why former residents such as 247 and 248, who are older and who had been present there at an earlier stage, said that they did not experience abuse. Furthermore, WN307's evidence was contradicted by the Blanche Pierre diaries and even by Alan Maguire's admissions at interview.

3.110 I conclude that the flaws in the approach of Ian Christmas and Crown Advocate Binnington were addressed by the Attorney General; I have ultimately concluded that the decision-making process he adopted was appropriate and professional in the circumstances.

3.111 The then Attorney General, Michael Birt QC, concluded that the evidential test was not met in respect of any charges that had been committed to the Royal Court. This was a significant decision to have reached in circumstances where there had been a committal with consideration of the evidence by a Magistrate. However, I also note that the situation was not straightforward:

3.111.1 Ian Christmas had not properly applied the evidential test prior to drafting the charges (it seems to have been his view that the evidential test was not in fact met);

3.111.2 there was concern that Judge Trott had not properly considered the evidence at committal and had permitted charges to be committed where there was no/little evidence in support; and

3.111.3 the test applied in a no case to answer submission at committal (as was made on behalf of Jane Maguire) was whether the

[80] The Inquiry was subsequently provided with a contemporaneous medical report. It was made available to Nicholas Griffin QC before he gave oral evidence

prosecution could make out a prima facie case and is not the same as the realistic prospect of conviction evidential test.

3.112 I have ultimately concluded that the Attorney acted to a professionally competent standard for the following reasons:

3.112.1 whilst the Attorney General had referred to the letter and memoranda provided by Ian Christmas and Crown Advocate Binnington, he had also conducted a review of the evidence during a case conference;

3.112.2 he went on to apply the dual evidential test and public interest test in reaching his decision, identifying where Crown Advocate Binnington had fallen into error and apparently not taking into account the suggested poor health of Alan Maguire; and

3.112.3 this was a difficult case involving conflicting evidence in which a competent specialist prosecutor could logically have reached the same decision as the Attorney General.

3.113 This has been a finely balanced conclusion, in a case where I would have reached different decisions on the evidence. However, the test I apply is not what I personally would have done in the circumstances but whether the decision-making process was appropriate and professional, applying the test of the competent specialist prosecutor.

3.114 It has been suggested that DC Troy disputed that the case conference actually took place. It would be necessary to revisit this conclusion if further information came to light indicating that the Attorney General's file note of the case conference was not accurate.

Conclusions: 1999 investigation

3.115 I conclude that the preparation of the further case file and the process by which the decision was taken not to prosecute WN81's 1999 allegation of sexual abuse were both to a professional standard.

3.116 There were real problems in continuing an investigation in the circumstances that then existed on the basis of WN81's 1999 evidence. This was primarily because:

3.116.1 she had gone on to [REDACTED] when one might have expected her to have taken that opportunity to distance herself from them;

3.116.2 she had not previously mentioned the sexual abuse when speaking to the police, although she knew that others were making such allegations. Indeed, she was expressly asked during her 1997

interview why she thought this had not happened to her, to which she replied 'I don't know'; and

3.116.3 it was only following the decision to discontinue proceedings that she came forward with these further allegations.

Conclusions: Operation Rectangle

3.117 I conclude that the preparation of the Operation Rectangle case file and the decision making process regarding prosecution were to a professional standard.

3.118 Before reaching a final decision, the Attorney General sought advice from Crown Advocate Baker, Queen's Counsel in London and his own legal adviser, John Edmonds. The advice received covered competently and in detail the question of evidential sufficiency, the application of the public interest test but also important and difficult questions of law.

3.119 There is no doubt the proper consideration was given whether to prosecute the case at this stage."

11.93 The Panel concludes that the decision in 1998 to abandon the prosecution was ultimately taken professionally. The Panel notes the following matters:

- In deciding to prosecute, Ian Christmas applied the wrong test. He appears to have believed that the evidential test was not satisfied, yet pursued prosecution to give the complainants their "day in court".
- The decision to abandon the prosecution, despite Judge Trott having ruled that there was a prima facie case, was one that could properly be reached, even though another prosecutor may have made a different decision. We accept that the AG conducted an appropriate review of the case and reached a decision that was, on the material before him, open to him.

11.94 The Panel concurs with the view of Nicholas Griffin QC that the decision not to prosecute in 1999 was professionally taken. The factors that he listed (and which are set out above) would have caused substantial difficulties in any prosecution, and those difficulties were correctly identified and properly addressed.

11.95 The decision in 2008 not to proceed was properly and professionally taken. The Panel notes that:

- The decision was clearly taken with the utmost seriousness. The AG obtained advice from two Queen's Counsel in England, as well as the Principal Legal Adviser of the CPS;
- There is a clear public interest in people being able to rely on the decision of prosecutors not to bring a prosecution. That public interest may be outweighed, in some cases, by the countervailing public interest in offenders being brought to justice (although that will not be a decision for the prosecutor alone. It will almost always be open to a defendant to argue before the Court that prosecution following an announcement of a decision not to prosecute would be an abuse of process);
- Prosecution following an announced decision not to prosecute may be justified when significant new evidence emerges. We agree with the view expressed by prosecutors and Mark Ellison QC that such new evidence did not exist. Whether we agree is, in any event, too high a test. The test that we have to apply is whether the view was reached professionally, and we believe that it was;
- In this case, the decision that the public interest in upholding the decision of a previous AG was professionally reached.

WN7

11.96 In 2004, allegations of physical assault on children at La Preference were made against WN7, a member of staff. These allegations concerned two residents in the early part of that decade, and one individual who had been resident in the 1980s. No prosecution followed.

11.97 WN7 also worked at HDLG and Les Chênes. In the course of Operation Rectangle, allegations of physical and sexual assault were made against him by a further ten complainants, and two other potential victims (by then deceased) were identified.

11.98 John Edmonds considered the file and, on 8 April 2009, wrote a memorandum to the AG in which he concluded that the evidential test was not passed in

respect of any of the allegations.[81] He told the Inquiry that Baker Platt would always send a copy of each Advice to the SOJP so that factual inaccuracy could be identified and corrected. Baker Platt would have advised in this case.[82]

11.99 In this case, a number of the complainants were assessed to be unreliable. John Edmonds was asked, during his oral evidence, whether that assessment in respect of some witnesses would influence his view in respect of others. He said:

> *"Not unless there was evidence of collusion. The fact that individual A – and let's assume that the facts are as they are set out in [paragraph five of his memorandum] – individual A is wrong because they were not at Haut de la Garenne at the same time, that wouldn't influence a decision being made in respect of a wholly unrelated complaint. In fact one would actually be looking at it the other way: if we had a number of witnesses who were making a complaint of a similar conduct in relation to a defendant, they would support each other; we would be looking at it from that point of view rather than saying 'Well, X has made something up against this individual, therefore everybody else who has made a complaint against his individual would be wrong.' That seems to me to be intellectually flawed, to approach a case from that point of view."*[83]

11.100 The AG accepted John Edmonds' advice, and there was no prosecution in 2009.

11.101 Nicholas Griffin QC was unable to reach a conclusion in respect of the decision in 2004 not to prosecute. The brief memorandum from Laurence O'Donnell, Force Legal Adviser, in which he advised against prosecution, made no express reference to one of the complainants (although Laurence O'Donnell did say that his conclusion applied to "*all allegations contained within the file*"). Nicholas Griffin QC stated that the memorandum should have addressed the allegations of this complainant. He was unable to be sure whether Laurence O'Donnell had received an incomplete file or had failed to make reference to information that was available to him. Nicholas Griffin QC said:

[81] WD008792
[82] Day 126/131
[83] Day 126/132

> *" … I believe that Laurence O'Donnell probably did consider this evidence … but I am unable to reach a definitive conclusion about this. In such circumstances I am unable to come to a conclusion whether the decision-making process was appropriate and professional".*[84]

11.102 During Operation Rectangle, the AG issued a press statement stating that there would be no prosecution of WN7. After that press release had been issued, Crown Advocate Baker provided further advice on prosecution. Nicholas Griffin QC could not tell from the papers supplied to him whether the Law Officers had gone on to consider the second advice, and so could not say whether a professional approach had been adopted in relation to it. However, he believes it highly unlikely that the content of the advice would have made a difference to the decision not to prosecute:

> *" … having reviewed the underlying evidence myself, it seemed highly unlikely that that would have resulted in a different conclusion as to evidential sufficiency".*[85]

11.103 He concluded that in all other respects a professional approach was taken in case preparation and decision making.

11.104 Like Nicholas Griffin QC, and for the same reason, we believe that it would be unfair for us to reach a view on the decision-making in 2004. However, we believe that the decision in 2009 was taken professionally. The advice from John Edmonds was consistent with that from Baker Platt. John Edmonds impressed the Panel as a witness, and we have no doubt that he approached this decision, and all of his work, with complete integrity and a high degree of professional competence.

<u>WN491</u>

11.105 This case involved allegations that WN491, a member of staff at HDLG, physically assaulted children in his care. One allegation was that he used to flick boys with wet towels (sometimes knotted) in the showers, leaving welts. The complainants' evidence was that WN491 was not engaging in horseplay but was trying to hurt and humiliate them, and did so.

[84] WD008989/136

[85] Day 133/68/25–69

11.106 The decision was taken not to prosecute. The allegations were investigated by Operation Rectangle in 2008–2009 but not earlier. In respect of all the allegations, other than the towel flicking, Nicholas Griffin QC considered that a competent and professional approach was taken in respect of case preparation, that the decision not to prosecute was appropriate and professional, and that the decision was made for the reason stated, namely that the evidential test was not met.[86]

11.107 In respect of the towel-flicking allegation, Nicholas Griffin QC concluded that the AG again reached a competent decision, and did so professionally, but that the true reason for not proceeding was not the stated reason of the evidential test not being made out, but that prosecution of these relatively minor and very old matters was not in the public interest.[87]

11.108 The evidence from those involved in making the decision was that it was not made on public interest grounds but that the evidential test was not passed. William Bailhache QC explained:

> *" … there are circumstances in which the public interest can affect the assessment of the evidential test as well … the evidential test is whether, properly directed as to the law, a jury is more likely than not to convict, so a prosecutor looks at what a jury is going to make of a prosecution case … and if it's a case which is 30 years old … It may not be in the public interest to prosecute that … it's also possibly not going to beat the evidential test because you know a juror is going to say 'Was it really an assault?' Was there that malicious a criminal intent which is necessary … to bring a juror to the point of convicting?"*[88]

11.109 In concluding that the AG's approach, in reaching his decision with regard to the towel flicking allegations, was appropriate and professional in the circumstances, applying the test of the competent prosecutor, Nicholas Griffin QC said:

> *"I conclude that this test is passed … In my opinion it was legitimate for the Attorney General to find that there were public interest reasons against prosecution, in circumstances where the allegations in question*

[86] Day 133/77–78; WD008989/228

[87] WD008989/229; Day 133/78–83

[88] Day 128/32

were in some instances over 40 years old, the defendant was elderly and further the court might impose a nominal penalty on conviction."[89]

11.110 The panel is satisfied that, even if Nicholas Griffin QC is correct that the decision was made on public interest grounds, rather than on the evidential test, it is a decision which was professionally reached in the circumstances.

11.111 This is an example of the sort of case in which lawyers may disagree over whether the test being applied is the evidential test or the public interest test. While we agree with Nicholas Griffin QC's interpretation of the law on this issue (summarised above), we have no doubt that the AG acted in good faith in concluding that the evidential test was not met. We conclude that the decision not to prosecute was one that could lawfully and properly be reached, for the reasons given by those involved.

WN246

11.112 Allegations of physical assaults on children were made against WN246, a teacher at Les Chênes. One allegation, involving an alleged assault on one child some 15 or 20 years earlier, was made and investigated in 1999. Nicholas Griffin QC said that he was unable, on the information available to him, to reach any conclusions as to the standard of case preparation or decision-making. A police report stated that enquiries were ongoing, but no further material was available.[90]

11.113 Further allegations were investigated as part of Operation Rectangle. These allegations were much wider, and involved five additional complainants, who made a total of seven additional complaints of physical assault. The police also obtained evidence from former residents who spoke of other children being physically assaulted, but the reported victims did not confirm the accounts. The Police advised against prosecution; they recorded that WN246 denied the allegations, that only two of the allegations made by the six complainants were corroborated at all by the accounts of other residents, and that that corroboration was in some respects at variance with the alleged victims' accounts. DI Alison Fossey, agreeing with the view of the

[89] WD008989/154

[90] Day 133/83–85; WD008989/171

investigating officer, concluded that the evidential test was not met. Two members of Baker Platt advised (William Redgrave, an Associate with Baker Platt, and then Crown Advocate Baker), and supported the Police view; Crown Advocate Baker noted that there were no contemporary records of complaints, and no supportive medical evidence. He emphasised that he was not seeking to say that the complainants were lying; it did appear that WN246 had routinely assaulted residents. However, he concluded that the evidential test was not met in respect of the specific allegations that he was considering. The AG and John Edmonds reviewed the file and reached the same conclusion.

11.114 Nicholas Griffin QC queried the basis on which the decision was taken not to prosecute WN246 for having poured chocolate mousse over a boy's head. There was corroborative evidence for what would have been a memorable incident, and WN246 had himself told the police that it *"rang a bell"*. Crown Advocate Baker, in his Advice, concluded that the evidential test was not met in respect of any of the allegations. However, when dealing specifically with the chocolate mousse incident, he noted that there was corroboration but went on to say that it would not have been in the public interest for a prosecution to be brought; it would expose the prosecution process to ridicule. Nicholas Griffin QC concurred with the view that, if the evidential test were met, the public interest test would not have been satisfied. He concluded that case preparation and decision-making were competent, appropriate and professional.[91]

11.115 We, like Nicholas Griffin QC, do not have sufficient material available to us for us to reach any conclusions about the investigation in 1999.

11.116 In respect of the Operation Rectangle investigation, we believe the police to have conducted a thorough inquiry. Attempts were made to obtain corroboration, and a substantial number of residents interviewed. It was always going to be very difficult to obtain reliable evidence of individual assaults said to have occurred very many years earlier, particularly against what appears to have been a background of routine assaults. It is

[91] WD008989/172–173

unsurprising that residents' accounts were vague or inconsistent, but that very vagueness and the lack of corroboration clearly presented significant difficulties both for the officers and for those who had to make prosecuting decisions.

11.117 We conclude that the decisions not to prosecute were competently and professionally made. In respect of the chocolate mousse incident, it is clear to us that the evidential test was satisfied, and that that must have been apparent to those who decided not to prosecute. The decision not to do so was, we believe, made on public interest grounds.

11.118 While we believe that decision to have been taken professionally, we have to consider it against the evidence given to us that all decisions not to prosecute were made on evidential grounds. The evidence to us on this issue from William Bailhache QC was:

> *"I think one has to have regard to whether a charge – whether a jury properly directed as to the law would be more likely than not to convict on the charge, so they may well have been satisfied that the bowl of chocolate mousse was poured over his head, maybe, I don't know, but the chances of getting a conviction seemed to me to be remote. Now, that is an example of perhaps the difference that I have between that and Mr Griffin. He regards that, as I understand it, as being purely a public interest matter. I think that it is both, it's both a public interest and an evidential test."*[92]

11.119 Again, we conclude that this is a case in which different lawyers have, honestly and professionally, reached different views as to the characterisation of the test. While we prefer Nicholas Griffin QC's interpretation of the law, we have no criticism to make of the decision taken by the AG.

<u>WN335</u>

11.120 In this case, allegations of sexual abuse by a member of staff at Heathfield were made and investigated in 1991. Ian Christmas, Force Legal Adviser, took the decision not to prosecute, largely on the basis of his view that the complainant lacked credibility that there was no corroborative evidence, and

[92] Day 126/134

that WN335 had denied the allegations.[93] Nicholas Griffin QC considered that a competent and professional approach was taken in the preparation of the case file and that the decision not to prosecute was appropriate and professionally taken. He queried whether other residents of Heathfield should have been approached, in an effort to see whether corroboration could be obtained. However, he concluded that this issue was outside the scope of his instructions.[94]

11.121 The allegations were considered again as part of Operation Rectangle. By this time the complainant, WN216, said that he did not wish to assist any police enquiry. Forensic examination of a bed sheet (from 1991) provided no useful evidence, and the decision not to prosecute was taken under the matrix system adopted by the Gold Group sub-panel. Nicholas Griffin QC concluded that the decision was taken professionally and appropriately. He reached no conclusion on the case preparation by the police because the decision not to prosecute was taken before the case file was complete. (Nicholas Griffin QC had no criticism to make of the timing of the decision.[95])

11.122 We have addressed in Chapter 10 the two police investigations. We concluded that the police made proper efforts during Operation Rectangle to obtain corroborative evidence and we had no material on which we could criticise the investigation in 1991. We agree with the opinion of Nicholas Griffin QC that the decisions of prosecutors both in 1991 and during Operation Rectangle were taken professionally and competently. By the time of the latter investigation, WN216 was not willing to give evidence and no corroborative evidence could be found; the decision not to prosecute was, in our view, not only one that could properly be taken but was inevitable.

Les Hughes

11.123 Les Hughes was prosecuted in 1989 and pleaded guilty to sexual assaults on three female residents of Clos des Sables, where he was the

[93] Day 133/86; WD008989/181

[94] WD008989/185–186

[95] Day 133/86–87; WD008989/187–188

Housefather. Nicholas Griffin QC concluded that the preparation of the case file and the decision to prosecute were competent and professional.[96]

11.124 Further allegations against Les Hughes were considered as part of Operation Rectangle. The Gold Group sub-panel decided, before preparation of the case file was complete, not to proceed with a prosecution.

11.125 The sub-panel decided not to prosecute, for the following reasons:

- the allegations were not of the most serious nature; and
- Les Hughes was 82 years old, did not appear to have re-offended since 1989 and the risk of re-offending was minimal.

11.126 Chief Inspector Cane concluded that prosecution "*is not in the public interest*". DCI Alison Fossey endorsed that conclusion: "*Agree. NFA".*[97]

11.127 Nicholas Griffin QC expressed no opinion, in these circumstances, on the preparation of the case file. He concluded that the decision not to prosecute was appropriate and professional.[98]

11.128 We concur with Nicholas Griffin QC's view. It is obviously inappropriate for any criticism to be made of a case file left incomplete because a decision not to prosecute meant that no further investigations were pursued. We also agree that the decision not to prosecute was a professional one, taken for legitimate reasons.

<u>Anthony Watton</u>

11.129 The SOJP investigated complaints against Anthony Watton on a number of occasions. He was convicted of indecent assault in 1987 and charged again in 2001. He took his own life before the matter came to court. When further complainants came forward during Operation Rectangle, Anthony Watton had been dead for seven years.

11.130 Nicholas Griffin QC concluded that a competent and professional approach was taken in the preparation of the case file in 2000/2001. He stated that

[96] WD008989/203
[97] WD008989/202–203
[98] WD008989/204

there was insufficient information to enable him to reach a view on the Operation Rectangle investigation or earlier investigations:

> *"I don't here make any adverse findings at all. This is a criminal investigation that's been conducted … seven or more years after the death of the main suspect, so the fact that there was no file or decision as to charge is understandable in those circumstances."*[99]

We concur with Nicholas Griffin QC's views, and have no criticisms to make. We do not have sufficient information on which to base any detailed finding. However, we do not criticise the decision taken during Operation Rectangle not to allocate substantial resources to an investigation into alleged offending by a man who was dead and could obviously not be prosecuted.

Other investigations considered in Operation Rectangle

Mr and Mrs Jordan

11.131 The case concerned allegations of physical abuse of children at HDLG by two members of staff. Morag Jordan was employed there from 1970 to 1984 and Tony Jordan from 1978 to 1984. The allegations were that they routinely hit the children with a hand or wooden spoon to the face, arm or leg, and pushed children's faces into urine. Complaints were made that Morag Jordan had assaulted nearly 30 children. The evidence painted a picture of a regime of sustained cruelty.

11.132 Crown Advocate Baker advised that, because of the relatively minor nature of the assaults, prosecution was not in the public interest. He raised the possibility that some – but certainly not all – of the assaults might have been regarded as lawful chastisement at the time. He was overruled by the AG. The decision to prosecute was made after a discussion on 23 October 2009 over the public interest question, involving the AG, Crown Advocate Baker, John Edmonds and DI Alison Fossey.[100]

11.133 William Bailhache QC noted:

> *"In principle it is agreed that the public interest is passed because of the sustained oppressive regime, the fact that this was not an*

[99] Day 133/94
[100] WD009017/676–677

occasional lapse of judgment and that there was [sic] *some serious incidents."*

11.134 In his oral evidence to the Inquiry he said that he also had in mind the fact that he had stated that there would have to be some special public interest reasons not to prosecute the Rectangle cases and no such reasons were present.[101] Tony and Morag Jordan were prosecuted and received custodial sentences.

11.135 We find that Crown Advocate Baker advised competently and professionally. The issue as to whether the public interest test was met was a matter of judgment in which different prosecutors could legitimately reach different views. We also find that the AG's decision to prosecute was reached professionally and properly. It appears to be an example of the implementation of his policy to pursue Rectangle prosecutions when the evidential test was met, in the absence of compelling public interest reasons not to do so.

Mario Lundy

11.136 William Bailhache QC said that the case was obviously sensitive as, when the allegations arose in 2007/2008, Mario Lundy was the Director of Education. A total of 27 complaints of physical assault had been made against him, ranging from allegations that he had punched and caned children to accusations that he had thrown children against walls, while Deputy Principal of Les Chênes. Crown Advocate Baker advised that there were substantial evidential difficulties, including the fact that the allegations were very old and memories might not be reliable, attitudes to the treatment of children were different in the 1980s (the time of the alleged offences) from attitudes 20 years later, that a Court might have sympathy for staff members dealing with unruly teenagers, that the prosecution would have to disclose evidence from residents who contradicted the picture of a violent regime painted by the complainants, and that some of the complainants could be portrayed as difficult and challenging children.[102] When Crown Advocate Baker and John Edmonds advised that the evidential test was not passed he

[101] Day 128/66/116
[102] WD007970/15

decided that the case needed to be reviewed by independent leading counsel.[103] John Edmonds said that this was helpful:

> *" …. it provided advice from somebody – from people who had no connection with Jersey--- independent, robust advice …. If we were making a decision that was not correct we wanted people who would tell us that".*[104]

11.137 Martin Meeke QC, an experienced prosecutor in child abuse cases, was instructed. He agreed that the evidential test was not met. The AG accepted that advice and advised the police there was insufficient evidence to justify charging Mario Lundy.

11.138 On 7 August 2009, John Edmonds wrote to the Education Department to inform the Department that there would be no prosecution. He also advised that the Department should seek "*relevant disclosure*" from the police. The purpose was (1) invite the Department to seek disclosure of material from the police for the protection of children with whom Mario Lundy might come into contact, and (2) to enable the Department to obtain police documents for use in any disciplinary proceedings.[105]

11.139 The Panel considers that an appropriate and professional approach was taken by those making the decision whether or not to proceed to prosecution. It is clear that the matter was considered in great detail, initially by Crown Advocate Baker and John Edmonds. William Bailhache QC, aware of the sensitivities, acted entirely properly in obtaining independent legal advice. The fact that disquiet remained is reflected in John Edmonds' invitation to the Education Department to seek police disclosure for child protection purposes. That disquiet could not, of course, justify a prosecution if the evidential test were not met.

<u>WN108</u>

11.140 In 2009, 11 allegations of physical abuse were made against a member of staff at Les Chênes, relating to incidents said to have occurred between 1977 and 1988. The allegations were considered in tandem with those made

[103] Day 128/93–94
[104] Day 128/32
[105] Day 12 all 6/132–133; WD0089896

against Mario Lundy. The Police did not believe the evidential test to be met. They recorded that the allegations were uncorroborated, that other residents at the Home had nothing but praise for the alleged offender and that there was a possibility that one former resident was trying to cajole others into making false complaints in order to gain compensation.[106] Crown Advocate Baker advised that there was no corroborative evidence to support most of the allegations. Some of the complaints referred to excessive use of the cane. Crown Advocate Baker concluded that a court would be unwilling to convict a defendant for using a cane at a time at which corporal punishment was lawful. He noted, in respect of some of the other allegations, that the credibility of the complainants was in doubt. In some instances, residents alleged by a complainant to have witnessed an assault would not support the allegation. Some residents gave positive accounts of the alleged offender. Crown Advocate Baker considered that only one of the allegations merited serious consideration, and that one did not meet the evidential test.[107]

11.141 We consider that the decision not to prosecute was professionally made. Crown Advocate Baker had available to him the results of the police investigation, which had been thorough. The police had made every effort to obtain corroboration and, in doing so, had uncovered evidence that threw genuine doubt as to the veracity of the complaints. Crown Advocate Baker's detailed Advice demonstrates that he gave proper care to the decisions that he had to reach in each case.

WN264

11.142 We set out, in Chapter 10 (paragraph 10.150) a summary of the Police investigations into allegations made by WN195 against WN264. The decision taken during the initial investigation in 2004 was that there should be no prosecution because of the absence of corroboration. John Edmonds surmised when reviewing the file in 2009, prosecutors in 2004 were wrongly applying too strict a test in respect of the need for corroboration; it would have been open to prosecutors to proceed in the absence of corroboration,

[106] WD004518
[107] WD007970/4–9

although the judge would have had to warn the jury of the risk of convicting on uncorroborated evidence. Support for the view that too strict a test was being applied can be found in the memorandum of Laurence O'Donnell dated 24 September 2004. Laurence O'Donnell, a Force Legal Adviser, wrote:

> *""I note that there are no other victims identified as a consequence of the police investigation and thus, at present, the prosecution would proceed with only one victim. The practice locally is for such prosecutions not to be proceeded with and I am of the view that, should the matter be charged, the magistrate would discharge at an old-style committal."*[108]

A handwritten note on the memorandum recorded that the AG had reviewed the file, and had also concluded that in the absence of another complainant there could be no prosecution. The note recorded that the matter would be considered again if another victim came forward.

We recognise that there would have been difficulties in any prosecution. WN195's account did not tally precisely with the records that the Police had managed to locate. However, he was apparently a credible witness. The lawyers do not seem to have considered the likelihood of a prosecution succeeding in reliance on WN195 if a corroboration warning were given.

We believe it likely that the wrong test was applied. However, we accept that the decision not to prosecute was taken in good faith. We cannot say what decision would have been made had the correct test been applied.

We note that, during the course of Operation Rectangle, the correct test was applied and the decision still made not to prosecute. We regard that decision as having been professionally made and properly; the evidential difficulties meant that it was a decision in which different lawyers might reasonably come to different views.

<u>Kevin Parr-Burman</u>

11.143 Kevin Parr-Burman was the Manager at Heathfield when he was alleged to have assaulted a child in his care by grabbing the child, who did not want go

[108] WD007441/4

to school, and frog-marching him out to the waiting car. The incident was witnessed by other staff. This was not an Operation Rectangle case.

11.144 The Force Legal Adviser, Robin Morris, advised that both the evidential and public interest tests were met, and that prosecution should follow. He noted that it was regrettable that this one incident would almost certainly lead to the end of Kevin Parr-Burman's 30-year career working with children.[109]

11.145 Because of Kevin Parr-Burman's seniority within Children's Services, Robin Morris referred the case to the AG, who asked John Edmonds for further advice. He disagreed with Robin Morris, saying that any sensible court would regard criminal proceedings as wholly inappropriate and that, while Kevin Parr-Burman's conduct might amount to assault, it was the sort of incident *"replayed in households all over the world on a daily basis without there being any serious thought of a recourse to the criminal courts".* He recognised that there were differences from the normal family situation, in that the victim was particularly vulnerable and Kevin Parr-Burman was someone in a position of trust who should have known better. Nevertheless, he considered that the matter should be resolved through internal disciplinary procedures. Further, he identified some evidential difficulties in that the staff member who witnessed the incident was a participant in some of it, and the child did not recollect the one aspect of the incident – being grabbed by the back of the T-shirt and pulled down the stairs – which was the most obvious assault. He therefore advised that there was not, in his view, a realistic prospect of conviction.[110]

11.146 The AG agreed with John Edmonds' view.[111] While John Edmonds had considered that the evidential test was not met, William Bailhache QC told the Inquiry that he had taken a broader view. He did not recall the case but, from looking at the memorandum that he sent to Robin Morris, he had clearly taken into account John Edmonds' observation that the incident, even if an

[109] WD006849/10–1
[110] WD006849/7
[111] WD006849/3–4

assault, was similar to many daily household incidents which were not prosecuted.[112]

11.147 We consider that the decision not to prosecute was professionally taken. The case was scrutinised conscientiously by all three lawyers involved. The difference in their views reflects the difficulty in cases of this sort of reaching a decision that is clearly "right"; a number of lawyers, acting entirely properly, may come to different conclusions.

WN819

11.148 WN819 was another member of staff at Heathfield, accused of a physical assault on a child in his care, stated to have taken place in January 2009. This again was not a Rectangle case. WN819 had intervened when the child, who was 15 years old, was misbehaving. A member of staff and the child said that WN819 had grabbed the child's neck and swept his feet from under him, causing the child to fall. WN819 admitted placing his hands around the child's throat, and said that he had been feeling unwell and had "snapped".

11.149 Sarah O'Donnell, a Force Legal Adviser, considered that the evidential test was met, but that the public interest test was not. She took into account the fact that a social worker had said that prosecution would not be in the best interest of the child, and also the fact that internal disciplinary proceedings were to take place.[113]

11.150 The AG was consulted. He considered that it was difficult to take an evidential decision in the absence of witness statements but accepted that Sarah O'Donnell's note indicated that the evidential test had been passed.

11.151 He continued:

> *"There is a slightly disquieting feel about this, particularly in the light of the fact that [819]'s superior[114] has also had a complaint made against him last year."*

[112] Day 128/79–80
[113] WD007918/4–6
[114] Kevin Parr-Burman

11.152 He noted that Sarah O'Donnell had been very much influenced by the view of the social worker and asked for more details of her account. In particular, he wanted to know whether she had stated in writing that the child would be adversely affected by having to appear in court as a witness. He went on:

> *"This has slightly the hallmarks of what may later be described as a cover up. It may be a perfectly good decision. The problem is that as at present, I do not think we have enough information to be able to tell the difference."*

11.153 He asked to see the entire file.[115]

11.154 In his oral evidence to this Inquiry, William Bailhache QC was asked whether the reference to a "cover-up" was a reference to a cover-up within Heathfield. He said that it was not; it reflected a consciousness of the allegations of cover-up made against the LOD in the course of Operation Rectangle.

11.155 In the end, in March 2010, the decision not to prosecute was taken. By this time, Timothy le Cocq QC was AG. The decision was taken with the authority of John Edmonds; the correspondence indicates that the Minister was to be informed.[116]

11.156 William Bailhache QC told the Inquiry that it was his function, as AG, to consider whether to prosecute; it was not for him to be concerned that allegations had been made against two members of staff at a children's home within a short time. If something came up which was not [in itself] a criminal matter but which needed attention, the right course was for the AG to notify the relevant Minister or Committee. William Bailhache said that his predecessor had reported the Victoria College situation, and that that report had led to the commissioning of the Sharp Report. It also appeared that, in the present case, Timothy le Cocq had informed the Minister.[117]

11.157 We conclude that the decision not to prosecute was professionally taken. The correspondence indicates that those involved considered the evidential sufficiency in some detail, and gave very careful thought to the public

[115] WD007918/7–8
[116] WD007918/12
[117] Day 128/87–8

interest test. There was a lengthy debate between John Edmonds and Sarah O'Donnell on the question of whether the decision not to prosecute was truly taken on the basis that the evidential test was not met, or whether it was a public interest decision. While that debate did not affect the ultimate conclusion, it does, in the Panel's view, provide us with a degree of insight into the care with which these decisions were being taken.

WN820

11.158 This 2006 case concerned an allegation of gross indecency made against another member of staff at Heathfield. The suspect gave a "no comment" interview. The police view was that prosecution should not proceed because of the absence of corroboration.[118]

11.159 Laurence O'Donnell, Force Legal Adviser, concurred with that view. In a brief memorandum, he advised that the evidential test was not met and that there was no realistic prospect of conviction.[119]

11.160 We consider that this decision was professionally taken. We recognise the difficulties faced by any prosecutor in this situation. The Police had tried but been unable to obtain evidence from another resident to whom the complainant had made her first complaint. We note that, again, neither Police nor lawyer considered expressly whether the prosecution could rely on its one witness, even with a corroboration warning. Because the documents are so brief, we cannot say for certain that the wrong test was applied, nor (if it was) can we say that the decision would definitely have been different had the correct test been used. This is an area in which different prosecutors could legitimately reach different views.

The law in respect of corroboration

11.161 All the officers investigating offences against children, and all those involved in prosecuting decisions, of course had to apply the law then in force. The law of corroboration has developed significantly in Jersey over the last 20

[118] WD006876/8
[119] WD007860

years. We believe that those developments have had an impact on prosecuting decisions.

11.162 In April 1991, Anton Skinner, the Children's Officer, wrote to the then Bailiff, requesting an urgent review of the law, which then required there to be corroboration of the evidence of a child under 14 before a defendant could be convicted on that evidence. He stated:

> *"urgency derives centrally from an inability to progress legally towards criminal prosecution in an increasing number of cases where there has been no doubt in the minds of investigating officers had grave offences against children have occurred. However, due to the present restrictions surrounding the rules of evidence as they affect children, and the circumstances under which children must give evidence, there has been no possibility of considering prosecution for these very serious offences …*
>
> *… I am also aware through the work of the Child Protection Team that, regrettably, the law as it currently stands does not appear to be able to protect the interests of children in the matter of child abuse, and most particularly, child sexual abuse. I therefore hope that this is a matter which can be addressed within the near future".*

11.163 In September 1991, a working party chaired by Sir Philip Bailhache, the then AG, was set up to address, among other matters, the law on corroboration. It produced its first report in March 1993 and recommended a change in the law. The Education Committee accepted the working party's recommendations and in 1993 passed the matter to the Legislation Committee.[120]

11.164 In 1997, the law was changed so that there was no longer a bar to prosecution in which the evidence of a child was uncorroborated. However, a judge was still required to give a warning to the jury of the dangers of relying on the uncorroborated evidence of children or complainants in sexual offence cases.

11.165 Barry Faudemer recalled that, during the 1990s, case law on similar fact evidence developed, and there were fewer restrictions on its use and it became admitted in more cases.[121]

[120] Day 125/57–58

[121] Day 113/58

11.166 This is not a matter that we have investigated. However, assuming Barry Faudemer to be correct, then corroboration of the evidence of a child witness could from the 1990s onwards have been more readily obtained through the admission of evidence that, for example, the defendant had acted in a similar way on an occasion other than the one in respect of which he was being prosecuted.

11.167 Emma Coxshall thought that there had been many investigations which had not progressed to court because of a lack of corroboration, and described the corroboration issue as "*extremely frustrating*".[122]

11.168 Robert Bonney's evidence was that *"in sexual cases corroboration, if not mandatory required, is always required in practice and it was a very significant hurdle to overcome"*.[123]

11.169 On 21 April 2008, DI Alison Fossey wrote in an email to a senior police officer Shaun du Val:

> *"Laurence [O'Donnell, lawyer within the Law Officers' Department] was of the view, as I, that a lot of cases were not proceeded with in the past due to working procedures between the police and FLA. Many files were not even referred for legal advice and were written off by the DS/DI at that time and also the corroboration rule prevented many cases being proceeded with. A major change in the law is required and we were successful in our law drafting bid for a new Sexual Offences Law this year …"*[124]

11.170 On 14 July 2009, John Edmonds, Director of the Criminal Division of the LOD, wrote in an email to the AG, William Bailhache QC:

> *" … the Legal Advisers over a period of many years have effectively been applying a test of mandatory corroboration rather than properly evaluating whether an uncorroborated victim would nonetheless be regarded as a witness of truth. I fear that Ian Christmas' involvement both as a Legal Adviser and Magistrate set the tone for much of this practice … ".*[125]

11.171 John Edmonds explained how he had come to that view:

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[122] WS000639/12–13/51 and 53

[123] Day 114/118/20–22

[124] WD007895: in his oral evidence to the Inquiry, Robert Bonney said that he had never written off a case without consultation with the Force Legal Advisers [Day 114/119–120]

[125] WD0009000/432

> *"I had seen a number of files where the way in which advice was phrased -- and I put it that way because one can't discount that it's clumsy use of words within the advices, but the advice would read along the lines of 'X says this, there is no corroboration, therefore in my view there's insufficient evidence to prosecute' -- I'm putting it briefly, but paraphrasing. And that made me wonder whether the step that -- or the stage in the thought process that should be taking place where one has an allegation in respect of which there is no supporting evidence, the next stage in that is 'Well, notwithstanding there is no supporting evidence, is what is said true? What are the reasons why this individual is giving this account?' One has to start off from a position of why would this individual be making it up and I just wasn't always clear that that stage -- or at least it wasn't always clear from the advices at that stage of what I think is the proper thought process was taking place. Again to put that into context, the case to which this related and where Laurence O'Donnell, in 2005 was it, had said there was insufficient evidence, that same case was reviewed by Baker Platt in 2010 and 2012 and on both occasions they formed the view that there was insufficient evidence. Now, I saw the 2010 and 2012 advices and I'm satisfied that they applied the evidential test properly. So it's quite possible that this is in part a semantic issue in terms of the way advices are being written ...*
>
> *I had seen several advices where in particular he [Ian Christmas] had -- in the way that they were phrased, the absence of corroboration was the sole reason why prosecution wasn't taken. The stage of 'nonetheless is this a witness of truth', that stage hadn't obviously been applied from what was contained within the advice."*[126]

However, in respect of Operation Rectangle decisions, John Edmonds said:

> *" … there isn't a single case where in my assessment the fact that there was going to be a mandatory corroboration warning tipped the balance between prosecuting and not prosecuting".*[127]

11.172 The Inquiry attempted to locate Ian Christmas and obtain his evidence. It was unsuccessful in doing so.

11.173 Bridget Shaw gave the following evidence:

> *"38) We faced a significant issue at this time [i.e. from 1998] in relation to corroboration. The term 'corroboration' has a specific legal definition. It is evidenced from a source independent of the complainant that supports the complaint in a material particular. The rules were complex but the position was that in any trial involving the evidence of a child or in a sexual case where the evidence of a complainant was adduced,*

[126] Day 126/127–9
[127] Day 126/128

the jury had to be warned that it was dangerous to convict on the uncorroborated evidence of that child or that complainant."

11.174 This was formerly the position under English law. The requirement for the corroboration of the evidence of children was abolished in England and Wales by the *Criminal Justice Act 1988*. The requirement for corroboration of the evidence of the complainant in sexual offences was abolished by the *Criminal Justice and Public Order Act 1994*. The corroboration rule in both respects was abolished in Jersey much later by the *Criminal Justice (Miscellaneous Provisions) (No.3) Law 2012*.

11.175 Bridget Shaw continued:

"40) The effect that a corroboration warning could have on a jury was an important consideration for a lawyer in determining whether there was a realistic prospect of conviction. If the complaint was not supported by any other evidence or was supported by weak circumstantial evidence then the compulsory warning to the jury was more likely to lead to an acquittal; that would have bearing on whether the evidential test was met.

41) The corroboration rule was never a bar to prosecution. Legal Advisers could advise that a charge be brought where the uncorroborated evidence was particularly compelling. In such cases there might be strong supporting evidence that fell short of the technical requirements of corroborative evidence. Nevertheless the warning would still have to be given and the continuing application of the rule was therefore a matter of concern.

42) We do not know how individual juries come to their decisions and I cannot state that in any particular case a jury would have decided differently had a corroboration warning not been given.

43) I cannot say whether the corroboration rule had an effect on the number of cases being referred to the Legal Adviser's office by the SOJP and Honorary Police: that is a question for them.

44) Although the corroboration rule had an impact, I built a good relationship with the police and there was an increase in the number of cases referred to the Legal Adviser's office. Again, without more information I cannot comment on the cause of the increase or point to when it began. Nevertheless I can say that advising on cases of suspected child abuse became an important part of my role as a Legal Advisor. I know that Detective Inspector Fossey encouraged her officers to seek advice from the Legal Advisers at an early stage."

11.176 When asked why it took so long to change the law on corroboration, Bridget Shaw said: *"At that time there was no clear route through which the matter*

could be raised. Jersey does not have a Ministry of Justice. Matters involving the courts have sometimes been sponsored by the Home Affairs Department and sometimes, I believe, by the Attorney General. However, the Attorney General is not in a position to set criminal justice policy."[128]

11.177 On 16 October 2008, the Council of Ministers considered a change to the law on corroboration. The majority of Ministers decided that further advice was needed and referred the issue to the Law Commission. The AG William Bailhache QC was in favour of abolishing the corroboration requirement.[129] The Law Commission reported in May 2009 but it was not until 2012 that the law was changed.

11.178 Sir Philip Bailhache said that, in his view, the delay in changing the law on corroboration was not due to "*the absence of political will*", but "*incompetence, probably".*[130]

11.179 We conclude that the failure to amend the law on corroboration, coupled with failings by Ian Christmas and others in the application of the existing law, did contribute to decisions not to prosecute before Operation Rectangle. We accept, however, the evidence of John Edmonds that, during Operation Rectangle, the law was correctly applied and that the fact that a mandatory corroboration warning was going to be given did not "*tip the balance"* between a decision to prosecute and one not to prosecute. It is, of course, impossible to say whether anyone was acquitted who would have been convicted had there been no mandatory corroboration warning.

11.180 The Panel cannot accept that the failure to act to change the law, on a matter vital to securing justice for children and victims of sexual offences and in the light of a clear lead from the UK Parliament, can be explained as incompetence. We are satisfied that the failure to act reflected the lack of importance accorded to this issue by the States.

[128] WS000691/7–8/all
[129] Day 124/28
[130] Day 129

11.181 While the failure to act is regrettable, there are no implications for the future safety of children now that the corroboration warning rule has been abolished.