



Dr Jane Thomson  
Secretary  
Senate Standing Committee on Rural and Regional Affairs and Transport  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Dr Thomson

I would like to take this opportunity to address the concerns expressed by some committee members on the evidence provided in relation to who makes decisions on whether to prosecute at the hearings on Monday night (18 February 2019). I have reviewed my evidence, along with evidence provided previously to the Committee, as well as answers provided on notice to ensure that I have not misled the Committee.

On Monday evening I indicated that in this case it was not the decision of the Commonwealth Director of Public Prosecutions (CDPP/DPP) not to prosecute:

Senator Sterle: Whose decision was it not to do the prosecution:

...

Mr Kinley: Ultimately it was my decision not to prepare a brief of evidence to send to the DPP

Senator Sterle: So I am right in saying it was not the DPP's decision not to prosecute?

Mr Kinley: That's right

It may have avoided significant confusion if I had, consistent with previous advice, clarified that, in relation to *Ten Sixty Six*, there had been no occasion for the CDPP to make any decision to prosecute or not prosecute because no recommendation nor brief of evidence was forwarded to the CDPP by AMSA. Had a brief been provided it would have then been a decision for the CDPP to determine whether or not to prosecute.

In the above exchange, I intended to make clear that I accept ultimate responsibility for the conduct of my agency. However, I was not the decision maker and was not consulted on the decision not to progress a brief of evidence. These are not matters on which I would be asked to make decisions in the normal course of events. Suitably qualified and experienced officers and their managers assess the strength of evidence gathered during investigations and make those decisions.

Any lack of clarity on the point of roles and responsibilities may stem from AMSA's response to a question on notice from Budget Estimates 2018-19 (Committee Question number 161). AMSA advised the Committee:

'The WA Police recommendations were provided to AMSA in February 2015. AMSA considered these recommendations and discussed the evidence with the Commonwealth DPP. It is the decision of the CDPP whether or not to pursue charges'.

While it is correct to say that it is the CDPP's decision to pursue charges, I acknowledge that omitting a reference to the necessary prior step of the investigating agency sending a recommendation and brief of evidence to the CDPP may have created confusion.

In my evidence on 4 December 2018, I clarified that:

Mr Kinley: ...It is correct that the Commonwealth Director of Public Prosecution makes the final decision to bring charges. The CDPP makes this decision following receipt of a recommendation from the responsible agency by applying the prosecution policy of the Commonwealth. Whether or not AMSA makes such a recommendation is guided by the available evidence and usually involves pre-discussions with the CDPP. In the case of the Mills fatality, I can confirm that AMSA did not make any such recommendations to the CDPP.

AMSA's letter to the Committee Secretary of January 21, 2019 (in response to questions on notice taken on 4 December 2018) further clarified this issue as follows:

Consistent with our Compliance and Enforcement Policy, AMSA formed the view that it would not pursue the Police charges but would seek to gather further evidence in relation to the operational matters raised by DOT. The decision not to pursue the Police charges took account of the conflicting evidence about headcounts, and the minor, self-imposed regulatory nature of the multiple recording requirement. The decision was also taken in the context that the full circumstances surrounding the death of Mr Mills were not known and that the elements of any alleged offences would, if prosecuted, have to be proved to the criminal standard.

Given the significance of the above issues I thought it important to clarify these points.

Yours sincerely

**MICK KINLEY**

22 February 2019