

# The Hon. Michael John Daley MP – Attorney General

Budget Estimates Hearing  
6 March 2024

Questions on Notice – ODPP

Question #	Transcript Page #	Member	QON title	Question on Notice	Answer
4	17	The Hon. Susan Carter	Judicial Commission - Public	<p>The Hon. SUSAN CARTER: I'm sorry. How many times have you—</p> <p>Mr MICHAEL DALEY: "Is it commonplace?" According to what standard?</p> <p>The Hon. SUSAN CARTER: How many times have you seen a judge criticise a prosecution brought by the DPP in a judgement in the last two years?</p> <p>Mr MICHAEL DALEY: I'd have to go back and have a look at that. I don't keep statistics, as I told you, on comments that judges make.</p> <p>The Hon. SUSAN CARTER: How many times since you have become Attorney General have you been made aware of situations?</p> <p>Mr MICHAEL DALEY: I'll have to go back. I can't answer this question in any different way.</p> <p>The Hon. SUSAN CARTER: It doesn't matter how it is reframed, you still can't answer the question, Attorney General. Thank you very much.</p> <p>Mr MICHAEL DALEY: You are asking me a question about frequency. I don't have the statistic at my fingertip. For the sake of accuracy, I will go back and check</p>	I am advised this information is not held in a readily accessible form.

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11	28	The Hon. Susan Carter	Sexual Assault Category (cost orders)	<p>The Hon. SUSAN CARTER: Thank you for those answers to questions. Can I just ask a follow-up question. If the cost orders come out of the consolidated DCJ budget, does that impact other operations of the department? Perhaps you can take that on notice and tell me, and also if we can—</p> <p>Mr MICHAEL DALEY: I think the answer is that each year there's an anticipated allocation.</p> <p>MICHAEL TIDBALL: There is an allocation.</p> <p>PAUL McKNIGHT: There's a budget.</p> <p>The Hon. SUSAN CARTER: So it would only be if it exceeds the budgeted cost, then it would impact on other operations.</p> <p>Mr MICHAEL DALEY: Yes, and I think from having a look at those, you can see that over the four or five years that I've given you, they vary greatly. Some years would be under and some would be over, I would imagine.</p> <p>The Hon. SUSAN CARTER: You noted that they were cost orders generally. Can you separate them out so we have the sexual assault ones as a separate category?</p> <p>Mr MICHAEL DALEY: We'll take that on notice.</p>	<p>The ODPP has advised: According to ODPP data (based on the presentation of costs certificates to the ODPP):</p> <table border="1"> <thead> <tr> <th>Year</th> <th>Cost certificates granted</th> </tr> </thead> <tbody> <tr> <td>2018/2019</td> <td>10</td> </tr> <tr> <td>2019/2020</td> <td>9</td> </tr> <tr> <td>2020/2021</td> <td>4</td> </tr> <tr> <td>2021/2022</td> <td>11</td> </tr> <tr> <td>2022/2023</td> <td>14</td> </tr> </tbody> </table> <p>Please note the data differs from LC QON1837 due to differences in methodology.</p>	Year	Cost certificates granted	2018/2019	10	2019/2020	9	2020/2021	4	2021/2022	11	2022/2023	14
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32	53	The Hon. Susan Carter	ODPP	<p>The Hon. SUSAN CARTER: That's fine. The 11 that were dealt with by your office, they were dealt with, as in, authorised to proceed?</p> <p>SALLY DOWLING: That's right.</p> <p>The Hon. SUSAN CARTER: And you don't know the disposition of them after that?</p> <p>SALLY DOWLING: Two of them have proceeded summarily and resulted in convictions in the Local Court. Both of those matters are subject to appeal. One has been overturned on a conviction appeal for a fairly technical reason; the other one is listed for a conviction appeal on 28 March.</p> <p>The Hon. SUSAN CARTER: And the other nine you understand are still in the system awaiting trial somewhere?</p> <p>SALLY DOWLING: I will have to take that on notice.</p>	<p>Please refer to the transcript of the hearing.</p>												

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33	54	The Hon. Susan Carter	ODPP	<p>The Hon. SUSAN CARTER: Can you give us some rough estimate of what time delay we are looking at?</p> <p>SALLY DOWLING: We have a protocol for the provision of advice, and it depends on the complexity of the particular brief. I'd have to check the actual time frames in that, but I will revert to you shortly.</p>	<p>The ODPP has advised:</p> <p>According to the <i>Protocol Between the ODPP and NSW Police Force</i>, signed on 2 May 2023, the ODPP must provide advice within two months of a Police request for non-complex matters, and within four months of a Police request for complex matters.</p>
34	55	The Hon. Susan Carter	ODPP	<p>The Hon. SUSAN CARTER: Sorry, I'm not trying to interrupt you; I'm just conscious we have limited time. I value the broad description but I guess I'm really looking at the review process and the mechanisms.</p> <p>SALLY DOWLING: What I was wanting to explain to you is that there are points in time in the life of a particular matter in the ODPP at which these decisions to prosecute are overtly considered but they are also considered all through it.</p> <p>The Hon. SUSAN CARTER: Sorry, I'm not traversing the decision to prosecute.</p> <p>SALLY DOWLING: You want to know about—</p> <p>The Hon. SUSAN CARTER: I'm traversing, what are the internal processes? So the solicitor comes and brings this to your attention or to an intermediary.</p> <p>SALLY DOWLING: Depending on the level of solicitor who has the handling of it, a report will be done. A second report will be done by that person's more senior solicitor.</p> <p>The Hon. SUSAN CARTER: Do you remember, in this case, did it go to a superior or come straight to you?</p> <p>SALLY DOWLING: I'd have to check back on that.</p>	<p>The ODPP has advised:</p> <p>The judgment of <i>R v DS</i> [2022] NSWDC 441 was brought to the attention of the Director of Public Prosecutions (<b>DPP</b>) following its publication. The DPP considered the matter and reviewed the Crown case. The DPP determined that the Prosecution Guidelines were followed in this matter and noted her Honour's comment that the prosecutor "conducted herself impeccably, with restraint and fairness at all times" (at [44]). Accordingly, no further action was taken.</p>

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35	56	The Hon. Susan Carter	Judicial Criticism	<p>The Hon. SUSAN CARTER: What is the internal process in terms of, "Did we do a good job? Does a staff member need more support? Does somebody need more training?" How do you respond, as a management pathway, I suppose, to quite a significant critique of work that comes from the office.</p> <p>SALLY DOWLING: There are a number of different responses that will happen with this criticism.</p> <p>The Hon. SUSAN CARTER: In this case what responses were there?</p> <p>SALLY DOWLING: I'd have to take that on notice.</p> <p>The Hon. SUSAN CARTER: Yes, thank you.</p> <p>SALLY DOWLING: There is a register that's kept of judicial criticisms. And the individual practitioners who are involved in that decision, an analysis is done on the papers. They are counselled. We reassure ourselves that they understand what went wrong in this particular matter. A decision may be made that there is a broader training and development deficit that needs to be addressed, in which case that will be developed. It may be as simple as an all-staff email. It may be training at one of our internal conferences. It may be having an external practitioner, such as a judge—</p> <p>The Hon. SUSAN CARTER: Can you tell me, what was the outcome of this judgement? Was there training at an internal conference? Was there an all-staff memo? Was it an individual staff issue?</p> <p>SALLY DOWLING: I'll have to take that on notice, in relation to this particular one. I can indicate that it is my position, and that of the Solicitor for Public Prosecutions and the Senior Crown Prosecutor, that there is no systemic problem with the way in which—</p>	See response to question 34.

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36	56	The Hon. Susan Carter	ODPP	<p>The Hon. SUSAN CARTER: What is the internal process in terms of, "Did we do a good job? Does a staff member need more support? Does somebody need more training?" How do you respond, as a management pathway, I suppose, to quite a significant critique of work that comes from the office.</p> <p>SALLY DOWLING: There are a number of different responses that will happen with this criticism.</p> <p>The Hon. SUSAN CARTER: In this case what responses were there?</p> <p>SALLY DOWLING: I'd have to take that on notice.</p> <p>The Hon. SUSAN CARTER: Yes, thank you.</p> <p>SALLY DOWLING: There is a register that's kept of judicial criticisms. And the individual practitioners who are involved in that decision, an analysis is done on the papers. They are counselled. We reassure ourselves that they understand what went wrong in this particular matter. A decision may be made that there is a broader training and development deficit that needs to be addressed, in which case that will be developed. It may be as simple as an all-staff email. It may be training at one of our internal conferences. It may be having an external practitioner, such as a judge—</p> <p>The Hon. SUSAN CARTER: Can you tell me, what was the outcome of this judgement? Was there training at an internal conference? Was there an all-staff memo? Was it an individual staff issue?</p> <p>SALLY DOWLING: I'll have to take that on notice, in relation to this particular one. I can indicate that it is my position, and that of the Solicitor for Public Prosecutions and the Senior Crown Prosecutor, that there is no systemic problem with the way in which—</p>	See response to question 34.

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37	56	The Hon. Susan Carter	Judge Lerve	<p>The Hon. SUSAN CARTER: Are you aware of a judgement of Judge Lerve, I believe, in 2023?</p> <p>SALLY DOWLING: I am.</p> <p>The Hon. SUSAN CARTER: I couldn't locate that. Is that a reported or unreported judgement?</p> <p>SALLY DOWLING: I don't know if it's on New South Wales Caselaw.</p> <p>The Hon. SUSAN CARTER: Are you able to provide me with a copy of that and any judgement in relation to a cost certificate that was made?</p> <p>SALLY DOWLING: Do you know the name of the case to which you are referring?</p> <p>The Hon. SUSAN CARTER: I don't, no. Perhaps it's in your register of judicial criticism, I think you said it was called. I presume it would be recorded in there and you could identify it from there.</p> <p>SALLY DOWLING: I'm assuming that you're referring to a decision called R v Cowled.</p> <p>The Hon. SUSAN CARTER: I just know the name of the judge.</p> <p>SALLY DOWLING: Yes, this is a decision of Judge Lerve.</p> <p>The Hon. SUSAN CARTER: If I could be given a copy of that.</p>	<p>The ODPP has advised:</p> <p>The judgment of <i>R v Cowled; R v Wilson</i> [2023] NSWDC 162 is available on the NSW Caselaw website at: <a href="#">R v COWLED; R v WILSON - NSW Caselaw</a></p>
38	57	The Hon. Susan Carter	Judge Lerve	<p>The Hon. SUSAN CARTER: I'd love to see it when it's available. I don't have it. Perhaps we can have that on notice.</p> <p>SALLY DOWLING: It is somewhat difficult to have this discussion if you don't have the judgement.</p> <p>The Hon. SUSAN CARTER: Which is why I asked if I could have copy.</p> <p>SALLY DOWLING: I can certainly make it available.</p>	See response to question 37.

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39	57	The Hon. Susan Carter	Judicial complaints	<p>SALLY DOWLING: May I make one point in relation to these four judgments? I have not received any complaint of this kind directly from any of these judges or from the Chief Judge of the District Court about the particular criticisms.</p> <p>The Hon. SUSAN CARTER: Can I ask you about that? Do you commonly receive complaints directly from judges?</p> <p>SALLY DOWLING: I do.</p> <p>The Hon. SUSAN CARTER: In what circumstances?</p> <p>SALLY DOWLING: They often call me up and will say, "I have a concern about a matter that has resolved"—never a current matter—"or about the way in which something happened."</p> <p>The Hon. SUSAN CARTER: You said you haven't received anything directly in relation to sexual assault matters. What matters have you received complaints from judges about?</p> <p>SALLY DOWLING: I'd have to take that on notice.</p> <p>The Hon. SUSAN CARTER: Sorry, this is something you just raised.</p> <p>SALLY DOWLING: Yes, but there could be complaints—and I don't have—</p> <p>The Hon. SUSAN CARTER: If you can take it on notice—</p> <p>SALLY DOWLING: I'm trying to answer your question.</p> <p>The Hon. SUSAN CARTER: I'm sorry, you just said you can't answer the question because you need to take it on notice.</p> <p>SALLY DOWLING: And I'm elaborating on my answer, if you'd let me please finish.</p> <p>The Hon. SUSAN CARTER: I'm very conscious that we have very little time, so if you could take it on notice and provide a list of all the matters which judges have raised with you as criticism of the operation and the prosecution, I would be very grateful for that list. C</p>	<p>The ODPP has advised:</p> <p>The discussions referred to are informal and not documented. They concern general impressions of the performance of practitioners.</p>
40	58	The Hon. Susan Carter	All Staff email	<p>SALLY DOWLING: I believe there was an all-staff email rejecting the damaging comments of the judge.</p> <p>The Hon. SUSAN CARTER: Could you provide a copy of that for us, please?</p> <p>SALLY DOWLING: In due course. I would have to take that on notice.</p>	<p>The ODPP has advised that the email contained the following:</p> <p>"Dear Colleagues,</p>

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				<p>The Hon. SUSAN CARTER: Was there counselling of an individual staff member as a result of this judgement?                      SALLY DOWLING: I will also have to take that on notice</p>	<p>You may be aware of the recent judgment of Newlinds DCJ in the matter of Martinez, and the resulting negative media coverage. Disappointingly, the Weekend Australian newspaper neglected to contact the ODPP for a response before publishing its story.</p> <p>I intend to make a complaint to the Judicial Commission concerning the judgment.</p> <p>The ODPP has issued the following media statement in relation to this matter:</p> <p>'The Director intends to make a complaint to the Judicial Commission concerning the judgment delivered by Judge Newlinds in this matter.</p> <p>The ODPP unequivocally rejects any suggestion that it makes prosecution decisions lazily or on the basis of political expedience, or that it operates according to "some sort of unwritten policy", as the judge has speculated. Such remarks unfairly impugn the integrity of the Director of Public Prosecutions and the staff of the ODPP.</p> <p>Comments which fail to meet the minimum standards of temperance and impartiality expected of judicial officers have the capacity to undermine public confidence in the administration of justice.</p> <p>Decisions about the institution and maintenance of a prosecution are made in accordance with the Prosecution</p>

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					<p>Guidelines, which were developed in consultation with all stakeholders in the NSW criminal justice system.</p> <p>Each matter is assessed on the strength of the available evidence – including the reliability and credibility of witnesses – with the paramount consideration being whether the prosecution is in the public interest. The viability of a prosecution is constantly under review.</p> <p>It is well known that prosecuting matters involving highly intoxicated complainants involves complex issues of fact and law. In circumstances where the accused, in their police interview, acknowledged the complainant’s level of intoxication and the impact this had on her capacity to consent, there was a factual issue in this matter to be put before a jury.</p> <p>Further, three separate accused have pleaded guilty to sexual offences in relation to the complainant.</p> <p>The ODPP is also concerned that the judge appears to misapprehend the operations of the ODPP, which are governed by the DPP Act.’</p> <p>This statement will be posted on the ODPP website and issued to any media organisations that make enquiries about this matter.</p> <p>Please be assured that I am committed to taking strong action when this Office or its staff are unfairly criticised or our integrity is called into question.”</p>

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41	61	The Hon. Sue Higginson	Police prosecutions	<p>Ms SUE HIGGINSON: Can I ask of you, Ms Dowling, are you aware of the issue of police prosecutions, and I'm talking about police prosecutions—I'll get there in a sec to your office's role—where allegations are made of a domestic violence nature, then they are retracted, and then police are laying charges against the person who has made the retraction on the basis of the retraction only? Have police and police prosecutors and crime managers asked your office at all for any advice in relation to those kinds of matters?</p> <p>SALLY DOWLING: As you know, my office is responsible for prosecuting indictable offences in the District Court and the Supreme Court. In some circumstances the ODPP has entered into agreements with other agencies to take over and prosecute certain summary offences in the Local Court and Children's Court. That does not currently include prosecution of persons who are accused of making false allegations in domestic violence matters. My office and I recognise that there are complex public policy issues involved in the investigation and prosecution of domestic violence offences. It's my evidence to this Committee that these are matters for police to grapple with, because they are the ones on the ground doing that investigating. Any questions of how the police deal with those types of prosecutions and the laying of those charges really should be directed to the Police Minister or the police commissioner. At the moment there is no proposal on foot within my office or elsewhere, as far as I am aware, to refer any particular category of offences to the ODPP for prosecution, other than those that are currently contained in the relevant MOU between the Commissioner of Police and myself.</p> <p>Ms SUE HIGGINSON: No contact has been made for advice or assistance from police or crime managers at this point?</p> <p>SALLY DOWLING: I will have to take that question on notice. I'm personally not aware of any particular request for advice in a particular matter, but I can make that inquiry for you</p>	<p>The ODPP has advised:</p> <p>The ODPP gives advice to the NSW Police as to the sufficiency of evidence in individual matters in accordance with the advising protocol, but does not give informal or general advice in relation to types of matters. The ODPP has not otherwise been approached by NSW Police to assist with training concerning matters of the type identified.</p>

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42	64	The Hon. Susan Carter	cost certificates	<p>The Hon. SUSAN CARTER: And then I think we come to the matter of Smith in February of this year and Judge Whitford, who seemed to have similar issues with a matter that was before him. Was that matter also the subject of a costs certificate?</p> <p>SALLY DOWLING: I think the costs application is being made, is my understanding, but has not yet been determined.</p> <p>The Hon. SUSAN CARTER: Is that listed yet?</p> <p>SALLY DOWLING: I don't think so. I'm sorry, I withdraw that. It is a costs judgement in the Judge Whitford matter.</p> <p>The Hon. SUSAN CARTER: Would we be able to get copies of all of those judgements?</p> <p>SALLY DOWLING: Sure.</p> <p>The Hon. SUSAN CARTER: Would it be possible also to get a list of all matters in which costs certificates have been awarded in sexual assault cases over, let's say, the last five years?</p> <p>SALLY DOWLING: Certainly.</p>	<p>While reviewing the draft answer it was identified that some of the information provided posed the risk of contravening non-publication orders and statutory prohibitions on publication.</p> <p>It is not possible to provide a revised answer within the required timeframe.</p> <p>The ODPP has advised:</p> <p>The judgment of <i>R v Smith (a pseudonym)</i> [2024] NSWDC 41 is available on the NSW caselaw website at: <a href="#">R v Smith (a pseudonym) - NSW Caselaw</a></p>