

## Recent Changes in the English Public Prosecution Service

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### Abstract

Public prosecution services throughout the world have been developing very speedily in the last decade. This is true, not only in countries as far apart as South Africa, Pakistan and Tanzania but in England as well. The English Crown Prosecution Service (CPS) was set up only in 1986 but has developed considerably since then. In particular, since 2000, under successive Directors of Public Prosecution, it has become a confident and influential criminal justice agency. It has been given more powers, its structures have been tightened and it has absorbed some other prosecution authorities. Although its influence on investigation is indirect, CPS has made intelligent use of the internet and taken a strategic approach to developing criminal justice policy in a more effective way than other agencies. With its legal guidelines, CPS is starting to develop a third form of law to set aside Statute and Case Law. This has happened during favourable conditions that have now come to an end. The impact of public expenditure cuts will place a brake on developments but over the longer term it is likely that the CPS will move to a more central role in criminal justice matters. The new government elected in May 2010 is likely to make only minor changes to the CPS.

### Keywords

England, Prosecution, Criminal Justice, Crime Investigation

### Introduction

This paper looks at the Public Prosecution Service in England since 1986. It takes the line that the CPS was a very weak organisation from 1986 to 2000. Since then it has become more confident and influential. At the same time it has taken on more powers and issued many more guidelines, which influence all justice agencies.

In respect to prosecution, there is a strong need for the public interest to be taken into account. The position remains as set out in a debate in parliament by the Attorney General, in 1951: *"It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution"*. (Shawcross, 1951) Over many years this has led to the situation that all law enforcement officers have a great deal of discretion in whether a case should go forward. CPS has a powerful role here.

In respect to the law itself, there is a gradual change to long tradition that English criminal law is a mixture of Case law and Statute Law. A third factor is becoming evident, the legal guidelines drafted by the CPS and available to all on its web site. In producing such guidelines the CPS has begun to modify the historical role occupied by judges in setting case law.

## **Developments during 1985-2000**

### **Constitutional position of the Prosecution Service**

Before 1986 the prosecution system in England was archaic. There was no public prosecution authority. Police were entirely responsible for charging criminal defendants. But they had no real expertise to determine whether cases would be successful in court. Also miscarriages of justice occurred from time to time, at least partly because of the way that investigation, charging and case-presentation went hand in hand.

The need for independence of prosecution decisions was considered by the Royal Commission on Criminal Procedure (Philips, 1981), which recommended the setting up of a prosecution solicitor service. But the police were not happy about losing all their powers to influence charging. As a result the initial powers of the CPS were a messy compromise, with the police continuing to make charges and prosecute some less important cases. The CPS was not expected to interview victims, witnesses or suspects. It could not demand a specific sentence and had no case-ending powers of its own.

Moreover, 1986 was a time when money for public bodies was low. As a result the CPS had a very limited remit, most decisions were still either taken by police officers or barristers, CPS lawyers were poorly paid and CPS had a very low status. Police and Judges felt happier with the previous system and saw no great benefits from the CPS, staffed, as they saw it, with second rate lawyers.

Moreover, the CPS was not the only prosecuting body. There were separate bodies to investigate and prosecute cases of fraud against the Revenue: offences against public welfare authorities: cases against Customs and Excise: crime committed against banks and other financial institutions (and their customers): cases against local by-laws, including trading. The police continued to prosecute most minor offences, particularly motoring. Each prosecuting authority had its own legal basis and ways of working.

Although cases presented at the lower (Magistrates') courts were mainly presented by CPS staff, pressure from private lawyers meant that no prosecutions presented at the Higher (Crown) Courts were made by the CPS.

### **Case-ending Powers of Different English Agencies**

Only a relatively small number of all English cases get to court. All investigative agencies have devised administrative ways of dealing with petty cases. Agencies dealing with Fraud have devised civil or administrative penalties for low level frauds, usually involving small extra payments. The Police have for many years issued fixed penalties to motorists who contravene traffic regulations, and

some of these powers have been transferred to local authorities, especially regarding illegal parking. The Police also devised a system of cautions, not backed up statute, which were very effective in keeping court numbers from rising out of control. There was some lack of due process in all this but it was generally accepted by the public and saved the government money.

### **Political Position of CPS**

The CPS survived to the turn of the 21<sup>st</sup> century in a weak state, under relatively poor leadership. The government tried to solve the crime problem by increasing support and resources for the police and the prisons and by centralising the administration of the courts and the probation services. Politicians regarded the CPS as an integral part of the system but one to be kept separate from the other agencies. Changes to the justice system, which were almost continuous under all 1986-2000 governments, usually involved the local authorities, police or the courts.

### **Developments Since 2000**

The position of the CPS has changed considerably since 2000. This is in common with prosecution services in many other countries: eg. South Africa set up a prosecution service following the National Prosecuting Authority Act 1998. (NPA, 2010) Pakistan established a Public Prosecution Service following acts in 2006 (Zahid & Wasim, 2008) and Tanzania is developing the prosecution function through the expansion of the State Attorney system of public prosecutors in various parts of the country. However, in the early years such new prosecution services are often slow to take root and can be short of resources.

This is similar to position of the CPS in the years following 1986, as has just been described. The forthcoming paragraphs deal with the success of the CPS in the more recent period. They hopefully predict a similar pattern of success for the prosecution service in countries such as South Africa, Pakistan and Tanzania in the years to come.

### **Changes in England**

In England there has been an increase in government funding, greater powers for the service, the merging of different prosecution authorities into one body, higher salaries for staff, reorganization and better professional management. The CPS has also become more accountable to the general public and current roles have also been more formalized: CPS now aims to:

- a. provide the police and other investigators with advice to assist in tackling crime effectively and bring offenders to justice;
- b. engage with communities so that CPS is aware of their concerns when they make decisions;

- a. present cases fairly and firmly;
- b. assist the court in the sentencing process and in seeking to confiscate the proceeds of crime. (CPS, 2010a)

CPS has also taken the lead in the setting up of what may, in due course, become a third arm of English Law to complement Case and Statute law, that is the use of the Internet to set guidelines accepted by the public and by all agencies in the investigation, prosecution and case-ending of criminal offences.

CPS has also taken advantage of the stronger position of public authorities, involving more resources, central guidelines and performance measures. The cutbacks in public expenditure following 2010 election will change this and the CPS has already been forced to find cuts as part of the first tranche of government actions.

## **Changes in Legislation Since 2000**

### **Preparation of Cases**

The Criminal Justice Act 2003 led to important changes in the CPS:

- a. Charging became a power to be determined solely by lawyers in the CPS and not by the police. This reform meant that the CPS became 'gatekeepers' over cases and had far greater power over the direction of police investigation.
- b. The CPS was given the fundamental role of care of witnesses, who previously had been at the periphery of the criminal justice process and were often treated poorly.
- c. The CPS set up its own advocacy program to save money on barristers' costs and develop the talents of its own staff better.

### **Proceeds of Crime**

A further new role for the CPS in dealing with the proceeds of crime was set out in the Proceeds of Crime Act 2002 (POCA). Following this local agreements were made between CPS and police forces to clarify roles and responsibilities and set out effective working arrangements. Local prosecutors are expected to provide early advice to police concerning the investigation, preservation of assets, obtaining and enforcement of confiscation orders and confiscation matters generally and will make restraint and confiscation applications to the Crown Court on their behalf. The amount of criminal assets seized has more than doubled from £ 64m in 2004 to around £140m in 2008. A target has been set for 2009/10 to recover assets worth £250m.

## **Coordination of the Work of Prosecuting Authorities**

Recent years have seen a convergence of methods of working of the different prosecuting authorities in England. In 2006, a convention was agreed between prosecuting authorities to co-ordinate decision making and handling in related cases. There were also structural changes within CPS. The Revenue and Customs Prosecutions Office (RCPO) was merged with CPS from 2010 into a new CPS Revenue and Customs Division (RCD) to provide a specialist tax and revenue prosecution service, together with expertise in the prosecution of illegal arms dealing and sanctions violations. It also handles all direct and indirect tax fraud; evasion of duty on tobacco, etc; illegal arms trafficking, export controls and sanctions violations; and related money laundering. It also restrains and confiscates criminal assets. Closely related crimes, such as people smuggling through English ports are prosecuted by another specialist team within CPS.

## **Investigation Powers of the CPS in Relation to Other Justice Agencies**

Unlike many other jurisdictions CPS has no investigative powers of its own and relies on the police, HMRC and other agencies to carry out investigations. The constitutional position is set out in the Guidelines for Crown Prosecutors: (CPS, 2010b): The police and other investigators are responsible for conducting enquiries into a possible crime. The prosecutor can advise the police on investigation but not direct them. Despite this, the CPS does influence the investigation of cases in several ways:

### **General Guidelines**

Paragraph 4.7 of the Code for Crown prosecutors (CPS, 2010b), asks:

1. Is evidence collected by the police, HMRC, etc likely to be admissible in court, given current legal rules under which Judges work?
2. Is the evidence reliable: eg what is credibility of witnesses: have correct identification procedures been followed?
3. Is a witness reliable: ie likely to turn up in court on the correct day and repeat accurately statements previously given to the police?

### **Specific Guidelines**

drawn up following a CPS consultation process: eg those issued by the DPP into cases of assisted suicide in February 2010(CPS, 2010c). This set a precedent for English law. Previously new English law has either come from amending Statute Law or by a court judgement involving a particular case: eg. Rape became illegal in marriage following a 1990 Law Lords judgment. However, it was clear that the government did not want to amend the law on assisted suicide because of its high public sensitivity. Also, Judges in a recent

case on assisted suicide avoided the issue feeling that some form of public consultation was needed. The DPP circulated new guidelines in draft on the CPS web site. Nearly 4,700 responses were received and guidelines modified as a result.

### **Specific Guidance from Recent Case and Statute Law**

This is set out clearly on the CPS web site. A good example is the advice which the Police, all prosecutors and courts follow on cases of Shaken Baby Syndrome which can lead to a charge of murder. Such cases often depend on whether the jury believed one medical expert witness against another. The CPS guidance shows how recent case law has modified this traditional view. Important is given to the words spoken by the judge in a particular case: *'In cases like the present, if the outcome of the trial depends exclusively or almost exclusively on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore unsafe, to proceed': together with advice on how the words 'like the present' should be interpreted.*

### **Advice in Specific Cases**

At the start of an investigation the police will consult their local prosecutor (or the CPS Direct out of hours service) on how to proceed in a case

### **Protocols agreed between local police forces and CPS:**

eg the protocol agreed for Rape cases (CPS, 2010d) which makes provision for CPS and Police to agree detailed investigation plans for individual cases. CPS ensures that rape cases are allocated to a rape specialist prosecutor to advise and have responsibility for cases throughout. CPS will, in a small number of cases, interview the victim of alleged rape.

1% of case files are returned by the CPS to the police for further investigation.

## **Plea Bargaining**

Plea bargaining takes place informally. The only more formal aspect is that defendants who put forward a timely guilty plea will get up to a third discount on a custodial sentence. CPS is on record as saying that they would like a more formal approach to plea bargaining, subject to certain safeguards: eg plea-bargaining would have to be transparent, put before the court and subject to the agreement of the court.

## **Statutory Charging**

Since Statutory Charging was introduced from 2005, the CPS has taken over all charging and the percentage of cases that now result in a charge is much higher than it was before.

In 2005 over 30% of cases ended with no prosecution. By 2009 this had fallen to under 25%. The proportion of cases charged had risen from just over 40% to nearly 60%. (Chen & Lewis, 2010)

The guidelines under which Statutory Charging operate are set out by the CPS for the 'Custody Sergeant' who receives the offender in the Police Station. These are comprehensive and firm statements about the actions needed by the officer, when he should consult a prosecutor, case-ending possibilities for the police officer, tests to be used to judge the appropriateness of evidence and forms to fill in, all within the context of the CPS having the responsibility for charging. (CPS, 2010e). An integral part of Statutory Charging is CPS Direct, a national out-of-hours telephone service that allows police to access charging advice through the night and at weekends, 365 days a year.

### **Case Presentation in the Courts**

For the first 20 years of the CPS the prosecution of cases in the Crown Courts was carried out by private lawyers ('barristers') as agents of the CPS, following the compromise deal agreed in 1986. However, this compromise had one crucial disadvantage: the person who had taken the decision to prosecute and thus knew most about the case, the CPS lawyer, was not able to present the case. Moreover the prosecuting advocates were free to behave as they thought best in achieving the aim of prosecution. From around 2005, the CPS started to gain more control over the way that cases were prosecuted in the Crown Court:

CPS Crown Advocates now present some cases. This is a gradual process rather than a complete change. The CPS is not staffed to present all cases in court. Nor would the private barristers accept a complete takeover of their role. In fact the CPS has set a rather low target that they should aim to present around a quarter of cases in the Higher Courts within the next few years, although it can be much higher in certain parts of the country.

This increased continuity of case ownership that stems from conducting in-house advocacy enables CPS Advocates to demonstrate to victims and witnesses that they have an in-depth knowledge of their case. Crown Advocates are gaining expertise in high profile areas of criminal law where the challenges are greatest (eg. gun crime, violence, rape and hate crime). Complex Casework Units have recently been established nationwide and CPS Counter Terrorism, Organised Crime and Special Crime Divisions have been set up and are acquiring good international reputations.

Secondly, all those prosecuting cases, including the CPS itself, must work within the guidelines for Prosecuting Advocates set out by the CPS. (CPS, 2010f). These cover *inter alia* actions to taken in presenting evidence in particular types of



offences: actions as part of the trial process (eg. the need for special measures for witnesses); actions if the sentence is thought to be too lenient: human rights issues, etc.

The CPS has also issued specific guidance on what interventions should be made during the sentencing process. In many cases the prosecutor will now prepare a plea and sentence document (PSD) to assist the court when sentencing. This will include: any relevant statutory limitations on sentence; the names of any relevant sentencing authorities or guidelines; the scope for any ancillary orders (eg, about anti-social behaviour, confiscation or deportation); the age of the defendant; and information regarding any outstanding offences known at the time. It remains open to him to provide further information where it is thought likely to assist the court, or if requested. A PSD is not required in every case, but should be provided where it is likely to assist the court because the issues are complex or unfamiliar.

To assist the prosecutor in compiling the PSD a Sentencing manual has been produced by the DPP. This provides a "signpost" to relevant sentencing guidelines or guideline cases; it gives information about relevant statutory provisions, such as maximum sentences and any limitations on sentencing; it assists by identifying potential aggravating and mitigating factors for a given offence; and draws attention to potentially appropriate ancillary orders. By providing a consistent standard of assistance to all courts, CPS aims to reduce the number of erroneous sentences referred to the Court of Appeal.

## **Developments in Case-ending Powers of CPS and Other Agencies**

The CPS has no case-ending powers other than charging or returning the file to the police. Unlike, say, some European prosecuting systems they cannot issue a fine, or a community sanction, or, as in Japan, broker a deal between the victim (personal or society) and the offender, whereby some form of compensation is paid. However, in a small number of cases, currently around 2%, the CPS passes the file back to the Police asking that they issue a conditional caution. Conditional Conditions can be:

Reparative (such as writing a letter of apology; repairing damage; paying compensation or undertaking unpaid work in the community, if public or the wider community are the victim; mediation between the offender and the victim);

Rehabilitative (attendance at drug or alcohol awareness session in an effort to halt the causes of the offending behaviour); or

Restrictive (not to approach a particular area or person) if the restriction supports reparation or rehabilitation.

The number of such cases a year is only 12,000 a year. Many local prosecution chiefs make no secret that they would like to enhance their use of the conditional



caution. More than a half of conditions involved some form of compensation: 17% involved a drug or alcohol rehabilitation programme. 16% involved a letter of apology to the victim. (CPS, 2010g.) In this way the CPS is achieving a similar effect to other Jurisdictions where the prosecutor's power is stronger and more accepted (eg. Japan, Netherlands)

However, the political mindset is to continue to give more powers in case-ending to the police rather than the CPS. Since the turn of the 21<sup>st</sup> century the police power to give fixed penalty notices has been extended to many public order offences. These Penalty Notices for disorder are issued in around 200,000 cases a year of which around 80,000 were for creating harm or distress to others and 45,000 for shoplifting. Most of the other offences for which PNDs were given involved drunkenness or buying alcohol by or for young people. Some lawyers are unhappy about the lack of due process. However, there is no doubt that this process is accepted by the public. The proportion of orders paid up is no lower than the proportion of fines collected by the courts.

This lends strength to the case being made by some prosecutors for conditional cautions to replace the many trivial cases that go to the courts where the suspect is found guilty but given a discharge, frequently with no conditions imposed. At present there are around 12,000 cases given conditional discharges by the police on the instructions of the CPS, against around 80,000 cases a year given conditional discharges by the court, having gone through a costly trial process.

### **CPS involvement with Community interests**

English tradition has been that the police have been seen as the law enforcement agency most likely to know what the public wants, because of their tradition of 'walking the beat'. During the second half of the 20<sup>th</sup> century the police lost out on community contact by mainly being seen in their police cars rather than walking or on bicycles. However, from the start of the 21<sup>st</sup> century both the police and the CPS have put a great deal of effort into regaining community confidence, the police through creating the *Community Support Officer* and the prosecutor through creating the *Community Prosecutor* and through their extensive consultation processes.

The CPS has been developing the role of Community Prosecutors in the last couple of years and put forward a public document in April 2009 (CPS, 2010h). All prosecutors have been encouraged to engage much more with their local community and become more informed about local concerns, better understand the communities they serve and build stronger links with people from surrounding neighbourhoods.

Some specific tools have been set up. The **Community Impact Statement** is produced for each local area to help law enforcement officers to consider offences in the context in which they are committed and to take into account the harm inflicted on individual victims and the wider community. The **Community Involvement Panel** allows members of the community to discuss particular issues with the police and the Chief prosecutor of an area. The **Hate Crime Scrutiny Panel** is a group of community members who have the authority to investigate a sample of case papers and make suggestions and criticisms about the way the Police, CPS and the courts have dealt with particular cases.

Another tool is the **CPS National Schools Project** to raise awareness and educate pupils about the CPS; give information about the prosecution process and show the importance of witnesses. Central to the delivery is how young people can be supported by the CPS should they ever be called on to be a witness in court. Students have a chance to join in a role play exercise involving a criminal trial and act as lawyers who decide whether to prosecute based on the available evidence.

### **CPS Human Rights and criminal justice legislation**

The CPS has also been very active in public comment about Human Rights. These are not set down in the national constitution, as in the USA, because UK has no constitution. It holds to the Supremacy of Parliament in law, which means that and any law can be repealed. Parliament passed the Human Rights Act in 1998 which gave the CPS a statutory duty to see whether human rights set down by the European Convention on Human Rights (ECHR) are relevant in any particular case. It also gave Judges the duty to say, when judging a particular case, that they felt a new law was contrary to the ECHR.

English politicians are unused to judges criticising the government. Add to this the UK media frequently publishes misinformation about Europe and the ECHR. As a result, Human Rights has become a political football and led to certain politicians stating their intention to revise the Human Rights Act to make it 'properly British.' The Director of Public Prosecutions has recently intervened in this debate in a way unusual for a public servant by stating his support of the Human Rights Act:

*'For my part, I am proud to be part of a society that regards these rights, [as stated in the ECHR] as part of my entitlement as a member of that society.....The idea that these human rights should somehow stop at the English Channel is odd and, frankly, impossible to defend.'* (CPS, 2010j)

### **Possible Future developments**

The CPS has made strides in the last 10 years. It is difficult to forecast what will happen in the next 10. Political and resources considerations will be much tighter. The cut-back in public expenditure will lead to a period during which the powers of

public bodies will be curtailed. Early statements of the new government confirm the view that they are unlikely to overturn the way that the CPS has developed since the turn of the century. Proposals for minor changes in charging are likely with charging for minor contested cases returning to the police on grounds that it would reduce delays. Because the coalition contains parties with very different views on criminal justice, it remains to be seen whether the promise to revise the UK Human Rights Act will be given priority.

The success of the CPS, some 20 years after it was first set up should give confidence to those countries that have recently set up similar new authorities to conduct public prosecution of criminal cases. Lack of resources and some opposition can make the first few years difficult but throughout the world there is an acknowledgement that the evidence that is produced in criminal cases needs to have an effective legal mechanism to ensure it is sufficient achieve a conviction.

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