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Privatise the Prosecutors

Efficiency and justice in the criminal courts

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CENTRE FOR POLICY STUDIES

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Contents

Introduction 5

1. The system before 1985 7

2. The Philips Commission 10

3. The Crown Prosecution Service comes into being 12

4. Consequences of centralisation 14

5. The CPS under attack 16

6. Responding to the critics 21

7. Criticism from within 24

8. A better way of prosecuting 27

Notes and References 32

Introduction

In 1985, the Conservative Government created the Crown Prosecution Service. Unlike other state-administered services the CPS was not intended to further Utopian ideals of equality and social justice, nor to harmonise one area of public service provision with others. Ideology played no part in the matter. On the contrary, the creation of the CPS was seen as a one-off, well-intentioned, and thoroughly necessary attempt to unify the previously uncoordinated system of prosecuting allegations of criminal offences in England and Wales, and to introduce an independent body to review the decision to prosecute.

This paper examines how the inevitable happened; how centralisation produced waste, inefficiency and delay; how a system which, with admitted imperfections, worked well enough (and was perceived so to do), was replaced by one which no longer attracts widespread confidence; and how the Crown Prosecution Service should now be reformed.

1

The system before 1985

The CPS was established following the 1981 Report of the Royal Commission on Criminal Procedure (the Philips Commission). Announcing on 23 June, 1977, the then Labour Government's intention to set up the Commission, the Prime Minister told the House of Commons that the time had come to review the whole criminal process, from the start of investigation to the point of trial. For some years, public anxiety about the continuing rise in the level of crime – especially drug-peddling, street crime, fraud, the use of firearms and terrorism – had been growing. There was ignorance and confusion about the ways in which crime was investigated and prosecuted, and about whether, if these were improved, this would help bring the growth of crime under control. On the one hand, it was asserted that the job of the police in fighting crime and ensuring that offenders were brought to justice was being made unwarrantably difficult by the restraints of criminal procedure; on the other, it was said that the police used their powers in ways which were often open to grave question.

Criticism focussed both on the use made by the police of their powers of investigation, and also upon the wisdom of leaving the decision to prosecute with the people who did the investigating. This, it was often pointed out, was not the position in Scotland and other jurisdictions. Could not a separation of powers be devised for England and Wales?

It did not go unnoticed that similar debates were taking place in other countries. In Scotland, Northern Ireland, the United States, Canada and Australia major inquiries into criminal procedure were under way. In England and Wales, the topic had recently been fuelled by the heated controversy in 1973 and 1974 over proposals made by the Criminal Law Revision Committee to restrict greatly the so-called 'right of silence' enjoyed by suspects when interrogated by the police.[1] Widespread public disquiet was also aroused by the Maxwell Confait case, in which the Court of Appeal quashed the conviction of three youths and raised serious

questions about the way in which the police had handled the investigation.

It was against this background that the Philips Commission began its work in February 1978, to examine, inter alia, whether changes were needed in the process of, and responsibility for, the prosecution of criminal offences.

At this time, the system of police prosecutions was essentially local with the Chief Constable and the Police Authority responsible for each of the 43 separate police force areas. The majority of forces had Prosecuting Solicitors' departments – solicitors in the local authority's service who acted on behalf of the police in advising on prosecution decisions and presenting cases in court on which the police had decided to proceed. A significant minority of police forces, however, used local firms of private solicitors to advise and act for them.

The relationship between the Chief Constable and his prosecuting solicitor was one of lay client and solicitor, with the latter acting upon the instructions of the police, but the police not being bound by the solicitor's advice.

These arrangements were described by the Report of the Philips Commission as 'characterised by their variety, their haphazardness (and) their local nature'.[2]

The Commission noted that there had been no major attempt to alter the system since the late 1870s, and that until recently little manifestation of public concern about it. It added: 'It might be concluded, therefore, that by and large the arrangements work and have worked satisfactorily; the functions they are supposed to fulfil are fulfilled, as nearly as is possible with any man-made and administered procedures'.

In a minority of one was the Prosecuting Solicitors' Society's contention that: 'the present hotch-potch of different arrangements and non-arrangements is harmful to the prosecuting process in this country and must detract from the regard in which it is held'. The Commission, however, noted that the 'lack of uniformity of arrangements has not of itself attracted criticism from others of our witnesses, indeed some have commended it as being the most economical way to meet the different circumstances of different areas, for example in relation to the venue and timing of court sittings.'[3]

A much more valid criticism related to the unitary nature of investigative and prosecutorial functions; this meant that policemen, rather than lawyers, were primarily responsible for decisions to prosecute.

2

The Philips Commission

The Commission concluded that there should be a clear demarcation of responsibility between the investigation and prosecution of alleged criminal offences. Accordingly, it recommended the introduction of a locally based system with some national features. Under the scheme local Crown Prosecutors would be appointed to review the police's decision to prosecute and to take responsibility for preparing cases for court.

The Commission explicitly rejected a centrally directed National Prosecution System, in which, under the direct control of a Minister, a single official would theoretically be responsible for every decision to prosecute taken by the prosecution service, with a direct line of management extending from the lowest grade of local prosecutor to the national head of the service. Warning of the disadvantages that were likely to accrue from the bureaucratic nature of a large, centralised national organisation, the Commission stated:

> In order to transmit policies from the centre into effective practice at the local level and to ensure adequate accountability to the Minister, elaborate reporting and other supervisory systems would be required; this might create pressure for management to be in the hands of professional administrators rather than of solicitors. All would be at the cost of substantial resources and, perhaps, of the morale of the solicitors who would be operating on the ground. Furthermore, there would be powerful forces at work tending to promote the interests of those at the centre rather than of those on the periphery whom the organisation is, in fact, there to serve and to work with – the local police, courts and community. Nor are we persuaded that it is necessary to set up a national system in order to achieve the advantages that are claimed for one.[4]

The Commission added that it was hazardous to argue from the experience of other jurisdictions that a national prosecution service would be workable in England and Wales:

> We know of no common law jurisdiction in which the equivalent of a national prosecution system of the type we are discussing either covers an area with anything approaching the population of England and Wales (although some are geographically much larger) or deals with a crime load of anything like the same order of magnitude.[5]

Accordingly, the Commission concluded that 'a centrally directed national prosecution system for England and Wales is neither desirable nor necessary and we do not recommend its establishment.'[6]

3

The Crown Prosecution Service comes into being

The Conservative Government accepted the Royal Commission's premise that the functions of criminal investigation and prosecution should be separated, and enacted an independent prosecution service. The Government believed that this would promote consistency and fairness, reduce the proportion of cases brought to the court despite the lack of sufficient evidence, and improve the preparation and presentation of cases.

Those general aims had, and probably still retain, a fair measure of sympathy. The way in which the Government chose to implement them, however, is now almost universally seen to have been a failure.

For the Government ignored the Royal Commission's emphatic warnings about the dangers of a centrally directed national prosecution service, and created in effect a new Government Department – the Crown Prosecution Service – headed by the Director of Public Prosecutions under the superintendence of the Attorney-General, organised into 31 operational areas thoughout England and Wales, grouped into regions, and with headquarters in London. With effect from 2 January 1990, however, the regional organisation was abandoned, and responsibility for policy matters was centralised, with Chief Crown Prosecutors in the 31 CPS Areas reporting directly to the Deputy DPP and Chief Executive. In October 1993, the number of Areas was cut from 31 to 13, and the Director of Public Prosecutions, Mrs Barbara Mills QC assumed the Deputy DPP's Chief Executive role, gathering around herself her senior Headquarters staff and the Chief Crown Prosecutor for London to form 'the Director's Management Group'.[7]

Why did the Government conclude that centralisation was the best way to organise the new service? The Philips Commission had recommended that there should be a Crown Prosecutor in each police area, accountable to a local supervisory authority. It was proposed that for this purpose each existing police authority should

be developed into a police and prosecutions authority, to which both the Chief Constable and the Crown Prosecutor would be answerable. When the Commission's Report was debated in the House of Commons, however, in November 1981, strong reservations were expressed about whether this aspect of the Commission's proposals would be workable, or consistent with the independence of the new service. In July 1982, Ministers asked an interdepartmental Working Party of civil servants to advise them on the structure of the service. The civil servants presented Ministers with a straight choice: the Commission's scheme, or a national prosecution service headed by the DPP. The Government accepted the Working Party's conclusion that it would be inappropriate for local authorities to have control over the conduct of prosecutions under the general criminal law, but appears not to have considered any other model save the civil servants' favoured project. So it was that the Crown Prosecution service came to be born in its existing centralised form.

4

Consequences of centralisation

The estimates of what the CPS would cost proved to be wildly optimistic. In simple terms, the CPS rapidly doubled the cost of criminal prosecutions. As the Comptroller and Auditor-General recounted in his 1989 *Review of the Crown Prosecution Service*:

> In August 1986, the Lord Chancellor's Department and the Home Office attempted to compare the cost of the CPS with the cost of the previous regime. They estimated broadly that the old arrangements would have cost £70 million for 1987–88 as against estimated expenditure of £110 million for the Service. But they accepted that this might not take full account of the costs of accommodation and general administration, and concluded that the difference in costs was due mainly to the increase in staff numbers. The actual cost of the Service in 1987–88 was £134 million.[8]

This figure would, of course, have been far higher had not up to a quarter of the staff posts remained unfilled. As the Comptroller noted at paragraph 2.12 of his report, when the CPS became fully operational in October, 1986, all but three areas were understaffed, with shortfalls as high as 52% in London – and, by the way, 'many of the lawyers recruited were newly qualified and had little experience'.

By the financial year 1989–90, the cost of the CPS had risen still further, to £184 million – and the Director of Public Prosecutions was still complaining of unsatisfactory staffing levels. By 1991–92, total expenditure had reached £226.15 million (a startling £28.39 million increase on the actual expenditure for 1990–91)[9] – yet recruitment problems were so bad that the CPS was driven to apply for increased rights of audience in the criminal courts as a carrot to 'improve its standards of case preparation and decision-making, enhance morale, and ease recruitment problems'.[10] The latest Annual Report of the CPS, published in July 1993, reveals a further

major increase in total expenditure – to £257.49 million in 1992–93! Yet the recruitment problem persists: the latest figures available for the numbers of lawyers in post still show a shortfall as at 30 September 1992 of 187.8, or 8.3% of the CPS's Total Manpower Requirement.

Increases in cost of this order might be justified if the number of cases dealt with by CPS had greatly risen; such a development might also help excuse examples of inefficiency and delay. But the volume of cases dealt with has gone down recently; in the case of both Magistrates and Crown Court hearings the number for cases received and finalised all fell during the period 1990–93. In the year 1992–93 the number received for hearing by magistrates fell by 2.6 per cent, while finalisations fell by 2.3 per cent. In the case of Crown Court hearings, cases received fell by 12.2 per cent, while finalisations fell by 8.3 per cent.

It might have been worth meeting such an escalation in costs had the nation been getting something better for it. Sadly, the reverse has been the case.

5

The CPS under attack

Each of the two independent reports on the performance of the CPS since its inception contains serious criticisms.

First, the Comptroller and Auditor General made these observations:

(i) In a survey conducted between February and May 1988, the National Audit Office asked other agencies in the criminal justice system whether in their experience since the Service was introduced the standard of case preparation had generally improved, deteriorated, or remained the same. The responses from local agencies and individuals were as follows:

	Improved	Deteriorated	Remained the same
	%	%	%
Local Law Societies	12	49	39
Local Magistrates	14	44	42
Local JPs' Clerks	15	31	54
Judges	7	39	54
Bar Circuit Leaders	–	50	50

None of the central organisations reported improvements.

Asked to give their reasons, staff shortages, staff inexperience, poor file administration and inadequate preparation were principally given. It seemed clear from the facts that staff morale had plummeted, because the CPS had failed to measure up to the demands of an increasingly competitive market in legal services.

(ii) Whilst an important objective of the Crown Prosecution Service had been to contribute towards the reduction of delays in court proceedings, in fact Home Office statistics indicated that since the introduction of the Crown Prosecution Service there had been a significant increase in the average length of time taken to process cases through magistrates' courts. For example, between October

1985 and June 1988 the average interval between charge or summons and completion for indictable offences rose from 63 days to 76 days.[11]

The second major criticism came from the Home Affairs Committee of the House of Commons which published a major study of the CPS in April 1990.[12] The Committee noted that:

> Much trenchant criticism of the CPS was indeed presented to us. The Criminal Bar Association told us that 'the system is significantly less efficient than it was', the South Eastern Circuit of the Bar described the CPS in the magistrates' courts as a 'shambles', the Chief Metropolitan Magistrate wrote of 'universal dissatisfaction' with the CPS, bringing the courts into disrepute, the Chairman of the Magistrates' Association could 'not think of a single good thing' the CPS had done for justice or the courts and the Police Federation witnesses spoke of the reputation of the criminal justice system 'at crisis point'.

The strength of the criticism and the importance of the sources from which such criticism had come had 'amply justified our decision to look at the CPS'; and whilst they concluded that the CPS was 'not nearly as bad as portrayed', nevertheless 'we do not wish to play down the criticism of the CPS. Much of it is warranted.'[13]

The Committee asked a crucial question: 'Is the CPS showing sufficient competence in presenting cases?' The overwhelming answer was 'No':

(i) competence in court

As the Committee noted,

> When the CPS do decide to prosecute, the public have the right to expect them to do so competently. We received some very striking evidence that they sometimes did not. The Midland and Oxford Circuit of the Bar told us of CPS incompetence in prosecuting cases doomed to failure for evidential reasons or in dropping cases unnecessarily . . . and other claims of incompetence were made by the Magistrates' Association and the Chief Metropolitan Magistrate, who spoke of 'guilty people going

> free because evidence has not been produced, and innocent people's acquittal being delayed'. In the evidence of the Council of Circuit Judges, we were told of numerous failings, and some of these were confirmed by the Resident, Designated and Presiding Judges, who were particularly critical of the standard of drafting of indictments. The Police Federation also spoke of police disillusion at inefficiencies in an area which had been inefficient before. The CPS itself frankly admitted that 'it has not always been possible to ensure that the prosecutor in a particular court is of sufficient calibre or competence'.[14]

The Committee concluded that the CPS's performance was patchy and that there were clearly still too many examples of ineffective prosecutions.[15]

(ii) delays

Particularly undesirable for the system of justice are delays in the court process – witnesses begin to forget the facts, and it becomes increasingly difficult to prove a case beyond reasonable doubt, let alone the suffering which delays cause victims and accused persons alike, particularly if an innocent man or woman is remanded in barbaric custodial conditions for a trial which subsequently vindicates him or her.

The Committee recorded that one particular area of complaint was that the CPS was to blame for delays in the court system:

> The Chairman of the Magistrates' Association told us that he regarded the CPS as responsible for increases in delays since 1986 . . . the Circuit Judges also drew attention to the increased number of adjournments in magistrates' courts, and to a number of practices in the Crown Court which caused delay, in particular poor preparation and failure to meet proper defence requests. The standard of case preparation also 'attracted a great deal of adverse comment from the Resident, Designated and Presiding Judges'. Among their complaints was lack of timely preparation pre- and post-committal, and serving of notices of additional evidence at the last minute or at the trial itself. Barristers of the Midland and Oxford Circuit told us that

briefs were scantily prepared and tardily delivered, and the Police Federation told us that 'very often a court cannot be set up because there is no prosecutor available'.

That the CPS is so often late in preparing cases for court was, in the Committee's view, 'clearly most undesirable'.[16]

(iii) staff competence and morale

Paragraph 70 of the Committee's report goes to the heart of the problem:

As the CPS's own evidence told us, their greatest problem has been the recruitment and retention of staff. There has been a deficit of around a quarter in lawyer numbers ever since the CPS came into existence, and smaller deficits among law clerks and other administrative staff. The figures vary widely in the different CPS areas, with the worst picture found in the South East, the Midlands and particularly London. The CPS recognise that the substantial difficulties which they have encountered have been due directly or indirectly to these staffing problems. A wide variety of witnesses have commented on the Service's understaffing and of the adverse effects of this . . . the inexperience of support staff and its knock-on effects were commented upon critically by several witnesses.

Particularly sapping of staff performance, the Committee concluded, was the present pay structure:

The Criminal Bar Association called for 'the freeing of the CPS from the straitjacket of . . . civil service structure so that it can independently put people of the right grade into the right work', and the CPS itself told us that, in terms of recruitment, it was at a disadvantage compared with the private sector because of civil service rules.[17]

What follows from the Committee is a familiar lament on the way in which state administered services fails to reward adequately their most able employees:

> However, we realise that the Treasury is most unlikely to allow wholesale increases in CPS pay, especially because of the knock-on effect this would have on other lawyers employed in the public sector . . . we would like to see the CPS having more freedom to reward merit and hard work, and more flexibility about paying differential pay scales in different areas of the country [and] the DPP told us that regional pay scales could be a very attractive idea, but that they were opposed by the trades unions, and might have the effect of causing people to migrate from one part of the country to another.

Inevitably, the present system fails to reward individual lawyers' particular efforts and skills. The Committee noted that there are wide varieties in the amounts of work expected of different CPS lawyers in the different parts of the country, and very little facility to reward those who do more than their fair share. The problem is cyclical: the hardest worked CPS lawyers are in London, the South East and the Midlands because these are the areas which are most understaffed and where the demands on the service are heaviest. These, however, are the very areas where the differential between CPS and that of lawyers in the private section is highest. The CPS has no ability to do what the Criminal Bar Association thought it should: 'to get the right man to do this job in London North we are going to pay this man this sum, and he would get less than that if he were doing the job in Nottingham'.

(iv) Fundamental approach

In its approach to such other, fundamental, matters as the warning of witnesses, the preparation of transcripts of interviews and its attitude towards the victims of alleged crime, the CPS was also found wanting.

6

Responding to the critics

It has been greatly to the credit of the CPS as a whole and its leadership in particular that the Service has not been deaf to the strictures of its many critics. Whilst successive Annual Reports have skilfully sought both to claim that the Service is gradually improving and also to shift some of the blame for its failures and inadequacies onto other, external, factors, there have also been apologies. Writing, for example, in June, 1990 the then DPP, Allan Green QC, conceded that:

> Setting up a new service has proved to be a costly business. The Public Accounts Committee understandably drew attention to the early and less than wholly accurate estimates of that cost . . . and the more recent report of the Home Affairs Committee make[s] clear that there are still important issues to tackle.[18]

But the CPS has not taken such criticisms lying down: it has also launched a spirited fight-back of its own. Both of the main techniques it has employed are reminiscent of those used by other state-run services.

First, a plea for more Government cash – elegantly made, for example, by the DPP in his 1989/90 Annual Report:

> I recognise that there are several constraints on public expenditure at the present time; however, I hope that we shall not now find ourselves with less than adequate resources to discharge the statutory responsibilities of the Service, in the manner and to the standard expected by Parliament when the legislation setting up the Service was enacted.

Second, a desire to arrogate to itself more rights and responsibilities – in the CPS's case, its demand for Rights of Audience in the higher courts for its own employees.

The Courts and Legal Services Act, 1990, enacted a statutory

mechanism for considering all questions of Rights of Audience in the courts, based on an Advisory Committee which considers applications by professional bodies such as the Law Society and the CPS and then makes recommendations to the Lord Chancellor and to certain 'designated Judges'. The CPS has made no secret of its belief that increased Rights of Audience for CPS lawyers would make a career in the Service more attractive to existing and potential staff, adding to their job satisfaction and status. In a telling piece of evidence to the Home Affairs Committee, the then Attorney-General, Sir Patrick Mayhew QC MP, seemed to imply that without such Rights of Audience, the CPS was a 'second-class' career.[19]

On 3 April, 1992, the Advisory Committee rejected its application in terms which speak volumes about the CPS's claims of recent improvements.

> The Committee believes that the CPS must demonstrate a high standard of achievement in its present functions before an extension of rights of audience can be justified . . . the CPS has not yet fully overcome initial difficulties in terms of resources, manpower and organisation, and may not yet be in a position to take on the additional responsibilities of providing advocacy services in the higher courts.

As *The Independent* newspaper reported on 21 April, 1992, under the heading, 'CPS facing a crisis of confidence,'

> The [Advisory] Committee's report was couched in the careful language of such occasions, but the message was clear. In layman's terms, the CPS was told that if it wanted extended rights of audience, it had better get its act together.

There is no doubt that the CPS realises that it must put its own house in order. It has recently implemented measures to improve its standards of service to the criminal justice system, for example by reducing the time witnesses have to spend at court before they give evidence and setting standards for the payment of witness expenses within five to ten days. When the Director of Public Prosecutions last appeared before the Home Affairs Committee of the House of Commons, in October 1992, her evidence[20] included solemn

pledges to examine ways of providing information to the public in a more systematic way, and to set minimum standards for dealing with correspondence and telephone inquiries. She also promised a Statement of Common Purpose and Values as 'a public expression of the principles which the CPS upholds', and generally to 'create a system which is, and is seen to be, efficient, effective and caring'.

7

Criticism from within

These statements of good intent are admissions of the current inefficiency and ineffectiveness of the CPS: if the CPS was operating efficiently they would not have been necessary. A senior Crown Prosecutor, writing anonymously in *The Daily Mail* on the 21st October 1993, described today's CPS as 'an incredibly centralised bureaucracy' and offered some valuable insights into its current workings:

> *There have been many complaints from police and the Home Secretary about the amount of time police spend doing paper-work when the public wants them out on the beat. Much of this extra paperwork is caused by the CPS, which has insisted that the police prepare all their cases using CPS designed forms and CPS designed systems known as National Operational Practice (NOP) and Pre-Trial Issues (PTI). Prior to NOP, when the police prepared a case for the CPS to send to the Crown Court, they would use a word-processor to provide a typed witness list which would then be photocopied to serve on the defence. Under NOP, however, the police now have to prepare the witness list on a specific NOP form which cannot be put in a word processor and so takes more time. Once this list reaches the CPS, a lawyer has to copy it onto a second form which is sent to a typist, who then copies it onto a third form, which is then served on the defence. One simple task has become three tasks, and CPS lawyers, who did not invent these Alice in Wonderland systems, are the ones being blamed for the delays they cause . . . When the CPS adopted a new logo, every member of staff was sent a free beer mat with the logo on it, while a recent instruction ordered us to stop using the word 'memorandum' and use the 'minute' instead . . .*
>
> *The CPS gives no encouragement to good lawyers or to courageous prosecuting. If a prosecutor drops a difficult case, then nobody in the CPS criticises him on the grounds that the case*

could have been won. If he takes one on and wins, nobody praises him. But if he takes on a difficult case and loses, he could face criticism for accepting a 'weak case' and knows his career could be affected. So it is simpler and safer to drop a difficult case rather than fight it. And drop them prosecutors do – every day . . .

CPS lawyers have to decide on the correct charges for a case. This can be complex – there are 11 varieties of assault, for example, with sentences ranging from six months to life imprisonment. Yet CPS policy is becoming less concerned with choosing the right charge and more concerned with getting a quick plea in the magistrates' court. It is certainly cheaper and quicker for magistrates to deal with such cases than the higher courts, but it is hardly justice for the victim, or for the public.

Within the author's personal knowledge are the following recent illustrations of the failings of the CPS:

- A scheduled four-day Crown Court trial had to be postponed when it was revealed on the morning of trial that the previous evening a CPS employee had peremptorily told all the witnesses that they need not attend.
- The CPS failed to reveal a witness statement which disclosed an arguable defence to a criminal charge tried in the Magistrates' Court. The Crown Court, on appeal, overturned the conviction by the Magistrates, ordered a re-trial, and ordered the CPS to pay all the costs which the privately-paying defendant had incurred.
- The CPS charged a defendant company under a statutory provision, which had actually been repealed seven weeks before the offence was alleged to have been committed. The case was dismissed, with costs awarded against the CPS.
- The CPS failed to disclose an expert's report on a drink-driving charge until the very morning of trial. The case had to be adjourned to a new date, in order to give the defence the opportunity to obtain expert evidence in rebuttal.
- The CPS proceeded to list a matter for Crown Court trial when the Divisional Court still had to determine the appeal of an essential preliminary issue. The result was that barristers, solicitors, policemen and witnesses had to attend at the Crown Court

only to have the matter necessarily adjourned until the Divisional Court had ruled on the appeal point.

- On a bank robbery case involving the use of shotguns, one defendant pleaded guilty, and received a substantial term of imprisonment, leaving two others to be tried at the Crown Court. Defendant number two admitted that he had been at the bank and said that Defendant number three had been there too. Defendant number three alleged, however, that he had an alibi. Only a trial could determine whether Defendants two and three had been involved in the robbery, and should be punished accordingly. The CPS decided, without consulting prosecuting counsel, not to proceed against Defendant number two, thereby making the case against Defendant number three very much weaker. The trial judge roundly condemned the CPS for taking such a decision without bothering to seek the advice of counsel whose reponsibility it was to conduct the case at the Crown Court.

Although anecdotal, these examples lend substance to the diplomatically worded opinion of the recent Report of the Royal Commission on Criminal Justice, chaired by Lord Runciman (Command Paper 2263, HMSO, July 1993), that the performance of the CPS 'may still remain patchy in some areas'. The underlying message is clear: the failings of the CPS have not been consigned to the history books: they are real, continuing, and greatly damaging to the criminal process in England and Wales.

8

A better way of prosecuting

Any believer in the general philosophy of modern conservatism will not find this saga at all surprising. For the CPS has many of the classic features of a nationalised industry. It is one large state-administered organisation which lacks the healthy spur to excel which exists, for example, within the Police Force through the existence of separate constabularies. As in other parts of the public sector there is little sense of personal responsibility. When mistakes are made the fault inevitably lies at some other point in the system – anywhere but with the individual CPS employee who is present in Court, announces the latest debacle and applies for a further adjournment. This is in marked contrast with the position of the defence solicitor who has perhaps forgotten to notify his client of a hearing date, and as a result may face not merely embarrassment, but an Order that he personally meet the costs incurred by his negligence.

One possible means of reform would be simply to return to the system which operated before the Prosecution of Offences Act, 1985. This would lose the role of independent review of the decision to prosecute for which the Crown Prosecution Service was created. As the Home Affairs Committee of the House of Commons recalled:

> The fundamental principle which underlay the creation of the CPS was independence. Until 1986, prosecutions were conducted by the Police and by lawyers instructed by them. Some police forces employed solicitors, some gave the work out to private firms, a number used police officers themselves to prosecute minor offences. Many observers believed this system was unfair. As the organisation, JUSTICE has stated, 'having the investigating and prosecuting functions within the same body facilitated any abuse or bias, and made easy the concealment of any such abuse or bias'. This view was held by the Royal Commission on Criminal Procedure [which] believed it was fairer and more just for prosecutors not to be identified with the investigative process.[21]

Under the new criminal justice system which the 1985 Act introduced, the police retain the functions of investigation and power to charge a suspect. Following the charge or summons process and the delivery of the case papers to the CPS, it is the CPS alone which has the duty and powers to take the case forward, either by continuing the prosecution on the same or different charges or by deciding to drop the charge. Though they may seek further evidence through the police, there is a dividing line between investigation and prosecution. The two processes are meant to be as distinct as possible.

The principle of independence is surely valid. 'Virtually no-one now argues against the principle of an independent CPS, and the great majority of our witnesses accepted that the separation between the police function of investigation and the CPS function of prosecution was desirable,' noted the Home Affairs Committee. The Midland and Oxford Circuit of the Bar believed that none of the members of the Circuit 'now would argue against the objectives of creating a strong, independent and competent prosecuting authority', the Law Society 'were wholly behind the principle of an independent CPS' and similar views were expressed by the National Association of Probation Officers (NAPO), the Howard League for Penal Reform and the Magistrates' Association. Most significantly, the police service's three representative bodies – the Association of Chief Police Officers (ACPO), the Police Superintendents' Association and the Police Federation – expressed themselves unequivocally in favour of an independent prosecution service. The Committee fully shared the view that an independent prosecution service is fairer and more just than the system which existed before.[22]

The aim of reform must surely be to diminish the dead hand of state bureaucracy while the necessary and popular concept of independent review of the decision to prosecute. The problems of an inefficient centralised service cannot be solved by merely farming out some of its work to agents; expediency and chronic staff shortages already force the CPS to instruct lawyers other than their own in-house staff, leaving unaddressed the fundamental drawbacks of working in an amorphous centrally controlled national organisation.

If the twin objectives described above are to be realised, the Crown Prosecution Service should shrink to a small cadre of high

calibre staff, appointed by the Director of Public Prosecutions and responsible to her, and ultimately to the Attorney-General. Their role should be two-fold:

(i) to set, implement and monitor national policies concerning the conduct of prosecutions. Massive regional variations in the criteria which guide decisions to prosecute and in the conduct of prosecutions must be avoided. Nationwide consistency is desirable. This is presently based on the Code for Crown Prosecutors, under Section 10 of the Prosecution of Offences Act, 1985, which outlines certain fundamental principles. These are intended to guide individual decisions to prosecute – the so-called 'Evidential Sufficiency Criteria' and the 'Public Interest Criteria' – and to implement national practices in, for example, the charging of suspects and the treatment of juveniles;
(ii) to prepare major prosecutions, such as terrorist and espionage cases.

The powers and duties of the new, much slimmed-down, central body would, however, require the strictest statutory definition. This would be necessary to ensure that it no longer continued to exercise a centralising influence.

At local level – for each Crown Court area – there should be a Crown Prosecutor. He should be a solicitor in private practice – typically, a partner in a medium-sized High Street firm which regularly undertook criminal work – appointed for a fixed term (which would be renewable) by the Director of Public Prosecutions. This would be a prestigious legal appointment, recognised as such by its remuneration and by the status it conferred in the national and local community: each Crown Prosecutor would receive from the Crown such recognition as is appropriate to the office, just as a High Court Judge is knighted, a Circuit Judge is styled 'His Honour', and a Deputy Lord Lieutenant is entitled to the letters 'DL' after his name.

Each local Crown Prosecutor should be responsible for the review of the decision to prosecute. He would be guided in the exercise of his discretion by the central CPS, which would, for example, promulgate its own National Code for Crown Prosecutors, organise national conferences and otherwise instil nationwide standards of

competence and proficiency. In many ways, the local Crown Prosecutor would be similar to a solicitor holding a part-time judicial appointment as a Deputy District Judge of the County Court; solicitors are well accustomed to combining such public duties with a seat in a private firm of solicitors.

Once he had taken the decision to proceed with a prosecution, then his firm would handle the case – in just the same way as solicitors in private practice handled some police prosecution work before 1986. But in contrast to the pre-1986 situation his firm would be responsible to the Crown Prosecutor and not to the Police, and remunerated from Central Funds (in other words by the Crown, in whose name most criminal prosecutions are brought). In order to avoid possible conflicts of interest his firm would be barred from taking on defence briefs.

The attractions of this scheme are easy to see. The vital concept of independent review would be preserved, by the automatic requirement that a case could not proceed without the approval and guidance of the Crown Prosecutor. Thereafter, all the advantages of professional services being undertaken in the private sector would flow: costs would be saved, standards of work would be higher and job satisfaction would be greater. Lawyers in the Crown Prosecutor's firm would know that failure to provide an efficient service would result in the termination of his – and their – employment, with the most serious effects not just upon their local prestige but also their prospects of alternative employment elsewhere. Professional success, on the other hand, such as a proven record of fair-mindedness and competence, could not fail to enhance the reputation, both of the solicitors' firm and the individual solicitors concerned, bringing a welcome boost to High Street firms whose markets for work are threatened by the recession and by their loss of valuable conveyancing work to estate agents and 'licensed conveyancers'. Most of the several thousand employees of the present CPS would have to be declared redundant, but former staff of quality would surely be attractive as potential recruits to those High Street firms whose partners were minded to apply for appointment as Crown Prosecutors – and their pay would be determined in the soundest way possible, by the operation of market forces to determine their worth as solicitors engaged to provide local legal services.

Any scheme for reform of public sector provision necessarily requires careful costing before it can be introduced, and the author has not attempted, nor is he qualified, to quantify the financial consequences of these proposals for reform. Experience in other fields suggests, however, that decentralisation usually produces significant savings to the public purse as well as improvements to efficiency and morale. Justice is a 'public good' and cannot be privatised in the simple manner in which a car producer can be taken out of state hands and placed in private ownership. In the case of the Crown Prosecution Service, however, it is possible for the state to meet its obligation by introducing a substantial measure of privatisation within the context of a national framework of centrally monitored standards and procedures.

The number of recorded crimes has risen from 3.8 million in 1986 to 5.6 million in 1992. Opinion polls show that the public feel more strongly about crime than about any other issue. The efficient prosecution of alleged criminals is an important duty of the Crown. Since its creation, the Crown Prosecution Service has failed the Crown. Now is the time for reform.

NOTES AND REFERENCES

1. Criminal Law Revision Committee, 11th Report, HMSO Command Paper 4971.
2. HMSO Command Paper 8092, para 6.62.
3. Op Cit, para 6.64.
4. Op Cit, para 7.22.
5. Op Cit, para 7.23.
6. Op Cit, para 7.24.
7. CPS Annual Report 1992–93.
8. National Audit Office Report 345, 3rd May 1989.
9. Annual Report of the CPS, 7th July 1992, HMSO.
10. 'Advice to the Lord Chancellor,' Lord Chancellor's Advisory Committee on Legal Education and Conduct, 3rd April 1992.
11. National Audit Office Report supra, paras 3.18, 3.21, 3.22 and 4.6.
12. Fourth Annual Report of the CPS, HMSO 1990.
13. Op Cit, paras 9, 10, and 11.
14. Op Cit, para 58.
15. Op Cit, para 60.
16. Op Cit, paras 62–65.
17. Op Cit, paras 82–85.
18. Fourth Annual Report of the CPS, supra.
19. Minutes of Evidence, HMSO 1990, page 221.
20. Minutes of Evidence, HMSO 1992, pages 1–10.
21. Home Affairs Select Committee Report Supra, paras 5–6.
22. Op Cit, para 7.