THE DIRECTOR OF PUBLIC PROSECUTIONS

PRINCIPLES AND PRACTICES FOR THE CROWN PROSECUTOR

Foreword by Sir Thomas Hetherington

Graham Mansfield and Jill Peay

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An inquiry carried out at the Centre for Criminological Research, University of Oxford

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AND JILL PEAY

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The views expressed in this book are ours and should not be taken to represent the view of any of the individuals and institutions to whom we are so indebted.

G.M.
J.P.
July, 1985

AUTHORS' NOTE

We should like to stress that no reference is made here to the Code for Crown Prosecutors published in the summer of 1986, which sets out the principles upon which the Crown Prosecution Service is to exercise its functions. Such an inclusion, at the time of writing, would have required the skills not of researchers, but of clairvoyants.

FOREWORD

In 1982, the Home Office funded the Centre for Criminological Research at the University of Oxford to conduct research into the prosecution system in England and Wales, and Dr Jill Peay and Dr Graham Mansfield were asked to undertake a 'warts and all' study into the workings of my department. It must have been a daunting prospect for them, and I, too, must confess to some trepidation at the thought of such scrutiny at the hands of researchers of their experience and perception. They set about their task with industry and an engaging enthusiasm. It was indeed a pleasure to work with them. They have now produced a book worthy of their efforts. It charts with accuracy the complexities of decision-making in the prosecuting process and is, I think, a valuable contribution to the debate on the criteria that the Crown Prosecution Service should adopt from its inception in 1986.

Sir Thomas Hetherington, KCB, CBE, TD, QC
Director of Public Prosecutions
25 July, 1985

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CHAPTER 1

PROSECUTION STANDARDS – PAST, PRESENT, AND FUTURE

> 'The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power.' (Douglass 1977: 4)

The distinction between prosecution and persecution may be easier to draw for those who prosecute than for those who are prosecuted. From the professional side of the fence prosecution requires a combination of technical legal skills with an ability to portray an event for people who were not there, but who have to decide the truth or otherwise of the prosecution's case. The process of prosecution requires the prosecutor to engage in a series of tasks. First, since laws are framed in general terms, the prosecutor has to decide whether a particular act or omission by the accused might reasonably be said to fall within the ambit of the criminal law. Once this has been established, the prosecutor has next to decide whether to prosecute, or whether the case may be more appropriately dealt with by means of a caution, or, indeed, by taking no further action at all. In these pre-trial decisions the prosecutor exercises considerable discretion; a discretion which becomes subject to judicial review only in those cases where a prosecution commences.[1] The prosecutor's third task in making out a case is to persuade the court that all the necessary technical elements of the particular criminal offence were present in the behaviour and state of mind of the accused. This has to be established to the satisfaction of either a judge in the Crown Court or, in the Magistrates' Court, either lay justices or Stipendiary Magistrates, if the case is to get beyond 'half-time' and the accused is to be called upon to present his defence.[2] Fourth, if the prosecution is to result in a conviction the case also needs to be presented in a form that is both comprehensible and capable of being persuasive, beyond reasonable doubt, to lay assessors, whether magistrates or jurors. Finally, the prosecutor has to curtail the content and presentation of his case in accordance with the rules of evidence to prevent those lay assessors from being unreasonably persuaded that the accused is guilty. The supposed

justifications for these evidential restrictions are the need to prevent the courts from acting on 'unreliable' evidence and the need to protect the rights of the accused. Thus, the prosecutor is constrained in his telling of the story.

'Telling a story', though, is precisely how many accused persons would regard the presentation of the prosecution case. For them, prosecution may appear as a game played by a series of rules which they may neither know nor understand. They may dispute that their behaviour was in any way illegal and, even if it was wrong, they may challenge the particular charges brought against them. They may feel frustrated at not being able to speak when they want to, at having their case put for them by a lawyer, and at hearing their case presented in court in a way which conflicts with their 'certain' knowledge of what occurred. For them, the process may feel inherently unfair. Yet it is precisely because of the need to ensure that the game is played by the rules that the contestants are lawyers, the referee a judge, and the ultimate arbiters 'peers' of the accused. Even where the defendant feels marginal to the proceedings, prosecution cannot be equated with persecution if it is conducted by the rules and without enmity.

In contrast with the decision to prosecute, the decision to convict rests primarily with lay people, whose minds may not be hardened by the experience of crime or cluttered by the technicalities of the law. But, if 'morality' is to be assessed against a background of 'legality', these lay individuals require the case to be presented to them by those who do understand and can apply the law. So, lawyers should prosecute in the spirit of 'ministers of justice' and not as if in pursuit of a verdict.[3]

At the office of the Director of Public Prosecutions (DPP) the prosecutors act as gatekeepers, making decisions as to which cases will go forward for prosecution and which will not.[4] This book addresses the question of how the DPP's lawyers go about their job as prosecutors: what principles underlie their decision-making, and how this affects the process of prosecution. Prosecutorial responsibility falls into two parts: first, the decision as to *whether* to prosecute; and secondly *how* to prosecute – the manner of the prosecution. The maxim of 'prosecution without persecution' should apply to both stages.

A recurrent theme throughout the book is the tension between prosecutorial *theory* and prosecutorial *practice*. The first chapter begins by reviewing why the DPP has become the focus for an independent prosecution service; it examines the role of the DPP

and it explains the nature of the 'reasonable prospects' approach to prosecution. Following this, there is a more detailed analysis of two of the elements of a prosecutor's role as envisaged by the reasonable prospects approach: first as an 'arbiter of facts' and secondly as an 'arbiter of the public interest'. This theoretical framework is criticized as providing an insufficient guide for prosecutors keen to emulate the DPP's approach to prosecutions; the problems likely to arise out of it lead into an explanation of the need for the empirical research undertaken – distilling theory from practice. Finally, the question of what amounts to practical as opposed to theoretical independence is addressed. As a postscript to the chapter, a possible revision to the 'reasonable prospects' test is briefly presented for the reader to reflect upon in the course of the subsequent chapters.

AN INDEPENDENT PROSECUTION SERVICE FOR ENGLAND AND WALES: GERMINATION AND EVOLUTION

In 1981 the Royal Commission on Criminal Procedure reported that 'the present arrangements for the prosecution of criminal offences in England and Wales defy simple and unqualified description' (1981: para 6.1). Indeed, it deliberately refrained from describing the arrangements as a 'system', since they were neither uniformly organized nor did they rest on a single legislative foundation. However, the Royal Commission did note that the great majority of prosecutions were brought by the police and that these police prosecutions were locally based, with each of the forty-three separate police force areas organizing their own prosecutions under the control of the local chief constable and the police authority. It also noted that the arrangements could be characterized, at least so far as police prosecutions were concerned, 'by the unitary nature of the investigative and prosecutorial functions, with primacy of responsibility for the decision on prosecution being vested in the police and not in the legal profession' (para 6.6).

Within these arrangements the DPP was exceptional in that he acted on a national basis handling all cases of certain types (see pp. 7–10). But two further features of the DPP's approach were singled out by the Royal Commission. The first related to the question of who gets prosecuted (the prosecutorial standard), and the second to who takes that decision, and how the case is subsequently conducted ('independence').

The prosecutorial standard

The Royal Commission distinguished the DPP from local prosecutors on the basis of the standard of evidence required before a prosecution could be launched. At local level, prosecutions would routinely be brought where a *prima facie* standard of evidence could be established, namely where there was 'evidence, upon the basis of which, if it were accepted, a reasonable jury or magistrates' court would be justified in convicting' (Royal Commission on Criminal Procedure: 1981 para 8.8).[5] At the DPP a more stringent criterion was employed in that prosecutions would only be brought where there was 'a reasonable prospect of conviction'. This requires a standard of evidence which makes it more likely than not that a conviction will be returned. Over and above this evidential requirement, a prosecution would only be brought by the DPP where it was considered to be 'in the public interest'. Thus, prosecutors at the DPP had both to satisfy the reasonable prospects *test* which required weighing of the evidence, and then to apply the reasonable prospects *approach*, which amalgamated this assessment of evidential sufficiency with public interest considerations. The difference between these two apparently similar terms must be stressed here, since it is central to discussions in this book. The reasonable prospects approach includes the reasonable prospects test, the latter being simply the evidential part of the wider approach.

Thus, if the prosecution process is likened to a conveyor belt, the essence of the Royal Commission's recommendations with regard to the prosecutorial standard was that fewer of the cases which end in acquittal should be placed on the conveyor belt at all. Instead of the prevailing presumption, namely that where the *prima facie* standard could be satisfied the case should be 'put to the court', all prosecutors were now enjoined to exercise a discretion to prevent cases from joining the otherwise natural progression to court. Such a progression has been termed the 'prosecution momentum'.

Independence

The second distinguishing feature of the DPP was his independence from those conducting investigations into crime. As a prosecutor the DPP acted neither for nor at the behest of the police but 'for the public [and] in the public interest' (Hetherington 1980b). Other lawyers, acting as prosecutors for the police, did not share this

independent standing but acted within a solicitor–client relationship: the prosecutor as solicitor acted upon the instructions of the police as client – he could offer advice but the police were not bound by that advice. The Royal Commission considered this to be deficient. Those who investigated the crime, namely the police, should not also have the responsibility for prosecuting because their objectivity might be impugned. Thus the Royal Commission sought to ensure that the functions of prosecutors of crimes should be separated as far as possible from those of the investigators of crimes.[6] It recognized that there was an extent to which this objective had already been realized in some police authority areas, where prosecuting solicitors' departments provided a permanent prosecution service for the police, but that the situation varied from area to area. More importantly it maintained that mere demarcation of the prosecutors' role from the investigators' role would not constitute a sufficient reform. It would, however, be a necessary precondition for the attainment of its second objective, the abolition of the 'solicitor–client' relationship. The Royal Commission opined that this relationship 'is not precisely defined, and much depends upon the co-operation and understanding of the individuals concerned' (1981b: para 143). But, if overall responsibility for prosecutions were to shift from the police to lawyers, then the prosecutor's independence must be assured and not left to the vagaries of individual relationships. Hence, the prosecutor was to be able to stand back from the conveyor belt and judiciously examine the merits of allowing a case to proceed to prosecution.

The Royal Commission's recommendations

The Royal Commission criticized the existing prosecution arrangements on the basis of three standards: fairness, openness and accountability, and efficiency. Its major recommendation was that a Crown Prosecution Service should be established, with the conduct of prosecutions becoming the responsibility of a service staffed by individuals with legal qualifications who were not identified with the investigative process. The Royal Commission further recommended that in line with this transfer of responsibility the new Crown prosecutors should adopt a higher evidential standard, namely the reasonable prospects test.[7] Its underlying rationale for this wider application of the evidentially more stringent test was that someone should not be put on trial if it could be predicted with some confidence that he was more likely than not to be acquitted,

since this is 'both unfair to the accused and a waste of the restricted resources of the criminal justice system' (1981a: para 8.9).

Although the Royal Commission never explicitly characterized its proposed Crown Prosecution Service in terms of its 'independence', the Government's response to the report was to recognize a strong case in principle for 'an independent prosecution service'.[8] Independence was to become the keyword in the subsequent publication in October, 1983 of the White Paper, *An Independent Prosecution Service for England and Wales*. It can be argued, however, that the prosecutorial standard and independence are not strictly separable: since adoption of the reasonable prospects test may in itself entail some adjustment to the traditional solicitor–client relationship existing between the lawyer and the police. In dealing with professional conduct generally, and duty to the court specifically, the solicitor is exhorted in a Law Society publication not to mislead the court but: '*He ought not to forsake a client* on mere suspicion of his own as to the case or *on any view he might take as to his chances of success*' (Lund 1973: 54; emphasis added). Since the DPP's 'prospects of conviction' is not dissimilar from 'chances of success', and since this test was to provide one of the foundations for a revision of prosecutions, the solicitor–client relationship was clearly an impediment to the Royal Commission's proposals.

Similarly, adoption of the higher prosecutorial standard may help the prosecutor to ensure that his view of how a case should be handled prevails over that of the police and of counsel at trial. First, each case referred by the police to the prosecutor, presumably still on the basis of *prima facie* evidence, will require active reassessment to determine whether the reasonable prospects test can be met. The presumption of proceedings where *prima facie* evidence exists will therefore be challenged. Secondly, in a system in which cases and specific charges are only proceeded with if the prosecutor has decided that there is a reasonable prospect of conviction, there is significantly less scope and incentive for prosecution counsel handling the case to engage in plea negotiations than in a system where cases are brought merely on a *prima facie* standard. If plea negotiation amounts to one of the ways in which the prosecutor's control over the course taken by a case may be undermined, it is less likely to occur where the prosecutor employs reasonable prospects in his decisions. This is because he is less likely to 'overcharge' in the first instance.[9] It would be logical to infer that both the early need actively to review an initial decision by the police to prosecute and

the reduction of the later scope for plea negotiation will protect the prosecutor's independence.

Thus, it is not surprising that the prosecutorial standard became the first focus for reform. Early in 1983 the Government affirmed its commitment to the spirit of the Royal Commission's recommendations when the Attorney General sent a circular to all Chief Officers of Police, which provided guidance on the criteria for prosecution (Attorney General 1983).[10] These criteria are similar to those employed by the DPP, in that they incorporate guidance on the meaning of the reasonable prospects test and emphasize the public interest element in the decision to prosecute. Not only is the DPP's approach to prosecutions to be promulgated throughout the Crown Prosecution Service, but the subsequent White Paper also specified that the Director is to head the new service, with his department forming its central headquarters.[11] The DPP is to become the linchpin of the proposed service.

THE DPP: FUNCTIONS AND WORKLOAD

The post of Director of Public Prosecutions was created by statute in 1879; its historical development has been fully explored by Edwards (1984) and will not be reviewed here. The essential functions of the office have not altered substantially in the ensuing 100 years.[12] At the time at which the research was conducted there were some fifty-nine professional officers (POs) at the office of the DPP, working in ten divisions each headed by an Assistant Director (AD). Two Principal Assistant Directors (PADs) oversaw their work, with the Deputy Director and Director at the apex of the department.[13]

The fundamental role of the DPP is to undertake prosecutions in cases of importance or difficulty, and to offer advice to the police when such advice is sought. The DPP operates under the Prosecution of Offences Regulations 1978, with a consolidating statute in 1979. Section 2 of the Prosecution of Offences Act 1979 states:

> 'It shall be the duty of the Director, under the superintendence of the Attorney General to institute, undertake and carry on such criminal proceedings and to give such advice and assistance to Chief Officers of Police, Justices' Clerks and other persons concerned in any criminal proceedings respecting the conduct of those proceedings as may be prescribed, or as may be directed, in a special case, by the Attorney General.'

Subsection (2) stipulates that: 'The regulations shall provide for the Director's taking action in cases which appear to him to be of importance or difficulty, or which for any reason require his intervention.' The DPP thus has a duty to prosecute and advise in prescribed cases and the discretion to take action in any case he deems appropriate.

However, this role limits the DPP to a small proportion of indictable cases. In only 3 per cent of all indictable offences is the decision to prosecute taken by the DPP, and in a further 5 per cent advice on prosecution is offered to the police. This small percentage is not evenly spread across the criminal calendar: the DPP is responsible for dealing with all cases of certain types, for example all prosecutions of police officers and all murders. The caseload consists chiefly of cases tried at the Crown Court. The DPP's officers are responsible for the decisions as to whether and how to prosecute in a particular case, and for the conduct of the pre-trial stages of a case – up to and usually including committal to the Crown Court. However, the case is conducted by counsel at trial.[14] In this sense, the responsibilities of both barristers and solicitors employed at the DPP may be likened more to those of advisers than advocates.

For DPP cases tried at the Central Criminal Court the Director can nominate Treasury Counsel to conduct the case for him. At the time that the research was conducted there were 7 senior Treasury Counsel and 10 junior Treasury Counsel plus a supplementary list of 27, all appointed by the Attorney General.[15] The Treasury Counsel system has two main advantages. First, the DPP has priority in calling upon counsel of the requisite calibre and experience who are familiar with his approach to prosecutions. Secondly, counsel can be available to offer advice to the DPP during the earlier stages of a case – sometimes even before the decision to proceed has been made. However, there is the possible drawback that Treasury Counsel lose the benefits said to accrue from handling defence cases too (see p. 51 and letter to *The Times*, 10 August, 1984).

The 'consent' cases

Criminal proceedings for certain offences may only be taken once the consent of the law officers (Attorney General or Solicitor General) has been given; more than sixty statutes require the DPP's consent, either exclusively or in substitution for either of the other

law officers.[16] Although there is no obvious pattern in the consent provisions, Parliament appears to have included the requirement where otherwise there would be a risk of prosecutions being brought in inappropriate circumstances. Since it is not always possible to define precisely the intent of the legislature in passing a particular statute, the inclusion of a consent provision may help to ensure that prosecutions are restricted to those cases where the spirit as well as the letter of the statute is contravened – examples are sexual offences such as incest, buggery, and gross indecency (restricted for the latter two to categories where one of the parties is under 21), and the theft of, or damage to, the property of a spouse. These consent provisions can assist in securing consistency of practice, prevent abuse through recourse to vexatious private prosecutions, and enable account to be taken of mitigating factors which may not be susceptible to statutory definition.[17] Consent provisions are also included where there is likely to be considerable public concern about the decision to prosecute – either because the law deals with matters that are particularly sensitive or controversial, such as race relations or censorship, or because there are important considerations of public policy such as may arise in relation to official secrets, corruption, or explosive substances. Thus, the consent provisions apply to offences varying from quite minor to very serious cases which may have national or international repercussions. Although only the consent of one of the law officers is required before proceedings may be instituted,[18] the more serious cases will also tend to be retained for prosecution by the Director's department itself, rather than being referred to the police to prosecute once consent has been granted.

The 'regulations' cases

A number of other serious offences have to be reported to the DPP under Regulations 6(1) and 6(2) of the Prosecution of Offences Regulations 1978. The prosecution of these offences is invariably handled by the DPP. They include homicide, some offences under the Offences against the Person Act 1861, large-scale conspiracy and fraud, robbery using firearms, cases involving EEC law, and multiple rapes.[19] A provision under the 1978 Regulations enables the DPP to vary the list of reportable offences as the pattern of serious crime changes. Another empowers chief officers of police to seek the DPP's advice in any case.