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‘Justice requires that prosecutions should be undertaken by a body which is fully independent and impartial’. To what extent does the CPS fulfil this role?

Until 1986, criminal prosecutions were officially brought by private citizens rather than the state: in practice, however, most prosecutions were brought by the police, though technically they were prosecuting as private citizens.

This issue had been brought to ahead in 1970, when the law reform group, JUSTICE, criticised the role of the police in the prosecution process. It argued that it was not in the interests of justice for the same body to be responsible for the two very different functions of investigation and prosecuting. This dual role prevented the prosecution from being independent and impartial: the police had become concerned with winning or losing, when the aim of the prosecution should be to discovery the truth. As a result, there was a real danger of the police intentionally withholding from the defence evidence that might make a conviction less likely. The report also highlighted the fact that public policy and the circumstances of the individual were relevant considerations in the decision to prosecute, and that the English legal system was unique in Europe in allowing the whole process, from interrogation to prosecution, to be effectively under the control of the police - who were not trained as lawyers or advocates - in the majority of cases: this system contravenes Montesquieu’s theory of the ‘separation of powers’ and has led to various miscarriages of justice, including ‘**The Guildford Four**’, ‘**The Birmingham Six**’ and ‘**Judith Ward**’.

A similar review was also undertaken by the Royal Commission on Criminal Procedure (RCCP) in 1981, which highlighted various concerns: there was a lack of uniformity (with differing procedures and standards applied across the country), inadequate preparation time for cases (**R v Lawrence**) and the current system prevented a consistent national prosecution policy. As a result of these findings, the RCCP recommended the establishment of a Crown Prosecution Service, which was later set up under the **Prosecution of Offences Act 1985**, and is headed by the Director of Public Prosecutions (currently Ken McDonald), who reports on the running of the service to the Attorney General (Lord Goldsmith), who in turn is responsible in Parliament for general policy.

The establishment of the CPS means that the prosecution of offences is now separated from their detection and investigation. However, it has no involvement in cases where the police decide not to prosecute, including those where the offender is given a caution. If the police decide the offender should be prosecuted, a file on the case will be sent to the CPS. They then review that decision, on the basis of criteria set out in the **Code for Crown Prosecutors**, which provides that the decision must be taken in two stages. First, they must ask whether there is enough evidence to provide a ‘realistic prospect of conviction’, that is to say that a court is more likely than not to convict. If the case does not pass this evidential test, the prosecution must not go ahead, no matter how important or serious the case may be.

If the case does pass this first test, the CPS must then consider whether the public interest requires a prosecution. For example, a prosecution is more likely to be in the public interest if a conviction is likely to result in a significant sentence, if the offence was committed against a person serving the public (such as a police officer) or if the offence, although not serious in itself, is widespread in the area where it was committed. On the other hand, a prosecution is less likely to be in the public interest where the defendant is elderly, or suffering from significant mental or physical ill-health. At the end of this two-stage test, the CPS may decide to go ahead with the prosecution, send the case back to the police for a caution instead of a prosecution, or take no further action: this decision rests entirely with the CPS, and the police need not be consulted.

It is clear that there are various benefits of the CPS, including the fact that it appears to promote a higher degree of consistency in prosecuting throughout England and Wales; the establishment of the guidelines laid down should mean that ‘weak cases’ are discontinued before they reach court, therefore saving vital time and money; and due to the fact that such prosecutions are brought independent of the police, civil liberties should be respected and upheld and justice should prevail. However, it is important to acknowledge that despite these advantages, the CPS ran into difficulties from the very beginning, mainly because the Home Office had underestimated the cost of the new service: the salaries offered were low, therefore making it impossible to find sufficient numbers of good lawyers, resulting in a reputation of incompetence and delay. A further issue which raised concern involved the delicate relationship between the police and the CPS: the police resented the new service and its demands for a higher standard of case preparation from police. While the CPS saw a high rate of discontinued cases as a success story, the police saw this as letting offenders off the hook.

It is important to acknowledge that when the CPS first started to operate in 1986, it was organised into 31 areas, each with a Chief Crown Prosecutor. These were subsequently increased to 38, but in 1993, in an effort to improve efficiency, the areas were enlarged into just 13 across the country and the administration was centralised around headquarters in London. In the light of continuing concern over the functioning of the CPS, a review was carried out by a body chaired by Sir Ian Glidewell in 1998, which heavily criticised the CPS. It concluded that the 1993 reforms (where the 38 areas had reduced to 13) had been a mistake, as it made the organisation too centralised and excessively bureaucratic. It also found that there was a problem with judge-ordered acquittals (where the case is too weak to be left to the jury and the judge acquits the defendant), which was in many cases due to inadequate compilation of case papers; the drafting of inadequate or erroneous indictments; and the counsel being briefed too late to put things right: Glidewell commented that the CPS “has the potential to become a lively, successful and esteemed part of the criminal justice system, but…sadly none of these adjectives applies to the service as a whole at present”.

The key recommendation of the report was that there should be a devolution of powers from the centre to the regions, with the London headquarters playing a more limited role. This would involve replacing the existing 13 CPS areas with 42 areas corresponding to police force area, with each area headed by a Chief Crown Prosecutor with considerable autonomy and an independent budget. In addition, it proposed that the CPS should take over the conduct of prosecutions immediately after the police charge a defendant. The CPS would then organise the initial hearing in the magistrates' court and make all the arrangements for witnesses to attend court proceedings. It also proposed that teams of CPS lawyers, police and administrative caseworkers should be established to prepare and deal with many straight forward cases in their entirety (i.e. both the case preparation and the court advocacy). Further amendments to the criminal procedure are also the result of the 1997 Narey Report, which proposed that CPS staff should work alongside the police officers to prepare cases for court in order to prevent unnecessary delays in the system.

In conclusion, it is clearly evident in view of the information outlined above that in recent years, various steps have been taken to improve the structure and set up of the CPS. However, there is still doubt as to how far the CPS provides an independent perspective on deciding whether or not to prosecute. Since the police still take the initial decision on whether to pass the file to the CPS, such decisions are taken without the CPS being able to exercise any control, which leads to wide variations in cautioning rates. Where the police do refer a case for prosecution, the CPS makes up its mind on the basis of information with which it is provided – it cannot ask for further inquiries to be made. Given that the police, once satisfied that the suspect is guilty, will tend to look for evidence that supports this conclusion, and see any material that points in another direction as mistaken, or irrelevant, the file may point a very partial picture of the true situation.

In my view, although it is clear that various amendments have been made to improve the CPS and the criminal justice system, I support the view advocated by Sir Robin Auld, who argues that the CPS should be involved in criminal cases at an earlier stage and that it should be the CPS and not the police (with the exception of very minor or urgent cases) who decides the appropriate charge. Therefore, in my view, whether or not the CPS (or as it might been renamed in the near future, the Public Prosecutions Service, under plans put forward by David Blunkett) will become totally impartial and independent depends to a large degree on what further alterations are made to enhance the CPS's position and influence, such as the recent establishment of the Crown Prosecution Service Inspectorate.