PROSECUTING BY CONSENT – A PUBLIC PROSECUTION SERVICE IN THE 21st CENTURY

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Below is the annual JUSTICE Tom Sargant Memorial Lecture given by the Director of Public Prosecutions on 19th October 2004.

Introduction

The office of the Director of Public Prosecutions was created by the *Prosecution of Offences Act 1879*. Prior to this, all prosecutions in England and Wales were undertaken either by private individuals or by the police. But the new Director's powers were limited to certain serious or sensitive cases. And so for another hundred years the vast majority of criminal prosecutions continued to be brought by the police. In our jurisdiction there was still has no disinterested public authority empowered to conduct routine criminal prosecutions. This was, in international terms, a highly unusual state of affairs - and it impacted adversely on the administration of justice in this country for generations. Indeed, in spite of the creation of the Crown Prosecution Service in 1985, or perhaps because of its severely curtailed remit, the damaging effects of this continue to be felt. I want to show how we are, finally, seeking to move decisively away from this legacy.

Essentially our purpose is to turn the CPS into what it should have been from the start - an influential organisation of stature, at the heart of criminal justice, with all the powers and responsibilities associated with similar bodies in other jurisdictions: in other words a properly empowered public prosecution service. It may well be that this, I would argue belated, transformation could not have been embarked upon until recently. It may be that we have had to go through the experiences of the last eighteen years to arrive at a position where we could begin to develop ourselves in this way. In any event, the process has begun. Of course, there is a long way to go.

A little history

By the mid-1980s a consensus had at last generally been reached that it was not appropriate for the police both to investigate and to prosecute crime. There needed to be separation. So, the *Prosecution Of Offences Act 1985* set up the Crown Prosecution Service, under the leadership of the Director of Public Prosecutions. At a stroke, the DPP became responsible for all criminal prosecutions commenced by the

police in England and Wales. Of course, in spite of the general consensus, we all know that this was not a development which was welcome to everyone. Some in the police were hostile.

As I have suggested, the remit granted to the new CPS was as notoriously limited as its funding. Essentially, the CPS would receive files of cases investigated and charged by police. It would review those files in accordance with appropriate prosecution tests. If those tests appeared to be passed, the case would, more often than not, be handed over to a barrister in independent practice to prosecute through the courts. Beyond this, the huge focus of the CPS's own work and brutally limited advocacy was in the Magistrates Court. The Bar, of course, was happy enough with this.

Yet, in spite of the modesty of the new CPS's function (one government minister of the day describing it as 'low grade legal work'), even the responsibility that the CPS was given for reviewing files, and so for necessarily deciding that some cases did not pass the appropriate test, was particularly unpopular with the police - and with some sections of the press. In certain quarters, we became known as the Criminal Protection Society. This was an attitude which completely failed to understand, as some still do, the distinction between evidence justifying arrest and evidence sufficient for prosecution- or the risk to justice and the dreadful financial waste associated with confusing the two. This simple failing had clogged our courts for years with an endless stream of cases which should never have been there in the first place- and which were never going to result in convictions let alone pleas of guilty. I have no doubt it also led to many miscarriages of justice.

The only purpose was to consume time and energy and to sap public confidence because so many cases seemed to be going nowhere- or convictions were obtained in others which were so implausibly brought. The cost in professional frustration was incalculable. This was a system which was literally incompetent. The failing I have identified also served to highlight, in the most simple and straightforward way, what was wrong with a criminal justice system that lacked a properly empowered prosecuting authority. For its absence from police stations and the point of charge, to its absence from the courtroom and from everywhere in between, justice in those days suffered from a continuing imbalance which did nothing for public confidence.

An equally damaging and lasting effect of the difficult early relationship between the CPS and the police was a disconnection between us and the public - particularly victims and witnesses, for whom the police retained sole responsibility. The CPS was seen as aloof, avoiding direct contact with the public and not explaining prosecution decisions except occasionally by a brief reference to the code test that had been applied. In the early days, our offices were even ex-directory, lest outside contact contaminate the purity of our albeit very limited prosecutorial decision making. This was a double whammy. In fact we had little power, but we were seen as remote, we refused to explain ourselves- and so we usually got the blame for everything when things went wrong. And the circle was completed by our suffering in silence.

Let me state the obvious: it was completely untenable, and corrosive of public confidence in the criminal justice system as a whole, to have a prosecution service that was not respected by the public. All this meant that the prosecution service had to develop in stature. It had to assume new roles. It had to take over responsibility from investigators for all those decisions which were properly decisions to be taken by lawyers. It had to move into new areas of practice so that a career with us provided the best criminal lawyers with the opportunity to exercise all the skills their training has provided- including, importantly, advocacy.

My predecessor David Calvert-Smith recognised these problems and realised that without change, public confidence in the CPS as a credible organisation was at risk. He was right. And what needed changing went right to the heart of the CPS's original remit. Fundamentally, it is not tenable for us to be complicit in a public perception that we are somehow sandwiched between the police and the Bar, working the Magistrates Courts or otherwise playing pass the file. For a public prosecuting authority to accept such a role:

- distorts the balance of the system, woefully compromising evidence gathering, case building and victim and witness care;
- savages our status; and above all;
- results in a poor service to the public.

Not least, any such authority would find itself third or fourth on any list of places an ambitious criminal lawyer would want to work.

And so, at the turn of the century we promoted reforms such as communication with victims, increasing engagement with the public, improved witness care and a return to closer working with the police. As a result the CPS is very far from the organisation that was set up in 1986. It has grown in public respect. It has won the trust of the police who are supporting our current the reforms in a way unthinkable in the 1980's. And it has won the confidence of the executive, which has invested it with significant new resources and an increasing role in driving justice reform. It also contains people of huge talent and commitment from all backgrounds and races. It is the biggest law firm in the country by a mile. And I think it is clearly now ready for the next and most radical stage in its development.

Accountability and independence

I want to explore some of the issues raised by our plans for reform and explain what lies at their heart. And the principle of prosecuting by consent, which is set out in the title, encapsulates perfectly the major issues that face the CPS in this process and in this new century. It is about exercising power with accountability.

Let me go straight to that context. There is no doubt that necessary reforms in the role of prosecutors are making them more powerful. This is all about power, after all. That is inevitable as we build an organisation which begins at last to shoulder its appropriate share of responsibility in criminal justice. But, process is part of a contract. People will accept an enhanced role for prosecutors so long as we make a bargain to hold fast to values of fairness, impartiality and independence. That is to say that in playing a more central role in prosecuting criminal activity robustly, promptly and fairly, we aim only for safe convictions in which the public can have confidence. An essential foundation of public confidence in criminal justice is that prosecutors should be trusted. Indeed, that is the first duty of prosecutors: to be trusted.

Equally, an essential precondition of public trust is that we should be independent. People in this country do not want politicised justice, any more than they want prosecutors who merely act as tame lawyers to the police. People in this country

want a prosecution service that is confident strong and independent. We all understand that decisions taken with fairness impartiality, integrity and independence are more likely to deliver justice. Decisions that, for whatever reason, lack these characteristics risk miscarriages of justice. They also seriously undermine confidence in the rule of law, on which everything else depends.

So, we strive to find our own place in the constitutional firmament. This is not always easy. It presents challenges. But these are challenges of practice rather than of principle. There is unanimity on the principle. These twin requirements of public confidence and independence seem to me to raise in turn two issues.

Community engagement

First, it is obvious that in carrying out their functions, prosecutors must have the confidence of the public. That's what brings authority. So, quite contrary to what used to be believed, prosecutors must be responsive to, and engage with, the communities they represent. To do this properly may require them to take on additional duties or powers. As the police have long recognised, if the community has confidence that the police represent and respond to their concerns, there will be a greater willingness on the part of the public to play its part in the process. An obvious example: in countries where the police are an instrument of state oppression or are perceived as a coercive force, they are less likely to be able to rely on the practical support members of the public to assist them in carrying out their essential functions, including upholding the rule of law. The same principle applies to public prosecutors. Victims and witnesses are less likely to put themselves to the trouble of reporting crime, making statements and attending court if they are not confident that the prosecutor has taken into account their interests in the case.

But the degree to which those interests should be taken into account brings me onto my second point. Prosecutors must also remain impartial. This is an essential attribute of independence. Decisions must be independent and fair. A public prosecutor has to be just - and has to be seen to be so. But this is not always easy. Our society is hugely diverse. This is one of its greatest strengths. But it also means that there are communities within communities which may have very different needs, desires, opinions, even morals. While there is usually a shared interest across communities in being protected from violence or theft, there are also circumstances where the position of one group may conflict directly with that of another. An

expression of free speech by one person may be considered threatening or offensive by somebody else.

So there are obviously tensions between engaging with the community and maintaining an impartial independent role. But in spite of these, I firmly believe that the CPS needs vigorously to reposition itself as an outward looking prosecuting authority that is accountable to the public that it represents, while retaining the independence and discretion that is essential to its quasi-judicial function. In my view, we have a positive duty to engage with the public, to take into consideration developing social concerns and mores, to identify those areas where we are lacking tools to do the job and then to engage with the public in a debate about our acquiring them. We have a duty to be publicly accountable.

The old fashioned idea that criminal justice somehow sits above the community and consists of principles and practices beyond popular influence or argument is elitist and obscurantist. We are putting this new approach into practice. We are seeking and developing engagement with communities at all levels- in fact I insist on this as a part of our most basic duty as public prosecutors.

Policy development

Perhaps this is most starkly seen in the field of policy development. We spend a lot of time on this. Obviously, we don't just move through our work blindly. So I have a policy directorate which consists of some 70 lawyers and other staff. And we develop priorities and guidance and rules of working for our staff. But we can't do this adequately without community help. So now we go looking for it. We have already done it with domestic violence; racist and religiously aggravated offences, homophobic crime and serious sex crime. In essence we went out and consulted with community groups, the voluntary sector and other agencies. And we took account of everything we were told before drafting and publishing policy documents in these areas.

The idea is that we are properly informed. And that we can be judged against what we say we will do. This is particularly important in the area of hate crime. We understand that these offences are particularly serious because they are motivated by discrimination and hate and strike at the heart of diversity in society. So I also have regular meetings with black and minority ethnic groups, faith groups, secular

women's groups, LGBT (?) groups and so on. We listen to them to build up relationships and so we that we can take their views into account when we are developing new policies. The only sensible way of finding out what people want is to go and ask them, not to make assumptions on their behalf. That is why we are also developing a national community engagement strategy, so that as well as becoming an integral part of front line prosecutor activity, it also becomes an integral part of management, planning and strategic decision-making.

We have moved a long way. From the threat of a formal CRE investigation in 2001 to our current status as a Whitehall beacon organisation in diversity issues. Only last week we were short-listed in the Guardian's Diversity awards for 2004. None of this is a 'bolt-on'. It seems to me that it is part of the essence of what makes a prosecution service public and trusted.

A public prosecution service for the future

So, now we want to build on this community engagement and increasing confidence to create a prosecution service that is a world-class organisation. World class in decision-making, case-building and presentation, staffed by talented people and seen as a world class employer.

But beyond winning more engagement from the public in our work, what are the concrete steps we need to take?

Strengthening the prosecution process

Early advice and charging

Decisions taken at all points of the prosecution process need to be of the highest possible quality. In particular, investigations need to be focussed and consistent with due process. The fundamental decision about whether the evidence turned up by an investigation justifies a prosecution needs to be sound. If it a prosecution is required, the selection of the appropriate charges must be accurate. These are all jobs for prosecutors. And finally, we are giving them to prosecutors. My staff are moving into police stations to work with investigators, giving advice and counsel where it is

necessary. Sometimes we help police to design operations. Sometimes we advise them to conclude operations or to run them in a different way. We are a legal resource that investigators need and increasingly trust.

We are giving our prosecutors the power they should always have had to make the decisions and judgments and calls, the legal decisions and judgements and calls, that prosecutors as lawyers should make, including the power to rule that appropriate cases should be diverted away from the courts and dealt with elsewhere. The new statutory charging arrangements place the charging decision, by law, in the hands of the prosecutor. This is a significant transfer of power from investigator to prosecutor. It's a major signifier of the future. It is the basic building block in an entirely new architecture for criminal justice. In essence, we shall become the gatekeepers in the system. No case goes ahead unless it gets through us first. Of course you will readily see that this also means that any investigation which defies our advice in its conception or in its conduct is likely to doom itself before it begins. This simple truth will change cultures in ways we cannot even yet begin to imagine. More immediately, this is a huge opportunity for us to use our skills to ensure that the right decisions are made from the outset, so cases can be properly built and safe convictions obtained against guilty defendants. Equally to ensure that we do not bring cases which should not be brought and which are not justified by any sufficient evidence.

This is a two way street. Because I have no doubt whatsoever that the involvement of a prosecutor from the earliest stages of an investigation, right through to the charging decision and beyond, far from being something to fear, will clearly and tangibly strengthen fairness and due process. In every other fair trial jurisdiction, prosecutors and investigators work together and in cooperation. Our failure to follow this model has compromised investigations and it has compromised prosecutions. I am sure it has also resulted in miscarriages of justice. It has been bad for victims, for witnesses, for defendants and for the public. This is going to change.

Pre trial interviews

But we need more than this. We also need some other process changes. Let me start by saying this: I agree with my old pupil mistress, Helena Kennedy, that when you are embarking on a reform programme in an area as sensitive as criminal justice, you start by deciding what is not negotiable.

So let us be clear: fair trial, routinely open, before an independent and impartial tribunal is not negotiable. Equality of arms, fairness between prosecution and defence, is not negotiable. The right to full disclosure of the case against you is not negotiable. And the criminal standard of proof is not negotiable. It seems to me appropriate that the Director of Public Prosecutions should say all this plainly and clearly.

Indeed I expect all criminal lawyers would agree on the list, a litany of Article 6 rights, those I have mentioned and others. As many of you will know, I was a defence lawyer at the Bar and my chambers was well known for its human rights work. I understand these issues. But beyond what is not negotiable in a civilised system of justice, we have to recognise what is baggage. And in this jurisdiction we have a fair bit of that.

Some of you will be aware that before I took up my post, the CPS undertook, on behalf of the Attorney General, a public consultation exercise on the question of prosecution pre-trial interviews with witnesses. This followed, I think, the Damilola Taylor case. The Attorney has yet to publish his conclusions, but I am firmly of the belief that the rule forbidding such interviews should go. Prosecutors must be permitted to interview witnesses about their evidence where they believe it is necessary to do so to reach a fully informed prosecution decision. Most members of the public are astonished to learn of the existence of a rule forbidding such an obvious safeguard and they are right to be astonished. I cannot think of another fair trial jurisdiction where the principle applies. It's an unjustifiable throwback to the days I mentioned at the outset when prosecutions were brought by private individuals. It's baggage and it needs to go.

Empowering the prosecutor to interview a witness about the evidence the witness can provide is a natural part of giving prosecutors a greater role in advising the police and the responsibility for determining the charge. Enabling prosecutors to take, in the words of Lord Justice Auld, 'full and effective control of cases from the charge or pre-charge stage'. This is not an Americanisation. Witness interviews are accepted practice in the Canadian provinces, Australian states and in Northern Ireland. Indeed our research has discovered that in Canada any judge would consider it a dereliction of a prosecutor's duty if he or she had not interviewed an important witness before the trial began. Anyone who is familiar with Canadian constitutional law will know

Canada to be a jurisdiction where human rights, due process and the separation of prosecution and investigation are taken very seriously indeed. Interviewing witnesses is not seen as incompatible with these principles. And that is because it is not.

As the DPP for New South Wales said in a letter on this topic to one of my staff: *'It's high time (you) entered the 21st century'*. I agree with him.

Victims and witnesses

Indeed the criminal justice process in England and Wales is unusual, if not unique, among common law jurisdictions in the extent to which prosecutors have traditionally keep themselves at arms length from prosecution witnesses in all circumstances. This includes victims. So that far from interviewing them pre-trial, we did not event talk to them. It was almost as if they were unclean. The sight of a prosecutor talking to a victim would provoke a furious complaint to a judge or a lacerating, or supposedly lacerating, cross-examination. In my view, this world of criminal lawyers was becoming more and more unreal- and more and more divorced from what the community wanted and expected from us. Because what this approach absolutely guaranteed was the disengagement of victims and witnesses from the prosecution and trial process. Disengagement implies that they were once engaged; perhaps it would be more accurate to describe it as non-engagement.

As the 20th century was drawing to a close, this situation began to change, much of it as a result of the vision and the work undertaken by my distinguished predecessor, David Calvert-Smith. For the first time, prosecutors were obliged routinely to explain their decisions to people who were not part of the criminal justice system. This created a really fundamental change of culture in the CPS. Though I have to say that the fact we had to wait until the 21st Century to see this happen is an indication of how hidebound the system had become.

No witness no justice

I am pleased to say that now we're now taking this very much further. Our 'No Witness No Justice' witness care programme is currently being implemented throughout the country. This has, at last, brought prosecutors directly and positively into the business of victim care.

From now on, whenever a statement is taken by police, they will be required to undertake a needs assessment for the witness. This means considering the specific

needs of the witness and the preferred means of contact, as well as victim personal statements, the need for any special measures, willingness to attend court, childcare and transport problems and so on. After charge, dedicated witness care teams will manage the delivery of information and support to witnesses throughout the life of a case, providing a single point of contact and tailoring information and support to meet the individual needs of the witnesses. A 'thank you' letter will be sent at the conclusion of the case, which will also include the details of the outcome. How is this working in practice? Well, the evidence so far is extremely promising. Witness attendance rates have improved in all areas, by an average of 19 percent across the pilot sites. Ineffective trials resulting from witness problems have reduced by 27 percent.

Broadly, we are placing prosecutors at the heart of this programme, which is right where they belong. Bluntly, I expect prosecutors to have a sympathetic and civilised relationship with victims and witnesses.

Conditional cautioning

Prosecutors in other fair trial jurisdictions also have an important role in diverting appropriate cases away from the courts. I am pleased to say that we are shortly to be given this power too.

For many years police officers have had the power to caution suspects. Our power will go step further. We shall, where appropriate, conditionally caution individuals. This might be tied to drug treatment, restorative action, the payment of compensation and so on. This is an important development. Again it will change the culture and make explicit a prosecutor's role in crime reduction and community safety. On an individual level, the introduction of the conditional caution will permit prosecutors to refer suitable offenders to early drug intervention programmes, such as those currently being piloted by the Home Office.

This has the potential, in appropriate cases, to reduce levels of, for example, acquisitive drug related crime at far greater benefit to the community than anything achieved by putting people endlessly through court or prison. I shall be expecting prosecutors to work with local communities, voluntary organisations, the police and other agencies to develop initiatives tailored for local needs. In this way, as with

others, contact between my staff and the public will increase. And the important and appropriate role of prosecutors in crime reduction will be made explicit.

Advocacy

In the United States, in continental Europe, in other fair trial countries, the public prosecuting authority is an employer of choice. We need to be as well. In the United States, the brightest law graduates head for the District Attorney's office or to work for the Department of Justice, sometimes staying, sometimes later moving off into private practice. They routinely recruit successful lawyers from private firms. This is as it should be. Open democratic societies need prosecuting authorities of stature, staffed by the best people, well versed in rights and due process.

Much of what I have said about the reform of our role and our increasing power and influence within criminal justice, makes us more attractive as an employer. And I am delighted to say we are finding it easier and easier to recruit high quality people. In particular, all over the country, increasing numbers of lawyers are joining us from private practice. I welcome this and I encourage it. It's a very healthy development.

But as I said at the outset, we need to be offering lawyers in our organisation all the challenges that criminal lawyers train for. Many will greatly enjoy much the challenge of working side by side with the police in developing investigations. This is exciting and energising work, right at the front line.

Many will enjoy the challenge of being charging lawyers, of making the final decision about whether a case goes to court or not. Many will enjoy their new role in diversion, or in community engagement and policy work. And many will enjoy advocacy. Indeed my own strong view is that if we do not have this as a realisable aspiration in the prosecution service, we will not succeed in any of our other plans. You cannot expect to be an employer of choice for criminal lawyers without the possibility of advocacy. So we need to develop a cadre of trial lawyers. This will not threaten the Bar. Firstly, we will never do anything approaching all prosecution advocacy. Secondly, I have no doubt that, just like in other jurisdictions, future advocates will move backwards and forwards from the prosecution service to the Bar - as no doubt I shall.

Finally, the Bar is an institution of fundamental public and constitutional importance and the criminal Bar, in spite of many doomsayers, has clearly grown in power in the

26 years that I have been a member of it. Perhaps it needs to be a little more self-confident. Of course a prosecution service will always use barristers of ability and commitment- and in huge numbers. But trial law will strengthen us at all levels. It will improve our advice to the police. It will improve our charging decisions. It will improve our witness care. It will change the whole culture of our organisation for the better. And we are a hugely diverse group of lawyers. We can help to change the face of the courts for the better, too.

Conclusion

All this is ambitious. But I think in the past, my organisation has, if anything, lacked ambition- and this lack of ambition has not served the public interest. All over the world, British legal institutions are, still, admired and respected as models. It really is time the same applied to our public prosecution service.

More power to determine and to shape cases, more engagement with the community, more respect for victims and witnesses, a greater role in court, profound attachment to independence and the possibility, finally, of judicial appointment- these, I think, are the features of a prosecuting organisation which is fit for public purpose. They are also the building blocks of our future.