

Tom Sargant Memorial Annual Lecture

20 October 2015

The Crown Prosecution Service: Protector of victims' and defendants' rights

Introduction

Imagine you are a victim of crime. You have had the courage to report it.

- If there is any evidence to suggest who the perpetrator was, would you want the case to go before the courts?
- And if you're told it won't, would you want the chance to challenge that decision?
- If it does go to court and you have to give evidence, including facing cross-examination - would you want to know what it's going to be like? Understand the sorts of things you might be asked?

Have a think about it.

But imagine you have been accused of that crime.

- If you know you are innocent and on balance the evidence suggests you would be acquitted, would you think it is fair to go through the court process during which some people may question your innocence?
- If you are told no further action is going to be taken, would you expect that to be the end of the matter?

- Or if it went to court would you want the evidence against you to have been prepared in a way that it might give your accuser an unfair advantage over you? For a lawyer to have coached your accuser?

These questions make clear that the rights of the victim and the defendant must be carefully balanced – and that the CPS plays a crucial role in achieving that balance. We must protect the rights of defendants and ensure their right to a fair trial – while providing the best possible service to and delivering justice for victims and the wider public we serve.

So tonight I want to discuss how we put both the victim and the defendant at the centre of the criminal justice system so we can deliver exactly that service.

I am going to do this by looking at the CPS' involvement in different stages of the criminal justice process – and explain at each point how we work to protect both the interests of defendants and victims:

- Firstly and importantly and the decision on whether or not to charge.
- Secondly, through the exercise of our disclosure obligations.

- And finally the court process.

But first I want to remind us about:

- the role of the CPS – and why we were established
- as well as to look at how the role of victims has developed over time – without damaging the defendant's right to a fair trial.

The role of the CPS

So starting with the role of the CPS.

The CPS is the principal prosecuting authority for England and Wales, acting independently in criminal cases investigated by the police and others such as HMRC, NCA, DWP etc.

The CPS:

- decides which cases should be prosecuted – keeping them all under continuous review;
- determines the appropriate charges in more serious or complex cases – advising the police during the early stages of investigations;
- prepares cases and presents them at court - using a range of in-house advocates, self-employed advocates or agents in court; and
- provides information, assistance and support to victims and prosecution witnesses.

And as DPP it is my responsibility to uphold the CPS as an independent but also transparent and accountable prosecution service.

In order to understand why we have an independent prosecution service it is necessary to understand the history and work which preceded its creation.

The question about the need for independence of prosecution decisions came to the public fore as a result of the Royal Commission on Criminal Procedure under the chairmanship of Sir Cyril Philips which reported in January 1981.

The report asked, how was the satisfactory working of a prosecution system to be judged? The Commission's response to this question was to consider the existing arrangements and its proposed system against the broad standards of fairness, openness, accountability and efficiency.

The existing framework was examined and important questions, such as:

- “is the system fair?”
- Are there “inexplicable differences in the way that individual cases or classes of case are treated locally or nationally?”
- Is it open and accountable in that those who make the decisions to prosecute or not can be called publicly to explain and justify their policies and actions as far as that is consistent with protecting the interests of suspects and accused?” (6.8)

The Report went on to stress that the proper objective of a fair prosecution system is to "... ensure that prosecutions are initiated only in those cases in which there is adequate evidence and where prosecution is justified in the public interest." (6.9)

In considering the separation of the investigator's and lawyer's roles the Report notes that it was "... said to be unsatisfactory that the person responsible for the decision to prosecute should be the person who has carried out or been concerned in the investigation." (6.24)

Overall, the Phillips Commission had three main criticisms of the Criminal Justice system in England and Wales:

1. The police should not investigate offences and decide whether to prosecute. The officer who investigated a case could not be relied on to make a fair decision whether to prosecute;
2. Different police forces around the country used different standards to decide whether to prosecute; and
3. The police were allowing too many weak cases to come to court. This led to a high percentage of judge-directed acquittals – in 1978 19% of all acquittals in the Crown Court were ordered by the judge and in 24% the judge directed the jury to acquit - 43% of cases resulting in acquittal failed because the prosecution was unable to adduce sufficient evidence to make a prima facie case.

As a result, the report recommended that a prosecuting solicitor service – which came to be the Crown Prosecution Service - should be established to cover every police force.

The service was to be structured to recognise the importance of independent legal expertise in the decision to prosecute; make the conduct of the prosecution the responsibility of someone both legally qualified and not identified with the investigative process; and achieve better accountability locally for the prosecution service, whilst making it subject to certain national controls.

This independence is as important today as it was then. We make our decisions in accordance with the Code for Crown Prosecutors, not as some might suggest because of pressure from the media or politicians.

Prosecutors guard their independence jealously and rightly so. But that does not mean that we should not be called upon to explain our decisions and to be accountable for them and I will come back to this later.

Historic changes to improve rights of victims

In the 1980s the criminal justice system was seen as more of a straight 'fight' between the prosecution and the defence, with victims often treated as bystanders. Since then, however, there has been a significant change in our understanding of the role – and rights – of victims.

Without question, victims are now treated with more respect, dignity and recognition. They are significant in reform of the system, appearing in policies relating to crime – both in respect of reduction and prevention.

The experience of victims is also used as a factor to determine the success of the CJS.

But what prompted this change and how was it brought about?

From the end of the 1980s a series of influential reports and surveys of victim experiences made it clear that victims and witnesses were not being given the best possible support. The first major response to this was publication of the first Victim's Charter in 1990, describing how the system worked and giving examples of good practice.

The role of the CPS also came under greater external scrutiny. There was increasing concern that the CPS should play a greater role and not rely on the police as the principal means of communicating with victims and witnesses as was the case at the time. The report: "Review of the Crown Prosecution Service" by Sir Iain Glidewell published in 1998, and the report of the Stephen Lawrence Inquiry by Sir William Macpherson in 1999, both contained recommendations that the CPS should deal directly with victims and witnesses.

In the wider CJS, the Victim and Witness Satisfaction Surveys in 2000 and 2002 were instrumental in making the case for greater change. The surveys revealed that 40% of witnesses would not want to give evidence in court again because of intimidation or the experience of going to court and being cross-examined.

They also highlighted issues such as the poor provision of information – and in some cases this resulted in a withdrawal of support for the prosecution, non-attendance at court and dissatisfaction with the process.

The 2002 the White Paper “Justice for All” published jointly by the then Home Secretary, Lord Chancellor, and Attorney General, played a very major part in setting out a new approach to victims and witnesses. The White Paper had an explicit aim of rebalancing the criminal justice system in favour of the victim. It sought to reform the system so that victims and witnesses would be supported and informed, and thereby empowered to give their best evidence in the court environment. All these developments resulted in a major overhaul of services provided to victims and witnesses by criminal justice agencies, including the CPS.

More recent changes for victims’ rights

In 2006, commitments to victims were placed on a statutory footing by the Code of Practice for Victims of Crime, known as the Victims’ Code, which sets out the service victims can expect from CJS agencies in England and Wales. The Witness Charter in 2008, although not statutory, introduced similar provisions for witnesses.

The CPS has been a key contributor to the revision of both the Victims' Code and the Witness Charter, which were republished in 2013. The Victims' Code will be re-issued again next month, ensuring that the requirements of the European Victims' Directive are enshrined. It is also a government pledge that there will be a victim's law.

By 2009, these developments and other cross-CJS initiatives such as 'Speaking up for Justice' which introduced Special Measures had increased satisfaction to a top line measure of 81% - with four out of five victims and witnesses indicating they were either fairly, very, or completely satisfied with their experience of the CJS.

However, even with the introduction of these provisions, the support being provided wasn't based on what individual victims told us they needed and a number of things prompted us to think yet again:

- A report by Sara Payne, Victims' Champion until 2010, recommended that the CJS should be addressing the needs of individual victims and witnesses.
- Louise Casey, Victims' Commissioner until October 2011, recommended that the CJS should be focusing its limited resources on those victims and witnesses who most need support.
- Inspectorate reports highlighted that the operation of joint CPS and police Witness Care Units had become too process driven.

- And research showed that in around 80% of cases, victims say that they do not want any information, advice or support from the state or from other sources.

In an effort to address these issues, we made further improvements in the support provided to victims, developing a far more tailored, targeted approach to supporting victims and witnesses within our Witness Care Units. We also enhanced the service we deliver to bereaved families to offer meetings at important stages of the criminal justice process – giving families the opportunity to meet the advocate who will present the case in court and to meet with the prosecutor following an acquittal.

And we launched a new policy that enshrines a victim's right to request a review of any decision taken by the CPS to not charge a suspect or to stop a prosecution. I will come back to this shortly.

Then, when I became DPP towards the end of 2013, I made the CPS service to victims a key priority for my five-year term. We have introduced new Victim Liaison Units with trained staff, undertaken a major survey of more than 7,000 victims and witnesses and are introducing new support for victims and witnesses at court – another subject I will come back to later.

But with every initiative to improve the support we provide to victims, I must ensure we do not damage the rights of the defendant to a fair trial.

Why defendants' rights are important

And why is that the case?

Because defendants' rights must be at the heart of any criminal justice system.

It is defendants and not victims who face the possibility of punishment if they are convicted, and in some cases, the loss of liberty. Because a conviction can carry such serious consequences, the system must ensure it avoids the wrongful conviction of the innocent. It also clearly does not serve the interests of victims or the wider community for an innocent person to be convicted while the true offender remains undetected, particularly with the potential to reoffend.

It is therefore vital that the criminal justice system works on the basis that the accused is innocent until proven guilty, and that the burden of proving guilt falls on the prosecution, which in criminal cases must be established 'beyond reasonable doubt'.

Charge

I want to move now to look at the different stages of the criminal justice process.

Of course there are protections for those accused of crime during police investigations.

But the role of the CPS in the criminal justice process really starts with a decision to charge a suspect – or not. So it is worth starting here in thinking about how we balance the rights of the victim and the defendant.

It was the Justice Committee in their July 2009 report who concluded that the CPS is a “gatekeeper” of the criminal justice system, recognising that the pivotal role of the CPS is to ensure that prosecutions “are not brought when there is no real evidence”.

And as I have outlined this was certainly why the CPS was created – to ensure that cases are only brought before the courts where there is a realistic prospect of conviction and it is in the public interest to do so. No case should proceed to court unless a CPS prosecutor is satisfied that it fully meets what we call the Code test.

I'll explain that.

All cases that are referred to the CPS are reviewed in accordance with the Code for Crown Prosecutors – and all cases that are prosecuted must pass the two-stage test that is contained in the Code.

Firstly, there must be sufficient evidence to provide a realistic prospect of conviction. If there is insufficient evidence, the matter will not be charged and will not proceed any further no matter what the public interest maybe.

In every case where there is sufficient evidence to justify a prosecution, we must go on to consider whether a prosecution is required in the public interest.

It has never been the rule that a prosecution will automatically take place once the evidential stage is met, as your first chair Sir Hartley Shawcross - then AG - said. A prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour.

We decide in a number of cases to charge, and in a number of cases not to charge.

Last year we decided not to charge 66,000 of the suspects referred to us by the police and other investigative bodies – that's more than 20% of all suspects referred to us. The overwhelming majority of these were for evidential – rather than public interest – reasons.

However, in taking these decisions it is vital to remember that we are not ruling on guilt – and we are not replacing the role of the jury or tribunal. It is for them to decide if there is guilt or not.

The roles of the CPS and the jury are completely different – and so it is entirely legitimate for them to come to different conclusions. It is entirely possible for it to be right to bring a case to court, but right for the jury to acquit.

As I have said, the prosecutor must decide if there is a realistic prospect of conviction – and where there is we authorise charges if it is in the public interest to do so. These decisions are not taken lightly, but the prosecutor does not always have the benefit of testing the evidence. That – rightly – happens in court, and puts the tribunal in the best possible position to give its verdict.

So the judgment the tribunal has to make is a different one to the CPS, and they base it on a different examination of the evidence. Which is why an acquittal does not mean that a case should not have been taken to court – it is the criminal justice system working as it should.

I do not want to lead a prosecution service that only takes cases it knows will result in conviction. If we only took cases to court where a conviction was absolutely guaranteed we would rightly be criticised for being overly risk averse. And many many people would be denied justice.

We know that there are some types of case where successful prosecutions are notoriously hard to obtain, even though the police officer in the case and the crown prosecutor may believe that the complainant is reliable and credible. If we were to apply a purely predictive approach based on past experience of similar cases – what you could call a “bookmakers approach” - the prosecutor might well feel unable to conclude that a jury was more likely than not to convict the defendant.

Similar considerations have arisen historically in cases of child sex abuse where the behaviour of the victims has been seen as undermining

their credibility as a witness and therefore affected the prosecutor's judgement of a realistic prospect of conviction.

Now we look at the issue differently. In the "merits based" approach, the question of whether the evidential test was satisfied does not depend on statistical guesswork.

Instead the prosecutor imagines him or herself to be the fact finder and asks whether, on balance, the evidence was sufficient to merit a conviction, taking into account what is known about the defence case and of course looking at the evidence.

So we consider each case on its merits and if the Code test is met, it will always be right that the evidence in such cases is put before a jury to decide. And we will always respect the decision of the jury.

There is of course another safeguard against cases without any foundation being brought to court - if a judge feels that a prosecution case should not be put to a jury he or she can direct an acquittal. Last year 0.7% of Crown Court prosecutions led to a Judge Directed Acquittal.

Victims' Right to Review

Moving back to the decision to charge, we made a major change to our policies in this area in 2013.

The Victims' Right to Review policy enshrines a victim's right to request a review of any decision taken by the CPS to not charge or to stop a prosecution.

It is one of the most significant victim initiatives ever launched by the CPS as it provides victims with a clear opportunity to ask the CPS to look again at a decision to not start, or to stop, a prosecution.

It recognises that victims are active participants in the criminal justice process, with both interests to protect and rights to enforce – and it ensures that the people affected by our decisions can hold us to account.

However, importantly, the right to review is not unlimited.

Victims have three months from the date of decision in which to seek a review – after that we will only reconsider in exceptional circumstances.

This limitation is both necessary and appropriate if we are to balance the rights of the victim and the accused.

Indeed, as much as we need to recognise the right of a victim to challenge our decisions, we must also respect the right of an accused to have some degree of finality. We believe a three-month period strikes the right balance – giving victims sufficient time to consider and/or make a challenge but also safeguarding the right of an accused to know their fate.

The VRR scheme was introduced after the Court of Appeal, in its judgment in the case of *Killick (R v Christopher Killick [2011] EWCA Crim 1608)*, concluded that victims have a right to seek such a review. In doing so the Court said:

“it is clear that in considering whether to prosecute the prosecutor has to take into account the interests of the State, the defendant and the victim.”

Reviewing a decision at the request of a victim does not mean we are then acting on their behalf – as with all other decisions, we are operating independently in the interests of justice, and we are always very mindful of that.

Disclosure

I want to move on now from the charge to disclosure – a crucial component of a fair criminal justice process. Essentially it involves we – the prosecution – disclosing to the defence any material we have that weakens our case or strengthens the case for the defendant.

In the last three years following the Magistrates' Court and Lord Justice Gross review, we have made improvements in our disclosure process to safeguard defendants' rights. This was prioritised as we recognise that the correct approach to disclosure is crucial to ensuring the defendant has a fair trial, and we accept that the disclosure process works best when the prosecution takes the lead. The CPS reviewing lawyer is therefore ultimately responsible for ensuring that the prosecution discharges its duty of disclosure.

To do this effectively, we have put in place a system in which a disclosure assurance review is completed by each of our CPS Areas on a bi-annual basis. We have also appointed a National Disclosure Champion who, working with local disclosure champions, has oversight and monitors the whole system to ensure that there is an efficient disclosure process in place.

But this is not a one way process. The defence must also play their part, by identifying the issues in dispute, thereby helping the prosecution to make informed decisions. In more serious cases a Disclosure Management Document is agreed to assist in identifying areas where further disclosure might be required.

By taking these steps the CPS has demonstrated its commitment to ensuring that the principles of disclosure are clearly understood and that disclosure is more efficient in all cases in the magistrates' and Crown Courts. Our improved disclosure guidance and assurance process means that information that undermines the prosecution's case or assists the defendant's case will be disclosed at the earliest possible opportunity to benefit defendants, and to ensure a fair trial

This has been progressed even further by our Transforming Summary Justice Programme, which I will turn to next, where defendants receive disclosure at or before the first hearing rather than having to wait until much later.

Transforming Summary Justice

So what is the Transforming Summary Justice programme – or TSJ as it is known - and why does the criminal justice system need it?

TSJ is a CJS-wide project to improve how cases are handled in magistrates' courts by reducing delay, ensuring there are fewer hearings per case, and that more trials are effective on the day. We have led the project to design and implement TSJ – focusing on ensuring it improves victims' experience while safeguarding the intrinsic rights of defendants.

The aim of the TSJ model was:

- to enable guilty pleas to be taken and dealt with in one hearing, and
- for contested cases to be properly case managed at the first hearing, actively progressed thereafter, and disposed of at the second hearing. This is achieved by adopting ten key characteristics of best practice which were identified during a review of high performing areas because they presented the greatest likelihood of delivering effective first hearings.

Safeguarding defendants' rights

So how will TSJ safeguard defendants' rights?

First, in contested cases, the defence are now provided with more comprehensive information for the first hearing, which sets out the

prosecution evidence against the defendant. This includes a schedule of what is called 'unused material', which are documents that the prosecution does not want to rely on. This information is now disclosed at the first hearing, rather than just before the trial, when previously only a skeleton file was served at the first hearing. So now, the defence are immediately provided with the full prosecution case.

In cases where it is anticipated that the defendant will plead not guilty, there are 28 days between the date of charge and the first hearing. This means that there is ample time for a defendant to instruct a solicitor, enabling them to request the evidence against his client up to 5 days before the court date and discuss the case beforehand. Each case will also be subject to a detailed case management hearing, which will be used to establish what the issues in dispute are and what evidence can be agreed. This will save victims and witnesses – including defence witnesses –having to attend court unnecessarily.

Anticipated guilty plea cases are listed for first hearing 14 days after charge, which is sufficient time for a defendant to instruct a solicitor.

The court process

I want to move on now to the detail of that court process – particularly to the support we provide to victims and witnesses ahead of and during proceedings.

Lawyers may "familiarise" their witness with the process of giving evidence, but not coach them on the content of it.

Case law binds both professions. As Lord Justice Judge (the former Lord Chief Justice) pointed out in R v Momodou [2005] EWCA Crim 177, prohibition of coaching does not simply protect against dishonest clients with over-zealous lawyers. The risk of innocent contamination of witnesses is prevented.

The Victims' Commissioner and many others I have met over the last two years have raised concerns about the support victims and witnesses receive in advance of a court hearing, and at the court itself. And a major survey we undertook of more than 7,000 victims and witnesses clearly showed they want more support through the court process.

Ultimately, as prosecutors we have a duty to support victims and witnesses at court – not least by introducing ourselves, trying to put the nervous or vulnerable at ease and explaining procedures whenever

possible. We should also keep victims and witnesses informed about delays and ask for them to be released as soon as possible after giving evidence.

Clearly, none of this can be described as coaching, and it should take place as a matter of course. Indeed, whatever the concerns about and legal constraints against coaching, there is no excuse for forgetting our basic obligations to help victims and witnesses and ensure that they are better prepared, able and willing to assist us by giving evidence.

However, I do think there is more we can do to help support and prepare witnesses for court – without endangering the fairness of the trial process – and last month we published the new ‘Speaking to Witnesses at Court CPS Guidance’ following a public consultation earlier in the year. We are about to undertake pilots to gather feedback on the practicalities of implementing the guidance, which is planned for national roll out from January next year.

There was considerable support for the proposals, but there was concern from the legal community that the guidance would be unfair to defendants because witnesses would be ‘coached’ in giving their evidence.

We are making sure that is not the case.

We are publishing clear guidance about what can and cannot be said in the conversations that take place. A note of the conversations will be recorded. And there will be training for all CPS advocates so we can ensure that everyone holding these conversations has the skills to do so.

With these safeguards I believe we can significantly improve the experience of victims and witnesses while safeguarding the defendant's right to a fair trial.

Conclusion

So it is clear that through each of these stages of the criminal justice process in which the CPS plays a major role – charging, disclosure and the court process – we must carefully balance the needs of victims and witnesses with the fundamental rights of the accused.

We are able to do that because underpinning everything the CPS does is our independence.

We place great importance on the service we provide to victims and witnesses. That is absolutely right and will continue.

But our core purpose is to deliver justice – which we can only do by making independent and fair decisions about charging suspects.

Undertaking our disclosure duties independently and professionally. And maintaining our independence while supporting victims and witnesses.

In this way we safeguard defendants' rights and ensure that we deliver justice for them, for victims and witnesses and for the wider public we are here to serve.

Thank you.