

'The Case for the Prosecution: independence and the public interest'

Dominic Grieve

Thank you Professor Ormerod and good evening Ladies and Gentlemen. I am delighted that this evening's event is jointly organised by the Mile End Group and Queen Mary's School of Law as this brings together key strands of my life – history, law and politics. I was a student of history before I was a lawyer and a lawyer before I was a politician.

The Law Lord, Cyril Radcliffe, believed that 'you cannot be a good lawyer unless you can cultivate good historical sense'. I agree, history and law are natural bedfellows.

Knowledge of the one improves understanding of the other.

This is of particular relevance to my subject tonight – 'The case for the prosecution: independence and the public interest'.

There is, I think, an important debate to be had as to the merits or otherwise of an independent prosecution service staffed with professional prosecutors. At a time of reduced and diminishing resources we have to ensure that the criminal justice system is not only fair but is also providing value for money. It is a debate which, to some extent, has already started. Should we reform the CPS? Is there a greater role for the police in dealing with court cases? As the superintending Minister for the CPS I do not seek to shy away from potentially difficult questions and answers, so I welcome this debate.

In my strong view there is one fundamental truth that underpins a fair and just system and that is prosecutorial independence. The decision to prosecute must ultimately be one taken by the prosecutor acting independently of the investigator. That view is not based on some theoretical principle of the superior merits of lawyers but is based on the clear lessons to be learnt from history.

In order to understand why we have an independent prosecution service it is necessary to understand the history and work which preceded its creation. And, in deference to my colleague the Secretary for State for Education, I suggest we start at the beginning and consider the history of prosecutions in England and Wales in chronological order.

The Road to a national prosecution service

Until the last half of the Twentieth Century, in England and Wales, criminal offences were prosecuted by a curious mix of private individuals, police officers or police solicitors, county prosecutors and, oftentimes, local firms of solicitors.

In 1845 the Criminal Law Commission reported that prosecutions were conducted 'in a loose and unsatisfactory manner' The Commissioners continued 'the duty is frequently performed unwillingly and carelessly...the direct and obvious course for remedying such defects would consist in the appointment of public prosecutors'.

It was not the first Report of the Law Commission that was slow to be taken up by legislators and I have no doubt from experience that it will not be the last!

It was not until 1879 that tentative first steps were taken toward a more formal structure. The Prosecution of Offences Act 1879 created the office of the DPP. The new Director was charged with the duty to act in cases of 'importance and difficulty'.

The Director had only limited resources, with no department of his own and only one Assistant and three clerks to help him; although rest assured the official records reveal that at some point a 'Departmental firearm', was provided. This was a pistol which was not surrendered to New Scotland Yard until 1953 – worryingly with 14 rounds of ammunition unaccounted for!

In the 1920s the then DPP, Sir Archibald Bodkin, was said to personally examine 2000 cases a year and would often personally draft indictments.

With 107,244 Crown Court cases in 2011 – 12 were I to suggest a return to the ways of the past I suspect the current Director might seek the return of the departmental firearm!

Slowly the DPP became involved in more criminal prosecutions, but his impact remained limited. Prosecutions continued to be prosecuted on a local basis. The

police would decide the charges and make all the decisions as to the merits of a prosecution. Many offences were prosecuted by the police officers who conducted the investigation and the arrest. Even in those cases in which counsel was briefed the police remained the ultimate arbiters as to what should or shouldn't be proceeded with.

In 1962 a Royal Commission looked at the conduct of prosecutions and reported that 'In general, we think it is undesirable that police officers should appear as prosecutors except for minor cases'. The Commission declared that the regular employment of the same police officers as advocates was to be 'deplored'.

The Commission's report led to some police forces creating prosecuting solicitors departments and in other areas County Councils assumed the task. Several police forces retained the services of local solicitors to conduct prosecutions. But the solicitor/client relationship meant that the police had the last word. If instructed to go ahead with a case,

the prosecutor was obliged to do so. The legal commentator Joshua Rozenberg has aptly described the prosecution solicitor of that time as being akin to a constitutional monarch, with the power to advise and the power to warn but no power of veto.

The system was haphazard, inefficient and often arbitrary and unfair. Clearly change was needed and in the Seventies action was finally taken. The catalyst for action was a murder and fire in Catford in South East London– the Maxwell Confait murder case.

Three youths with various learning difficulties were accused of murdering Maxwell Confait and then setting fire to his flat. The youths had been starting fires in the local area and the police concluded they were responsible for Mr Confait's murder. Through oppressive questioning confessions were obtained and the police closed their minds to there being any other explanation for the murder. The prosecution accepted the police evidence at face value and there was no real effort to assess the strength of the confessions or available forensic evidence. The youths were charged and convicted.

Those convictions were subsequently overturned by the Appeal Court. It was held that the confessions had been obtained unfairly and, crucially, that the post mortem evidence revealed death had occurred at a time when the youths could not have been present. It was apparent that although the boys might have started a fire at Mr Confait's address, by the time they arrived he was long dead.

There had been major failings by the police in the conduct of the investigation and treatment of young, vulnerable suspects. There had also been a failure on the part of a prosecution, too willing to accept the police evidence, reluctant to test and probe its accuracy. There was considerable public disquiet and the government of the day commissioned an inquiry to establish what had gone wrong in that case. The findings of that inquiry prompted, in 1978, a far wider review of criminal procedure by a Royal Commission chaired by Sir Cyril Phillips.

The Royal Commission on Criminal Procedure

Ultimately, the Commission's report was to provide the blueprint for the modern criminal justice system, the twin pillars of its construct being the Police and Criminal Evidence Act and the Prosecution of Offences Act – the creator of the Crown Prosecution Service.

With regard the prosecution of offences, the Commission found defects which needed urgent redress – there was perceived to be unfairness, inefficiency and a lack of accountability in the process.

Looking at the role of the police as prosecutors, the Commission found that a police officer who carries out an investigation, inevitably, and properly, forms a view as to the guilt of the suspect. They felt, however, that without any improper motive the officer may then be inclined to shut his mind to other evidence which undermines that view or overestimate the strength of the evidence gathered – witness the Maxwell Confait case. Absent effective oversight, there was also greater opportunity for police corruption.

Without a truly independent prosecutor, able to ignore police instructions, a weak or poorly investigated case would often proceed only to fail at court. This was unfair to victims who would be given false hope...unfair to defendants whose reputations and liberty may be at stake.....and unfair to the public purse.

The Commission backed their conclusion with cold, hard figures. In 1978 they found 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.

The unanimous conclusion of the Commission was that the police should no longer retain the responsibility for prosecutions save for the most minor crimes such as traffic and regulatory offences. To the Commission it was self evident that there had to be change.

The CPS is born

The Commission reported in 1981 and the then Home Secretary, Willie Whitelaw, introducing the Commission's report to the House of Commons recognised that, whilst there may be resource implications, there was a need for change.

In 1983 a White Paper was published entitled 'An Independent Prosecution Service for England and Wales'. The White Paper proposed a national prosecution service accountable to the DPP. It was stated that it would be neither proper nor efficient to make the prosecutor accountable to local authorities – a national service would be more consistent with the necessary independence of the new service. The result was the Prosecution of Offences Act which created a national prosecution service, the CPS.

The ultimate decision as to whether a case would proceed was no longer that of the police but rather the Crown Prosecutor, a professional lawyer, separate from the investigation and independent of the police, acting on behalf of the DPP.

So independence...independence from the police anxious to see a prosecution brought for flimsy or prejudicial reasons, but was this..... is this true independence?

Is there not still a danger of encroachment by the executive or, to paraphrase Sam Silkin, a former Attorney General, a danger that the Director is little more than the 'mere creature of the Attorney General'?

Independence

Prior to 1985 the Prosecution of Offences Act 1879 charged the Attorney General not only with the superintendence of the DPP but also provided him with the power to direct the institution of proceedings in special cases. The power to direct is not mentioned in the 1985 Act. I continue to superintend the work of the DPP and the CPS and I am answerable to Parliament for their work – I do not control or direct their daily work.

And I think it is important to emphasise here and now that inevitably there will be times when the DPP and I will not agree. That is the nature of the law and indeed human affairs. There will be healthy and sometimes robust debate and views will be canvassed and exchanged but, save in the most exceptional of circumstances, it is not for me to order the Director to do or not do something and I have not done so.

The relationship between the Attorney General and the prosecuting departments which he superintends is recognised in a protocol. This is a formal restatement of many of the conventions which hitherto governed the relationship between my predecessors and the DPP of the day. The Protocol makes clear I am accountable to Parliament for the work of the DPP and the protocol expressly requires me to safeguard the independence of prosecutors in making prosecution decisions.

Those decisions are those of the prosecutors under the direction of the Director and the protocol states that I will not seek to give a direction in an individual case save very exceptionally where necessary to safeguard national security – of which more shortly.

The Protocol also recognises that, for certain offences Parliament has deemed that my consent to prosecution is required. With such offences, if the prosecutor believes there is sufficient evidence to proceed then I will be asked to consider the public interest in bringing proceedings. When exercising this role I act independently of government and, as I will shortly explain in more detail, it is for me and no one else to determine if a proposed prosecution is in the public interest.

Further protection against the encroachment of the State is provided by the Code for Crown Prosecutors. By statute the DPP is required to issue publicly a Code for Crown Prosecutors and, in addition to defending the CPS's independence this is one of the ways

in which the national prosecution service provides greater consistency in prosecutorial decisions. A significant improvement on the pre CPS position.

By providing guidance on the review of cases, the Code also helps ensure that decisions nationally are fair, objective and independent. The Code provides a two stage test known as the Full Code test – is there sufficient evidence to provide a realistic prospect of conviction and is a prosecution required in the public interest – which if applied properly ensures no prosecution will be brought without evidence or for petty, vindictive or improper reasons.

A further strand, providing protection from state prosecutions brought at the behest of a malevolent and tyrannical government, ably assisted by its cruel henchman, the Attorney General, is the professional and ethical responsibilities of those employed as prosecutors.

The DPP has issued a 'Statement of Ethical Principles for the Public Prosecutor' which sets out the principles which should underpin and guide the work of the prosecutor.

Prosecutors are required to act at all times in accordance with the highest ethical standards and, crucially, in the best interests of justice – not the interests of the police or the government of the day, not even in the interest of victims – but in the best interests of justice.

The statement enjoins the prosecutor to observe the code of conduct of their professional body and to strive to be consistent, independent, fair and impartial. Prosecutors are required to report any improper attempt to influence their decision-making. It is a statement which is an important protection against an overweening State, the police or a powerful individual or pressure group which seeks to control a prosecution for their own ends.

And another cornerstone of the wall protecting prosecutorial independence is the curious nature of my own Office. Although the principal legal adviser to the Government, I perform daily a number of other functions which require me to act not as a Government Minister but as Guardian of the Public Interest – as we have seen from the Protocol with the prosecuting departments, my role in prosecutions falls within this category.

In this role I act alone, free of government policy or direction.

This is a valuable protection from an oppressive State. I cannot be ordered either to commence or end a prosecution and, as we have seen, the DPP is not answerable to any politician aside from me.

He and I consider prosecutions as lawyers and it is firmly established that I am required to act in the public interest.

The public interest

So what is the public interest – this shape without form, this shade without colour?

Lord Radcliffe stated:

‘The public interest may often require, I think, that ideal remedies should not be pursued.....it does not always suit the public interest that certain things should be put right by the courts, even if they ought to be adjusted in the ordinary decencies of private life’

This is an elegant exposition of the principle that not every crime will result in a prosecution – a principle acknowledged and approved by the Code for Crown Prosecutors.

The Code provides examples of public interest factors to be considered when deciding to bring a prosecution – how serious is the offence, what is a suspect’s culpability, what was the harm caused, was the suspect a youth at the time of the offence, is a prosecution a proportionate response, and are there sources of information which require protection? A prosecutor considering these factors may conclude that the circumstances of a case are such that the public interest does not require a prosecution to be instituted.

These are some of the factors which guide a prosecutor when applying the Full Code test and considering the public interest – but what of me? What is my approach to such cases?

To a large extent, remarkably similar to the Crown Prosecutor, when I consider consent cases I too will have regard to the factors in the Code. When performing this role I act in a quasi-judicial capacity and I do not act as Minister, I do not consider government policy or allow my own political views to intrude.

But I do not act in isolation, in some cases I am required to look, as it were, at the bigger picture – this is particularly true in cases involving National Security....cases which you will re-call, under the terms of the protocol I am still able to make directions.

These cases may come to me either to consider the issue of consent or because my involvement is required owing to the peculiar sensitivities of the case. If I am considering if an offence of this nature should be prosecuted then it is common sense for me to identify all the relevant facts.

As one of my predecessors, Sir Hartley Shawcross, informed the House in 1951, an Attorney General, in order to inform himself of relevant considerations may 'consult with any colleagues in the government and indeed, as Lord Simon once said, he would in some cases be a fool if he did not'. But it is important to remember such a consultation – since 1951 termed a Shawcross exercise – is for the provision of information and does not consist of telling an Attorney what to do – that decision is mine and mine alone and cannot be shared or passed to government colleagues.

Thus if I should provide a direction in a case of National Security, although conversant with the facts and fully informed, no decision I make would be as the result of pressure or directions from within or indeed without government.

This is a vital protection for the independence of the prosecution process.

Room for improvement

As I said at the outset, there is a debate to be had as to the future – I do not pretend to see finery where there are only rags, there is scope for improvement.

So what of that future? How do we carry forward improvements and make justice more efficient whilst preserving those principles which are fundamental to the fairness of that system?

Occasionally there is talk of a privatised CPS. I do not see this as being realistic or practicable. How would success be measured? How would performance be assessed? Will a prosecutor or his managers truly be independent, acting in the public interest if wary of profit margins and shareholders? And remember – he who pays the piper calls the tune.

The prosecutorial function is quasi judicial and we must not lose sight of that truth.

Nor do I think there should be a wholesale return of prosecutions to the police.

Please don't misunderstand me, I think there are certain non-contested, regulatory and traffic offences which can be and may well be best handled by the police. These volume offences require little review and CPS involvement adds little value. This was the position recognised by the Phillips Commission and Parliament which allowed for so called specified offences to be retained by the police. Indeed, last year with the agreement of the Home Secretary, I extended the number of low level specified offences which can be handled by the police.

In doing so the valuable resource which is the prosecutor, is left freer to concentrate on the review and prosecution of serious crime.

I also believe that there is a greater role for the police to play in terms of charging. When the CPS was established, in line with the recommendation of the Phillips Commission, the police retained the decision as to who should be charged. Over the last decade that position shifted, with the CPS taking a greater role in the decision as to charge. That was, perhaps, a shift too far.

Too many low level offences were being considered by prosecutors and, inevitably a degree of delay, was introduced. This was inefficient and overburdened the CPS. I believe that the prosecutor is best placed to add value to the charging process when advising police in relation to large scale and serious offences, principally those offences which can only be tried in the Crown Court. There is a balance to be struck and we must ensure that we find the best process for ensuring greater efficiency.

But ultimately it must be recognised that if we are to avoid a return to the very real unfairness of the prosecution system prior to the creation of the CPS, we must maintain a system of prosecutorial independence. That is not to say there is not more than the police can do.

I am working closely with the Home Secretary and Justice Secretary to determine where we can turn work to the police without detracting from the vital role the CPS plays or lessening the robust fairness of the system we currently have. I do not see the police prosecuting contested cases but I can see more of the routine, non contested work, thereby freeing the CPS to deal with more difficult cases. But we must avoid parallel systems of prosecutions. To do otherwise would not only be inefficient and chaotic but would run counter to the tide of history and constitutional principle.

Should the CPS be privatised as some have advocated? Personally I am not persuaded that a devolved system of independent but local prosecutions would deliver the efficiency, consistency and fairness which we require. To break the CPS into local prosecution departments would be to remove the economies of scale which we now see within the CPS. Consistency would also slip away as, inevitably, a varied range of policies, guidance and processes evolve across the country. This would be inefficient and unfair. I agree that the CPS should reflect local concerns and there must be greater engagement with, for example, Police and Crime Commissioners, but the national model is best placed to ensure independence and efficiency.

The Lord Chancellor, Home Secretary and I recognise, however, that there is a need for reform and we are each working toward achieving greater efficiency within the CJS. The CPS is at the forefront of that process. Only last week we saw the DPP take the lead in introducing new, national improvements to the way that we investigate and prosecute child sexual offences. From its position of independence and knowledge the CPS is a body well placed to provide national consistency, oversight and leadership within the CJS.

But the CPS is not the only part of the criminal justice system which needs to improve. The police too have a vital role to play in improving prosecution performance. I think that the relationship between the CPS and police is sufficiently embedded now to allow a frank discussion of the need for mutual improvement.

There is little point in spending thousands of pounds on an investigation with a wealth of forensic and technical work only for a case to fail because the correct evidence has not been provided to the prosecutor. I fully endorse the Home Secretary's drive to reduce unnecessary and wasteful police paperwork: we cannot justify the waste of a valuable resource. But in so doing we have to take care to ensure that we maintain a system that works. The Crown brings the case and the Crown must prove the case and to do that sufficient evidence is required. It must be in the right form and there has to be effective disclosure. The CPS, courts and police have been very successful in creating and promoting the Early Guilty Plea scheme. We need to be better at identifying those cases that will ultimately lead to a guilty plea. But we all know this is not an exact science! Just because there has been an arrest does not mean we can assume conviction will automatically follow – to make that assumption is to return to the position revealed in the Confait case and deplored by the Phillips Commission.

Not all paperwork is unnecessary or bureaucratic. We need to identify and concentrate on what is needed.

There is a need also to ensure greater integration and compatibility between the computer systems of the courts, police and CPS. The CPS is taking the lead on this as it implements the use of digital files within the CJS. Great progress has been made but more is required.

Conclusion

The CPS plays a vital role and, despite the occasional high profile failure or error, we should not lose sight of the fact that the vast majority of cases are prosecuted

professionally and successfully in accordance with the principles of fairness, independence, fairness and impartiality. As the most visible player in the trial process the CPS is too often an easy target for uninformed criticism, a scapegoat for wider failings within the CJS. The reality suggests such criticism is very often misplaced.

In 2011 – 12 there were 891,716 prosecutions in the Magistrates Court with a conviction rate of 86.5%; and in the same period, in the Crown Court, there were 107,244 prosecutions with an 80.8% conviction rate. These are impressive figures which show an independent prosecution service which daily delivers justice.

When I began, I suggested history and law march together and that by looking at the past we can better understand the present and best determine the future. It is sometimes a salutary experience to pause and reflect, as we have this evening, on why things are.

Do we still need an independent prosecution service? I say yes. It is a matter of both constitutional propriety and common sense.