

An 'ethos of mutual support'? The relationship between the police and the CPS

Mandy Burton questions an apparent shift in power

In a speech to the Superintendents' Association in 2010, the Director of Public Prosecutions (DPP) said that the relationship between the police and the Crown Prosecution Service (CPS) had never been so good and was characterised by an 'ethos of mutual support' (Starmer, 2010). In fact, the relationship between the police and the CPS appears to share many of the features of the relationship between the parties of the Coalition government. The two parties have to work together (even though perhaps they would really rather not), they do not always share the same objectives, when things go wrong (as they inevitably do) there is always the option of blaming the other party, and one party is always in a more powerful position than the other. It was apparent from the earliest days of the Coalition government that the police were in a strong position. Theresa May's first speech as Home Secretary was to the Police Federation and in it she pledged to reduce police bureaucracy and to restore the professional standing of the police. Following two major scandals in 2011 – the 'phone hacking' saga and the use of undercover police officers to infiltrate protest groups – the reputation of the police is in need of some restoration. So why, in this context, is the government still intent on transferring more powers from the CPS to the police?

Failure to disclose evidence

In January 2010 the prosecution of six environmental activists for conspiracy to commit aggravated

trespass at the Ratcliffe-on-Soar power station in Nottinghamshire spectacularly collapsed when the CPS dropped the case because of 'previously unavailable information'. That information was the evidence of an undercover police officer, Mark Kennedy, who had infiltrated the group and posed as an activist for seven years, making secret recordings of their meetings. Following the collapse, a dispute arose between the CPS and the police as to who was responsible for the non-disclosure of the Kennedy surveillance tapes. Kennedy, who had offered to give evidence for the defence, said that the police knew that they could not prove the case against the six and that he had no idea why the police had withheld the tapes that would show this. The police response was that the tapes had not been suppressed by them but had been in possession of the CPS for more than a year. Yet two months before dropping the case, the CPS had written to the defence giving an assurance that they had nothing in their possession that had *Criminal Procedure and Investigations Act 1996 (CPIA)* potential in relation to Kennedy or in general terms (Lewis and Evans, 2011).

The CPIA requires the prosecution to disclose, at the earliest possible

stage, all material (unless 'sensitive') that might reasonably be considered capable of undermining the case for the prosecution or assisting the case for the accused. In fact, the problems of non-disclosure by the police to the CPS, and by the CPS to the defence, are legion. Academic research and an official inspectorate report have identified many of them (HMCPSI, 2008), but the fundamental flaw is the expectation that the prosecution team (the label given to joint working by the police and CPS) will act in an inquisitorial way and abandon their conviction-orientated goals.

Wherever the precise blame in the Kennedy case lies, a matter that is the subject of inquiries by Sir Christopher Rose (examining the CPS role) and the Independent Police Complaints Commission (IPCC) (investigating the alleged failures of Nottinghamshire police), it will always be tempting when the prosecution team are caught keeping evidence from the defence for each party to blame the other. The disclosure system itself is at fault. Without fundamental change, there will be many more cases where the weaknesses in the prosecution case, known to the police and sometimes the CPS, never come to light.

The phone hacking scandal

In 2007 Clive Goodman and Glenn Mulcaire, both working for *The News of the World*, were convicted of phone hacking offences. At the time it was alleged that hacking

was widespread and sanctioned by senior management. The police investigated these allegations and the Metropolitan Police Service (MPS) were given advice by the CPS about possible prosecutions. When the phone hacking scandal erupted again

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in 2011, the nature of the advice given by the CPS was subject to scrutiny. The DPP was called to give evidence to a parliamentary

inquiry, and the question inevitably arose as to whether the CPS advice limited the scope of the police investigation by defining hacking offences narrowly (Starmer, 2011). The DPP said it had not, but acting Deputy Commissioner of the MPS, John Yates, said that the CPS had repeatedly given such advice during the original investigation. Both implied that the other had misled Parliament (Davies, 2011). The reputation of the police, in failing to bring to light widespread malpractice at an early stage, has been seriously undermined. Again, it has sought to share some of the blame, not only with those who failed to cooperate with the investigation, but also with the CPS in relation to the advice it received.

Neither the police nor the CPS are likely to emerge from these two scandals unscathed. However, at the time of writing, the standing of the police looks most damaged, with both Sir Paul Stephens, Commissioner of the Metropolitan Police, and John Yates forced to resign. In this context it is strange, to say the least, that the Coalition government is forging ahead with its plans to give a boost to the police by returning to them charging powers that were transferred to the CPS by the New Labour government.

Returning charging powers

Under the statutory charging scheme introduced by the *Criminal Justice Act 2003* (which came into full effect in 2006), the CPS took over responsibility from the police for charging all but the least serious cases. Allowing the CPS to take a more active role in charging decisions was intended to reduce the number of cases going to trial on the 'wrong' charge and the number 'cracking' through late guilty pleas to reduced charges. An Inspectorate report on the statutory charging scheme identified a number of benefits of statutory charging, including earlier discontinuances of weak cases (HMCPSI and HMIC, 2008). However the working relationship between the police and CPS, at least at local level, was in some ways problematic.

Police officers complained that prosecutors were 'risk averse', and prosecutors complained that police officers were less likely to complete work post charge. Tensions in the relationship were heightened by the introduction of a 24-hour telephone service, CPS Direct, which meant that face-to-face contact between the investigating officer and the Crown prosecutor was only available for the most serious cases. Police officers complained of being left hanging on the telephone waiting for advice in cases that they felt could have been dealt with much more simply and speedily by themselves.

Before the Coalition government came to power, moves were already afoot to return some charging powers to the police; pilots were taking place in five police areas. In her speech in May 2011, one year on from her inaugural promise, the Home Secretary claimed that the pilots were a success and announced that even more charging powers would be returned to the police, including anticipated not-guilty pleas in theft cases (May, 2011). The police will undoubtedly be happy that they will once again be able to make charge decisions rather than having to defer to a prosecutor. The policy is part of a package expected to save an estimated 2.5 million police hours a year, but from a due process perspective it looks questionable. The CPS was originally introduced to provide a check on police power, and CPS powers to make charge decisions were enhanced because of a recognition that the police often charged people with a criminal offence when they should not, charged them with more serious offences than was warranted by the evidence, or got charges wrong. While serious cases clearly merit the closest scrutiny, every case (whatever the level of charge) involves an individual defendant and a potential miscarriage of justice. This latest readjustment of responsibility for charging may be just one more step in returning all charging powers to the police, leaving the CPS in a structurally weak position where they are merely decision 'reversers' on a course already set by the police.

Bolstering the police

Despite the events of 2011, the police look in a more powerful position than the CPS, at least in terms of influencing Coalition policy. In the storm of the current scandals of incompetence or malpractice, the police have been able to deflect some of the blame onto the CPS. The CPS may be responsible for some of the failings – at the time of writing it is unclear precisely what role it played in the phone hacking and undercover policing cases. However, if the government pursues a strategy of bolstering the professional standing of the police by removing powers from the CPS, they run the risk of undermining the CPS and the integrity of the criminal justice system further. The policy of returning more charging powers to the police seems unjustifiable given the original rationale for removing them, the evidence of benefits of enhanced CPS charging powers, and the current damaging allegations surrounding the police. ■

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