

Public policing for private benefit

Ed Cape highlights the conflict of interests arising from police involvement in private criminal prosecutions

Recently, Jordan Beaumont suggested that the term 'criminal justice system' should be replaced by 'criminal industrial complex' (Beaumont, 2014). This would be more appropriate given 'a media that ideologically reinforces and promotes criminalising interventions, private companies that are increasingly involved along the lines of the American [prison] system and third party organisations that are also being drawn in'. A network of commercial organisations involved in punishment and 'rehabilitation' now has a direct interest in encouraging criminal justice responses to social problems because they profit from them. Whilst the government has not (yet) found a way of handing over the courts to corporations, many of their support and ancillary services are provided by commercial companies and civil courts, at least, are increasingly expected to charge 'commercial' fees for determining cases.

Criminal legal aid is, and always has been, largely delivered by lawyers in private practice although, in an irony lost on many, Chris Grayling has used the prospect of an expanded Public Defence Service to try to scare legal aid lawyers into accepting a reduction both in fees and the number of 'suppliers'. However, this is a short term strategy, and it is inconceivable that the government has any intention of permanently replacing private with public provision.

Commercialisation of processes

The police have not escaped the developing commercialisation of criminal processes. For decades

the police have been able to charge for 'special services', such as policing football matches and other sporting and public events (currently governed by the *Police Act 1996*, Section 25). Many police stations have been built under private finance initiatives, and some are not only owned but also run by commercial enterprises, staffed by their employees, with police officers as licensed occupiers (Skinns, 2011). In addition to employing their own civilian police community support officers (PCSOs), police forces can also designate civilians working for organisations contracted to supply services as PCSOs, and can accredit civilians under community safety accreditation schemes (*Police Reform Act 2002*). Police authorities can receive 'gifts' of money or other property, and can accept commercial sponsorship of any activity (under *Police Act 1996*, Section 93) – the most obvious example of which is police cars emblazoned with the name of a car recovery company. The Association of Chief Police Officers (ACPO) even publishes a guide to income generation, which was prepared by the Police Forum on Income Generation, designed to 'help forces counter the effects of declining budgets and increasing pressure on resources' (ACPO, 2010).

The developing inter-relationships, and inter-dependencies, between the police and commercial enterprises described so far raise similar concerns and questions to those in respect of the involvement of commerce in prisons and probation. The fact that companies derive profit from the police means that they have an interest in ensuring that the income stream does not dry up. However, a

recent case in the Court of Appeal shed light on an even more insidious development – the direct involvement of the police in pursuing the financial interests of commercial enterprises through criminal investigations and the confiscation of assets.

Over the past few years, a number of satellite television companies have been waging a campaign to prevent viewers accessing programmes, such as Premier League football, without payment or at reduced cost by using foreign decoders and other devices. In 2008, Virgin Media Ltd was investigating the sale of television set-top boxes that enabled purchasers to obtain access to premium services without paying a subscription. Virgin decided to conduct a private prosecution of one supplier, Munaf Zinga and associates, for the offence of conspiracy to defraud.

Unlike in continental European jurisdictions, where prosecution is normally reserved to the state, in England and Wales the right of private individuals and companies to prosecute has been recognised at least since 'modern' policing was invented in the mid-nineteenth century. When the Crown Prosecution Service (CPS) was established in 1985, the right of private prosecution was preserved by *Prosecution of Offences Act 1985*, Section 6. However, individuals and companies do not have powers to apply for a search warrant or to investigate financial means. So Virgin approached the Metropolitan Police who agreed to apply for, and execute, search warrants – although they omitted to tell the magistrates that it was Virgin, and not the police, who were conducting the investigation and who would be prosecuting.

Incentive schemes

Shortly afterwards, Virgin entered into a written agreement with the Metropolitan Police Authority under which they would pay the authority 25 per cent of any money recovered under a compensation order in the event of conviction. Zinga was subsequently convicted, and although Virgin initially sought

compensation, they abandoned this in favour of pursuing a confiscation order under the *Proceeds of Crime Act 2002*. The court made an order in the sum of over £8 million and, under the terms of an 'incentive scheme' introduced by the Home Office in 2004, the Metropolitan Police collected more or less the same as they would have received under the original agreement with Virgin. Zinga appealed both against the validity of the search warrant (on the grounds of lack of disclosure of the true identity of the prosecutor), and against the making of the confiscation order (on the grounds that a private prosecutor could not bring confiscation proceedings, and the propriety of the agreement between Virgin and the Metropolitan Police), but failed on both counts.

This was not an isolated case. Whilst statistics on the number of private prosecutions and, especially, prosecutions that are assisted by the police, do not appear to exist, there is evidence that they are becoming more prevalent (Leigh, 2014). Furthermore, the Court of Appeal itself said that 'the bringing of private prosecutions as an alternative to civil proceedings has become more common' (*R v Zinga*, 2014). It is easy to see why. Criminal proceedings have a number of advantages over civil proceedings for companies that can afford to mount them. They can use the police to carry out parts of the investigation on their behalf, criminal proceedings are generally quicker than civil proceedings, civil court fees are avoided, and if successful the company can recover the costs of prosecution from the accused and can use state agencies to conduct financial investigation for the purposes of obtaining compensation or a confiscation order.

As the Fraud Advisory Panel (an organisation that offers advice and assistance on responses to fraud) stated in one of its 'factsheets': 'A successful private prosecution can result in a criminal conviction and custodial sentence for the offence, and compensation being awarded to the victim. It can also send a powerful deterrent message to those considering engaging in criminal

activity against the victim' (*Zinga* judgement, para. 55).

So what's not to like? The problem is not private prosecutions in themselves. Whilst legal aid is not available, they can be used by individuals to pursue a prosecution where the police or CPS have decided not to prosecute or to proceed with an out-of-court disposal in circumstances where the victim believes this to be inappropriate. The family of Stephen Lawrence went ahead with a private prosecution when the CPS decided there was insufficient evidence. Whilst, in the event, the prosecution failed, it was an important stage in their campaign to hold the police accountable for an incompetent investigation, and to bring the perpetrators to justice. However, the use of private prosecutions by commercial organisations, especially as an alternative to pursuing civil proceedings, raises profound concerns which were recognised by the Court of Appeal in *Zinga*, and in the earlier case of *R v Hounsham* [2005] EWCA Crim 1366, in which the police had approached insurance companies to contribute to the costs of investigating fraudulent claims arising from 'staged' car accidents and had only pursued those cases in which a contribution was made.

Distortion of priorities

The most obvious danger of arrangements by which the police can generate income from pursuing cases on behalf of a company, especially a large commercial organisation, is the distortion of policing priorities and the diversion of resources away from more serious, but unprofitable, investigations. Not only may they result in the police concentrating on some crimes rather than others, but it may also mean that the police provide a 'gold-plated' service to paying clients, and a second-rate service to others. This is of particular concern at a time of financial constraint and savage cuts to police budgets. In this context, the prospect of earning, potentially, millions of pounds from one investigation (as was the case in *Zinga*) may well be irresistible to the police. Such arrangements also have implications for the independence

and accountability of the police. The fact that the police are being paid to pursue what are, in effect, the private interests of commercial enterprises is not something that normally emerges into the public domain. Furthermore, whilst Crown Prosecutors are bound by a publicly available *Code for Crown Prosecutors*, for which ultimately there is political responsibility, no such constraints apply to private prosecutors. Whilst the courts offer pious words about the duty of lawyers acting in private prosecutions to observe the highest standards of integrity, and to act in the interests of justice in preference to the interests of the client (*Zinga*, para. 61), in reality they are hardly subject to effective public or judicial scrutiny.

The Lord Chief Justice in the *Zinga* appeal urged ACPO, the Association of Police and Crime Commissioners, and the Home Office to give urgent consideration to issuing clear guidance 'on what the police may or may not do when approached by commercial enterprises to lend assistance in the proceedings for confiscation and claims for compensation' (*Zinga*, para. 54). However, what is needed is a wider examination of the relationship between the police and big business. Given the government's ideological commitment to privatisation, and the acute pressures on police budgets, such an examination is highly unlikely. ■

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