The changing role of the Crown Prosecutor

Many of the new measures introduced to speed up prosecution have not led to the efficiency gains expected and are depriving the accused of proper safeguards says **Jacqueline Hodgson**.

In England and Wales, as in many other European countries and the United States, there is a general trend away from the courtroom disposition of cases and a corresponding expansion in the role of the police and the prosecutor. The objective is to produce a cheaper and speedier outcome, but in reducing the opportunity to test the prosecution case, accused persons are deprived of many of their basic fair trial rights. Measures such as the recently criticised fixed penalty notices issued by the police represent an extreme form of summary justice and one that is increasingly popular: they have risen from just under 60,000 in 2004 to nearly 600,000 in 2007. The number of people proceeded against at court has fallen during this time, but this is perhaps less of an efficiency gain when one considers that recorded crime has fallen at an even greater rate. This is not an unfamiliar pattern: the police power to attach conditions to bail did not reduce the number of defendants having to appear in court in order that conditions might be imposed, but simply resulted in conditions being attached to those who would previously have been granted unconditional bail. The police have also been given greater powers to prevent or pre-empt crime, to control populations perceived (by the police) as risky – from the stop-and-search provisions under s44 Terrorism Act 2000 which dispense with the requirement for reasonable suspicion, to the power to require someone to leave a locality if the officer thinks their presence is likely to contribute to alcohol-related disorder under s27 Violent Crime Reduction Act 2006.

The prosecution function has seen significant changes, expanding in both directions – into the pre-trial phase with statutory charging and pre-trial witness interviews (PTWIs) and into the disposition of cases with alternative penalties that recast prosecutors as sentencers. The legal and functional separation of the police and prosecution roles was at the heart of the creation of the Crown Prosecution Service (CPS) as a prosecution body independent of the police investigation more than 20 years ago, and it has been accepted by a variety of subsequent commissions and reviews. However, the role has changed significantly and prosecutors now do rather more than simply review the police file for prosecution. Prosecutors work more closely with the police during the investigation of serious crimes such as rape and murder and there is a specialist CPS counter-terrorism unit that works alongside police officers and also has dealings with the security services. Prosecutors have a more formal pre-trial role beyond determining whether to prosecute and with what offence. The statutory charging scheme requires the CPS to determine charge in non-minor cases (around 40 per cent of cases) and PTWIs may now be carried out by prosecutors in order to resolve gaps in evidence, the witness' credibility or her commitment to trial. Prosecutors are also responsible for determining what material is disclosed to the defence, as well as whether to request that inferences be drawn from silence or bad character provisions invoked. And finally, the CPS exercises important dispositive powers through the imposition of conditional cautions – originally introduced for rehabilitative purposes but then made explicitly punitive.

What is the role of the modern CPS as represented by these reforms? The House of Commons Justice Committee is critical of the piecemeal nature of these changes and has called upon the DPP and the Attorney General to show clearer leadership in defining the aims and purposes of the CPS and its proper role within the criminal justice system. Academic research has criticised prosecutorial dependency upon the police file of evidence and so earlier CPS involvement may improve the quality of case preparation. Reinforcement of the legal and evidential requirements for charge through daily prosecution advice might also lead to the CPS playing a more pedagogical role vis-à-vis the police. But we know that the behaviour of legal actors is influenced by more than legal rules. Social and occupational cultures are often much more powerful determinants, whether this be 'cop culture' or courtroom working groups. So, we must also consider the impact upon CPS independence that these reforms might have. Being based at the police station to determine charge, for example, on police territory, prosecutors risk coming to see things increasingly from a police perspective and losing some of their objectivity. There have been tensions in the past when prosecutors refuse to prosecute cases they consider insufficiently supported by evidence. For their part, the police can become frustrated when suspects they consider to be obviously guilty are not proceeded against because of the 'technicalities' of the law. The trick is to inculcate better understanding of how legal and evidential requirements must be met, without over-identifying with a policing perspective. The two roles should remain separate, whilst working towards a common aim of gathering

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reliable evidence in order to bring a prosecution.

The police complain of delays in waiting to see a prosecutor in order to get the charge approved and there are potential conflicts in approach stemming from the different measures of performance success. For example, Tim Godwin (then Acting Deputy Commissioner, Metropolitan Police and ACPO lead on criminal justice) told the House of Commons Justice Committee:

> *An example of that would be lawyer A with 100 burglary files who charges all of them and gets 60 convictions and lawyer B with the same number of burglary files who charges 10 and gets 10 convictions. For the Police Service lawyer A is the better lawyer; for the CPS lawyer B is the better one because at that point it is based on conviction rates.*
> (Justice Committee, 2009)

But on the whole, the statutory charging scheme has been proclaimed a success, and in particular, it is described as being responsible for the decline in the number of cases discontinued and the increase in convictions. However, it is not clear that these improvements are simply attributable to the CPS role in charging, as discontinuances have been falling by a percentage point per year since 2000, five years before the new charging arrangements were put in place.

PTWIs may improve case preparation, providing additional information about the real strength of evidence. But much will depend on the selection of cases, whether lessons are fed back to officers and how the prosecutor defines her role acting in the public interest.

Although working more closely with the police, it is important to note that the CPS role remains one of advice. Prosecutors have no authority to direct officers who remain accountable to their police superiors, not to the CPS. In this way, the reforms stop short of adopting the approach of most other European jurisdictions, where the prosecutor has authority over the investigation and may direct officers to carry out specific acts. This is probably a good thing for several reasons. If advice is given that a particular piece of evidence is needed to justify charge, the officer is likely to act on that if she can. In this way, advice is likely to have a similar effect in practice to direction, but without the tensions that may arise from the CPS having direct authority over officers. The police have already relinquished the decision to prosecute to the CPS; they would undoubtedly not wish to surrender control of the investigation.

A further consideration in any shift towards investigative supervision is that of training. Many European prosecutors enjoy a judicial or quasi-judicial status, having undergone training in the practical elements of criminal investigation, as well as in the practical application of professional ethics that emphasise the public interest ideology of prosecutors and judges. This equips them, in theory at least, for the more judicial task of overseeing the investigation. In practice, this avoids some of the most egregious malpractice (such as that witnessed in the miscarriage of justice cases here in the 1980s and 1990s), but even with this vocational training, prosecutors often come to share the crime control ideology of the police and fall prey to the same tendencies towards case construction. Once arrested and detained for questioning, a presumption of guilt operates and the primary objective is the obtaining of a confession. It is an enormous challenge to maintain a robust, objective, and independent stance when required to oversee the police investigation. And it must be remembered that the 'judicial' nature of this supervision is seen to obviate the need for all but the most basic defence safeguards.

Conditional cautions represent another important shift in the prosecutorial function. The original conditions attached focused on reparation or rehabilitation, but have now expanded to include explicitly punitive sanctions such as unpaid work for the community or a financial penalty of up to £250, giving the prosecutor a clear dispositive function within the criminal process. As with any caution, this may offer an appropriate and speedy resolution to the case, avoiding the need to go to court. Or, it may represent another incentive for suspects to make admissions without any proper knowledge of the case against her. There must be a clear admission of guilt before a caution may be canvassed, but along with silence and bad character provisions, this is likely to make the job of the defence adviser even more difficult.

These changes to police and prosecution roles represent a further shift away from the adversarial conflict of courtroom trial, with the objective of producing a faster and more efficient justice system. However, additional powers, roles and responsibilities cannot be simply heaped on to legal actors without some thought for the wider consequences and without some overall vision. It is clear that many of these new measures fail to produce efficiency gains, whilst at the same time transforming police and prosecutors into sentencers and depriving those accused of the proper safeguards associated with a fair trial. ■

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