



House of Commons
Justice Committee

The Crown Prosecution Service: Gatekeeper of the Criminal Justice System

Ninth Report of Session 2008–09

*Report, together with formal minutes, oral and
written evidence*

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The Justice Committee

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Summary

People do not have a clear picture of the place of the Crown Prosecution Service within the criminal justice system. Historically it has been seen as the minor partner, the handmaiden, to other organisations such as the police. In reality, the decisions made by prosecutors are pivotal. They are the gatekeepers, determining which cases go forward into the system to be prosecuted at public expense.

The role of the prosecutor is central to the criminal justice system, yet the role has only developed incrementally over time, in response to specific challenges, rather than with clear expectations or direction. Fundamental changes have been made to the prosecutor's role and how it relates to other parts of the criminal justice system, but it does not appear that this happens as part of an overall vision. The CPS has, amongst other things, taken on responsibility for decisions about charging, a power formerly belonging to the police, and gained powers to recommend conditional cautions, arguably giving it the function of a sentencer. Thus the prosecutor's role seems to be defined by what it takes away from others, rather than having a proactively defined strategic place in the criminal justice system.

The prosecutor's role in relation to victims also seems to be generally misunderstood. The prosecutor is not able to be an advocate for the victim in the way that the defence counsel is for the defendant, yet government proclamations that the prosecutor is the champion of victims' rights may falsely give this impression. Much of the prosecutor's work by its nature serves the needs of victims, and we should strive for a better service to victims, but there needs to be a better understanding of what it is possible for the prosecutor to be and to do in relation to victims.

In this report the Committee highlights the importance of the prosecutor to the criminal justice system, seeks to shed some light on what the role of the prosecutor should be, and considers alternatives to the present structures.

1 Central to the Criminal Justice System

1. The CPS and other prosecutors play a pivotal role in the criminal justice system.¹

“In hardly any other area of the law will the exercise of discretion ... have a greater effect on the individual and the enjoyment of his or her fundamental right of liberty”.²

Decisions made by the CPS have an enormous impact on everyone experiencing the criminal justice system, whether victims, witnesses or defendants. They determine what happens to the work of the police, and of other investigative agencies, and effectively determine the workload of the courts (and therefore impact on the workload of the prison and probation services). It is important for the CPS to contribute significantly to achieving the broader aims of the criminal justice system.

2. Rt Hon Baroness Scotland of Asthal QC, the Attorney General, and therefore Government Minister responsible for prosecution, emphasised not only the importance but also the challenges of the prosecution role: “The fair and effective prosecution of offenders is a more important, more demanding and more sophisticated job than it has ever been”.³ She described her aim as trying to make sure that the prosecutors are “effective gatekeepers” of the criminal justice system.⁴ Lord Justice Toulson described this gatekeeping role of the Director of Public Prosecutions (DPP):

“The head of an independent, professional prosecuting service ... entrusted by Parliament with the responsibility of deciding whether or not a person should be prosecuted at public expense”.⁵

The prosecutor is entrusted with determining on an evidential and public interest basis whether a person should be prosecuted and therefore whether he or she should go forward for a judgment before the courts. There is an obvious need for the prosecutor to ensure that cases are not brought where there is no real evidence, both to ensure that the time of the court is not wasted when there is little prospect of conviction and that innocent people are not unnecessarily put through the strain of a court process. But MPs are frequently contacted by constituents who are angry where there has been a decision not to prosecute, where the local perception is that there is a case to answer and a wish to see the courts decide. The decisions made by the prosecutor often stand at the centre, amidst competing concepts of fairness both to different players in the system and sometimes to the same player in different ways, such as fairness to the public desire for justice to be seen to be done and fairness to the public in terms of spending their money effectively.

1 Other organisations conducting prosecutions in England and Wales include the Serious Fraud Office, Health and Safety Executive, Local Authorities and the Royal Society for the Prevention of Cruelty to Animals. For further discussion about the range of prosecuting agencies see chapter 5.

2 Ev 93 [Maik Martin]

Maik Martin is a German lawyer and holds a part-time lectureship in UK constitutional law at Freie Universität Berlin, having previously worked at JUSTICE and at the House of Commons.

3 Ev 62

4 Q 378

5 R (B) v. DPP (EHRC intervening) [2009] EWHC 106 (Admin)

3. Despite the significance of the prosecutor to the criminal justice system, much of the policy and public debate seems to focus on policing or prisons. The Public and Commercial Services Union (PCS) described investment in the criminal justice system as “heavily biased on the issue of policing” by comparison with other agencies.⁶ The CPS budget for 2007-8 was £639.5 million; in contrast the Government grant and central spending on services for the Police Service was £11.1 billion in 2007–08.⁷ Research for the British Crime Survey found that people spontaneously associate police, courts and prison with the criminal justice system but that “there was little awareness or understanding of the Crown Prosecution Service”.⁸ We undertook an inquiry into the role of the prosecutor to redress this balance in our own body of work.

4. The role of the prosecutor in the criminal justice system is pivotal, so it is perhaps surprising that the principal prosecuting authority, the Crown Prosecution Service (CPS), is not much more than 20 years old. The CPS began operation in 1986 for a very specific purpose: to “make the conduct of prosecution the responsibility of some one who is both legally qualified and is not identified with the investigative process” in the interests of “fairness”.⁹ In its relatively short life there have already been a number of reviews and discrete but fundamental changes to the powers and role of the CPS. One significant example is the decision, following the Rt Hon Lord Justice Auld’s Review of the Criminal Courts of England and Wales, to transfer the decision on what, if any, offence an individual was charged with from the police to the CPS in more serious cases.

5. The key theme that has engaged the Committee is the extent to which changes to the prosecution have formed part of a structured movement towards a clear vision of what the role of the prosecution should be. The Attorney General said:

“The current arrangements for delivering prosecution services in England and Wales have developed over time and in response to particular challenges, reviews and reports”.¹⁰

This appears to us to be a rather passive approach, given the central importance of the prosecution service within the criminal justice system. We fear that piecemeal changes may be being made without full consideration of what these mean to the prosecutor and to the criminal justice system as a whole. The risk is that the CPS becomes home to “conflicting demands ... unclear expectations, unclear roles and responsibilities”.¹¹

6. It sometimes appears that the prosecutor is caught in the middle of competing interests and is defined by what other agencies want, rather than by a coherent vision of what the prosecutor should be. When we asked Keir Starmer QC, Director of Public Prosecutions (DPP), about the rationale for reorganising the CPS so that the 42 areas (which match police force boundaries) are also brigaded into 15 groups the answer hinted at a balancing

6 Ev 118

7 Ev 74; Home Office Departmental Report 2008, p.30 (this figure is not exclusively Home Office spending).

8 Report prepared for the Home Office by BMRB Social Research, *Fairness and effectiveness in the Criminal Justice System: development of questions for the British Crime Survey*, p.3

9 Sir Cyril Philips, *Report of the Royal Commission on Criminal Procedure*, January 1981, Cmnd. 8092-I, para 7.3

10 Ev 64

11 Ev 116 [PCS]

act between the other agencies in the criminal justice system: “on a group basis ... the courts can be serviced better. So this was not a model designed only to suit or to fit with the pattern and structures of policing”.¹² Sir Ken Macdonald QC, former Director of Public Prosecutions, called the early CPS “an unhappy compromise between numbers of strongly competing interests”.¹³ David Jeremy QC painted a picture of the role of the CPS being to resist the different interests and represent fairness: “the prosecutor strives to resist pressures from victims and from the police, to show respect for due process, to be fair and act as a ‘minister of justice’”.¹⁴

7. The prosecution plays a pivotal role in the criminal justice system. This role has become too important to continue to be vulnerable to piecemeal amendment in response to events. We expect the Attorney General and the Director of Public Prosecutions to show clear leadership in defining the role of the prosecutor in the criminal justice system. Specific changes to the operation of the prosecution system should be made in the light of an awareness of how they affect and contribute to this clear role and to the criminal justice system as a whole.

8. The aims and purposes of the Crown Prosecution Service need to be clear and it also needs to be clear how they relate to the overarching aims and purposes of the criminal justice system as a whole. We fear that the Crown Prosecution Service is sometimes defined by what it is not or by its relationship to other organisations, rather than its own aims and purposes, or by clarity about its role within the criminal justice system.

The inquiry

9. We began our work on the prosecution system on 3 April 2008 in order to consider provisions in the Draft Constitutional Renewal Bill relating to the Attorney General and her superintendence over prosecutors. We reported on these specific matters in June 2008 (*Draft Constitutional Renewal Bill (provisions relating to the Attorney General)*, fourth report, session 2007-08, HC 698).

10. We began this inquiry into the role of the prosecutor, taking the CPS as the principal prosecuting agency, with oral evidence in January 2009. We would like to thank all those who submitted written material or gave oral evidence.

11. We look first at several key developments affecting the role of the CPS, and particularly its relationship with other agencies in the criminal justice system. We look then specifically at the role of the CPS with regard to victims and witnesses and what expectations have been created in relation to what the CPS can achieve for victims. We consider a theme that recurred through our inquiry, consistency, and how this relates to the concept of the CPS as a national service, locally delivered. Finally we locate the CPS in the context of other agencies that conduct prosecutions in England and Wales and consider issues of transparency and consistency. We do not attempt to look in detail at CPS performance; the CPS is inspected by the CPS Inspectorate, and is subject to detailed scrutiny in other forms,

12 Q 331

13 Sir Ken Macdonald QC, *Coming Out of the Shadows*, CPS Lecture, 20 October 2008

14 David Jeremy QC, “The Prosecutor’s Rock and Hard Place”, *Criminal Law Review*, [2008] 936

such as a report into CPS handling of Magistrates' Court work published by the National Audit Office in 2006.¹⁵ We hope, however, to illuminate key questions about the role of the prosecutor in the criminal justice system.

15 National Audit Office, *Crown Prosecution Service: Effective use of magistrates' courts hearings*, HC 798 Session 2005-2006, 15 February 2006

2 Defining the role of the prosecutor

12. The Crown Prosecution Service began operation in 1986. Rt Hon Sir Iain Glidewell, conducting a review of the CPS just over a decade later, commented:

“it occupied a position between the courts, which have been in existence for centuries, and the police with a century and a half of history and tradition. It is difficult for any new organisation in such a position to establish a clear role for itself and to have that role accepted by the existing older agencies. The CPS had to grapple with that difficulty, which arose partly out of group psychology and partly from the division of responsibility between the CPS and other agencies”.¹⁶

13. Since the CPS was created, its role in relation to the other agencies in the criminal justice system has fundamentally changed. Keir Starmer QC, Director of Public Prosecutions, told the Committee:

“when the CPS was first set up it was envisaged that it would occupy a space between an investigation by the police and proceedings in court. It would take the charge from the police and the evidence from the police, process it and parcel it out to the self-employed Bar in most instances for the serious cases for prosecution. It has now changed. It occupies the same sort of space but it is a much more sophisticated exercise of function”.¹⁷

Our witnesses often put changes to the CPS in the context of how the CPS relates to other parts of the criminal justice system. For example, new powers of the CPS to recommend conditional cautions — whereby prosecution is suspended pending successful completion of particular conditions within a specific timeframe—were described as giving the CPS the function of a sentencer, “fundamentally blur[ring] the boundary between the role of the courts and the role of the prosecutor”.¹⁸

14. Nicola Padfield, University of Cambridge, felt that:

“the most interesting questions are concerned with the way in which the CPS relates to other parts of the criminal justice system. As it grows up and becomes a more powerful player in the criminal justice system the rub-on effects, and indeed perhaps the unintended consequences, need to be thought about”.¹⁹

We received evidence of four particular areas in which the CPS’s role was changing in relation to other agencies in the criminal justice system, and, as a result, the map of the criminal justice system was being redrawn. These areas were:

16 Rt Hon Sir Iain Glidewell, *The Review of the Crown Prosecution Service: A Report*, June 1998, Cm 3960, para 16

17 Q 297

18 Ev 88

19 Q 1

- statutory charging—the decision on what offence, if any, an individual is charged with has become a matter for the CPS in all but minor cases. This defines the parameters for much of what happens next to an individual case in the criminal justice system;
- the link between the charge that is chosen and whether an offender pleads guilty. This raises the question of whether we are seeing the development of a plea bargaining system which moves decision-making from the judiciary to the prosecutor;
- the extent to which the prosecutor’s role is affected by powers to recommend conditional cautions, which again can involve the prosecutor in part of the judicial role of sentencing;
- CPS advocacy, and the way in which the increase in CPS staff presenting cases in court impacts on the quality of advocacy and the future of the criminal Bar.

All of these individual changes have a potentially fundamental impact on the role of the prosecutor, on other agencies and on the working of the criminal justice system as a whole.

Where does the police role end, and the role of the CPS begin?

15. ‘Statutory charging’ refers to the new charging arrangements which have moved the responsibility for determining what (if anything) an individual is charged with from the police to the CPS for the more serious cases.²⁰ Lord Justice Auld’s Review of the Criminal Courts recommended this change; the Criminal Justice Act 2003 enacted the necessary legislative provisions.

16. Both the CPS and the Association of Chief Police Officers (ACPO) see this as a significant change both for the criminal justice system and for the relationship between the two agencies. ACPO said statutory charging was “a significant, unparalleled, collaborative project between two organisations that historically had not fully trusted each other”.²¹ Keir Starmer QC described statutory charging as “marking, in many ways, the coming of age of the CPS after 18 years in which we were very much the minor partner in the Prosecution Team”.²²

17. The statutory charging scheme was rolled out between 2004 and 2006. ACPO told us that there have been “real and measurable benefits year on year during the course of this journey”.²³ Tim Godwin, now Deputy Commissioner of the Metropolitan Police, speaking on behalf of ACPO as their lead on criminal justice, described in more detail how:

“Initially, as far as the Police Service was concerned it was felt that it [the statutory charging scheme] could not be trusted, but when you look at the discontinuance rates we had at the time as far as efficiency was concerned the necessary relationship between the service and the CPS was not there in terms of victims. Since then the

20 According to ACPO (Q 37) 60% of charging decisions numerically remain with the police, but anything from the level of seriousness of Assault Occasioning Actual Bodily Harm upwards is referred to the CPS.

21 Ev 59

22 Keir Starmer QC, ‘A prosecution service for the 21st century’, a speech to the London Metropolitan University, 9 January 2009

23 Ev 59

outcomes show that whilst the number of charges has fallen numerically convictions have increased, so on that data we are getting better judgments in terms of outcomes which must be good for victims and witnesses”.²⁴

The CPS also draw on these statistics as evidence of success of statutory charging: “Before the introduction of statutory charging, 36% of cases heard in the magistrates’ courts were discontinued. At March 2008, that figure had dropped to 13.2%”.²⁵ The DPP commented on the impact of discontinued cases on the broader criminal justice system:

“Every case that is discontinued has an impact on [victims and witnesses] ... It has massive resource implications because we will have prepared all those cases and the courts will have had to handle them”.²⁶

18. Several witnesses felt that, as a matter of principle, the CPS should make the decision as to what offence an individual was charged with. The Public and Commercial Services Union (PCS), which represents about 3,000 CPS employees, stated that:

“the Police are not best suited to decide what evidence is required to prove a charge. This is the job for the CPS as an independent authority which was set up to prosecute criminal cases investigated by the Police in England and Wales”.²⁷

PCS thought that statutory charging “has been the driver behind narrowing the justice gap”.²⁸ The Attorney General said:

“what we recognised was that it was very important to get a level of acuity, a level of judgment, at a fairly early stage so that we actually got the right charge for the right set of facts”.²⁹

19. Stephen Wooler CB, Chief Inspector of the CPS, echoed the support for the principle that the CPS should make charging decisions, but also acknowledged the practical challenges:

“Whilst the charging arrangements, in my view, are very sound and actually put the decision making in the right place and ensure early preparation of cases and case building, they have, from the operational point of view, some significant disadvantages in making sure that there are quick decisions”.³⁰

24 Q 42

25 Ev 76

26 Q 351

27 Ev 113

28 Ev 113

The justice gap is the difference between the number of crimes which are recorded and the number which result in their perpetrator being brought to justice.

29 Q 371

30 Q 266

His comments highlighted the need for both the CPS and the police to improve statutory charging:

“we looked to the CPS to be more flexible, more responsive to the police needs in the way that it delivers pre-charge decisions but also we were looking very much at the role of the police in the preparation of files, the supervision of investigating officers, to make sure that the CPS had the quality of the material that it needed to take properly informed and sound decisions”.³¹

The Chief Inspector’s comments followed a joint review of the new charging arrangements carried out by HM Crown Prosecution Service Inspectorate (HMCPSP) and HM Inspectorate of Constabulary (HMIC) in 2008. This report commented:

“operational personnel (both police and CPS), understood the potential benefits of the scheme ... however most also felt that the processes involved need to be significantly more efficient”.³²

20. Tim Godwin described the practical application of statutory charging as “probably the biggest issue between the two agencies”.³³ The key concern from the police was delays caused by the CPS. Tim Godwin described statutory charging as operating

“a bit like a doctor’s surgery ... making an appointment [to see a prosecutor] and waiting your turn et cetera when in reality we should be able to access those services 24/7 when we are ready to charge”.³⁴

Other organisations noted the impact on timeliness. The Criminal Bar Association (CBA) said:

“Overall we feel that allowing the CPS to decide upon charge has been a positive step. But the effect of this change has also been to build in a significant delay in the time from arrest to the disposal of the case”.³⁵

21. Such concerns may explain why there have been proposals to move back from statutory charging. Sir Ronnie Flanagan’s Independent Review of Policing report recommended consideration of “the extension of police charging powers to all cases heard at the magistrates’ court, and to additional offences subject to trial, either at the magistrates’ or the crown court”.³⁶ This was reiterated by Jan Berry, former Chair of the Police Federation, in her interim report on progress against the Flanagan Review.³⁷

22. Nevertheless, ACPO were positive that the CPS and the police could resolve their difficulties: “There are issues to be resolved about how we access charging decisions et

31 Q 259

32 Criminal Justice Joint Inspection (HMCPSP, HMIC), *The joint thematic review of the new charging arrangements*, November 2008

33 Q 38

34 Q 38

35 Ev 67

36 Sir Ronnie Flanagan, *Independent Review of Policing*, Recommendation 22

37 Jan Berry, *Reducing Bureaucracy in Policing*, February 2009

cetera, but there is great willingness for the two agencies to work together to resolve those problems”.³⁸ The DPP also acknowledged the difficulties and considered how to reach resolution:

“it is true that there have been some issues about how quick the service is being provided in some areas and whether face to face is the appropriate way forward or whether telephone advice is the way forward. ... I do not think it is a one-size-fits-all across all areas because geography and the profile varies enormously from area to area, but there is this important initiative driven—and this is the important thing—by a standard. This is something which should be simply driven by standards, in our view, this quality of charging decision within this timeframe for the following sorts of cases, 24/7 access. The police and the CPS are working jointly on this to solve the difficulties and I am sure we are going to do so”.³⁹

23. One suggested way forward was through enhancing CPS Direct, the CPS unit which provides charging decisions by telephone out of hours. Stephen Wooler said “we concluded that ... there were certain features of CPS Direct which could be taken and applied to the daytime situation in order to produce that sort of flexibility”.⁴⁰ Tim Godwin was also positive about CPS Direct, suggesting that as well as dealing with some of the practical concerns about getting access to lawyers, an enhanced CPS Direct model had other potential advantages in increasing consistency:

“I believe that with a virtual charging centre where you have a specific number of experienced lawyers to make decisions on charging there will be a far more consistent outcome and, as a result, we can plan evidence quality. One needs to address inconsistencies as between lawyer A and lawyer B as to whether, for example, a fingerprint needs corroborative evidence”.⁴¹

The Police Federation were also positive about CPS Direct: “In a small and simplistic survey most responses were very positive [about CPS Direct] saying that on the whole this service was far better than the one given in stations”.⁴² It also noted however “logistical issues of getting both volume of evidence and certain types of evidence to the lawyer given the infrastructure limitations”.⁴³

24. However, the remote service provided by CPS Direct is perhaps less able to deliver one of the key benefits identified from implementing statutory charging: “relationships between the police and CPS have improved which has helped develop a more joined-up approach”.⁴⁴ Gillian Guy, Chief Executive of Victim Support, suggested that physically situating prosecutors and the police together had benefits in terms of the service to victims:

38 Q 37

39 Q 351

40 Q 266

41 Q 41

42 Ev 109

43 Ev 109

44 Criminal Justice Joint Inspection (HMCPPI, HMIC), *The joint thematic review of the new charging arrangements*, November 2008

“our experience is that co-location of agencies actually helps ... just to make sure that that communication happens and also that the people perspective is put into the system at every possible opportunity”.⁴⁵

We also heard related concerns that CPS Direct as a ‘virtual’ area, rather than a local service, presented challenges: “How does this [the growing role of CPS Direct] fit with issues of local (area) accountability?”⁴⁶

25. The relationship between the police and the CPS is not simply one of a boundary at the point of charging. Witnesses also emphasised the value of prosecutor advice to the police at the early investigative stages. Peter Lewis, Chief Executive of the CPS, told us:

“Once upon a time it was fairly easy to answer that question [when does the role of the prosecutor begin and end in the criminal justice system] in that it started after the police had charged the case, but increasingly now as we work with the police under what we call a prosecution team ethos we are starting to get involved earlier and earlier”.⁴⁷

Tim Godwin similarly described the ‘prosecution team’:

“The relationship with the CPS as we speak now is one that I would call a prosecution team. Certainly, a significant amount of work is going on to reduce bureaucracy, streamline processes and reduce cost through integrated prosecution teams and the development of virtual courts. All those things drive efficiencies but at the same time improve our effectiveness”.⁴⁸

The Attorney General felt that such close working was improving the quality of output:

“I do think that what we are getting is a greater degree of acuity, judgment, sharpness about what is necessary, and what is also possible (and it is happening increasingly, of course) is that where the prosecutor believes that further or other information could be secured which would enable a successful prosecution to take place, that advice is being given to good effect”.⁴⁹

The Attorney saw value for the police and for the CPS in learning about each other’s expertise:

“one of the things I have found really interesting is to see how, through the police and prosecutors working together, it is almost a cross-fertilisation of education so that they better understand the information that is likely to bring about a successful prosecution, but also, I think prosecutors are starting to better understand some of the challenges that investigators face”.⁵⁰

45 Q 127

46 Ev 106 [Nicola Padfield]

47 Q 309

48 Q 37

49 Q 376

50 Q 376

26. Some witnesses questioned, however, whether the relationship between the CPS and the police was too close. PCS said: “Public perception of CPS independence may be affected once they become more aware of the recent close working relationships between the Police and CPS”.⁵¹ Another witness wrote “the relationship between the police and the Crown Prosecutors ... seems way too close and mutually supportive”.⁵²

27. Other witnesses felt that the relationship between the police and the CPS should be one of challenge. The Attorney General described how “a close, professional and robust relationship between the prosecutors and the investigators is an increasingly important aspect of justice”.⁵³ Mind drew out the role of the CPS to make the police better: “The CPS therefore has a role to play in improving investigations, by demanding more and better evidence from the police at the charging stage”.⁵⁴ Specifically they felt the CPS might have an important role to play in ensuring commensurate treatment for offenders who had targeted individuals as the victim of crime because of a disability or their ethnicity for example:

“If the CPS had greater involvement during the investigation stage prosecutors could do more to ensure that evidence is robust enough for an aggravated sentence to be considered by the judge”.⁵⁵

This accords with Keir Starmer’s words, that the CPS is no longer the ‘minor partner’ in the relationship.

28. We also looked at the prosecution model in Scotland, whereby the Procurator Fiscal has responsibility to direct the police during the investigation. Robin White, University of Dundee, told us “the Fiscal is in charge; he tells the police what to do”.⁵⁶ In comparison, he suggested that the prosecutors in England and Wales were historically “to use a phrase, handmaidens of the police”.⁵⁷

29. ACPO felt that such a change in powers was unnecessary in England and Wales, because close engagement between CPS and police personnel could achieve the same outcomes. Tim Godwin, ACPO, said:

“In terms of serious crime it is a matter of common practice in the Police Service to bring in the CPS early in the investigation so they can give advice and guidance in terms of where the line of inquiry may go and what is needed to get to the point of charge. Therefore, for homicide, rape and crimes of that kind we would have that sort of contact. As to the more ‘volume’ crimes probably the capability of CPS would be sorely tested to achieve that”.⁵⁸

51 Ev 111

52 Ev 91 [David Marriott]

53 Ev 62

54 Ev 95

55 Ev 95

56 Q 19

57 Q 3

58 Q 43

The CPS were not demanding such an option, although Peter Lewis, CPS Chief Executive, did not close the door to it:

“What we have found so far is that the police really welcome the sort of advice we give them ... So at the moment in the sense of do we need that power to get the necessary influence [the power of the Procurator Fiscal to direct the police], the answer is, no. Obviously if it proved to be the case, then the position would need to be considered”.⁵⁹

30. The CPS needs to take a bold and robust approach as the independent prosecutor. Part of that role is challenging the police to do better. The CPS is not a minor partner in the criminal justice system.

31. There is much to commend in the collaborative approach being taken by the police and the CPS, which helps to raise overall standards through understanding the challenges and expertise of other agencies. While such arrangements are working well we do not see the need for the CPS to have powers such as those of the Procurator Fiscal to direct the police. The debate about whether the CPS should have such powers has to be seen in the light of the increasing development of joined up working between the police and the CPS at earlier stages of an investigation. In theory this could raise a question over the way in which the CPS will be expected—at a later stage—to make an independent decision about whether or not to prosecute but in practice it seems better to have that relationship throughout an investigation as long as both sides are clear that joint working must not blur the distinction between the police responsibility to investigate, and the CPS responsibility to take the decision about prosecution and to manage any subsequent process. Oversight of this relationship is clearly a matter for the inspection and scrutiny processes.

32. We heard strong support on grounds of principle for the charging decision to rest with the prosecutor. We also heard concerns that the arrangements for statutory charging had resulted in delays. Nevertheless, these considerations did not lead us to a conclusion that statutory charging should be wholly or partly abandoned. There is clearly a willingness on behalf of the CPS and the police to resolve what are significant practical problems.

33. CPS Direct provides a telephone and IT based ‘remote’ service, which appears to be well regarded by its users and we hope that it can contribute to the consistency and ease of access to legal advice provided for the police. However, this service should not be assumed to be a substitute for local engagement and should operate within the context of a good working relationship and mutual understanding between the police and the CPS at a local level.

Negotiated justice?

34. Another area where the police raise concerns about the CPS is in relation to the level of charging. Police criticisms tend to focus on questions of whether the CPS is over-cautious, or target-driven, and as a result will prefer less risky, i.e. lower, charges that are more likely

to lead to a guilty plea or a conviction. Sentencers ask whether patterns in charging decisions represent a move through the back-door to a plea bargaining system, which enhances the decision-making powers of the prosecutor in preference to the openness and transparency of going through the courts.

35. The Police Federation said: “There is a perception amongst many officers that, to use a current buzz phrase, many CPS [prosecutors] are ‘risk averse’ when it comes to charging decisions”.⁶⁰ Their concern was that the CPS would only pursue the “most certain of cases”, perhaps because of how their performance targets worked.⁶¹ John Coppen, Police Federation spokesperson on police custody issues, wrote:

“Anecdotally, police officers state that the CPS are reluctant to put before a court anything other than cast iron cases so as better to meet their performance targets. Thus cases that could realistically be charged as serious offences are either not charged at all, or downgraded to something that is easier to prove”.⁶²

Tim Godwin, ACPO, described how conflicting performance regimes between the CPS and the police might give rise to tensions:

“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”.⁶³

36. Tim Godwin acknowledged the sorts of police perceptions around CPS charging described by the Police Federation but stated that examination did not necessarily bear them out:

“for the police it can give rise to a bit of a myth, in that the reason detection and commission rates go down is that we cannot get a charge out of the CPS. Generally, when that happens I ask the officers in my command to send me the files so I can assess whether they are accurate in terms of the quality of the evidence or otherwise. Generally speaking, I end up deciding that probably the CPS has got it right”.⁶⁴

37. Nevertheless, it is not only the police who raise concerns about CPS charging. The Criminal Bar Association told us:

“We suspect that there has been some under-charging ... We have reason to suppose that there is a tendency to accept inappropriate pleas”.⁶⁵

60 Ev 109

61 Ev 109

62 Coppen, J., ‘PACE: A View from the Custody Suite’, in Cape, E. and Young, R., (eds), (2008) *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future*, Oxford and Portland, Hart Publishing, p. 87

63 Q 42

64 Q 41

65 Q 71

The Magistrates' Association told us:

“Although this is difficult to detect, our members have been highlighting examples of cases brought into court where the magistrates felt the matter had been under-charged”.⁶⁶

The Magistrates' Association provided a number of case study examples and analysed trends in charging. It said, for example, that charges of ‘Assault occasioning Actual Bodily Harm’ did not often appear, but photographs of bruises and scratches were common in cases of Common Assault (which require a person to have been put in fear of violence but not necessarily for physical contact to have occurred).⁶⁷

38. The DPP did not believe that there was evidence of under- or over-charging by the CPS:

“What is said about over- and under-charging is said about over- and under-charging and has always been said, but there is no evidence of that that I am aware of and obviously there is judicial review of certain decisions not to charge which would give us further evidence if it was there”.⁶⁸

He also noted that the CPS was an inspected service which provided an additional safeguard as to whether decision-making was appropriate.

39. David Jeremy QC considered some of the evidence as to whether under- or over-charging is happening in a 2008 article. He noted high levels of attrition for assault offences (citing research from 1999 demonstrating that only 19% of those charged with Intent to cause Grievous Bodily Harm, under section 18 of the Offences Against the Person Act 1861, were convicted of this rather than for example another, less serious, assault offence). He also questioned whether the statistics used to assess CPS decision-making could mask issues in charging. For example, he said that the definition of a ‘successful outcome’ would include a case where two offences were charged and the judge orders a verdict of not guilty upon the prosecution accepting a plea to a lesser offence and offering no evidence for the more serious one.⁶⁹ The Magistrates' Association, in discussing concerns about charging and plea bargaining, stated:

“We note that the CPS maintains a high level of success in its prosecutions. During October 2008, their overall success rate nationally was 86.5% of prosecutions: for our courts, the percentage in some offence groups such as motoring offences was higher at 90% and 93% for theft and handling offences”.⁷⁰

The Magistrates' Association appear to be questioning what the high success rate actually means.

66 Ev 89

67 Ev 90

68 Q 317

69 David Jeremy QC, “The Prosecutor’s Rock and Hard Place”, *Criminal Law Review* [2008] 926

70 Ev 89

40. Several witnesses concluded that more evidence was needed to determine what is happening with charging. The Criminal Bar Association recommended that “an analysis be undertaken as to whether allowing the CPS to determine the appropriate charge has also resulted in under-charging or simply more realistic charging”.⁷¹ Nicola Padfield, University of Cambridge, said:

“I think we ought to undertake a lot more research ... into the extent to which over-charging happens in order to allow for greater negotiation. I think the extent to which we really do not know how much this happens in practice is quite surprising”.⁷²

This accords with the Magistrates’ Association’s conclusion as regards its examples of under-charging:

“We do not know whether this represents a back door attempt to introduce a plea bargaining system into our courts or whether these are isolated examples from inexperienced prosecutors”.⁷³

41. Nicola Padfield, University of Cambridge, told us that she was “very nervous” about plea bargaining.⁷⁴ She said

“One of the reasons we say we really do not do plea bargaining in this country is that traditionally we have not involved the judge in the process, but I am sure that for ever a defence lawyer has rung up whoever is in charge of the prosecution and said that his or her client would plead guilty to a lesser charge if the higher charge was dropped. Informal negotiation has gone on for ever. What we are moving towards very fast is a much more formal system of plea negotiation and plea bargaining which I suspect will more often be initiated by the prosecution than the defence which I think shifts the balance of power in a very important way”.⁷⁵

She went on to describe, by way of comparison, the American system where the prosecutor has power to offer bargains involving matters such as the length of sentence and the type of prison it will be served in.⁷⁶ Her concern was at the amount of power that ended up residing in the prosecutor:

“I do not think the prosecutor of the CPS within our system should be encouraged to develop that sort of power in the plea bargaining process. My view is that we should stop and think before we slide that way ... I think that such decisions should be made

71 Ev 65

72 Q 11

73 Ev 89

74 Q 5

Robin White (Q 9) defined different types of plea bargaining: sentence bargaining, where the sentence becomes less than it would otherwise have been; charge bargaining, where one charge might be dropped for a guilty plea to a lesser charge; and fact bargaining, where the charge would stay the same but there might be agreement as to how the prosecutor describes the circumstances, e.g. stabbed rather than repeatedly stabbed. We are looking here at charge bargaining.

75 Q 5

76 Q 6

in an open court where at least the public is able to see what bargain has been agreed”.⁷⁷

42. Nicola Padfield did not ignore the potential benefits of plea bargaining; a guilty plea means that neither the victim nor the public purse need to be put through the long process of a trial. She commented:

“The Crown Prosecution Service obviously has to make extraordinarily difficult judgments in relation to costs and the trauma to witnesses, and all sorts of issues come into play to affect the decision to downgrade a charge in response to a guilty plea”.⁷⁸

However, she emphasised the safeguards necessary for a system of plea bargaining:

“There are huge practical benefits to the system ... but it does depend on two very important things. One is that suspects should be well advised because it is very easy to agree to something which is not in your interest if you do not understand what is going on ... Then, of course, the public interest does not necessarily accord with the interest of the prosecutor or the suspect”.⁷⁹

43. The DPP similarly noted the importance of safeguards in a system of plea bargaining:

“I cannot see that there is any problem with a more formal approach if that is going on informally in any event, subject to some safeguards. One is, it has got to be transparent, and secondly it has got to be put before a court, and thirdly the court has to be the final arbiter—and I add a fourth, there must not be over-charging, in other words the Code test for the appropriate charge must lie at the heart of any system and there must never be over-charging with a view to influencing any negotiation of charges at some later stage”.⁸⁰

In March 2009 the Attorney General issued guidelines for prosecutors engaged in discussions about pleas in serious or complex fraud cases. These guidelines were aimed at encouraging “discussions about guilty pleas in fraud trials to happen earlier and more transparently”.⁸¹ The Attorney General noted that “the benefits of plea negotiations are especially marked in fraud cases and can narrow issues for trial, saving time and costs, and reduce stress for victims and witnesses”.⁸²

44. The decision as to what offence an individual is charged with is pivotal, with significant implications for the rest of their journey through the criminal justice system. It also goes to the heart of what that system is trying to achieve; we are not

77 Qq 6-7

78 Q 11

79 Q 7

80 Q 317

81 Attorney General’s Office Press Release 18 March 2009, <http://www.attorneygeneral.gov.uk/attachments/Plea%20negotiations%20+%20Crown%20Ct%20powers%20AGO%20release%2018Mar09.pdf>

82 Attorney General’s Office Press Release 18 March 2009, <http://www.attorneygeneral.gov.uk/attachments/Plea%20negotiations%20+%20Crown%20Ct%20powers%20AGO%20release%2018Mar09.pdf>

trying to maximise conviction rates, we are trying to maximise convictions of guilty people for the crime they have committed. While perceptions of both under- and over-charging may be inevitable, they are nonetheless damaging to public confidence. The Attorney General should consider what evidence is required to monitor the extent of under- and over-charging, and how this data could be best collected.

45. An effective and ongoing evaluation of the extent to which under- or over-charging happens is important not least because of what it tells us about whether plea bargaining is happening. Expanding the use of plea bargaining would have significant consequences and in our opinion needs the utmost care and consideration. We must not drift towards a situation where it is commonplace without discussing whether it is desirable and, if so, what safeguards must be put in place for defendants, victims and the public.

A day in court

46. A number of witnesses expressed concerns about the growth of out-of-court disposals such as fixed penalty notices, penalty notices for disorder and conditional cautions. Prosecutors determine whether or not to use a conditional caution; this is a decision which the Magistrates' Association told us represents a shift in power from the courts to the prosecutors: "With the introduction of conditional cautions, the CPS has taken on the role of sentencers".⁸³

47. The prosecution have had powers to recommend conditional cautioning since 2003, rolled out to all CPS areas by April 2008.⁸⁴ A conditional caution suspends the prosecution on the basis of the offender completing particular conditions within a specified timeframe. A conditional caution can only be given where the suspect admits that he or she committed the offence. If the individual fails to meet the conditions, the suspended prosecution can be reinitiated. These are therefore disposals, like fixed penalty notices, in the sense that an individual does not enter the formal criminal justice system leading to a court hearing, but unlike fixed penalty notices, the conditions can vary according to the situation and the individual. Our witnesses' comments often linked fixed penalty notices and conditional cautions together as out-of-court disposals. However, the merits and value of such disposals overall is beyond the scope of this report.

48. Our witnesses questioned whether the fundamental nature of the shift towards out-of-court disposals had been recognised and understood. Robin White, University of Dundee, said:

"I am not alone in saying that this is the most important change in criminal procedure possibly in all parts of the UK for the past 100 years or more, but it seems to be largely unnoticed".⁸⁵

He referred to out-of-court disposals as a "paradigm-shift" in criminal justice, away from a paramount concern of "due process" conducted in open court.⁸⁶ He said:

83 Ev 88

84 Ev 76 [CPS]

85 Q 3

“Reasons for using [alternatives to prosecution] have expanded from coping with numerous minor regulatory offences by routinisation, to asserting that many ‘real crimes’ (including assaults, breaches of the peace and thefts), simply do not justify a court appearance”.⁸⁷

49. Nicola Padfield, University of Cambridge, questioned whether we knew what the end product should be. She commented:

“I think it is extremely useful to have in place systems that allow low-level public disorder to be dealt with without prosecutions as long as it is not being used for cases which would otherwise in court be dealt with perhaps more leniently. It is providing an alternative system of criminal justice”.⁸⁸

She went on: “the question is that we have drifted towards a huge increase in non-court disposals because it is cheaper. Have we adequately thought through whether it is better?”⁸⁹ She also wondered whether people had really noticed “that the numbers [of out-of-court disposals] are enormous”.⁹⁰

50. Others questioned if it was appropriate for such powers to shift towards prosecutors or the police, or whether these should be judicial decisions. Robin White, University of Dundee, commented that out-of-court disposals “constitute ‘punishment without prosecution’, transferring considerable power from the courts”.⁹¹ The Magistrates’ Association stated:

“Whilst the Association accepts the use of fixed penalty and penalty notices for disorder or minor offences, where all who accept them receive the same punishment, it has always believed that where a choice of sentence has to be made, that is a judicial decision and not one that should be reserved to an arm of the executive”.⁹²

Maik Martin, a German lawyer, commented on the balance between CPS and judicial decision-making:

“While, not least under valid considerations of the most appropriate use of scarce resources in the criminal justice system, not all criminal offences should necessarily be prosecuted ... it should be a decision ultimately left to judges to decide whether or not the ordinary course of the law should be disturbed by a decision of the CPS or other prosecution agency not to bring a case to court”.⁹³

51. The Director of Public Prosecutions told us that conditional cautions “occupy a particular space ... but I do not see them as usurping the function of the court”.⁹⁴ He

86 Ev 133

87 Ev 132

88 Q 30

89 Q 31

90 Q 30

91 Ev 132

92 Ev 88

93 Ev 93

94 Q 314

argued that there was a misconception that these matters would otherwise be dealt with by the courts:

“If you take together fixed penalty notices for traffic, for disorder, cannabis warnings, cautions and conditional cautions, which is a sort of broad range of powers here, you are talking about a huge number of cases. You are talking about something like 3.7 million cases. Therefore, I think it is wrong to assume these are cases which would otherwise have gone to court because there are over a million cases going to court and the system could not cope if all of those cases were being put into the system”.⁹⁵

This links back to Lord Justice Toulson’s definition of the gatekeeping role of the DPP in making the decision about who should be prosecuted “at the public expense”. If the courts could not cope with every case going into the system, then part of the gatekeeping role of the CPS is to determine on which cases finite resources should be spent.

52. The Director of Public Prosecution expressed support for the system of alternative disposals, providing there were adequate safeguards: “Subject to that being transparent and having safeguards, I do not see a constitutional problem or a practical problem in the operation of that sort of system”.⁹⁶ However, witnesses including the Chief Inspector of the CPS, academics and sentencers raised concerns about whether the transparency of, and safeguards for, alternative disposals were adequate.

53. Stephen Wooler, Chief Inspector of the CPS, saw benefits for out-of-court disposals in an appropriate system. He said: “prosecution is only one means of enforcement. The criminal justice system benefits substantially from taking straightforward cases out of the criminal justice system if there can be a fair and just penalty or treatment provided in another way”.⁹⁷ However:

“There are issues of ... consistency of approach. Across the different authorities I could point to parts of the country where you might attract a £60 fine or fixed penalty—the Home Office are increasing that at the moment—for shoplifting or criminal damage and yet from the local authority a large fine if you overfill your wheelie bin or in London, if you are in a bus lane, it would be even more”.⁹⁸

The Chief Inspector’s particular concern was that decisions as to whether to prosecute or use alternative mechanisms could differ between the CPS and other prosecuting agencies.⁹⁹ He commented: “it is very important that the enforcement as a whole, whether through the structured criminal justice system or the alternative means is actually seen to be consistent and fair”.¹⁰⁰ The Chief Inspector felt “there does need to be a form of scrutiny which actually looks at the way those powers are being used”.¹⁰¹ He was particularly concerned that “such powers are less subject to judicial processes ... I am not satisfied that the present

95 Q 315

96 Q 315

97 Q 267

98 Q 269

99 Q 267

100 Q 269

101 Q 268

level of checks and balances is sufficient to retain public confidence”.¹⁰² He noted that it could be an extension of his inspection role, although it was potentially a multi-inspectorate question, for example linking to police use of fixed penalty notices.¹⁰³

54. Nicola Padfield questioned whether an out-of-court disposal would result in the same penalty had the case been heard in court: “Often the fixed penalty is higher than the defendant would receive in the equivalent case going to court”.¹⁰⁴ She questioned whether those on lower incomes would suffer a disproportionate impact from the use of fixed penalties.¹⁰⁵ She was concerned that a similar problem of more severe punishment than if the case had been heard in court would arise with conditional cautions, although it was too soon to evaluate the evidence.¹⁰⁶ The Attorney General suggested that, where there were such inconsistencies, we did not know which was the correct penalty:

“there are those who, say, get an £80 fixed penalty notice and if you went to court you would perhaps get a £50 fine. There is a big issue, is there not, as to which one is right and which one is wrong”.¹⁰⁷

55. Witnesses also questioned whether the systems for conditional cautions and other out-of-court disposals were adequately transparent. Robin White said:

“With decriminalisation and civil penalties the criminal justice system is in effect entirely removed. You have the secretary of state or local authority imposing a penalty without being obliged to use any of the protections of criminal procedure because it is called a civil penalty. ... it is a contradiction in terms. It is a monster and an attempt to sneak up on people with a penalty which pretends not to be one”.¹⁰⁸

Nicola Padfield emphasised the importance of dealing with matters in the courts:

“Magistrates’ court business has gone down enormously and I question whether that is necessarily a good thing. Local justice by local magistrates seems to me to be a very useful criminal justice process and one that at the moment is being squeezed”.¹⁰⁹

The Magistrates’ Association echoed her concerns:

“Conditional cautions are an example of the triumph of pragmatism over principle. A court conducts its matters in the open where justice can be seen to be done by

102 HMCPSI annual report 2007/8

103 Q 269

104 Q 30

105 Q 30

106 Q 30

107 Q 378

In addition to the specified amount of the fixed penalty notice or fine imposed by the court there will be other costs such as the cost to the defendant in time, travel and inconvenience of attending court and the costs to the public purse to administer a fine or fixed penalty that need to be considered in any comparison.

108 Q 3

109 Q 31

victims, witnesses and the public, as opposed to a conditional caution which is NOT administered in public”.¹¹⁰

Mind suggested a general desire from victims for a court process: “Many people tell us ... that they want to have the opportunity for their experience to be proper and often the assailant to be tried through a court”.¹¹¹ In terms of defendants, the Chief Inspector of the CPS questioned whether there were adequate safeguards: “It is very important that when people are being offered fixed penalties or cautions or something of that nature, they appreciate the full implications of accepting that”.¹¹² He noted, for example, that some penalties have implications for future employment.¹¹³

56. The Magistrates’ Association questioned what happened to those given conditional cautions if they did not comply:

“We have been told that 38% of those that fail to comply with the conditions of a conditional caution are not then taken to court and the matter is just dropped. This means that although the offence might be recorded as one that has been brought to justice, the offender remains unpunished”.¹¹⁴

57. We asked the Director of Public Prosecutions how often conditional cautions were not complied with. He told us that:

“Very often the conditions are conditions which we have recommended in the first place and therefore we will follow them through with the police, who will implement the caution ... we have got an interest in ensuring that they are complied with and obviously it is our decision, if they are not complied with, to proceed with a charge”.¹¹⁵

Despite expressing this interest in knowing what happened to those conditionally cautioned, he did not have figures to hand as to whether conditions were often not complied with.¹¹⁶ The CPS wrote to us subsequently and told us that 8011 conditional cautions were made by the CPS in 2008. Of these, there was non-compliance in 707 cases, of which 571 were prosecuted, 126 were not prosecuted and 10 had their conditions varied.¹¹⁷ This appears to mean that no further action is being taken against almost one fifth of those who do not comply with conditional cautions.

58. Conditional cautions are part of a significant change to how the criminal justice system operates, making a material difference to the process by which the state punishes people. The fact that prosecutors can now recommend that an individual be conditionally cautioned, and a prosecution suspended subject to the fulfilment of

110 Ev 89

111 Q 144

112 Q 269

113 Q 269

114 Ev 89

115 Q 320

116 Q 321

117 Ev 85

particular conditions, represents a significant change to the prosecutor's role. On the other hand if such decisions prevent an individual being drawn further into the criminal justice system, and therefore succeed in reducing the likelihood that they will re-offend, that is in the interests of potential victims and society as a whole, as well as having a benefit to the individual. Such decisions can therefore contribute to the responsibility of the CPS to reduce re-offending.

59. However, the growth in the number of out-of-court disposals represents a fundamental change to our concept of a criminal justice system and raises a number of concerns about consistency and transparency in the application of punishment. Different patterns of fines may simply reflect local priorities and be argued to be a feature of community engagement. However, we believe the use of these disposals requires systematic scrutiny, and we recommend that as a first step they should be the subject of a multi-inspectorate review. The Attorney General should assemble a comprehensive map of the offences and relevant penalties in operation across England and Wales to assist this scrutiny.

Arguing their own case

60. Keir Starmer QC described the role of the CPS when it was set up as to “take the charge from the police ... process it and parcel it out to the self-employed Bar in most instances for the serious cases for prosecution”.¹¹⁸ The CPS today however “prosecutes in many instances its own cases in court”.¹¹⁹ The role of the CPS therefore is beginning to have a fundamental impact on the criminal Bar as a competitor as well as a customer.

61. The Courts and Legal Services Act 1990 established a statutory scheme for the definition and regulation of rights of audience before the courts. Before this, only practising barristers were able to conduct cases in the Crown Court. As amended by the Access to Justice Act 1999, this Act removed prohibitions on individuals employed by the CPS or others from exercising rights of audience. Thus the CPS may use its own in-house staff (Higher Court Advocates), either solicitors who have achieved accreditation or barristers, to present Crown Court cases rather than instructing self-employed barristers.¹²⁰ As at 30 September 2008 the CPS had 977.6 Higher Court Advocates (full-time equivalent); in 2008/9 they presented 79,947 hearings in the Crown Court.¹²¹

62. The CPS argues that having its own staff present cases in court offers a number of benefits. These include “enabl[ing] the CPS to operate continuous case ownership of more serious casework which strengthens consistency of decision-making”.¹²² Keir Starmer QC said:

118 Q 297

119 Q 297

120 The CPS now uses the term Crown Advocates to describe the in-house CPS lawyers entitled to appear in the Crown Court.

In 1998 legislation was introduced that enabled trained but non-legally qualified CPS staff to review and present certain types of non-contested cases in the magistrates' court. These individuals are now called Associate Prosecutors (formerly Designated Case Workers). Recently these rights of audience have been subject to extension.

121 Ev 80

122 Ev 81

“The practical experience of prosecuting cases at trial strengthens the CPS at all levels. It improves our advice to the police. It improves our charging decisions. It improves our witness care. It will change the whole culture of our organisation for the better”.¹²³

The CPS business plan for 2008-11 states that one of the outcomes of the advocacy strategy is “an improved service to victims, witnesses and the public”.¹²⁴ Sir Ken Macdonald QC similarly suggested that conducting advocacy in-house increased the standard of the CPS’s other work:

“It makes us better at charging cases, at building cases, increases our accountability—if you have to justify yourself, the way you prepared it, in court, you’re going to prepare a lot more carefully than if farming out to a barrister to take the flak”.¹²⁵

63. Unsurprisingly, the Criminal Bar Association (CBA) articulated a number of concerns about CPS advocacy. Desmond Browne QC, Chair of the Bar Council, said: “no one could possibly be blind to the increasing share of available work being taken by the CPS in-house, or to the tension and uncertainty which that creates”.¹²⁶

64. The Criminal Bar Association accepted in principle that there were advantages to the CPS conducting advocacy in-house.¹²⁷ However, they also described it as “counter-productive” and stated

“we feel greatest concern ... that it is being conducted at the expense of what we would see are the core functions of the prosecution service”.¹²⁸

The Bar has also argued that a constitutional safeguard is lost by the CPS conducting its own prosecutions. Desmond Browne QC, Chair of the Bar, asked “Does society want an ever-expanding monolith of a state prosecutor?”¹²⁹ His concern, that the even-handedness of prosecutors who defend and defenders who prosecute would be lost, was echoed in evidence by the Criminal Bar Association:

“Many of the HCAs [Higher Court Advocates] have little or no experience of defending in the Crown Court. As a result they do not have the valuable perspective/independence of the self-employed Bar, nearly all of whom both prosecute and defend”.¹³⁰

Robin White, looking from the perspective of the Scottish system, was unconvinced:

123 Keir Starmer QC, ‘A prosecution service for the 21st century’, a speech to the London Metropolitan University, 9 January 2009

124 The Crown Prosecution Service Strategy and Business Plan 2008-11

125 The Times, ‘Sir Ken Macdonald: We are determined to do more ourselves’, April 8 2008

126 Bar Council Minutes, 8 December 2008

127 Q 90

128 Ev 65, Q 69

129 Bar Council Minutes, 8 December 2008

130 Ev 67

“In England and Wales, prosecution of serious crime has been undertaken by barristers in private practice, on the ground of the need to preserve the independence of the Bar, and the possible susceptibility of professional prosecutors to ‘prosecution-mindedness’. Neither justification seems plausible. The existence of Advocates-Depute has never been argued to compromise the independence of the Scottish Bar, or taint prosecutions with ‘prosecution-mindedness’”¹³¹

65. Nicola Padfield, University of Cambridge, questioned whether the implications for justice had been thought through, or whether advocacy had been pushed forward for potential cost-savings. She asked whether the agenda was driven by “the processes that are economic, that is, saving money by using CPS as presenters of cases and not simply as objective assessors of police evidence”.¹³² She called for:

“A review of the wider implications of the CPS becoming both decision-maker and advocate ... what are the due process implications? Are the wider implications for the independent criminal Bar welcome?”¹³³

Sir Ken Macdonald QC, former DPP, also suggested there were wider implications to the development of advocacy at the CPS:

“Advocacy changes everything for us. It enables us to grow up. To become at last a body of prosecuting advocates. I rather doubt that the broader significance of this is yet fully understood”.¹³⁴

66. The Criminal Bar Association raised the issue of the importance of a healthy criminal Bar in the context of delivering the criminal justice system as a whole:

“The increasing deployment of HCAs [Higher Court Advocates] is also creating a longer-term problem for the effective and efficient running of the Criminal Justice System ... There is a real risk that by removing vast swathes of work for the junior Bar that the balance and experience gained of both prosecuting and defending as a junior barrister will be lost”.¹³⁵

The CPS currently uses a mix of in-house advocates and members of the self-employed Bar to conduct cases. The CBA are concerned about the “negative impact on the future supply of legal services” if there are no opportunities for self-employed barristers to gain prosecuting experience as a junior criminal barrister; this could also affect the future supply of experienced self-employed advocates for the CPS.¹³⁶

67. One answer from the CPS is that barristers might develop flexible careers moving between employed, at the CPS or elsewhere, and self-employed advocacy. Keir Starmer QC said:

131 Ev 132

132 Q 24

133 Ev 107

134 Sir Ken Macdonald QC, CPS Lecture, ‘Coming out of the shadows’, 20 October 2008

135 Ev 67

136 Ev 72

“I have no doubt that, just as in other jurisdictions, future advocates will move backwards and forwards from the prosecution service to the Bar - as indeed I have. This process is a wholly good thing and it is clearly in the public interest”.¹³⁷

Sir Desmond Browne QC, in his inaugural speech as Chair of the Bar Council, was unsure: “at present the direction of travel is all one way”.¹³⁸ Rt Hon Lord Phillips of Worth Matravers, in his 2008 *Review of the Administration of Justice in the Courts* as Lord Chief Justice, stated:

“I am also concerned that the increasing use of ‘in house’ advocates by the Crown Prosecution Service ... ha[s] reduced the number of those who are starting at the criminal Bar”.¹³⁹

Robin White, University of Dundee, described an alternative model from Scotland where

“There has ... always been a cadre of professional, albeit temporary, senior prosecutors ... Advocates-Depute have traditionally been members of the Scottish Bar, holding part-time three-year, appointments from the Lord Advocate, and the office has been seen as a stepping stone to the Bench”.¹⁴⁰

68. The CPS sees advocacy as providing important career development for its own people. Keir Starmer QC commented “if we did not allow them to exercise their rights [of audience] we would be restricting what they could do if they were acting elsewhere and we would find it difficult to attract the very best”.¹⁴¹ The CBA acknowledge this point, and the potential benefits inherent in this approach to the quality of CPS work:

“I recognise, as does the Bar generally, the importance of having a career structure within a thriving prosecution service, and I can see the sense and adopt the logic ... of a service in which one could go in and become promoted through the criminal justice system, acting not just as a case worker and the preparer of a file but also, in due course, as an advocate, so that you can see the consequences of the way files are put together, the consequences of the way an investigation is conducted”.¹⁴²

There is a potential key stumbling block to advocates building a career through the CPS, which is that there may be roadblocks between this and a judicial career. Rt Hon Lord Justice Leveson told us that “this requirement that, in the normal course of events, people aspiring to judicial office will first test their suitability by obtaining fee-paid [part-time judicial] experience, causes a difficulty for employed CPS lawyers”.¹⁴³ Their concern was one of fairness:

137 Keir Starmer QC, ‘A prosecution service for the 21st century’, a speech to the London Metropolitan University, 9 January 2009

138 Bar Council Minutes, 8 December 2008

139 The Lord Chief Justice’s *Review of the Administration of Justice in the Courts*, March 2008, HC 448

140 Ev 132, Ev 134

141 Q 348

142 Q 82

143 Ev 125

“The overwhelming majority of criminal prosecutions in England and Wales are conducted by the Crown Prosecution Service, and for a judge to be an employee of the CPS would breach the requirement that a case be heard by an independent and impartial tribunal”.¹⁴⁴

Some thought is now being given to the possibility of CPS employees gaining part-time judicial experience in other arenas, such as tribunals, in which the CPS is not itself involved.

69. The obvious further question, after whether the CPS should conduct its own advocacy, is how well it is being done. Nicola Padfield, who sits as a Recorder in addition to lecturing on law at the University of Cambridge, noted that “the increase in the percentage of advocacy dealt with in-house leads to a lot of problems”.¹⁴⁵

70. One concern raised with us was whether the CPS’s targets for advocacy create perverse incentives. The Criminal Bar Association suggested that the deployment of advocates

“is moving at a speed and with a disproportionate focus simply on getting people into court to be advocates at the expense of the performance of the organisation generally and at the expense of the work load of the people who remain in the office, the case workers, for example”.¹⁴⁶

They suggested that people might be pressured by targets to take on cases for which they did not have the experience or competence.¹⁴⁷

71. In particular, advocacy was seen as being taken forward at the expense of case preparation. PCS told us “prosecutors have high in-house advocacy targets, so are rarely in the office to work on their own files”.¹⁴⁸ The Criminal Bar Association said:

“It seems to us that, in a drive to get as many people as possible into advocacy, there has been a diminution of those available to perform the bedrock functions of simple case preparation and the like, the sort of concept of file ownership which was such an important feature of the Crown Prosecution Service hitherto”.¹⁴⁹

Concerns have also been raised by members of the judiciary. For example, a Nottingham judge commented in the press that a case had to be dropped because no one at the CPS had taken ownership of it and implemented pre-trial court orders.¹⁵⁰ The Director of Public Prosecutions said he had “every confidence” that increasing advocacy was not undermining case preparation as he had “no evidence to suggest that is the case”.¹⁵¹

144 Ev 126

145 Q 24

146 Q 69

147 Q 72

148 Ev 113

149 Q 69

150 Nottingham Evening Post, ‘Judge’s anger as trial abandoned’, 1 December 2008

151 Q 346

72. At the time of our inquiry the Chief Inspector of the CPS was conducting a thematic review into the quality of prosecution advocacy and case preparation. He commented:

“At the end of the day, the quality of the advocacy is actually dependent on the preparation which goes into cases. Even the best advocate cannot do justice to a poorly-prepared case. We have been looking at all those issues and how Crown advocacy is managed to ensure that you get the continuity of handling which is necessary, certainly in the more serious and contested cases”.¹⁵²

This review has now concluded and two reports published into the quality of prosecution advocacy and case presentation and an audit of systems for allocation, instruction and payment of advocates.¹⁵³ Whilst the review concluded that differences on the ground between self employed counsel and crown advocates were “not so striking” as expected from feedback and comments, the inspectorate found a difference in quality across different types of hearings.¹⁵⁴ In non-contested hearings a greater majority of crown advocates were fully competent; counsel performed better in trial hearings.¹⁵⁵ The Chief Inspector commented that the CPS has reached a “watershed” in its implementation of advocacy and needs now to “consolidate this expansion [the quantity of court work undertaken by in-house advocates] with a change of emphasis from quantity to quality”.¹⁵⁶ He also sought “further development” of a “more collaborative and less combative approach” between the CPS and the Bar.¹⁵⁷

73. We heard that, although case ownership is supposedly one of the benefits of CPS conducting advocacy, problems may be caused by splitting off the earlier stages of advocacy (the plea and case management hearings, in which the judge, on the basis of the defendant’s plea, gives directions for the future timetable of the case) from the later ones. Nicola Padfield commented:

“If you go to a busy crown court today which has a morning of plea and case management hearings you will find that due to recent changes in the way legal aid is done the trial barrister is likely to be there representing the defence but the person representing the Crown Prosecution Service is a very hard-pressed CPS advocate dealing with all the PCMHs [plea and case management hearings] that morning. He or she may well not be the trial counsel”.¹⁵⁸

152 Q 265

153 HMCPSI, *Report of the thematic review of the quality of prosecution advocacy and case presentation*, July 2009; HMCPSI *Audit of the instruction of prosecution advocates in the Crown Court and the payment of counsel by the Crown Prosecution Service*, July 2009

154 HMCPSI, *Report of the thematic review of the quality of prosecution advocacy and case presentation*, July 2009, paragraph 1.21

155 HMCPSI, *Report of the thematic review of the quality of prosecution advocacy and case presentation*, July 2009, paragraph 1.23

156 HMCPSI, *Report of the thematic review of the quality of prosecution advocacy and case presentation*, July 2009, HM Chief Inspector’s foreword, p.1

157 HMCPSI, *Report of the thematic review of the quality of prosecution advocacy and case presentation*, July 2009, HM Chief Inspector’s foreword, p.2

158 Q 25

This might have a detrimental impact on victims or families; Roadpeace called for consistency in terms of the person handling the case from the CPS.¹⁵⁹

74. The Criminal Bar Association suggested that the CPS were taking the plea and case management hearings for their own advocates, and if a case went forward to trial instructing the self-employed Bar at the last minute.¹⁶⁰ They suggest that this has economic incentives:

“what one finds now is that in reality in-house advocates conduct almost all of the lists for plea and case management hearings [PCMHS] and very few on a proportionate basis of the trials. You do not learn much advocacy by doing a list of PCMHS, but what you do, from the point of view of a financial target, is you keep in-house, on the face of it, the money that is available to pay for advocacy”.¹⁶¹

75. The Criminal Bar Association were very concerned that “there is, in fact, no empirical evidence on the cost and quality advantages of the steps that are being taken”.¹⁶² The CPS has published information about their cost calculations of advocacy work and provided the Committee with further information on plans for quality assurance of advocacy.¹⁶³ The intention is that a CPS scheme for quality assuring their advocates, and work undertaken by the Legal Services Commission to develop a quality assurance scheme for publicly funded criminal defence advocates should converge.¹⁶⁴ We noticed that although the Criminal Bar Association stated that “the Bar is increasingly focused on maintaining and developing high standards ... particularly in the area of advocacy” they did not feel that they had a “direct responsibility” for the quality of CPS advocacy as they had very few CPS members.¹⁶⁵

76. The development of CPS advocacy cannot simply be seen as the next logical step in how the CPS should develop: it has wider implications for the criminal justice system and will lead to a very different organisation from that which was originally set-up.

77. While the representatives of the Criminal Bar Association clearly saw this issue in terms of the interest of their members, we recognise that the consequences of CPS advocacy on the future provision and quality of legal services as a whole require attention. The idea of advocates moving more freely between employed and self-employed work is an attractive one, not least because it would preserve the benefits of experience of both prosecution and defence work, which probably produces better advocates.

78. We do not dismiss the anecdotal concerns raised from a number of quarters about the quality of CPS advocates and the systems for their deployment, such as allegations that complex cases are dumped on self-employed barristers at short notice, but regard

159 Ev 123

160 Q 86

161 Q 86

162 Q 69

163 Ev 86

164 Ev 86-7

165 Qq 81, 77, 78

this as evidence of a need for better case management by the CPS, rather than providing a general argument against CPS advocacy. We welcome the Chief Inspector's reports into CPS advocacy and case preparation and the evidence basis this provides for developing the quality of CPS advocacy and ensuring effective systems across the CPS to support this, and we look forward to considering the responses of the CPS and the Bar.

3 Prosecutors and victims

At the heart of the criminal justice system

79. In 2002 the Government's White Paper *Justice for All* set out the concept of rebalancing the criminal justice system to place victims at its heart:

“The people of this country want a criminal justice system that works in the interests of justice. They rightly expect that the victims of crime should be at the heart of the system. This White Paper aims to rebalance the system in favour of victims, witnesses and communities”.¹⁶⁶

The prosecutor has been a key part of the Government drive to put victims at the heart of the criminal justice system. The Prosecutors' Pledge was launched in 2006, setting out the expectations that a victim can have of the CPS (and other prosecutors) including keeping the victim informed of decisions that are made and seeking victims' views on particular decisions. On launching the pledge then Attorney General, Rt Hon Lord Goldsmith QC, said:

“The prosecutor plays a vital role in achieving this objective [of putting the victim at the heart of the criminal justice system] by communicating with and supporting victims of crime. They are also champions of victims' rights and protect their interests”.¹⁶⁷

However, Victim Support did not feel that the aim to put the victim at the heart of the system was being realised, saying that the Government has set out its stall “as putting victims and witnesses at the heart of the criminal justice system when actually that is very hard to prove to anybody who then goes through the system”.¹⁶⁸

80. Several of our witnesses suggested that one of the reasons why this objective might not be realised was that it set an unrealistic expectation of what the role of the prosecutor could be with regard to the victim. Nicola Padfield, University of Cambridge, said: “The Government's determination to ‘rebalance’ the system in favour of victims can exaggerate the role of the victim in the prosecution process”.¹⁶⁹ Robin White noted that there had to be distance between the victim and the prosecutor: “One form of prosecutor independence in the public interest is independence from the victim”.¹⁷⁰ He went on to distinguish between the role of the prosecutor with regard to the victim, and with regard to the criminal justice system:

¹⁶⁶ *Justice for All*, July 2002, Cm 5563, foreword

¹⁶⁷ Statement by the Attorney General, The Prosecutors' Pledge, July 2006

¹⁶⁸ Q 122

¹⁶⁹ Ev 106

¹⁷⁰ Q 15

“prosecution by a public prosecutor is not necessarily in the interests of the victim. It may or may not be, but the point of the criminal justice system is to identify who did the wrong thing and make that individual subject to a penalty”.¹⁷¹

Sir Ken Macdonald QC noted in his final lecture as Director of Public Prosecutions that “it will never be possible, in adversarial proceedings governed appropriately by Article 6, for the interests of victims to overcome those of defendants”.¹⁷²

81. Victim Support feared that victims had been given unrealistic expectations that the prosecution would be on their side. Gillian Guy, Chief Executive of Victim Support, told us: “I suspect that they [victims and witnesses] believe that prosecutors are there as their barrister, as their advocate”.¹⁷³ She described victims and witnesses asking the Victim Support service:

“ ‘When am I going to meet my barrister? Why have I not got the same access to my barrister as the defendant has?’, and, ‘Why do I have to deal with so many different agencies, whereas the defendant only has one advocate that they have to channel their process through?’”¹⁷⁴

However, the CPS “does not act for victims or their families as solicitors do for their clients”.¹⁷⁵ Victim Support questioned whether such misperceptions might arise because victims are given false expectations. Gillian Guy told us

“the expectations from victims and witnesses tend to be what we give them as expectations, and we spend the rest of our time perhaps trying to live up or down to them”.¹⁷⁶

She called for a commitment to a more realistic set of expectations:

“I think the answer is that we really need to define what those expectations realistically can be within a criminal justice system and then seriously live up to them”.¹⁷⁷

82. Rather than being the champion of victims’ rights, the evidence we heard suggested that the prosecutor should be seen as more of a neutral figure, whose role ultimately is to provide for justice. The Attorney General said:

“I think that allowing the prosecutor to be the gatekeeper, to be the guardian of the public interest ... is really important, but that means representing all the public

171 Q 15

172 Sir Ken Macdonald QC, ‘Coming out of the shadows’ CPS lecture, 20 October 2008

173 Q 122

174 Q 122

175 Ev 78 [CPS]

176 Q 122

177 Q 122

interest, which is the victims, the witnesses and the defendant, and that fairness is something which I think is central to the prosecutorial role”.¹⁷⁸

The DPP also emphasised the role of the CPS in contributing to a fair criminal justice process: “The existence of a strong, effective and publicly respected prosecuting service is an absolute requirement of a fair criminal justice system based on the rule of law”.¹⁷⁹ Rather than acting on behalf of victims, he noted: “the client of the CPS is the public”.¹⁸⁰ Fairness was also one of the driving forces behind creating the CPS. Sir Cyril Philips, in the report of the Royal Commission on Criminal Procedure, said of the separation of functions of prosecution and investigation leading to the creation of the CPS that the “division of responsibility and function of itself provides a safeguard to the liberty and rights of any person who becomes involved with it”.¹⁸¹

83. Telling a victim that their views are central to the criminal justice system, or that the prosecutor is their champion, is a damaging misrepresentation of reality. Expectations have been raised that will inevitably be disappointed. Furthermore, the criminal justice system is set up to represent the public rather than individuals, and there are good reasons for this. The CPS’s role as independent arbiter of decisions about prosecution is critical. Explaining this role clearly to victims such that their expectations are managed realistically, rather than raised then disappointed, is vital.

Victims’ experiences

84. Sir Ken Macdonald QC noted that:

“The Crown Prosecution Service and prosecutors find themselves at the heart of this debate. It is possible to find a balance which improves the respect with which victims and witnesses are treated, while at the same time upholding defendant rights and fair trial principles”.¹⁸²

Whilst therefore not raising false expectations that the prosecutor will act as the victim’s advocate, we should be striving to achieve a better service to victims. Victim Support have previously told us that what victims want most of all—apart from not having been a victim in the first place—is that the same thing will not happen again.¹⁸³ In other words, the role of the criminal justice system in preventing offending and reducing re-offending is of major importance to victims, and the responsibility of the CPS to act in support that aim should be a clear part of the explanation of the role of the CPS.

85. It was emphasised to us that victims needed to be treated as people, and helped to understand what was happening in the criminal justice process. Mind described to us how

178 Q 381

179 Keir Starmer QC, ‘A prosecution service for the 21st century’, speech to the London Metropolitan University, 9 January 2009

180 Q 335

181 Sir Cyril Philips, *Report of the Royal Commission on Criminal Procedure*, January 1981, Cmnd. 8092-I, para 10.5

182 Ken Macdonald QC, ‘Balancing the Rights of Victims and Defendants: prosecutors and due process’, a speech to the British Institute of Human Rights, 18 January 2008

183 Oral Evidence taken before the Justice Committee on Consultation Sentencing Guideline: Theft and Burglary (non-dwelling), 3 June 2008, HC (2007-8) 649-i, Q 15

people might feel that they were “passengers in a system which was being driven by other people”.¹⁸⁴ Victim Support similarly had concerns that organisations were “process driven rather than people driven”.¹⁸⁵ Mind felt that there was a disconnection between the process and the individual:

“Often the individual agencies are trying to get the process working in the most effective way, but there seems to be a lot of problems and barriers on the way to helping these things happen most effectively to the individual, and it is the individuals, whether they are the witnesses or the victims, who are quite often carried along”.¹⁸⁶

Victim Support talked about victims having the information to really understand what was happening:

“there is a great deal of power that resides in the CPS, which is seen by victims and witnesses, and yet it is not fully explained to them, actions are not fully explained to them”.¹⁸⁷

The Health and Safety Executive (HSE) acknowledged this as a key part of their work as a prosecutor with victims: “The important thing for us to do is to manage the expectations of victims and to be able to explain”.¹⁸⁸ However it saw challenges in achieving this within the system for criminal justice:

“it is difficult for [bereaved families] to understand why the case has to go from one agency to another to the coroner and then back to court. All that we can do is to try and explain that”.¹⁸⁹

86. The CPS highlighted the different policies and work undertaken by the CPS to improve the service for victims. These include the Prosecutors’ Pledge, setting out the support that victims can expect from the CPS; the Direct Communications with Victims scheme, introduced in September 2002—and now incorporated into the Code of Practice for Victims of Crime—setting out how the CPS will communicate directly with victims; the ‘No Witness, No Justice’ care programme, through which Witness Care Units have been established across England and Wales to ensure that victims and witnesses have information and support necessary to give their best evidence; and Victim Focus, an enhanced service for bereaved relatives.¹⁹⁰

87. The Attorney General told us that the treatment of victims is:

184 Q 126

185 Q 122

186 Q 126

187 Q 122

188 Q 251

189 Q 252

190 Ev 78-9

“light years away from where it used to be and it is much better. They [victims] always say there is more for us to do, but the important thing is they are saying it is much better than it was”.¹⁹¹

The Director of Public Prosecutions acknowledged the role of CPS staff in providing a better service for victims and witnesses: “Undoubtedly, they are working really hard on this issue. They are really proud of what they do”.¹⁹²

88. Victim Support was also complimentary about key policies providing for victims. The Chief Executive of Victim Support described having a meeting with the Director of Public Prosecutions soon after joining Victim Support, being presented with the Prosecutors’ Pledge and thinking “fantastic”.¹⁹³ The problem, however, seemed to be in what happened next, in the need for “words on paper [to be] given life”.¹⁹⁴ We are not convinced that the plethora of different policy statements are followed through in practice, or that the Prosecutors’ Pledge has a central place in the minds of prosecutors on a day-to-day basis. There is a considerable amount of well-intentioned over-complexity in the system and we urge the Attorney General to undertake radical steps to simplify the systems of pledges, guidance and regulation so that expectations and commitments are set out for everyone in the CPS and for courts, victims and the general public in the same clear and simple terms.

89. The Prosecutors’ Pledge was discussed frequently in our evidence. The Director of Public Prosecutions felt that “it is really taken seriously and is recognised to be central”.¹⁹⁵ Victim Support were more sceptical about whether “people would understand it and recognise it”.¹⁹⁶ They were however positive about the future:

“I think [the Prosecutors’ Pledge] is something that can work, but, first of all, the leadership has to be about, ‘We will make this work’, and then the support has to be about, ‘we will give people the wherewithal to make it work.’”¹⁹⁷

90. One of the key issues that needs to be resolved is inconsistency. Gillian Guy said:

“I believe there is commitment on the part of the CPS to change and we are seeing that happen, and what we have been saying, I think reasonably consistently ourselves, is that it is inconsistency that is the problem”.¹⁹⁸

Mind similarly described the CPS’s service to witnesses as “patchy”.¹⁹⁹ The Chief Inspector of the CPS was also concerned that good initiatives might be introduced but were then not supported, leading to a decline in performance:

191 Q 383

192 Q 343

193 Q 128

194 Q 128

195 Q 343

196 Q 123

197 Q 130

198 Q 145

199 Q 141

“Victims and witnesses are a good example of that because in the 2005 overall performance assessments we gave some quite positive findings to the CPS. We had to report in 2007 that there was actually a marked decline”.²⁰⁰

91. PCS questioned whether the CPS’s ability to provide a service to victims and witnesses was hampered by the resources available, saying:

“The capacity for CPS to cater for victims and witness needs at court is limited by resources, for instance caseworkers in London and a number of other CPS Areas regularly have more than two or three court rooms to cover”.²⁰¹

Mind and Victim Support argued that CPS staff were not necessarily being given the tools to provide an effective service to victims, because they were not provided with, or required to attend, relevant training.²⁰² The Director of Public Prosecutions told us that “We have training for all of our prosecutors on working with victims and witnesses”.²⁰³ Victim Support told us that training modules around working with victims had only been taken up by approximately 20% of prosecutors.²⁰⁴ Gillian Guy noted that, with regard to this training, “we are keeping an eye on what mandatory actually means”.²⁰⁵

92. A second point raised in relation to training was what it actually covered. Again, Victim Support wanted training that looked at victims as people rather than a part in a process:

“there are issues around ... the training that is given in order for the legal profession ... to actually be able to relate to people rather than process and be clear about what it really feels like ... what the impact is of the justice system on individuals”.²⁰⁶

They suggested that “it would help enormously if organisations like ours were involved in preparing the training for prosecutors and getting that understanding into the training base”.²⁰⁷ There were also specific concerns about the content of training: “Mind believes the CPS does not provide sufficient training about mental health for prosecutors to make consistently good decisions concerning mental health and credibility”.²⁰⁸ Mind said that decisions about whether or not to prosecute should not be based on “assumptions” about a witness but that criminal justice professionals should consider cases individually on the basis of a better understanding of mental health and the implications for witness credibility.²⁰⁹

93. The concept of involving victims in the evaluation of what was happening was raised several times in evidence. Mind suggested that victims’ views could be part of a qualitative

200 Q 261

201 Ev 115

202 E.g. Q 141

203 Q 340

204 Q 130

205 Q 130

206 Q 123

207 Q 144

208 Ev 95

209 Ev 95

mechanism to assess CPS performance such that it incorporated: “reflection which is led by people who have been victims in the past”.²¹⁰ Gillian Guy, Chief Executive of Victim Support, said: “I am ... a fan of actually talking to victims and witnesses, actually confronting what their experience has been and making changes as a result of that”.²¹¹ The Inspectorate of the CPS stated that they used feedback from victims and witnesses in their inspections. “When our inspectors go to court they would speak to the victims and witnesses if they were able to with the help of the Witness Service after they had given their evidence”.²¹²

94. Victims want to be treated as people, which often does not happen in a criminal justice system that is driven by process. We are pleased that the CPS has risen to this challenge by developing good policies for engaging with victims and witnesses. Delivering these consistently on the ground continues to require a major effort.

Complaints

95. One way to incorporate feedback from people who have experienced the work of the CPS is through complaints. This was an area that our witnesses felt needed urgent attention. Nicola Padfield, University of Cambridge, stated:

“One area that is quite difficult to explore and to learn about from different bodies’ websites is complaints against the CPS. Who deals with complaints against the CPS? Should that be for an inspectorate or should it be for a separate complaints body?”²¹³

Both Mind and Victim Support felt there was a need for a “straightforward” system to make complaints within the criminal justice system.²¹⁴

96. On 5 March 2009 HMCPSI published a review of CPS complaints handling. This report found considerably variety in CPS handling of complaints:

“Although more than half were excellent or good [in terms of quality of response and thoroughness of investigation], the balance did not meet the required standard and too many were unduly defensive”.²¹⁵

The report also criticised accessibility for people wanting to make a complaint as, for example, “The complaints leaflet does not define what a complaint is, is not readily available in the places where, according to the guidance, it ought to be”.²¹⁶ We discussed with the Chief Inspector of the CPS whether the complaints system should have an external element. He commented: “There is precedent for it in relation to the Public Prosecution Service in Northern Ireland where they do have an independent complaints

210 Q 145

211 Q 145

212 Q 262

213 Q 13

214 Qq 137, 138

215 HMCPSI, *When things go wrong: a thematic review of complaints handling by the Crown Prosecution Service*, March 2009, Chief Inspector’s Foreword

216 HMCPSI, *When things go wrong: a thematic review of complaints handling by the Crown Prosecution Service*, March 2009, para 2.3

officer who is outside the Service”.²¹⁷ The Chief Inspector did not, however, feel it should be part of his role:

“There is already an existing power for the Attorney General to ask us to look into matters relating to the Service which are of particular public concern. It would probably detract from our ability to inspect if we became routinely involved in reviewing complaints handling. I do not think I would want that role other than in exceptional circumstances”.²¹⁸

97. Even before the HMCPSI report into CPS complaint handling was published the CPS told us it was an area that they were aware of and one on which they wanted to take action. Peter Lewis, Chief Executive, said: “We acknowledge that we have got to do more on complaints. Our complaints system at the moment is too old, too defensive, it is not open and transparent enough”.²¹⁹

98. The lack of a consistent, effective and readily understood complaints handling system has been a serious weakness of the CPS. We welcome the CPS’s recognition of the need, and commitment, to take action to ensure that the system is more open and transparent. We believe that it should provide a valuable mechanism for the CPS to learn more about the service that its various clients and stakeholders would like provided, as well as giving a proper response to complainants.

Special Measures

99. Stakeholder organisations such as Mind and Victim Support raised serious concerns that special measures are not being appropriately used; these concerns were acknowledged by the CPS Inspectorate. Special measures are intended to assist vulnerable or intimidated witnesses to give the best quality evidence they are capable of in criminal proceedings. Such measures may include the ability to give live evidence through a televised link thus without having to be physically present in the court room, for wigs and gowns to be removed, and for witnesses to be able to give evidence through an intermediary.²²⁰ Victim Support told us that “notification and applications [for special measures] are made too late, when the courts have no choice, according to their discretion, but to refuse those applications”.²²¹ However, the bigger problem is that people are not being identified as suitable for special measures in the first place. Victim Support told us:

“people are not being identified for those special measures at all sometimes, and we have discovered ourselves as the witness service 18,000 people on the day are coming to court who should have been identified for special measures: so they have been failed on two occasions coming through the system and they are then in a court process without that assistance”.²²²

217 Q 296

218 Q 296

219 Q 332

220 Youth Justice and Criminal Evidence Act 1999

221 Q 123

222 Q 123

Sally Hobbs, Deputy Chief Inspector, HMCPSI, commented: “It is fair to say that there are shortcomings in both [police and CPS] in terms of identifying vulnerable and intimidated victims and witnesses at the various stages of contact”.²²³

100. Paul Farmer, Chief Executive of Mind, was able to describe the consequences of not utilising special measures effectively, combined with what he described as the CPS’s “institutional reluctance around being prepared to believe people with mental health problems as credible witnesses”.²²⁴ He noted:

“the lack of the CPS’s ability to be able to pursue a case—effectively having cold feet because they felt that the key victim was not a reliable witness but not actually putting in place appropriate support for that witness which could have made the whole process much more effective—has led the CPS to be found to be acting unlawfully and in contravention of the Human Rights Act”.²²⁵

101. When the Director of Public Prosecutions subsequently came to give evidence to us he expressed concern about these issues raised by previous witnesses. He drew attention to the work that is being done:

“In 2008, 30,449 applications were made for special measures, of which 28,858 were granted. That gives you a sense that there is some really significant work being done here on behalf of victims and witnesses”.²²⁶

He continued: “We are actively considering some research to see if we can capture better some data about possible missed cases”.²²⁷

102. Whilst we were pleased that the concerns of earlier witnesses had already been taken on board, we were alarmed by Mind’s statement: “In discussions with the CPS, Mind has been assured that primary responsibility for identifying vulnerable witnesses lies with the police and not prosecutors”.²²⁸ Victim Support made a general comment: “What has happened so far is that the separation has enabled people to pass the buck”.²²⁹ This may suggest a tendency for agencies to pass the responsibility for a particular problem to a different agency, rather than dealing with it themselves. Sally Hobbs, Deputy Chief Inspector at HMCPSI, highlighted that both the police and the CPS had a role to play:

“There are certainly some issues in terms of police ... They are perhaps not sufficiently aware of what special measures really meant for vulnerable and intimidated victims and witnesses ... For the prosecution, it is about being more alert at the charging stage ... The alertness is there in terms of the evidential issues but it is actually what is needed for those people as well that is missing”.²³⁰

223 Q 263

224 Q 142

225 Q 139

226 Q 339

227 Q 339

228 Ev 97

229 Q 139

230 Q 264

103. Special measures are a crucial part of the criminal justice system which should enable a witness to give the best evidence they are capable of giving. We are concerned by the evidence that individuals are not being identified as being suitable for special measures, or that delivery failures mean they do not receive them once their need has been identified. We are also concerned at the suggestion that the CPS may be reluctant to recognise that people with mental health problems can be credible witnesses at all. The CPS is not the only agency with a role to play in identifying those who need special measures but it is a key agency and should be alert at the charging stage to what people need. The CPS could also work with the police to ensure that they are identifying individuals for special measures effectively. We look forward to hearing more about the CPS's work to improve its identification of those cases where the need for special measures was not recognised.

4 Consistency and local discretion

104. One theme that has echoed and re-echoed through the different elements of discussion on the role of the prosecutor is that of consistency. Stephen Wooler told us “The area where the CPS needs to improve most is in securing greater consistency across the organisation in its systems and procedures”.²³¹

105. We heard the same message for those talking on behalf of people who received a service from the CPS, who worked with the CPS or who worked for the CPS. Gillian Guy, Chief Executive of Victim Support, said:

“a key theme running through what I want to say on behalf of victims and witnesses would be about inconsistency and about the differences of approach and a lot of dependency on action of individuals and personalities as opposed to being able to understand the system in full”.²³²

Tim Godwin, speaking for ACPO, told us: “One of the big issues ... is consistency”.²³³ Christine Haswell, from PCS, the public service union representing approximately 3,000 individuals working at the CPS stated: “One of the things that does hit me about the service is that it is not necessarily always one service”.²³⁴

106. Stephen Wooler suggested that one of the problems was in sustaining and embedding work when new initiatives came along:

“one of the features [of the treatment of victims and witnesses in the criminal justice system] has been the development of good policies; the need to embed those policies at frontline level has often not been as successful in the longer term as it might have been. One of the features across the criminal justice system when we are looking at national initiatives is that because there has been such an emphasis on improving criminal justice, initiatives, when they are new, tend to be successful. As managers turn their attention to other things, then the eye goes off the ball”.²³⁵

Other witnesses told us that there were often good policies but these were not always implemented consistently on the ground. PCS told us: “The thing with the CPS, I have found, is ... a lot of good policies and good working practices, in theory, but sometimes the actual application varies tremendously”.²³⁶

107. The theme of inconsistency may be linked to tension over the extent to which the CPS is a national or a local service. The Director of Public Prosecutions talked about the balance:

231 Q 254

232 Q 123

233 Q 41

234 Q 119

235 Q 261

236 Q 119

“At the national level there must be common priorities, common standards, common targets and common policies. So that runs right through the organisation nationally... It is delivered locally ... You have got to have an appropriate leader at the appropriate place to plug into the criminal justice system as a whole... It is not like Tesco where there is one product which is simply being sold in different areas. The area has to operate in accordance with other agencies”.²³⁷

This is a theme that goes back to the creation of the CPS. Sir Cyril Philips recommended in his report of the Royal Commission on Criminal Justice that the CPS should be “locally based, but with certain national features”.²³⁸ A national CPS was created following his report. Rt Hon Sir Iain Glidewell, in his 1998 review of the CPS reiterated, however, that “the prosecution process is essentially local in nature”.²³⁹

108. The Attorney General talked about how national standards fit with community responsiveness:

“I think we do have to have clear standards which are applied everywhere, but how we deliver for a community will be very much shaped by the needs of that community”.²⁴⁰

She saw community engagement as a key part of the decision-making process:

“Prosecutors need also to engage with their communities to ensure that their public interest decisions are properly informed by the public’s concern about crime”.²⁴¹

In April 2009 the *Engaging Communities in Criminal Justice* Green Paper committed to the introduction of ‘community prosecutors’ in 30 pathfinder areas in 2009-10. The community prosecutor approach is designed to “enhance the service the CPS provides to local people and the visibility of its work”.²⁴²

109. Catherine Lee, of the Office for Criminal Justice Reform, suggested that the CPS’s community role grew out of work it had already started, engaging with wider stakeholders:

“In recent years the CPS has become really good at looking at domestic violence and rape and adopting a scrutiny panel approach to that and a much more specialist approach to how to deal with victims and prosecute cases. I think the time has come when one applies that kind of approach to looking at community issues and working closely with the police in charging suites but also at neighbourhood policing team level to try to understand the background to what a community is experiencing and suffering and so help to inform charging or other disposal decisions”.²⁴³

237 Q 328

238 Sir Cyril Philips, *Report of the Royal Commission on Criminal Procedure*, January 1981, Cmnd. 8092-I, para 9.4

239 Sir Iain Glidewell, *Summary of The Review of the Crown Prosecution Service*, June 1998, CM 3960, para 10

240 Q 379

241 Ev 62

242 Criminal Justice System, *Engaging Communities in Criminal Justice*, April 2009, Cm 7583, para 13

243 Q 60

Some witnesses commended the CPS's approach to equality issues. Help the Aged commented

“We believe the strong commitment to equality amongst senior leaders in the CPS has been a key factor in ensuring the success of the organisation's equality scheme... we believe the CPS should be commended for its positive approach to equality issues”.²⁴⁴

Mind said “Mind has had positive discussions with the CPS about greater involvement of people with mental distress in its business planning”.²⁴⁵ Nevertheless, it and other organisations emphasised that there was still a way to go. For example, the National Secular Society suggested a problem for the CPS in joining up with people who did not have an established community to represent them, such as “people who keep their faith in the private realm or who are of no faith at all”.²⁴⁶

110. Such debates identify a tension for the CPS in providing a consistent national service whilst being responsive at a local level to communities and particular circumstances. It is also part of the ongoing development of the role of the prosecutor. John Kennedy, Office of Criminal Justice Reform, spoke about delivery of cross criminal justice targets on reducing antisocial behaviour:

“The approach has widened the view of the prosecutor... in terms of antisocial behaviour the CPS is currently working in providing specialist prosecutors in a number of areas to ensure there is specialist advice about the nature of the law of disorder and the possible remedies to which it can respond”.²⁴⁷

111. This opens up questions about two key elements in the role of the prosecutor. The first is how the role of the prosecutor contributes to aims of the criminal justice system such as reducing re-offending. The Attorney General linked the prosecutor's gatekeeping role to this aim: “it has been very, very important for us to get the correct level of charging and that we intervene at an appropriate level to reduce the likelihood of re-offending”.²⁴⁸ The DPP also saw tackling crime and re-offending as an “essential function” of the prosecutor, to be achieved in the first place through the CPS engaging with communities.²⁴⁹ Another element touched upon by John Kennedy is the facility of the CPS to provide legal advice to the police and more widely. Nicola Padfield suggested that the CPS is doing this beyond the area of Anti-Social Behaviour, and said that the CPS website is “particularly impressive: openly providing guidance in areas of law which Parliament has somewhat irresponsibly cloaked in fog”.²⁵⁰

112. The contribution from the Crown Prosecution Service to the broader criminal justice system aims of reducing re-offending is matched by its contribution to broader aims such

244 Ev 88

245 Ev 94

246 Ev 102

247 Q 49

248 Q 377

249 Q 298

250 Ev 100

as the efficiency of the criminal justice system. The 1997 Persistent Young Offender pledge, to reduce the time taken between arrest and conviction for young offenders, sought in part to reduce re-offending through timeliness (confronting young offenders with the consequences of their actions quickly to help address their offending behaviour positively) as well as reduce delays, and therefore improve the experience, for victims and the public and thereby costs to criminal justice agencies.²⁵¹ The Magistrates' Association considered the role of the CPS in both this and the introduction of CJSSS (Criminal Justice Simple, Speedy, Summary); their concern was that limitations on prosecutorial resources would risk timeliness gains to the system:

“We are anxious that, if crime increases during the current recession, the provision of speedy justice in our courts gained through the introduction of CJSSS (Criminal Justice Simple Speedy Summary) and the Persistent Young Offender project are not eroded due to a shortage of funds for prosecutors”.²⁵²

113. An important aspect to consider in relation to developments to the role of the prosecutor is whether resources are available. The Attorney General commented that “one has to remember that the prosecutors are a relatively small group”.²⁵³ Stakeholders were concerned about the pressures of trends in the criminal justice system. ACPO noted: “the problem lies in the capacity. Convictions and trials are going up in large parts of England and Wales and the fiscal settlement for the CPS will make that challenging”.²⁵⁴

114. Inconsistency in CPS delivery was a clear theme in the evidence we received and must be tackled. Failures to define clearly the role of the prosecutor, and the pressures pushing and pulling it in different directions, militate against priorities for consistent delivery. The definition of a clear role should include the CPS's contribution to the overall aims and delivery of an effective criminal justice system. The development of community prosecutors is a further fundamental change to what we expect from prosecutors in the criminal justice system, raising questions about what kind of local discretion is desirable and beneficial to the public interest. The Attorney General should make a clear statement of how local responsiveness can be made compatible with the demands of natural justice for system-wide consistency.

251 <http://www.yjb.gov.uk/en-gb/>

252 Ev 89

253 Q 372

254 Q 43

5 The public prosecution landscape

115. The CPS describes itself as “the principal prosecuting agency in England and Wales”.²⁵⁵ However, it is not the only agency. The Criminal Justice Act 1987 created the Serious Fraud Office (SFO), which investigates and prosecutes serious and complex fraud. The Commissioners for Revenue and Customs Act 2005 created the Revenue and Customs Prosecutions Office (RCPO), which prosecutes cases brought by HM Revenue and Customs (HMRC) and the Serious Organised Crime Agency (SOCA). On 8 April 2009 the Solicitor General wrote to the Committee stating that RCPO would be brought together with the CPS “in order to deliver enhanced prosecution services to the public”.²⁵⁶ The merger is due to take place 2009-10, and to be consolidated the following year; for a transitional period David Green QC, Director of RCPO, will lead an HMRC prosecution service within the new combined service, reporting directly to the Attorney General.²⁵⁷

116. In addition to these prosecuting departments, there are a range of other organisations that conduct prosecutions. The Attorney General described a workshop attended by “over 40 prosecutors from prosecuting agencies as diverse as the Civil Aviation Authority, Maritime and Coastguard Agency, FSA [Financial Services Authority], DEFRA [Department for Environment, Food and Rural Affairs], SOCA [Serious Organised Crime Agency], Office of Fair Trading as well as the statutory prosecutors”.²⁵⁸ The CPS noted:

“There is no definitive list of organisations that institute prosecutions in England and Wales. The common law power to instigate private prosecutions is preserved under section 6(1) of the Prosecution of Offences Act 1985 and it is used by a number of organisations who otherwise do not have the statutory power to prosecute”.²⁵⁹

The CPS identified organisations that institute prosecutions including the Gambling Commission, the Driver & Vehicle Licensing Authority, local authorities and the Royal Society for the Prevention of Cruelty to Animals.²⁶⁰ Further organisations invited to attend the Whitehall Prosecutors’ Group meeting (described below) include the National Health Service and the Information Commissioner’s Office.²⁶¹

117. The Attorney General describes the CPS as “by far the biggest player in the delivery of prosecution services”, comparing workload data which shows the CPS completing 96,992 Crown Court cases in 2007-08, the RCPO 270 and the SFO 16.²⁶² In terms of other agencies that carry out prosecutions, in 2007-8 the Health and Safety Executive (HSE) completed

255 www.cps.gov.uk/about/

256 Ev 128

The Solicitor General states that RCPO and the CPS will both continue to exist legally but will be brought together under one banner for practical purposes.

257 Ev 128

258 Ev 62

259 Ev 84

260 Ev 84-5

261 Ev 130

262 Ev 63

565 cases, representing 1,028 offences prosecuted.²⁶³ In 2006-7 BERR (the Department for Business, Enterprise and Regulatory Reform, now part of BIS, the Department for Business, Innovation and Skills) prosecuted 277 defendants.²⁶⁴ Whilst numerically handling far fewer cases than the CPS, nevertheless the types of work conducted by other organisations may be important in other ways. For example, the Health and Safety Executive has a role in the investigation of work-related deaths; Gary Slapper, Professor of Law at the Open University recently commented in *The Times* “Globally, more people are killed each year at work or through commercial enterprise — more than two million — than die in wars”.²⁶⁵

118. The variety of prosecuting agencies in England and Wales contrasts with that of Scotland, where the Crown Office and Procurator Fiscal Service has a “monopoly” over prosecutions, and prosecutes:

“the cases investigated by some fifty reporting agencies, including the Department of Work and Pensions, Health and Safety Executive, Department of Trade and Industry, HM Revenue and Customs, Serious Fraud Office, Television Licensing Authority, and local authorities”.²⁶⁶

Thus several of the bodies which carry out prosecutions in England and Wales, such as the Health and Safety Executive, operate successfully in Scotland, where they pass cases for prosecution to the Procurator Fiscal.

119. We discussed with our witnesses whether the CPS should have, as the Procurator Fiscal has, a monopoly of prosecution. Robin White, University of Dundee, felt that “thought should be given to extending the CPS remit, as ‘public prosecutor’, to prosecuting all crime”.²⁶⁷ He was critical of the “variety and haphazardness [that] exist [in England and Wales], for perhaps 25% of all prosecutions are still undertaken by government agencies independently of the police, CPS, and each other, according to markedly different policies”.²⁶⁸

120. Nicola Padfield, University of Cambridge, commented that such a question could only start to be considered now as “in the first 15 years or so in the CPS’s life it was not a body in which there was enough confidence that it could take on the big umbrella role”.²⁶⁹ However, she also said that before such an umbrella role could be considered, it would be necessary to look at:

“the extraordinarily different prosecution policies of different bodies. If you look at tax bodies, compliance policies in environmental crimes there are some very

263 <http://www.hse.gov.uk/statistics/enforce/>

264 <http://www.berr.gov.uk/whatwedo/businesslaw/criminal-investigations/convictions/page46380.html>

265 *The Times*, ‘Corporate manslaughter: making work a much safer place’, 11 June 2009

266 Ev 131 [Robin White]

267 Ev 131

268 Ev 131

269 Q 34

interesting differences between different bodies as to whether they seek to prosecute or negotiate satisfactory results”.²⁷⁰

For example, we heard from the Health and Safety Executive (HSE) that their focus as an organisation might be very different from that of the CPS. The HSE is “primarily concerned with ensuring the health and safety of people at work and those affected by work”.²⁷¹ Peter McNaught, Head of the Litigation and Enforcement Team at the HSE, told us that to achieve that objective they might use other means than prosecution:

“we will issue many, many more improvement notices and prohibition notices than we will take prosecutions to court because that will achieve the aims of the Health and Safety at Work Act”.²⁷²

121. Stephen Wooler, Chief Inspector of the CPS, was concerned that, if organisations were making different decisions about whether to use prosecution or alternative mechanisms, this could lead to inconsistencies:

“There is a use for alternative disposals [to prosecution] provided that arrangements are in place that ensure that each of the different authorities—and this would apply to prosecution authorities as well—is acting in a broadly consistent manner. The problem is that where you are dealing with public health, it is very different from an MTIC fraud. So you apply the public interest test but the types of factors which come into play can be very different. It is like apples and pears but that judgment has to be made as to whether in the final analysis it is in the public interest to prosecute”.²⁷³

122. Different prosecutors also have different working arrangements. The Serious Fraud Office noted that, as specialists in serious and complex fraud, they integrated investigators, prosecutors and accountants: “The integration of professionals besides lawyers allows the SFO to proactively and collectively respond to serious fraud investigations in all types of business activity”.²⁷⁴ At the Health and Safety Executive, inspectors “who are effectively investigators [and] also the prosecutor” undertake:

“a lot of work... giving advice and guidance and enforcement notices and they have therefore a very good knowledge of where the benchmark is in terms of where action will bring about improvement in health and safety without prosecution and where a prosecution is needed”.²⁷⁵

123. David Green QC, Director of RCPO, was concerned that specialisms would be lost in one big organisation. He said:

“if prosecutors were all merged into one monolithic organisation, specialism and expertise in certain key areas such as, in our case, fiscal and tax law, customs and

270 Q 34

271 Q 201

272 Q 206

273 Q 267

274 Ev 127

275 Qq 201, 202

smuggling law, would quickly be diluted and lost... In a large single monolithic organisation there will always be competing and emerging priorities at different times, therefore a pressure to shift resources within that large organisation to that new and emerging priority. If you have a specialist prosecutor, then of course you have a dedicated ring-fenced resource within that small area of specialism”.²⁷⁶

Keir Starmer QC, DPP, was not concerned that specialism would be lost in a single organisation: “I am not aware that there is any loss in Scotland in terms of specialism and it is right to say that we have specialisms within the CPS”.²⁷⁷ Examples of specialisms within the CPS include the Fraud Prosecution Service, a national specialist fraud service situated within CPS London, and specialised casework divisions within CPS Headquarters for example covering terrorism or organised crime.²⁷⁸

124. The Attorney General felt that there were overarching similarities between prosecutors:

“all the prosecutors ... have the same objective in terms of identifying crime, prosecuting it fairly and successfully to the benefit of our community. They are all operating in the same courts, according to the same rules, before similar judges”.²⁷⁹

Peter Lewis, Chief Executive of the CPS, felt that:

“one of the things the public ought to expect is that whoever prosecutes them in the public domain there are similar standards and that those are the best standards for litigating cases”.²⁸⁰

There are three individuals with a potential role in ensuring consistency and transparency in the prosecution arrangements between different organisations. These are the Attorney General, the Chief Inspector of the CPS, and the Director of Public Prosecutions.

125. The Attorney General is responsible for:

“safeguarding the independence of the prosecutors in taking prosecution decisions. The Attorney General receives the budget for the prosecuting departments and sets their strategic direction. The Attorney is the Government Minister responsible for prosecution. As such, she is responsible, with the Directors [of RCPO and SFO and the DPP], for ensuring that in the development of Government policy, due account is taken of the role of the prosecutors, of the impact of policy proposals on prosecution, and of the contribution which prosecutors can make”.²⁸¹

Following the review of the Attorney’s role there is a protocol setting out the relationship between the Attorney and those prosecution services she superintends.

276 Q 202

277 Q 308

278 HMCPSI, Review of the Fraud Prosecution Service, October 2008; Ev 74

279 Q 394

280 Q 303

281 Ev 61

126. The Attorney has a different role with regard to the three departments of CPS, RCPO and SFO than other organisations that prosecute:

“The Attorney General has a role also in respect of the prosecutors in Government departments and agencies, within the Government Legal Service (GLS) over whom she does not have statutory superintendence. She exercises ‘general superintendence’ for legal and prosecutorial questions; and sponsors common approaches to sharing expertise, guidance and training”.²⁸²

The importance of the relationship between the Attorney General and wider agencies conducting prosecutions appeared to be a relatively new idea:

“One of the things that came out of the review of the Attorney General’s role [in 2007-8] and the prosecutorial role is that I came to clearly understand that there was a wider prosecutorial family which I did not superintend on a statutory basis, and it seemed to me that there was a huge amount for us to learn from each other”.²⁸³

The Attorney General was not clear why she had a different relationship with different prosecutors, telling us “I think it is historical”.²⁸⁴

127. Rt Hon Baroness Scotland QC stated

“I also was somewhat surprised to discover that it was not usual for all of the prosecutors, not even the ones I statutorily superintend, to come together at one time to talk about common issues”.²⁸⁵

She highlighted the work she was now doing:

“In 2008-9 the Attorney set up for the first time a Strategic Board, which is chaired by her and includes the three Directors over whom she exercises statutory superintendence”.²⁸⁶

RCPO told us that the idea of this strategic board “is to ensure that strategy is joined up across the law officers’ departments”.²⁸⁷ This Board, however, does not involve the broader spectrum of prosecutors, for whom we were told that the Whitehall Prosecutor’s Group was a key forum.

128. The Whitehall Prosecutors’ Group (WPG) is:

“a coming together of senior members of the various governmental prosecuting authorities for the purpose of sharing knowledge, discussing and co-ordinating action on issues of mutual concern and acting as a voice for our members”.²⁸⁸

282 Ev 62

283 Q 389

284 Q 392

285 Q 389

286 Ev 61

287 Q 202

288 Ev 129

It has practitioner sub-groups which look at common issues such as confiscation and asset recovery or disclosure; the group also considers training for prosecutors.²⁸⁹ The Chair of the Whitehall Prosecutors' Group told us about:

“the co-operation and joint-working that is facilitated by the WPG in support of the valuable work of all of the organisations that prosecute on behalf of the government”.²⁹⁰

Its membership includes a range of prosecutors; the CPS are invited to attend as an observer.²⁹¹

129. Individual organisations suggested to us that systems of liaison between them were a valuable way of working through practice on common issues. David Green QC, Director of RCPO, said:

“I could give you an example, say on the confiscation of criminal assets. The people who do that within the CPS and the people who do that within my organisation liaise regularly on interpretation of case law, interpretation of statutes, how to go about things, how much to pay receivers, that kind of thing. So you end up with a pretty standard approach”.²⁹²

Similarly the Serious Fraud Office told us:

“The SFO liaises with all relevant Departments including the other Law Officers Departments, the Serious Organised Crime Agency (SOCA), the Office of Fair Trading (OFT) and the Financial Services Authority (FSA) to consider and determine (policy) issues of related interest, such as Disclosure, Policy for the prosecution of companies and management of very high cost cases”.²⁹³

The Attorney suggested that her overarching role could be important in this respect:

“Her position of oversight in respect of all the prosecutors gives her a unique insight, enabling her to identify systemic issues which need to be addressed”.²⁹⁴

130. The Attorney General also discussed work she was undertaking with regard to agreements that set out how the different prosecuting agencies can work effectively side-by-side. “In 2008-9 the Attorney has sponsored a project to refresh and re-launch the [Prosecutors'] convention”²⁹⁵ The Prosecutors' Convention:

“is a slim document designed to ensure exactly this, that the most appropriate prosecutor with the right expertise in the right place takes the case forward. You could imagine you could get a prosecution which might have a tax angle, it might

289 Ev 129

290 Ev 129

291 Ev 130

292 Q 233

293 Ev 128

294 Ev 62

295 Ev 62

have a drug importation angle, it might have a violence angle and obviously in those cases there is an established mechanism which works to enable the best placed prosecutor to take that forward”.²⁹⁶

As our inquiry started, signatories to the ‘current’ Prosecutors’ Convention included the Department of Social Security (the Department of Work and Pensions was created in 2001) and the Ministry of Agriculture Fisheries and Food (formally dissolved 2002).

131. The Chief Inspector of the CPS also has a potentially important role. HMCPSI was originally established as an internal unit of the CPS following a Senior Management Review in 1995. It became an independent body on 1 October 2000.²⁹⁷ By statute HMCPSI also inspects RCPO, and has by agreement inspected other organisations including the Army Prosecuting Agency and the Public Prosecution Service (Northern Ireland). The Chief Inspector told us

“There is perhaps an oddity in that the prosecuting authorities who are subject to inspection at the moment are the ones which actually are already superintended and accountable to Parliament through the law officers whereas the other prosecutors are not accountable centrally”.²⁹⁸

The Chief Inspector went on to consider the benefits of one inspectorate being able to look at a variety of different prosecuting agencies:

“It is valuable from our point of view as inspectors that we see how other prosecuting agencies operate, we learn from that and we can try to cross-fertilise some of the good practice... The other agencies do benefit from being inspected by somebody who has looked at a range of other bodies as well”.²⁹⁹

132. We also heard that the Director of Public Prosecutions, in terms of his ownership of the Code for Crown Prosecutors, was important to consistency across prosecutors. The Attorney General described how:

“The Director of Public Prosecutions (DPP) is required by law to issue a Code for Crown Prosecutors, which is applied also by the Director of the SFO and by law by the Director of the RCPO. The Code gives guidance on general principles to be applied in determining whether proceedings for an offence should be instituted or discontinued and which charges should be preferred. The DPP consults the Attorney and the other Directors about any proposed changes to the Code. The provisions of the Code and any changes are required to be included in the DPP’s annual report, which is laid before Parliament”.³⁰⁰

When asked about consistency between prosecutors, David Green QC, Director of RCPO, said:

296 Q 242 [David Green QC, RCPO]

297 www.hmcpsi.gov.uk

298 Q 267

299 Q 271

300 Ev 61

“first of all ... certainly we follow the Code for Crown Prosecutors”.³⁰¹

The Chief Executive of the CPS described how the Code set out standards for prosecutors:

“most of the other prosecutors do accept that those [the Code] are the guiding principles which ought to guide all public prosecutors and that includes the local authority prosecutors too, so it does represent a broad series of well-tested standards which ought to apply everywhere”.³⁰²

133. However, it was also clear that the Code might be used differently by different prosecutors. The Attorney General notes that while RCPO is required by statute to have regard to the Code, the SFO is not.³⁰³ We discussed with RCPO how the public interest test in the Code might be more likely to include considerations of the public revenue for them than some other agencies.³⁰⁴ We also heard how other agencies might put the Code in the context of their broader enforcement work. The Health and Safety Executive told us:

“What we do to try to ensure consistency in addition to applying the Code for Crown Prosecutors is that we have our own enforcement policy statement which has some flesh in the context of health and safety enforcement”.³⁰⁵

134. We were surprised that it was only through the recent review of the Attorney General’s role that the Attorney came to the conclusion that different prosecuting agencies could learn a lot from each other. There seems to be much good work already undertaken by organisations talking to each other about matters of common interest and we welcome the interest the Attorney General is now taking in this work. There is much the Law Officers could do to guide and provide better support to such discussions and, in doing so, ensure consistency of approach across different prosecutors. We emphasise that it is not only those prosecuting agencies superintended by the Attorney which have an interest in how prosecuting policy is developed.

135. We believe that the role of the Chief Inspector of the CPS could successfully be extended so that he can inspect other agencies conducting prosecution. We would also like to see the CPS, as the principal prosecutor and owner of the Code for Crown Prosecutors, demonstrating leadership within the wider prosecutorial family. The public interest test may invoke different considerations in different circumstances, but choices about prosecution across different agencies should be consistent and transparent.

136. We have not come to the conclusion that England and Wales should move towards the Scottish model of a single prosecuting authority. We believe that there are more pressing priorities for CPS management than such a major change, but, given the diverse structure of prosecuting authorities, we regard co-ordination and the sharing of best practice as essential.

301 Q 203

302 Q 304

303 Ev 61; The SFO website states that it follows “the principles outlined in the Code for Crown Prosecutors”.

304 E.g. Q 229

305 Q 206

Conclusions and recommendations

Central to the Criminal Justice System

1. The prosecution plays a pivotal role in the criminal justice system. This role has become too important to continue to be vulnerable to piecemeal amendment in response to events. We expect the Attorney General and the Director of Public Prosecutions to show clear leadership in defining the role of the prosecutor in the criminal justice system. Specific changes to the operation of the prosecution system should be made in the light of an awareness of how they affect and contribute to this clear role and to the criminal justice system as a whole. (Paragraph 7)
2. The aims and purposes of the Crown Prosecution Service need to be clear and it also needs to be clear how they relate to the overarching aims and purposes of the criminal justice system as a whole. We fear that the Crown Prosecution Service is sometimes defined by what it is not or by its relationship to other organisations, rather than its own aims and purposes, or by clarity about its role within the criminal justice system. (Paragraph 8)

Defining the role of the prosecutor

3. The CPS needs to take a bold and robust approach as the independent prosecutor. Part of that role is challenging the police to do better. The CPS is not a minor partner in the criminal justice system. (Paragraph 30)
4. There is much to commend in the collaborative approach being taken by the police and the CPS, which helps to raise overall standards through understanding the challenges and expertise of other agencies. While such arrangements are working well we do not see the need for the CPS to have powers such as those of the Procurator Fiscal to direct the police. The debate about whether the CPS should have such powers has to be seen in the light of the increasing development of joined up working between the police and the CPS at earlier stages of an investigation. In theory this could raise a question over the way in which the CPS will be expected—at a later stage—to make an independent decision about whether or not to prosecute but in practice it seems better to have that relationship throughout an investigation as long as both sides are clear that joint working must not blur the distinction between the police responsibility to investigate, and the CPS responsibility to take the decision about prosecution and to manage any subsequent process. Oversight of this relationship is clearly a matter for the inspection and scrutiny processes. (Paragraph 31)
5. We heard strong support on grounds of principle for the charging decision to rest with the prosecutor. We also heard concerns that the arrangements for statutory charging had resulted in delays. Nevertheless, these considerations did not lead us to a conclusion that statutory charging should be wholly or partly abandoned. There is clearly a willingness on behalf of the CPS and the police to resolve what are significant practical problems. (Paragraph 32)

6. CPS Direct provides a telephone and IT based ‘remote’ service, which appears to be well regarded by its users and we hope that it can contribute to the consistency and ease of access to legal advice provided for the police. However, this service should not be assumed to be a substitute for local engagement and should operate within the context of a good working relationship and mutual understanding between the police and the CPS at a local level. (Paragraph 33)
7. The decision as to what offence an individual is charged with is pivotal, with significant implications for the rest of their journey through the criminal justice system. It also goes to the heart of what that system is trying to achieve; we are not trying to maximise conviction rates, we are trying to maximise convictions of guilty people for the crime they have committed. While perceptions of both under- and over-charging may be inevitable, they are nonetheless damaging to public confidence. The Attorney General should consider what evidence is required to monitor the extent of under- and over-charging, and how this data could be best collected. (Paragraph 44)
8. An effective and ongoing evaluation of the extent to which under- or over-charging happens is important not least because of what it tells us about whether plea bargaining is happening. Expanding the use of plea bargaining would have significant consequences and in our opinion needs the utmost care and consideration. We must not drift towards a situation where it is commonplace without discussing whether it is desirable and, if so, what safeguards must be put in place for defendants, victims and the public. (Paragraph 45)
9. Conditional cautions are part of a significant change to how the criminal justice system operates, making a material difference to the process by which the state punishes people. The fact that prosecutors can now recommend that an individual be conditionally cautioned, and a prosecution suspended subject to the fulfilment of particular conditions, represents a significant change to the prosecutor’s role. On the other hand if such decisions prevent an individual being drawn further into the criminal justice system, and therefore succeed in reducing the likelihood that they will re-offend, that is in the interests of potential victims and society as a whole, as well as having a benefit to the individual. Such decisions can therefore contribute to the responsibility of the CPS to reduce re-offending. (Paragraph 58)
10. However, the growth in the number of out-of-court disposals represents a fundamental change to our concept of a criminal justice system and raises a number of concerns about consistency and transparency in the application of punishment. Different patterns of fines may simply reflect local priorities and be argued to be a feature of community engagement. However, we believe the use of these disposals requires systematic scrutiny, and we recommend that as a first step they should be the subject of a multi-inspectorate review. The Attorney General should assemble a comprehensive map of the offences and relevant penalties in operation across England and Wales to assist this scrutiny. (Paragraph 59)
11. The development of CPS advocacy cannot simply be seen as the next logical step in how the CPS should develop: it has wider implications for the criminal justice system

and will lead to a very different organisation from that which was originally set-up. (Paragraph 76)

12. While the representatives of the Criminal Bar Association clearly saw this issue in terms of the interest of their members, we recognise that the consequences of CPS advocacy on the future provision and quality of legal services as a whole require attention. The idea of advocates moving more freely between employed and self-employed work is an attractive one, not least because it would preserve the benefits of experience of both prosecution and defence work, which probably produces better advocates. (Paragraph 77)
13. We do not dismiss the anecdotal concerns raised from a number of quarters about the quality of CPS advocates and the systems for their deployment, such as allegations that complex cases are dumped on self-employed barristers at short notice, but regard this as evidence of a need for better case management by the CPS, rather than providing a general argument against CPS advocacy. We welcome the Chief Inspector's reports into CPS advocacy and case preparation and the evidence basis this provides for developing the quality of CPS advocacy and ensuring effective systems across the CPS to support this, and we look forward to considering the responses of the CPS and the Bar. (Paragraph 78)

Prosecutors and victims

14. Telling a victim that their views are central to the criminal justice system, or that the prosecutor is their champion, is a damaging misrepresentation of reality. Expectations have been raised that will inevitably be disappointed. Furthermore, the criminal justice system is set up to represent the public rather than individuals, and there are good reasons for this. The CPS's role as independent arbiter of decisions about prosecution is critical. Explaining this role clearly to victims such that their expectations are managed realistically, rather than raised then disappointed, is vital. (Paragraph 83)
15. Victims want to be treated as people, which often does not happen in a criminal justice system that is driven by process. We are pleased that the CPS has risen to this challenge by developing good policies for engaging with victims and witnesses. Delivering these consistently on the ground continues to require a major effort. (Paragraph 94)
16. The lack of a consistent, effective and readily understood complaints handling system has been a serious weakness of the CPS. We welcome the CPS's recognition of the need, and commitment, to take action to ensure that the system is more open and transparent. We believe that it should provide a valuable mechanism for the CPS to learn more about the service that its various clients and stakeholders would like provided, as well as giving a proper response to complainants. (Paragraph 98)
17. Special measures are a crucial part of the criminal justice system which should enable a witness to give the best evidence they are capable of giving. We are concerned by the evidence that individuals are not being identified as being suitable for special measures, or that delivery failures mean they do not receive them once their need has

been identified. We are also concerned at the suggestion that the CPS may be reluctant to recognise that people with mental health problems can be credible witnesses at all. The CPS is not the only agency with a role to play in identifying those who need special measures but it is a key agency and should be alert at the charging stage to what people need. The CPS could also work with the police to ensure that they are identifying individuals for special measures effectively. We look forward to hearing more about the CPS's work to improve its identification of those cases where the need for special measures was not recognised. (Paragraph 103)

Consistency and local discretion

18. Inconsistency in CPS delivery was a clear theme in the evidence we received and must be tackled. Failures to define clearly the role of the prosecutor, and the pressures pushing and pulling it in different directions, militate against priorities for consistent delivery. The definition of a clear role should include the CPS's contribution to the overall aims and delivery of an effective criminal justice system. The development of community prosecutors is a further fundamental change to what we expect from prosecutors in the criminal justice system, raising questions about what kind of local discretion is desirable and beneficial to the public interest. The Attorney General should make a clear statement of how local responsiveness can be made compatible with the demands of natural justice for system-wide consistency. (Paragraph 114)

The public prosecution landscape

19. We were surprised that it was only through the recent review of the Attorney General's role that the Attorney came to the conclusion that different prosecuting agencies could learn a lot from each other. There seems to be much good work already undertaken by organisations talking to each other about matters of common interest and we welcome the interest the Attorney General is now taking in this work. There is much the Law Officers could do to guide and provide better support to such discussions and, in doing so, ensure consistency of approach across different prosecutors. We emphasise that it is not only those prosecuting agencies superintended by the Attorney which have an interest in how prosecuting policy is developed. (Paragraph 134)
20. We believe that the role of the Chief Inspector of the CPS could successfully be extended so that he can inspect other agencies conducting prosecution. We would also like to see the CPS, as the principal prosecutor and owner of the Code for Crown Prosecutors, demonstrating leadership within the wider prosecutorial family. The public interest test may invoke different considerations in different circumstances, but choices about prosecution across different agencies should be consistent and transparent. (Paragraph 135)
21. We have not come to the conclusion that England and Wales should move towards the Scottish model of a single prosecuting authority. We believe that there are more pressing priorities for CPS management than such a major change, but, given the diverse structure of prosecuting authorities, we regard co-ordination and the sharing of best practice as essential. (Paragraph 136)

Formal Minutes

Wednesday 15 July 2009

Members present:

Sir Alan Beith, in the Chair

Siân James
Alun Michael
Jessica Morden
Julie Morgan

Dr Nick Palmer
Andrew Turner
Andrew Tyrie
Dr Alan Whitehead

Draft Report (*The Crown Prosecution Service: Gatekeeper of the Criminal Justice System*), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 136 read and agreed to.

Resolved, That the Report be the Ninth Report of the Committee to the House.

Ordered, That the Chairman make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence was ordered to be reported to the House for printing with the Report.

[Adjourned till Tuesday 21 July at 4.00 pm]

Witnesses

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Nicola Padfield, Fitzwilliam College, University of Cambridge, and **Robin White**, University of Dundee Ev 1

Tim Godwin, Acting Deputy Commissioner, Metropolitan Police and ACPO lead on criminal justice, and **Catherine Lee**, Director of Delivery and Communications, and **John Kennedy**, Head of Local Delivery, Office for Criminal Justice Reform Ev 7

Tuesday 3 February 2009

Peter Lodder QC, Chairman, and **Tom Little**, Secretary, Criminal Bar Association, and **Christine Haswell**, Negotiations Officer, Public and Commercial Services Union Ev 14

Gillian Guy, Chief Executive, Victim Support, and **Paul Farmer**, Chief Executive, Mind Ev 20

Tuesday 10 February 2009

David Green QC, Director, Revenue and Customs Prosecutions Office (RCPO) and **Peter McNaught**, Head of Litigation and Enforcement Team, Health and Safety Executive Ev 27

Stephen Wooler CB, Her Majesty's Chief Inspector, **Sally Hobbs**, Her Majesty's Deputy Chief Inspector and **Jerry Hyde CBE**, Her Majesty's Deputy Chief Inspector, Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) Ev 34

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Keir Starmer QC, Director of Public Prosecutions, and **Peter Lewis**, Chief Executive, Crown Prosecution Service Ev 41

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Reports from the Justice Committee since Session 2007–08

Session 2008-09

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Second Report	Coroners and Justice Bill <i>Government response</i>	HC 185 HC 322
Third Report	The work of the Information Commissioner: appointment of a new Commissioner <i>Government response</i>	HC 146 HC 424
Fourth Report	Work of the Committee in 2007-08	HC 321
Fifth Report	Devolution: A Decade On <i>Government response</i>	HC 529 Cm 7687
Sixth Report	Sentencing Guidelines and Parliament: Building a Bridge	HC 715
Seventh Report	Constitutional Reform and Renewal: Parliamentary Standards Bill	HC 791
Eight Report	Family Legal Aid Reform	HC 714
Ninth Report	The Crown Prosecution Service: Gatekeeper of the Criminal Justice System	HC 186
Tenth Report	Draft Sentencing Guideline: overarching principles—sentencing youths	HC 497
Eleventh Report	Constitutional Reform and Renewal	HC 923

Session 2007-08

First Report	Protection of Private Data <i>Government response</i>	HC 154 HC 406
Second Report	Work of the Committee in 2007	HC 358
Third Report	Counter Terrorism Bill <i>Government response</i>	HC 405 HC 758
Fourth Report	Draft Constitutional Renewal Bill (provisions relating to the Attorney General) <i>Government response</i>	HC 698 Cm 7689
Fifth Report	Towards Effective Sentencing <i>Government response</i>	HC 184 Cm 7476
Sixth Report	Public Appointments: Lord-Lieutenants and High Sheriffs <i>Government response</i>	HC 1001 Cm 7503
Seventh Report	Appointment of the Chair of the Office of Legal Complaints <i>Government response</i>	HC 1122 HC 342

Oral evidence

Taken before the Justice Committee

on Tuesday 20 January 2009

Members present

Sir Alan Beith, in the Chair

Alun Michael
Julie Morgan

Mr Andrew Tyrie
Dr Alan Whitehead

Witnesses: **Nicola Padfield**, Fitzwilliam College, University of Cambridge, and **Robin White**, University of Dundee, gave evidence.

Q1 Chairman: Nicola Padfield and Robin White, thank you very much for coming to help us today. We invite you to give a short introductory comment because you are not hostile witnesses but people who have come to help us with your better understanding of how the system works including, in Robin White's case, the comparative features of the English and Scottish systems. If you would like to take up the invitation to make a brief opening comment please do. I need to warn you that we expect a division at five o'clock, so effectively that sets a time limit on this particular part of our session.

Nicola Padfield: I shall be very brief anyhow. Thank you for inviting me here today. I imagine that you have all read my brief written evidence to the Committee. I thought I would just remind you briefly of what I wrote there. By way of introduction, in part I do not consider myself to be an academic expert in this area specifically. I am an academic interested in criminal justice. My particular research of recent years has been in sentencing and early release, but I am also a Recorder in the Crown Court and would like to think that my interest overlaps between what is law in theory and law in practice and maybe I have something to contribute there. I also ought to state that I am a part-time legal adviser in a small way to the independent Hate Crime Scrutiny Panel set up by Cambridge CPS which is composed of representatives of minority communities who review CPS files. In my written evidence I highlighted certain key issues which I think are important for this Committee. I certainly think it is very exciting that this Committee is looking at the subject now because the CPS is still very young. It's very young, in the context of the English and Welsh criminal justice systems. It had a very rocky start. It was badly under-financed, badly set up. Its first 10 years must have been extraordinarily difficult and in the past 10 years there has been enormous improvement in all sorts of ways, but it does not mean that life is perfect. Perhaps the most interesting questions are concerned with the way in which the CPS relates to other parts of the criminal justice system. As it grows up and becomes a more powerful player in the criminal justice system the rub-on effects, and indeed perhaps the unintended consequences, need to be thought about. I think I will stop there.

Q2 Chairman: Thank you very much indeed. I have forgotten which of the two papers, yours or Robin White's, brought home to us that the notion that the police evolved as a form of private prosecutor provides such a sharp contrast with the Scottish system. Indeed, prosecution has always been the role of the Crown. I wonder whether you would like to enlarge on that briefly.

Robin White: Do you want me to make a brief introduction?

Q3 Chairman: Yes, please do so.

Robin White: I am Robin White, a senior lecturer at the University of Dundee Law School and I have been looking at some criminal justice issues in the past few years including some prosecution issues and comparative aspects. It seems to me that intra-UK comparisons are, to be honest, frequently perfunctory. People look at Germany, France, the United States, Israel and Malaysia—all sorts of exotic places—whereas within the same state there are three prosecution systems et cetera. There are two particular points that I want to address. One is the comparative aspect, specifically Anglo-Scottish, and I am very happy to answer questions on that. Just the same, I shall say a bit more about it in a moment. The other matter is the rise of alternatives to prosecution which strike me as a rather worrying trend. To enlarge a little on both points, as to Anglo-Scottish comparisons I have quoted Lord Justice Auld as saying, a few years ago to be fair, that the CPS had still to fulfil its proper role which should be closer to the more highly regarded procurator fiscal in Scotland which gives me some power to enlarge upon that. There are numerous differences between the two systems. In my written evidence I included as an appendix a brief overview and comparison of the two systems on which I am happy to enlarge if necessary. It struck me that it would be quite useful to look at four particular points, one of which you have already mentioned, that is to say the relative role of the police in England and Wales. The prosecutors have been, to use a phrase, handmaidens of the police. In Scotland in effect the reverse is true. The second point is prosecutorial monopoly. There is to all intents and purposes a monopoly by the Crown Office and Procurator Fiscal Service of all prosecutions in Scotland; there

is not a multiplicity of agencies. The third matter is the professional prosecution of crime. In Scotland crime at all levels is professionally prosecuted in the sense that what I call short career prosecutors do it. The fourth one is perhaps a recent development: the depoliticisation of law officers, as I have called it; that is to say, in the past few years in Scotland both law officers are career prosecutors and not lawyer politicians. I should be happy to enlarge on all those things in the context of a Scottish comparison. Briefly, the other general area that I should like to mention is the rise of certain alternatives to prosecution. I am not alone in saying that this is the most important change in criminal procedure possibly in all parts of the UK for the past 100 years or more, but it seems to be largely unnoticed. What I am referring to is the expansion particularly of conditional offers, that is to say effectively where an enforcement agency says that if a person pays a nominated penalty it will not prosecute. Thus, the courts are avoided. I have a number of specific concerns about that. Perhaps the main one is that this is largely an unnoticed and enormous change in the way the criminal justice system operates. I have mentioned conditional offers specifically. There is a further stage for which there is no official term, as it were, but I use the expression “decriminalisation”. The phrase “civil penalties” is used in this regard, but there is no consistent terminology. The significance of those is that with conditional offers at least there is an offence. It is a question of how the offence is dealt with as an alternative to the court. With decriminalisation and civil penalties the criminal justice system is in effect entirely removed. You have the secretary of state or local authority imposing a penalty without being obliged to use any of the protections of criminal procedure because it is called a civil penalty. I am in the middle of writing an article. If you will excuse the pretentiousness of it, to give you a flavour of it the article is entitled “*Civil Penalties Oxymoron: Chimera and Stealth Sanction*”; in other words, it is a contradiction in terms. It is a monster and an attempt to sneak up on people with a penalty which pretends not to be one.

Q4 Chairman: Is the situation in that respect any different in Scotland from the position in England?

Robin White: Broadly speaking, I think not.

Q5 Julie Morgan: Can Nicola Padfield say a little more about what she describes as informal plea-bargaining, because I think that this concept outside the system is a bit of a mystery?

Nicola Padfield: One of the reasons we say we really do not do plea-bargaining in this country is that traditionally we have not involved the judge in the process, but I am sure that for ever a defence lawyer has rung up whoever is in charge of the prosecution and said that his or her client would plead guilty to a lesser charge if the higher charge was dropped. Informal negotiation has gone on for ever. What we are moving towards very fast is a much more formal system of plea negotiation and plea bargaining which I suspect will more often be initiated by the prosecution than the defence which I think shifts the

balance of power in a very important way. I do not know whether you want me to say why I am very nervous about where we are going.

Q6 Julie Morgan: I was going to ask for your views on it.

Nicola Padfield: In this area most of my views are tentative because we do not have a lot of evidence. The evidence we have often comes from other jurisdictions. I completely agree with the point that we do not look often enough at Scotland for our comparisons. Too often the comparisons are with the United States where in terms of plea-bargaining we see some very worrying things. The most obvious place for an English lawyer to look at the moment is the decision of the House of Lords last summer on the extradition of Gary McKinnon. There we see a very precise and practical example of the enormous power of American prosecutors in offering a bargain which involves not only a much shorter sentence if the subject pleads guilty but also the terms on which the sentence will be served, what sort of prison involved and the likelihood that the person will be sent home to serve the sentence. To my mind, that is an extraordinarily worrying world to be slipping towards. I do not think the prosecutor of the CPS within our system should be encouraged to develop that sort of power in the plea-bargaining process. My view is that we should stop and think before we slide that way.

Q7 Julie Morgan: But there are other practical benefits to plea-bargaining and it has always gone on?

Nicola Padfield: There are huge practical benefits to the system. There are huge practical advantages to prosecutors and there may well be huge practical advantages to suspects, but it does depend on two very important things. One is that suspects should be well advised because it is very easy to agree to something which is not in your interest if you do not understand what is going on. Again, there is evidence from the United States that the power of the prosecutor in relation to some suspects is accepted as a fact of life which is a subject of concern. Then, of course, the public interest does not necessarily accord with the interest of the prosecutor or the suspect. For my part I have perhaps a slightly old-fashioned trust in open justice. I think that such decisions should be made in an open court where at least the public is able to see what bargain has been agreed. The trouble with plea-bargaining is that too much of the decision-making is likely to be made out of sight.

Q8 Julie Morgan: Would you welcome a much more transparent way of doing it? Members of the public who have spoken to me about it are often mystified as to why things have gone in a certain way. Do you believe that plea-bargaining should be public?

Nicola Padfield: Much more obviously public, yes.

Q9 Julie Morgan: Robin White, do you want to comment?

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Robin White: First, I believe that plea-bargaining is inevitable. If you have an adversarial system where two sides locked in battle it is inevitable that some people will plead guilty and the system depends on that. Some people will plead guilty to a charge which in some sense has been negotiated. There is an enormous range of situations in which it occurs. At one end when somebody is to be charged with a particular offence very early on the defence agent will contact the prosecutor and say that certain witnesses may be found to be a bit dodgy but his client will plead to such and such. At the other end of the spectrum, just before the court convenes the fiscal is sitting there with about six trials to run and the defence agent will pop round and say that the individual has two charges and if one of them is dropped he will get him to plead to two. That is quite a range. Another point to look at is an analysis of the nature of plea-bargaining. It is probably orthodox to say that there is more than one form of it. The terminology varies, but in the case of sentence bargaining from the accused's point of view the great advantage is a lesser sentence. Sentence bargaining means that the sentence is formally less than it would otherwise have been. I think that must be trilateral in the sense that you have the prosecution, the defence and judge involved. As I understand it, one difference is that sentence bargaining happens in England but it does not appear to have occurred in Scotland at all. The second matter is charge bargaining; in other words, perhaps one charge is dropped for a guilty plea; and there is fact bargaining where the charge remains the same, or possibly there is something between the two. Perhaps the word "repeatedly" is dropped from "repeatedly stabbed", or there is agreement that the facts narrated by the prosecutor are to be put in a particular way. It is quite useful to analyse the three. I agree that formality appears to be a good idea. Again, I would very much agree that open court is better than behind closed doors. My difficulty—perhaps this is simple ignorance on my part—is how on earth sentence bargaining in particular occurs. If at a very early stage a judge is asked what he would impose on this or that occasion I am not sure how that judge can answer sensibly when he or she has not heard any plea in mitigation. It is very much in the dark.

Q10 Alun Michael: First, you referred to the need for greater public transparency as to what is happening. Is it not true that very often neither the defendant nor those affected, the victim or family, has much clue as to what is going on? Therefore, it is not just a question of public transparency, is it?

Nicola Padfield: I absolutely agree with you if what you are saying is that everyone needs better to understand the process. Public education about the criminal justice system is to be welcomed.

Q11 Alun Michael: Second, you referred a process that generally took place without the judge or magistrate being involved. That can result in the court being constrained, can it not, because if a particular charge is ruled out and lesser charges are left in and the evidence unfolds in such a way to

suggest that perhaps the higher charge is the one that ought to have been pursued it can be very frustrating for the court as well?

Nicola Padfield: The Crown Prosecution Service obviously has to make extraordinarily difficult judgments in relation to costs and the trauma to witnesses, and all sorts of issues come into play to affect the decision to downgrade a charge in response to a guilty plea. I think we ought to undertake a lot more research—I would say that, wouldn't I—into the extent to which overcharging happens in order to allow for greater negotiation. I think the extent to which we really do not know how much this happens in practice is quite surprising.

Q12 Alun Michael: But in respect of both forms of bargaining to which you referred a moment ago something is decided in advance of the evidence being tested and therefore you are in danger of trying to negotiate on the basis of justice by numbers rather than evidence?

Nicola Padfield: And the discretion of the judge is inevitably significantly curtailed.

Q13 Alun Michael: We are talking here about transparency in a particular way. I want to ask about transparency in the taking of decisions generally. What do you see as the role of the inspectorate in this? Is there a greater role here for the inspectorate in ensuring there is such transparency?

Nicola Padfield: I believe your Committee, certainly the House, explored that in detail last year with a proposal to fuse the criminal justice inspectorates. I for one am very glad that it did not happen because it seemed to me that the different inspectorates had very different functions. At the moment the inspectorate of the CPS has very much an inspectorate of process role and is hugely useful in that role. Whether it should be widened further or there should be other bodies dealing with other areas I am not sure. One area that is quite difficult to explore and to learn about from different bodies' websites is complaints against the CPS. Who deals with complaints against the CPS? Should that be for an inspectorate or should it be for a separate complaints body? Those are difficult issues to which I do not have an answer. Certainly, it is worth having an inspectorate but whether it should be widened I am not sure.

Q14 Alun Michael: Robin White, do you have a view on that?

Robin White: Perhaps I may make a couple of points particularly in relation to your first question. You mentioned over-charging.

Q15 Alun Michael: Or under-charging.

Robin White: Yes, but I should like to make a point about over-charging. Perhaps here I may put in a word for the Scottish system. One of the problems with over-charging, as I understand it, is to do with what is called prosecution momentum or optimism. Insofar as the police initiate things they may get the bit between their teeth and the result is over-charging. The CPS, which perhaps is still the

handmaiden to the police, may have difficulty in stopping the horse from running. The great advantage of an entirely separate system where the police are subordinate to the prosecutor is that there is a genuine second look at it. These days the fiscal sitting in his or her office gets on screen the details of a particular matter. There are no police about. I find the idea of co-location where prosecutors go to the police slightly strange. It seems to me that it ought to be the other way round. The prosecutor is the prosecutor and is the one to decide. The police provide the information and the prosecutor decides on the matter. Therefore, over-charging is largely avoided because of the system. You also mentioned victims. I am a little concerned about the role of victims in the criminal justice situation perhaps in a slightly unusual way. I find there is an enormous amount of confusion often demonstrated by the conjunction of victims and witnesses as if it is the same thing. One form of prosecutor independence in the public interest is independence from the victim. Whatever “in the public interest” means—it is on occasion a very useful fig leaf—prosecution by a public prosecutor is not necessarily in the interests of the victim. It may or may not be but the point of the criminal justice system is to identify who did the wrong thing and make that individual subject to a penalty.

Q16 Alun Michael: I ought to make clear that my question was about transparency rather than the interests of different parties and that at least the victims or their families ought to be clear what is happening.

Robin White: Yes.

Q17 Chairman: I should like to clarify one point. Just how does the relationship between the fiscal and the police work in the Scottish system? You regarded co-location as a bit uncomfortable.

Robin White: In the sense it is used in England and Wales, yes.

Q18 Chairman: But to what extent is the fiscal actually saying at a very early stage that a particular witness ought to be interviewed or further inquiries should be made to see whether a witness can testify to this or that, or that time is being wasted by approaching a particular witness or looking for a particular kind of forensic evidence?

Robin White: That is very much what the fiscal does. These days it is done on screen. Take a custody case. I think the normal practice in any office is for those fiscals who are not appearing in court on a particular day to mark cases. They all turn up at nine o'clock in a particular room and on screen are however many custody cases there are. They see the number of people arrested in the past 24 hours. Obviously, this is a piece of software with a particular format, but the essence of it is a bit of text, for example that a search warrant was effected at two o'clock that morning and evidence of drugs, such as scales, has been found. Two people were there and various items were seized. They think that certain forensic tests are needed, that another witness or two may be

needed and so on. What does the fiscal do? It is very much *de novo*; in other words, the fiscal makes perhaps a slightly complicated decision. Does there appear to be an offence at all? The answer may be no and the police have wasted their time; or there may be insufficient evidence, and so on. Yes, the fiscal certainly can, and from time to time does, require the police to interview new people, carry out searches and forensic tests and so on.

Q19 Alun Michael: That implies the power of direction in the way we discussed last week?

Robin White: Yes, that is absolutely so. As an appendix to my written evidence, I included various common law and statutory authorities which make it very plain that the fiscal is in charge; he tells the police what to do.

Q20 Alun Michael: I put a question to you, Nicola Padfield. In your written submission you indicated that the desire for improved efficiency in the CPS must not lead over human rights and due process. It seems quite reasonable as a statement, but I have some suspicions about it. “Due process” is a polite term for the incompetence, inefficiency and delay in the system that we have all experienced. To explain why I put it in that way, particularly in relation to youth justice I am a great believer in the principle that justice delayed is justice denied. Delay does not do any good to anybody involved in the system including the defendant in the long term. The only person it helps is perhaps the less scrupulous defence solicitor. Why do you think there is a tension between improved efficiency and human rights and due process? They are not necessarily in opposition or tension, are they?

Nicola Padfield: Of course they are not necessarily in opposition. Perhaps I may teasingly take issue with your description of the defence solicitor who is the beneficiary of delay. I am not sure that nowadays legal aid encourages a defence solicitor to delay.

Q21 Alun Michael: I agree that things have improved since my time.

Nicola Padfield: There are good as well as bad reasons for delay. My concern is with any agenda which is clearly led by key performance indicators which matter to the extent they do in our current managerialist culture, if you like. There can be a pressure on parties to comply with key performance indicators to an extent that can be unhealthy. I also said in my evidence—you may not have welcomed the way I put it—that I did not like the definition of “unsuccessful outcomes”. Perhaps I may say a bit more about that.

Q22 Alun Michael: I think we are reasonably happy with that; that is a fair point. But if one takes youth justice in the UK the ability to squeeze things down from 141 days to fewer than 72 suggests there was a hell of a lot of unnecessary delay to be squeezed out of the system.

Nicola Padfield: I have no doubt that there is a lot of unnecessary delay. Sometimes a delay may be useful in an individual case.

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Q23 Alun Michael: In an individual case, yes, but I just want to understand the way you put the opposition of the two elements. Can you give an example of a situation in which that has arisen? My concern is that you put it as “managerialist”. Quantifying and measuring what people do has had considerable beneficial effects in driving out a lot of the inexcusable delays that existed in parts of the court system and still exist in some of them. What is the real fear that underlies that comment?

Nicola Padfield: The issue could be illustrated by way of a whole number of examples.

Q24 Alun Michael: One or two would be fine.

Nicola Padfield: I will start with the processes that are economic, that is, saving money by using CPS as presenters of cases and not simply as objective assessors of police evidence. I think we see quite a lot of problems developing because of the great priority given to the increase in the number of magistrates court sessions covered by associate prosecutors or, even more, the increase in the percentage of advocacy dealt with in house leads to a lot of problems.

Q25 Alun Michael: Can you give us an illustration because that is a bit vague?

Nicola Padfield: If you go to a busy crown court today which has a morning of plea and case management hearings you will find that due to recent changes in the way legal aid is done the trial barrister is likely to be there representing the defence but the person representing the Crown Prosecution Service is a very hard-pressed CPS advocate dealing with all the PCMHs that morning. He or she may well not be the trial counsel. We see delays slipping in and there are lots of issues.

Q26 Chairman: Therefore, the prosecution is at a disadvantage, not an advantage?

Nicola Padfield: The prosecution which is badly prepared because of the pressure on them to be quick and cheap leads to increasing problems. One issue that I should very much like to bring to the attention of this Committee is a very good article by Judge Denyer.

Chairman: If you provide the reference we can look at it. I must move the questioning on; otherwise, we shall not be able to cover some of the issues that Dr Whitehead wants to raise.

Q27 Alun Michael: Perhaps I may say that at the moment I am convinced there is a degree of pressure on people—there always is—in the period running up to proceedings in court.

Nicola Padfield: There are disclosure issues, meeting time limits and all sorts of matters and they are not just defence problems but prosecution problems that cause a lot of delay. That is an article by Judge Denyer in 2008 *Criminal Law Review*.¹

Chairman: If you give the reference we will look at it. I am sorry to rush things.

Q28 Alun Michael: If any examples can be sent to us separately that will be helpful.

Nicola Padfield: I shall take that up.

Q29 Dr Whitehead: Both of you in your written evidence to us raise the issue of conditional cautions and in Scotland conditional offers and decriminalisation. You point out that in effect that is a punishment without prosecution.

Robin White: I should say it is not my phrase; it is a sheriff’s phrase.

Q30 Dr Whitehead: In particular Nicola Padfield raises the issue of the extent to which sometimes, for example, a fine or a conditional caution may exceed what would have happened in the magistrates court anyway and also perhaps the lack of understanding of what happens should a conditional caution be imposed. Can you expand on your concerns on those issues in relation to conditional cautions?

Nicola Padfield: I think the evidence is clearer in relation to fixed penalty notices. Often the fixed penalty is higher than the defendant would receive in the equivalent case going to court. That is clear in, for example, the Explanatory Memorandum to the latest increase in the number of offences with fixed penalty notices. We are told that in the case of the possession of cannabis when no equivalent offence exists the penalty amount reflects the average fine given out by a magistrates court. If it is the average fine, it means that a lot of people are getting more now than they would have received had they gone to a magistrates court. There is evidence from the small amount of work which has been done on PNDs. There is very real concern that poorer families maybe losing out. I have here another piece of research which suggests that some young people and police officers feel that the scheme may unfairly discriminate against poorer families.² We do not yet know a great deal about conditional cautions, but there must be a concern that they punish people more than they would have been had they been to court. The potential implication of that is something we must monitor. That is why openness is very important. I am not saying that it is necessarily a problem in all cases, but the potential of these non-court disposals to punish people more than they would be punished had they had a court disposal is a very real fear. As to net-widening possibilities, do not misunderstand me: I think it is extremely useful to have in place systems that allow low-level public disorder to be dealt with without prosecutions as long as it is not being used for cases which would otherwise in court be dealt with perhaps more leniently. It is providing an alternative system of criminal justice. The other point that we have not

¹ *Note by witness:* Non-compliance with case management orders and directives, [2008] Crim LR 784-792

² *Note by witness:* see Amadi, Juliana, Piloting Penalty Notices for Disorder on 10-15 year olds: results from a one year pilot (*Ministry of Justice Research Series 19/08*) November 2008

adequately noticed is that the numbers are enormous. I have brought along the latest criminal statistics published this year. The numbers of cautions and PNDs, fixed penalty notices, are enormous and I am not sure that that has been adequately digested.

Q31 Dr Whitehead: But in pointing to that is it implicit that there is a substantial case for better regulation of the relationship of various fines or punishments following fixed penalty and conditional caution arrangements or that the system itself appears to have run away with a particular notion of how these things are done and therefore itself might be circumscribed to a much greater extent? In a sense you may say there could be two routes: one is to regularise and regulate that new system and the other is that the new system itself raises a number of question marks such that one ought to rein it back?

Nicola Padfield: Of course, it is more efficient to have prosecutors' fines however they are, whatever "efficient" means. Whether or not it is more effective depends entirely on what one seeks to effect. I really cannot give answers. I am really asking questions and am very diffident in anything that I say today. But the question is that we have drifted towards a huge increase in non-court disposals because it is cheaper. Have we adequately thought through whether it is better? I also say in my evidence that I am an old-fashioned fan of magistrates courts, public decision-making by volunteer local magistrates. Magistrates' court business has gone down enormously and I question whether that is necessarily a good thing. Local justice by local magistrates seems to me to be a very useful criminal justice process and one that at the moment is being squeezed.

Q32 Mr Tyrie: You are a recorder. Is it not correct that generally recorders process these cases much faster than magistrates? Certainly, the figures for London support that. But the appeal rate and successful overturning of recorders' decisions is lower.

Nicola Padfield: I think you are talking about District Judges' (Magistrates Court), in old language, the stipendiary magistrates. The stipes definitely have the reputation you say. I am a Recorder and a Recorder is a part-time circuit judge in the Crown Court and is a rather different animal, if I may put it that way.

Q33 Mr Tyrie: But the point I make stands, does it not? On the whole, the amateurs end up making more mistakes than the professionals?

Nicola Padfield: I would need to look that up to know whether that is correct. Certainly, the district judges' courts tend to be much faster. Whether or not there are fewer appeals I cannot tell you off the top of my head.

Q34 Chairman: Nicola Padfield, do you have a view about the prosecuting monopoly that exists in Scotland? Are there serious disadvantages in having a number of government agencies, the Serious Fraud Office, HM Revenue and Customs and even the Television Licensing Authority in England and Wales to carry out prosecutions?

Nicola Padfield: I think we are now at the stage when we can ask the question which you ask. Certainly, in the first 15 years or so in the CPS's life it was not a body in which there was enough confidence that it could take on the big umbrella role. Before it was invited to take on the big umbrella role we have to think about the extraordinarily different prosecution policies of different bodies. If you look at tax bodies, compliance policies in environmental crimes there are some very interesting differences between different bodies as to whether they seek to prosecute or negotiate satisfactory results. Again, it raises all the questions that we are discussing today about negotiated justice and what the end product is. Do we want people to be able to pay up rather than be prosecuted? If you look across at all the non-CPS agencies the policies are very different.

Q35 Chairman: In part does that not reflect the field in which they are working? For example, in tax cases getting the money in is the primary objective unless clearly fraudulent activity going on, whereas in, say, smuggling cases you want to lock up smugglers?

Nicola Padfield: Those are big questions that need to be discussed, are they not? It is not obvious to me that you necessarily want to lock up smugglers more than you want to lock up tax fraudsters. Why?

Chairman: I excluded fraud.

Q36 Dr Whitehead: Nicola Padfield, I want to turn briefly to the other point you make about civil protection orders such as ASBOs, the more recent serious crime prevention orders under the Serious Crime Act 2007 and violent offender orders. You also point to the inconsistency of rules and sanctions in those protection orders. Is that an area that you also think may benefit from better regulation or is it one where, as you suggest in evidence, they are parliamentary knee jerk responses and perhaps Parliament ought to "unjerk" its knee?

Nicola Padfield: The law is fantastically complicated and in quite a lot of the areas you mention it is almost impossible to understand the detail, complexity and overlap. Certainly, complicated law wastes money. Robin White mentioned in his presentation de-criminalisation and what you raise here is de-criminalisation in a very interesting way in relation to the civil penalties and orders you mention. Whether or not they have been a good thing is a moot point. When ASBOs were introduced wishy-washy liberal academics like myself were deeply opposed to them because we were told they were dealing with sub-criminal matters and since it is difficult to imagine sub-criminal matters, everybody was very concerned. They have been used not for

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sub-criminal but serious criminal matters in order, you might say, to avoid the problems of the due process safeguards of the criminal justice system. I think ASBOs are still problematic when they are an alternative. I do not oppose them at all as a criminal sanction; I think they have been very useful as a sentencing option available to the courts, but there are still lots of questions about using civil orders for

serious criminal matters. I believe that serious criminal matters should be prosecuted through the criminal courts.

Chairman: I take this opportunity to thank both of you for your work. If you have further points we look forward to hearing from you.

The Committee suspended from 5.05 pm to 5.22 pm for a division in the House

Witnesses: **Tim Godwin**, Acting Deputy Commissioner, Metropolitan Police and ACPO lead on criminal justice, and **Catherine Lee**, Director of Delivery and Communications, and **John Kennedy**, Head of Local Delivery, Office for Criminal Justice Reform, gave evidence.

Chairman: I now welcome Tim Godwin of ACPO, Catherine Lee, director of delivery and communications, and John Kennedy, head of local delivery—I will not speculate as to what those terms convey—of the Office for Criminal Justice Reform. I ask Julie Morgan to begin.

Julie Morgan: Tim Godwin, how would you describe the relationship between the police and the CPS?

Q37 Chairman: I did say that the witnesses could make introductory statements. Tim Godwin, you may wish to answer that question in your introductory statement.

Tim Godwin: From my personal perspective, I am currently chair of the London Criminal Justice Board and chair of ACPO's Criminal Justice Board in addition to my role in the Met. Five years ago the relationship with the CPS and the other justice agencies was pretty poor. There was no consensus about data; each collected its own. As a result there was no real consensus about what problems and issues confronted the criminal justice process across all the collaborative agencies. Criminal justice boards were formed. The Office for Criminal Justice Reform was formed. As a result there was far more collaboration and joint understanding. I think the first journey was to get the data sets right so we could understand the issues, the performance challenges and problems. We have now progressed to the point where the vast majority of local criminal justice boards will start to plan collaboratively how to achieve common objectives. The relationship with the CPS as we speak now is one that I would call a prosecution team. Certainly, a significant amount of joint work is going on to reduce bureaucracy, streamline processes and reduce cost through integrated prosecution teams and the development of virtual courts. All those things drive efficiencies but at the same time improve our effectiveness. In that sense we have a very good relationship at the strategic level nationally and, in the vast majority of cases, at local level. It would be disingenuous of me to say there is not the occasional rub in the police station where a charging decision may be perceived by the police to be appropriate but is regarded by the CPS as inappropriate. There are issues to be resolved about how we access charging decisions et cetera, but there is great willingness for the two agencies to work together to resolve those problems. I am pretty confident that it is a good working relationship.

Chairman: I suggest that for a moment we concentrate on the police and CPS relationship and we then go on to the local criminal justice boards when I shall invite Catherine Lee or John Kennedy to give a brief overview from the point of view of their organisation.

Q38 Julie Morgan: Would you like to see any changes to the current procedure?

Tim Godwin: The change we are looking for is a change to the charging process which has emerged from the joint HMIC and HMCPSP report on charging. It is probably the biggest issue between the two agencies because up to now it operates a bit like a doctor's surgery. Sixty per cent of charging decisions still remain with the police, but for more serious cases—actual bodily harm and above—we have to refer the matter to the CPS. That means making an appointment and waiting your turn et cetera when in reality we should be able to access those services 24/7 when we are ready to charge.

Q39 Chairman: Are you saying it happens because a lot of charging takes place outside office hours?

Tim Godwin: Yes.

Q40 Chairman: In office hours CPS makes charging decisions?

Tim Godwin: Yes. There may be two or three offenders who are ready for charge at the same time and when you have charging lawyers in police stations it is about getting access to them to make the charging decision. As a result, Peter Lewis as chief executive of the Crown Prosecution Service and ACPO are piloting a CPS Direct enhanced service which means access 24/7. We use the virtual court technologies to which I am sure the Committee is alive in terms of collaborative space. Technically, that enables us to have a single file in a number of places so the prosecutor can see the file; it does not have to be in the police station. We have the file and can amend it at the same time. We can have face-to-face contact through virtual conference facilities. That is the answer to the issue of charging. It makes us far more efficient and means that we can access those services quite quickly, whereas the current system is inefficient because it relies on lawyers being present at the time.

Q41 Julie Morgan: You raised the issue of having a more efficient system. You also said that there was the occasional rub when you felt that the decision was different from what you would have wished. Does that happen very often?

Tim Godwin: Yes, and for the police it can give rise to a bit of a myth, in that the reason detection and commission rates go down is that we cannot get a charge out of the CPS. Generally, when that happens I ask the officers in my command to send me the files so I can assess whether they are accurate in terms of the quality of the evidence or otherwise. Generally speaking, I end up deciding that probably the CPS has got it right. That arises sometimes but it is a relationship issue. You have a passionate, enthusiastic police service that wants to do something and as a result the CPS quite rightly challenges it and says that a little more evidence is needed. One of the big issues of which I am sure the CPS is aware, because I have had conversations with Peter Lewis about it, is consistency. The Police Service has a lot of very young officers with varying skill and experience in various places. The CPS is no different from that. I believe that with a virtual charging centre where you have a specific number of experienced lawyers to make decisions on charging there will be a far more consistent outcome and, as a result, we can plan evidence quality. One needs to address inconsistencies as between lawyer A and lawyer B as to whether, for example, a fingerprint needs corroborative evidence, but I am confident that that work is being done. There are three pilot areas and I hope that that will roll out quite quickly.

Q42 Julie Morgan: How have you adjusted to the statutory charging scheme?

Tim Godwin: That is really what I am talking about here. Initially, as far as the Police Service was concerned it was felt that it could not be trusted, but when you look at the discontinuance rates we had at the time as far as efficiency was concerned the necessary relationship between the service and the CPS was not there in terms of victims. Since then the outcomes show that whilst the number of charges has fallen numerically convictions have increased, so on that data we are getting better judgments in terms of outcomes which must be good for victims and witnesses. But one of the challenges identified in Flanagan was the difference between us in terms of performance regimes. 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. That issue is identified in Flanagan. We are adjusting performance regimes so they are compatible and so we acknowledge discontinuance and efficiency but at the same time it is about bringing the guilty to justice. That will never be clear; there will always be grey areas, but it is a journey we are making together.

Q43 Chairman: Earlier we heard how the procurator fiscal in Scotland directed the police. He would say there would be no point in seeing this witness and they should see that witness or pursue this but not that evidence. Does ACPO have a view about moving to that kind of system? Do you have a personal view? I imagine that many police officers have a view about it. It is a system that is very long-established and clearly functions efficiently in Scotland.

Tim Godwin: In terms of serious crime it is a matter of common practice in the Police Service to bring in the CPS early in the investigation so they can give advice and guidance in terms of where the line of inquiry may go and what is needed to get to the point of charge. Therefore, for homicide, rape and crimes of that kind we would have that sort of contact. As to the more “volume” crimes probably the capability of CPS would be sorely tested to achieve that. I believe that in the case of those crimes the Police Service is quite capable of making those sorts of choices and decisions in the investigation, but in the case of serious crimes there is collaboration prior to charge. Having been on the street crime initiative that led to the National Criminal Justice Board, many moons ago I recall getting some feedback from the Civil Service. That came from the lady sitting on my right. Following a walk-through of the failures of the criminal justice system in terms of robbery offenders, the advice was that prosecution started before charge and investigation continued after it. That has stuck in my mind ever since. Therefore, there is a role for the prosecutor to become involved before charge, but it depends on the level of offence, the level of detail and how much it is direction or advice. I believe that advice is right, but the problem lies in the capacity. Convictions and trials are going up in large parts of England and Wales and the fiscal settlement for the CPS will make that challenging.

Q44 Chairman: Are you saying that in those areas where there is such closeness at an early stage there is not that big a difference? Although it is called “advice” in England and “direction” in Scotland you have more or less got to take the advice; otherwise, you will not get your prosecution or you will be wasting your time, whereas in Scotland there is a clear power to direct. But it also has resource implications. If the prosecution say to you that you must interview 10 more witnesses, as the fiscal can say to the police in Scotland—presumably, they must be accustomed to dealing with this—do you see it as a resource problem?

Tim Godwin: We do see it as a potential resource problem. As to the difference, in terms of direction, ie who is in charge of the investigation, we see ourselves as accountable in court for it, but there is a need to operate as a team and so we work very closely together to achieve the same objective which is to obtain a charge when one is appropriate.

Q45 Chairman: Before I ask Dr Whitehead to ask some questions, this may be the opportunity for Catherine Lee to make her opening statement about the work in which she is engaged.

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Catherine Lee: John Kennedy and I work in the Office for Criminal Justice Reform which is a relatively new organisation that reports to the three ministers responsible for overseeing the criminal justice system. It was very much born out of a feeling that the system needed to be better joined up which is why we have trilateral reporting arrangements. We support the National Criminal Justice Board which has on it the heads of all the agencies that make up the criminal justice system, ministers and senior advisers. They set the general direction which is underpinned by a public service agreement target called Justice For All, but delivery is absolutely down to local criminal justice boards of which there are 42. Those are coterminous with police force areas. Our task in the Office for Criminal Justice Reform is very much to work with criminal justice boards, both with chairs such as Tim Godwin and other members but crucially with their support teams, to try to enhance their capability to understand and prioritise their local business, respond to the needs of their communities and meet the targets set across the whole system.

Q46 Dr Whitehead: I should like to move directly from that description of how management moves from national level to the 42 local criminal justice boards. I think this is a question for all the witnesses. How would you describe the relationship between the police at local level, the CPS and the boards themselves? How does that work in practice, and what issues have arisen in terms of that relationship?

Catherine Lee: I think that at approximately the time local criminal justice boards were set up statutory charging came into being which encouraged the new prosecution team ethos to which Tim Godwin referred. It was a time when the CPS and the police were beginning to develop a closer, though still properly independent, relationship with each other and to work on a number of initiatives not just statutory charging but, crucially, as another lesson we learnt from the street crime initiative, the importance of providing really consistent and strong support to witnesses going through the system. Another example of how the CPS and the police work together is the setting up of witness care units to provide single points of contact post-charge right through to post-conviction. There are all sort of other areas in which they work together. I believe the establishment of the local criminal justice boards at that time encouraged and enhanced the prosecution team ethos because it provided an environment whereby they were coming together anyway but with their wider partners across the whole system, typically meeting every month or six weeks. Not only is it important because they then share the agenda and decide collectively what their priorities are at the table, but there is an awful lot of less formal stuff that goes on at those meetings at the margin which encourages that kind of joint approach. Importantly, that comes from the very top at local area level and we hope that that is transmitted down to the charging suites and witness care units. This is an ethos that has been evolving over the past five

years and has now reached a good point, though there are still rubbing points as Tim Godwin highlights.

Tim Godwin: For me, the initial challenge was to understand each other, to understand that we had common objectives and the key issues where we could work better in collaboration to achieve the same outcomes. That has now shifted. There is understanding in the vast majority of cases. There is still the odd relationship issue in the 42 locations between the chief crown prosecutor and the chief constable, but in the vast majority of cases those relationships are forged through the criminal justice boards. We see that now far more criminal justice boards at local level take charge of the agenda as opposed to being directed through the NCJB and OCJR. There will be tension between the local perspective and national perspective which we are going to resolve at a strategic level. The other point is that obvious areas of waste within the criminal justice system are overcome only by joint planning. One of the key challenges in that regard is that sometimes the cost will arise in one agency and the benefit in another. I believe that swapping the benefit with the cost across agencies is a challenge that many of us must overcome. For example, across the country the CPS and the police operate two separate files which is inappropriate in any event in terms of evidence. In London we now go to a single file which we call an integrated prosecution team. It means that post-charge I do not need criminal justice units and I can reinvest in prisoner process units to get police officers back out of cell blocks quickly, and I can clear up the stuff around criminal injuries compensation by investment and cash savings by paying money to the Crown Prosecution Service to do a single file and cover my work as well as theirs after charge, which is totally appropriate. That is a big cultural change in terms of putting the money across.

Q47 Chairman: You pay them to do that?

Tim Godwin: Yes. That saves the police authority a significant amount of money. It reimburses them for the work they need to do. It also means that we are far more collaborative in terms of planning. That will also come into the court service. We have to be careful of the judiciary and its independence. Equally, in terms of the court service the benefits of virtual courts, court closures and things like that are a challenge for anyone to talk about. Those issues become very political but will have to be addressed and I think that is the next iteration of the debate at criminal justice board level as we move on. I can see some significant efficiencies to be gained there together with speed in obtaining justice. In trying to keep a victim motivated and informed there is nothing worse than having a date set for trial that is nine months hence. We need to get down all those trial times, and in the virtual court of which we have a prototype working with the CPS and the court service our first client was arrested for domestic violence at 12 and was convicted and in Brixton prison at five the same day, and for the victim it was

a significantly different experience from the ones before. That is the sort of thing we can do when we work together effectively.

Q48 Dr Whitehead: Is the downside to that that whilst there are benefits in having an agreed process agencies may start vying for work, as it were, in that they work closely together in the local board and then say they can do this and that and there is a contested area of overlap of work, or a contest for work which is not an agreed process, and therefore is not necessarily one that leads automatically to the sort of outcomes you describe?

Tim Godwin: I think that would occur if you did not have clear objectives to achieve. At the moment I do not think any of us vies for more work, but it could well arise as you start to process it as a business. You need to be businesslike but it is not a business in terms of trying to get more contracts to increase your size or whatever. At the moment we still have too long a time for our trials. We have a national effectiveness rating—it is slightly higher in London—in terms of confidence. As to effectiveness, nationally 37% of those citizens asked believe we are effective; it is 56% in terms of fairness. That is a big challenge. At the moment the focus is on ensuring people see that we become far more effective, dynamic and quicker and that we get consistency and all the rest of it. I have not experienced that yet. That is not to say it might not occur later, but probably there is a big journey before we get to that point.

Q49 Dr Whitehead: I have a question for John Kennedy. The CPS has been given a particular role in pursuing the success of some public service agreements, particularly PSA23 which concerns antisocial behaviour and targets for reducing the number of people who perceive antisocial behaviour as a problem. How do you think the CPS has done in discharging that area of concern under those PSAs?

John Kennedy: The CPS occupies an important role in terms of the delivery of both PSA23 and PSA24, and indeed PSA25 has an important relationship in how those agreements are delivered. The role of the CPS in terms of the PSA23 contribution is that the traditional approach of prosecution in terms of the position prior to statutory charging was that the CPS primarily received files from the police and at that point initiated the prosecution. As Tim Godwin described, they did not take a position before charge and were not encouraged to do so. The approach has widened the view of the prosecutor; it has widened the view to include aspects of PSA23, so in terms of antisocial behaviour the CPS is currently working in providing specialist prosecutors in a number of areas to ensure there is specialist advice about the nature of the law of disorder and the possible remedies to which it can respond. In terms of community justice which is another issue in the context of PSA23 the CPS has been working alongside community justice pilot areas offering a customised service that is supportive of those pilot arrangements. In the case of prolific and priority offenders the CPS was involved in the development of the policy in 2004

and is a key partner in terms of the fast-tracking of prolific and priority offenders through the criminal justice system. In terms of a number of aspects of PSA23 the CPS has occupied a key role and has been part of the team response required of a criminal justice system.

Q50 Dr Whitehead: Would you describe that as a developing role and, if so, how do you think further improvements to it might be made?

John Kennedy: The illustration of the position in London and the concept of the prosecution team, where in effect the police and prosecutor work more collaboratively together at an earlier stage in terms of investigation and evidence gathering, provide a very effective model in understanding how joint resources in times of straitened finances can be made to go further and be more effective whilst not necessarily reducing the quality of the outcomes.

Q51 Chairman: Is this very much a London thing? Has it not been done much anywhere else?

John Kennedy: In terms of development I believe that London has led on this. Tim Godwin in his ACPO role is perhaps better placed than me to comment on it.

Tim Godwin: If we have a problem such as antisocial behaviour and gang-related crime we now have such a relationship with the criminal justice boards where we can have experienced lawyers attached to those units that tackle those issues, whether they be neighbourhood teams or specific gang task forces. They review the evidence and assisting us in terms of how we might make the criminal justice system effective in tackling those problems. I know that the intent is for the CPS to look at problem-solving or prosecutors will support the neighbourhood teams which are rolled out across the whole of England and Wales. This will be for England and Wales. It will support them to resolve specific problems in neighbourhoods where the CPS lawyer would become part of the group that looks at how to resolve it in the longer term. If Peter Lewis were here—I am always nervous about speaking for someone else—one of his concerns would be capacity in terms of the throughput of cases. Because we are becoming more effective in capturing offenders in the fiscal planning processes we will have to deliver the efficiencies to enable them to free up sufficient lawyers to do that effectively even for the whole of London. Therefore, in terms of the charging we mentioned before which will reduce the number of lawyers required the virtual court means that fewer prosecutors will be hanging around courts because they can do it virtually from Ludgate Hill or wherever. That will enable us to develop further the problem-solving neighbourhood prosecutor to work with the police to tackle the priorities that citizens have identified through the neighbourhood policing process.

Q52 Alun Michael: I am wondering how to ask a question that relates what you have just been talking about to the next point. To say that I am struggling to understand how best to relate it may help you in

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answering it. It is about two and a half years since the publication by the then Department for Constitutional Affairs of *Delivering Simple, Speedy, Summary Justice*. I am sure the department must have spent months dreaming up that title. Looking at that, the aim was fairly clear; it was to look at the system and the courts in particular to ensure they were more responsive to concerns raised by local communities and to deal more speedily with low-level crime. In that sense it is very complementary to the agenda for the creation of the crime and disorder reduction partnerships, things like ASBOs and so on. As I understand it, those proposals focus on magistrates courts. In the two and a half years since that publication to what extent has that approach become embedded? Is it working? Is that improved communication working in the way suggested at the time? As Obama is speaking at the moment, can you give us a state-of-the-nation update on that aspect of tackling local crime and disorder?

Catherine Lee: It is perhaps not the snappiest of titles. It does do what it says on the pack. The focus was on trying to make the system proportionate, simple and speedy. It had become over-complicated particularly in magistrates courts. A lot of the panoply of the crown court procedural process had been put onto magistrates courts. Peter Lewis, who has been referred to already several times, plus colleagues from Her Majesty's Court Service went on a grand tour of various courts and were appalled at the number of adjournments simply because things were not ready. Pleas which should have been entered at a much earlier stage as guilty pleas were not happening because there was chaos. There were adjournments caused by both the defence and CPS and there was no grip taken by the court; it did not have the right information to take it. This process was very much a cross-agency matter and was led by local criminal justice boards. In every single area court teams got together; they brought together not just the police, CPS and HMCS staff but also judges, district judges, magistrates and crucially the defence to work out how they could better manage the system. As a result the figures show there has been a huge improvement—21%—in timeliness, which was critical, and a 30% improvement in adjournments. What we are looking at here is low-level offending that should be dealt with simply and speedily in the magistrates courts as a response to lots of low-level crime that is taking place in areas. In streamlining processes like that people gain confidence that the courts will deal with this and perhaps fewer out-of-court disposals are needed.

Q53 Alun Michael: Can you help us with the figures? You said that there had been a 21% improvement in timeliness. What is the measure?

Catherine Lee: I think the measure is the time taken from first hearing through to conviction.

Q54 Alun Michael: So, there has been a 21% improvement in the overall time?

Catherine Lee: Yes.

Q55 Alun Michael: From the initial charge?

Catherine Lee: I believe it is from the first hearing, but I have to check that.

Q56 Alun Michael: It depends on how long the first hearing took. Perhaps you would clarify that for us.

Catherine Lee: I will clarify it in writing³.

Q57 Alun Michael: You referred to 30%. Is that a 30% reduction in adjournments altogether?

Catherine Lee: Yes.

Q58 Alun Michael: That is quite significant.

Catherine Lee: It is very significant. The reason why we really must press ahead with the streamlining process that has been referred to several times is that because we have got things into a much better state now in magistrates courts by saying that much more has to be done at the front end so that cases are trial ready at a much earlier stage it should not result in more unnecessary work for the police. As a result of that we are embarking on the work of streamlining the process, to which Tim Godwin has referred, to make sure that file preparation is proportionate and the police are not doing too much to get cases into an appropriate state of readiness to have an effective first hearing.

Tim Godwin: In my view it is now embedded across all the areas in terms of the first hearing; that is, one hearing for guilty pleas and two for not guilty pleas. We review why we do not achieve that and learn from the experience where it is not achieved. When that was brought in it provided good evidence of the collaborative working referred to earlier. The Police Service, being a nervous bunch of people, anticipated being asked to do a lot of statements very quickly which would prove unnecessary in prosecuting cases—hence the debate with the Crown

³ *Note by witness:* Criminal Justice: Simple, Speedy, Summary Performance (CJSSS). The statistics provided in the oral evidence session (p 32) relate to CJSSS cases, which are adult charge cases prosecuted by CPS/ Police, disposed of in the magistrates' court. They do not include summons cases or cases that are committed or sent to the Crown Court. These cases have had: an estimated 21 per cent improvement in timelines from charge to completion in magistrates' courts (reduced from 61 days to 48 days); an estimated 30% improvement in the average number of overall adjournments (reduced from an average of 1.93 adjournments per case to an average of 1.36 adjournments per case). The data comparison period in the Time Intervals Survey in September 2008 compared to the CJSSS baseline period, which is aggregated from the 4 quarterly surveys during the 12 months to March 2007. (The Time Intervals Survey operates for one week in each calendar quarter and captures timeliness data on all relevant criminal cases completed in that week (the survey period is longer for youth cases). They are therefore "snapshot" estimates, rather than exact measures and are liable to function as a result of case mix changes and other external factors, as any snapshot survey would be. It is worth noting therefore that such changes in the results may not be similarly reflected in future Time Intervals Surveys. The result of the Time Intervals Survey are published in a national Statistics bulletin prepared by the Economic and Statistics division of the Ministry of Justice. Current and previous editions of the Time Intervals Survey bulletin can be found at <http://www.justice.gov.uk/publications/time-intervals.htm>)

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Prosecution Service and the Director of Public Prosecutions to get a streamlined process and, at the same time, still monitor guilty pleas and effective trial rates. The outcome for us is that in terms of charge to conviction the period has been reduced by about two weeks. We have asked for the six pilot areas now being undertaken to be rolled out across England and Wales, but we save 98 minutes of an officer's time. I do not know how they account for the eight minutes, but it is an hour and a half per guilty plea. Where we anticipate a guilty plea but it then becomes a not guilty plea the case file saves us 158 minutes in terms of the amount of paperwork time. That is really usable time—it is not 30 seconds—when police officers can go back out. We needed not just the CPS to change that and for lawyers to be briefed to accept it because it is summaries of evidence but also the judiciary to support the case management in magistrates courts. That was crucial. For example, why does one need a busy doctor to make a statement that a person had a bloody nose? Does not the photograph tell you that? That can be asked in the court at the point of taking the plea. Lord Justice Leveson as senior presiding judge spoke to all the bench chairs across England and Wales to point out their responsibility in supporting robust case management. The results have been pretty effective. As a result everyone is totally signed up to going further in understanding how it can be done better.

Q59 Alun Michael: You heard in earlier evidence some concern about the pressure to meet targets, perhaps putting some decision-making at risk. Are you satisfied that so far that is not the case and there are sufficiently robust systems in place to avoid that sort of fraying at the edges which is a danger with any system that seeks to improve efficiency?

Tim Godwin: I am satisfied that there are such safeguards. I think the fact that it has to go through the prosecutors and not just the police and all the rest of it means that those safeguards have been put in place. We are looking at what happens in terms of guilty plea changes *et cetera* and it is the same under the new system as it was under the old. Guilty pleas are probably improving. I believe that the safeguards are there because it goes through the court process.

Q60 Alun Michael: I put a question to both agencies. What do you see as the scope for future improvement and liaison? What do you see as the outcomes of those teams now that they are used to working together in the way both of you have described?

Tim Godwin: We now need to look at the amount of bureaucracy and file work for some of the crown court cases. Obviously, the streamlined process saves a lot of police time and is focused on the summary justice end, but there are also some straightforward guilty pleas in the crown court and that is work we have started in that sense. There is an opportunity to look at the middle tier of trials either way in terms of the court process. Does it need to go all the way to a higher court? Is there an alternative? I believe the virtual court means that we will get summary justice

very swiftly and it will enable us to revisit fixed penalty notices, formal warnings for cannabis and conditional cautions because the court may be quicker in dealing with things than we are, but it means that one needs to give courts wider disposal powers than they probably have at the moment. I believe that once we get virtual charging and consistency of charging we will get a better performance indicator in terms of quality of evidence which is always very hard to do in a process. That will give us greater insight into the difference between borough A versus borough B in their evidential quality which will give us the opportunity to intervene. It will also look at independent evidence around decisions by lawyers. There is a massive opportunity to start to understand that level of detail and make things better, and we will also save quite a bit of money.

Catherine Lee: To build on that, although I agree with that there is still scope for greater collaboration. One of the key areas in which the Crown Prosecution Service and the police can forge ahead in their relationship was touched on earlier. I refer to the notion of a community prosecutor to complement the neighbourhood policing teams. In recent years the CPS has become really good at looking at domestic violence and rape and adopting a scrutiny panel approach to that and a much more specialist approach to how to deal with victims and prosecute cases. I think the time has come when one applies that kind of approach to looking at community issues and working closely with the police in charging suites but also at neighbourhood policing team level to try to understand the background to what a community is experiencing and suffering and so help to inform charging or other disposal decisions. I believe that is a key area.

Q61 Chairman: That is quite distant from the approach we heard in earlier evidence from those who would argue that there is not necessarily a coincidence between the public interest and the interest of the victim, that the general purpose of the criminal justice system cannot be entirely that as perceived by the victim or perhaps the community to the extent the community takes the same view as the victim. Is that an issue and, if so, how does it fit with what you have just described?

Catherine Lee: If one of our key aims is to improve public confidence in the criminal justice system we have to be seen to be not just effective and efficient, which we have talked about a lot, but responsive. The CPS acknowledges the need to be more responsive and has become so. When one is considering whether or not it is in the public interest to prosecute a particular crime in a particular area one needs to be informed of the situation in that area, the views of the community and what it is suffering. I believe that is a legitimate interest to take into account.

Q62 Chairman: Would it make a significant difference to decisions to discover that people in an area did not like crimes of violence committed on the

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streets or were becoming increasingly irritated because of lack of success or persistence in prosecuting those who carried out those crimes?

Catherine Lee: I believe that in certain areas it could make a real difference. I believe that in some areas the responsiveness is there but we have an issue with information flows. How well informed is the CPS? Through neighbourhood policing teams and other proposals we are developing to try to join up the collective effort to engage with communities we now have an opportunity to inform the CPS.

Q63 Alun Michael: The approach you adopt seems to imply acceptance, does it not, that it is part of the function of the process of prosecution to try to reduce the criminal activity that is going on in an area?

Catherine Lee: I believe that that is very much the criminal justice system's contribution to PSA23 and also PSA24. Fundamentally, we are about reducing crime and reoffending.

Alun Michael: I ask the question because it is quite nice to hear it being made explicit.

Q64 Chairman: Tim Godwin, do you want the last word on that?

Tim Godwin: I was just nodding in agreement with what Catherine Lee said. It is about reducing crime as well as increasing convictions for the more serious crimes which are appropriate to go through that process. Whilst sitting here I have been reflecting on the opportunity which I honestly believe is there to be grasped. I thought that I had made that sound a little bit easy. There is a massive cultural issue facing all the agencies in order to do that. A big process of change will have to be undertaken to deliver it but the work is already under way and I am confident that we can land it. For some CPS and police staff that different way of working is a challenge, but the prize is a good one.

Chairman: Thank you very much. We are grateful to you for giving evidence to us this afternoon.

Tuesday 3 February 2009

Members present

Sir Alan Beith, in the Chair

Mr David Heath
Dr Nick Palmer
Alun Michael
Julie Morgan

Mr Andrew Turner
Mr Andrew Tyrrie
Dr Alan Whitehead

Witnesses: **Peter Lodder QC**, Chairman, and **Tom Little**, Secretary, Criminal Bar Association, and **Christine Haswell**, Negotiations Officer, Public and Commercial Services Union, gave evidence.

Q65 Chairman: Welcome, Christine Haswell, from the Crown Prosecution Service. You are the Negotiations Officer in the Crown Prosecutions Service.

Christine Haswell: Yes, from the Public Commercial Services Union, and I represent members in the Crown Prosecution Service.

Q66 Chairman: Mr Lodder and Mr Little, from the Criminal Bar Association, the Chairman and the Secretary?

Peter Lodder: That is correct, yes.

Q67 Chairman: Welcome to you. We are grateful to you for helping us with the work we do on the Crown Prosecution Service. Could we usefully start by giving you an opportunity to tell us of any concerns you have about the budget pressures currently facing the CPS and the target structure which seeks to apply those pressures?

Christine Haswell: My union, as I say, represents most of the staff in the Crown Prosecution Service and we feel very concerned about the cut in budgets, particularly with respect to job losses, which in a time of increasing pressures on the criminal justice system, we feel, are adding to the stress and burden of our members working there. We feel that the targets are driving very much more pressure on the staff in the courts and in the supporting areas. We think that they are pressuring, not necessarily short cuts, but are putting a lot of stress on the individuals trying to meet them.

Q68 Chairman: Some people would argue that the direction in which the CPS has been travelling, which appears to be saving it money, whether or not that is the motive, is one which enhances the responsibility and work range of both lawyers and also non-lawyers employed within the CPS, because the CPS is taking more cases in-house: (a) is that so, and (b) if it is so, is that not something you would welcome on behalf of your members?

Christine Haswell: We certainly welcome the creation of the Associate Prosecutor. We feel that that has helped develop and enhance that role, and we supported that. However, as that has bedded in we have found that sometimes the amount of court time has exceeded targets and that there is, again, increasing pressure on them in terms of very short preparation time and so forth. We are concerned

that under resourcing in the service is perhaps reducing the quality of the service that our members can produce.

Q69 Chairman: The Bar Council probably has a slightly different perspective on this. What would you like to say?

Peter Lodder: I am not sure that it is necessarily a different perspective because, in general terms, we see the value of an invigorated and active prosecution service which has a strong feeling of self worth, and I think that the position that the last Director and current Director have maintained is to grow within the Crown Prosecution Service a sense of purpose which the CPS has not had for a number of years, and so to that extent we think that that is a good, objective and a useful guide. Where we feel greatest concern is that that development is focused in some very particular areas so that it is being conducted at the expense of what we would see are the core functions of the prosecution service, and to that extent I think there is overlap in the position that Christine Haswell has just expressed and the position that we find. Really what we are concerned about is this. Yes, it is moving in the right direction of travel, but it is moving at a speed and with a disproportionate focus simply on getting people into court to be advocates at the expense of the performance of the organisation generally and at the expense of the work load of the people who remain in the office, the case workers, for example. What we are concerned about is that the rate of change that is being pursued is too rapid, and so what it means, for example, is that there are not enough people who are working towards the preparation of the case when it comes into court and that there is, in fact, no empirical evidence on the cost and quality advantages of the steps that are being taken. You indicated in your question of Christine Haswell that it appears to be saving money, and we are not entirely sure that that is a correct assumption. We invite consideration as to whether that is a correct assumption, but what it boils down is to this. It seems to us that, in a drive to get as many people as possible into advocacy, there has been a diminution of those available to perform the bedrock functions of simple case preparation and the like, the sort of concept of file ownership which was such an important feature of the Crown Prosecution hitherto. If I may summarise what has, I am afraid, been a rather

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long answer: yes, we see the value of the initiatives, but we question the speed with which we are being pursued because, in our view, the changes that are being undertaken are not being given, individually, enough opportunity to bed in.

Q70 Mr Heath: That was an answer that was based on the personnel implications and on the method of work. I just wondered whether you wanted to expand at all the outcome of that work, the output, as to whether you believe that resource implications have affected the prosecuting policy or the disposals which are available.

Peter Lodder: I think a difficulty here is the absence of any real analysis of what has happened as a consequence of these changes. When you talk about outcomes, do you mean that a number of cases have been moved through the system more quickly than they would have been say a year or two years ago?

Q71 Mr Heath: No, is the answer to that. I am asking has there been a difference in the level of charge applied or the outcome?

Peter Lodder: We suspect that there has been some under charging, as we indicated in our written submissions. We have reason to suppose that there is a tendency to accept inappropriate pleas. In other words, where a Crown Prosecution Service in-house advocate is prosecuting a case, that person will be more likely to accept a plea to a lesser offence—the section 18, section 20 scenario is a common one in this instance—and so to that extent, using the phrase “outcomes”, we feel the outcomes probably are not in fact of the order to justify these changes, no.

Q72 Alun Michael: Could you say something about the time scale there just to clarify? You referred to current charges and I was not sure whether you were talking about the last six months, the last year, the last couple of years. My direct knowledge of prosecution services goes back quite a number of years, at which time it was a very ramshackle outfit with pretty poor quality barristers who could not find anything better to do appearing in the magistrates court, and it seems to have changed over recent years into a much more conventional organisation. Are you talking about a fairly small time scale?

Peter Lodder: I should not tie myself to a particular time frame. May I adopt your time frame? I entirely agree with you that there has over that span of time (and I have had a similar personal experience to yours certainly in terms of longevity) been significant improvement, and that is why, in response to your Chairman’s invitation, I indicated our support and encouragement for what has happened. I think there has been generated within the Crown Prosecution Service a much better sense of identity and a stronger sense of purpose, so to that extent I think there has been significant improvement, and, may I say, we applaud it as well, because we are participants in the criminal justice system. As members of the Bar we both prosecute

and defend. It is vital, in our view, that the criminal justice system acts efficiently and effectively in all its constituent parts. Our concerns really derive in recent time from the rapidity of the change. What we fear is a target driven approach, which means that in the interests of hitting particular targets the individual areas are trying to drive the employees into court as often as possible, and what this leads to, in our experience, is people being instructed to go and present cases which they may not have been acceptable for had they been self-employed lawyers and for which they may not have sufficient experience or competence but that there is a pressure to do it because of the target. I have experience of individual members of the Crown Prosecution Service who are members of the Bar saying that that is something that they have come across, and so there is a concern when that happens. The criminal justice system, if that is correct, is not well served if there is that dynamic in operation within the system.

Q73 Chairman: Do you have members who work for the Crown Prosecution Service?

Peter Lodder: We do.

Q74 Chairman: Membership associations?

Peter Lodder: There are, yes. There are very few, and because there are so few, so as not to appear to be identifying anybody, my conversations are with barristers who are not necessarily members of our association, and so when I indicate conversations I am not necessarily identifying someone who is a member of the association.

Q75 Alun Michael: In the light of the Chairman’s question, I am tempted to put my tongue in my cheek and say is there a tension between representing both employed and self-employed barristers, given the Bar Association is sometimes seen as a bit of a trade union for defence lawyers.

Peter Lodder: I am slightly saddened to hear you say we are seen as a trade union for defence lawyers; I personally prosecute as well as defend. We are an association for barristers who practise in crime, but I appreciate it is tongue in cheek.

Q76 Alun Michael: Practising crime is a phrase that needs to be used with care as well, is it not?

Peter Lodder: But I know in this company it will be understood!

Q77 Alun Michael: Can you say something about the responsibility of the Criminal Bar Association in terms of ensuring that the higher standards of advocacy are pursued within the CPS?

Peter Lodder: We do not have a direct responsibility, because we are an association which provides a service to its members. So unless individuals are members of our association, they do not benefit in any significant way from what we do to maintain standards. We run educational programmes, which are largely attended by the self-employed Bar. As a matter of interest and since you ask, we had a lecture last week at the Old Bailey,

which a number of CPS in-house advocates attended in order to benefit from the wisdom of the speaker. We run other courses: we run advocacy courses. Again, they are for members of the association, and so if someone who practises as in-house advocate is a member of the association, then of course they may attend.

Q78 Alun Michael: How much is your membership from within the CPS?

Peter Lodder: It is small. Our membership is, broadly speaking, I think about 3,600 at the moment, and I think that the CPS in-house element is about 25, and largely it consists of those who were practising at the self-employed Bar who have since gone to join the CPS. I am not aware of any significant drive by the CPS to bring their in-house advocates into our association; it is rather a hangover from—

Q79 Alun Michael: Do you encourage it?

Peter Lodder: I cannot say I have gone out and banged the drum to encourage them to join.

Q80 Alun Michael: Do you think you should?

Peter Lodder: I can see some value in it, yes, and certainly it is something which we as an association have always been welcoming of. I have to say, I do not go and bang the drum around individual sets of chambers either, so there is nothing partisan about that position.

Q81 Alun Michael: How do you see the development of CPS advocacy, of professionalism that we have referred to already, affecting the future of the Bar as a whole? How do you see the future of moving between employed and self-employed roles?

Peter Lodder: First of all, the Bar is increasingly focused on maintaining and developing high standards, so far as the criminal Bar is concerned, particularly in the area of advocacy. We run many educational programmes and you will be aware of the requirements that are placed upon practitioners to satisfy annually the requirements of continuing professional development. The objectives behind this are always to achieve the best possible quality of advocacy, and I appreciate that across a whole profession you will not always achieve it.

Q82 Alun Michael: Forgive me though, if your membership from within the CPS is small and your objectives are to drive up the standards of advocacy generally, does that not imply that there ought to be rather greater even-handedness or recruitment across both sectors?

Peter Lodder: So far as our association is concerned, there is no lack of even-handedness. The association is available for any practising barrister to join. I no more direct someone to join it at the self-employed Bar than I do if it is someone who is at the employed Bar; it is a matter for individual choice; they pay their subscription and they are members. There is no threshold which they have to overcome, bar being practising members of the criminal Bar. In terms of how we may develop in

the future, I have already recognised the importance of a thriving prosecution service. I recognise, as does the Bar generally, the importance of having a career structure within a thriving prosecution service, and I can see the sense and adopt the logic of the comments of the previous Director when he spoke of a service in which one could go in and become promoted through the criminal justice system, acting not just as a case worker and the preparer of a file but also, in due course, as an advocate, so that you can see the consequences of the way files are put together, the consequences of the way an investigation is conducted. I think all of that is laudable and it is, if I may say so, commonsense. From our point of view at the criminal Bar, the focus of our work is entirely upon advocacy, and therefore we encourage and seek to promote the highest standard of advocacy. We see our position as being one which can happily run alongside the development of advocacy within the Crown Prosecution Service. What troubles us is that the statements of where the Crown Prosecution Service wish to go do not entirely fit with the actuality of what they do. If you were, for example, to look at the framework, and you have seen the framework which is annexed to our submissions----. I wonder if I might just take you to it because I think it is helpful. This is a document which came about as an agreement between the Crown Prosecution Service and the Bar.

Q83 Chairman: I do not think all members have that in front of them. We have copies of it but I do not think it is in front of us at the moment.

Peter Lodder: If there are spare copies, I wonder if they might be handed out because I think it bears examination in the light of where we are now.

Q84 Chairman: You are referring to?

Peter Lodder: I am referring to a document which is entitled “Crown Prosecution Service”.

Q85 Chairman: Where in the document though?

Peter Lodder: The second page, which flows on from a sub-heading called “Underpinning statements”.

Q86 Alun Michael: The second page of the annex?

Peter Lodder: The second page of the annex, yes. The first full paragraph, “The CPS recognises that the self-employed Bar provides a valuable service to the CPS by offering high quality self-employed barristers to undertake prosecution work”, and it goes on to recite what having a self-employed Bar brings to prosecution work and to the Crown Prosecution Service. In the following paragraph it then talks of the development of HCAs as an integral part of the whole prosecution function from community engagement, and so on. May I go then to the last sentence of that paragraph: “Crown prosecutors will discharge these duties more effectively having gained suitable advocacy and, in particular, trial advocacy experience”—this is an agreed framework between the Bar and the CPS.

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The final paragraph on that page: “Both the Bar and the CPS recognise that for advocates to develop their ability to a high standard, they need to be able to undertake a range of advocacy work commensurate with their developing skills, handling more difficult cases if their skills develop but only undertaking those cases, either alone or being led, for which they have sufficient advocacy experience. All advocates will require a range of work in order to develop their expertise to assist this developmental process”, and it goes on about interchange. Forgive me for reading in a rather lengthy fashion, but what this framework envisaged was what we would regard as a steady growth which, for example, aimed at ensuring that CPS advocates gain, in particular, as the document says, trial advocacy experience. The reality of targets is that they cherry pick where the budget appears to be most favourable, and so what one finds now is that in reality in-house advocates conduct almost all of the lists for plea and case management hearings and very few on a proportionate basis of the trials. You do not learn much advocacy by doing a list of PCMHs, but what you do, from the point of view of a financial target, is you keep in-house, on the face of it, the money that is available to pay for advocacy, and so there is this distortion. I will not take you through it in detail but I do encourage all members of the committee to read this framework. It is an enlightening document. Another aspect of this agreement was that it was recognised that, consistent with good case management, the Crown Prosecution Service would identify the advocate for trial 14 days before the PCMH and, if that were not possible, certainly the trial advocate would be instructed very swiftly after the PCMH. In reality very few members of the Bar are instructed to conduct PCMHs and in reality, as we have set out in our document, often they are not instructed in trials until quite a significant time after the PCMH; and we highlighted in our written submissions examples of that and, indeed, one of them is a case in which Tom Little, our Secretary, was the prosecuting advocate. They are leaving it until the last minute so that important acts and functions are not, in fact, performed and this is in the interests of targets.

Q87 Chairman: Are you saying that the targets conflict with what is the declared policy of the CPS?
Peter Lodder: Yes.

Q88 Alun Michael: Can I question that. Surely you would accept as well that getting cases before the court quickly, getting them dealt with efficiently and moving things on, is something that actually the court system has not been very good at in the past and there is some good reason for trying to improve its performance?

Peter Lodder: Absolutely, I totally agree with that, but the thing is that if you are going to have that sort of initiative and that initiative is going to succeed, then these sorts of framework principles need to be followed. There is no point in advancing

a system so that you have early management hearings and then finding that when you get to trial the system breaks down.

Q89 Alun Michael: Finally from me, would you not accept that you should be arguing for the right balance between those things, rather than seeming to imply that the targets ought to go out of the window?

Peter Lodder: No, I do argue for the right balance, but the reason I focused upon what I did in answering these questions is because the essence of your question was are they not, in fact, getting through the work, getting it done, achieving a successful outcome, and my argument, or my comment rather than argument, because I am not trying to argue, is actually it depends how you assess your outcome and is the outcome really the development of what the stated policy said it would be.

Q90 Mr Tyrrie: I want to try and summarise what I think you are saying. I will try a few sentences and you can interrupt or qualify each one as we go. You accept the principle that there are advantages to in-house advocacy?

Peter Lodder: Certainly, yes.

Q91 Mr Tyrrie: You accept by implication that the CPS’s decision to go down that route must be based either because they think it would deliver better justice or it would deliver the same quality of justice at less cost—or both?

Peter Lodder: I think there are a number of reasons why the Crown Prosecution Service wish to pursue this policy, and one of them (and I think it is a perfectly legitimate policy) is to give the organisation as a whole a sense of purpose and a sense of identity. I think that one of the difficulties that the CPS laboured under for many years was that it felt that it was just a somewhat shambolic and often criticised organisation, and undoubtedly it has gone a long way since those days. There are also the other factors which you have mentioned, but I do not think it is one factor rather than the other; I think there are a number of issues there.

Q92 Mr Tyrrie: One can reorganise the CPS a hundred times in different ways—

Peter Lodder: People did.

Q93 Mr Tyrrie: ---but at the end of the day you want to measure the output?

Peter Lodder: Yes.

Q94 Mr Tyrrie: And the output is measured in quality of justice per unit of cost, is it not?

Peter Lodder: Yes. I am interested as to exactly how that measurement can be made.

Q95 Mr Tyrrie: That is a difficult question, but by implication of everything you have just been saying, it is an attempt to do so, is it not?

Peter Lodder: Yes, I agree.

Q96 Mr Tyrrie: That is why I am trying to get you to agree or continue to disagree with the conclusion that the CPS, although they may also decide that there are various organisational reasons for doing this, have at the root the objective of securing either better justice or the same quality of justice at less cost?

Peter Lodder: I am not at the moment persuaded that it is at less cost, because I do not think it has been properly costed, which is why I made the observations I made at the beginning. It may well be that, for other reasons, it is worth paying that cost, but I think that the focus has become so finely pointed at targets that I think the cost implications have become somewhat blurred.

Q97 Mr Tyrrie: Let us put the cost issue to one side and come back to that in a minute. Are you persuaded that they are at the moment capable of doing this at the same level of quality of justice?

Peter Lodder: That is a difficult question to answer. There are some extremely good practitioners in the Crown Prosecution Service.

Q98 Mr Tyrrie: But the fact is you do not have a clear-cut answer, which is, “No, I think the quality of justice is declining”?

Peter Lodder: My personal view is that I do think the quality is declining, yes, but I do not think that that means that their objective is not to try and raise it; I think their objective is to see that, and they have some people who undoubtedly can, but in general terms I think it is too much of a mix.

Q99 Mr Tyrrie: I am trying to get to the bottom of your concern. It seems that you are now saying that the quality of justice is declining and it is costing more money?

Peter Lodder: No, I think the quality of justice will decline if—

Q100 Mr Tyrrie: I am sorry to interrupt, but you just said a moment ago there is no evidence that they are saving money.

Peter Lodder: No, because I do not think there has been a proper analysis of how much it is costing to pursue this course. Can I make what may appear to be a slightly superficial observation? When you employ someone in-house you have a number of structural costs, of which I am sure you are aware—the building, the secretarial support, whatever it is, sick pay, holiday pay, pensions, *et cetera*, *et cetera*—and you also have, once you have recruited someone, the liability to continue employing them; whereas if you come to the independent Bar you can pick them up and drop them as you wish.

Q101 Mr Tyrrie: Had you not better set to work doing that number crunching on behalf of your members ASAP if you want to make the point that there maybe hidden costs which are not embedded?

Peter Lodder: It is a one-sided exercise, is it not? We need the data. We do not know how much.

Q102 Mr Tyrrie: Had you not better write down the data you need, send it to us and we will do our best to have it made available?

Peter Lodder: We would be very happy to do that.¹

Q103 Mr Tyrrie: That would be a first step. I think a second step that might be helpful is trying to establish, since you agree that there is, in principle, some benefit to in-house advocacy, telling us where the optimal point is. You have argued that it is not zero and you are presumably going to argue that it is not 100, so it must be somewhere between nought and 100% and there must be some explanation for a view that lies somewhere between those, and I would be grateful to see that.

Peter Lodder: I would be very happy to assist you with that. I do not think one can fix it precisely. Interestingly, certainly the last Director was most reluctant to commit himself.

Q104 Chairman: We are not asking the Director, we are asking you.

Peter Lodder: I understand that.

Q105 Mr Tyrrie: Good; we have got that far. That leaves one last question, it seems to me, from what I have heard. At one point you seemed to set aside these arguments, or at least deflect them a little, by saying in any case it is all happening too fast.

Peter Lodder: Yes.

Q106 Mr Tyrrie: That is correct?

Peter Lodder: Yes.

Q107 Mr Tyrrie: When you have established for us what this equilibrium point might be, do you have a view about what speed it could take place at which would be sensible or optimal?

Peter Lodder: Can I take that point, with your last point, and say that what we are dealing with here is the concept of justice, and the concept of justice does not easily fall into an economic assessment because justice is a general thing, a general concept, but in simple terms the speed at which what is happening at the moment is too rapid because, for example—let me come back to what Christine was saying about her members—we have a situation where, because people are being taken out of the office and put into court as often as is possible, those who are left in the office are under greater stress because there are not enough of them. Under stress they then do not do what they might do to get the files up to the requisite standard, the stress comes back through the system because, for example, it goes to court, the judge throws it out because the file has not been properly prepared and it comes back down through the system.

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Q108 Chairman: These are assertions. Is there evidence to back this up?

Peter Lodder: I cannot give you a specific case where a judge has, for example, thrown this out in terms of naming it, but I am aware of it. I am aware of it from what judges have said as to their experience.

Q109 Mr Tyrrie: Sir Ken Macdonald has said that when allegations of poor quality CPS advocacy have been looked at in more detail they have been found to be the same cases that are being reported several times.

Peter Lodder: I cannot comment on which ones he has looked at or someone on his behalf has looked at, but I can tell you, in my direct experience, of cases in the north of the country in recent times. For example, a rape file came through to a court and the judge discovered that there was no statement from the complainant in it.

Q110 Chairman: I think what we would need to be convinced by this line of argument, and I do not expect you to do it just now, is to be directed towards some measurable evidence that the situation in this respect is worse than it was before the present level of in-house advocacy.

Peter Lodder: I understand that. May I say, there is a difficulty for us as a profession providing this material, which is that it stems from those who act on the part of the CPS and there is an obvious reluctance to indicate these issues because of livelihood.

Q111 Mr Tyrrie: Well you had better tell us what we need to ask and we will get on with it.

Peter Lodder: May I invite you to consider this? How many judges have you got coming before you to explain their experience? They are in a position to tell you of their direct experience without any fear concerning their either being partisan or indeed their income.

Chairman: We have another area that we need to move to and I am going to call on Dr Whitehead.

Q112 Dr Whitehead: This question is particularly for Christine Haswell. In the PSC evidence you raised the issue of the question of the relative roles of the CPS and other agencies in criminal justice system and the extent to which there might be either tension or confusion between those roles. You mention, for example, the possible confusion about police and CPS roles within witness care units and also the perception of CPS independence, where they are working in single work spaces together, and whether the claimed efficiency saving might, on the other hand, threaten CPS independence. Do you think there is a challenge facing the CPS in terms of its perceived or actual independence in working with other organisations across the criminal justice system?

Christine Haswell: Generally, our members in the CPS do work well with the other parts of the criminal justice system, but there is a big issue around co-location projects. The Integrated

Prosecutor Team Project in London is one, and one part of that is to do with accommodation but also the size of teams. In London they have had moved to small teams, such as the ones that have been moved into police stations, and have found that that had not worked and they have moved back to a bigger office environment, for economies of scale, partly, and other reasons. We have concerns. Bullying is reported to us by our members as a bit of a problem in the service, and if people are working alongside other parts of the justice system, people who are doing similar jobs or with different terms and conditions, this is causing, particularly in the police stations, tensions and there is a potential there for bullying or problems in the workplace. I am not saying this has necessarily happened, but it has the potential to cause problems over independence of the prosecution.

Q113 Dr Whitehead: Do you mean by bullying, for example, “You must prosecute these people we have detected”, even if you are not absolutely certain this is the best way to proceed?

Christine Haswell: I am not saying that has actually happened, but there could be the potential there for that if you have got very small teams of CPS located in a much bigger environment dominated by other justice professionals, yes. There is that potential.

Q114 Dr Whitehead: So do you think that the whole question of co-location under those circumstances is perhaps a bad practice to start with, or do you think there are ways in which that experience and the effectiveness of the CPS could be improved whilst perhaps working in co-located arrangements?

Christine Haswell: We have a policy from the members on the ground that this is not a popular situation, and although we have been involved in negotiating when these moves have taken place—we have talked to Health and Safety about accommodation and things like that—it is not popular.

Q115 Chairman: Are you saying that co-location is not popular?

Christine Haswell: No, it is not popular. Our members tell us that they would prefer to work in a Crown Prosecution Service with other Crown Prosecution Service and to keep that physical distance as well as, if you like, a sort of structural distance.

Q116 Mr Heath: Are you saying that CPS staff may be having direct professional contact with people who are outside the CPS? I am not talking about an advocate discussing a case with a police officer, or whatever, but are you saying that a police officer might come into the office and say, “I do not like the way you are putting that file together. Do this; do that”? That seems to be very unprofessional conduct.

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Christine Haswell: It does, yes. We are concerned that there is the potential for that sort of thing to happen more if you are talking about a very, very small CPS team in a much bigger environment like that. People feel, as they report to us, happier in a Crown Prosecution Service environment. As well as the cultural differences, there are different terms and conditions. In some of the roles in witness care, for example, the job description is almost the same and yet you have got these people on different terms and conditions, and, of course, in things like witness care and in the court you have actually got the third sector, the voluntary sector, in as well. You have got the three parts of people all doing ostensibly the same thing in a court, which is a bit—

Chairman: We are waiting to hear from what voluntary sector, so we are going to bring this session to a close.

Q117 Mr Heath: I am sorry to interrupt. I had not realised that there was any prospect of CPS staff not being entirely responsible to their line managers.

Christine Haswell: They are; I am just saying that there is this potential there. I am not saying it has happened, but there is a concern that it could.

Q118 Mr Heath: I understand that.

Christine Haswell: I do not want to cast a slur on the professionalism of—

Q119 Dr Whitehead: You have mentioned in your evidence that the potential may arise from the fact that there are different targets for the police and the CPS. The target for the police is around detection rates, and what happens afterwards, you might say, is additional to that target being achieved; whereas the CPS has a target to reduce attrition rates by making sure that only evidentially strong cases are prosecuted. I think the essence of the question is, therefore, is that something which is a structural problem for the CPS and the police co-locating, or is it something that protocols and good working practices ensure could be overcome?

Christine Haswell: Good working practices are something that we get. The thing with the CPS, I have found, is the union official has a lot of good policies and good working practices, in theory, but sometimes the actual application varies tremendously. One of the things that does hit me about the service is that it is not necessarily always one service: because in the 42 areas there does seem to be very different management styles in the application of all sorts of policies, and sometimes you can get something happening in one area although ostensibly it is covered by the same policy because of the general culture of practices that have grown up in offices and things are not always---. Sometimes it is like you are hearing about two different organisations because some roles have grown, in some cases the use of different case workers, or it would be done by certain caseworkers, might be done by slightly different grades where there is an overlap in job descriptions and so forth. It has got a good protocol, if you like. It would be terrific if it was always going to be followed in the same way across the service in a consistent fashion.

Q120 Mr Turner: Is this happening or is there a potential for it happening?

Christine Haswell: I would not like to say that it is definitely happening. I do not know that this definitely happens, but it is enough of a concern to our members for us to feel that it was worth putting in the submission in that it was something that people were concerned about.

Q121 Chairman: Thank you very much. Thank you to all three of you for helping us this afternoon. Of course, if you have after-thoughts or, indeed, responses that have not been raised that you feel you want to let us have later, by all means do so.

Peter Lodder: May I just ask what the time frame is for the responses?

Chairman: The sooner the better, but we have more evidence sessions still to go on this. If you could do so within the next two weeks, it would be very helpful and more likely to be of use in the in report.

Witnesses: **Gillian Guy**, Chief Executive, Victim Support, and **Paul Farmer**, Chief Executive, Mind, gave evidence.

Chairman: Ms Guy from Victim Support and Mr Farmer from Mind, thank you very much for joining us this afternoon. We are particularly keen to hear from you. Dr Palmer, is going to begin.

Q122 Dr Palmer: Thank you for coming. One of the things that we all run into as constituency MPs is the expectations of victims of the criminal justice system. How realistic do you both feel that they actually are?

Gillian Guy: I think that the expectations from victims and witnesses tend to be what we give them as expectations, and we spend the rest of our time perhaps trying to live up or down to them

depending on what their experience actually is. A lot of that is about having set out our stall as putting victims and witnesses at the heart of the criminal justice system when actually that is very hard to prove to anybody who then goes through the system because it is process driven rather than people driven, and that is what we spend at Victim Support a lot of our time trying to change the balance on in terms of how those people perceive and experience what justice is for them. I think, insofar as the Crown Prosecution Service is concerned, there is a great deal of power that resides in the CPS, which is seen by victims and witnesses, and yet it is not fully explained to them, actions are not fully explained to them, and so they

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are immediately up against a lowering of expectation or a dashing of those expectations as they come through. Obviously, the CPS are part of a much wider system. There are about 13 agencies, all with different protocols, as we have just heard, different procedures, cultures and expectations themselves of what the system will be doing, and it is a very difficult place for victims and witness to really understand what they are supposed to be getting. I suspect that they believe that prosecutors are there as their barrister, as their advocate, and that is not really properly addressed on their behalf and is not properly explained. Many times we get witnesses saying to us, “When am I going to meet my barrister? Why have I not got the same access to my barrister as the defendant has?”, and, “Why do I have to deal with so many different agencies, whereas the defendant only has one advocate that they have to channel their process through?” I think the answer is that we really need to define what those expectations realistically can be within a criminal justice system and then seriously live up to them.

Paul Farmer: I support much of what has been said. I would go a little further to suggest that in many cases people with an experience of mental health problems have quite low levels of expectation because of their constant experience of trying to seek access to justice only to be turned away. A lot of the work that we did in our *Another Assault* report, which I know is referred to in our submission to you, suggested that significant numbers of people experience victimisation and harassment but are fearful of contacting the criminal justice system in that broadest context because they feel they will not be believed, they feel that their evidence will not be taken seriously, and I think for those people who experience mental health problems, the access to support and help from the criminal justice system which they and we all see as fundamental part of our citizenship is often denied to them. Although I know post bags are often maybe full with people who feel as though they have some right to pursue cases which, on the balance of probability, may not be the appropriate ones for a system to be pursuing, I think we would argue that in far more cases people are not even making contact with the system because of their poor experiences.

Q123 Dr Palmer: We received a copy of the *Prosecutors’ Pledge*. Does the victim see this pledge at any stage? Is it given to them at the beginning? Do they see it at all?

Gillian Guy: I think it is potentially one of those issues that is not consistently applied. I think a key theme running through what I want to say on behalf of victims and witnesses would be about inconsistency and about the differences of approach and a lot of dependency on action of individuals and personalities as opposed to being able to understand the system in full. As far as the pledge is concerned, I cannot say how many people see it. I could speculate as to how many people would understand it and recognise it. I think that some of

the issue is putting words on paper which do not match how it actually feels to be a victim and a witness. One of the things that we clearly feel very strongly about are special measures in court where, quite clearly, people are not being identified for those special measures at all sometimes, and we have discovered ourselves as the witness service 18,000 people on the day are coming to court who should have been identified for special measures: so they have been failed on two occasions coming through the system and they are then in a court process without that assistance. We also find that notification and applications are made too late, when the courts have no choice, according to their discretion, but to refuse those applications, and we also find that people have no idea what it is they might expect in good time to prepare for the special measures that they might receive in court. That is but one example of where, following on from that theme, expectations are not realised. I also think there are issues around the pledge of the training that is given in order for the legal profession, from which we have just heard, to actually be able to relate to people rather than process and be clear about what it really feels like—and I use that word again—what the impact is of the justice system on individuals, and I also think that there is a cultural issue in those organisations (and I have mentioned the 13 different agencies involved) in actually seeing that victims and witnesses are the most important element of that system.

Paul Farmer: In the context of mental health, I think special measures are extremely rarely used with people who experience mental distress or mental health problems, and the understanding of the *Prosecutors’ Pledge*, in most cases, will be quite limited by victims themselves. I think this is particularly relevant in the context of the way in which evidence of previous psychiatric history is utilised, where the pledge is very clear that prosecutors have a responsibility to protect victims from unwarranted attacks on their character, and yet in many cases we have found, from work that we did, that previous psychiatric history was being used inappropriately to discredit or undermine the effectiveness of the evidence from a witness.

Q124 Dr Palmer: Among the pledges are “where practical seek a victim’s view when considering the acceptability of a plea”. As I understand the system, correct me if I am wrong, the decision is sometimes taken after only informal contact with the CPS. The police may decide simply to give a caution. I have a constituency case where a child was allegedly beaten up and the police officer decided that the adult had been mildly provoked and just issued a caution. The alleged victim was not consulted there. Do you feel there is a gap there? Should this pledge apply to the police as well, or is it sufficiently covered by them consulting the CPS?

Gillian Guy: I believe there are two issues there. One is whether it actually happens under the pledge with the CPS (and again I use the terms “consistency” and “individuals” and “individual approaches”)

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because in some instances prosecutors will go to great lengths to have that consultation and we know that victims then feel quite valued in the process, they understand what has been going on and they appreciate that. We also know in other instances they are not consulted and sometimes not even told, and that includes the family as well as the victims themselves. As far as extending it to the police, I think if we have standards of behaviour for the system throughout for victims and witnesses they should apply to all agencies in it.

Q125 Dr Palmer: Another set of victims of the system are people who are wrongly accused. We do get cases where people appear to have waited an inordinate amount of time, like a year, to be told that they will not be prosecuted and sometimes—and this is very anecdotal—there will be a question, where an accusation seems to be fairly frivolous, that it actually takes longer to dismiss because the CPS feel: “This is a minor case; I will get to it sometime.” Do you feel that it would be helpful if the CPS had a screening process to rapidly dismiss obviously frivolous allegations?

Paul Farmer: It is not something we would have a view on, I do not think.

Gillian Guy: I think there would be a long argument as to what amounts to frivolous accusations, which I probably should not get into here. I think that anything that helps the system to act more effectively and quicker, so that people understand what is happening, would be good and, of course, the interests I would be looking at there would be of the witnesses waiting in the wings, who will be clearly stressed by whether they have to come forward and be witnesses or not, and the sooner they know that and know whether they have been deemed to be frivolous, perhaps with an explanation as to outcome, the better.

Q126 Julie Morgan: I notice that with certain victims of sexual abuse, for example, or domestic abuse, if a charge is withdrawn this can be extremely devastating. Do you feel that the CPS usually deal with that situation as well as they can?

Paul Farmer: I think this comes back to the question about the interface between the various arms of the criminal justice system. Often the individual agencies are trying to get the process working in the most effective way, but there seems to be a lot of problems and barriers on the way to helping these things happen most effectively to the individual, and it is the individuals, whether they are the witnesses or the victims, who are quite often carried along. A number of people in our survey talked about their experiences, feeling as though they were passengers in a system which was being driven by other people rather than the system being there for them themselves. I think the question of pace is an important one for ensuring that people are treated with dignity and respect as well as being treated appropriately, justly and fairly.

Q127 Julie Morgan: Ms Guy, do you want to say anything on the more specific point that Ms Morgan raised about where, for example, a rape or sexual abuse case cannot not proceed and the way the victim is dealt with?

Gillian Guy: I think the word used was “usually”, and I think this is a consistent theme of mine really, which is that there is not necessarily a usual situation. There are people who understand the ramifications of that and will go, as I said, to great lengths to give the explanation, and it is a very difficult situation to deal with for a victim who may then suffer further victimisation as a result of having pursued a case; so it does require as well joint working across agencies to pick up that issue and be able to communicate, not just with the victim, but with those other agencies as well to be able to help. I would say that from the previous evidence our experience is that co-location of agencies actually helps in that kind of working just to make sure that that communication happens and also that the people perspective is put into the system at every possible opportunity.

Q128 Alun Michael: Could I stick with this business of the victim’s experience. I wonder if we could sharpen up on what is needed. You have both made reference in the questions to the Prosecutors’ Pledge, and I would like to be clear what the problem is. Are you saying that there are issues with the pledge and what it covers, or are you saying the aspirations are right but it is not what drives the way that prosecutors operate?

Gillian Guy: I believe that the aspirations are right. Indeed, when you read the aspirations they are very difficult to disagree with. I will not slip into anecdote, but I remember first joining Victim Support, having a meeting with the DPP and being presented with the *Prosecutors’ Pledge*, and I thought, “Fantastic; so it is going to be a good experience then.” My experience after that—

Q129 Alun Michael: You have recovered since!

Gillian Guy: Yes, I have learnt a bit since then. I think really it is about words on paper being given life; the people expected to give that life actually being given the tools to do it; so that it is no good saying to a prosecutor, “You were that type of prosecutor yesterday and today you are going to be like this”, and we see a difference when there are new people coming into the CPS, for example, as opposed to people who may have been there for a very long time who are expected to change their very thinking process. I think that is very difficult.

Q130 Alun Michael: Sure, but I am trying to get it how we use this. Is this something that is not sufficiently built into the targets and the performance expectations within the department and, therefore, is ineffective, is it something that you think is hung on the wall in the average prosecutor’s office or carried around in the wallet as something that is valued and important, or is it just something that is produced when you meet a new victim’s concern?

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Gillian Guy: Probably all of those, and that is the consistency point. I think it is something that can work, but, first of all, the leadership has to be about, “We will make this work”, and then the support has to be about, “We will give people the wherewithal to make it work.” I recently spoke at a CPS conference, and what struck me was that there were modules of training for prosecutors who would be dealing directly with victims. I would argue that you do not necessarily have to deal directly to understand what impact you are having, but let us just take that. Those modules have been taken up by something 20% of prosecutors. They have been made more mandatory than they were in 2001, and, obviously, we are keeping an eye on what mandatory actually means and what impact that has, but the question there has to be after that is: “How does that change the behaviour of prosecutors and how are we actually monitoring that?” This does not stray into all of those other areas, but whenever we have something that is written either as legislation or as guidance, we do not tend to follow up and evaluate the impact that that is having, and I think that the leadership needs to take that evaluation into account.

Q131 Alun Michael: So your criticism is not of the Charter as such, it is that it needs to be seen as important and it needs to be driven within the service?

Gillian Guy: My criticism is: I sat at a meeting with a prosecutor who said, “I have got to talk to a witness and tell them they will not be credible. I cannot do that. It is not the job of a prosecutor.”

Q132 Alun Michael: As far as complaints are concerned, what is your experience when people have not met the expectations that a victim from the *Prosecutors’ Pledge* might reasonably expect?

Gillian Guy: I think complaint is a whole other issue in the criminal justice system.

Q133 Alun Michael: I am coming on to it, so I am asking for the relationship between the pledge and the complaint.

Gillian Guy: I would wish anyone luck who wanted to see their complaint through, and I would like to see that there was a channel that enabled people to understand where the complaint was going to be handled, that it was not their problem to understand who they had to send the complaint to in the system and that once the complaint had come through they would be assured of a change in procedure so it would not happen to them or anyone else again.

Q134 Alun Michael: Yes. The answer did not relate to the pledge to a complaint.

Gillian Guy: I would include the pledge in that.

Q135 Alun Michael: You would merely include it within it?

Gillian Guy: Yes.

Q136 Alun Michael: The other thing in relation to following up where the experience of the victim is not what is supposed to happen, we had a document on the Code of Practice for victims of crime from the Office for Criminal Justice Reform, which points to, I think, ten service providers and, when it comes to the question of how to complain, provides ten different avenues of complaint. Given that the two of you have referred several times in your answers to the criminal justice system as if it is a single system, is this satisfactory? Should it be changed? Should there be a single complaint system for the whole of the criminal justice system? What is the way forward?

Gillian Guy: I think that the important thing is that people receiving complaints want to receive them and act on them. In order to demonstrate that a complaints procedure has to be as clear and simple as possible and it should not be the job of a complainant to work their way through. The problem with the code is that, as you have rightly identified, there are many avenues to go and complain into and, very often, someone going through this system, which as you say has many parts, will not know which person has let them down or which organisation has let them down and will not know where to go. If they do not give up at that stage on trying to find out who to complain to, they then have to trot along to an MP and go to the Parliamentary Ombudsman. Our information is that in the three years in which that code has been around the complaints to the Ombudsman are in double figures. I do not think that the complaints about the criminal justice system are so few.

Q137 Alun Michael: Which demonstrates?

Gillian Guy: Which demonstrates that there is not much getting through to the Ombudsman, because it is yet another hurdle for a complainant to get over. So the short answer to your question is, yes, I think there should be a straightforward single complaints system.

Q138 Alun Michael: What do you see as the role of the prosecutor, which is the reason that I started with the pledge? Should the prosecutor be managing that victim’s experience. Is there a role there?

Gillian Guy: Yes, I think there is. Every person who plays a part in the experience of a victim and witness going through the justice system has a responsibility to look after that experience.

Paul Farmer: We would absolutely agree that there is a role for the prosecutor in ensuring that their experience, particularly as a witness as opposed to other formal parts of the criminal justice system who might be considering their experience as a victim, need to receive the appropriate degree of help and support. We would also support a single-track complaints procedure. Many people have to go to great lengths in order to pursue their complaint as a victim and if they find themselves unfairly treated, in their view, then we should make

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it as straightforward as possible for them to pursue appropriate complaints. At the moment it is a mine field.

Q139 Mr Heath: It is a very brief point, but it is a concern of mine. I have sensed from my contact with victims over the years that there are occasions in which the police actually find the Crown Prosecution Service a convenient whipping boy and will say to the victim, “We have done everything we can, but we really cannot understand why the CPS has not prosecuted”, and that puts the CPS, does it not, in very difficult position in actually trying to communicate to a victim what the situation is in regard to their case if they appear to have the police saying, “That is a load of nonsense. We know better.” Is there a way of making sure that the different elements in the system actually give the same explanation and understand one another’s problems in this respect, because surely that must be better for the victim at the end of the day?

Gillian Guy: I would say that would be a laudable aim for the system. I think what it actually points to is that it should not be the criminal justice system, it should be a criminal justice service and that that service then will have its outcomes and its objectives that all of the agencies that are party to that need to sign up to, and that is when they can start supporting one another, and working in co-location situations, working together for those common objectives, helps with that situation. What has happened so far is that the separation has enabled people to pass the buck.

Paul Farmer: Our experience is that people’s experiences of the police and the CPS are equally poor and equally good: where it worked it did not work because of one or the other, it worked because they were working together as a team, and, of course, in the extreme circumstances where this does not work, such as the case that has recently been in the High Court, *FB v DPP*, where really the lack of the CPS’s ability to be able to pursue a case—effectively having cold feet because they felt that the key victim was not a reliable witness but not actually putting in place appropriate support for that witness which could have made the whole process much more effective—has led the CPS to be found to be acting unlawfully and in contravention of the Human Rights Act.

Q140 Dr Whitehead: I wanted to raise that particular issue, because on this occasion the witness was a victim as well as a witness, shall we say.

Paul Farmer: Yes.

Q141 Dr Whitehead: Obviously there will be witnesses who are victims and witnesses who are not victims. How effective do you think a witness care unit as far as witnesses who are not victims is concerned?

Paul Farmer: I think for those people who experience mental health problems, particularly where they are working, where the victim is also somebody who has a mental health problem, as is

quite often the case with people who live in communities together, their experience is fairly patchy. I think as with a non-physical disability, if you like, people with mental health problems tend to not always fall into the category that are most obviously likely to receive the right degree of support, and a lot of work has been done to try to improve the understanding, but I think a key point that I would want to make across the whole of this piece is the need for better training and understanding around mental health and mental health issues for all staff within the criminal justice system, whichever service they might be working in. Unfortunately, many people tell us that the people they work with, their understanding across the system still does not really take account of the reasonable adjustments that are needed to be made for somebody with a mental health problem.

Q142 Dr Whitehead: Clearly, as you have pointed out a little earlier, the victim and the witness are essential elements in the whole process, and, therefore, the idea that the CPS, for example, should take great care in making sure that the witness is able to give the best testament possible, that the experience of the witness is as good as possible and the witness feels fully supported, are essential elements, you might think, in the process. How well do you think the CPS actually does that and how well do you think it works with other agencies to ensure that happens?

Paul Farmer: Unfortunately, I think there is a theme coming through from our evidence around the patchiness of the experience for people and, again, the experience for many people with mental health problems in terms of the support they receive from the CPS is very patchy. I have to say, I think we feel that there is an institutional reluctance around being prepared to believe people with mental health problems as credible witnesses. I think there is a fundamental concern that sits with many prosecutors around how credible witnesses who happen to have mental health problems are, and yet this is despite very clear evidence that a previous history of a mental health problem does not impede somebody’s ability to be able to give good quality evidence, but it does suggest the need to think about people who experience mental health problems in that vulnerable witness category more effectively so that they receive the best possible support, so that they can give the best possible evidence. Where it does not work, the experience tends to be that a witness, whether they are a witness or a victim, is treated with a lack of understanding about their support needs and then, in turn, an edginess creeps in sometimes to prosecutors, which I think is what happened in this case at the High Court that was published last week—the edginess about the overall confidence of this witness evaporated wholly inappropriately because there was not sufficient evidence to suggest that this person would be anything other than a very reasonable witness. This guy had had his ear bitten off. There was some very clear evidence about the effect of the crime, his experience as a

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victim; he had already given very cogent evidence to the police, the police believed it was a reasonable case, that there was sufficient evidence to take it to court, but I think, because of the lack of understanding, the lack of training from the prosecutors and a lack of recognition of the need to treat psychiatric evidence and the need to treat that individual as a vulnerable witness, the support mechanisms were not in place.

Q143 Dr Whitehead: It would be possible to argue, I guess, that if we identified the fact that the CPS should take maximum care of witnesses because they are so important to what the CPS is doing in the first place, then part of that duty of care could be to ensure the future well-being of the witness by, in an adversarial system, not exposing those witness to being destroyed in that adversarial system if they consider that, notwithstanding how well they treat the witness, the experience of that witness could then be very bad under circumstances external to the CPS. Is there a line you think should be drawn, or is there a wider duty of care, therefore, for witnesses in an adversarial system and is it achievable under those circumstances?

Paul Farmer: You are referring, presumably, to the cross-examination process.

Q144 Dr Whitehead: Indeed.

Paul Farmer: I suppose that is where you come back to the validity and importance of the *Prosecutors' Pledge*. The prosecutor clearly has a responsibility to intervene where they feel that the questioning is inappropriate, and the prosecutor in that sense does not simply have the responsibility to prosecute but to support their client, the victim, in terms of the process that that victim is experiencing; and if that support is more forthcoming, I think there is clearly a significantly important role for CPS prosecutors to pursue. To come back to your original question around the appropriateness of protecting a witness from what could be a very traumatic situation, I think we have to balance that with a number of issues which have gone before. First of all, in the case of a victim there is the fact that they are the victim of a terrible event, a victim of a crime. Secondly, there is the process that they will have already gone through, which is quite traumatic, to get to this particular point. Thirdly, I think the issue then arises of the way in which that victim as a witness is then supported, and I think the measures that have been taken to provide protection to vulnerable witnesses certainly are designed to make those processes less traumatic than they otherwise could be, and, of course, there is the risk of significant cross-examination—that is, after all, the nature of the adversarial environment—but preparation and support before hand, appropriate measures within the court room and I think, importantly, support after the event can all go a long way to making a major difference. Many people tell us that their experience in those circumstances is that they want to have the opportunity for their experience to be

proper and often the assailant to be tried through a court. This is a simple and yet very complicated question of access to justice.

Gillian Guy: I think it would be a very dangerous path to follow that allowed a prosecutor to make those kind of decisions on behalf of victims and deprive them of justice, because the overall aim is to try and get justice and stop things from happening again. That is the primary aim of victims. I think it would help enormously if organisations like ours were involved in preparing the training for prosecutors and getting that understanding into the training base and if we use the tools that are available to us. As Paul has said, if we had more pre-trial visits for victims and witnesses, if we had a referral to our own witness service to give the kind of training support that was available and to organisations such as Paul's as well, if we had vulnerable or intimidated witnesses identified. Here is the irony. We can stop people actually going forward with a case, yet we cannot identify 18,000 people a year as vulnerable or intimidated witnesses and give them the support they require to go and give the evidence in court. So if we actually use the tools we have got, improve the training that we have got and actually get a better commitment to the outcome of justice, then we can probably solve some of these problems without going that far.

Q145 Mr Heath: Mr Farmer made the point of the patchiness: that some people have good experiences and others have bad experiences. My question is this. Obviously that can be down to individual practitioners and their attitude, or it can be down to poor management, poor training, a culture within a particular criminal justice area which is failing to understand the principles behind pledge, *et cetera*. It does seem to me to a certain extent in the former case, but certainly in the latter case, that that is something that is down to national management in the form of the DPP and also the inspectorate, who certainly if it were a police force in an area, which I am more familiar with, I would be expecting HM Inspector of Police to be doing a thematic inspection across each force area and basically grading the results and pointing out the areas which are falling short. Have you ever put that to either the DPP or to the Chief Inspector; that there is a case for naming and shaming those criminal justice areas which are failing to meet your reasonable expectations?

Paul Farmer: I think on the form of the question about the role of the management responsibility, clearly there is a management responsibility. Since our survey was published last year, I think we have found an increasing welcome at the door of the DPP. I think we are beginning to make some progress in that area, although there is a huge distance to travel as we overcome the stigma and discrimination around the area of mental health. From our point of view as a campaigning organisation, I think we can see a value in having a clear and transparent process which reflects the quality that is being delivered in different parts of

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the country. As someone who has participated quite significantly in various league tables around health in the context of the work of the Healthcare Commission, there are clearly some benefits to be had from it. However, it is also important to recognise that in some of these cases this is not simply a question of the performance of a particular cluster or particular force, as it is often not particularly the performance of a whole set of clinicians in the health environment, but sometimes it is a single prosecutor or single groups of prosecutors or single groups of police. So I think we need to ensure that any such approach, and I think we would welcome that kind of apparent transparency, had both within it a qualitative framework which allowed a reflection, and ideally a reflection which is led by the people who have been victims in the past. I think that would be an excellent way of thinking about a framework which allowed for a truly qualitative evaluation as well as something which could lead to headline grabbing accusations of tick-boxes. I think we want something that is really in depth in terms of quality, but I think we would certainly support an approach which gave a greater degree of transparency to overall performance, and we would certainly be encouraging the CPS to be doing that. They should

be doing it internally anyway, regardless of whether there is a regulatory requirement on them to do it externally.

Gillian Guy: I think there are two things required. One of them is commitment to see this kind of change and to see victims and witnesses have a very different experience and one that they would not mind participating in again: it is not something we would want to be in but at least feel that it worked to our benefit in some way. I believe there is commitment on the part of the CPS to change and we are seeing that happen, and what we have been saying, I think reasonably consistently ourselves, is that it is inconsistency that is the problem. So I think, in an old-fashioned way, I would say “performance management”, and I believe you have identified the types of performance management that are needed. I am not a fan of inspection for its own sake, but I think transparency certainly I am a fan of and, more than that, a fan of actually talking to victims and witnesses, actually confronting what their experience has been and making changes as a result of that.

Chairman: Thank you both very much indeed. We are grateful for your help this afternoon. We are now going into private session.

Tuesday 10 February 2009

Members present

Sir Alan Beith, in the Chair

Mr David Heath
Alun Michael
Julie Morgan

Mr Andrew Turner
Mr Andrew Tyrie
Dr Alan Whitehead

Witnesses: **David Green QC**, Director, Revenue and Customs Prosecution Office (RCPO), and **Peter McNaught**, Head of Litigation and Enforcement Team, Health and Safety Executive, gave evidence.

Q196 Chairman: Mr Green, Director of the Revenue and Customs Prosecution Office and Mr McNaught, Head of Litigation and Enforcement Team in the Health and Safety Executive welcome to you both. You wanted to say something initially, Mr Green, about the nature of your work.

David Green: Yes; indeed. I thought it might help if I explained to the Committee just in a couple of minutes what the Revenue and Customs Prosecution Office is, who we are, what we do and how we fit with the CPS. RCPO is a specialist prosecutor serving both HM Revenue and Customs and the Serious Organised Crime Agency, established in 2005 under the Act which merged Inland Revenue and Customs and Excise into Revenue and Customs. At the same time, that Act took the prosecution function out of those predecessor bodies and set it up in a new, separate and independent prosecuting agency. RCPO is not—repeat not—part of HM Revenue and Customs. RCPO prosecutors have the same relationship with HMRC investigators as the CPS do with the police. As with the Director of Public Prosecutions and the Director of the Serious Fraud Office, as Director of RCPO I operate under the superintendence of the Attorney General and we prosecute all types of tax offences including missing trader intra-community fraud in VAT, excise and duty fraud on alcohol, tobacco and oils, drug smuggling, money laundering, strategic export controls and sanctions violations. In other words, our work really coalesces under the headings of tax and borders. All these are obviously acquisitive crimes and naturally we have expertise as well in the confiscation of criminal assets. Whereas generally—and I mean generally—the CPS is the public prosecutor, prosecuting cases where the victims are individuals, RCPO is a government prosecutor prosecuting cases whose victims are all taxpayers or indeed society as a whole; one thinks of tax offences or drug smuggling. That said, we of course work very closely with CPS and indeed the Serious Fraud Office at a corporate level through the law officers' departments and the Attorney General's Strategic Board. We have regular liaison with the CPS on policy initiatives and the formulation of guidelines on new tools for the prosecutor such as serious crime prevention orders. Our confiscation specialists in both organisations speak with one voice and perhaps the best example with which I will leave you of our working together with the CPS is in our work for the Serious Organised Crime Agency. Since January 2006 CPS and RCPO have both prosecuted

for SOCA under what is known as the dual prosecutor model. The system now works seamlessly and prosecutors speak as one to SOCA. By agreement RCPO prosecutors, in line with our expertise, prosecute most cases of large-scale drug importation, related money laundering and weapons smuggling investigated by SOCA. I hope that is of some assistance to explain who we are and what we do.

Q197 Chairman: Yes; very helpful. You are both United Kingdom agencies.

David Green: I am England and Wales only.

Q198 Chairman: But of course Revenue and Customs is a United Kingdom body.

David Green: Yes; it is indeed.

Q199 Chairman: In Scotland the prosecutions are carried out under the authority of the Crown Office and the Procurator Fiscal.

David Green: Indeed.

Q200 Chairman: So they manage without having a specialised prosecution agency presumably in either of the fields for which you are responsible.

Peter McNaught: Yes; that is right. In the Health and Safety Executive, once the report has been prepared it is handed to the Procurator Fiscal who then prosecutes the case.

Q201 Chairman: Do you notice any difference in either outcomes or ease of conduct of business between the two systems?

Peter McNaught: Probably, to understand the Health and Safety Executive you need to know a little bit about how that operates in England and Wales because that is quite different in the Health and Safety Executive from the way in which RCPO or CPS operate in that the Health and Safety Executive is primarily concerned with ensuring the health and safety of people at work and those affected by work. So inspectors, who are effectively investigators, are also the prosecutor and in many cases will be the person who presents the case in the magistrates' court and conducts the function of the prosecutor. In the more complicated cases, we use outside solicitors to advise and in a very small proportion of cases my team of lawyers present the case and prepare the case. We ensure independence through other members of the Health and Safety Executive approving prosecution decisions and

remaining at arm's length from the investigating inspector. Against that background, the same system operates in Scotland inasmuch as the inspector will investigate, his principal inspector will approve that the case should go to the Fiscal and then the Fiscal will decide whether to take that forward to court as part of his function. The Procurator Fiscal has recently set up a new unit to deal with Health and Safety prosecutions, which appears to be an acceptance that it is a rather specialised area of the criminal law which needs that expertise. That is a very welcome development for the Health and Safety Executive.

Q202 Chairman: Just to add to the sum of general understanding of what happens in Scotland, which is always a good thing, especially if, like me, you live on the border, but perhaps rather more to make the point that it is possible to do all this without having the kind of specialist prosecution role which you each have, in Mr Green's case as a separate organisation for England and Wales and in Mr McNaught's case rather more like Customs used to be as an inspecting and prosecuting body, you did not tell me whether you thought it made much difference.

Peter McNaught: It is difficult to know whether the outcomes are better in Scotland or in England and Wales. What is probably missing in Scotland compared to England and Wales is the connection between other action which takes place as part of enforcement. A lot of work which is done by the inspector is in terms of giving advice and guidance and enforcement notices and they have therefore a very good knowledge of where the benchmark is in terms of where action will bring about improvement in health and safety without prosecution and where a prosecution is needed. Effectively some of that will happen in any event before a case goes forward to the Fiscal for a decision on prosecution.

David Green: May I make a couple of points on that? First of all, it is right to say that the Attorney has set up a strategic board, the idea of which is to ensure that strategy is joined up across the law officers' departments. Part of that board's work is just beginning now as a strategic programme which is frankly designed, as you would expect, to achieve the most efficient and effective prosecution services for the future. That work includes looking at the structure of the prosecutors. As I understand it, all options are very much open. It is right to say that the current system works well, but that is not the same as saying that it is not capable of improvement. There are arguments on both sides, with which I am sure you will be familiar, but perhaps I might take a few points in favour of the specialist prosecutor. One might think that if prosecutors were all merged into one monolithic organisation, specialism and expertise in certain key areas such as, in our case, fiscal and tax law, customs and smuggling law, would quickly be diluted and lost. That was certainly the view of the Gow/Hammond report in 2000 and Mr Justice Butterfield's report in 2003 which led to the establishment of RCPO. Secondly, it might be right to say that in a large single monolithic organisation

there will always be competing and emerging priorities at different times, therefore a pressure to shift resources within that large organisation to that new and emerging priority. If you have a specialist prosecutor, then of course you have a dedicated ring-fenced resource within that small area of specialism. I have to say, as I am sure you will readily agree, fiscal and tax law and customs law are not for the fainthearted.

Q203 Mr Heath: You have partly answered my question in what you were saying about the coordinating arrangements. There are times when you prosecute and there are times when you use other means to achieve your objectives. I wonder whether you both believe there is consistency between the various prosecuting authorities on when to prosecute and when not to prosecute or whether there is a possibility that it is pure happenstance if a particular case which might be in the overlap area is taken up by one prosecutor or another as to what the disposal is likely to be in that sense and to what degree there is any coordination.

David Green: I would say first of all that certainly we follow the code for crown prosecutors; RCPO follows them by statute, so does the Serious Fraud Office, so does the Crown Prosecution Service and the DPP has ownership of that code. As I pointed out, we do of course prosecute a very distinct group of offences.

The Committee suspended from 4.32 pm to 4.47 pm for a division in the House.

Q204 Mr Heath: Do you remember my question?

David Green: The purport of your question was that having lots of prosecutors in different organisations might produce inconsistent results.

Q205 Mr Heath: Yes and all those areas which do not lead to prosecution. Taking it beyond the convention of whether the evidence is sufficient and whether it is in the public interest, it is clear that some of the organisations have alternative means to ensure a result other than prosecution. I am wondering whether there is a degree of consistency or not.

David Green: With respect, it is probably horses for courses, is it not? From HMRC we can only consider a prosecution which they refer to us and of course HMRC is a tax collector primarily and has all sorts of other mechanisms available to it but once it has referred to us, I would say our decisions within the organisation are entirely consistent, just as consistent, for instance, as a prosecutor in Southend working for the CPS would make a decision consistent with a prosecutor working in Scunthorpe for the CPS. There is no difference in principle.

Q206 Mr Heath: The Health and Safety Executive is slightly different perhaps.

Peter McNaught: Slightly different and different because other agencies prosecute health and safety breaches in particular local authorities. What we do to try to ensure consistency in addition to applying the code for crown prosecutors is that we have our

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own enforcement policy statement which has some flesh in the context of health and safety enforcement to the areas which are important in relation to that enforcement. That is a document to which local authorities have access and they will apply consistently in the same way as the Health and Safety Executive will seek to do. In terms of other penalties and other ways of dealing with things rather than simply going to court, as I mentioned earlier the Health and Safety Executive and local authorities will use enforcement action in terms of notices, improvement notices and prohibition notices, as a very useful tool to ensure compliance with health and safety law and ensure safety at work. In fact we will issue many, many more improvement notices and prohibition notices than we will take prosecutions to court because that will achieve the aims of the Health and Safety at Work Act.

Q207 Mr Heath: Do you have a clear and set out policy in respect of deaths which may have been occasioned by a failure to ensure health and safety? Do you have clear lines of communication both with coroners and with the police authorities where they may be involved?

Peter McNaught: In relation to work-related deaths there is the work-related death protocol which is a protocol signed by the HSE, police, CPS and other agencies who become involved in such investigations and prosecutions. That helps in relation to joint working, initially with the police, because that would be the first contact after a death at work. The police will be informed, the Health and Safety Executive or the local authority will be informed and the protocol helps us to work out from that point onwards who should lead in the investigation, which parts of the investigation should be dealt with by which agency and as the investigation then progresses it is then that the CPS will become involved and decisions will then be made as to whether this is a case where there is a case of manslaughter, either against an individual, or corporate manslaughter against a company. As part of that process, depending upon who has the lead of the investigation, the coroner will be kept informed of the progress of the investigation and of course the families of the deceased, very important in any such investigation, will be kept informed, depending upon who is the lead agency, by the police or by the Health and Safety Executive.

Q208 Mr Heath: I do not want to labour this point. Do you think that has improved significantly recently? I have a long-standing case which I have been pursuing—I do not want to go into the details—where it is clear there was not that degree of coordination.

Peter McNaught: There are certainly cases that I am aware of where there has not been successful coordination. It is improving, has improved over the recent couple of years. We are doing a lot with the CPS and with the police to try to improve that coordination. There are regional liaison committees in each of the regions of England and Wales and Scotland to discuss particular cases and particular

issues which arise from those cases to try to work out, if things do go wrong, where they went wrong, to improve in the future and if things have worked well, how they worked well and to disseminate good practice and a national committee which then tries to pull that all together. Whilst I would not say that in every case it always works perfectly or sometimes very well, it is an improving situation and one which certainly we, the police and CPS are working to improve further.

Q209 Mr Heath: May I return to you, Mr Green, on a different matter? You may say this is a matter for HMRC rather than yourself. May I give you an example which has cropped up in my work where a different disposal appears to be being used in regard to carousel fraud? It is a big issue and there is political determination to sort it out. The mobile phone trading industry has effectively been brought to a halt without there being a significant number of successful prosecutions by a mechanism of withholding VAT returns. I do not want to defend anyone who is acting fraudulently but equally I feel that this is a diversion away from due process to assume that these companies, simply because they are trading in the sector, are probably guilty of the fraud. It worries me that there is something going on there which is not due process. Does it worry you?

David Green: First of all, obviously we only consider for prosecution things which are referred to us for a decision as to prosecution by HMRC. In relation to what you have said, I am aware of similar circumstances. I am afraid that is something HMRC would have to answer for but I would also say that anyone who has had their VAT withheld is perfectly able to appeal to a tribunal for its return.

Q210 Mr Heath: Eventually.

David Green: Yes.

Q211 Mr Heath: But it is a large sum of money which HMRC then withhold the next year. It is not something you have discussed with HMRC?

David Green: No, that would be a matter for HMRC.

Q212 Chairman: So you do not have any influence on what the policy is for the use of alternative mechanisms to deal with infringement?

David Green: To say we have no influence is not quite right. We make strong submissions to HMRC and they listen to them.

Q213 Mr Heath: Have you on this?

David Green: We are in regular discussion on MTIC fraud and how to prosecute it.

Q214 Mr Heath: What have you said?

David Green: Investigating MTIC fraud is largely a matter of course for HMRC. They have to decide what sort of resource they want to put into investigating it. Once they have done that we are perfectly happy to consider anything they report to

us for prosecution. They are the tax collectors and as I have said three times now, we can only consider for prosecution cases which are referred to us.

Q215 Mr Tyrie: They are referred to you for consideration?

David Green: Yes.

Q216 Mr Tyrie: HMRC's primary concern is to get the money in. It is as simple as that really, is it not?

David Green: Yes.

Q217 Mr Tyrie: Therefore, when they consider what to refer to you, they are thinking about putting before you cases which can help them get the money in?

David Green: It is a question again which is better put to HMRC but obviously they have their investigative priorities; we have some influence in what their priorities might be. Obviously priorities change but we are a prosecution authority quite separate from HMRC.

Q218 Mr Tyrie: What are their priorities at the moment?

David Green: Generally speaking safeguarding the revenue.

Q219 Mr Tyrie: Yes; getting the money in.

David Green: Protecting the revenue and that may touch on all sorts of things. It may be alcohol diversion fraud, it might be the same sort of fraud in relation to tobacco, it might be missing trader intra-community fraud to which you have referred and it may be frauds on income tax or other sorts of tax.

Q220 Mr Tyrie: The reason I am asking is that whereas the evidential base for your drug smuggling cases may be relatively straightforward, your evidential base for income tax fraud, for example, may be very complicated and very difficult and expensive to pursue. Am I right?

David Green: Pursue from an investigative point of view or a prosecution point of view.

Q221 Mr Tyrie: Prosecution perspective.

David Green: We are properly resourced and we have a number of very complex cases on hand at any one time.

Q222 Mr Tyrie: That was not a very informative reply. I will try to come at it from a slightly different angle. Do you never find yourself engaged in discussions about a trade-off between whether it is worthwhile prosecuting and what effect it will have on the revenue?

David Green: Once we receive material from HMRC with a view to prosecution, we will look at it and we will apply the code test. The public interest will undoubtedly come into it because that is part of the code test, but generally speaking it depends on the quality of the evidence.

Q223 Mr Tyrie: What I am trying from all different angles now to get at is that before you were created this discussion, which I am trying to suggest may still be taking place—though I have not yet been able to elicit whether it does—used to take place internally within Customs and Revenue.

David Green: Yes.

Q224 Mr Tyrie: They would ask themselves whether it was worth the candle because prosecution was very expensive and they would ask what exemplary effect it would have on the yield elsewhere.

David Green: That would be a decision taken on their side before they refer it to us.

Q225 Mr Tyrie: Before they refer it to you at all?

David Green: Yes.

Q226 Mr Tyrie: You have no involvement in that whatsoever?

David Green: We may well be involved in a case early on, if we are asked whether an investigation is worth taking forward. As prosecutors we could say that they will need to prove X, Y and Z. Certainly we would be involved in that way. That is how the system works.

Q227 Chairman: You have given us two different descriptions of what happens in practice actually. One is not being involved early on and Revenue and Customs coming to you with a file and asking you to prosecute and you looking to see whether you can. The alternative is doing what the CPS now say they do, which is to be involved early on, the day their officer walks into the police station with the beginnings of the investigation, then saying to the officer that what he really needs to do if you are going to prosecute this successfully is X rather than Y. In Scotland of course they can say "You will do X and Y".

David Green: Yes. Both things happen. Obviously if someone is stopped at the airport with drugs on them the investigator from HMRC will call one of our prosecutors, they will be given advice on charging. Equally, there may be a case which is simply referred to us without any prosecutor involvement. Certainly in the more complex cases we are involved from a very early stage, both with HMRC in the way I have described and certainly with the Serious Organised Crime Agency, looking at what the options are and which is the best way forward in a particular investigation.

Q228 Mr Tyrie: Let me try to get to the conclusion of my slightly periphrastic cross-examination. What I am trying to get at is what net benefit we have by having you in existence as opposed to having your role done internally, as we used to.

David Green: If you go back to what happened and why we were set up, I am sure you will remember the Butterfield report and the reasons why RCPO was created. The problem, as analysed by Mr Justice Butterfield then, was that within Customs and Excise there were investigators and there were in-house lawyers and essentially the in-house lawyer,

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for various reasons, was often being cut out of the picture. The axis in several cases was between the investigator on the one hand and prosecuting counsel acting for Customs and Excise on the other. Therefore, there was not much value added by the prosecutors within Customs and Excise and problems arose on the difficult issue of disclosure. Now things have changed. The decision was taken to take us out from the new Revenue and Customs and really to engender a culture of case ownership amongst our prosecutors and we have done that. We operate a 91% conviction rate.

Q229 Mr Heath: When you assess the public interest is there a pound sign attached? Is the return to the revenue one of the factors you consider to be in the public interest?

David Green: It might be one of the factors.

Q230 Mr Tyrrie: It might be?

David Green: It depends; it depends. One looks at it from the code test. It may not always be in the public interest. Obviously if it is a very large fraud, a large amount of public money disappeared, of course we would try our utmost to perfect the case to bring it to court; of course we would.

Q231 Mr Heath: That is a different public interest test to the one CPS applies generally.

David Green: It is one of the factors that would come under public interest; one of the factors, there may be many.

Q232 Alun Michael: I want to return to this question of how you make sure that there is consistency across the system. You said a few minutes ago that in looking at consistency there was no difference between your decision making and perhaps the comparative decision making of the crown prosecutor in Southend as distinct from Cardiff or Birmingham for instance.

David Green: Yes.

Q233 Alun Michael: But there is a difference, is there not? In that case they would be part of the same management structure and there would be systems in place, one would expect. We are talking here about very clearly separate prosecuting organisations. Can you tell us what systems of liaison and discussion there are between the different prosecuting agencies? I am talking about ensuring that practice and policy are consistent.

David Green: I could give you an example, say on confiscation of criminal assets. The people who do that within the CPS and the people who do that within my organisation liaise regularly on interpretation of case law, interpretation of statutes, how to go about things, how much to pay receivers, that kind of thing. So you end up with a pretty standard approach.

Q234 Alun Michael: How does the management of those cases ensure that is the case? You seem to be referring there to practitioner cooperation on a specific task within the overall role. How do you

ensure that there is consistency across what are different organisations with different management structures and accountability?

David Green: Because we have liaison at all levels from director level downwards to senior managers down to practitioners. We have working groups. An example, for instance, would be the development of guidelines on disclosure. That was done by a working group which included CPS, RCPO and SFO. That again was the product of discussion. Then it is enforced by management and by a system of inspection.

Q235 Alun Michael: Let us take that example for a moment. Who decides at the end of the day? A working group has produced some recommendations, it has included people from the different agencies, is that signed off by the heads of all the different prosecution agencies? Does the Attorney General have a role at the end of the day?

David Green: At the end of the day it would be in relation to disclosure. For instance, joint guidelines were produced by the DPP, by me and the director of the Serious Fraud Office. That happens in other areas as well.

Q236 Alun Michael: Yes, but I am trying to get this clear. Is that a matter where the three of you in that case agree on the joint guidelines and if the three of you cannot agree it does not happen? Or does it go up to the Attorney General to sign off what the three of you have agreed or, if necessary, to knock heads together?

David Green: I cannot think of an occasion when anyone has had to knock our heads together; certainly as superintendent of the prosecutors the Attorney General would have knowledge of and bless the agreement in the end. One ought as well to make clear in connection with this consistency point that by statute RCPO is inspected by the Crown Prosecution Service Inspectorate. We are held to the same sort of account as the CPS; we are undergoing an inspection at the moment actually.

Q237 Alun Michael: The suspicion I would have is that that is all fine as long as things are going well, but what is the fallback? You have indicated that the inspectorate may provide part of the integrated oversight.

David Green: Yes.

Q238 Alun Michael: The Attorney is ultimately responsible I suppose?

David Green: Yes.

Q239 Alun Michael: If you agree something across the different agencies, is that then something that goes up to the Attorney for either blessing or for amendment?

David Green: It is the sort of thing which would be dealt with at the strategic board to which I referred earlier. The whole point of the strategic board is that it includes all the Attorney's departments within the law officers' departments and we meet with a view to

ensuring our strategy is joined up across the law officers' departments. It is precisely to get this kind of consistency that the strategic board exists.

Q240 Chairman: I am just going to check whether Mr McNaught is involved in that board.

Peter McNaught: No, we are not one of the official superintended prosecuting agencies. We are part, as indeed are RCPO, of the Whitehall prosecutors' group who, in a similar way, share their good practice, develop good guidance and work together on a number of issues which affect us all and share that learning and good practice.

Q241 Alun Michael: To return to Mr Green on the situation where multiple agencies have an interest in pursuing prosecution, I suppose the best way of putting it is that they share a bit of the public interest; they may have specific issues which are primary to them in a complex case where there are several elements. How do you deal with those?

David Green: There is the prosecutors' convention which does what it says on the tin essentially; it is a mechanism.

Q242 Chairman: It sounds like something held in a very grand hotel.

David Green: It is a slim document designed to ensure exactly this, that the most appropriate prosecutor with the right expertise in the right place takes the case forward. You could imagine you could get a prosecution which might have a tax angle, it might have a drug importation angle, it might have a violence angle and obviously in those cases there is an established mechanism which works to enable the best placed prosecutor to take that forward.

Q243 Alun Michael: With respect, even if prosecutors are these wonderful, cooperative people who never disagree but always coordinate efficiently amongst themselves, agencies do tend to be a little narrower sometimes in their focus. In those rare circumstances, perhaps the one in a thousand where there is a different view between a couple of agencies about who should go first, how does that get resolved?

David Green: I can give you an example. I explained to you earlier that work for the Serious Organised Crime Agency is divided between the CPS and RCPO on the basis of expertise and so forth and who is available and capacity, *et cetera*. There is a procedure agreed between us that if it simply cannot be agreed who should do the case then the directors, DPP and I, should discuss it. That escalation mechanism has never been used; it has never had to be used.

Q244 Alun Michael: The threat is enough.

David Green: There is genuine cooperation and it works.

Peter McNaught: The same applies in relation to Health and Safety Executive in terms of the Environment Agency. We often become involved in

prosecutions where there is firstly the cause of an incident which interests us very much, but then the consequence of the incident may well involve the Environment Agency and interest them very much. What is important is that there is discussion to be clear as to what each agency regards as their important aspect of the case, how the cooperation is going to take place, but at the end of the day the Environment Agency have rights in relation to their prosecution and the Health and Safety Executive in relation to ours. As long as that is discussed and agreed at an early stage, then the misunderstandings you have mentioned will not arise.

Q245 Alun Michael: You did mention earlier that local authorities prosecute and therefore it is not an agency in the same sense. Do complications arise as far as liaison with local authorities is concerned on who takes the lead?

Peter McNaught: With the Environment Agency there could be similar issues but, again, they would operate in a similar way. We work very closely with local authorities to consider in particular cases and particular premises whether there may be a need for us to take some enforcement action which would not normally be the case if there are reasons why a local authority feels there are difficulties in it enforcing that particular aspect of the law.

Q246 Dr Whitehead: The HSE is what you might call a vertically integrated organisation as far as investigating and making decisions about prosecutions are concerned, notwithstanding other agencies it may work with. You therefore may have circumstances where perhaps an inspector is investigating and may decide on a course of action which does not involve prosecution. On the other hand there may be a decision about prosecution. How does that work internally to your organisation? Are there, for example, circumstances where you may say "Actually we are rather snowed under with prosecutions as far as the organisation is concerned so perhaps when you are inspecting could you please make sure that you bring about outcomes which do not relate to prosecutions?". On other occasions you may take a different view. How does that actually function?

Peter McNaught: One of the aspects of our enforcement policy statement is to make quite openly the statement that we do target enforcement action in relation to those where the risk is greatest. That does not mean necessarily in particular circumstances there will or will not be action and in another there will not. It has to be realised that we have to use our resources where they are most needed and that is where there is the most risk of injury being caused in the workplace. We have systems in place to ensure that decisions of the type you have mentioned are made as consistently as possible, consistent with that targeting. For instance, there is a process which an inspector will go through to refer a decision to somebody else's principal inspector who will then make the decision

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in relation to a prosecution, having kept himself at arm's length from the investigation. The criticism which is often made of the investigator being the prosecutor is that the investigator cannot take an objective view. The way in which we deal with that suggestion is to have the line manager, the principal inspector overseeing. He may have some involvement in the investigation in terms of ensuring it is carried out properly but as a day-to-day way he will not involve himself in how that is carried out. So that person can then apply objectivity, impartiality and a degree of independence to that decision to make sure it is consistent with other decisions that are being taken. The issue in terms of the inspector taking other enforcement action is that sometimes he needs to do that there and then because if an inspector goes into a particular premise and there is something happening that is a considerable risk to the health and safety of those at work, he has to take action and that cannot mean him referring to somebody else to do so necessarily. Through systems which are internal, albeit there is this vertical structure of being the investigator and the prosecutor, we aim to bring in the sort of independent approach that exists in the Crown Prosecution Service and RCPO.

Q247 Dr Whitehead: Is that a matter of policy and universal practice or is it done when it is appropriate?

Peter McNaught: No, that is universal practice. It is done in slightly different ways in different cases. The model I have explained to you is the normal model in the most routine cases. In more complex cases then my unit will become involved and we will effectively act as the prosecutor, independent of the inspector and where we can make all the decisions in relation to a prosecution once it has been approved and referred to us for prosecution in a very similar way to that described by the RCPO.

Q248 Dr Whitehead: On that basis how would you be able to demonstrate within the organisation that, if a complaint had perhaps been received, there was undue collusion between an inspector, say, deciding either to prosecute or not to prosecute and the person who had done the investigation and had made a recommendation? How would you demonstrate that the process you described really did function in the way it did as far as the Executive was concerned?

Peter McNaught: I would be able to demonstrate it by the fact that the person who has taken the decision, the approval officer, has not been involved in relation to the investigation. It will have been the inspector and perhaps other inspectors who had been doing the day-to-day investigation, dealing with witnesses, speaking to witnesses, gathering evidence and somebody quite separate from that not coming to it completely isolated, because that would be impossible in the organisation we have, but great care is taken that that person does not become so involved in that investigation that they cannot bring

that element of impartiality to the decision that is necessary to be able to demonstrate to people that this is an impartial decision.

Q249 Julie Morgan: I want to ask you about victims. Mr Green, you do not have individual victims in the sense of actual individuals but you say society as a whole?

David Green: We think of our victims generally speaking as society as a whole or taxpayers. That is not to say that some of our work does not touch upon individual victims and where that happens we do get involved. By way of example, you will know tobacco smuggling has caused considerable damage to the local economies of Folkestone, Dover and Kent. Obviously we therefore have a voice on the Kent Criminal Justice Board. To that extent, yes, we are involved with individual victims but generally speaking it is as you say.

Q250 Julie Morgan: How does the fact that your victims generally are the taxpayers influence how you operate?

David Green: I am trying to think. I suppose it is an element of the public interest that one applies in the test. It is something which is always in the background. When you are thinking about losses to the public purse, as has been said earlier, it is a factor, a major factor and often a very important one in the decision whether or not to bring a prosecution.

Q251 Julie Morgan: Could I ask Mr McNaught quickly about your experience with victims?

Peter McNaught: We do have victims of course because we deal with over 200 work-related deaths every year. The families of the bereaved are very important in part of the process. We have a policy which applies all the main principles of the victims' code and the victims' charter and the prosecutors' pledge. Our investigations and the proceedings can be very lengthy in terms of the time they take, for some of the reasons Mr Heath mentioned in terms of the need to have the CPS involved, the need to have an inquest. The important thing for us to do is to manage the expectations of victims and to be able to explain. Whilst I am sure they always want to have an early resolution, we must be able to give information to explain why in any particular case a case is taking a long time to come to a conclusion. We do that by giving them information, by giving them regular updates and in conjunction with the police ensuring that they are kept informed about the proceedings.

Q252 Julie Morgan: Do they understand the whole range of organisations involved and what your actual role is?

Peter McNaught: It is difficult for them to understand. It is difficult for them to understand why the case has to go from one agency to another to the coroner and then back to court. All that we can do is to try to explain that.

Q253 Julie Morgan: So you spend a considerable amount of time explaining?

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Peter McNaught: Yes and it is the responsibility of the inspector who is investigating to ensure that the victim is kept informed and as much as possible to give as much information as possible, because in the early stage of an investigation it can be very difficult to give information, as much as we can we do, so that

the bereaved families and the victims understand where the investigation is going and why it is taking a long time and why that is.

Chairman: Thank you very much Mr Green, Mr McNaught; we are very grateful to you.

Witnesses: **Stephen Wooler CB**, Her Majesty's Chief Inspector, **Sally Hobbs**, Her Majesty's Deputy Chief Inspector, and **Jerry Hyde CBE**, Her Majesty's Deputy Chief Inspector, Her Majesty's Crown Prosecution Service Inspectorate (HMCPIS), gave evidence.

Chairman: Mr Wooler, Chief Inspector and your two deputies, Mr Hyde and Ms Hobbs, welcome to all of you. I know you have some opening remarks but I think they follow quite naturally from the opening question which Mr Turner is going to ask. I shall let him do so and that question will enable you to give some opening comments.

membership of the local criminal justice boards to develop its community engagement and develop that responsiveness. It is a balance between having consistent national policies which are applied in the areas and the responsiveness to local needs and the prevalence of particular types of offence locally.

Q254 Mr Turner: Could you tell us one thing you think the CPS most needs to improve on in terms of its day-to-day business?

Stephen Wooler: The area where the CPS needs to improve most is in securing greater consistency across the organisation in its systems and procedures. One of the things we have found in the years of inspection has been tremendous variation not only between the 42 areas but within some of the larger areas in order to deliver its basic business. The linkage between those comments and the specific areas is actually around case preparation in the magistrates' courts which the CPS has been working on over the last year or so, partly as a result of the findings of our overall performance assessment, partly as a result of comments in the Cabinet Office's capability review of the CPS and, similarly, in the Crown Court there is a need also to reinforce the systems and processes which underpin case preparation. If I had to pick one thing, that would be it.

Q257 Dr Whitehead: What does responsiveness to local needs actually mean in terms of the question of a locally responsive service but with national standards and national guidelines? Has the oscillation between centralism and decentralism which has characterised the CPS over recent years in terms of its organisation been in part a search to find an answer to that question?

Stephen Wooler: The Service certainly has been trying to find the balance between the national service and local delivery. That is what the Glidewell review was about some 10 years ago and that very much pointed in the direction of the 42 largely autonomous areas. To come back to your question, society obviously is structured differently across the country. Where, for example, you have perhaps large immigrant, black and minority ethnic populations or immigrant populations there you will have particular needs and the Service has strong policies in relation to racially aggravated crime, for example. I would expect in areas where there are large BME populations to find strong community engagement ascertaining the extent of problems, working with the police to ensure that there are firm and clear policies and that those who may be the subject of racially aggravated hate crime know that they will be supported if they come to the authorities and report that. That is what I would be looking for on an inspection. I mentioned immigrants because of course that is a group of society which may well be subject to exploitation. I know that there are parts of the country where that is a big issue for the local Chief Crown Prosecutor because he or she must work closely with the police to ensure that they are supportive and that they are looking into those types of situations. I can think of East Anglia where there are large numbers of people working in very lowly paid jobs, subject to possible exploitation, possible abuses and we have seen some quite serious consequences of that up in Morecambe Bay for example. That was an example of exploitation which had not been checked. Now there is a much greater awareness of those types of issues. When I say that it is a national service but responsive locally, then

Q255 Mr Turner: Yes, the different areas have different views about priorities.

Stephen Wooler: I am talking about the delivery of the business. In terms of priorities, the Service as a whole has very strong leadership from the top and some very clear priorities are signalled in terms of the national initiatives which it is pursuing. I am talking about the way that those are implemented at area level and at unit level in order to deliver the basic business, which is the handling of the cases before the court, the public front shop window.

Q256 Mr Turner: Do you think that is more popular than a local choice?

Stephen Wooler: What the public in any area will want to see is that there is effective handling of cases, fair, firm prosecution and that, in terms of improving the efficiency of the Service, is where the emphasis would lay. In terms of local priorities, it is right that the Service must operate to consistent national standards but responsive to local needs. That is why the Service has been working quite hard in its

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that is what I have in mind and indeed particular areas subject to the prevalence of particular types of offence and offending.

Q258 Dr Whitehead: In the inspection regime there is not really a category saying you were particularly good at being locally responsive.

Stephen Wooler: In our inspection regime we certainly looked at the effectiveness of community engagement and when we talk about community engagement we are not just talking about the Service going out and projecting its image to the local community and local population, we are talking about actually engaging, talking about what the problems are and then looking within the parameters of national policies to adapt and to respond to those problems.

Q259 Dr Whitehead: At first sight, in terms of the way that the outcome of the inspection is phrased, one of the local CPS organisations will say "Hang on a minute. What about the police doing a good job in my area in their local responsiveness or bringing the prosecutions to the point where I can take decisions?" or "Is the Court Service operating effectively so that what I do is going to be as good as it could be?". Bearing in mind what is therefore essentially a matrix of what the national performance is, the local responsiveness is and the other agencies' impact on the judgments which are made, how confident are you that the judgments which eventually come out about the grading of the critical aspects of the CPS actually works?

Stephen Wooler: We are pretty confident that in the overall performance assessment, which is clearly what you are referring to, we look at the interaction of the CPS with its criminal justice partners very fully indeed. For example, when we look at the aspect, the first aspect is the statutory charging regime, the quality of advice is in it. We have just concluded and published a report which we did jointly with the Inspector of Constabulary on statutory charging which found very constructive ways of improving the Service for the benefit of the public overall and where we looked to the CPS to be more flexible, more responsive to the police needs in the way that it delivers pre-charge decisions but also we were looking very much at the role of the police in the preparation of files, the supervision of investigating officers, to make sure that the CPS had the quality of the material that it needed to take properly informed and sound decisions. That was something we were able to do perhaps more effectively than we can as a single agency because we were working with partners there. I think that we try to reflect not only the way that the CPS behaves towards the other criminal justice agencies and how its performance affects them, but we make allowance. We do flag up in our reports where we think that the CPS's performance has been affected by the way that others have discharged their duties: police file quality being perhaps a prime example of that but from time to time we touch on the way the courts are run and scheduled, the impact that may have, the impact that may have on others like victims

and witnesses. It is a circle and the better the treatment by the criminal justice system as a whole is for victims and witnesses, the more likely it is that one will retain their cooperation, their support in a case and the more likely that you will successfully bring offenders to justice.

Q260 Dr Whitehead: You may have hinted at this in your description of the joint work which you have done. Are there systems in place in general which can take out of those judgments areas of good practice and promote those to the Service as a whole or would you describe what you are doing as perhaps exhortation as a result of your experiences in very general terms?

Stephen Wooler: The development of good practice is an area on which I would want to see more work being done. Certainly the CPS overall is very responsive to our reports. I have been discussing one in recent days with the chief executive relating to the CPS handling of complaints. That is a very important issue and the report has not been published yet so I do not want to go into any detail. What I can be quite confident of, even at this stage, is that we have found areas where it needs to be improved. Those are being taken very seriously and as a result progressively over the coming period there will be a substantial review of practice and procedure within the CPS and I would expect an improved system to come about. That is at the national level. In terms of one of the products of inspection being the promulgation of good practice, I have to put my hand on my heart and say we could do more on that and I would like to get to a stage where the CPS actually has the resource to work with us on that. It has gone off; we were better at it about three or four years ago than we are now.

Q261 Julie Morgan: How well do you think the CPS does work with witnesses and victims?

Stephen Wooler: Over the last 10 years the treatment of victims and witnesses in the criminal justice system as a whole has gone forward quite considerably. Having said that, there is absolutely no scope for complacency. There has been a whole raft of initiatives across all the criminal justice agencies. If I may just digress again, we have recently completed with two other inspectorates a review of the treatment of victims and witnesses across the whole of the criminal justice system. We were working with the Inspectorate of Constabulary and we were working with the Inspectorate of Courts' Administration on that. That report is with the agencies for comment at the moment. It has come a long way. One of the general comments I would make is that each individual agency has been working well. One of the features has been the development of good policies; the need to embed those policies at frontline level has often not been as successful in the longer term as it might have been. One of the features across the criminal justice system when we are looking at national initiatives is that because there has been such an emphasis on improving criminal justice, initiatives, when they are new, tend to be successful. As managers turn their

attention to other things, then the eye goes off the ball, if I might put it that way. Victims and witnesses are a good example of that because in the 2005 overall performance assessments we gave some quite positive findings to the CPS. We had to report in 2007 that there was actually a marked decline and I know that has triggered activity but still there is a long way to go to get to the level I think the CPS would aspire to.

Q262 Julie Morgan: Do you get some actual feedback from witnesses and victims in your inspection process?

Stephen Wooler: Very much so. May I say that Sally Hobbs actually led that and certainly a lot of direct evidence was taken?

Sally Hobbs: Yes, we would do that as part of our area inspections when we were looking at individual areas. When our inspectors go to court they would speak to the victims and witnesses if they were able to with the help of the Witness Service after they had given their evidence. Certainly in the thematic review we have just done with the other inspectorates we did speak to a number of victims and witnesses after they had given their evidence and were able to hear from them what their experience was because we were very much concerned, not so much about the processes that back them up but also we wanted to know what had happened to people, how it had actually turned out for them. We were able to observe what was happening in court, look at the relevant case papers and files and also talk to the relevant victims and witnesses as well. The report is only out for consultation at the moment, nevertheless in that there are quite a few case studies of where things have worked well and where things have not worked so well.

Stephen Wooler: May I add that, in terms of making the treatment of victims and witnesses most effective, one of the issues we have been addressing in the report—I do not want to go into details—is the role of the local criminal justice board. There is a large number of initiatives coming out of different agencies at national level and one of the keys is making sure that those are implemented effectively at local level and that there is clarity as to the responsibilities and who is doing what between the different agencies. Sometimes from the point of view of the victim or the witness there can be a confusing number of agencies who are involved, whether it is the Witness Service, Victim Support, the CPS, the police and the specialist units and so forth.

Q263 Julie Morgan: Victim Support did actually raise with us concern that particularly vulnerable victims were not being identified quickly enough by the CPS. Do you have any comment on that?

Sally Hobbs: The need to identify vulnerable or intimidated victims and witnesses stems right from the beginning of the process, so the police have a role to play in that and then the CPS have a role to play in it as well. It is fair to say that there are shortcomings in both those agencies in terms of identifying vulnerable and intimidated victims and witnesses at the various stages of contact. Then of

course that needs to be picked up later by the witness care units and then the result of that can be that there is some late identification, late applications for special measures, which even though they are late will often be granted. Of course the victims or witnesses are perhaps not sure what is going to happen to them in court so it adds to their anxiety and stress and it can even delay the start of court business. There are issues to be addressed around that identification by both the police and the CPS.

Q264 Julie Morgan: What can you do to make sure that they do identify vulnerable people?

Sally Hobbs: There are certainly some issues in terms of police training and experience of the officers involved. They are perhaps not sufficiently aware of what special measures really meant for vulnerable and intimidated victims and witnesses, how they worked in practice. For the prosecution, it is about being more alert at the charging stage. This was something which came out of the joint inspection of statutory charging that there is a need for greater alertness at that stage about the needs of victims and witnesses. The alertness is there in terms of the evidential issues but it is actually what is needed for those people as well that is missing. Some things will probably need to be reinforced as a result of what we found on this joint inspection.

Q265 Chairman: One issue which causes controversy in certain quarters is the increased use of in-house advocacy. Is your system going to assist some assessment of the quality and value of this initiative?

Stephen Wooler: We are just concluding our field work at the moment. We are carrying out a number of meetings and interviews with key headquarters personnel and we will be looking in that at all aspects of the issue from the value for money issues, which the Chairman of the Criminal Bar Association was making comments on when he gave evidence a couple of weeks ago. We are looking at the qualitative things and we have brought together an expanded team for that, using a number of associate inspectors, drawing on expertise from some retired judges and from CPS trainers so that we have a very full range of expertise to assess the quality of the advocacy and in fact we have been looking not just at advocacy but case presentation as well. At the end of the day, the quality of the advocacy is actually dependent on the preparation which goes into cases. Even the best advocate cannot do justice to a poorly prepared case. We have been looking at all those issues and how Crown advocacy is managed to ensure that you get the continuity of handling which is necessary, certainly in the more serious and contested cases.

Q266 Chairman: To go back to an earlier stage on a different point, there has been quite a bit of discussion around the new charging system and particularly the CPS Direct service which the police rather like because they get a very quick response and of course that is what they use out of hours as it were. We got some evidence which suggested that the police found it a very convenient and accessible

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service. Have you made any assessment or comparison between the two ways of providing that service?

Stephen Wooler: We did indeed. We did two parallel reviews: one was the joint review of the daytime statutory charging scheme; the second was the first inspection of CPS Direct. We concluded that by saying there were certain features of CPS Direct which could be taken and applied to the daytime situation in order to produce that sort of flexibility. Whilst the charging arrangements, in my view, are very sound and actually put the decision making in the right place and ensure early preparation of cases and case building, they have, from the operational point of view, some significant disadvantages in making sure that there are quick decisions. The appointment system does introduce delay prior to charge and it can be very frustrating for operational officers if they cannot get the advice they need at the time they need it. One of the consequences of that can be larger numbers of people waiting on police bail and bail management problems for police when in fact the case is built; the prospective defendant is released from a police station because an appointment has to be made to see a duty prosecutor. The CPS are working with ACPO. There are pilot schemes, which no doubt the DPP will talk to you about, operating in London and South Yorkshire to ensure that there is a telephone service which will supply greater flexibility there and greater responsiveness.

Q267 Mr Heath: I am going to ask a question to which I know the answer, because you mentioned it in your annual report last year, but for the record. Diversion from prosecution. Your views on it and how might the oversight be strengthened?

Stephen Wooler: This ties into the discussion you were having earlier with the two previous witnesses that prosecution is only one means of enforcement. The criminal justice system benefits substantially from taking straightforward cases out of the criminal justice system if there can be a fair and just penalty or treatment provided in another way. The difficulty is twofold. The first is the range of authorities now involved with law enforcement. I suppose they come into the three categories: you have those which you have taken evidence from, the Revenue and Customs Prosecution Office, the CPS, those superintended by the Attorney General; you have what I would call the other government prosecutors, Health and Safety Executive, DWP; and you have a whole raft of other smaller enforcement bodies, local authorities, public health, planning and those types of issues, the Environment Agency and so forth, all of whom have a raft of different disposals. The most controversial are the growing fixed penalties. There is perhaps an oddity in that the prosecuting authorities who are subject to inspection at the moment are the ones which actually are already superintended and accountable to Parliament through the law officers whereas the other prosecutors are not accountable centrally; some, depending on their relationship, are

accountable more locally but that is an anomaly¹. There is a use for alternative disposals provided that arrangements are in place that ensure that each of the different authorities—and this would apply to prosecution authorities as well—is acting in a broadly consistent manner. The problem is that where you are dealing with public health, it is very different from an MTIC fraud. So you apply the public interest test but the types of factors which come into play can be very different. It is like apples and pears but that judgment has to be made as to whether in the final analysis it is in the public interest to prosecute.

Q268 Mr Heath: Can I narrow that down to what most people think of as a fixed penalty, the misdemeanour where it is diverted from the court by application of a fixed penalty notice and it is paid. It seems to me that there are two potential problems there: one is the potential lack of continuity in that it does not go before a court, there is no view of the sequence of events for that individual and therefore an appropriate disposal. The second is the risk that the sort of thresholds that the CPS would use are not actually being applied so the evidential test may not be passed and the public interest test may not be passed and you may have a disproportionate penalty in comparison with what would actually happen before a court. How do we make sure that is not happening?

Stephen Wooler: Just as on prosecutions you would want to ensure there is consistency, and that is often not in the hands of the prosecutors but in the hands of the police and the hands of local authorities and so forth, there does need to be a form of scrutiny which actually looks at the way those powers are being used.

Q269 Mr Heath: Should that be you?

Stephen Wooler: It would be an extension of our role. It could be done quite naturally to see the way the power to impose penalties is being used and to make sure it is not being used when the offence is not made out. There is a risk, for example, of police officers using fixed penalties. That might be more a matter for HMIC but perhaps we would have expertise to bring to bear there as to whether, when they interpret a public order situation, they are justified in issuing a fixed penalty which quite often will not be charged. The second point I would make is that it is very important that when people are being offered fixed penalties or cautions or something of that nature, they appreciate the full implications of accepting that. Cautions do remain on records for some time, they may be cited again and they can have other implications in terms of employment, having to be disclosed or travelling abroad to other countries and so forth where they may be relevant. There are issues of the circumstances in which they are used, people understanding the implications and also the consistency of approach. Across the different authorities I could point to parts of the country where you might attract a £60 fine or fixed

¹ *Note by witness:* this form of accountability may risk introducing political considerations at a local level.

penalty—the Home Office are increasing that at the moment—for shoplifting or criminal damage and yet from the local authority a large fine if you overfill your wheelie bin or in London, if you are in a bus lane, it would be even more. That type of thing may sound trivial but in terms of the confidence and the way the public perceive it, it is very important that the enforcement as a whole, whether through the structured criminal justice system or the alternative means is actually seen to be consistent and fair.

Q270 Mr Heath: Have you ever formally requested an extension of your terms of reference or, alternatively, have you ever suggested, say, to Her Majesty's Inspectorate of Constabulary that a joint thematic inspection might be appropriate in order to cover that ground?

Stephen Wooler: In one of our local criminal justice board inspections with HMIC we did actually spend some time looking at the way the police in that particular area had been using fixed penalties because we had picked up some vibes about that. No, the list of topics which is on the prospective agenda for inspection is vast. This is not one of them at the moment but I am sure if this Committee wanted to give it a push, we would be listening.

Q271 Chairman: You have been inspecting various other prosecuting bodies by informal arrangement. Are you hoping to get a full house by this method and embrace the widest range of prosecuting agencies?

Stephen Wooler: Certainly the Attorney General finds it valuable that we look at the Revenue and Customs Prosecution Office and we do that on a statutory basis. It is intended that we should look at the Serious Fraud Office on a non-statutory basis within the regime. We look at the Army Prosecuting Authority on a non-statutory basis. There is a limit to what one ought to do by way of extending one's remit without the *imprimatur* and the blessing of Parliament. It is valuable from our point of view as inspectors that we see how other prosecuting agencies operate, we learn from that and we can try to cross-fertilise some of the good practice. As I said earlier to Dr Whitehead, I do not think we are as good at that as we ought to be. The other agencies do benefit from being inspected by somebody who has looked at a range of other bodies as well.

Q272 Mr Tyrrie: You may have already published this, I do not know, but I wanted to make sure I understand how you put together your overall performance assessments. Are the various critical aspects and the other defining aspects each given a weight?

Stephen Wooler: They are. We have a very complicated tool which we cribbed from the Audit Commission called the deterministic rule model. Some of the various factors are classified as critical—

Q273 Mr Tyrrie: Meaning important?

Stephen Wooler: Yes; important. You get a score in relation to the critical factors and then you bring in the others to give the overall score. That is about as

simple as I can get it but it is something which tries to weight the key factors like the case outcomes and the leadership.

Q274 Mr Tyrrie: It does weight?

Stephen Wooler: Yes, it does weight.

Q275 Mr Tyrrie: Is there a percentage number here which we can allocate to this in order to get to the overall score?

Stephen Wooler: It is not a percentage number. The critical aspects produce a factor for a score of their own and that will limit how far up the assessments you can go. Unless you score a certain amount in the critical factors, then you cannot get up to excellent.

Q276 Mr Tyrrie: Is this published?

Sally Hobbs: Yes. I believe the overall performance assessments are in the back of the summary.

Q277 Mr Tyrrie: The weighting?

Sally Hobbs: You may be using “weightings” in terms of whether we say this aspect is worth 20% of the score, whether magistrates' courts' outcomes are worth 20% or are worth more than that. It is not quite that sort of weighting. Just to explain a little, what happens is that those we call the critical aspects lead the rest of the score, lead the overall scoring. For example, to be excellent you need to have scored an overall score of excellent (or in some instances good) in the critical aspects. You have to have that in the first instance and then you may have a range of scores for the less critical aspects which will bring you to a final score. It is quite difficult to explain. It is not quite the weighting that I suspect you were referring to but you should find it at the back.

Q278 Mr Tyrrie: I have not seen that and I have not investigated it as carefully as I should have done before asking these questions. Having said that, I am struck by the fact that you already have something which strikes me as pretty opaque and I was wondering whether you might be able to consider a simpler, more transparent system which would enable the people being assessed to see readily how they had been assessed.

Sally Hobbs: We might disagree with you that it was opaque. It is quite difficult to describe, but it is set out and the people we inspect do actually understand it. When we first developed our overall performance assessments we made absolutely certain that we were transparent in everything we did. We published frameworks, our criteria and we set out data ranges on which people would be assessed that were ranked as excellent, good, fair or poor. We held workshops with them to ensure that they did understand how they were going to be assessed.

Q279 Mr Tyrrie: Do you review the system every year?

Sally Hobbs: We will be reviewing the system for the next round of overall performance assessments which, under our current strategy, will take place in 2010. We have used this twice: first as an initial baseline and then a second time to assess the movement, the improvement there has been.

Q280 Mr Tyrie: Does it have any bearing on the amount of remuneration or promotion or in any other respect? Does it affect people's careers?

Stephen Wooler: I do not have direct knowledge of that.

Q281 Mr Tyrie: Why would they mind really? I have only just found out that Sussex, which I happen to represent, seems to be doing well. No-one has ever come to me and said they could do better. Perhaps that is why.

Stephen Wooler: I would be surprised if the director and the senior managers of the CPS did not take inspection findings into account when assessing performance. There is not a direct link but it is a very important factor in their appraisal process.

Jerry Hyde: The director and the chief executive have taken positive action when an area has been rated poor and there have been changes in the management team in order to rectify that.

Q282 Mr Tyrie: That is within an area. What about between areas?

Stephen Wooler: I do not think there is any instance where somebody has been taken out from a poor area and put into another area.

Q283 Mr Tyrie: I am looking to see what happens. I have not found one because I have not been looking closely enough. Suppose we had an area here which was poor, poor, poor, poor?

Stephen Wooler: It is taken very seriously. The special measures do not involve the inspectorate.

Q284 Mr Tyrie: Here we are. London North & East does not appear to be doing very well.

Stephen Wooler: The example I was going to pick happened to be in the first round of overall performance assessments when Cumbria was found to be poor. At that time they were already receiving strong support. Certainly when an area is found to be poor the CPS have a management consultancy team who move in and try to assist. Sometimes it does need more radical measures. Where we have a poor area we always go back and re-inspect afterwards. Certainly the four that were poor in the first series in 2005, Cumbria, Essex, Bedfordshire and one other², all received a follow-up inspection quite shortly. In about six or eight weeks' time we are about to do follow-ups in relation to Surrey and Leicestershire which were the two which were poor in the year 2007-08.

Q285 Mr Tyrie: I do not want to prolong this too much but let us just take one of these "Defining Aspects" "Delivering change". You turn up at Sussex and you ask how they are doing at delivering change. How do you measure that?

Stephen Wooler: It focuses mainly on the initiatives which are being pursued in the criminal justice system at the time, whether that happens to be development of witness care units, whether it is the direct communications with victims scheme and we analyse

the progress that they have made, how they have worked with their criminal justice partners and how far they have actually got in delivering that change and whether it is producing the results. We also look at whether at local level they are actually themselves measuring whether the benefits which are expected from them have been achieved.

Q286 Mr Tyrie: Suppose there are five initiatives and you are looking to see whether they have delivered them, if someone has delivered all five in the preceding 12 months they get a good and if someone has delivered none of them they get a poor. Am I right?

Stephen Wooler: If they have delivered them well, they will get a good or excellent.

Q287 Mr Tyrie: These are only relative measures are they not, not absolute measures?

Stephen Wooler: No, they are absolute measures in the sense that they are very clear criteria and you could have an aspect where there were universally low ratings and that has happened on some issues.

Q288 Mr Tyrie: Let me end with a question which perhaps encapsulates it. Are you using these to try to find ways of enabling areas which are not performing very well to learn from the practice of the best? Or are you trying to draw up an objective standard against which everybody should judge themselves?

Stephen Wooler: We are trying to drive up performance by encouraging chief crown prosecutors; indeed the director and the chief executive have both made it clear that they expect the individual areas to progress up and that each round of overall performance assessments should see a better performance. In that sense it is driving up performance. It is also setting an objective standard in that there are clear criteria which have to be met in relation to each of the aspects in order to secure particular ratings. Out of this work we do try to draw together the good practice and identify the areas which are doing well. From that we do know that the CPS areas do talk to each other. We know, for example, that Humberside, which was rated as excellent on the last occasion, has had a large number of delegations, people who are trying to learn from them, their systems, their processes and the way that they have tackled particular issues.

Q289 Dr Whitehead: A very brief question. I understand that CPS has now been brigaded into 15 groups?

Stephen Wooler: Yes.

Q290 Dr Whitehead: What on earth does that mean? Are the brigades inspected? Are there brigadiers at the head of the brigades?

Stephen Wooler: Restructuring is perhaps a better word. The 42 areas proved quite difficult in management terms from the point of view of the director and chief executive who had 42 separate chief Crown prosecutors reporting to them; certainly in terms of managing the performance of 42 separate areas. What has happened is that they have gone into 13 groups plus Greater Manchester and London

² Note by witness: this was CPS Devon and Cornwall

which will stay. You can call them groups, you can call them areas³. The concept has come out of the need which the capability review flagged up to address how you are a national service locally delivered, to get greater emphasis on performance management and to some extent consistency. The original concept was that the groups would have a group chair who would set the strategy and the larger areas would assist the smaller areas. It has moved on from there in that there has been a recent decision that the group chair will in effect line manage the chief crown prosecutors in the areas for which he or she is responsible. That brings a new concept to it. I would not go so far as to say they are assistant chief crown prosecutors but it is a different relationship. The result of that is that there is a substantial redistribution of responsibilities and we are still actually talking to the CPS. The CPS are still developing the new structures with the result that we will have to revise the overall performance assessment mechanism to make sure that we focus on the areas, what is an area responsibility, and on the group, what is a group responsibility. That is really work in progress as far as the CPS is concerned. Without wishing to be unhelpful, probably the director is the person who is best able to describe exactly where they have got to in that process.

Q291 Mr Heath: That rather knocks co-terminosity on the head to an extent.

Stephen Wooler: There will be implications for things like that.

Q292 Mr Heath: I just want to go back to your overall performance assessment. Speaking as a former member of the Audit Commission I am quite alarmed that you are reviewing your critical factors after relatively short exposure because every time you do that the benchmarks move and you do not have that direct comparability. My question is simply this: have you at any stage contemplated having a joint assessment with the National Audit Office so you get value for money built into the same inspection in terms of the areas? Certainly I found that the joint studies between the Audit Commission and Her Majesty's Inspectorate of Constabulary, for instance, were actually very valuable; same with the Social Services Inspectorate.

Stephen Wooler: Obviously we do not have a lot of contact with the Audit Commission because they are primarily concerned with local authorities. We have quite a close working relationship with the National Audit Office. We assisted the National Audit Office in an advisory capacity in relation to the piece of work it did two years ago as regards case work in the magistrates' courts. We did actually seek to engage them in the work we are doing on advocacy to assist us with the value for money. They were not able to lend

us anybody for that. There are some statutory inhibitions on actual formal joint activity between the National Audit Office, which of course accounts to Parliament, and ourselves, who account through ministers to the Government so that is an inhibition. However, we do actually exchange information and meet them quite regularly, we do try to use their expertise when we can and we have worked in an advisory capacity with them.

Q293 Mr Turner: I may have missed the right end of the stick, as it were, but I am confused on what you have just told us about number of 13 groups instead of the ones which were designed on each police force. Is that correct? The Crown Prosecution Service is going over to a number of larger groups.

Stephen Wooler: The Crown Prosecution Service will retain its 42 areas. However, they will be grouped together and there will be 13 groups plus London and Greater Manchester so that the group chair will, for example, retain his or her responsibilities for the area for which he or she is chief crown prosecutor but will also have a supervisory role in relation to a number of other areas.

Q294 Chairman: We will question the director about this when we see him in a fortnight's time. It is presumably too soon for you to have inspected it because it is only just happening is it not?

Stephen Wooler: Exactly. Just going back to Mr Heath's comment about changing the aspects, the only reason for seeking to change the aspect is actually to reflect the different division of responsibilities that there may be. For example, if budgeting is being done more at group level, then obviously we have to reflect that.

Q295 Mr Heath: That is fine.

Stephen Wooler: We try to keep comparability between the different assessments.

Q296 Chairman: Is it unsatisfactory that there is no external recourse for complaints against the CPS? If there is a gap to be filled, should it be you who fills it?

Stephen Wooler: There is a case for an external element. It is obviously a policy matter for the Attorney General at the end of the day. There is precedent for it in relation to the Public Prosecution Service in Northern Ireland where they do have an independent complaints officer who is outside the Service. There is already an existing power for the Attorney General to ask us to look into matters relating to the Service which are of particular public concern. It would probably detract from our ability to inspect if we became routinely involved in reviewing complaints handling. I do not think I would want that role other than in exceptional circumstances.

Chairman: Thank you very much indeed. We are very grateful to you for your evidence this afternoon.

³ *Note by witness:* they are groups made up of several CPS areas

Tuesday 24 February 2009

Members present

Sir Alan Beith, in the Chair

Mr David Heath
Alun Michael
Julie Morgan
Dr Nick Palmer

Mrs Linda Riordan
Mr Andrew Tyrrie
Dr Alan Whitehead

Witnesses: **Keir Starmer QC**, Director of Public Prosecutions, and **Peter Lewis**, Chief Executive, Crown Prosecution Service, gave evidence.

Q297 Chairman: Mr Starmer and Mr Lewis, welcome. Welcome particularly, Mr Starmer, in your new post. We welcome you to that and wish you well in it. We enjoyed more than one exchange with your predecessor and we look forward to the same with you. If you would like just to start by giving in a nutshell your view of the constitutional role of the prosecutor and the purpose of the prosecutor within the criminal justice system.

Keir Starmer: The constitutional role of the prosecutor is much more sophisticated now than it was several years ago. I think it has fundamentally changed and I think this is a good time to articulate that change because when the CPS was first set up it was envisaged that it would occupy a space between an investigation by the police and proceedings in court. It would take the charge from the police and the evidence from the police, process it and parcel it out to the self-employed Bar in most instances for the serious cases for prosecution. It has now changed. It occupies the same sort of space but it is a much more sophisticated exercise of function because it is involved pre-charge in giving advice at the investigative stage in serious cases. It now charges in all the serious cases, considers diversion if that is appropriate, prepares cases in a completely different and more sophisticated way and now prosecutes in many instances its own cases in court. So it still sits in that space but it is a much expanded, much more sophisticated role.

Q298 Chairman: Baroness Scotland's foreword to your strategy and business plan talks about the CPS's role in reducing re-offending. Given the description you have just given about the constitutional position, how do you think the prosecutor can contribute to reducing re-offending?

Keir Starmer: I do think it is an essential function of the prosecutor to tackle crime and re-offending. That can be done in a number of ways, first and foremost by engaging with the communities the Prosecution serves. The Prosecution obviously exercises public functions on behalf of the public and in order to inform itself about the decisions it makes it needs to squarely face that public and engage with communities. That will involve working on crime reduction in a number of different ways, as it were, in a general sense. There is then obviously the gateway function when an individual crime is identified and detected and at that point crime reduction enters the equation when the decision is made whether to

charge or not charge, when the public interest is taken into account, and when things like diversion are considered.

Chairman: I am going to come back to some of those issues shortly, but I am going to ask Mr Tyrrie to continue questioning.

Q299 Mr Tyrrie: Do you have a rough idea, Mr Lewis, how many agencies have prosecuting powers in the UK?

Peter Lewis: Yes. It would be something like about 20. There are the main prosecutors you will be familiar with, RCPO, SFO, other government departments have prosecution functions, local authorities have prosecution functions as well and there is the odd organisation like the RSPCA which can launch prosecutions. It is quite a broad category.

Q300 Mr Tyrrie: Are you content with that arrangement?

Peter Lewis: Broadly speaking, the arrangements work in the sense that they are bringing offenders before court and making sure they are competently prosecuted. There is a piece of work that is going on under the Attorney's leadership at the moment to look across at all the government prosecutors at least and make some recommendations to see if there are any efficiencies there, but that is a very early stage of work.

Q301 Mr Tyrrie: Our staff asked your staff for a list of all the agencies and your staff did not have one, so we also asked the Attorney General's office and they did not have a list either. Maybe there is one in your brief, but it would be helpful if you could furnish us with one.

Peter Lewis: I will.¹

Q302 Mr Tyrrie: Do you think there are some advantages to bringing everything under the uniting organisations with prosecuting powers under one prosecutor?

Peter Lewis: These are the issues we are looking at at the moment. We have, I suppose, a broad view that there ought to be standards that you would expect from any public prosecutor and I think the first step in the review we are undertaking is to describe what those standards are and then look at each one of us and match us against that.

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Q303 Mr Tyrrie: Do you think there are likely to be advantages in allowing best practice to develop in different ways so that there is always a variation in quality but you then get an opportunity to drive quality towards the best, as different prosecuting authorities illustrate it?

Peter Lewis: I think one of the things we would wish to come out of this review, whatever the answers are, is that there is a common approach to standards. I think one of the things the public ought to expect is that whoever prosecutes them in the public domain there are similar standards and that those are the best standards for litigating cases. So whatever comes out of this review, we hope that will.

Q304 Mr Tyrrie: Do you see the Code as part of that exercise?

Peter Lewis: Yes. There are some of the agencies who sign up to the Code on a statutory basis like the RCPO. The SFO follow it, but most of the other prosecutors do accept that those are the guiding principles which ought to guide all public prosecutors and that includes the local authority prosecutors too, so it does represent a broad series of well-tested standards which ought to apply everywhere.

Q305 Mr Tyrrie: Do you think you will be able to pick up the waste, wasted resources, wasted energy from an exercise such as the one you are undertaking?

Peter Lewis: Yes. We think that certainly when we talk with the Attorney's people about what are the standards you should expect from the Public Prosecutor one of those standards is that they should be efficient, so that is something we are going to take a particularly hard look at, particularly at this moment, of course, when all the individual prosecutors will be under such pressure with regard to their budget.

Q306 Mr Tyrrie: You are going to try and bring that down to a number so that we can see clearly variations in performance, are you?

Peter Lewis: I am not sure we will be able to bring it down to an actual number certainly in the sense of—for the major prosecutors I think we can look at cost per case. It is one of the things we certainly look at. Whether that information exists in all those other prosecutors I frankly do not know until we undertake the exercise.

Q307 Mr Tyrrie: Could I ask you to look into that?

Peter Lewis: Yes.²

Mr Tyrrie: Thank you.

Q308 Chairman: Are you aware of any feeling that the system in Scotland, where there is a prosecutions monopoly, leads to any loss of specialist skill, ability to handle different kinds of prosecution; and if not, are the arguments against a prosecution monopoly simply that we have never done it that way?

Keir Starmer: I am not aware that there is any loss in Scotland in terms of specialism and it is right to say that we have specialisms within the CPS. We obviously have our counter-terrorism division, we have special crime and serious organised crime divisions, so you can have even on the Scottish model a number of specialisms sitting under one prosecutor or on our model a number of specialisms within the various prosecuting services, but I am not aware of any evidence that the Scottish approach is detrimental to the approach here or any worse than the approach here.

Q309 Dr Palmer: Mr Lewis, when do you feel the role of the prosecutor begins and ends in the criminal justice system?

Peter Lewis: We have increasingly, as the Director has mentioned, extended our role. Once upon a time it was fairly easy to answer that question in that it started after the police had charged the case, but increasingly now as we work with the police under what we call a prosecution team ethos we are starting to get involved earlier and earlier. So in our most serious cases around counter-terrorism and serious and organised crime we are involved with the investigator sometimes before there is even a suspect, when they are thinking about conducting an operation and they are seeking our advice for what sort of evidence you would need, what you would need to follow to get the assets. So the point where we begin in the system is getting earlier and earlier, certainly on the most serious cases.

Q310 Dr Palmer: So do you actually see a logical conclusion of that something like they have got in Scotland with the Procurator Fiscal? The CPS actually directs the police to take particular action.

Peter Lewis: Obviously we have looked closely at the system in Scotland. What we have found so far is that the police really welcome the sort of advice we give them. We are not finding on these serious cases that we have to force our way in, far from it; they actually want our involvement and take our advice. So at the moment in the sense of do we need that power to get the necessary influence, the answer is, no. Obviously if it proved to be the case, then the position would need to be considered, but so far the police welcome us in on these big cases.

Q311 Dr Palmer: One of the issues that has come up in evidence is that there is the difficulty of different, some would say conflicting, targets for policing and for prosecutions. I see you are familiar with the issue. If there was one target for the whole of the criminal justice system, for instance the number of offences successfully brought to conviction, would that be better or would it lead to finger pointing between the different arms of the service?

Peter Lewis: The reason I was nodding is that you are quite right to say that where there have been conflicting targets they have proved really unhelpful, particularly the police at one stage had a target, what they call their sanction detection target, which was met when somebody was charged or cautioned, whereas our targets tend to be about successful

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outcomes. Those conflicting targets did not help our relationship and we have committed with the police, both of us, to actually go for the sort of target you have talked about because we believe that is the best and where we have seen other targets, where we have ended up with the same target, such as on proceeds of crime, that has really helped joint working, there is no question about it. So the answer is, yes.

Dr Palmer: Thank you.

Chairman: I had better just explain shortly that we think there will be a vote which will force us to suspend the sitting for 15 minutes, but we will be back.

Q312 Mr Heath: I do not know whether to speak quickly or slowly to accommodate that! Thinking in terms of the relationship between prosecutors and police, there is also a change in the relationship at the other end, as it were, between the prosecutors and the courts and the process of that. I have been looking at the prosecutor's role in sentencing the draft Code for the Crown Prosecution Service. It is clear that there is a change in that relationship. Is there a danger that the prosecutors are being drawn into a form of ancillary sentencing?

Keir Starmer: I do not think so. At the moment the role is to advise the court on sentence and to try to ensure through advice that the appropriate sentence is passed, but it is advising the court for the court to sentence, whereas in the past the prosecution really would not have played much of a part in the sentencing stage, but I do not think at this point it goes beyond that.

Q313 Mr Heath: Even, to posit an example, where the prosecutor would recommend a conditional caution? Do you keep records of how often that applies, and if so is there a risk then that the prosecutor is actually to an extent usurping the power of the court to decide what the proper disposal is?

Keir Starmer: The conditional caution as an alternative to going to court?

Q314 Mr Heath: Yes.

Keir Starmer: No, I do not think there is. Between charge and court there is a number of options for dealing with criminal conduct and the approach we take is that criminal conduct has to be dealt with effectively in a timely way and appropriately, and there is a number of cases which can more appropriately be dealt with by conditional cautioning. We do, obviously, keep records of those conditional cautions and we have looked at them in the round amongst all the other methods for dealing with criminal conduct other than proceeding to a court. They occupy a particular space. There are obviously Fixed Penalty Notices, there are ordinary cautions. They occupy the same space but I do not see them as usurping the function of the court.

Mr Heath: I am going to come back on Fixed Penalties in a moment.

Chairman: Sitting is suspended for 15 minutes.
The Committee suspended from 4.45 pm to 4.59 pm for a division in the House.

Chairman: We were going to the question Mr Heath was formulating.

Q315 Mr Heath: I was, Chairman. We have just been discussing the effect of a recommendation for a caution. Mr Starmer, you mentioned Fixed Penalty Notices and of course there is a whole other range, including primarily Fixed Penalty Notices, which prevent a case from ever really reaching the CPS in the first place. Does that cause you any concern, that those various forms of disposal are increasing in their use and do you have an overall picture of the extent to which that practice is developing and the consequences for the whole of the prosecution system?

Keir Starmer: Can I take that in stages? If you take together Fixed Penalty Notices for traffic, for disorder, cannabis warnings, cautions and conditional cautions, which is a sort of broad range of powers here, you are talking about a huge number of cases. You are talking about something like 3.7 million cases. Therefore, I think it is wrong to assume these are cases which would otherwise have gone to court because there are over a million cases going to court and the system could not cope if all of those cases were being put into the system. That is why you have these measures. You have them in most countries that operate similar systems. Insofar as most of them are fixed penalties for identifiable conduct without much variance, then again that is common across similar systems and it does not cause us much concern, and most of the Fixed Penalty Notices have been there for a very long time and been operating for a very long time. Conditional Cautions is obviously the particular power which the CPS exercises. It has oversight of some cautioning and there effectively it is a decision to suspend the prosecution pending the fulfilment of particular conditions. They are coming to us, so in relation to that category of cases I do not have any concerns because we are seeing them and the prosecution is only suspended on satisfactory fulfilment of the conditions. Subject to that being transparent and having safeguards, I do not see a constitutional problem or a practical problem in the operation of that sort of system. That is where my answer to your previous question lies, which is that I do not think it is right to talk about this as diversion. There is a number of powers to deal with criminal behaviour swiftly and effectively and these are among them, and those that need to go to court should go to court and those that can be properly dealt with elsewhere should be dealt with elsewhere, and the system could not cope if we did not have them.

Q316 Mr Heath: Yes. I am tempted to explore the argument, for instance, in a shoplifting case as to whether you then have a disposal which understands the circumstances, understands the propensity and can give a proper response to the criminal behaviour, whatever it may be, but that is perhaps an argument for another day. You are content that you, as Director of Public Prosecutions, have a handle on what is happening across the country and the degree of consistency that is being applied?

Keir Starmer: We have a handle on it. We have a much better handle, obviously, on that part for which we are responsible, but I can say that we understand and recognise that there must be transparency and there must be safeguards, and certainly in respect of the powers we exercise we will be making it as transparent and putting in as many safeguards as it is possible to do. We recognise that must be part and parcel of it.

Q317 Mr Heath: Just one more question, if I may, on the issue of consistency. One of the principal criticisms, I guess, of the CPS is that it is either overcharging or undercharging. Both may apply. I wonder to what extent that is, first of all, a concern that you share, secondly the extent to which that reflects an informal plea bargaining system which may or may not be applied, and thirdly whether you consider that actually moving to a formal plea bargaining system is something that would be helpful and something you would support.

Keir Starmer: Taking those three in turn, over and undercharging, I have read the evidence which has previously been given to you and I realise that different witnesses say, on the one hand, we are overcharging and, on the other hand, we are undercharging. We do operate the Code that you know about for Crown Prosecutors and paragraph 7 deals with charging. There is a standard for charging and there is an understood test. That should be applied. It is really important to remember that the CPS is an inspected body. You have heard from the Chief Inspector. We welcome that inspection. It is rigorous. It involved the inspectors looking at particular cases and taking a considered view on whether we have charged appropriately, and recent inspections have suggested that the judgement calls we are making on charging are right. I think Tim Godwin gave evidence to you and he said that where he had had the opportunity to look at our charging decisions he thought we were getting the judgements about right. So we are inspected and we do have a Code. What is said about over and undercharging is said about over and undercharging and has always been said, but there is no evidence of that that I am aware of and obviously there is judicial review of certain decisions not to charge which would give us further evidence if it was there. So far as the second part of your question is concerned on, as it were, plea bargaining, there has always been discussion between prosecutors and those defending about charging, or more likely what pleas are likely to be advanced for certain charges. It is normally, "Would you accept a plea to charge X and Y at the expense of Z?" or, "Would you accept a plea to charge A on the following factual basis?" Those discussions have gone on. It is useful that they go on because if there is agreement it can be put before the court, particularly on the factual basis, and they will always go on in an adversarial system. Should it be formalised? Well, in principle I cannot see that there is any problem with a more formal approach if that is going on informally in any event, subject to some safeguards. One is, it has got to be transparent, and secondly it has got to be put before a court, and

thirdly the court has to be the final arbiter—and I add a fourth, there must not be overcharging, in other words the Code test for the appropriate charge must lie at the heart of any system and there must never be overcharging with a view to influencing any negotiation of charges at some later stage. Those would be the conditions I would attach.

Mr Heath: I am grateful. Thank you.

Q318 Chairman: There was mention earlier of Conditional Cautions. If the conditions of the caution are not complied with, what is the CPS involvement then?

Keir Starmer: If the conditions of the caution are complied with, the suspension of the decision, as it were, to prosecute becomes permanent and there is no prosecution.

Q319 Chairman: But if they are not?

Keir Starmer: If they are not, then there can be a prosecution for the behaviour in question.

Q320 Chairman: How much of a system do you have to keep you informed of any non-compliance?

Keir Starmer: Well, very often the conditions are conditions which we have recommended in the first place and therefore we will follow them through with the police, who will implement the caution. But they will have come from us and therefore we have got an interest in ensuring that they are complied with and obviously it is our decision, if they are not complied with, to proceed with a charge.

Q321 Chairman: Does that happen in very many cases?

Keir Starmer: It happens in some. I do not have the figures before me, but certainly we could try and put them before the Committee.³

Q322 Chairman: We are interested in how it compared with Magistrates' Court sentences, which have a compliance element—a suspended sentence, for example, where it is very open, clear and transparent where compliance has not taken place. It may be less obvious in your Conditional Caution cases.

Keir Starmer: I accept it is done in a different way and it is not done in open court and therefore one does not have that degree of transparency.

Q323 Dr Whitehead: How well do you think the CPS is doing in delivering its core business, its overall performance and measurement of its performance, and indeed how is the progress in delivering its core business actually measured?

Keir Starmer: If I may, I will answer that in two ways. Since I took up office I have been visiting each of the areas in turn. There are 42 in total and Peter and I are visiting them all before April, so we are literally going to each of the 42 areas to get a hands-on view of what is going well that we should build on and where there are problems which have got to be dealt with and how we can deliver a better quality

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service. So far as performance itself is concerned, obviously the performance reviews we undertake have got to be transparent and they have got to inspire confidence. There are two elements. There is the internal element. We have quarterly performance, area performance reviews, so each area has a review and I think you have been given some documentation relating to that which I will take you to in just a moment. The broad scheme is that there is a basket of key performance indicators against which each area is rated. If there are any red ratings then at the performance review meeting, which the Chief Executive and the DPP attend, the area has to explain what action it is going to take to deal with that rating. We also identify good practice, so there is the internal aspect. Externally, of course, we have the Inspectorate who have overall performance assessments. They have done assessments, I think, in 2005, 2007 and they are due to do another one in 2010, and we take the two together. So we have got our internal process and the external process, which we would say is very robust in identifying poor performance and dealing with it.

Q324 Dr Whitehead: On your internal measures is the national rating that you set as an outcome the sum total of your local ratings, or is that an entirely differently derived measure?

Peter Lewis: May I explain, because it is something I have had a little bit more experience of? If I can explain the process, I hope this will answer the question. We set the national targets at the CPS Board. We then segment them so that we can have a rating for each target, so red, amber, going up to green. We look at each area quarterly against each of those targets to see where they are and if they are making progress. We then want to know overall, because of course we are looking at each area and we also want to see if there is a trend, is there a particular issue overall that we are missing? So, for example, we would look at proceeds of crime, we would look at each area and say whether they were doing well or not, but we would also want to know at board level overall are we getting enough money in. So we would look down the list and say, "How much money are we getting in at that stage?" So that may mean you could have, looking down the issue, quite a few areas which appear to be under-performing and we would want to tackle that with them, but because some of our stronger areas are over-performing and bringing in lots of money they would balance, so that we would know, looking down this, for example, overall we are bringing in the right sum of money but if all of our areas pull their socks up and made some more effort we could bring in even more. So that is how we approach it. On each area we are looking across all of them to see if they could improve but we are also seeing if there are bigger trends. So, for instance, if we did have a problem on proceeds of crime, as you can see from papers we have shown you that is something we are keeping a very close eye on at the moment because although some of our strong areas are doing really well, there are lots of areas that could do better.

Q325 Chairman: If you look down the column it is sickness and prosecution costs which seem to exhibit the most red squares?

Peter Lewis: Yes. Can I say on the prosecution costs we rate areas, because it is budgetary, on their predictability as well as the outcome. So say, for instance, overall in prosecution costs we are under-spending, the areas have actually got those ratings mostly because they are under-spending but it is more than their profile because we want predictability. So even though they are under-spending, we say, "You should have made a better estimate at the beginning of the year to profile your spending and therefore even though you are on the right side of the equation we still think you have not done better –

Chairman: There is more than one way of dealing with the model!

Q326 Dr Whitehead: I was observing these dashboards—it is more like a sort of aircraft control centre than a dashboard—and the appearance systematically of the national rating, at the bottom of the list is not just significantly but very substantially more rosy than appears to be the case by the aggregation of areas. Whilst I take, of course, what you are saying about the fact that some areas are over-performing, in some instances some areas would have to be over-performing very astonishingly in order to achieve the outcome at the bottom. I cannot help thinking that either that ought to be better unpacked or there does appear to be a rather rosier picture emerging at the national level than is evidenced by what is happening up and down the localities.

Peter Lewis: Can I say to begin with this is the tool that the Director and I use to drive up performance so it is not in our interests for it to be rosy at all. What we want to do is identify problems and intervene because, as you have already heard, part of our object is to drive up the performance of the core business, but we do want an overall feel particularly, say, on the money. Is this that we have got a real crisis or is this about driving up the individual performance? So we are constantly revising and looking at this, but the object is that we spend most of our time looking at the individual areas and this is just our overview. What the detail is, we get each area in and we go through each of these issues, not just looking at this rating here but we have some detailed analysis from our people about what the performance is that lies behind it, and also an explanation from the area on each of these detailed issues. So our whole focus is driving up the performance of each individual area. This is just to give us a brief picture on, say, proceeds, whether we have got a big underlying problem. But to go back to where I started from, it is absolutely not in our interests to present a rosy picture, not least because we know the inspection regime is going to look at it completely from the outside and if we have given ourselves a false picture they will very soon put us right.

Q327 Dr Whitehead: How within that arrangement do you make sure that new initiatives actually do not crown out what is longer term practice, that new work essentially becomes embodied in a contract. I know, for example, that indeed your sickness indicator has been replaced between two quarters by people measures. I am not sure whether that is a new initiative or whether that is a different way of defining an indicator.

Peter Lewis: We get reviewed quite a lot and we have obviously got the inspection looking at us. We have also got a capability review process and when we were looked at by the capability review one of the things they said to us is, “Of course it is right to look at your sickness level, that is important and we will continue to look at it,” but they said to us—and we accepted this advice—“The real important things are, have you got really engaged staff who are well-led, properly inducted and well-trained? That is actually what you really ought to be focusing on, not just the very narrow issue about who is sick, important though that is.” So in response to that we are refining these all the time and we have taken the advice that basically we need to focus on those issues which are better indicators of the overall strength of the organisation, and that seems sensible to us.

Q328 Dr Whitehead: This picture then provides us with a substantial snapshot of what is happening with the localities and what is happening nationally and what you have said in your strategy and business plan is that one of your aims will be to clearly define what is a national service locally delivered means to the CPS, and then you have gone on to say it is about “articulating the roles of different parts of the organisation and how they work together to achieve our strategy, strengthening our partnership, working in our financial capabilities.” What does that actually mean?

Keir Starmer: Can I answer this? A national service locally delivered. The way we see it is this, focusing for the first part on the national. At the national level there must be common priorities, common standards, common targets and common policies. So that runs right through the organisation nationally. There is also, obviously, a central focus through the DPP and through the Chief Executive. It is delivered locally and local is that you have the area as the principal unit with the Chief Crown Prosecutor and that is important because of the engagement with the local criminal justice boards. You have got to have an appropriate leader at the appropriate place to plug into the criminal justice system as a whole. Because that Chief Crown Prosecutor is working with other agencies in that area there is going then to be local variation. It is not like Tesco where there is one product which is simply being sold in different areas. The area has to operate in accordance with other agencies and in the area, so you will get variation and you will have discretion and you have to have that to make that effective at the local level. There will then be questions of best practice which are not within the central core targets

or standards. We encourage best practice and to that extent would see consistent best practice across areas, but the difference between this model and a model for any other national organisation is the fact of local discretion, the reasons for it and so long as one stays with the areas as the principal units, for good reason, that is probably the best way the system could be set up.

Q329 Dr Whitehead: So how does the rationale of restructuring the CPS into 15 areas fit with that description?

Keir Starmer: The principal unit is still the area, so you have still got 42 areas and each area will have a Chief Crown Prosecutor for the reasons I have given. There are now 15 groups where areas are grouped together. The driving force behind that—and this is probably the best explanation—was as follows: firstly, it was appreciated that for complex cases it was better to have an arrangement which went beyond a single area because very often crime will go beyond the area and the capacity will go beyond the area, and the policing of the offence will go beyond the area. So there was good reason to have some more serious cases dealt with on a group basis so complex case units were set up. Secondly, some functions were better carried out across a number of areas. Communications would be an example. Equality and diversity is another example, so some functions across the groups. Also, there were some resource implications, some efficiencies if certain activities were dealt with on a group basis. So it was not, as it were, a simple restructuring as such, it was, “How do we deal with those three issues and accommodate them whilst retaining the 42?” and that led to the group structure. It obviously means that we now have a group chair, who is, as it were, the senior Chief Crown Prosecutor within the group and the senior Area Business Manager, who do have oversight of what is going on in the group but it is not, as it were, a return to the 13 areas that used to be the position back in, I think, 1992. So it is a structure that is built on the 42 areas with the groups having been constructed to perform particular functions and it is pretty new but I think they are performing them well.

Q330 Dr Whitehead: Does that facilitate the sharing of good practice between areas or is it not designed for that purpose, and if it is not designed for that purpose is there any method of making sure that happens?

Keir Starmer: No, it is designed for that purpose. There is a Group Strategy Board which meets, so all of the Chief Crown Prosecutors and the Area Business Managers meet the Strategic Board, which would look at good practice across the areas within the group so that what was good practice in one area could be transferred across to another area. What the 15 groups have given us as well is the opportunity for all of the groups to get together, as it were, groups of 15, to also share best practice. That is very much part of it.

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Q331 Mr Heath: Just on one aspect of that, if I may, because I can see there may well be merits in having these groups for all sorts of purposes, but the one thing it does not seem to me to do from my knowledge of policing is to follow functional policing. As an example, Avon and Somerset, which I happen to know rather well, the crime area for Avon and Somerset does not extend down to Cornwall. In that group a Crown Prosecutor working in Tewkesbury in Gloucestershire would be actually nearer to Scotland than he would be to one working down in Penzance. So the crime area, the policing area that is logical is actually Avon and Somerset and South Wales and West Midlands because that is where the interlinks are between the serious crime.

Keir Starmer: That is why it is important to appreciate why the group structure was put in place. It was not just to mirror regional policing. Partly that is the situation with complex cases but, for example, when it comes to courts and servicing the courts, they do not correlate with the policing but we have to service the courts. For example, advocacy can be dealt with on a group basis because the courts can be serviced better. So this was not a model designed only to suit or to fit with the pattern and structures of policing. Although there is an element of that in complex cases, it is also designed for other purposes and as soon as you look at the courts and the arrangement of the courts you will appreciate that a lot of thought had to go into the particular groupings. But it is not a restructuring for the sake of restructuring, it is to fulfil these particular functions in the best way that they can be fulfilled that it was done.

Q332 Dr Whitehead: Does this structure facilitate good mechanisms for handling complaints against the CPS, and if it does are there mechanisms, for example, of peer review of complaint systems or do you think perhaps there is room for improvement in how complaints might be best handled?

Peter Lewis: May I respond on this? We acknowledge that we have got to do more on complaints. Our complaints system at the moment is too old, too defensive, it is not open and transparent enough and we know we have got to do something about that. The inspectorate are doing some work now. They have been sharing their early findings and they have made that very clear to us, if we had not worked it out for ourselves already, and we are going to respond very promptly to that. So we know that what we have got there is old-fashioned and defensive. In terms of having some external scrutiny of it, we have been looking very closely at what has been taking place in Northern Ireland, where there is a degree of external scrutiny so that somebody is permanently looking at the complaints, the way people are responding to complaints and then giving feedback to the Director. We are going to take a hard look at that because we can see there are some benefits to it, but we are very clear that this is something we have got to attend to. It is not right now and we have got to deal with it quickly.

Q333 Julie Morgan: I just want to ask you about your work in relation to victims and first of all if you could generally say what the CPS's role is in relation to victims?

Keir Starmer: Although we prosecute on behalf of the public, we do acknowledge that victims and witnesses are central to what we do. Can I provide some context? The landscape, as you know, has changed enormously over the last ten years. There have been various pieces of legislation that have dealt with victims and witnesses and there has been a whole host of initiatives by the criminal justice agencies, including the CPS, to put victims and witnesses at the heart of the criminal justice system. So we have got various policies. As you know, there is a *Prosecutor's Pledge, et cetera*. What we have focused on recently is really trying to bring this together and therefore we have got a strategy for 2008 onwards which is trying to pull together all the initiatives of the last few years into one place and then to focus on the delivery side, and so we have got a delivery unit specifically for victims and witnesses. So we do see it as central to our core business and it will continue to be so. Our focus has got to be on delivery.

Q334 Julie Morgan: Do you think the witnesses and victims are at the heart of the criminal justice system?

Keir Starmer: Yes, that is how we view it and that is how we operate and therefore we are part of the service which is offered to a victim or a witness from, as it were, point of charge onwards, as it were, walking through the system, taking into account their views and acting on that insofar as we are able to do so through any number of different measures, obviously the question of whether special measures should be put in place for a witness and/or whether arrangements can be made for them to be at court, telling them where they have got to be at court, et cetera, and ensuring that when they do get to court they are told appropriately by the Prosecutor what is going on. So we do see them as part of the criminal justice system and we accept and acknowledge that we have a particular responsibility to them.

Q335 Chairman: Is the victim in any sense a client of the CPS or not?

Keir Starmer: No, the client of the CPS is the public, but the victim or the witness is central to what we do.

Q336 Julie Morgan: Do victims understand that, because I know you are supposed to take into account the victim's views when you decide whether you are going to prosecute or not, but they do not have a determining role in that? It is quite difficult, I would have thought, for them to understand their role.

Keir Starmer: Well, we do try to explain the arrangement to them. We do undertake to take their views into account. The Code that we operate to requires us to take their views into account and we do do so. I am not saying it is a perfect system, but that is the basis on which we approach it. We act on behalf of the public but we take into account, for

obvious reasons, the views of a victim in any particular case. That is explained and we try to operate to that standard.

Q337 Julie Morgan: So if a particular course of action was not acceptable to a victim, would you then change that course of action?

Keir Starmer: Their views are listened to and taken into account. In some cases that may well lead to a particular course of action, but not necessarily. It is a factor that we take into account in the decisions we make. It is a very weighty factor, but it cannot be on our constitutional arrangements the determining factor in every case.

Q338 Julie Morgan: What feedback do you get from the witnesses and victims about, for example, their views being taken into consideration? Have you any method of getting the feedback?

Keir Starmer: Recently the OCJR did carry out a satisfaction survey of witnesses and there was 81% satisfaction. Obviously that could be improved upon, but it is not insignificant. We also ourselves have a number of mechanisms by which we try to capture the views of victims and witnesses and we have, for example, scrutiny panels looking at particular decisions after the event to learn any lessons that are there to be learnt about the way in which we have handled them, and the focus of that is very much on victims and witnesses. So there is a number of mechanisms and this is something that we are determined to get right.

Q339 Julie Morgan: You also mentioned the special measures. We were told by Victim Support and MIND that they felt there was sometimes quite a delay in recognising that special measures were needed and this meant that the courts were not able to respond. Do you have any evidence of that?

Keir Starmer: I did read that evidence and obviously that was of concern to us and we have done what work we can on it. Can I just give you these figures? In 2008 30,449 applications were made for special measures, of which 28,858 were granted. That gives you a sense that there is some really significant work being done here on behalf of victims and witnesses, and on those figures it would appear that we are identifying the right cases for special measures because the vast majority are being granted by the court. It is very difficult to gauge those cases that we have missed and we do not suggest the system is foolproof by any stretch of the imagination. There is no evidence, I think is the reality about cases which may have been missed, but we take seriously what previous witnesses have said to you as a cause for concern. To some extent it is a multi-agency problem because in the first instance the police are responsible for identifying cases where special measures might be needed, but it is also our responsibility and we accept that. We are actively considering some research to see if we can capture better some data about possible missed cases. But you do not know what you do not know. It is very difficult. As I have been able to demonstrate, I hope, there is a large number of cases in which measures have been put in

place and we are doing all we can and take very seriously the challenge of ensuring that any that have got through the net should not get through the net in future.

Q340 Julie Morgan: What training do your prosecutors have to enable them to recognise this and also generally working with witnesses and vulnerable victims?

Keir Starmer: We have training for all of our prosecutors on working with victims and witnesses, in particular on special measures. As I say, in the first instance it is for the police to identify those cases, but we do get the opportunity ourselves to consider whether there should be special measures, so we do have that in place.

Q341 Julie Morgan: Finally, the *Prosecutors' Pledge*. How does this actually work? Does every prosecutor refer to this at every point in the work?

Keir Starmer: It is a core document and it is an important document, and it is a pledge which we operate to. When there are a million cases plus going through the system there are bound to be cases where there are possible shortcomings and we are aware of that, but it is a pledge. It is a pledge that we take seriously. There is on an area by area basis a number of targets which were specifically about victims and witnesses, so we hold the areas accountable for their record on victims and witnesses and we do monitor how well they do. I am not going to pretend there are no cases that ever fall through the netting, but it is a really serious pledge that we take. The point in the delivery unit is, as it were, to make sure the pledge and the practice marry up because we are well aware of the criticism of any organisation, "You've got glorious pledges but it doesn't match up with what's happening on the ground," and the delivery unit is intended to ensure that the focus is on delivery.

Q342 Dr Palmer: Just a silly question. The *Prosecutor's Pledge* reminds me a bit of the mission statements my old company used to produce and I know that many people who worked for the company had never read the mission statement. Are you confident that every prosecutor has read the prosecutor's pledge?

Keir Starmer: I would hope they have. I could not say—

Q343 Dr Palmer: Do you send it to every prosecutor?

Keir Starmer: Well, they all do have access to it. We have been, as I have said, going round all of the areas. It is an intense piece of work from January to April, seeing as many staff as possible, and we have seen hundreds of staff. We have always insisted that the staff who are closest to witnesses and victims speak to us and we have organised for them to do so in groups where they feel able to do so openly. Undoubtedly, they are working really hard on this issue. They are really proud of what they do and so are the rest of the staff in the area. So it is something that they really take pride in and they do get positive feedback on the individual cases and they like that.

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They are more frustrated than anybody else when things go wrong in the system that frustrates the work they have been doing. When a case is adjourned where they work hard with the victim and the witness to try and get them to court and reassure them, they are really frustrated that all their work appears to have come to nought. So I cannot say that everybody has read every document and could recite it as a moment's notice, but I do really get a sense that it is really taken seriously and is recognised to be central, and rightly.

Dr Palmer: Would it be a fair summary to say that you feel the spirit of the pledge infuses the organisation but the actual pledge itself has not necessarily been –

Q344 Chairman: Dr Palmer is offering you a lifeline! Just say yes, I think.

Keir Starmer: Yes.

Q345 Chairman: Just a couple of specific points. One is, how would you respond to concerns that the CPS has an “institutional reluctance”, two words which were used to us, to see people with mental health problems as credible witnesses?

Keir Starmer: I do not think it is an institutional reluctance. We do recognise this is a really serious issue. We have devised policy which is being consulted on at the moment and we work with a number of other agencies with a specialist interest such as MIND and Scope on this, so I do not think it is institutional, but we have made mistakes and we accept that.

Q346 Chairman: One of the things the CPS has done under your predecessor, quite deliberately, is to increase the amount of in-house advocacy and of course there are arguments from Criminal Bar practitioners about the merits of this. I just wanted to put this question to you: are you satisfied that the commitment of resources devoted to advocacy has not undermined your ability to engage in case preparation as an organisation?

Keir Starmer: I have no evidence to suggest that is the case, so I have every confidence.

Q347 Chairman: You intend to continue with the policy of developing in-house advocacy?

Keir Starmer: Yes.

Q348 Chairman: Is there an optimum level it should reach?

Keir Starmer: There has been much discussion about percentages, both before this Committee and elsewhere. My priority is delivering a first-class Prosecution Service. Percentages and levels are secondary to that. Having said that, we do have a large number of in-house barristers and solicitors who have rights of audience and the rights of audience they exercise in the CPS are no different from the rights of audience they would be entitled to exercise if they were in-house in any other organisation or if they were solicitors in a solicitors' firm. That is a really important point to appreciate because if we did not allow them to exercise their

rights we would be restricting what they could do if they were acting elsewhere and we would find it difficult to attract the very best if we restricted what they could do with us in a way which was not restricted in another organisation.

Chairman: I think Mr Heath has a wider point he wants to raise.

Q349 Mr Heath: Yes. It is a question, Mr Starmer, which relates to you and your specific position and the relationship with the Attorney General. You will know that there has been concern expressed on a number of occasions about the duality of the Attorney General's position both within Government and as a law officer. There are certain decisions which are left to the Attorney General by statute. Are there circumstances in which you would make a recommendation to the Attorney General that it would be appropriate for her to leave a decision on prosecution to yourself rather than take it as Attorney General?

Keir Starmer: Well, the current Attorney General has made it clear that she does not want an involvement in individual cases in the vast majority of cases. So she has deliberately distanced herself from decision making in any individual cases and so there is a clear understanding that the decisions of the CPS are made independently of her. That is not to say there would not be consultation if a particular case was sensitive or had a high public interest factor, but it would be consultation. There is a small group of exceptional cases where national security is in play, where the Attorney General has, obviously, a much more hands-on role and/or where she has under legislation a power of consent where she is required by law to exercise that consent. But the current arrangement is that she will not be involved in the vast majority of cases.

Q350 Mr Heath: I am thinking of the difficult cases where there might be a view that the Attorney General's position within the Government might prejudice her position in respect of a decision on prosecution. Would there be any circumstances whereby you would say you would advise the Attorney General that this is an inappropriate place for her to exercise her statutory discretion?

Keir Starmer: Most of that is best put, I think, to the Attorney General. Where she has a statutory function it is not really for me to advise her about the exercise of it, although she consults us on the exercise of it. But if it is a statutory function, it is a statutory function. In sensitive cases we would discuss the best way forward.

Mr Heath: Thank you.

Q351 Chairman: I have been reminded that one of the issues that was also raised by us in evidence was the differences in, as it were, the standard of service to the police in charging, and of course you have two different systems. You have, as it were, a daytime system and an out of hours system. Do you believe that there are still significant disparities in the efficiency and quality of the charging service

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provided to the police and that either of these two systems has particular merits that recommend its wider use?

Keir Starmer: Can I just get some context to this? This was a really big change in the criminal justice system and in the relationship between the police and the CPS. It is still relatively early days. The power was altered in 2003 but roll-out was 2006. It is right to say that the initial focus was area-based with the emphasis on face to face charging advice, backed up by CPS Direct, a telephone service out of hours. That was rolled out ahead of time, but there is this factor, that it was expected that the CPS would be handling about 260,000 cases for decision. In fact we handle over half a million, about 550,000 cases, so it is more than it was thought would be the case. There are some very good early indicators and for me the most important one is the decline in the discontinuance rate, down I think from 36% to 13% and that is really important. We have been talking about victims and witnesses. Every case that is discontinued has an impact on them and to get that number down is really important. It has massive resource implications because we will have prepared all those cases and the courts will have had to handle them, so there are some really good positive results and I can say, if you have not been to the areas, locally the police and our staff say the relationship between them and the police is much better. Because they are liaising without charging they are in contact with each other and they are very obviously driving towards the same target. Now, it is true that there have been some issues about how quick the service is being provided in some areas and whether face to face is the appropriate way forward or whether telephone advice is the way forward. That is an issue we have grappled with with the police. Throughout all of this this has been a joint initiative and we have put in place the modernising charging programme, which is intended to ensure 24/7 access by the police to charging advice from duty prosecutors and predominantly that will be on the telephone but with the ability to have face to face contact for the more serious complicated cases where there is real value added in that. I do not think it is a one-size-fits-all across all areas because geography and the profile varies enormously from area to area, but there is this important initiative driven—and this is the important thing—by a standard. This is something which should be simply driven by standards, in our view, this quality of charging decision within this timeframe for the following sorts of cases, 24/7 access. The police and the CPS are working jointly on this to solve the difficulties and I am sure we are going to do so.

Q352 Julie Morgan: It has been put to me that the telephone advice offered out of hours, in particular for sensitive cases of domestic abuse or sexual abuse, has not always taken into account the vulnerable nature of the victims and the advisor has not necessarily had the specialist knowledge which a specialist domestic violence prosecutor, for example.

Keir Starmer: Yes. What I say in response to that is something I will say in response to many questions when things are said that this is not done as well as it could be, and that is that it is always important to bear in mind we are an inspected organisation, there is rigorous on-going inspection and therefore everything we do is looked at in considerable detail, and we welcome that. That is exactly as it should be. It is very positive and we learn a lot from it, but we are inspected and there was a joint inspection on charging by the inspectorate and the HMI and they produced a report and it commented favourably on the quality of CPS Direct. It is difficult to deal with suggestions that have not been looked at in that way, but there was a very extensive inspection, and a good thing too, and on CPS Direct it was a positive inspection report.

Q353 Julie Morgan: I can only say what has been reported to me.

Keir Starmer: I appreciate that and I am not saying there is nothing in it at all. It is just very difficult to deal with that. It crops up in advocacy as well, but it is important to step back and say, “This is an inspected organisation that, as it were, opens its books and everything is looked at in individual cases.” That is a really good thing because it identifies good practice and shortcomings but it is also a very good defence for us because we are able to say, “We are looked at and if you want to know how we operate, look at our internal reviews and look at the external inspection.” It is difficult to deal with information which may be right or wrong from other individuals about particular cases that fall outside of that.

Q354 Chairman: Finally, your predecessor has availed himself with some quite forthright views since he retired, but that would be a very unfair comment because in office he was quite prepared to set out his individual view of important matters of public policy affecting the office of the Director of Public Prosecutions. I just give one example. He gave quite a clear view about what he saw as the potential benefits of the use of interceptor’s evidence. He did not feel restrained from giving a view about that. Are you going to be a bureaucratic spokesman of a collectively agreed organisation or do you see the office of DPP as one which positively invites and encourages a forthright statement of what the holder believes is in the public interest?

Keir Starmer: The latter. For evidence, see the decision on assisted suicide, which turned on the public interest. We said we are going to be modern and we said we are going to be transparent and be a leader in the criminal justice system. For that reason, we put our reasoning into the public domain so that everybody could see it, comment on it and hold us to account. So I would take the same forthright approach. I hope and trust there is already evidence that that is the way I intend to lead the CPS.

Chairman: Mr Starmer and Mr Lewis, thank you both very much indeed.

Tuesday 10 March 2009

Members present

Sir Alan Beith, in the Chair

Mr David Heath
Julie Morgan
Dr Nick Palmer
Mrs Linda Riordan

Mr Andrew Turner
Mr Andrew Tyrie
Dr Alan Whitehead

Witness: **Rt Hon Baroness Scotland of Asthal QC**, Attorney General, a Member of the House of Lords, gave evidence.

Q355 Chairman: Attorney General, welcome. We are glad to have you before us again. What significance should I attach to the fact that you have not yet been in a position to reply formally to our 2008 report on the provisions relating to the Attorney General's office in the Constitutional Renewal Bill?

Baroness Scotland of Asthal: I think first, Chairman, I should say, of course, that we did invite the committee to accept as our response the answer to the consultation. A review of all the arguments that were put before this committee was undertaken and we did hope that you would agree that the answer to the consultation, the conclusion of the consultation, was a comprehensive response to the report of this committee. In fact, I think we wrote a letter asking you to accept that as our response; so you will know that the Constitutional Renewal Bill is a bill which has been under consideration for quite some time.¹

Q356 Chairman: There is an issue in it which bears particularly on the inquiry we are currently engaged in, and it relates to your relationship with the Serious Fraud Office.

Baroness Scotland of Asthal: Yes.

Q357 Chairman: Because the bill distinguishes that from your relationship with other organisations by giving you a power to halt investigations—not prosecutions, but investigations—by the Serious Fraud Office, and I think we have had difficulty all along in understanding what the basis of this is.

Baroness Scotland of Asthal: The basis upon which the Serious Fraud Office undertake their operations, as you know, is that they undertake both investigation and prosecution, and, therefore, if it was decided that it was not in the national interest to continue with a prosecution, then *a fortiori* it may then follow that you would cease that activity, and that activity may include the investigative arm of it. I think it is because of the nature of the SFO itself, but I think we made clear that if that decision was ever taken there would be an account given to Parliament that that decision had been taken and information would be provided about it.

Q358 Chairman: But if the matter on which you thought there was public interest in bringing things to a halt was being investigated by the police or by

Revenue and Customs, you would not have the power, in fact nobody, other than the Police or Revenue and Customs would have the power to cease the investigations, would they?

Baroness Scotland of Asthal: The difference is, of course, that the prosecutorial authority in the CPS has no purchase on investigations because the two are separate. The models are changing slightly, as you will know, for instance, similar to the case of Rhys Jones where the prosecution can become involved early on in the investigative process, but that is not the norm. The police will be solely responsible for decisions taken in relation to investigation and the prosecutor cannot direct the police. The reason there is a slightly different arrangement with the Serious Fraud Office is because they have that dual function.

Q359 Chairman: What worries me slightly is that if the Government thought that it was, let us say, embarrassing for an investigation to continue, in the case of the Serious Fraud Office, you on their behalf can bring the investigation to an end. If the investigation was into just a different crime and it was a crime, therefore, being investigated by the Police or Revenue and Customs, nobody would be able to say to them, "Stop investigating this because we are not going to prosecute anyway."

Baroness Scotland of Asthal: No, I think we need to be very clear. Embarrassment will never, and can never, be a *bona fide* basis upon which any prosecution could be stopped. The issue is whether that prosecution is or is not in the national interest, and you will know, Chairman, that quite often that involves national security. That is a very high end issue. An embarrassment plays no part whatsoever in the prosecutor's assessment. The prosecutor has to make two decisions: are the elements of the offence in any given case made out? That is the first step. The second step: is it in the public interest to prosecute? And there will be a whole set of reasons why it may or may not be in the public interest to prosecute a particular case, but one of those issues will be national security and only in respect of that issue has there been any reservation.

Chairman: Before we leave this issue, Mr Tyrie.

Q360 Mr Tyrie: I just wonder if you would comment on what Lord Faulkner said about this when he gave evidence to the joint committee, to which you referred a moment ago. He said, "If you are the

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Attorney General who is part of a group of politicians making decisions about, 'Should we stop a prosecution which the Prime Minister is very keen to stop?', and there is no secret about that, I cannot envisage that the public out there do not think that the fact you are part of that group has an influence on your decision."

Baroness Scotland of Asthal: I think there has to be a clear distinction between perception and fact. The fact is that each Attorney General, of whatever political complexion, is appointed on the basis that they do have the skills and acuity to make decisions independently on issues of law, and so when it comes to prosecution that function is entirely independent from government, and I know of no attorney, past or present, who has any difficulty or has had any real difficulty saying to their political friends that our job is very clear and separate from what they may wish.

Q361 Mr Tyrrie: Some have described that as an attorney's trade union: that they will speak so uniformly on the subject. Even if it is accepted that in fact that is the way matters have been conducted and that we have a system with sufficient integrity that in future it will, we are still left with the perception problem. The public do not believe it, do they? The public think that attorneys are influenced by politics.

Baroness Scotland of Asthal: I am afraid I do not necessarily agree with you, because there have been innumerable occasions, and I can speak for the 18 months or so that I have been Attorney, where the public seemed to be forever asking for the Attorney to look at something when they are worried about it. I am quite warmed sometimes when I look at the press and I understand that I have been doing all sorts of things where the public are saying, "And the Attorney should look at this and the Attorney should look at that." So I do not think it necessarily is that the public have this perception, I believe that some have this perception, and it is really important for us to help to explain and inform people about what the reality is. In fact, that is one of the big things that I got out of the review; that there is so little understanding of what an attorney general does, or a law officer does, at all, and that is something that I have tried very hard in the last few months to address, because I think educating people about the reality is really important so that the perception actually matches the reality as opposed to the other way round.

Q362 Mr Heath: We must move on to the Crown Prosecution Service, but one particular area where people have said the Attorney General must look at it, and particularly the judges have said this, is the Binyam Mohammed case.

Baroness Scotland of Asthal: Yes.

Q363 Mr Heath: And that does seem to me to be out of kilter with what you have just been describing, because there you are taking a view as to whether an investigation by the police should be instigated.

Baroness Scotland of Asthal: No.

Q364 Mr Heath: Is that not a very unusual position to find yourself in?

Baroness Scotland of Asthal: No, that is not what I am doing. I think we need to be very clear about what the court did. The court was clearly worried about whether or not they should disclose information that had been given to them, and it is quite clear from the judgment that they were not comfortable. On balance, they thought it was right and proper to honour the position that had been clearly set out to them by the Foreign Secretary in terms of the way forward, and their pragmatic response to that difficulty was to ask the Home Secretary to refer the papers to me. The reason they felt comfortable about doing that with the Attorney General is the courts absolutely understand that when an attorney general, when I come to look at those papers, that I will not look at them as a minister of the Crown, I will look at them as an independent prosecutor in relation to it and I will not investigate these issues—I have no power to investigate these issues and neither does the DPP. If a decision was made that an investigation was necessary, and that is an issue that, of course, would fall to be determined, then it would be the police who would have to investigate.

Q365 Mr Heath: I understand that. That is where I am not really clear. I am sorry, you explained it very clearly, but I am still not clear exactly what your role is. Are you assessing the chances of a successful prosecution, or are you assessing a *prima facie* case, whether there is credible evidence which should be investigated? What exactly are you assessing?

Baroness Scotland of Asthal: It is my role is to look at whether it would be necessary to refer the matter to the police. That is the position that we are at now, but I am not—

Q366 Mr Heath: Necessary in what sense?

Baroness Scotland of Asthal: If there was information disclosed in those papers, in the documents, which would require further investigation by the police.

Q367 Mr Heath: When will you make up your mind?

Baroness Scotland of Asthal: I will make up my mind when the investigations, when the perusal of the papers, the inquiries and the examination is complete.

Q368 Mr Tyrrie: Could you possibly disclose what the criteria are for a 'requirement'?

Baroness Scotland of Asthal: What do you mean by "requirement"?

Q369 Mr Tyrrie: I am using your words that "this would require investigation by the police".

Baroness Scotland of Asthal: The matter has been referred to the Director of Public Prosecutions, you will know that he is our chief prosecutor, and, as I made clear in the letter that I wrote to Andrew Dismore, he will then be able to share with me a view

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in relation to those papers and I will come to a decision in relation to whether I think there is sufficient information in those papers to require examination.

Q370 Mr Tyrie: You do understand—I am sure you do—the lack of public confidence in this area is a consequence of repeated denials of allegations of rendition, which have subsequently turned out to be true and which may lead to a level of public scepticism about the independence of your role in performing this task?

Baroness Scotland of Asthal: I certainly do not believe, and I am sure the committee will help me if I am wrong, that there has ever been a suggestion that either I or my predecessor in title have done anything to make that suggestion valid.

Chairman: At which point, I think we must return to some of the issues that we have to deal with this afternoon. Dr Palmer.

Q371 Dr Palmer: We would like to start by looking at the role of the Crown Prosecution Service in relation to the police and the courts. My understanding is that originally there was an easy to understand and fairly clear distinction that the police investigate, the CPS decide whether to prosecute and the courts hear it. The CPS role appears to have expanded so that they have say both at the police stage and the court stage. Is that a plan? Is it going to carry on expanding?

Baroness Scotland of Asthal: I think what has been very important is we have tried to improve the quality and effectiveness of prosecutions and the process overall. You will remember that, before we started work in 2003 through the National Criminal Justice Board and the Local Criminal Justice Board, there was a worry that we had a high level of ineffective trials, things were not being managed in a way that gave people a lot of confidence, particularly victims and witnesses, that these processes would be improved, and what we recognised was that it was very important to get a level of acuity, a level of judgment, at a fairly early stage so that we actually got the right charge for the right set of facts. We absolutely understood what was said to us by so many victims that they were given false promises as to what might be possible, and so getting the charge right was the best way forward, and you will know that is why we did No Witness No Justice, and it came out of that project that we understood that if you could get the charging decisions correct, then it made it much more effective and efficient and, indeed, we now have the CPS undertaking about 35% of the charging. The police still undertake about 65% of the charging. The 35% tend to be the more serious and the outcomes are much better. So if the question is: do we want to continue that efficiency and effectiveness? Yes, we do. We also know in some very serious cases, like the Rhys Jones case, that the police and the prosecutors working together from a very early stage has huge benefits in terms of successful outcomes, and that was one example of an extremely successful outcome, not just in terms of

bringing people to justice, but also for the families, who had great support both from the police but from the prosecutors as well.

Q372 Dr Palmer: If that is the case, and I do not necessarily dispute it, would it not be natural to extend it further so it is not 35% but 50% or, indeed, 100%?

Baroness Scotland of Asthal: No, I think what one really has to look at is what will be most effective and efficient. You will know from hearing the evidence that we are looking at virtual charging, virtual hearings, and it may be that, as we develop the technological and other opportunities, more of this could be done, but I think the focus—because one has to remember that the prosecutors are a relatively small group—is likely to remain on the more serious and more important cases, and I know that there is virtually a unity of view between the CPS and the police that they have probably got the balance about right at the moment.

Q373 Dr Palmer: At the moment the police basically decide, do they not? They can ask the CPS, but the CPS do not at present have the power to direct the police.

Baroness Scotland of Asthal: That is right.

Q374 Dr Palmer: Are you comfortable with that? Do you think that is the right balance?

Baroness Scotland of Asthal: I think it is working well at the moment because we have moved into an area where both the police and the CPS see real benefits in working in partnership and assisting each other.

Q375 Dr Palmer: As you may have seen in earlier evidence, there is the issue that they have slightly conflicting targets. The police have an interest in charging as many people as possible and the CPS have an interest in prosecuting as few people as they can be confident of convicting. Would it not be better if they had a joint target?

Baroness Scotland of Asthal: I think, if you look at the PSA targets we now have, they are joint in terms of confidence and delivery. I do think that I should correct the impression that you may have got. The CPS have an absolute interest in correctly charging all defendants who come within their purview, and it is getting that prosecution right; and we have seen the real benefits of that because we have probably saved, as a result of police being assisted by prosecutors in charging in the way I have just described, about £95 million, and it is likely that we will save more.

Q376 Dr Palmer: To take a specific case, it is always going to be more an art than a science. If there is a case where there is between a 40 and 60% chance of a successful prosecution, the police officer investigating would almost be falling down in his or her duty if he did not make a charge so that the CPS had the chance to study it. The CPS would be inviting an adverse effect on their record if they then pursued it, even if it was slightly under 50%.

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Baroness Scotland of Asthal: I think one of the things I have found really interesting is to see how, through the police and prosecutors working together, it is almost a cross-fertilisation of education so that they better understand the information that is likely to bring about a successful prosecution, but also, I think prosecutors are starting to better understand some of the challenges that investigators face. So I do think that what we are getting is a greater degree of acuity, judgment, sharpness about what is necessary, and what is also possible (and it is happening increasingly, of course) is that where the prosecutor believes that further or other information could be secured which would enable a successful prosecution to take place, that advice is being given to good effect. I have heard from a number of police officers. One police officer described it to me as “having our own brief now”. He said, “In the past we felt we were on our own. The defence had their brief and we did not have ours”, so having somebody there available to give them cogent advice but also, actually, to tell them when something just will not fly and why.

Q377 Dr Whitehead: You have mentioned the question of making sure that the correct charge is levelled, but, of course, with the CPS’s power to determine charges there are suggestions that that has led to a number of occasions where lesser charges are offered in return perhaps for a guilty plea and, of course, more recently, the issue of the CPS’s powers to issue conditional cautions perhaps as an alternative to a case proceeding. Are you assessing the effect that those processes might have on whether really you can say that the CPS are across the board ensuring that correct charges come about? Conditional cautions have been described in evidence to us, for example, as a triumph of pragmatism over principle.

Baroness Scotland of Asthal: I really do not think that it is a triumph of pragmatism over principle. I think it has been very, very important for us to get the correct level of charging and that we intervene at an appropriate level to reduce the likelihood of reoffending, and it is very important, I think, if you look at the way in which the criminal justice system now sees itself, that those targets that we have now created apply to all of us, not just to one of us; and the opportunity that we have to look at whether we are getting the balance right is not just me looking with the law officers department, it is also us looking together across the CJS, through the National Criminal Justice Board, through the Local Criminal Justice Boards because there are tensions. You have spoken about the not unnatural tension that there can be between the police and CPS about: “Are we getting it right?” So Jan Berry is working hard in terms of bureaucracy. I know you heard from Tim Godwin about the development that is taking place between police and CPS. So there is a lot of scrutiny and I think one of the things that I found really most encouraging is that this is a cross-discipline scrutiny, because at the end we want a system which is just, we want one that is balanced, one that looks after victims and witnesses, one that charges the right

people, hopefully, convicts the right people and gives them a sentence which is likely to reduce their likelihood to come back. So I think there is a lot of opportunity for checks and balances, and I think that that is very important if we are going to get the high quality criminal justice system which I know we all want very much.

Q378 Dr Whitehead: On the question of the correct charge and the public confidence, therefore, that the correct charge has been levied and public confidence, I guess, also in the role of prosecutors, as it were, as a gatekeeper to the criminal justice system, have you also made an assessment of the increasing impact and use of fixed penalty notices where in a sense those are alternatives to even levying a charge in the first place and increasingly straying outside the process of prosecution and, of course, under some circumstances, producing outcomes which perhaps can be seen as considerably worse for the person prosecuted or levied with a fixed notice than would be the case had the “correct charge” been proceeded with through the courts?

Baroness Scotland of Asthal: Of course, that is an issue that is being looked at. I do not think that there is any cogent evidence at the moment that there is inappropriate use of fixed penalties, but I absolutely hear what you say. For instance, there are those who, say, get an £80 fixed penalty notice and if you went to court you would perhaps get a £50 fine. There is a big issue, is there not, as to which one is right and which one is wrong, but the fixed penalty notices have been used to some good effect, lots of people prefer to pay a fixed penalty notice, particularly because it enables them to dispose of the offence, which they acknowledge they have committed, quickly and easily without the administrative burden of doing it elsewhere, and I think there is cogent evidence to show that it is effective. When you add to that the reforms we are making to the process in the Magistrates’ Courts—you will have heard of the CJSSS, which makes that process faster—I hope that if there is any incentive to use a fixed penalty notice rather than going to court, that would be reduced: because if it is going to be fast, effective and speedy, then which one you choose may be dependent on the level of the offence that you are looking at. So I think it is something that we should continue to look at. I know that the NCJB is continuing to look at it, but I think we also need to understand the huge improvements I think there have been as a result of charging. For instance, discontinuance is down from 36% before we started charging to now 13.2%. Systemically, that is a very significant improvement, but I do not think you can look at any of these strands separately. It is not as if we can say, if we just do this, it will work. We have got to improve charging, improve the understanding of which offences need to be fixed penalty, which need to go to court; we have got to improve the position in terms of the process we adopt in court and improve the data that we have in relation to the effectiveness of sentencing. All of that has to be done, there is no one quick fix, but, of course, what I am trying to do in terms of the prosecutors is make

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sure we are really honing their job, that they are effective gate keepers. We know, for instance, as a result of charging, we have significantly managed to give ourselves an assurance in terms of disproportionality; so from the recent information we have of the charges that the CPS are undertaking, we know that there does not appear to be any improper disproportionality based on race, or sex, or religion, or any other factor. So there are some assurances that we can build in to make sure that the prosecutors are doing their part and discharging their duty appropriately.

Q379 Mrs Riordan: How can the CPS provide both a consistent national service and a locally responsive service, and what would a local CPS office actually do? Can they adapt to local communities' concerns, i.e. press for the highest charges for certain crimes that that community particularly fear? Is that appropriate or even possible?

Baroness Scotland of Asthal: I think it is going to become increasingly possible for the following reasons. Firstly, no. We have devolved more and more responsibility down to the Local Criminal Justice Boards that the number of targets has been reduced. We are talking about confidence in the local criminal justice systems. That gives local actors a much better purchase about what do we need to do in our area to enhance public confidence and accountability. Also you will know that Keir Starmer and I are looking at the whole idea of introducing community prosecutors so that they really understand when we come to look at public interest: what is the public interest in my area? Are there factors that I really need to take into account so I can better understand how I make these judgments? I am actually really proud of the outreach work that the CPS are now doing in all sorts of areas in the country, going out talking to communities, getting involved in some of the safer school partnerships, understanding better how to respond to community need. So I think we do have to have clear standards which are applied everywhere, but how we deliver for a community will be very much shaped by the needs of that community, and that flexibility I think is really important.

Q380 Julie Morgan: I wanted to ask you about the role of the victim and the Crown Prosecution Service's role in relation to the victim. Obviously your office and you think it is very important that the victim is at the heart of the criminal justice system.

Baroness Scotland of Asthal: Absolutely.

Q381 Julie Morgan: Is there any conflict between taking the interests of the victim and deciding on a fair decision in law about whether to prosecute or not?

Baroness Scotland of Asthal: I do not think there is. I know that there was. You will know that one of the reasons in the past was that prosecutors were not even allowed to talk to victims; it was thought in some way that would pollute their independence and their judgment. We have clearly come to the view,

from all the information, all the evidence we have, that that is not case; that you need to be able to really understand the quality of information that you are given so you can assess the case properly, so you can explain it to the court and so that the victim really is kept at the centre of the process. I think it gives them a better opportunity to make correct judgments. You will know that prosecutors now have a specific duty to make sure the court understands the impact of this particular offence on the victim. It does not mean that in any way it impacts negatively on the duty they have to be fair in relation to the defendant and only prosecute those things that are clearly merited both because they identify offences that have been committed, but, secondly, they come to the judgment that it is in the public interest. I think that allowing the prosecutor to be the gate keeper, to be the guardian of the public interest in that regard is really important, but that means representing all the public interest, which is the victims, the witnesses and the defendant, and that fairness is something which I think is central to the prosecutorial role.

Q382 Julie Morgan: So you think the distress of the victim does not ever influence the decisions?

Baroness Scotland of Asthal: No, I do not think it does, because if you look at the way in which it is structured, the investigative officer is normally the person who will do a lot of the work. There will be the victims and witness unit who will do some of it. The real advantage I think we have now is the fact that the victim, the witness, has an opportunity to speak to the prosecutor, but that does not mean that that will improperly influence the prosecutor, who has to do a totally professional job. I think if you talk to victims, the biggest thing they say that has made a difference is that somebody talks to them and explains why things have happened. Quite often people have felt very upset, very angry, not because what was done was wrong, but because they did not understand why it was being done and how it was going to be done, and I think that has been a very, very important shift. It is probably one of the most important differences that we have been able to deliver for victims, and I do not think there is any evidence that that has improperly influenced what happens to defendants; defendants have not been harmed or disadvantaged by allowing prosecutors to give that support to victims and witnesses.

Q383 Julie Morgan: Have you done any research on that?

Baroness Scotland of Asthal: I do not know whether there is any specific research. I can only tell you the information that certainly I have been privileged to hear from victims. You will know that for four years I was the Minister at the Home Office specifically charged with the victims panel, and so I was there at the time when they were complaining bitterly that nobody spoke to them, and this was the worst thing that happened, and it was terrible and they felt left out, and I have been on that journey with them through to the position now where the same people said it is light years away from where it used to be

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and it is much better. They always say there is more for us to do, but the important thing is they are saying it is much better than it was.

Q384 Dr Whitehead: In your evidence to the committee about the CPS, remarkable by its absence was any mention of complaints about the CPS. Does that imply that you are happy with how the procedures on complaints work at the moment as far as the CPS is concerned?

Baroness Scotland of Asthal: You will know that there is at this very moment a review of the complaints procedure. I did not make any particular reference to that. I believe that the committee was aware that we were going through that process. Obviously, I am very happy to give the committee any information at the end of the review process in relation to the recommendations that will be made of that review. (Note to come)

Q385 Dr Whitehead: That review is taking place in line with the comments of the recent inspector's report?

Baroness Scotland of Asthal: Absolutely.

Q386 Dr Whitehead: And the concerns that are underlined there?

Baroness Scotland of Asthal: Yes.

Q387 Dr Whitehead: So we can anticipate that that will perhaps be looked at cognitively as far as the review is concerned?

Baroness Scotland of Asthal: Certainly there was no resistance at all from the CPS in relation to accepting the recommendation that a review should be taking place. This is now underway. There will be a review, for instance, as to what role, if any, the Attorney General should play. You will know that at the moment the only role that the Attorney of the day would have is to look to see whether the process adopted in relation to the complaint was faithfully carried out. You do not look at the substance; you look at structure of the investigative process. All of that is under review. I am not sure, obviously, what the recommendations will be about how we should restructure, but I am very clear that the CPS, and I am sure if Keir Starmer was here, he would endorse that—

Q388 Chairman: He is not.

Baroness Scotland of Asthal: He is very keen to make sure that the complaints process is as robust as it reasonably can be, and I think that is very important.

Q389 Mr Turner: What steps are you taking to ensure that there are consistent standards across public prosecutors (a) that you are going to superintend and (b) that you do not superintend?

Baroness Scotland of Asthal: One of the things that came out of the review of the Attorney General's role and the prosecutorial role is that I came to clearly understand that there was a wider prosecutorial family which I did not superintend on a statutory basis, and it seemed to me that there was a huge

amount for us to learn from each other. I also was somewhat surprised to discover that it was not usual for all of the prosecutors, not even the ones I statutorily superintend, to come together at one time to talk about common issues. Yet I was seeing them all individually and seeing that systematically there were clearly some joint issues that they would be benefiting from discussing. As a result, since I have become Attorney we have done a number of things. The first thing, as you will know from my evidence, is we have created a Strategic Board so that the prosecutors I do superintend, together with the other law officer's departments, the Treasury Solicitors, *et cetera*, can come together, but I also knew that the opportunities for prosecutors in different departments in Whitehall to come together was not as clear as it should be; so a number of things have happened. The first, as you know, in 1999 there was a decision that the Attorney General of the day should have regular meetings with the Whitehall prosecutors, and this has continued. I have also taken the opportunity to have a round table where all the prosecutors got together, and we were able to talk about some common themes and there are a number of common themes, which will—

Q390 Mr Turner: Examples?

Baroness Scotland of Asthal: Discovery, procedural information, for instance, process. All the prosecutors will be subject to those, and we have done a number of things. There is a website, a government legal service website called LION. We have created a prosecutor's part of that website so they can exchange information, they can discover and discuss appropriate points of interest between them. We have also helped to enable them to share some of the work that is being undertaken by the prosecutors I do superintend statutorily, that is the CPS, who have produced some very good information, and we are looking now to see how prosecutors, the CPS and others, might perhaps be able to get access to LION. There is a real commonality in terms of the work that is undertaken through the Whitehall prosecutors, and I think that one of the more interesting opportunities we have had in the last 18 months is to see ourselves as a family of prosecutors. We have, I think, now got a joint vision, which is certainly a first, and you will know that through the Strategic Board I have been working hard with the different directors to see what further efficiencies and effective ways we can adopt to prosecute more successfully.

Q391 Mr Turner: Do you think public awareness and understanding about the different powers and roles of organisations with prosecutorial powers, other than the CPS, is important?

Baroness Scotland of Asthal: I think it is.

Q392 Mr Turner: Why are there some that involve you and others which do not involve you?

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Baroness Scotland of Asthal: I think it is historical.

Q393 Chairman: Have you never been attracted by the Scottish system, where there is a prosecution monopoly? You would find that attractive, would you not?

Baroness Scotland of Asthal: I find partnership very attractive, because it works.

Q394 Chairman: Are those not weasel words?

Baroness Scotland of Asthal: No, they are not, because you will know that I was the minister responsible at the Home Office for creating the Office of Criminal Justice Reform and the minister responsible for driving really hard the local criminal justice process, and that is because I believed 100% in the benefits of partnership. I remember that when I started in 2003 certain people said I was sweet, and the reason they said I was sweet was I really believed that the police and the CPS and others would all work together. After 30 years of doing this, I did not think it was sweet, I thought it was essential if we were going to get a criminal justice process going. So I do not see partnership as weasel, I see partnership as the way of getting really effective productive improvements. If you look at all the prosecutors, and this is something that clearly hit me when I became Attorney, they all have the same objective in terms of identifying crime, prosecuting it fairly and successfully to the benefit of our community. They are all operating in the same courts, according to the same rules, before similar judges and, therefore, there are opportunities for us to help one another. If the agencies remained hermetically sealed within their jurisdiction, there were some real difficulties. Why? Because crime is becoming increasingly complex.

Q395 Chairman: I do not think you need to persuade us of the argument for it. Quite the contrary, I was asking the question why you do not take the further step?

Baroness Scotland of Asthal: You know that we have got the Strategic Board, we are having a review of all the operational practices that are operated by all of the prosecutors and all options are on the table, nothing is off the table. We have a Strategic Board meeting on 2 April. I have asked each of my directors to look rigorously at what they do, how they do it, with whom they do it, to look at the crime trajectory: where is the direction of travel, what sort of prosecutions will we be likely to be faced with in the next five, ten years, who is going to be doing it, what is the level of expertise we will need, what and how are we going to be able to fund those? So those radical systemic issues are now being discussed very, very critically by the prosecutorial team as a team, and it is the first time that has ever happened, and I think it has been important that we have been able to do that, because we reviewed at a very fundamental level, as a result of the review of the Attorney General's role, as to what each of us did, and why we were doing it, and how we were doing it and whether the process adopted was the right one for the 21st century. So that is exactly what we are doing now.

Chairman: In other words all options are on the table under the Attorney General's role in the same paragraph, but I am not sure I am supposed to connect them. I am going to ask Mr Tyrie to make one further quick question, because we are actually out of time.

Q396 Mr Tyrie: I want to bring you back, if I may, to your role in the Binyam Mohammed investigation. You have had those papers, those 42 documents, since last October. Is that not correct?

Baroness Scotland of Asthal: I think, firstly, to say—

Q397 Mr Tyrie: I am sorry, could I have an answer to the question of when you got the papers?

Baroness Scotland of Asthal: I do not accept it is 42 documents, and I do accept since when the matter was referred to me.

Q398 Mr Tyrie: The 42 documents is pretty much a matter of public domain. Why is it taking you so long to digest them?

Baroness Scotland of Asthal: I beg your pardon, 42 documents—

Q399 Mr Tyrie: The fact of the 42 documents is pretty much in the public domain.

Baroness Scotland of Asthal: Are you asserting that only documents that need to be reviewed are 42 documents?

Q400 Mr Tyrie: There may be others. Are you calling up further documents that, therefore, are requiring you to take an inordinate amount of time over this? Why is it that, nearly six months later, we still have not had a response?

Baroness Scotland of Asthal: The first thing to say is that I reviewed these documents and, as I indicated in the letter that the committee has before you, I have invited the DPP to assist me in that regard. What is of absolute critical importance is the review of those documents is comprehensive and accurate. It is important to get the right decision, as opposed to a decision which is precipitous, and I will ensure, and am trying to ensure, that a decision will be made as quickly as is possible, but I am sure this committee would not wish to be putting improper pressure on either me or the DPP to come to a precipitous and ill-founded conclusion.

Q401 Chairman: Come come, you are in the position that it is your job, as you have often pointed out, to resist any pressure you regard as improper.

Baroness Scotland of Asthal: Exactly.

Q402 Chairman: And I am sure you can resist any that might come from us.

Baroness Scotland of Asthal: Yes, I am just reminding this committee that there is a line which we all have to follow.

Q403 Chairman: It is in the nature of things that colleagues might from time to time not realise that they are putting improper pressure on you in your

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Cabinet position, and, therefore, you have to be in the position of saying, “No, this is where you cannot cross the line.”

Baroness Scotland of Asthal: I am telling you, Chairman, that no improper pressure has come on me from anywhere else.

Q404 Chairman: Else? This committee asking you simply to explain when your work might be completed is putting improper pressure on you?

Baroness Scotland of Asthal: No, I am just suggesting that I have given a very full and frank answer that this matter has been referred to me. I am looking at it, I am looking at it as speedily as is proper and I will, as I have made absolutely clear, report to Parliament as soon as it is complete, and I can assure you that I absolutely understand the need for expedition. I also absolutely understand the need for accuracy and the importance, whichever way this goes, of making sure that decision is the right one, and that is the criteria that I will use. It will be as speedy as possible.

Q405 Mr Heath: I certainly do not want to apply any undue pressure in terms of time; the Attorney General can take as long as she likes provided she is

assessing this requirement—the word that she used earlier—and the criteria, which she has just used, in away we understand. I am still at a loss to know whether the test that she is applying to this material is an evidential test and, if so, where the threshold is, or whether it is a public interest test, and that is a very simple question.

Baroness Scotland of Asthal: It is a public interest test in as much—. Actually, I need to be really clear. The first thing to determine is whether there is any information contained in the documents that I have which would require investigation. If there is to be an investigation, of course, the prosecutorial process in relation to it would then take place later, and at that later stage, if we went through all that, then there would be a public interest test. So I must not conflate those two, and it is easy to jump to the end without going through the process, but the first process is: is there anything at the moment disclosed in those papers which would require investigation?

Q406 Chairman: Thank you very much. It was helpful to get some clarification on these issues and we are very grateful to you.

Baroness Scotland of Asthal: Thank you very much.

Written evidence

Memorandum submitted by the Association of Chief Police Officers

This paper is the Association of Chief Police Officers response to the Justice Committee Inquiry into the Crown Prosecution Service. In particular it addresses: “How the CPS contributes to, and fits into the Criminal Justice System and how does it relate to and share information with the police.”

1. Lord Justice Auld’s Review of the criminal courts in England and Wales in 2001 recommended that the CPS should determine the charge to be brought against a suspect in all but minor routine cases, to ensure the charge was correct from the outset, to weed out non-viable cases at an early stage and ensure that remaining cases were ready for trial at the point of charge.

2. Following the Auld Review, new legislative arrangements for statutory charging were introduced by the Criminal Justice Act 2003, which shifted the responsibility for key charging decisions from the police to the CPS by amending the Police and Criminal Evidence Act 1984 (the Act).

3. This statutory charging initiative signified a significant shift in the way in which Police and CPS worked together, both at a local operational level and at a national strategic level and signalled the start of the prosecution team ethos between both agencies. It was a significant, unparalleled, collaborative project between two organisations that historically had not fully trusted each other.

4. Under the banner of the Prosecution Team Change and Delivery Board (formally the Charging Operations Board) senior representatives from ACPO and CPS have worked closely together, supported by a joint team of operationally skilled area co-ordinators, to introduce substantial change in business processes, and reaped real and measurable benefits year on year during the course of this journey. The membership of this board also consists of senior members of HMCS, NPIA and Office of Criminal Justice Reform.

5. The joint Police/CPS ‘National Prosecution Team’ has continued to oversee and support the application of Statutory Charging, and related reform initiatives impacting on the start of the criminal justice process, including Conditional Cautioning, Criminal Justice: Simple, Speedy, Summary (CJSSS), and more recently, the Streamlined Process for magistrates court cases.

6. By establishing the collaborative brand of the National Prosecution Team, we have been extraordinarily successful in changing entrenched working practices across both police and CPS, and have overcome significant cultural hurdles in both organisations to implement and operate new CJ initiatives and improve performance.

ALIGNING TARGETS

7. Recommendation 22 of the Flanagan Report recommended the need to ensure that targets and performance indicators for the Police and CPS are brought into alignment and set against the core objective of convicting the guilty. Following the publication of the Flanagan Report in February 2008, urgent work was undertaken by the National Prosecution Team in consultation with HO, NPIA and AGO to align targets.

8. The Assessments of Policing and Community Safety (APACS), the police performance framework, and the CPS performance management framework have now been aligned around the new Tier 1 and Tier 2 OBTJ rate measures. The broad Sanction Detection rate has been subordinated within APACS to a diagnostic measure, whilst the CPS has similarly decided to subordinate its attrition and discontinuance targets to diagnostic measures, thus removing the source of reported tension. As a result, both the police and CPS are working to deliver the same outcomes; forces and CPS areas are measured against the same performance indicators; and both are working together as a prosecution team to detect and bring to justice a greater proportion of serious crimes.

JOINT THEMATIC REVIEW OF CHARGING

9. In November 2008, HMIC and HMCPSI published their thematic review of charging. Whilst acknowledging the benefits of the new charging arrangements, Inspectors made a number of recommendations to substantially refine some aspects of the scheme, particularly to provide investigators with more timely and proportionate access to prosecutors; to address conflicting targets; and improve performance management.

PROSECUTION TEAM PERFORMANCE MANAGEMENT (PTPM)

10. PTPM is a joint process developed by the Prosecution Team to support the application of the Statutory Charging arrangements. It uses current data from the CPS Case Management System (CMS) to monitor the throughput and outcomes of cases passing through the charging centre into the criminal justice system. A recent development has been to provide data on improving the charge to non-prosecution rate, which is now a new diagnostic measure within APACS.

11. Pursuing a recommendation contained in the recent Joint Thematic Review of Charging, a project is shortly to be launched to re-invigorate the PTPM process to assist local police and CPS managers improve performance.

National Prosecution Team Projects

12. Detailed below are the key projects the National Prosecution Team are committed to delivering.

MODERNISING CHARGING

13. The National Prosecution Team are developing plans to Modernise Charging to improve and re-engineer the way that Statutory charging is delivered to the police as well as the use of telephony and IT based systems. This programme of work takes forward the joint Inspectorates' recommendation to improve access. Tests will commence in four Areas between November 2008 and April 2009. They will seek to introduce a more responsive Statutory Charging service that guarantees direct 24/7 access for Police Investigators to Duty Prosecutors.

14. The proposed solutions will deliver Statutory Charging through a range of face to face, telephony and electronic exchange methods depending on the type of casework involved and seeks to improve:

15. The responsiveness/timeliness of Charging to the police— offering all Officers direct contact with a Prosecutor at any time through an 'always-on' service; face to face meetings will be available in appropriate cases.

16. The quality of decision—enabling a proportionate level of service, tailored to the type of crime and the decision sought; and,

17. Productivity—ensuring the best use and match of available Police Investigators and Duty Prosecutor time on Statutory Charging

STREAMLINED PROCESS (SP)

18. SP forms part of the overall CJSSS programme of work. The Police Service had participated successfully in the piloting and rollout of CJSSS during 2006/07 but recognised that they did not have the resources to sustain their contribution due to the amount of preparation required to enable the 1st hearing to be effective. A key aim of SP is the reduction in time taken to prepare a prosecution case file, freeing up officer time to return to other duties. Under SP, proportionate and consistent file preparation will produce a file which has sufficient information to determine the appropriate charge; allow the defence to take instructions and to enter a guilty plea if appropriate and for the bench to understand the nature of the case and to assist in either sentencing or case management where a not guilty plea is entered.

19. The expected benefits from the Streamlined Process are;

20. A reduction in police officer and administrative staff time taken to prepare a prosecution file.

21. Little or no detrimental impact on the guilty plea rate at first hearing.

22. Little or no increase in the number of adjournments before trial.

23. The Streamlined Process (SP) was developed by the National Prosecution Team following short pilots of similar arrangements in London and Gloucestershire under a Quick Process scheme in 2007. SP, which is a refinement of the original Quick Process scheme commenced in Spring 08 in seven test Areas. Full coverage is now in place three of these Test Areas (including London) and plans are now well established for SP to be introduced fully across the remaining Basic Command Units (BCUs) in the four remaining Test Areas.

VIRTUAL COURTS

24. The Virtual Court couples video-conferencing and electronic document management to directly link police custody suites with magistrates' courts for first hearings. London CJB ran a prototype Virtual Court in the summer of 2007 at Camberwell Green which was judged a success by an independent evaluation and demonstrated the potential to reducing the time by which a first hearing can be taken to an average of 3–4 hours from time of charge.

25. A national pilot of the Virtual Court model has been agreed. The pilot sites will be London and Kent. Both pilot sites are expected to commence in March 2009, but this is subject to procurement time scales around the technical aspects.

26. The London pilot will cover the central and south east areas and will run for 12 months. The Kent pilot will cover the Medway area and will also run for 12 months.

January 2009

Memorandum submitted by the Attorney General

ATTORNEY GENERAL'S MEMORANDUM OF EVIDENCE TO THE JUSTICE COMMITTEE IN ITS INQUIRY INTO THE WORK OF THE CROWN PROSECUTION SERVICE

1. This memorandum sets out recent developments in the strategic direction of the prosecuting departments, under the leadership of the Attorney General, to assist the Justice Committee in its Inquiry into the role of the Crown Prosecution Service.

BACKGROUND

2. The background to this is that the Directors of the prosecuting departments (which are the Crown Prosecution Service (CPS), the Revenue and Customs Prosecution Office (RCPO), and the Serious Fraud Office (SFO)) exercise their statutory functions subject to the superintendence of the Attorney General. The Attorney General is accountable to Parliament for their work. She is responsible for safeguarding the independence of the prosecutors in taking prosecution decisions. The Attorney General receives the budget for the prosecuting departments and sets their strategic direction. The Attorney is the Government Minister responsible for prosecution. As such, she is responsible, with the Directors, for ensuring that in the development of Government policy, due account is taken of the role of the prosecutors, of the impact of policy proposals on prosecution, and of the contribution which prosecutors can make.

3. The Prosecution of Offences Act 1985, which created the Crown Prosecution Service, preserved the right for others to prosecute. The Criminal Justice Act 1987 created the SFO and the Commissioners for Revenue and Customs Act 2005 created RCPO. The CPS prosecutes cases brought by the police, immigration officers and SOCA, the RCPO cases brought by HMRC and SOCA, and the SFO cases which come within their published criteria and which they accept for investigation. The Director of Public Prosecutions (DPP) is required by law to issue a Code for Crown Prosecutors, which is applied also by the Director of the SFO and by law by the Director of the RCPO. The Code gives guidance on general principles to be applied in determining whether proceedings for an offence should be instituted or discontinued and which charges should be preferred. The DPP consults the Attorney and the other Directors about any proposed changes to the Code. The provisions of the Code and any changes are required to be included in the DPP's annual report, which is laid before Parliament. There is a Director of Service Prosecutions who leads the prosecution capability of the three Armed Services. There are other specialist prosecutors linked to departments or agencies with some responsibilities for enforcing some aspects of the criminal law, typically in a regulatory environment, such as the Health and Safety Executive.

A CONTINUING PROGRAMME OF REFORM

4. In 2007–08 the Government consulted on the role of the Attorney General. Following this consultation, the Government concluded that there was no need for fundamental change to the responsibilities of the Attorney General, nor to the basic structure of the relationship between the Attorney and the Directors. However it was identified that there was a need for reform to clarify the way in which the relationship operates, to safeguard the independence of prosecution decisions and to confirm and safeguard the Attorney General's accountability to Parliament. The Government proposed that the Attorney General be required, in consultation with the main prosecuting authorities, to produce a protocol setting out how their relationship would operate. The Government also proposed some rationalisation of the offences for which consent to prosecution is required by the Attorney or the DPP and a commitment that the Attorney would no longer have a power of direction in relation to prosecution decisions (or in the case of the SFO, investigation and prosecution decisions) save in very exceptional circumstances involving national security. It was also proposed that the Attorney General should not routinely attend meetings of Cabinet.

5. In 2008 the draft Constitutional Renewal Bill, which would give effect to these and other reforms, was subject to pre-legislative scrutiny. At the same time the Attorney has been working with the Directors on the protocol, which covers: general responsibilities; strategy, planning and performance; responsibility for prosecution decisions; development of policy; dealing with the media; and dealing with complaints. It will provide, for the first time, a clear and transparent framework for the relationship between the Attorney General and the prosecuting departments. While the draft legislation makes provision for the protocol, the protocol does not need to be on a statutory footing.

6. The Attorney General has, in parallel, been taking forward a number of other reforms to the operation of the relationship between herself and the Directors and their relationship with each other and with other prosecutors.

In 2008–09 the Attorney set up for the first time a Strategic Board, which is chaired by her and includes the three Directors over whom she exercises statutory superintendence. The Board oversees strategy, reviews and monitors financial management and performance, oversees the development and delivery of Spending Review submissions, encourages joint work where appropriate, and identifies and pursues opportunities to achieve maximum efficiency and effectiveness. The Attorney's responsibilities, and the membership of the Strategic Board, extend more widely to the Law Officers' Departments as a whole, including the Treasury

Solicitor's Department, Her Majesty's Crown Prosecution Service Inspectorate, the National Fraud Strategic Authority and the Attorney General's Office itself, but this memorandum concentrates primarily on the strategy for the prosecuting departments.

7. The Attorney General has a role also in respect of the prosecutors in Government departments and agencies, within the Government Legal Service (GLS) over whom she does not have statutory superintendence. She exercises "general superintendence" for legal and prosecutorial questions; and sponsors common approaches to sharing expertise, guidance and training, for example through the shared Prosecutors' Action Zone on the GLS website, LION. There is some work in hand looking at the arrangements for prosecution across the GLS, which will feed into the Law Officers' Departments Strategy Programme's examination of the prosecution landscape and its fitness for the future, see below.

8. The Attorney supports and encourages collaboration, coordination and joint working between the prosecutors. She oversees and coordinates legal and practice issues, both domestic and international, which cross over departments and affect all prosecutors. Her position of oversight in respect of all the prosecutors gives her a unique insight, enabling her to identify systemic issues which need to be addressed. To ensure consistency of practice across prosecutors generally the Attorney General may issue guidelines. (Examples of the kind of area where guidelines may be needed include plea negotiations in fraud cases, on which the Attorney General consulted in 2008.)

9. Another mechanism for coordination is the Prosecutors' Convention, a document to which a large number of prosecuting authorities are signatories. Its purpose is to require prosecutors to be proactive in overcoming the problems that can arise where more than prosecuting authority wishes to proceed against the same individual or company for related offences. The Convention encourages prosecutors to co-ordinate their interests and develop an agreed prosecutorial strategy with, wherever possible, one prosecutor in the lead and a single (joint) prosecution. The Convention also requires prosecutors to agree practical points such as mechanisms for information sharing, disclosure and press handling. The Convention works on the basis that prosecutors should develop effective lines of communication from an early stage. In 2008–09 the Attorney has sponsored a project to refresh and re-launch the Convention, including a workshop attended by over 40 prosecutors from prosecuting authorities as diverse as the Civil Aviation Authority, Maritime and Coastguard Agency, FSA, DEFRA, SOCA, Office of Fair Trading as well as the statutory prosecutors. The revised Convention should be adopted shortly.

10. The role and expectations of the independent prosecutor have evolved considerably since the CPS, and in their turn the SFO and RCPO were set up. The fair and effective prosecution of offenders is a more important, more demanding and more sophisticated job than it has ever been. Crime crosses borders and exploits new technology. Prosecutors need to develop the specialist knowledge and skills to take forward ever more complex cases. They need also to be able to work across many organisational boundaries, as crime is increasingly multi-faceted. For example, human trafficking may involve offences relating to employment law, non-compliance with the National Minimum Wage, immigration offences, drugs, money laundering, sexual exploitation and/or violence, requiring investigators and prosecutors to work in an increasingly joined up way. Prosecutors need also to engage with their communities to ensure that their public interest decisions are properly informed by the public's concern about crime.

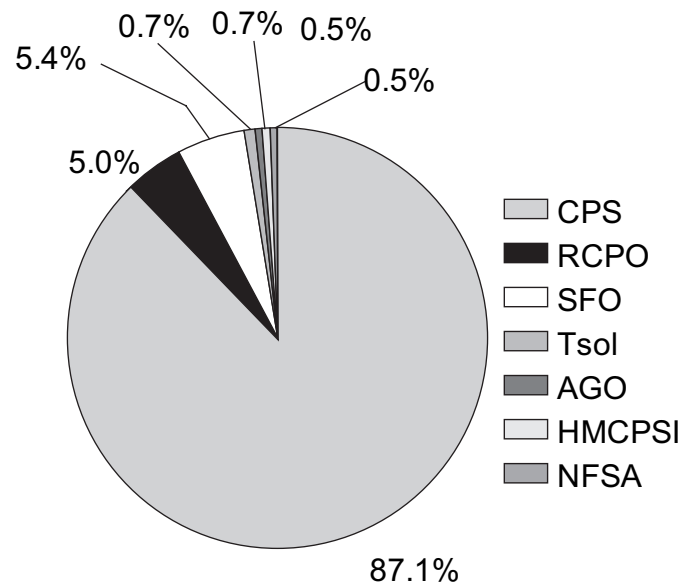
11. The prosecutors have an important position as gatekeepers to the criminal justice system, working ever more closely with investigators to ensure that prosecutions go forward with the best chance of success; as well as advising on and implementing non-prosecutorial disposals. A close, professional and robust relationship between the prosecutors and the investigators is an increasingly important aspect of justice. Early involvement of the prosecutors in an investigation helps investigators to develop an investigation strategy which enables a case to be built up effectively towards prosecution, or to identify early where an investigation is unlikely to be successful, with assessment given to the use of alternatives and ancillary orders and for example for assets to be restrained as necessary sufficiently early, to be recovered more effectively in due course. A good example of the benefits of early and close involvement is the recent prosecution in the Rhys Jones case. Eleven year old Rhys Jones was tragically shot on 22 August 2007. The next day a CPS Crown Advocate was nominated as the reviewing lawyer. After a painstaking evidence-gathering exercise, during which the CPS reviewing officer worked closely with the investigating police officers, the CPS took the decision to charge a number of individuals, all of whom were later convicted. Throughout this period, the reviewing officer made and maintained contact with Rhys Jones' parents, providing them with updates and clarification. And, ultimately, the reviewing officer, a Crown Advocate, was second junior at the trial. Prosecutors also have a role in sentencing: CPS advocates prepare a Plea and Sentence Document in Crown Court cases and appropriate cases in the magistrates' courts. This document identifies aggravating and mitigating factors in the case as well as relevant statutory provisions and case law.

12. The Attorney sees an important role for the CPS in taking forward the equality and diversity agenda, including ensuring that prosecution decisions are made fairly and proportionately. The CPS has commissioned independent equality impact assessments of charging decisions since 2004–05. The purpose of these assessments is to produce an analysis of prosecutors' charging decisions by principal categories for 'like for like' offences, comparing outcomes by ethnicity, age, gender and disability. These assessments have been built upon year on year so that the data analysed and conclusions that can be drawn have become increasingly robust and comprehensive. In 2007–08, there was no variation of charging decision by the main ethnic group of the suspect; and no significant variation in charging decisions by gender. There were some

trend differences for specific groups. There were differences between age groups, with older people significantly less likely to receive a charge than younger age groups. The disability data was not robust enough to draw conclusions. CPS is committed to further improve data collection and better understand some variations that have been identified. However, given the very important gatekeeper role that CPS performs in the CJS, these assessments provide a reassuring level of fairness and proportionality of the decisions made by the CPS and the role of CPS lawyers' decisions in helping correct and reduce disproportionality in the system, which we know to be a challenging and enduring area. The CPS has also shown leadership within the criminal justice system on responding to hate crime, ensuring that vulnerable members of society receive justice, and prosecutors continue to work in partnership to help to protect the interests of victims and witnesses. In setting the strategic direction for the prosecutors, the Attorney continues to emphasise the importance of the independent prosecutor, providing fair and objective decisions, to enable the criminal justice system to deliver positive outcomes, reducing crime and protecting the public.

VALUE FOR MONEY

13. The Attorney emphasises also the need to ensure that prosecution services are delivered with maximum efficiency. The Law Officers' Departments have the smallest budget of any department in Whitehall. In 2008–09 the overall settlement for the Law Officers' Departments was £722.8 million. It was distributed as follows:



(Note-TSoI is largely funded on a net recovery basis, with a relatively small amount of annual budget received from Parliamentary Vote for three specific areas of work, plus the AGO and HMCPSI. The NFSA is funded by around £12 million over three years from the CSR allocation of an additional £29 million over three years to implement specific recommendations from the 2006–07 Fraud Review).

This demonstrates that the CPS is by far the biggest player in delivery of prosecution services, which is underlined further by a comparison of workload data (here based on 2007–08 figures):

	Mags Courts completed cases 2007–08	Crown Court completed cases 2007–08	Confiscation orders 2007–08	Assets recovered 2007–08
CPS	966,626	96,992	4,090	£65 million
RCPO	1,018	270	485	£21.1 million
SFO	N/A	16	14	£1.1 million

14. In the CSR period 2008–11 the Law Officers' Departments have a challenging settlement, with a target to deliver 5% efficiency savings, and have now, with the rest of Government, been set a further challenge to find their share of the additional VFM efficiencies of £5 billion for 2010–11. There is clearly some scope to find efficiencies from greater sharing of back office and other services. Because of their small size the Law Officers' Departments have already developed a complex of arrangements to assist each other to achieve their business objectives, which include some sharing of services and, on occasions, loans to manage variation of spending against plans. The aim now is, urgently, to find more systematic and long term shared arrangements in order to achieve even greater efficiencies.

 PROSECUTION LANDSCAPE

15. The current arrangements for delivering prosecution services in England and Wales have developed over time and in response to particular challenges, reviews and reports. As identified above, there remains a need, more than ever, for expert provision for the most complex cases as well as for a community facing approach responding to the vast majority of cases, which may be legally more straightforward but which touch the lives and concerns of the public day to day. The current arrangements are capable of delivering this, particularly within the coordinating framework provided by the Attorney General as described above. But the Attorney has agreed with her Strategic Board that the time is right to examine the current arrangements critically, against an assessment of current and future crime trends and investigative priorities and bearing in mind increasing constraints over public expenditure, and to implement such changes as may be necessary to provide effective and efficient prosecution services for the future.

LAW OFFICERS' DEPARTMENTS STRATEGY PROGRAMME

16. Accordingly the Attorney is leading a Strategy Programme, involving all the Directors, which is, among other things, examining both the effectiveness and efficiency of current case flows and assessing the likely future demand for prosecution. It is this analysis that will enable an evidence based decision to be taken as to the most effective and efficient delivery model for prosecution going forward. Announcements about conclusions from the Programme will be made as they emerge.

Rt Hon Baroness Scotland of Asthal QC

March 2009

Supplementary memorandum submitted by the Attorney General
REPLY TO JUSTICE COMMITTEE REPORT ON THE DRAFT CONSTITUTIONAL RENEWAL BILL (PROVISIONS RELATING TO THE ATTORNEY GENERAL: EVIDENCE GIVEN ON 10 MARCH)

May I start by apologising for any misunderstanding that may have arisen from my reply to your question on Tuesday about the Government's response to your Committee's Fourth Report of 2007–08 on the draft Constitutional renewal Bill. I am grateful to you for giving me the opportunity to clarify the position.

It remains the Government's intention formally to respond to the Report once we have taken a final decision on the wider constitutional reform programme, of which reform of the role of the Attorney General is just one part. The response will be published ahead of the Constitutional Renewal Bill's introduction to Parliament.

I am very grateful to you and your Committee for your continued forbearance and for allowing this extra time in which to respond to your report.

I'm so sorry I misunderstood

Rt Hon Baroness Scotland, of Asthal QC

March 2009

Memorandum submitted by the Criminal Bar Association
WRITTEN SUBMISSIONS OF THE CRIMINAL BAR ASSOCIATION FOR THE JUSTICE COMMITTEE'S INQUIRY INTO THE CROWN PROSECUTION SERVICE

1. The Criminal Bar Association ["CBA"] welcomes the opportunity to provide submissions to the Justice Committee's comprehensive inquiry in to the Crown Prosecution Service ["CPS"]. The CBA has in the region of 3,500 members, a large proportion of whom undertake a significant amount of advocacy and advisory work for the CPS. As such the CBA is well placed to comment upon the strengths and weaknesses of the CPS. We have sought to limit our submissions to those issues upon which we have particular knowledge and have therefore isolated particular parts of the terms of reference.

2. Earlier in the year we drafted written submissions. We have amended those to take in to account recent developments and to remove those sections relating to the role of the Attorney General which we understand the Committee has already considered. These submissions should be regarded as being in substitution for the earlier submissions. The CBA would be willing to provide additional submissions either developing any points made in this document or in respect of points arising from submissions from other bodies/organizations. Further the CBA would welcome the opportunity to provide oral submissions to the Committee.

EXECUTIVE SUMMARY

3. The CBA is of the opinion that the CPS makes a significant and a positive contribution to the Criminal Justice System but that it is currently under-resourced.

4. The CPS has made improvements in the way in which it addresses the needs and concerns of victims and witnesses and in the way in which it handles rape and other sensitive cases. However, for the reasons set out at paragraphs 6 and 12–29 we are concerned that those improvements are beginning to be reversed.

5. The CBA agrees that allowing the CPS to make charging decisions is a positive step but would suggest that this has created delays in the time between the date of the offence and disposal of the case. We also recommend that an analysis be undertaken as to whether allowing the CPS to determine the appropriate charge has also resulted in under-charging or simply more realistic charging.

6. The CPS policy of using its own in-house advocates in the Crown Court is counter-productive. The flaws in this policy far outweigh any perceived advantages. Moreover the CBA is of the opinion that the increasing use of in-house advocates is being rushed and that as a result financial targets are being met by following practices that are not in accordance with the spirit of the Criminal Procedure Rules nor in the public interest.

7. The CBA is concerned at the marked discrepancy between the fees paid to Prosecution advocates and Defence advocates in the Crown Court, which is particularly marked in rape cases.

CPS CONTRIBUTION TO AND HOW IT FITS INTO THE CRIMINAL JUSTICE SYSTEM

8. The CPS plays a fundamental role in the Criminal Justice System. In the main the CPS now decides whether a person should be charged with a criminal offence and if so, with what criminal offence. The CPS brings the vast majority of the criminal prosecutions in England and Wales. The work undertaken by the CPS varies enormously both in terms of its severity and complexity.

9. In order to fulfill their onerous obligations the CPS self-evidently requires sufficient resources. The CBA has significant concerns at the fact that the CPS budget for the next three years will reduce in real terms by 3½% per annum. This is despite the fact that those cuts will take place at a time when the CPS is prosecuting cases of increasing complexity including, but not limited to, terrorism prosecutions.

10. It is perhaps therefore no coincidence that there has recently been an increasing use of cautions and non-court disposals. Further there is a perception that budget constraints may be leading to a culture of under-charging by the CPS. It may in fact be that there is now more realistic charging than used to be the case but we would ask that the Committee consider analysing the statistical data to see if the perception is accurate.

How does the CPS operate and serve its customers?

11. Over the last few years there have been a raft of measures which seek to ensure that the interests of victims and witnesses are paramount. Those include the *Prosecutors' Pledge*, the *Victim's Code* and the "No Witness No Justice" Project. It is difficult for the CBA to comment in detail on the success of those measures and we would suggest that others such as the Witness Service and Victim Support will be better placed to assist in this regard. However, it is our experience that the CPS has given both victims and witnesses an increased priority in the last few years.

Do the different staff functions of the CPS support effective case management?

12. The CBA has very real concerns at the CPS's current and future staffing policies. This concern primarily relates to the use of in-house Crown Advocates who are more generally known as Higher Court Advocates ["HCAs"].

13. The CPS maintain that the reason for using their own HCAs to undertake more Crown Court advocacy is:

- (a) that advocacy experience is likely to improve the standard of advisory work performed by the CPS's lawyers and in particular in deciding whether and with what offences to charge;
- and
- (b) that guaranteed Crown Court advocacy is likely to enhance the prospects of recruiting able lawyers to the CPS;
- and
- (c) increased continuity and ownership of cases;
- and
- (d) that it is cost effective.

14. The CBA does not accept that those arguments justify the current significant use of HCAs, many of whom are relatively inexperienced. At no stage have the CPS been willing to demonstrate to us that the true costs of using HCAs will actually save any money. The figures that are alleged to support the claimed cost saving have never been revealed. The junior bar with its low overheads is highly cost effective. A policy with such far-reaching consequences surely requires a transparent and independently audited study. It has had no such thing. Indeed the CBA strongly suspect that the CPS have not in fact undertaken a full and rigorous assessment of the advantages and disadvantages of undertaking a far greater volume of advocacy in-house as opposed to using the expertise and cost-efficiency of the self-employed Bar.

15. The introduction of the Criminal Procedure Rules in April 2005 was meant to herald a change of culture in criminal cases. Effective case management, especially in the Crown Court, is vital to the efficient running of difficult and often complex cases. There is a direct link between the efficient running of the criminal courts and the way in which the Criminal Justice System is perceived by the public whether they are victims, witnesses or jurors or more generally.

16. At the heart of effective case management is the need for the Trial advocate to be instructed at as early a stage as possible and prior to the Plea and Case Management Hearing ["PCMH"]. The PCMH is the hearing at which the Defendant will be arraigned and when the Judge will give directions to ensure that the case will be ready for Trial when it is listed. In Crown Court defence work the principle of the early instruction of the Trial advocate was enshrined in the Revised Advocacy Graduated Fee Scheme which was introduced in April 2007 following Lord Carter of Coles' Final Report.

17. Unfortunately the CPS's current practice is to instruct the Trial advocate after the PCMH. This is as a direct result of their desire to ensure that the HCAs undertake more of their own advocacy. Until recently practically every case heard in the Crown Court was prosecuted by members of the self-employed Bar. However, in the last three years the CPS has dramatically increased the amount of Crown Court advocacy which its HCAs are doing.

18. In order to ensure that the increasing using of HCAs was fair and in the interests of justice a "*Framework of Principles*" was agreed between the CPS and the Bar in 2006. A copy of that Framework is attached at Appendix One. The spirit of the Framework of Principles has been given additional status by part of its contents being included in the Criminal Case Management Framework¹.

19. Unfortunately the CPS have continually failed to comply with this Framework. In a recent example, both the prosecution and the defence briefs in a section 18 wounding case (involving a 10-suture leg wound to the defendant's cohabitee), were returned to members of the self-employed Bar a matter of days before the trial, after a number of written defence requests for disclosure of the victim's medical records to which no response had been given by the CPS. In the face of a threatened defence application for wasted costs, the prosecution abandoned the application for an adjournment to deal with the requests for disclosure and accepted a plea from the defendant to common assault, for which he was conditionally discharged. It is difficult to imagine, in those circumstances, that the interests of the victim and of justice were best served by the delay in instructing the trial advocate for what amounted to about five months. Key principles 1, 2, 5, 6 and 7 of the Framework do not appear to have been complied with in that case.

20. It is notable that the Framework is not on the CPS website nor is it referred to in the CPS's Strategy and Business Plan for 2008–11 (which was published in April 2008). In fact the sections of that Strategy and Business Plan which relate to advocacy could reasonably be regarded as being inconsistent with the Framework of Principles.

21. The statistics of one Chambers in London revealed that appreciably less than 30% of Crown Court cases received were sent prior to the PCMH. Of those that were sent to that Chambers after the PCMH a large proportion were weeks after the PCMH.

22. It is the clear view of the CBA that the speed at which the CPS have deployed their HCAs is too fast. In the CPS's Business Plan for 2007–08 a minimum target of 18% of Crown Court work to be undertaken by HCAs was set. 18% of Crown Court work by value amounts to far more than 18% of Crown Court cases. As is often the case with targets they provide perverse incentives. This is especially true in respect of HCA deployment. The drive to meet those targets means that lawyers are in Court rather than in the office reviewing and progressing cases. This leads to delays in cases being trial ready and has an inevitable and significant impact on victims and witnesses, as well as defendants who may well be in custody.

23. It is far easier to meet the financial targets if the CPS use HCAs to cover all the PCMHs and then return those cases where not guilty pleas are entered to the self-employed Bar. Such a practice means that the HCA does not attend the PCMH with any intention of being the Trial advocate. In those circumstances there is at least the risk that they will not prepare the case as if they were the Trial advocate. It also follows that such a practice, which is not in accordance with the spirit of the Criminal Procedure Rules, is also not

¹ See Criminal Case Management Framework for the Crown Court at <http://cmf.cjsonline.gov.uk/downloads/Part%202%20-%20Crown%20Court.pdf>

in accordance with the reasons given for using HCAs in the first place (see paragraph 13 above). It is hard to see how undertaking a large volume of PCMHs will assist the quality of the CPS lawyer's advice in the police station nor will the lure of lists of PCMHs and Committals for Sentence be an attractive recruitment tool. The drive to meet financial targets means that the CPS look to assess whether a defendant will plead guilty or is likely to and if so then the CPS are likely to keep the case in house for as long as possible.

24. The practice of not instructing the Trial advocate until after the PCMH, and frequently not until weeks after the PCMH, creates the possibility for miscarriages of justice. One example of this was a robbery case last year at Snaresbrook Crown Court where an HCA undertook the PCMH on 11 January 2007 at which a direction was given for the Crown to serve a bad character application relating to the defendant's numerous robbery previous convictions by 8 February 2007. That case was returned by the HCA to the self-employed Bar at 5pm on 28 March 2007, which was the night before the trial. No bad character application had been made nor had the preparation been undertaken to obtain the details of those robbery convictions. It was clear that the case had not been prepared at all by the HCA but had been left, no doubt assuming that the defendant would plead guilty. Efforts were made to obtain the material relating to the previous convictions on the morning of trial and thereafter but the Judge refused the woefully late bad character application. The defendant was acquitted. This was without doubt because the jury were not able to hear of the defendant's bad character.

25. In addition the CPS will also frequently instruct a self-employed for the PCMH at the very last minute either the day before or sometimes on the morning of the PCMH. A recent example being the instruction the night before the PCMH of a self-employed advocate in a rape case, where the date for the service of the papers had been a month earlier. Although there was a single victim, there were three counts of rape and the instructions in the brief included the remarks: "It is highly likely that the complainant will retract ... Despite my misgivings in the case, I am minded to charge the suspect ..." There was insufficient time for the advocate to give detailed consideration to the obvious shortcomings of this serious and sensitive case before the PCMH hearing.

26. The discrepancy between the length of time that the CPS advocate is instructed when compared with the Defence advocate now represents a significant inequality and one which does not sit well with putting the victim at the heart of the Criminal Justice System. There is evidence that the CPS delay instructing a self-employed advocate to conduct the trial until substantially beyond the PCMH in the hope that the defendant will plead guilty. This has the obvious disadvantages that, first, the CPS will not always be able to instruct their trial advocate of choice at short notice and second, the trial advocate is prevented from playing a vital role in the pre-trial preparation of the case. In practice, in many cases, the first key principle of the Framework is operated on the basis that the trial advocate is selected as late as possible in contested cases.

27. In addition the drive to meet targets means that the CPS often instruct their HCAs as juniors in serious cases such as murders, drugs conspiracies and frauds. When instructed in such cases the HCAs normally have a distinct lack of Crown Court trial experience. This means that they are not able to provide the assistance so badly needed by the leading Prosecution advocate. On occasions when the leader for the Crown is not present (perhaps because he/she is in the Court of Appeal) it has been known for the Trial to stop because the HCA is not sufficiently experienced to undertake the trial on their own. Such delays are costly and not justifiable and do nothing to assist the public's perception of the Criminal Justice System.

28. The increasing deployment of HCAs is also creating a longer-term problem for the effective and efficient running of the Criminal Justice System. The impact of the use of HCAs is felt most keenly by the junior Bar. There is a real risk that by removing vast swathes of work for the junior Bar that the balance and experience gained of both prosecuting and defending as a junior barrister will be lost. The effect of this is something which should not be underestimated. A linked point is that many of the HCAs have little or no experience of defending in the Crown Court. As a result they do not have the valuable perspective/independence of the self-employed Bar, nearly all of whom both prosecute and defend.

Is decision-making on charges or whether to prosecute effective?

29. As set out above the CBA does have concerns that the current budgetary constraints upon the CPS creates the potential incentive to under-charge or not to charge. Much of our information in this respect is anecdotal. There is no doubt that the Government's drive to bring more offences to justice brings with it the risk that it will be easier to bring less serious offences to justice than more serious offences.

30. Overall we feel that allowing the CPS to decide upon charge has been a positive step. But the effect of this change has also been to build in a significant delay in the time from arrest to the disposal of the case. This is because the decision over charge can frequently take a number of weeks to be made. These delays mean that cases do not get to Court as quickly as they should do and it also creates the possibility for some Defendants to commit more offences in the meantime.

How is the CPS managing key areas such as prosecuting rape and domestic violence?

31. The CBA is of the opinion that the CPS has, in general, improved the way in which it is managing rape and domestic violence cases. However, there is still much more that can be done. The CPS in London recently conducted an application process for barristers to apply to be monitored for the CPS London Rape List. However, having conducted that exercise the application process stalled for many months as there were insufficient members of CPS staff who were trained to undertake the monitoring. We are concerned that the CPS will not be able to provide sufficient monitoring to make this process work.

32. One very considerable issue which must be addressed by the CPS, as a priority, in relation to the prosecution of rape cases is the wide discrepancy between the payment for the advocates who prosecute and who defend. Following the introduction of the Revised Advocacy Graduated Fee Scheme in April 2007 the payment for Defence advocates and Prosecution advocates has differed. This is most apparent for rape cases where, for example, in trials lasting between five and 10 days (which is most rape trials) the Defence advocate is likely to be paid nearly double that of the Prosecution advocate. The inevitable effect of this discrepancy is that many advocates will wish to defend rather than prosecute those cases. At Appendix Two is a breakdown of four example rape cases to illustrate the difference in remuneration. Such inequality of payment cannot be justified for these types of cases that must be prosecuted by the most able and experienced advocates. It should also be noted that the Defence payment structure resulted from an independent review conducted by Lord Carter of Coles.

October 2008

APPENDIX ONE

CPS / BAR FRAMEWORK OF PRINCIPLES FOR PROSECUTION ADVOCATES IN THE CROWN COURT

OVERARCHING OBJECTIVES

The Bar and the CPS are committed to working in harmony together, serving the interests of the criminal justice system, and ensuring the highest possible standards of advocacy and case preparation in the criminal courts in England and Wales.

In the Crown Court, the CPS is intent on delivering an excellent prosecution service using high quality prosecutors drawn from the ranks of self-employed barristers and in-house Higher Courts Advocates (HCAs). The Bar and the CPS are committed to training of the very best standard.

To help achieve these objectives the CPS and the Bar agree this statement and will abide by the Farquharson Guidelines attached to this Framework.

UNDERPINNING STATEMENTS

The Bar understands that the CPS wishes to increase the number of in-house prosecutors with higher court rights of audience and also to deploy in-house prosecutors more often on the full range of case types in the Crown Court. This will provide career opportunities for employed barristers but will inevitably affect the amount of work available to the self employed Bar.

The CPS recognises that the self-employed Bar provides a valuable service to the CPS by offering high quality self-employed barristers to undertake prosecution work. Self employed barristers bring wide experience and understanding to their prosecution work and the CPS is determined to ensure that there remains a flourishing self employed Bar with barristers of skill and ability at all levels who are willing and able to play their part in prosecuting a full range of work for the CPS.

The CPS seeks to develop HCA deployment as an integral part of the whole prosecution function from community engagement, to advising police on major investigations, to making charging decisions, to undertaking case preparation, to dealing with restraint and confiscation, through to advocacy in all courts. Crown Prosecutors will discharge these duties more effectively having gained suitable advocacy, and in particular trial advocacy, experience.

Both the Bar and CPS recognise that for advocates to develop their ability to a high standard they need to be able to undertake a range of advocacy work commensurate with their developing skills, handling more difficult cases as their skills develop but only undertaking those cases, either alone or being led, for which they have sufficient advocacy experience. All advocates will require a range of work in order to develop their expertise.

To assist this developmental process, there may be a greater interchange of advocates between the self-employed Bar and CPS, enabling practitioners to contribute to this essential public service from either the employed or self employed sectors.

It is also envisaged that the Bar and CPS will continue to explore together initiatives, such as advocacy training, where there can be mutual benefit.

LIAISON BETWEEN THE BAR AND THE CPS

The CPS and the Bar will continue to liaise at a national and local level. In particular:

- The CPS and the Bar will, through the Advocacy Liaison Group (ALG), raise matters of concern and mutual interest affecting advocacy in the Criminal Courts, including training.
- The CPS will alert Circuit Leaders and local Bars to any significant employment initiatives for the recruitment of HCAs by the CPS, so as to enable local Bars to discuss such initiatives with the CPS, and plan barrister recruitment.
- CCPs or nominated representatives will meet with Circuit Leaders or nominated representatives on a regular basis (at Joint Advocate Selection Committees or otherwise subject to local agreement) to discuss the provision of advocacy services and to further the aims set out in this document.
- The CPS and the Bar will share information about developments in their approach to advocacy quality assurance through the ALG.
- The CPS and the Bar will continue to work to develop secure e-mail as a means of communication for the better conduct of CPS cases.

KEY PRINCIPLES

The CPS and the Bar will work together to ensure that all advocates demonstrate high standards of advocacy in accordance with the principles set out below:

1. The CPS will endeavour to identify those cases that are likely to be contested and will select the trial advocate as early as practicable. In such cases the trial advocate (whether external counsel or HCA) should be instructed as soon as possible after the case has been sent or committed to the Crown Court, and where possible at least 14 days before the PCMH, so that any necessary advisory work and case preparation can be undertaken in good time to ensure that the PCMH is effective for the proper and efficient future management of the case.
2. In those cases identified prior to PCMH as likely to be contested, and where external counsel is instructed as trial advocate, he/she should conduct the PCMH wherever possible. Where this is not possible, the CPS must be informed at the earliest opportunity to enable suitable alternative arrangements to be agreed. This may involve instructing an HCA as replacement advocate for PCMH purposes, taking into account the HCAs ability to make decisions and give the court the assistance which the trial advocate would otherwise be expected to give. The trial advocate must ensure that the case is in good order, and discuss with the advocate undertaking the PCMH any outstanding issues or potential difficulties, and the directions which the prosecution will seek. HCAs will be expected to work on a similar basis.
3. The CPS will endeavour to deliver instructions which:
 - (i) address the issues in the case including any strategic decisions that have been or may need to be made;
 - (ii) identify relevant case law;
 - (iii) explain the basis and rationale of any decision made in relation to the disclosure of unused material;
 - (iv) where practical, provide specific guidance or indicate parameters on acceptable pleas; and
 - (v) where a case is an appeal either to the Crown Court from the magistrates' court or is before the Court of Appeal, Divisional Court or House of Lords, address the issues raised in the Notice of Appeal, Case Stated, Application for Judicial Review or Petition.
4. On receipt of instructions as trial advocate, external counsel will consider the papers and provide timely advice to CPS where appropriate, preferably within five working days of receiving instructions or within any other agreed timescale². HCAs will be expected to work on a similar basis in order to identify quickly where further pre-trial work is required.
5. Advocates who attend Court to present the case at the plea stage should wherever possible also be the advocate who attends at the sentencing hearing. Advocates who attend the substantive hearing at the Crown Court should wherever possible also attend any subsequent Court of Appeal hearing.
6. External counsel should only return a CPS brief for trial in circumstances permitted under the Bar Code of Conduct (or any other applicable Code or Rules). If an advocate (whether external counsel or HCA) has professional difficulties which may cause a trial brief to be returned, he/she must raise these at the earliest possible stage with those responsible for the allocation of CPS briefs, to ensure that instructions are delivered which are well prepared and timely. He/she should also provide a full explanation of the reasons for the return. It is the intention of the CPS and the Bar that only rarely should PCMH briefs be returned and only in very exceptional circumstances should a trial brief be returned. HCAs will be expected to work on a similar basis.

² As per the Farquharson Guidelines

7. The advocate (where external counsel) must not give an indication or undertaking which binds the prosecution without first discussing the issue with the CPS. The CPS will, whenever possible, make available to external counsel a CPS lawyer or employee with sufficient authority to enable decisions (for example, as to acceptance of pleas) to be made promptly and efficiently. Where this is not possible, external counsel should ask the court to adjourn the hearing for a realistic period in order to consult with the CPS.
8. The CPS will wherever practicable, seek to have trials fixed so that the advocate instructed can prosecute the case.
9. It is essential that all advocates attending court make every effort to avoid being double booked in two or more different courts at the same time, wherever possible.
10. All advocates will abide by the *Prosecutors' Pledge* on the delivery of services to victims.
11. All advocates will seek to further the overriding objective of the Criminal Procedure Rules.

APPENDIX TWO

FEE COMPARISONS BETWEEN THE PAYMENT TO PROSECUTION AND DEFENCE ADVOCATES FOR A SAMPLE OF RAPE CASES

EXAMPLE 1

Rape case involving a single Defendant. Prior to trial there was a preliminary hearing, a PCMH and two mentions. The trial lasted 5 days with 185 pages of evidence and 12 witnesses and 6 units of taped evidence. After the trial there was a sentencing hearing.

The Prosecution advocate will receive a total of £2,305.69 (plus VAT) for all of the preparation work and for attending all of the hearings and the trial.

The Defence advocate will receive £4,597.92 (plus VAT) for all of the preparation and advisory work and for attending all of the hearings and the trial.

EXAMPLE 2

Rape case involving a single Defendant. Prior to trial there was a preliminary hearing, a PCMH and one mention hearing. The trial lasted seven days with 201 pages of evidence and eight witnesses and nine units of taped evidence. After trial there was a sentencing hearing.

The Prosecution advocate will receive a total of £3,086.59 (plus VAT) for all of the preparation work and for attending all of the hearings and the trial.

The Defence advocate will receive a total of £5,730.68 (plus VAT) for all of the preparation and advisory work and for attending all of the hearing and the trial.

EXAMPLE 3

Rape case involving two defendants. Prior to trial there was a preliminary hearing, a PCMH and two mention hearings. The trial lasted 10 days with 311 pages of evidence and 18 witnesses and 17 units of taped evidence. After trial there was a sentencing hearing.

The Prosecution advocate will receive a total of £4,647.70 (plus VAT) for all of the preparation work and for attending all of the hearings and the trial.

The Defence advocate will receive a total of £8,216.66 (plus VAT) for all of the preparation and advisory work and for attending all of the hearings and the trial.

EXAMPLE 4

Rape case involving three defendants. Prior to trial there was a preliminary hearing, a PCMH and three mentions. The trial lasted 15 days with 480 pages of evidence and 24 witnesses with 29 units of taped evidence. After trial there was sentencing hearing.

The Prosecution advocate will receive a total of £11,590.52 (plus VAT) for all of the preparation work and for attending all of the hearings and the trial.

The Defence advocate will receive a total of £15,048.99 (plus VAT) for all of the preparation and advisory work and for attending all of the hearings and the trial.

Supplementary memorandum submitted by the Criminal Bar Association

**JUSTICE SELECT COMMITTEE: INQUIRY INTO CPS—SUPPLEMENTARY MATERIAL
FROM THE CRIMINAL BAR ASSOCIATION**

On 3 February 2009 I appeared before the Committee in its review of the work of the Crown Prosecution Service (CPS).

In evidence I expressed some of the Bar's concerns about the rate of recruitment and the extent of the use of in-house advocates. Critical features of these practices include:

- The removal of opportunities for self-employed barristers to gain experience in CPS work.
- The placing in jeopardy of the future supply of advocacy services; without having the experience of prosecuting, independent barristers may not be in a position to supply the future needs of CPS.
- Making a move towards the employment of significant numbers of in-house advocates before there has been a full or an objective evaluation.

The basic framework for such an evaluation is establishing both the financial implications for the CPS of in-house advocates and the broader public interest implications. In respect of the former, the key would appear to be to establish the net benefit of employing in-house advocates.

In response to the invitation of Andrew Tyrie MP (QI02) to indicate which data we would need to establish the real cost to the CPS of employing in-house advocates, I enclose a note setting out the detail of the material required. The Bar is keen to work with the CPS to establish such an evaluation but it must rest on accurate and sufficiently detailed data. We suggest that this will best be achieved by the fullest answers to the points we have raised.

Mr Tyrie also asked for answers to two further questions: the Bar's view of the optimum balance between the numbers of self-employed and in-house advocates acting for the CPS; and the Bar's view as to the appropriate rate of recruitment of in-house advocates. These are not questions which are readily susceptible of a numerical answer. My response is that it is in the public interest that a significant proportion of prosecution work, across the whole spectrum of criminal offences, is prosecuted by the self-employed bar, and that the current rate of recruitment should be abated so that stock may be taken of what has occurred thus far.

We will be happy to begin the evaluation of this material as soon as it is available. In the meantime, please let me know if I can be of any further assistance to the committee.

APPENDIX

INTRODUCTORY COMMENTS

It is important that the Crown Prosecution Service (CPS) provide full and accurate data so that the Bar Council can have the opportunity to analyse it. It is the Bar Council's experience that data from Government in relation to criminal justice invariably requires a good deal of further examination before the full implications become apparent.

Peter Lewis, Chief Executive of the CPS, has indicated to the Bar Council in the past that it has the figures so that there should be no difficulty in providing the information.

It is important that the CPS does not give generalised, global, data eg total CPS spend on in-house advocates as against fees to self-employed Bar. This would not enable a proper comparison to be made between different types of work and different levels of seniority in the Crown Court. It is essential that in its answers to these questions the CPS gives precise data accurately broken down.

Data should be provided only for the Crown Court and not the magistrates' court.

BACKGROUND AND GENERAL ISSUES

It is important to distinguish between the costs of employing barristers and the savings (in terms of fees avoided) of utilising them.

Moreover, it is important to take account of the indirect effect of the increase in the use of in-house advocates on the continuing provision of high quality advocacy.

NET BENEFITS

As to the first point, this entails examining the imputed revenues associated with employed barristers. When this is calculated, those revenues minus costs give a measure of net benefit. If net benefit is negative, the practice of employing advocates in-house should be curtailed. Anything that adds to cost or reduces revenue makes this more likely.

If the CPS is content to employ advocates and if advocates are content to be employed, there is apparently some perceived mutual benefit. There are two issues which need to be considered:

1. Has the CPS miscalculated the net benefits to them of their in-house employment policy?
2. Are there other factors that, from a public interest perspective, need to be considered?

INDIRECT COSTS AND DISBENEFITS

In assessing the net benefits and disbenefits of the CPS increasing its workload it is very important for the Justice Committee to bear in mind that as the CPS grows there will be a series of indirect negative consequences which must be taken into account because they raise serious public interest issues.

Loss of training opportunities: If the CPS is restricting access to work which would otherwise represent a training opportunity for self-employed barristers, this clearly exerts a negative impact on the future supply of legal services. To use economists' jargon, they are imposing a negative externality and there are cogent arguments why they should be discouraged from pursuing such a policy even if it is to their own net benefit.

Loss of experience on both sides: There are other negative consequences. As the CPS grows, the less balanced will become the practices of CPS prosecutors, since an ever dwindling number will have experience of acting on both sides.

Other disbenefits have been described by Stephen Hockman QC in his March 2009 article in *Counsel* (a copy of which is attached). (*not printed*)

In public interest terms there are "externalities" which flow from an increase in the use of in-house advocates. It is therefore incumbent upon the CPS to demonstrate very clearly that there are very significant net benefits, since only if these exist could it ever be argued that the more indirect disbenefits have been outweighed.

ELEMENTS OF CPS NET BENEFIT

It may be useful to further distinguish between the costs of employing barristers and the savings (in terms of fees avoided) of utilising them. The latter constitute the imputed revenues associated with employed barristers and revenues minus costs gives a measure of net benefit. Of course if net benefit is negative the practice of employing advocates should be curtailed. Anything that adds to cost or reduces revenue makes this more likely.

QUESTIONS REGARDING COST

The list of questions below is not intended to be exhaustive. The CPS should provide to the Justice Committee and to the Bar Council so that they can be analysed, a full set of cost data relating to the use of in-house advocates in the Crown Court.

Some particular questions that should be answered are as follows:

1. Please specify the full costs of employing each level of in-house advocate working in the Crown Court.
2. Identify how each of these costs are broken down.
3. Provide data for each of: salary; other employment costs (National Insurance, hiring costs, severance costs, pension provision etc.).
4. How is appropriate allowance made for utilisation of space, office supplies, office services (IT, phone etc)?
5. To the extent not already done, please explain setting out all relevant assumptions how overhead costs are allocated and provide data showing the amounts of overhead costs allocated to in-house advocates working in the Crown Court.
6. Please explain the precise basis for the break down and set out all assumptions which are used in each allocation exercise.
7. In order that it can be seen whether costs vary with the type of work undertaken and the levels of seniority of Crown Court in-house advocates, please identify the different levels of seniority which are used within the CPS.
8. Explain how the cost varies according to the level of seniority of the advocate in issue.
9. Please explain, giving the supporting data, whether costs vary according to whether the in-house barrister acts in cases: (i) of 1–2 days; (ii) 3–5 days; (iii) 6–10 days.
10. Please explain, insofar as not already undertaken, how the above costs vary regionally.

QUESTIONS REGARDING REVENUE

In order to work out the relative efficiency of in-house advocates, please provide the following data and information:

1. On average how many days do employed advocates work per year?
2. What is assumed about: leave-taking, sick days, training days in coming to this answer?
3. What is the typical case load of an employed advocate at each level of seniority?
4. In particular how many: trials, cracked trials and guilty pleas does an employed advocate undertake: (i) per month: (ii) per six months' period; and (iii) per 12 month period?
5. Is there a detailed accounting of the "fees saved" by each employed advocate? If so, please provide this data. Can it be made available in anonymised form? If not why, not—particularly given that the GFS system would seem to permit exactly such accounting.

Peter Lodder QC
Chairman
Criminal Bar Association

March 2009

Memorandum submitted by the Crown Prosecution Service
1. INTRODUCTION

1.1 This memorandum addresses the Justice Committee's Terms of Reference set out in its Press Notice of 3 April 2008 and is structured as follows:

- the role of the Crown Prosecution Service (CPS), its organisation, its vision and priority programmes and the Code for Crown Prosecutors;
- bringing offences to justice, including casework in the magistrates' courts, diversion from prosecution, prosecuting rape and domestic violence, and its role in Anti-Social Behaviour Orders;
- working in partnership, including the National and Local Criminal Justice Boards, charging, sentencing and the courts, major terrorism cases, and with other prosecuting authorities;
- victim and witness issues;
- working with communities; and
- how the CPS is transforming itself.

1.2 The CPS will provide supplementary submissions as the Committee wishes.

2. THE ROLE OF THE CPS

2.1 The CPS was established in 1986 as an independent authority to prosecute criminal cases investigated by the police in England and Wales. In undertaking this role, the CPS:

- advises the police (including, in appropriate cases, the Serious and Organised Crime Agency) during the early stages of investigations;
- determines the appropriate charges in all but the most minor cases;
- keeps all cases under continuous review;
- prepares cases for prosecution in court and prosecutes the cases with in-house advocates or instructs agents and counsel to present cases; and
- provides information and assistance to victims and prosecution witnesses.

2.2 The CPS is headed by the Director of Public Prosecutions (DPP), Keir Starmer QC. Peter Lewis, Chief Executive, is responsible for day-to-day running of the business, and for human resources, finance, business information systems, and business development, allowing the DPP to concentrate on prosecution, legal issues and criminal justice policy.

2.3 The DPP is superintended by the Attorney General who is accountable to Parliament for the Service. The CPS has worked closely with the Attorney General in developing the proposals for reforming her role, in so far as they impact upon the CPS, and is committed to the way forward identified in the Governance of Britain White Paper and the draft Constitutional Renewal Bill. The DPP will remain accountable for all casework decisions taken by the CPS.

Code for Crown Prosecutors

2.4 Crown Prosecutors review each case in accordance with the Code for Crown Prosecutors (Annex 1) (*not printed*). They decide:

- whether there is enough evidence to provide a realistic prospect of conviction against each defendant on each charge; and, if so,
- whether a prosecution is needed in the public interest.

CPS organisation

2.5 The CPS is divided into 42 Areas across England and Wales, brigaded into 15 Groups. Each CPS Area corresponds to a police force; CPS London deals with the Metropolitan and City of London police services. Every CPS Area is headed by a Chief Crown Prosecutor [CCP], responsible for the delivery of a high quality prosecution service in their local community. A “virtual” 43rd Area, CPS Direct, is also headed by a CCP and provides out-of-hours charging advice to the police. Three HQ-based casework divisions deal with the prosecution of organised crime, terrorism and other specialised prosecution cases.

2.6 CPS key statistics are at Annex 2.

The CPS Vision, priority programmes and business plan

2.7 The CPS Vision Statement for 2008–11 is:

The CPS is a prosecution service that is confident and independent, efficient and effective—becoming truly world class. Everything that we do aims to deliver justice for all and to make our communities safer.

2.8 The CPS has identified six priority programmes to deliver this vision:

- achieving the agreed CJS PSA targets for 2008-11;
- improving performance in the magistrates’ courts;
- completing and embedding our Advocacy Strategy;
- focusing our support to victims and witnesses;
- restructuring our delivery model to improve performance, particularly on serious cases, and improving value for money;
- ensuring that we lead and manage well to get the best from all CPS people, and that we engage with them, partners and communities to improve our service.

2.9 The CPS Strategy and Business Plan for 2008–11 is at Annex 3 (*not printed*). The CPS budget in 2007–08 was £639.5 million. Following the 2007 spending review, the budget will reduce in real terms over the next three years by 3.5% per annum.

3. BRINGING OFFENCES TO JUSTICE

3.1 Annex 2 shows the success that the CPS has had in contributing to the achievement of the Government’s PSA target to bring more offences to justice and the CPS has introduced business systems and policies to underpin that success.

Optimum Business Model

3.2 The CPS’ Optimum Business Model (OBM) improves the handling of magistrates’ courts’ work. It ensures that consistent casework systems and processes are in place so that the CPS maximises effective progress in every case at every stage in and out of court.

3.3 Legal and administrative staff working closely together ensures that tasks are completed by the right person at the earliest opportunity. The Case Progression Manager, dedicated to managing trial cases proactively, is essential to improving performance and ensuring the CPS is trial ready two weeks before the trial date. The OBM was introduced in September 2007 and was implemented in all 42 Areas by September 2008.

Reviewing performance

3.4 Service performance is reviewed quarterly through the Area Performance Review (APR) process. The DPP, Chief Executive and Chief Operating Officer hold CCPs to account for service delivery against 15 Key Performance Indicators. The most recent assessments are at Annex 4 (*not printed*).

3.5 The Committee sought information about prosecuting rape and domestic violence. Both are addressed in the new Violence Against Women (VAW) Strategy and Action Plans with targets for reducing unsuccessful outcomes (Annex 5) (*not printed*).

Prosecuting rape cases

3.6 The CPS Policy for Prosecuting Cases of Rape recognises rape as one of the most serious offences and aims to prosecute each case effectively. The policy statement (Annex 6) (*not printed*) covers the handling of all rape cases against male and female victims of all ages, and is currently being updated.

3.7 Every CPS Area allocates rape cases to specialist prosecutors. Rape specialists work closely with the police to ensure all possible avenues of evidence are explored and the correct charge identified. They take responsibility for the case from the pre-charge stage to its conclusion.

3.8 The CPS is also:

- issuing a new Rape Manual for prosecutors providing guidance on dealing with medical, scientific and forensic evidence;
- preparing a joint manual with the National Police Improvement Agency setting out best practice for both investigators and prosecutors;
- rolling out a new training course for all rape specialists, with external speakers on rape trauma syndrome and the role of the forensic physician;
- providing additional training for in-house rape specialist High Court Advocates, similar to that provided by the Bar;
- working with ACPO and the medical profession to devise a protocol regarding the handling of sensitive images in rape and other cases.

3.9 The CPS instructs advocates who possess the necessary expertise and knowledge for rape prosecutions; who understand the impact that a serious sexual offence can have on a victim; and who deal with witnesses in a sensitive and dignified manner. Advocates must have attended a CPS-accredited training course that includes the substantive law, the experience of victims and CPS policy. All advocates are monitored to ensure they reach the required standard.

3.10 The CPS monitors all rape files for compliance with CPS policies and good practice. In addition, a sample of files is monitored for the quality of decision-making by each Area's rape coordinator who provides a quarterly report detailing local performance. This work is overseen nationally by the Rape Prosecutions Delivery Unit that provides advice and support on all aspects of rape prosecutions. This recently included a model Protocol between the police and CPS in the Investigation and Prosecution of Rape Allegations (Annex 7) (*not printed*) for CPS Areas and their respective police forces to adapt and implement locally.

Prosecuting Domestic Violence

3.11 The CPS is committed to raising the awareness and effective prosecution of domestic violence. Comprehensive policy and guidance (Annex 8) (*not printed*) on domestic violence were first developed in 2001. A Domestic Violence Coordinator (DVC) was appointed in every CPS Area to oversee the policy's implementation. These documents were revised in 2005, and are being revised again this year. A Domestic Violence Training Manual was developed jointly with the National Policing Improvement Agency. Good Practice Guidance was also issued to CPS Areas in 2005 (Annex 9) (*not printed*).

3.12 The CPS has built capability in its staff through training for all prosecutors and caseworkers and for prosecutors working in specialist domestic violence courts. The CPS has been a driving force in the developments of these specialist courts.

3.13 Unsuccessful outcomes in domestic violence cases have fallen significantly since 2004–05, alongside a reduction in cases that have been discontinued and those which resulted in a bind-over against a background of increasing volumes.

<i>Timeframe</i>	<i>DV Numbers</i>	<i>% successful</i>	<i>% unsuccessful</i>	<i>Discontinuance</i>	<i>Bind overs</i>
Q2 2008–09	17,071	72.1%	27.9%	21.7%	4.4%
Q1 2008–09	16,368	72.5%	27.5%	21.3%	5.3%
Q4 2007–08	16,368	70.7%	29.3%	22.9%	5.3%
2007–08	63,819	68.9%	31.1%	24.7%	6.6%
2004–05	34,839	55.0%	45.0%	37.0%	18.2%

3.14 There is a target to reduce unsuccessful domestic violence prosecutions to 28% for 2008–09 and the figures for the first two quarters of 2008–09 show that target has already been exceeded.

CPS involvement in diversion from prosecution

3.15 Since 2003, the CPS has been able to recommend that a suspect is conditionally cautioned in appropriate circumstances, rather than charged. A conditional caution suspends prosecution pending the successful completion of the conditions within a specified timeframe.

3.16 Full implementation in all CPS Areas was achieved in April 2008. Up to September 2008, 11,004 conditional cautions have been issued.

The CPS and Anti-Social Behaviour Orders

3.17 The CPS has two roles in respect of ASBOs:

- applying for orders following convictions; and
- prosecution breaches of ASBOs.

3.18 The CPS has a network of specialist ASB prosecutors. Their main duties are to:

- provide expert assistance to CPS prosecutors on ASB cases;
- prosecute sensitive or high-profile ASB cases;
- identify and deliver ASB training needs; and
- work with partner agencies to identify and respond to local communities' concerns about ASB issues.

3.19 Guidance was issued to prosecutors (latest edition issued in May 2008—see Annex 10) (*not printed*) on applying for ASBOs in criminal cases and prosecution of breaches.

3.20 The CPS ASB Delivery Unit trains prosecutors and works closely with the Home Office and HM Courts Service. During 2007–08, the CPS jointly ran workshops for ASB practitioners looking at the effective use of the tools and powers available to address anti-social behaviour.

4. CPS WORKING IN PARTNERSHIP

National and Local Criminal Justice Boards

4.1 The CPS is an integral part of the criminal justice system (CJS) and works jointly with its CJS partners through the National Criminal Justice Board and 42 Local Criminal Justice Boards. These Boards agree and implement joint actions to address key criminal justice issues, such as public confidence and victim and witness care.

Charging

4.2 The CPS is at the centre of the criminal justice process, routinely providing face-to-face charging service to 43 police forces, and other forces such as British Transport Police.

4.3 The CPS is responsible for authorising the charge in all but the most minor cases. CPS advice at the early investigative stages enables cases to be strengthened and prevents weak cases proceeding to court and being subsequently discontinued.

4.4 Before the introduction of statutory charging, 36% of cases heard in the magistrates' courts were discontinued. At March 2008, that figure had dropped to 13.2%.

4.5 CPS Direct was introduced to support this significant change in responsibilities. This telephone-based service enables the CPS to provide charging advice to the police 365 days a year, 24 hours per day. During 2007–08, CPS Direct provided 135,813 charging advices. The service is highly responsive and on average a police officer is able to speak to a Duty Prosecutor within 15 seconds of the call being presented.

Prosecutors and sentencing in the courts

4.6 Prosecution advocates have a role in assisting the court to reach appropriate sentencing decisions although it is not the prosecutor's role to recommend any particular sentence: see the Code for Crown Prosecutors (Annex 1) (*not printed*) and the Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise (2005) and its Addendum (2007) (Annex 11) (*not printed*).

4.7 CPS advocates prepare a Plea and Sentence Document in Crown Court cases and appropriate cases in the magistrates' courts. This document identifies aggravating and mitigating factors in the case as well as relevant statutory provisions and case law.

Electronic information sharing

4.8 The CPS Case Management System (CMS) and Management Information System were major projects that were delivered on time and within budget. They support the CPS and police by enabling electronic information sharing through:

- providing prosecutors working in over 300 Charging centres with access to CMS, email and electronic legal reference services;
- introducing technology to 140 home-based prosecutors who deliver CPS Direct; and
- developing an interface that enables police IT systems (NSPIS, NICHE and Consortium) to send information to CMS.

4.9 The interface will be live in 39 Areas by the end of 2008; the major constraint on information sharing is that the interface does not currently support the return of information from the CPS to the police.

4.10 Keeping victims and witness informed about their cases is being enabled through the Witness Management System (WMS) in use in 165 Witness Care Units (WCUs) staffed by Police (70%+) and the CPS.

Terrorism cases

4.11 All counter terrorism cases in England and Wales are prosecuted by CPS Counter Terrorism Division in headquarters. Prosecutors work very closely with Counter Terrorism Command, the Counter Terrorism Units and the Intelligence Services at all stages of a case, often before any arrest is made. Further, where appropriate, prosecutors will engage foreign partners to assist in building the strongest possible case. Twenty-four hour cover is provided for police to seek expert advice.

4.12 The workload of the Division has grown considerably since its inception and there have been high profile terrorism trials running almost continuously since early 2005. Guilty verdicts and pleas are currently being returned in approximately 90% of cases.

Other prosecuting authorities

4.13 The CPS' relationship with 16 UK-based prosecutors is covered by the *Prosecutors' Convention* (Annex 12) (*not printed*). The Convention addresses the situation when two or more prosecuting authorities wish to proceed against a suspect. It recognises the need for effective and early lines of communication, lists the issues to be covered in preliminary inter-agency discussions and requires each authority to identify a liaison officer to be responsible for effective communication and for monitoring compliance.

SFO and RCPO

4.14 The CPS works closely with the Revenue and Customs Prosecution Office (RCPO) and the Serious Fraud Office (SFO) on a range of issues common to prosecutors:

- CPS, RCPO and SFO are currently working together on defining security requirements and the approach to security of case information when dealing with external partners, such as the Bar;
- CPS and RCPO are members of a CJS inter-agency contingency planning forum to ensure the continuation of criminal justice services through periods of possible disruption; and
- CPS, RCPO and SFO are working on a procurement exercise seeking external suppliers to provide scanning and electronic presentation of evidence services for major prosecutions.

Fraud prosecutions

4.15 The CPS Fraud Prosecution Service prosecutes serious fraud cases and works closely with other prosecuting agencies, the City of London Police Economic Crime Unit, and with the Metropolitan Police who provide 75% of its cases. A joint vetting committee decides the allocation of cases between the CPS, SFO and other prosecuting authorities and considers issues of common interest.

Serious Organised Crime Agency

4.16 Cases investigated by the Serious Organised Crime Agency (SOCA) are prosecuted, either by the Organised Crime Division in CPS headquarters or RCPO, depending on the nature of the offences (Annex 13) (*not printed*). The need to decide on case allocation arises when expertise is shared between prosecutors; this typically relates to drug and gun trafficking and money laundering. Other cases are allocated to the prosecuting agency which has the expertise in those matters; for example, the CPS deals with human trafficking, immigration, hi-tech crime, non-fiscal fraud and work from the Child Exploitation and Online Protection Centre.

5. VICTIM AND WITNESSES

5.1 The CPS is committed to improving the level of service to victims of crime and launched a new Victim and Witness Strategy in June 2008. This will provide a framework to support delivery of existing commitments and identify a clear direction for future policy development to improve the service provided yet further.

5.2 The CPS does not act for victims or their families as solicitors do for their clients (see paragraph 5.12 of the Code), but when considering whether it is in the public interest to proceed with a prosecution, Crown Prosecutors always take into account the consequences for the victim of whether to prosecute and any views expressed by the victim or victim's family.

The Prosecutors' Pledge

5.3 The 2005 *Prosecutors' Pledge* (Annex 14) (*not printed*) sets out the support that victims can expect from the CPS. This includes: taking into account the impact on the victim or their family when making a charging decision; informing the victim where the charge is withdrawn, discontinued or substantially altered; where practicable, seeking the victim's view when considering the acceptability of a plea; introducing him/herself to the victim at court; answering any questions the victim has about court procedure; challenging derogatory mitigation; explaining any judgement; and advising the victim about the appeal process.

Direct Communication with Victims

5.4 Direct Communication with Victims (DCV) was introduced in September 2002. It allows the CPS to communicate directly with victims of crime rather than via the police. The CPS' DCV commitments are contained in the Code of Practice for Victims of Crime (Annex 15) (*not printed*). The CPS must:

- communicate any decision to drop or substantially alter the charge direct to the victim rather than via the police;
- give an explanation of the decision with as much detail as possible of the reasons for the decision, bearing in mind the sensitive and important issues which may restrict the amount of information that can be given;
- if a further explanation is required, offer a meeting in cases in certain serious categories of cases. The relevant offences are set out in the Code. Further, the reviewing lawyer has discretion to offer a meeting if it is considered appropriate in the circumstances of the case; and
- notify the victim of a decision where a Crown Prosecutor takes the decision that no criminal proceedings should be brought following receipt of a full evidential report, and other than in discussion with the Investigating Officer. In other situations, before charge, it is the responsibility of the police to inform the victim of the decision.

No Witness, No Justice Witness care programme

5.5 The "No Witness, No Justice" (NWNJ) victim and witness care programme is a CPS and Police initiative. Following a successful pilot study, 165 Witness Care Units were established across England and Wales by the end of 2005.

5.6 The Units, staffed by trained specialists, provide a single point of contact for victims and witnesses from the point of charge until the conclusion of the case. Dedicated Witness Care Officers ensure the individual needs of victims and witnesses are identified and met so that they have all the support and information they need to enable them to attend court and give their best evidence. They provide a tailored service, for example, making practical arrangements such as pre-trial familiarisation visits to the court, childcare, transport etc. Witness Care Officers keep victims and witnesses informed of case progress including the outcome and thank them for giving evidence.

5.7 This initiative has led to an increase in witness attendance from 77% to 85% (national average).

Victim Focus

5.8 In October 2007, the CPS introduced a new enhanced service to bereaved relatives in which, in certain cases, the reviewing lawyer offers to meet bereaved relatives to explain the charging decision, the court process and to highlight the opportunity to make a victim personal statement (Annex 16) (*not printed*).

5.9 Eligible cases are: murder; manslaughter; corporate manslaughter; familial homicide; causing death by dangerous driving; causing death by careless driving while unfit through drink or drugs; and aggravated vehicle taking where death is caused and the case is heard in the Crown Court.

5.10 By making a victim personal statement, the bereaved family can say how the crime has affected them. Following conviction, and before sentence, the prosecutor will—with the court's approval—either read the statement to the court or invite the judge to read the statement in private.

Post-acquittal meetings

5.11 Post-acquittal meetings are an extension of the service to bereaved relatives introduced under Victim Focus. A meeting is offered post-acquittal to answer any questions the family may have about the trial (Annex 17) (*not printed*). Arrangements are being piloted in CPS Merseyside, Northumbria and South Wales. Eligible offences are those under the Victim Focus scheme.

Pre-Trial Witness Interviews

5.12 National implementation of the pre-trial witness interview initiative (PTWI) was completed in April 2008.

5.13 The external evaluation of the pilot schemes confirmed that: “PTWI improves the quality of prosecutorial decision-making both by strengthening cases that proceed to trial and by timely rejection of evidentially weak cases.”

5.14 The purpose of the interview is three-fold:

- to assess the reliability of the witness’s evidence;
- to assist the prosecutor in understanding complex evidence; and
- to explain court process and procedures to the witness.

5.15 A witness cannot be compelled to attend an interview and they are held at the prosecutor’s discretion. Interviews are recorded and the tape is disclosed to the defence.

Special Measures

5.16 Special measures were introduced in 1999. They assist vulnerable and intimidated witnesses to give their best evidence in criminal proceedings. The current internal CPS guidance (which supplements inter-agency guidance contained in *Achieving Best Evidence*) is at Annex 15 (*not printed*). Prosecutors work with the police at an early stage to identify whether a witness may be eligible for special measures and, if so, which measures are the most suitable.

5.17 The witness may ask to meet the CPS prosecutor to discuss the decisions made concerning special measures either before or after the prosecutor applies to the court for the special measures direction. The evidence in the case should not be discussed.

5.18 Information concerning these meetings is included in: “*Early Special Measures Meetings between the Police and the Crown Prosecution Service and Meetings between the Crown Prosecution Service and Vulnerable and Intimidated Witnesses: Practice Guidance*” (Annex 18) (*not printed*). A revised version is being published in early 2009.

Child victims and witnesses

5.19 The CPS has issued a number of policies which set out how it prosecutes cases involving children and young people as victims and witnesses: *Children and Young People* (Annex 19) (*not printed*); *Jerome—a Witness in Court* aimed at 10–14 year olds; and *Millie the Witness* aimed at 5–9 year olds (Annexes 20–21) (*not printed*).

5.20 Guidance to prosecutors: *Safeguarding Children—Guidance on Children as Victims and Witnesses* (Annex 22) (*not printed*) was issued in 2008. It provides detailed guidance on the role of prosecutors in safeguarding children.

Victims of hate crimes

5.21 Under the Single Equality Scheme 2006–10, the CPS has published policies aimed at specific groups of victims or victims of a particular type of crime: race and religious hate crime; homophobic and transphobic hate crime; disability hate crime and crimes against older people (Annexes 23–25) (*not printed*).

6. HOW THE CPS RELATES TO COMMUNITIES

6.1 The CPS has a Community Engagement Strategy which sets the high level framework for CPS engagement at national, Group and Area level (Annex 26) (*not printed*). The Strategy seeks to embed a multi-strand approach to community engagement, including: the provision of information as appropriate; community consultation on key policies and practices; and community participation through Hate Crime Scrutiny Panels at Area Level, Community Involvement Panels at Group Level and a Community Accountability Forum nationally.

6.2 The CPS emphasises engagement with groups with historically low levels of confidence in the CJS or who have historically been excluded or under-represented, including BME, faith, LGBT communities, disabled groups, women's groups and more recently older people's interest groups.

6.3 The CPS has made significant progress in recent years in involving community stakeholders in informing key CPS public policies. This approach often involves:

- establishing project groups involving CPS staff and community stakeholders in considering policy proposals together from the outset;
- consulting on draft policies with a wider range of stakeholders, through public consultation; and
- complementing the public consultation with more qualitative and innovative consultation methods including interactive workshops with consultees; focus groups to probe more qualitative concerns; and wider project reference/advisory groups bringing in a broad range of consultees.

6.4 Elements of this approach have been applied in developing CPS Domestic Violence Policy; all CPS Hate Crimes Policies; and work on the VAW Strategy. This approach will be applied to the revised CPS Rape Policy and the Domestic Violence Policy, and was singled out for particular commendation in the Capability Review (June 2007). Further, the Commission for Racial Equality has recognised that the CPS is "at the forefront of good practice in the field of equalities in employment".

CPS Single Equality Scheme and the linked Community Accountability Forum

6.5 The CPS adopted a Single Equality Scheme (SES) in December 2006 addressing our commitments to equality in respect of age, disability, ethnicity, gender, religious or belief and sexuality (Annex 27) (*not printed*).

6.6 The SES was positively received by community stakeholders across the equality strands. It was cited in the Government's Green Paper on a Single Equality Act as a case study of a SES in advance of the legal requirement to produce such schemes.

6.7 Following the launch of the SES, the CPS established a national Community Accountability Forum, comprising 15 community stakeholders across the six equality strands together with senior CPS representatives and CPS equality Staff Networks.

CPS Area and Group focused activities

6.8 Between 2005 and 2007, the CPS ran a number of community engagement pilots to inform future practice at Area level. Following independent evaluation, the CPS agreed to roll out:

- Hate Crime Scrutiny Panels at the 42 Area level; and
- Community Involvement Panels at the 15 CPS Group level.

6.9 Simultaneously, the CPS issued:

- *Community Engagement Handbook* (Annex 28) (*not printed*).
- *Community Engagement Good Practice Guidance* (Annex 29) (*not printed*).

Annual community engagement at Area level

6.10 Since 2005, each CPS Area must undertake community engagement with a diverse range of local communities on an annual basis; to evaluate this engagement; and to use the results of this engagement to inform service improvements. This has led to a step change in performance on community engagement across CPS Areas.

7. HOW THE CPS IS TRANSFORMING ITSELF

7.1 The CPS is committed to developing its staff and the Service to fulfil its vision of becoming a world class prosecution service. It is transforming itself through a number of important initiatives.

Advocacy strategy

7.2 The CPS is deploying an increasing number of Higher Court Advocates (HCAs) to handle a growing volume of Crown Court cases previously handled almost exclusively by the self-employed Bar.

7.3 The CPS currently has 977.6 Higher Court Advocates (FTE as of 30 September 2008). In Q1 and Q2 of 2008–09 they presented 79,947 hearings in the Crown Court compared to 131,463 hearings in 2007–08 and 21,111 Crown Court hearings in 2004–05. These include 4,373 Crown Court trial hearings in Q1 and Q2 as compared to 6,083 hearings in 2007–08 and 276 Crown Court trial hearings in 2004–05.

7.4 This development enables the CPS to operate continuous case ownership of more serious casework which strengthens consistency of decision-making.

7.5 The CPS is committed to developing the full potential of its advocates and has a comprehensive training and development plan for this.

Associate Prosecutors (Designated Caseworkers)

7.6 As of 30 September 2008, the CPS has appointed 423.4 (FTE) Associate Prosecutors (formerly known as Designated Caseworkers) who are trained members of staff and able to appear in the magistrates' courts to prosecute a defined range of non-contested proceedings. The Criminal Justice and Immigration Act 2008 extends their powers to allow them, in due course, to conduct trials of summary non-imprisonable offences and introduces a regulatory regime.

7.7 The CPS has trained all Associate Prosecutors (APs) in the new non-contested powers and has developed a training programme for APs who now undertake contested prosecutions.

Proactive Prosecutor Programme

7.8 To ensure consistent and high quality decision-making across the Service, the CPS introduced the Proactive Prosecutor Programme (PPP) in 2005, a tailored training and development programme for all prosecutors. We have built on this programme by embedding the PPP method in our training courses and introducing new case studies to update and reflect current priorities.

People Strategy

7.9 The CPS People Strategy sets out the vision for how we want to lead, manage and engage staff to build capability to deliver the CPS business strategy 2008–11. Since May 2008, there have been a number of significant developments, including a new leadership model designed, agreed and introduced throughout its Human Resources and Development Processes and bespoke leadership development has been introduced for all senior grades and for operational managers.

7.10 Significant progress has also been made in the Workforce Planning Project and Hermes (the new HR IT system). Both of these projects are important in improving the CPS' ability to have the right people with the right skills, in the right place at the right time to deliver the service required.

Staff Survey 2008

7.11 Following publication of the results of the latest Staff Survey in August 2008, workshops have taken place around the country and actions arising have been included in Area and Headquarter planning processes. Challenging targets for improvement have been agreed by the Board, with the intent that that CPS results will be in the top quartile of the Civil Service by 2012.

8. CONCLUSION

8.1 Last year's Capability Review described the CPS as: "a well led organisation with many strengths, which has enabled it to transform its role, performance and reputation over recent years". Building on that endorsement, the CPS continually considers ways to improve its delivery further in order to deliver its vision of becoming truly world class and to ensure that it is a prosecution service of the highest possible quality, serving all members of the community.

December 2008

ANNEXES

<i>Annex</i>	<i>Description</i>
1	The Code for Crown Prosecutors http://www.cps.gov.uk/publications/docs/code2004english.pdf

Annex 2

CPS KEY FACTS

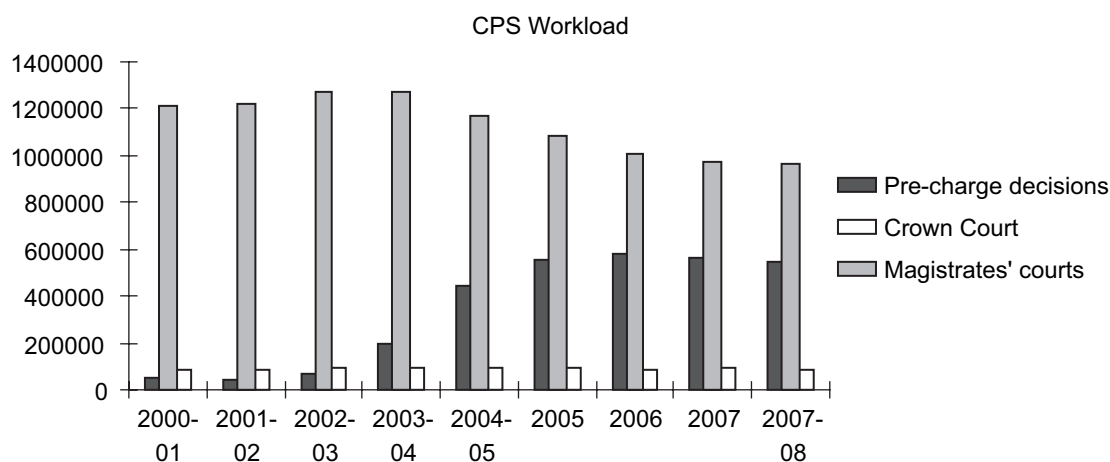
CPS PEOPLE

At the end of March 2008, the CPS employed a total of 8,351 people, 54 fewer than at the same time the previous year. This includes 2,913 prosecutors and 4,946 caseworkers and administrators. Over 91% of all staff are engaged in, or support, frontline prosecutions. The CPS had 945 prosecutors able to advocate in the Crown Court and on cases in the Higher Courts and 419 DCWs able to present cases in magistrates' courts.

CPS PERFORMANCE

Workload

In the year to March 2008 (2007–08), the CPS provided 547,649 pre-charge decisions, and completed 966,626 cases in magistrates' courts and a further 96,992 in the Crown Court. This compared with a 2006–07 workload of 584,216 pre-charge decisions, 987,981 cases in magistrates' courts, and 89,408 cases in the Crown Court.



Source: CPS

Case Outcomes

There were continued improvements in reducing unsuccessful outcomes in CPS cases**. Magistrates' courts unsuccessful outcomes represented 14.3% of the total compared with 15.8% in the preceding year and 23.6% in 2001–02, meeting an annual target of 15%.

Crown Court unsuccessful outcomes represented 20.7% of the total compared with 22.7% in 2006–07 and 26.8% in 2001–02. Annual performance in the Crown Court fell just outside the target of 20%: however, performance for the quarter January–March 2008 improved to 19.7%, falling just within target.

Total unsuccessful outcomes in magistrates' courts and in the Crown Court represented 14.9% of the total compared with 16.4% in 2006–07.

Guilty pleas and contests

During 2007–08, 641,541 defendants pleaded guilty to all charges in magistrates' courts, representing 66.4% of all completed cases, and a further 10,477 (1.1%) entered guilty pleas to some charges while others proceeded to a contested hearing. 139,618 cases (mostly minor motoring matters) were proved in the absence of the defendant, representing 14.4% of the total. 57,557 cases proceeded to a contested hearing with no guilty pleas being entered, representing 6% of the total.

In the same period, 66,700 defendants pleaded guilty to all charges in the Crown Court, representing 68.8% of completed cases, and a further 2,542 (2.6%) pleaded guilty to some charges while others proceeded to a contested hearing. 14,164 cases proceeded to a contested hearing with no guilty pleas being entered, representing 14.6% of the total.

CPS RESOURCES

The CPS budget for 2005–06 to 2007–08 was set in SR 2004 and the budget for 2008–09 to 2010–11 was set in the Comprehensive Spending Review (CSR) 2007:

	2005–06 Outturn	2006–07 Outturn	£ million 2007–08 Forecast Outturn	2008–09 Baseline Budget	2009–10 Baseline Budget	2010–11 Baseline Budget
Administration Costs	54	52	53	56	55	53
Programme Costs	546	564	584	580	575	571
Total	600	616	637	636	630	624

Over the three years up to 2007–08, the SR 2004 settlement represented an average increase in real terms of 3% a year.

***Unsuccessful outcomes represent all prosecution outcomes other than a conviction (including discontinuances and acquittals after trial). These are expressed as a proportion of all defendant cases completed during the period.*

Annex	Description
3	The CPS Strategy and Business Plan 2008–11 http://www.cps.gov.uk/publications/docs/business_plan_08_11.pdf
4 & 4a	Area Performance Assessments and Performance Dashboard http://www.cps.gov.uk/publications/performance/area_performance/08-09_q2.pdf
5	Violence Against Women Action Plan http://www.cps.gov.uk/publications/equality/vaw/vaw_strategy.html
6	CPS Policy for Prosecuting Cases of Rape http://www.cps.gov.uk/consultations/rape_paper.html#_02
7	CPS/Police Protocol in the Investigation and Prosecution of Rape Allegations http://www.cps.gov.uk/publications/agencies/rape_protocol.html
8 & 8a	Policy and Guidance for Prosecuting Cases of Domestic Violence 8: http://www.cps.gov.uk/publications/prosecution/domestic/domv.html 8a: http://www.cps.gov.uk/publications/prosecution/domestic/domv_guidance.html
9	Domestic Violence Good Practice Guidance http://www.cps.gov.uk/publications/docs/dv_protocol_goodpractice.pdf
10	Anti-Social Behaviour Guidance http://www.cps.gov.uk/legal/a_to_c/anti_social_behaviour_guidance/index.html
11 & 11a	Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise (2005) and its Addendum (2007) http://www.cps.gov.uk/legal/s_to_u/sentencing_-_general_principles/index.html#a22
12	Prosecutors' Convention http://www.cps.gov.uk/publications/agencies/prosconv.html
13	Director's Guidance to SOCA as to the appropriate prosecutor (not printed)
14	The Prosecutors' Pledge http://www.cps.gov.uk/publications/prosecution/prosecutor_pledge.html
15	Code of Practice for Victims of Crime http://www.cps.gov.uk/victims_witnesses/victims_code.pdf
16	Victim Focus—victim personal statement http://www.cps.gov.uk/legal/v_to_z/victim_focus_scheme/
17 & 17a	Post-acquittal meetings and Pilot Guidance (not printed)
18	Practice Guidance on Early Special Measures Meetings (not printed)

<i>Annex</i>	<i>Description</i>
19	CPS Policy on Children and Young People http://www.cps.gov.uk/victims_witnesses/children_policy.pdf
20	Jerome—a Witness in Court http://www.cps.gov.uk/victims_witnesses/jerome_english.pdf
21	Millie the Witness http://www.cps.gov.uk/victims_witnesses/millie_english.pdf
22	Safeguarding Children—Guidance on Children as Victims and Witnesses http://www.cps.gov.uk/leqal/v_to_z/safeguarding_children_as_victims_and_witnesses/
23	CPS Policy on Race and Religious Hate Crime http://www.cps.gov.uk/publications/prosecution/rrpbcbook.html
24	CPS Policy on Homophobic and Transphobic Hate Crime http://www.cps.gov.uk/publications/docs/htc_policy.pdf
25	CPS Policy on Disability Hate Crime http://www.cps.gov.uk/publications/docs/disability_hate_crime_policy.pdf
25a	CPS Crimes against older people policy http://www.cps.gov.uk/publications/docs/caop_policy.pdf
26	Community Engagement Strategy (not printed and not available on internet)
27	Single Equality Scheme http://www.cps.gov.uk/publications/docs/ses_2006_2010.pdf
28	Community Engagement Handbook (not printed and not available on internet)
29	Community Engagement Good Practice (not printed and not available on internet)

First Supplementary memorandum submitted by the Crown Prosecution Service

INQUIRY INTO THE WORK OF THE CROWN PROSECUTION SERVICE

I am writing to follow up my appearance before the Justice Committee with Peter Lewis on Tuesday 24 February. At the hearing, Peter and I gave commitments to the Justice Committee on the specific issues set out below.

Prosecutors in England and Wales

Mr Tyrie requested a list of prosecutors (see Q301—uncorrected evidence 186). There is no definitive list of organisations that institute prosecutions in England and Wales. The common law power to instigate private prosecutions is preserved under section 6(1) of the Prosecution of Offences Act 1985 and it is used by a number of organisations who otherwise do not have the statutory power to prosecute, and this makes it difficult to produce an exhaustive list. However, I have listed those prosecutors in England and Wales who are signatories to the Prosecutors' Convention and members of the Whitehall Prosecutors' Group, they are as follows:

- Crown Prosecution Service;
- Revenue & Customs Prosecutions Office;
- Serious Fraud Office;
- Department for Business, Enterprise & Regulatory Reform;
- Department for Environment, Food & Rural Affairs;
- Office of Rail Regulation;
- Service Prosecution Authority;
- Maritime & Coast Guard Agency;
- Environment Agency;
- Gambling Commission;
- Financial Services Authority;
- Department of Work & Pensions;
- Department for Transport;
- Health & Safety Executive;

Vehicle and Operator Services Agency;
Driver & Vehicle Licensing Authority.

In addition, prosecutions are instigated by local authorities (including trading standards authorities), other regulatory authorities, and a number of voluntary organisations such as the RSPCA.

Common standards and efficiency

Mr Tyrrie asked a number of questions about uniting organisations with prosecuting powers under one prosecutor and he asked if we could look at levels of efficiency between prosecutors as part of the current review being led by the Attorney General (see Q302—307). As Peter Lewis said at the hearing, the Attorney General, together with her Directors of the superintended prosecution authorities, will consider a number of issues as the review proceeds and this will include consideration of which prosecution models will deliver the greatest efficiency for the superintended prosecution authorities.

Non-compliance with Conditional Cautions

In response to a question from you (see Q320/321) about the number of cases where there is non-compliance with the Conditional Caution, I said I would provide you with the figures.

In 2008, according to the CPS' figures, there was a total of 8011 Conditional Cautions made by the CPS. Out of those, there was non-compliance in 707 cases subject to a Conditional Caution. Where there was non-compliance reported, 571 cases were prosecuted, 126 cases were not prosecuted, and 10 had their conditions varied.

If the CPS decides not to prosecute in such cases, it will tend to be because the prosecutor considers it would not be in the public interest to prosecute. This could be because the person has met most of the conditions in the Conditional Caution, for example, paying all but the final instalment of the compensation to the victim and the prosecutor is satisfied with the explanation about why the balance has not been paid. Another reason could be that the original offence is not proceeded with, as the person is subject to prosecution for more serious offences.

I hope this information is of assistance to the Committee and I look forward to seeing the report in due course.

Keir Starmer QC
Director of Public Prosecutions

18 March 2009

Second supplementary memorandum submitted by the Crown Prosecution Service

JUSTICE COMMITTEE ENQUIRY: CPS

I understand the Solicitor General wrote to you last week informing you of the decision to bring together the Revenue and Customs Prosecutions Office and the Crown Prosecution Service in order to deliver enhanced prosecution services to the public.

Notwithstanding this development, I am aware that your Committee has expressed an interest in the way in which the CPS and the RCPO work together, and I know that Alun Michael questioned my fellow Director, David Green QC, on this issue [Qs 243 and 244] when David gave evidence before you on 10 February.

I am writing to let you know that since then David and I have personally discussed one case in order to decide which of our two Services was the more appropriate to handle the proceedings. The discussions were entirely appropriate and we agreed that the CPS should have conduct of the case.

Although not a SOCA case, and therefore technically outside the Memorandum of Understanding that exists between the CPS and the RCPO to determine case allocation, I am sure that your Committee was enquiring about our relationship in general. On that basis, I thought I should bring this case to your attention. I am sure you will understand that it would not be appropriate for me to go into further specific detail.

More generally, I am delighted to take this opportunity to support David's evidence to you that there are very good working relationships between the CPS and the RCPO and that there is "genuine cooperation and it works" to cite his words to you.

Keir Starmer QC
Director of Public Prosecutions

14 April 2009

Third supplementary memorandum submitted by the Crown Prosecution Service

On 25 June 2009 the CPS published information on the costings methodology used to support the deployment of Crown Advocates (not printed) (<http://www.westminster.gov.uk/councilgovernmentanddemocracy/councils/decisionmaking/enforcement.cfm>)

CPS ADVOCACY QUALITY MANAGEMENT STRATEGY

ISSUE

1. The purpose of the paper is to provide information on the implementation of the CPS Advocacy Quality Management Strategy.

BACKGROUND

2. The Advocacy Strategy Programme (ASP) was established in April 2005 with the aim of transforming the CPS into a Service that routinely conducts its own high quality advocacy in all courts, and across the full range of cases.

3. Quality has always been an integral part of this vision and the Service's approach to deploying in-house advocates. A range of mechanisms have previously been used to ensure advocacy quality, including the CPS staff Performance Appraisal System and the receipt of judicial and court user feedback. The role of the judiciary in providing such feedback was formalised in November 2007 with the implementation of the "Protocol for Routine Liaison Meetings between Resident Judges and Chief Crown Prosecutors", issued jointly by the CPS and the Senior Presiding Judge.

4. The Service's significant increase in the volume and range of hearings dealt with by in-house advocates has now led to the formal establishment of a structured Advocacy Quality Management Strategy. This will provide a cohesive and nationally consistent approach to assessing, monitoring and supporting the further development of in-house advocates.

The Advocacy Quality Management Strategy (AQMS)

5. Implementation of the AQMS began with the development and introduction of the Crown Advocate (CA) Progression Framework in all CPS Areas in July 2008. This Framework categorises all CPS CAs into one of four Levels, which identify the skills, competences and usual range of work that is expected of advocates at each stage of their professional development. These Levels are aligned with those used by the CPS in grading members of the self-employed Bar who are instructed in prosecution work.

6. The operation of the Framework is now to be underpinned by a national system for advocacy assessment and the provision of targeted training for the support and further development of CPS in-house advocates, in both the Crown Court and the magistrates' courts.

7. The national advocacy assessment system will be implemented by a network of internally appointed, dedicated Advocacy Assessors. The network will comprise of one Advocacy Assessor for each of the 15 CPS Groups (with two for CPS London and CPS West Midlands). These will be supplemented by independent External Assessors who will:

- Complete a proportion of advocacy assessment each year, enabling a comparison of findings and ensuring objectivity and consistency; and
- Quality assure the performance of the internal assessors.

8. Advocates are to be assessed against the National Standards of Advocacy, which were revised in September 2008 and which are published on the CPS website. The results of assessments conducted across the Groups will be monitored centrally on a quarterly basis and reported to the Director of Public Prosecutions.

CPS Involvement in the Legal Services Commission QAA Pilot

9. Since 2006 the Ministry of Justice/LSC have been developing a quality assurance scheme for all publicly funded criminal defence advocates working in the Crown Courts and above. The QAA Scheme (as it is referred to) is being developed in partnership with the Bar Council, Law Society, Bar Standards Board, Solicitors Regulation Authority, Legal Services Commission and Ministry of Justice. The initial recommendation was for the QAA Scheme to be in place by April 2007 but progress has been slower than anticipated.

10. In December 2008, the Director of Public Prosecutions indicated his support for a set of common standards which apply to all advocates, whether in-house or external, and whether acting for the defence or the prosecution, on the basis that it would contribute to driving up standards across the board and makes

it easier for advocates to move across the public and private sectors. Supported by the senior judiciary, the CPS proposed that the QAA and CPS schemes should move towards convergence within an agreed timeframe.

11. To that end, the CPS is working closely with the Legal Services Commission to bring about consistent approaches to grading and assessment based on similar standards and criteria.

12. The intention is that there should be convergence between the QAA and CPS Schemes by Summer 2010 if possible, although the timeframe is not fixed. A converged scheme would share the following common features:

- common levels (1–4);
- common/comparable core competencies; and
- common/comparable assessment methods.

13. The CPS is involved in the QAA Pilot, which is now underway. The QAA Pilot schemes are taking place in London, Birmingham, Winchester and Cardiff. The CPS is continuing its involvement with in-house advocates participating in those pilots.

14. The CPS also maintains representation on the QAA Reference and Working Groups. These are monitoring the pilot schemes and will, in due course, consider the appropriateness of various assessment tools for advocacy quality.

RECENT DEVELOPMENTS

CPS Internal Advocacy Assessors (IAAs)

15. The recruitment process of IAAs is nearly complete with applications sought from suitably experienced Crown Advocates.

16. Successful applicants will devote 75% of their time to the Assessor role within their Group. They will be expected to spend the remainder of their time on operational Crown Court advocacy-related duties within their Area–Group to maintain their own levels of skill and experience.

17. The Project Team is finalising Instructions and Guidance to Assessors and managing the final preparation of training for the IAAs. The aim is to have all IAAs appointed and trained by the end of July 2009, and the project is on target to achieve this.

Procurement of External Assessors

18. The procurement process for the engagement of External Advocacy Assessors is underway and responses are currently undergoing the final stages of evaluation. The External Service Provider selected will be one of a number of highly regarded Law Schools. The project is on target to have External Advocacy Assessor arrangements in place by the end of July 2009.

Advocacy Strategy Programme

18 June 2009

Memorandum submitted by Help the Aged

1. Help the Aged is pleased to provide this short memorandum on the work of the Crown Prosecution Service (CPS) in response to the Justice Committee's call for evidence.

2. Help the Aged has been hugely impressed by the work that the Crown Prosecution Service has done in the recent years to introduce and then implement a Single Equality Scheme across all six equality "strands". In particular we have welcomed the work that has been done to understand and act upon age equality issues.

3. All too often the lack of a formal legal framework for age equality means that even those authorities who do attempt to introduce equality schemes across all strands neglect key issues relating to age.

4. To this end we have particularly welcomed the work which came out of the Single Equality Scheme to develop a new Public Policy Statement "*Prosecuting Crimes against Older People*" and new guidance on prosecuting crimes against older people. We are pleased that this policy sets out how the CPS will deal with crimes against older people and how older people who are victims of or witnesses to crime will be supported. It is extremely positive that the CPS is committed to taking age equality issues into account in all of their prosecution policies.

5. We are also pleased that the CPS will be monitoring cases involving crimes against older people to assess the impact of the public policy statement. We look forward to seeing the results of this monitoring activity.

6. We note from the Annual Report on the Single Equality Scheme published in June 2008 that a review of retirement is due to be completed in October 2008. Help the Aged hopes that the CPS will soon end the ageist practice of forcing staff to leave work on the basis of their age alone.

7. We believe the strong commitment to equality amongst senior leaders in the CPS has been a key factor in ensuring the success of the organisation's equality scheme.

8. Whilst, of course, there are areas of the CPS scheme which could be improved—for example more could be done to tackle the problems of multiple discrimination—we believe the CPS should be commended for its positive approach to equality issues.

October 2008

Memorandum submitted by the Magistrates' Association

EVIDENCE TO JUSTICE SELECT COMMITTEE INQUIRY ON THE WORK OF THE CPS

The Magistrates' Association represents some 28,000 magistrates sitting throughout England and Wales.

Magistrates encounter CPS prosecutors whenever they are sitting in a criminal court. There are three types of prosecutors, salaried CPS lawyers, salaried associate prosecutors (formerly known as designated case workers), and agency staff who may be Counsel.

We welcome the opportunity to contribute to the Justice Committee inquiry and wish to comment on the following matters:

- Associate Prosecutors.
- Use of agency staff.
- Prosecutors as sentencers.
- Undercharging.
- The effect of any upturn in crime during a recession.

ASSOCIATE PROSECUTORS

The Association has met with CPS staff to discuss the pilot programmes currently underway whereby Associate Prosecutors may take responsibility for conducting trials in non custodial matters. We await the results. Although not enthusiastic about the extension of the powers granted to Associate Prosecutors during 2008 following the passage of the Criminal Justice & Immigration Act, the Association welcomes the need for professional registration through ILEX and the setting of minimum standards of fitness that will result. With adequate training and selection, Associate Prosecutors should be able to provide a satisfactory level of service to the courts in their role as prosecutors as some have already been doing for many years in their former role as dedicated case workers.

However, we remain anxious about the deployment of Associate Prosecutors in the smaller courthouses where they may not always be able to provide a full service to the court, particularly if unexpected matters arise, such as prisoners in custody. We are also concerned that if legal advisers are withdrawn from courts where District Judges (MC) are presiding there would be no fully qualified lawyer present in the courtroom in the event of a defendant being unrepresented.

USE OF AGENCY STAFF

Our members generally report few issues with salaried prosecutors, although magistrates often report that agency staff, including counsel, have not been briefed in sufficient time to allow a trial to commence on time. This wastes both court time and that of defence advocates if the prosecution requests an initial adjournment. However, it can also lead to situations where the matter is decided without the trial proceeding. Those of our members who sit in the smaller courthouses that are closer to their communities often find there is no other work that can be transferred into the court that the agency staff can undertake, thus wasting court time. Although the use of agency staff has been declining we have heard of some recent increases in their use. If this is for budgetary reasons, such as a freeze on filling vacancies, then this can be a short-sighted policy, and the Committee may wish to investigate whether our concerns are justified.

PROSECUTORS AS SENTENCERS

With the introduction of Conditional Cautions, the CPS has taken on the role of sentencers. Whilst the Association accepts the use of fixed penalty and penalty notices for disorder or minor offences, where all who accept them receive the same punishment, it has always believed that where a choice of sentence has to be made, that is a judicial decision and not one that should be reserved to an arm of the executive. To do so fundamentally blurs the boundary between the role of the courts and the role of the prosecutor in our

adversarial system of justice. Conditional Cautions are an example of the triumph of pragmatism over principle. A court conducts its matters in the open where justice can be seen to be done by victims, witnesses and the public, as opposed to a Conditional Caution which is NOT administered in public. In addition there is no appeal mechanism. We have been told that 38% of those that fail to comply with the conditions of a Conditional Caution are not then taken to court and the matter is just dropped. This means that although the offence might be recorded as one that has been brought to justice, the offender remains unpunished. We note that disquiet about Conditional Cautions was expressed by one of your academic witnesses in the oral evidence session of the 20th January. He suggested the change had largely occurred unnoticed: magistrates have noticed and we have opposed it for the reasons given above.

UNDERCHARGING

Although this is difficult to detect, our members have been highlighting examples of cases brought into court where the magistrates felt the matter had been undercharged. In one area it has been reported that it is the POA s4 and s5 charges and s39 /s47 assaults which give the most cause for concern in undercharging. The charging criteria for s39 are wide and it might be helpful if they were more fully known. Some examples of perceived undercharging are included in the attached paper. We do not know whether this represents a back door attempt to introduce a plea bargaining system into our courts or whether these are isolated examples from inexperienced prosecutors. We note that the CPS maintains a high level of success in its prosecutions. During October 2008, their overall success rate nationally was 86.5% of prosecutions: for our courts, the percentage in some offence groups such as motoring offences was higher at 90% and 93% for theft and handling offences.

THE EFFECT OF ANY UPTURN IN CRIME DURING A RECESSION

We note from a partial analysis of prosecutions that in some areas the CPS was recording an increase in the number of defendants prosecuted during October 2008 (the latest month for which data has been published) when compared with October 2007. In the Metropolitan and City area of London, the number of defendants prosecuted in October 2007 was 11,646 compared with 13,100 in October 2008. Even allowing for trials with multiple defendants and differing lengths of trials and number of guilty pleas, this almost certainly represents an upturn in work. We are anxious that, if crime increases during the current recession, the provision of speedy justice in our courts gained through the introduction of CJSSS (Criminal Justice Simple Speedy Summary) and the Persistent Young Offender project are not eroded due to a shortage of funds for prosecutors. In passing, we would note that it is not only funding for prosecutors that will be needed if there is an upturn in crime, HMCS who operate the courts and the legal aid budget are also likely to be affected, as is the NOMS budget.

CONCLUSION

The CPS generally conduct cases in a professional manner in our courts and individual prosecutors have taken on board the changes brought about by CJSSS. We are aware that they may more frequently be confronted by unrepresented defendants and that in those circumstances they do their best to assist the smooth running of the court. We do wish to ensure that, if crime increases during the recession, the CPS are adequately funded to cope with any extra work without affecting the gains resulting from CJSSS.

February 2009

APPENDIX 1

EVIDENCE SESSION OF COMMITTEE 20 JANUARY 2009

The following question was asked of a witness:

Q32 Mr Tyrie: You are a recorder. Is it not correct that generally recorders process these cases much faster than magistrates? Certainly, the figures for London support that. But the appeal rate and successful overturning of recorders' decisions is lower.

Nicola Padfield: I think you are talking about district judges' magistrates court, in old language the stipendiary magistrates. The stipes definitely have the reputation you say. I am a recorder and a recorder is a part-time circuit judge in the crown court and is a rather different animal, if I may put it that way.

Q33 Mr Tyrie: But the point I make stands, does it not? On the whole, the amateurs end up making more mistakes than the professionals?

Nicola Padfield: I would need to look that up to know whether that is correct. Certainly, the district judges' courts tend to be much faster. Whether or not there are fewer appeals I cannot tell you off the top of my head.

NOTE FOR COMMITTEE

Justices of the Peace are amateurs only in respect of the fact that they are not paid. They receive considerable training for their role in court and probably sentence more cases than any other level of the judiciary, including District Judges (Magistrates' Courts) who often sit on trials lasting several days. It is not unusual for a bench of three magistrates to sentence 15–20 cases within a three hour period. Remarkably few appeals from Magistrates' Courts take place in the Crown Court and the breakdown between those from decisions of magistrates and DJs(MC) is not published. The Committee could ask the Ministry of Justice if it collects the figures.

APPENDIX 2

EXAMPLES OF UNDERCHARGING FROM MAGISTRATES ON NON-METROPOLITAN BENCHES ACROSS THE COUNTRY

1. A two-day trial where the defendant was charged with three counts of harassment (without violence) S.2 over a six-month period. The three charges were against three different people—the grandparents and mother of the defendant's girlfriend.

It was clear to us that at least two of the charges should have been S 4.

The grandparents, mature, solid citizens, were clearly terrified of the defendant and his behaviour to them and their family over a long period. The grandfather slept in his clothes, their house has been fortified with alarms and the post box blocked up so nothing could be put through it.

Examples of defendant's behaviour, which have to be put in context of two days of evidence of his behaviour:

- (a) He had rung them in Spain to ask the grandfather if he had a petrol can. They came home to find a bedroom window broken and a petrol can in their garden. The defendant's gloves were found in the road but no evidence was offered by the CPS as to any link between the defendant and the can. It turned out that there had been an incident while they were away with the mother taking her daughter and grandchildren away from the home as they were scared of the defendant. Was this his reaction to this?
- (b) In a separate incident the granddaughter was taken for safety by the mother to a flat in Stevenage. I can't remember all the ins and outs of it now, however it ended up with the grandparents coming to pick them up and the defendant arriving at approximately the same time. The defendant threatened the grandparents and mother with language that to us would have put the bench in fear of violence had it happened to us.

The situation was so bad that in the long run the grandfather left home and his marriage of 50-ish years. The grandparents are now reconciled but they no longer see their granddaughter or great grandchildren as the defendant has banned it.

This was a very serious case with a defendant who I felt was a truly evil manipulative man. Unfortunately as he was charged with S.2 it was summary only we could not give him more than six months and he had been on remand for approximately 11 weeks. We tried to get him on a probation order but he couldn't be bothered to turn up for the report (even though he was in prison and probation had booked the video link) so we had no choice than to give him custody. As he had been on remand for such a long time he effectively got approx an additional two weeks in custody for his offences and for putting three people through the hell of a trial.

2. In a television programme where a cameraman accompanies police on the beat, a motorway patrol gave a "warning" on three separate occasions when they stopped vehicles travelling at over 100 mph.

On one of the occasions the officer told the young woman (who had only just passed her test) recorded travelling at 103 mph that if he sent her to the magistrates court she would lose her licence and perhaps be sent to prison, but as he did not feel that appropriate he would just give her a warning on this occasion.

In a similar programme, one patrol officer gave a fixed penalty of £60 and three points to a driver recorded travelling at 68 mph in a 40 mph zone.

In others I have seen clear cases of persons guilty of GBH (with photographic evidence) being released without charge and persons being in possession of class A drugs being issued with a "street caution".

I watch a number of these programmes and what the police dole out to offenders is nothing short of alarming, making a mockery of our judicial system and of our Sentencing Guidelines which are provided primarily to ensure fairness and equality throughout the country.

3. It is my perception that under-charging is standard practice in my county. In fact it is very rare to see charges of ABH and my guess is that they are reserved for cases where injury is sufficiently serious to require hospital treatment, ie broken bones. It is extremely common to see photographs of bruises, scratches etc in cases of Common Assault and I have asked legal advisers why the higher charge has not been brought.

4. Just last week a public order offence which was contested became the lesser one (S.4 to S.5)—it was spitting at a policeman and resisting. I have seen a number of these occur in the courtroom, it is the norm.

5. I sat in the Crown Court with Judge X on an appeal against sentence for two accounts of common assault. The defendant had pleaded guilty in the lower court to two charges of common assault and given six months custody. He appealed saying he did not get any discount for his guilty plea. At the time, the lower court had been given the advice that as there were two charges they could give two lots of six months custody so they had in fact given him a discount. However, the law had changed and now for this summary only offence, you can only give a maximum of six months custody irrespective of how many charges are bought on the same day. This particular case was quite appalling. A young, fit guy had gone round to his Grandmother's flat and intimidated and assaulted her. He had tipped her off a sofa on to the floor bruising her face. The next day he had returned to her flat this time with his father (ie her son) and this time the two of them had assaulted and intimidated her again tipping her off the sofa and bruising her. This was a most appalling crime with many aggravating features not least of all it being domestic violence on a vulnerable person. In terms of level of seriousness the Judge, myself and the other magistrate were adamant that it deserved a year's imprisonment with a reduction for guilty plea. We were then totally appalled to find that we could a) only give a total of six month's custody even though there were two charges and b) we were obliged to give a discount off the six months for the guilty plea. His appeal was allowed and six months was reduced to four months.

I am not only frustrated by the law as it stands but by the CPS as well. I expect it was a plea bargain (though I do not know that for a fact but it was the opinion of the judge as well at the time). So by agreeing to plead guilty to the lesser charge he saves the public purse. But in a case like this is that justice? I certainly do not think so. Surely each case of common assault should carry a maximum six months custody. Especially where a higher charge could have been bought, as in this case as the victim was injured as a result of the assault and ABH would have been made out.

Memorandum submitted by David Marriott

There are two aspects of the CJ process which I think we've got wrong. And they reveal themselves time and time again when miscarriages of justice finally come to light.

The first is the relationship between the police and the Crown prosecutors, which seems way too close and mutually supportive. The CPS gets intimately involved at an early stage of investigations and often actively drives police to search for particular evidence that helps compile a case for the prosecution. I know there are arguments that say that this kind of relationship ensures fewer failed prosecutions, but is it at the cost of more wrongful convictions? In my view the police should investigate, follow all the leads, collect all the facts and pass them to the CPS for them to decide whether there is enough evidence to prosecute someone, with a clear dividing line between the roles of investigator and prosecutor. The way it currently works makes the police the evidence-gathering agency for the prosecutor's office. We don't know if the CPS were aware of the evidence in the Gilfoyle case which was never passed to the defence, but I wouldn't be surprised if that was actually the case.

The second aspect is the role of the "expert witness". In principle the "expert" is there to provide the court with technical explanations of evidence that an ordinary member of the jury couldn't be expected to understand. He is not there to offer opinions about anything else. But all too often the expert appears to bat for one side, and rather than serving the court he appears to serve the side which has hired him. There are some individuals who now make a career out of being an expert witness and will routinely be hired by either prosecution or defence to provide the testimony they require. With so many serious cases turning crucially on the evidence the expert witnesses, I think there needs to be some regulation to break the link between remuneration and giving evidence helpful to one side or the other. Perhaps a "stable" of experts could be kept on file and where the court deemed it necessary, one could be called, as the next cab on the rank, to provide expert testimony for the court about technical evidence. Being hired by the court rather than by one or other legal team would reinforce the expert's impartiality. It might also reduce the costs and complexity of a lot of cases that currently rely on expert witness testimony.

March 2009

Memorandum submitted by Maik Martin

1. A principal factor determining the work of the CPS is the test for deciding whether or not to prosecute an alleged offender. This two-pronged test is set out in the *Code for Crown Prosecutors*: firstly, a prosecution should only be brought where it is more likely than not that, on the basis of evidence admissible in court, a conviction can be secured. Secondly, a prosecution should only be brought where this would be in the public interest. A non-exhaustive list of factors which may be taken into consideration are set out in the *Code for Crown Prosecutors*.

2. The application of the public interest test and its reviewability in the courts should be a focus of the Committee's inquiry as they can affect both the rule of law and public opinion in relation to the operation of the criminal justice system in England and Wales.

3. At the current state of the law, crown prosecutors in effect enjoy a largely unfettered discretion as to whether or not to bring a prosecution even in cases where there is a high likelihood of a conviction and possibly the imposition of a substantial custodial sentence. A decision not to prosecute (or not even to investigate alleged or potential criminal conduct), whilst theoretically being amenable to judicial review in the Administrative Court, can be successfully challenged in the courts only in the most exceptional circumstances, *R (on the application of Birmingham) v Director of the SFO* [2006] EWHC 200 (Admin) at paras 63 and 64:

There is much authority to the effect that the jurisdiction to conduct a judicial review of a public authority's decision to launch or not to launch a prosecution, though it undoubtedly exists, is to be exercised sparingly. Where the decision is to prosecute, this admonition of restraint arises in part at least out of the imperative that criminal proceedings should not be the subject of satellite proceedings which have the effect of delaying the trial: R v Director of Public Prosecutions, ex parte C [1995] 1 CAR 136, especially per Kennedy LJ at 141; R v Director of Public Prosecutions, ex parte Kebilene [2000] 2 AC 326. Where the decision is not to prosecute, there cannot I think be a different rule; in any event there will have been expert assessments of weight and balance which are so conspicuously within the professional judgment of the statutory decision-maker that there will very rarely be legal space for a reviewing court to interfere.

Here, of course, the decision sought to be reviewed is a decision not to investigate. The position as regards the judicial review jurisdiction is in my judgment a fortiori a decision whether to prosecute. The authority's (here, the Director's) discretion is even more open-ended. It will involve consideration of the manner in which available resources should be deployed and whether particular lines of inquiry should or should not be followed: Hill v Chief Constable of West Yorkshire [1989] 1 AC 53 per Lord Keith of Kinkel at 59 D-F, summarising R v. Commissioner of Police for the Metropolis, Ex parte Blackburn [1968] 2 QB 118. It is submitted for the Director that absent bad faith or other exceptional circumstances a decision to investigate or not to investigate an allegation of crime is not subject to review. That is not quite right. It looks like an argument to limit the court's jurisdiction of judicial review; but the jurisdiction is as wide or as narrow as the court holds. The true proposition is that it will take a wholly exceptional case on its legal merits to justify a judicial review of a discretionary decision by the Director to investigate or not.

4. Contrast this situation with the situation under the German law of criminal procedure: there, the general rule under sections 152(2) and 160(1) of the *Strafprozessordnung* (StPO, Code of Criminal Procedure) is that the public prosecution service (usually acting through the police) are under an express duty to investigate a case where there are indications that a criminal offence had been committed. Where, upon completion of the investigation, in the judgement of the public prosecutor it is more likely than not that a prosecution would be successful, a prosecution will have to be brought according to section 170(1) StPO. There is, as a rule, no public interest test complementing the probability-of-conviction-test in the German system. Where the prosecutor is of the opinion that, on the basis of the evidence before him or her, a prosecution would be unlikely to lead to a conviction and thus formally decides to not prosecute and terminate the criminal proceedings, the victim(s) of the offence have to be notified and have recourse against the decision by way of an appeal to the head of the State prosecution service and, if unsuccessful, further appeal to a Court of Appeal (section 172 StPO). As the decision whether or not to prosecute is concerned exclusively with the prospect of securing a conviction on the basis of admissible evidence, it is fully reviewable by the Court of Appeal.

5. However, there are significant exceptions to what is called the principle of legality as described in the preceding paragraph: in relation to purely regulatory offences (*Ordnungswidrigkeiten*) which are dealt with by administrative agencies under a set of rules different from the rules of criminal procedure, agencies enjoy full discretion as to whether or not to impose a regulatory sanction (generally a fine). The exercise of the discretion not to impose a sanction is reviewable in the courts only in exceptional of circumstances. Another even more significant exception from the strict principle of legality applies to minor criminal offences (equivalent to summary offences, most either way offences and even some indictable offences in English criminal law): in relation to such *Vergehen* (all criminal offences which do not carry a minimum custodial sentence of at least one year), while there is still a duty to investigate the alleged offence, the prosecutor (in cases of relatively more serious offences only with the consent of the trial court) can discontinue proceedings even before a formal prosecution has been brought where the culpability of the offender is low and public interest does not require a prosecution (sections 153 *et seq* StPO). In most cases the court can attach certain conditions to this termination of proceedings such as the payment of a sum of money commensurate with the offender's level of culpability. This way of discontinuing proceedings is entirely discretionary and, as a rule, the exercise of the discretion on part of the prosecutor and, in most cases, the trial court, cannot be reviewed by a higher court. Prosecutors and the lower courts use this option frequently and perhaps even in cases which, from a purist's point of view, would be unsuitable for such a somewhat informal solution. It has to be emphasised, however, that in a significant proportion of cases where discretionary (conditional) termination of proceedings is resorted to, a trial judge will have seen the case files and agreed to this course of action being taken. The most problematic exception to this rule relates to cases of genocide and certain enumerated serious offences against the state: in these cases the federal Attorney General can order termination of proceedings where bringing a prosecution would be contrary to the public interest without the consent of the trial court.

6. Despite these major exceptions to the rule that criminal conduct has to be fully investigated and prosecuted, the principle of legality is considered to be a bedrock of the German criminal justice system.

7. While it has to be readily acknowledged that the German and English criminal justice systems and rules of criminal procedure differ significantly in numerous important aspects, the issue of discretion on the part of the prosecution whether to investigate and prosecute an offence is common to all criminal justice systems irrespective of legal traditions. Thus it would be a worthwhile, indeed a very important, exercise to look at the use of prosecutorial discretion by the CPS.

8. Unfettered, largely unreviewable discretion as to whether or not to investigate potentially criminal conduct and bring it before a criminal court can be considered an anathema to the rule of law, one element of which is the guarantee of equal application of the law. As the former Senior Law Lord, Lord Bingham of Cornhill, noted in his seminal speech on the rule of law at Cambridge University on 16 November 2006:

The broader and more loosely-textured a discretion is, whether conferred on an official or a judge, the greater the scope for subjectivity and hence for arbitrariness, which is the antithesis of the rule of law. This sub-rule requires that a discretion should ordinarily be narrowly defined and its exercise capable of reasoned justification.

In hardly any other area of the law will the exercise of discretion on the part of the executive, to which the CPS, with some hesitation, will have to be considered to belong, have a greater effect on the individual and the enjoyment of his or her fundamental right of liberty.

9. The application of the second limb of the test as to whether or not to bring a prosecution under the Code for Crown Prosecutors, the public interest test, may, in certain instances, have the flavour of the political, especially where the Attorney General intervenes in proceedings and orders their termination. While rare, these instances have the potential of bringing the criminal justice system into disrepute, as became readily apparent in the notorious al-Yamamah case relating to a decision to halt a criminal investigation by the then Director of the SFO. While the Director's decision has now ultimately been held to be lawful, it has nonetheless left behind a somewhat sour taste.

10. As a rule, the application of the criminal law and the decision whether or not to apply the law should generally be left exclusively to the courts whose proper domain the application of the law without fear or favour is. While, not least under valid considerations of the most appropriate use of scarce resources in the criminal justice system, not all criminal offences should necessarily be prosecuted, the decision whether or not to investigate and prosecute should be subject to a meaningful degree of judicial control. It should be a decision ultimately left to judges to decide whether or not the ordinary course of the law should be disturbed by a decision of the CPS or other prosecution agency not to bring a case to court. It is submitted that the current practice as exemplified in the decision in Birmingham and the al-Yamamah case does not appear to conform to this basic tenet of the rule of law. The courts show a marked, yet rather inexplicable, reluctance to develop and pronounce clear rules as to when criminal proceedings should be brought in order to satisfy the requirements of the rule of law. It should be a matter for the Committee to establish why this is the case and whether this should be remedied by appropriate legislation or other means of rule-making.

11. This inquiry provides a rare opportunity to scrutinize the use of the public interest test by the CPS. The CPS should be able to provide the Committee with a breakdown of the number and category of cases in which it was decided either not to investigate or not to prosecute an alleged offence for public interest reasons. Information might also be provided by the CPS in relation to the number of judicial reviews of decisions not to prosecute and the success rate of these proceedings. The Committee should seize this opportunity and consider the demands of the constitutional principle of the rule of law—the equal and predictable application of the law of the land—in relation to the decision to investigate and prosecute alleged criminal conduct and the way the courts should review this decision.

November 2008

Memorandum submitted by Mind

JUSTICE COMMITTEE INQUIRY INTO THE WORK OF THE CROWN PROSECUTION SERVICE

Mind (NAMH) is the leading mental health charity in England and Wales.

Mind's vision is of a society that promotes and protects good mental health for all, and that treats people with experience of mental distress fairly, positively, and with respect.

The needs and experiences of people with mental distress drive our work and we make sure their voice is heard by those who influence change.

Our independence gives us the freedom to stand up and speak out on the real issues that affect daily lives.

We provide information and support, campaign to improve policy and attitudes and, in partnership with independent local Mind associations, develop local services.

We do all this to make it possible for people who experience mental distress to live full lives, and play their full part in society.

Being informed, diversity, partnership, integrity and determination are the values underpinning Mind's work.

1. EXECUTIVE SUMMARY

1.1 *Another Assault*, Mind's report into the experience of victims and witnesses with mental distress, was published in November 2007. It highlights shockingly high rates of crime perpetrated against people living with long-term mental distress in community settings—71% of respondents to our survey had been the victim of crime or victimisation in the past two years.

1.2 Our report also reveals serious flaws in the way criminal justice agencies serve victims and witnesses experiencing mental distress. Sixty-four per cent of victims of crime or harassment in our survey were completely or somewhat dissatisfied with the overall response of the authorities to reporting the incident. Just six per cent (nine people) were completely satisfied with the outcome of their case.

1.3 Our key findings about barriers to justice, which are of relevance to this inquiry, are:

- a lack of training and awareness about mental health amongst criminal justice professionals across the board;
- evidence of failure by criminal justice agencies to address people's needs, despite systems in place to support vulnerable and intimidated witnesses;
- concerns about inappropriate decision-making by the police and prosecutors which causes attrition in the system; and
- inappropriate use of psychiatric evidence, which is used to discredit witnesses with a mental health problem in court.

1.4 The "credibility imbalance" we discovered in our research (whereby people with a psychiatric diagnosis were systematically discredited, not believed or not taken seriously) causes attrition of cases at each stage of the criminal justice system. Expecting to not be believed, or reporting a crime and not being taken seriously:

- deters people from reporting crimes;
- discourages thorough investigation of crimes by the police;
- leads to cases being dropped before they get to court;
- reduces prosecution rates when cases do go to court

1.5 Mind believes the failure of criminal justice agencies to meet the needs of victims and witnesses experiencing mental distress is contrary to their duties under the Disability Discrimination Act (DDA). In order to comply with the DDA, criminal justice agencies and policy makers should involve disabled people, including people experiencing mental distress, in policy and business planning. Agencies should also put measures in place to promote equal access to their services for disabled victims and witnesses.

1.6 Mind has had positive discussions with the CPS about greater involvement of people with mental distress in its business planning. However, we believe that at present the CPS does not do enough to ensure that its diversity policies reflect the full spectrum of needs that fall within the category of disability, including people experiencing mental distress.

1.7 This submission sets out issues uncovered in Mind's *Another Assault* report and recommendations for the CPS to promote equality in access to justice.

2. INCREASING PUBLIC CONFIDENCE IN THE JUSTICE SYSTEM

2.1 Victims of crime need to feel there is a reasonable expectation of getting justice if they are to report a crime. Our findings support Home Office figures showing that disabled people are significantly more likely to report a lack of confidence in the criminal justice system.³ Twenty-three per cent of people in our survey who chose not to report a crime said they did not report an incident because they thought nothing would be done and there was no point. Many respondents stated that previous experience of reporting an incident and it not being acted upon made it not worth bothering again.

2.2 Criminal justice agencies admit they have traditionally struggled in prosecuting hate crimes, domestic violence or sexual violence—the kind of crimes mentioned by people in our survey. In disadvantaged areas where antisocial behaviour is common, resources are often too scarce to respond to every incident of harassment—so hate crimes are investigated poorly or not at all.

³ Walker A, Kershaw C, Nicholas S: July 2006. *Home Office Statistical Bulletin—Crime in England and Wales 2005–06*

2.3 Mind believes that ensuring a thorough police investigation takes place is one of the simplest ways to improve confidence in the system for people experiencing mental distress. It will allow people to feel they have been taken seriously and any decision made by prosecutors has been made on the basis of all the facts, rather than assumptions or partial evidence. The CPS therefore has a role to play in improving investigations, by demanding more and better evidence from the police at the charging stage.

3. TRAINING FOR PROSECUTORS

3.1 Mind believes the CPS does not provide sufficient training about mental health for prosecutors to make consistently good decisions concerning mental health and credibility. We understand that prosecutors—indeed all lawyers—receive no mental health awareness training at all. Given the strength of the association between mental distress and not being believed, it is vital that all justice professionals understand the relationship between credibility and mental health in order to ensure equal access to justice.

3.2 Mental health awareness training for all frontline staff—including refresher training for long-serving staff—is key to improving the justice system for a number of reasons:

3.3 Frontline criminal justice professionals need to know when people might be experiencing distress so they can provide appropriate support—including the special measures provided to vulnerable and intimidated witnesses.

3.4 Criminal justice professionals need to understand why and when mental distress might affect a person's recall of events or their interpretation of an incident. Often, police and prosecutors are unaware of different diagnoses and their symptoms—but some knowledge is crucial to ensure cases are investigated without prejudice. People in serious distress can, and the vast majority do, retain full capacity to understand the world around them—including their experience of victimisation. Some people with psychotic illnesses will experience periods of delusions and paranoia—this should not discredit everything they experience when they are in a period of psychosis, and should not have a bearing on their experience when they are not experiencing psychosis. However, for a very small number of people, psychotic delusions may affect the reliability of their testimony.

3.5 All criminal justice professionals working with people with mental distress need to understand the principles of mental capacity. All people should be assumed to be able to make their own decisions and act for themselves, and should be supported in that capacity, unless there is good evidence otherwise. Decisions not to prosecute, should not be made on the basis of assumptions about the witness's resilience or whether they can "handle" court. These decisions should be made by the witness in consultation with experts.

3.6 Criminal justice professionals need to know how to work with someone whose statement may at first appear conflicting or confusing. Intermediaries can provide an invaluable service in supporting people with mental distress during interview and in court, by ensuring that questions put to a witness are understood fully and answers given are correctly interpreted. Being able to identify where this support might be valuable—by asking the right questions and assessing situations intelligently—is essential if needs are to be met.

4. INVOLVEMENT IN POLICE INVESTIGATIONS

4.1 Mental distress does not preclude people from providing good evidence in court. Yet some respondents said they felt the police or Crown Prosecution Service (CPS) had made judgements as to whether they could go through the process of giving evidence in court, without consulting them or offering support. "I was honest with the police about my history. They could have prosecuted. I was not the only woman he was stalking—the Detective Constable was also dealing with another victim at the same time as me. I think they felt I wouldn't handle court."

4.2 Mind believes prosecutors should have greater input into the investigation phase and should build stronger working relationships with police. If police officers feel that a witness may find court distressing, they should seek advice from the CPS about what support is available rather than dropping the investigation. Similarly, police should not pre-empt charging decisions, and earlier involvement by the CPS would prevent this from happening.

4.3 Another Assault revealed that much of the crime experienced by people with mental distress is targeted at those people in the most vulnerable circumstances—people living alone or without good social networks, people experiencing a mental health crisis, and those detained in hospital.

4.4 In focus groups, participants stated clearly that they felt the harassment they experienced was hate crime. Negative public attitudes to mental distress made them a target.

4.5 If the CPS had greater involvement during the investigation stage prosecutors could do more to ensure that evidence is robust enough for an aggravated sentence to be considered by the judge where the victim is particularly vulnerable or the incident is perceived to be a hate crime. This would increase confidence and raise public awareness that the State takes very seriously its responsibility to tackle discrimination.

5. MENTAL DISTRESS AND DISCREDITED EVIDENCE

5.1 Anecdotally, Mind has heard reports of cases being dropped by the CPS before they reach court because a witness's evidence is not seen as reliable; our research supports this. Sixty-four out of 73 support workers said they felt people with mental distress being seen as unreliable witnesses was an issue.

5.2 In court, people experiencing mental distress can face intrusive cross-examination about their mental health. One in five support workers (16 out of 86 surveyed) said they knew of cases where a person had been cross-examined about their mental health. For example, defence lawyers may bring up a psychiatric diagnosis to discredit witnesses' evidence. The defence can order a psychiatric report from an expert of their choosing, choose what questions are covered by the expert's evidence, and can also request access to an individual's medical records.

5.3 Mind is concerned that people's case notes or psychiatric reports are being used in an inappropriate manner, when this information has no direct relevance to the case. Support workers felt more could be done to protect clients from unnecessary cross-examination. It is an unjustifiable breach of privacy and can be very distressing to be grilled about such intimate information. Disclosure can have an impact on other parts of a person's life, such as their job or social relationships.

5.4 Mind believes the Government, in consultation with Mind and others, should bring forward proposals for tighter rules around the use of medical histories and psychiatric reports in court. Mind believes the proposals should be in line with existing restrictions on disclosure of a witness's sexual history or evidence of "bad character".

5.5 Mind recommends that these proposals include:

- (a) Producing guidance for prosecutors on the interplay between mental capacity, credibility, reliability and mental health. This would give prosecutors a better basis for assessing whether a witness experiencing mental distress will make a reliable witness in court;
- (b) Making decisions about the relevance of psychiatric evidence where possible before the trial or in a closed session, because media reporting of psychiatric information, and disclosure in front of friends and family in court, can be very stigmatising and distressing;
- (c) Producing guidance for prosecutors about how to assess what psychiatric evidence may be relevant to a case and should be passed to defence lawyers and what is not. For example, recent psychotic episodes including the experience of delusions might affect a witness's interpretation of events, depending on the nature of the delusion, and this might be disclosed. But it is unlikely that depression occurring a few years before an incident would be relevant to the witness's capacity to give evidence and therefore there is no need for the prosecutor to consider this as evidence at all. If the prosecutor believes the defence already have this information (for example where the accused is a neighbour), the prosecutor should anticipate the line of questioning and challenge it or bring in expert witnesses to discredit the defence argument;
- (d) Restrictions on the use of psychiatric evidence in cross-examination, where it is used in a discriminatory manner to imply bad character.
- (e) Courts appointing psychiatric experts to ensure a greater degree of independence. Until such time as this is introduced, guidance should encourage prosecutors to call on their own psychiatric experts in anticipation of the defence doing the same—so a balanced view of the psychiatric evidence is presented to the court;
- (f) Not taking into consideration psychiatric reports that do not give enough detail or which report on deliberately vague questions. This will rely on the CPS challenging the defence where, for example, the defence orders a psychiatric report which considers only whether the witness has a history of mental distress rather than analysing how that history might be relevant.

6. SPECIAL MEASURES FOR VULNERABLE AND INTIMIDATED WITNESSES

6.1 Another Assault revealed that, for people experiencing mental distress, accessing the criminal justice system is seen as difficult, intimidating and likely to have negative consequences for your mental health. Thirty-six per cent of respondents who had been a victim did not report the crime because they didn't want to go through the process. When victimisation had already left a respondent very distressed and anxious, they said making contact with the police exposed them to more discrimination and vulnerability—"the system of investigation is another assault."

6.2 It is worrying that people are choosing not to report crimes to protect their own wellbeing. After calculating the benefits and risks, it appears many people we consulted concluded that the anticipated harm of going through the process outweighed the potential benefits of ensuring that justice is done.

6.3 Government has long recognised that the most vulnerable or intimidated witnesses may benefit from additional support or measures to reduce the pressure of giving evidence in court. Over the past 10 years, a number of legislative and policy initiatives have sought to address these support needs.

6.4 The Youth Justice and Criminal Evidence Act 1999 provides for ‘special measures’ to support vulnerable witnesses, including: giving evidence via live link; removal of wigs and gowns; video-recording evidence in chief; and restrictions on evidence about the complainant’s sexual behaviour. More recently, the introduction of witness care units, intermediaries, and pre-trial interviews have added to this package of supports. Many of these special measures, and in particular intermediaries and pre-trial interviewing, would benefit people experiencing mental distress.

6.5 Nevertheless, one in five respondents to our survey who did not report a crime said they were not offered support to make a formal complaint or they didn’t know where to go to ask for support. Either information has not been well disseminated through the channels that people with mental distress access or people with mental distress are not being identified as vulnerable witnesses.

6.6 Even where support is available and well-publicised, victims with mental distress face a difficult decision before they can access support. In order to be offered “special measures”, an individual must first disclose that they have a mental health diagnosis to the police. But many respondents told us disclosure resulted in the police acting differently, stopping believing them, showing less sympathy, and in some cases dropping the investigation entirely.

6.7 In discussions with the CPS, Mind has been assured that primary responsibility for identifying vulnerable witnesses lies with the police and not prosecutors, who may well not see the witness until the day of the hearing. However Mind believes that prosecutors should take greater responsibility for identifying vulnerable witnesses. There should be more flexibility about arranging special measures whenever it becomes apparent that a witness would benefit from them.

6.8 Liverpool council have piloted a Witness Profiling scheme for witnesses with a learning disability. The Witness Profiling unit works with the witness, preparing them for trial and producing a written report about the individual, indicating what they require to enable them to give their evidence in court. The prosecution, defence and judge will then be able to address how each person’s difficulties may influence the way they give evidence. The judge is able to put in place measures that facilitate the victim giving evidence in a way that is fair to them as well as the defendant. Witness profiling has been very successful and Mind is calling for this scheme to be widened as there are clear benefits for people with mental distress.

7. DIVERSITY MONITORING

7.1 Mind’s *Another Assault* report recommends that all criminal justice agencies collect data to allow for comprehensive and consistent monitoring of diversity information of witnesses, including their mental health. Accurately recording diversity data from initial reporting to prosecution and sentencing should help to ensure:

- support is provided to the people who need it as a case progresses through the system;
- all criminal justice professionals have an awareness of the added psychological impact a crime may have had on a vulnerable victim;
- criminal justice agencies develop a greater understanding of patterns of crime against people experiencing mental distress; and
- monitoring should be consistent across agencies, so it is possible to monitor and benchmark performance and identify where the barriers to justice lie.

7.2 Mind recommends that the CPS should do more to monitor diversity systematically in its external work. Monitoring should not just cover “headline” diversity strands, but should consider the experience of diverse groups within strands (for example, monitoring mental health, learning disability, sensory impairments and physical disability within the disability strand).

7.3 Mind also believes the CPS should monitor the diversity of its employees, including experience of mental distress, and promote greater diversity among its staff.

7.4 Our experience of tackling discrimination shows that one of the best ways to improve attitudes towards mental distress is to challenge stereotypes and promote direct contact with people experiencing mental distress. Knowing that justice agencies have strong diversity policies will inspire confidence in people with mental distress that they will be treated with respect. Mind understands that the CPS is working towards greater openness about diversity issues internally, but there are issues around mental distress being seen as a lack of resilience or fitness to practice. Mind believes the CPS should do more to educate its staff about mental distress, and this will have knock-on effects on its external-facing work.

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Policy Officer

May 2008

Memorandum submitted by the National Audit Office

CROWN PROSECUTION SERVICE: REPORTS BY THE COMPTROLLER & AUDITOR GENERAL AND THE COMMITTEE OF PUBLIC ACCOUNTS

This paper outlines the main conclusions of the Comptroller & Auditor General's Report on the Crown Prosecution Service (CPS) delivered in 2006, with a report from the Committee of Public Accounts in the same year. It should be noted that these reports date back to 2006 and that the Service has put considerable effort into addressing the recommendations of the reports. Progress was most recently reported in the Autumn Performance Report.⁴ The NAO has not revisited the CPS since 2006 but may do in the future.

The role of the Comptroller & Auditor General with reference to the CPS is as external auditor: the C&AG certifies the financial accounts of the CPS annually. He also has a responsibility to report to parliament on the economy, efficiency and effectiveness of the CPS under the National Audit Act, 1983; as, when and in what way he reports is within his discretion. The report concentrated on the work of the CPS in relation to Magistrates' Courts because this constituted the majority of CPS effort.

The Comptroller & Auditor General's remit is to report to Parliament on value for money; this differs from the Chief Inspector's role which is to enhance the quality of justice through independent inspection and assessment of prosecution services, and in so doing improve their effectiveness and efficiency. There is crossover obviously and NAO and HMCPSI colleagues consult and discuss matter of mutual interest on a regular basis.

The NAO report in 2006 considered the Crown Prosecution Service's role in the effective use of magistrates' hearings, specifically whether the Service plans and prepares cases to make effective use of hearings; uses court time for the purposes of the hearings listed; and is taking action to improve its performance in magistrates' courts.

The report found that:

- An estimated 28% of all pre-trial hearings (784,000 annually) were ineffective. The defence was responsible for just over 478,000 of these, often where the defendant failed to attend, and the prosecution (that is the Crown Prosecution Service or the police or both) for about 165,000, of which we estimated that about 71,000 could be attributed to the Crown Prosecution Service.
- Published statistics showed that 62% of magistrates' courts trials were ineffective or "cracked" in 2004–05. Similarly, the defence was responsible for the majority of failed trials and nearly 17% (19,500) were attributable to the Crown Prosecution Service.
- The NAO calculated that ineffective hearings and cracked and ineffective trials cost the taxpayer £173 million each year, of which just under £24 million was attributable to the Crown Prosecution Service, caused by process errors or poor administration.

Individual prosecutors deal with a large volume of cases, often at very short notice. Nevertheless, the NAO report found that problems with the Crown Prosecution Service's planning and preparation for magistrates' courts hearings contributed to ineffective hearings. There was insufficient oversight of cases and a lack of clear ownership of cases. CPS lawyers needed to be clear who owns a case, who is taking it through the system, to try and cut down the amount of switches of cases that happen all the way through the system, so that they make good decisions early on about what the charges should be and what evidence needs to be gathered by police.

CPS lawyers often did not have enough time to prepare for hearings and Her Majesty's Courts' Service staff moved cases between courtrooms, so that prosecuting lawyers had to present cases they had not prepared. This practice in particular needs to be minimised as it raises the risk of an ineffective outcome.

We also found that there could be more effective systems for prioritising and progressing urgent or high-risk cases, particularly those involving children or sexual offences to minimise the trauma already experienced by victims. This meant that the CPS needed a case management system which would allow the identification of these cases and enough resources to be able to allocate them to an experienced lawyer within a reasonable timescale.

The report also noted an issue with general bureaucracy. Administrative errors by the CPS could result in prosecutions collapsing unnecessarily, at a cost to the public purse. Poor record keeping and slow response times to messages were particular issues. The CPS were not using technology well at the time, including simple technology like voicemail.

The police and the courts contributed further to the inefficiencies that resulted in prosecution delays: often the police did not provide the evidence in time for the hearing; the police constituted the main stakeholder for the CPS and good liaison with the police was vital to making sure that the necessary evidence is there

⁴ http://www.cps.gov.uk/publications/reports/autumn_2008/update.html

and collected, available for review and available for trial. A proportion of the cases in the NAO sample could not proceed at trial because the right evidence was not there on the day. The quality of the relationship between the CPS and the police was crucial and relied on the personalities in particular areas in order to work well. An end to end target owned jointly by police and CPS for getting cases to trial could act as a spur to better performance.

Nationally, the Crown Prosecution Service was seeking to improve its performance through initiatives such as No Witness, No Justice, which aimed to support prosecution witnesses through the courts process, and the Charging Initiative which passed responsibility for determining charges from the police to the Crown Prosecution Service. Also, it is playing a key part in Local Criminal Justice Boards to promote joint working with the other criminal justice agencies.

We found good examples of local action by Crown Prosecution Service offices to improve performance at magistrates' court hearings. The Cardiff unit, which was visited by the NAO, was found to be working well. People were co-located, they were working well together and it provided a model for a new way doing business that the CPS needs for Magistrates' Court's case management. They were intending to roll out this model across the country. However, generally, the Crown Prosecution Service needed to do more to re-organise and modernise its management of magistrates' court casework.

CPS' response to the PAC report

The PAC report on the "Effective Use of Magistrates' Courts Hearings" was published in October 2006. The Service made specific promises of action in their Treasury Minute response to the PAC report and the main ones are set out below. An up to date position statement from the CPS is included in their Autumn Performance report of 2008 and is summarised below. The PAC report made 17 recommendations to the CPS covering case management, the use of technology to improve processes and working with other criminal justice agencies. One recommendation was directed to the Department for Constitutional Affairs (DCA) (now the Ministry of Justice) and six recommendations encouraged closer joint working with other agencies. Below is detailed the progress against the 17 recommendations made in the report.

PAC CONCLUSIONS (i) TO (iv)

PAC conclusion (i): Develop and implement nationally the good local practice operating in Cardiff, so that small teams of lawyers and administrative staff are responsible for progressing all cases from a specific police command unit.

PAC conclusion (ii): Nominate a member of each team to be available during working hours to respond to queries on the team's caseload.

PAC conclusion (iii): Introduce and develop a time recording system to identify whether the CPS has the right mix of legal, caseworker and administrative staff, and to effectively manage its resources.

PAC conclusion (iv): Make full use of the CPS's electronic case management system (COMPASS) capabilities by requiring all CPS staff to update the system when moving files.

Progress on (i)—(iv):

A new business model for the magistrates' courts has been developed drawing on the good practice outlined in the NAO report. The new business model has been implemented in all areas. A key feature is the implementation of Proactive Case Progression Teams (PCPTs) which ensures that staff are available to respond to queries about their caseload. The new business model means that more effective use is made of legal, caseworker and administrative staff. The CPS continues to explore (through better use of management information and time recording) how to make the best use of staff resources in magistrates' courts. Mandatory recording of file location was introduced across the CPS in April 2008.

PAC CONCLUSION (v)

PAC conclusion (v): Work with Her Majesty's Court Service (HMCS) to establish 24 hour courts as "one stop shops" in city areas, where those arrested for minor offences could be dealt with immediately.

Progress on (v):

Earlier pilots of 24 hour courts concluded that they did not provide value for money and the criminal justice system has not pursued the idea further since then. The criminal justice system is exploring the use of virtual courts which provide video links between courts and police stations. A pilot of the virtual court is planned for London and further pilots will begin in 2009.

PAC CONCLUSION (vi)

PAC conclusion (vi): The DCA should follow their endorsement of the effectiveness of District Judges, consult further with the Head of the Judiciary, on the case for a significant increase in their number, particularly in city areas, in order to speed up the delivery of summary justice.

HMCS Progress on (vi):

The Ministry of Justice believes the current mix of magistrates and district judges continues to deliver the necessary expertise to deal with the workload of the magistrates' courts. District Judges are already concentrated in the main metropolitan areas where the workload is greatest. The case for creating a new district judge post continues to be based on a business case prepared by HMCS. The Department has begun a review of the process, with the judiciary and interested stakeholders, to ensure that HMCS can continue to provide the service the public expect. Between October 2006 and October 2008 a further nine fulltime district judges were appointed to the magistrates' courts. There are currently about 30,000 magistrates and 141 full-time district judges (magistrates' courts).

PAC CONCLUSION (vii)

PAC conclusion (vii): Mark cases requiring medical or CCTV evidence as high risk, and review them weekly to obtain the necessary evidence in time for the hearing.

Progress on (vii):

The new business model has introduced a time readiness aspect which ensures that all cases are trial ready two weeks in advance of the magistrates' court listing date. This means that any high risk cases, including those requiring medical or CCTV evidence, are identified and sufficient time exists to gather further evidence as required.

PAC CONCLUSION (viii)

PAC conclusion (viii): Examine the reasons for dropping cases on the day of the trial as part of its regular review of area performance to identify ways in which its processes might be improved.

Progress on (viii):

Information on ineffective trials which includes cases dropped on the day of the trial is available to all 42 Areas. The reasons for ineffective trials are discussed with the CPS's criminal justice partners and lessons are identified to help improve performance in future. The CPS's performance on cracked and ineffective trials continued to improve in 2007-08.

PAC CONCLUSION (ix)

PAC conclusion (ix): Take a risk based approach to quality assurance, focusing on cases that are more likely to experience delays, and periodically disseminate lessons learned.

Progress on (ix):

Case Management Panels (CMPs) have been instigated to keep the top tier of cases under review. Crown Court cases due to last six months or more (posing greatest risk to the reputation of the CPS) are subject to CMPs chaired by the DPP; cases due to last eight weeks to six months are subject to CMPs led by Chief Crown Prosecutors. CMPs keep prosecution processes, scope, timeliness and resources of high risk cases under regular review throughout the life of the case. In addition Casework Quality Assurance (CQA) is a scheme through which over 25,000 files are examined each year to ensure that quality standards are met. Furthermore, the CPS has established closer monitoring of cases subject to custody time limits.

PAC CONCLUSION (x)

PAC conclusion (x): Provide electronic equipment, which allows legal staff across the CPS to record case information at court and automatically transfer it to the COMPASS system.

Progress on (x):

Electronic links have now been established to 169 courts. The CPS continues to work with HMCS to install electronic links between the courts and the CPS.

PAC CONCLUSION (xi)

PAC conclusion (xi): Provide CPS lawyers during the 2006/07 financial year with technology such as pagers to enable them to be contacted more easily when away from the office.

Progress on (xi):

CPS lawyers can be contacted more easily through the provision of call-forwarding facilities, enabling calls to be automatically forwarded from their office telephone extension to their mobile phone. Blackberry devices are also available to provide mobile email access and in early 2009, it is planned to extend the mobile network access through the provision of 3G network enabled laptops.

PAC CONCLUSION (xii)

PAC conclusion (xii): Equip each CPS office with a DVD player on which to review evidence.

Progress on (xii):

All CPS staff have access to a DVD player on which to review evidence.

PAC CONCLUSION (xiii)

PAC conclusion (xiii): Encourage Local Criminal Justice Boards to seek greater availability of DVD players in courts.

Progress on (xiii):

HMCS, as part of the videolinks upgrade programme, has provided a total of 429 courtrooms with equipment which include DVD players. The technology was used in the CJSSS programme to view evidence and assisted the programme to make the great improvements in timeliness that have been seen in adult magistrates' courts and more recently in youth courts as well.

PAC CONCLUSION (xiv)

PAC conclusion (xiv): Take the lead in initiating discussions with the police, the Courts Service, manufacturers, trade associations, and other interested parties, to explore the scope for a national CCTV standard to provide consistency across the industry.

Progress on (xiv):

This is being dealt with as part of the Home Office's national CCTV Strategy.

PAC CONCLUSIONS (xv) AND (xvi)

PAC conclusion (xv): Seek co-operation from HMCS to list each CPS team's cases together so that lawyers can present more of their own cases in court.

PAC conclusion (xvi): Pursue with HMCS the grouping of straightforward cases in court listings, setting and monitoring joint monthly targets for the number of court sessions covered by designated caseworkers (now known as Associate Prosecutors/APs), thereby releasing lawyers to manage more complex cases.

Progress on (xv) and (xvi):

The CPS and HMCS continue to work together nationally and locally, in line with the Senior Presiding Judge's listing guidance, to improve listing arrangements so that APs can present more cases in the magistrates' courts and Crown Advocates can present more cases in the Crown Court.

PAC CONCLUSION (xvii)

PAC conclusion (xvii): Set up a national protocol with local National Health Service (NHS) trusts to improve the timeliness of medical reports.

Progress on (xvii):

The CPS and the British Medical Association have a draft version of the protocol and this is presently being considered by the Association of Chief Police Officers (ACPO).

July 2009

Memorandum submitted by the National Secular Society

This Submission is a response to the call for evidence into the work of the Crown Prosecution Service (CPS) as set out in Press notice No. 23 of Session 2007–08 dated 3 April 2008, currently on the Committee’s webpage on http://www.parliament.uk/parliamentary_committees/justice/jsc030408pn23.cfm.

The National Secular Society (NSS) thanks the Justice Committee for the welcome opportunity to make a Submission.

(1) Section 1 of our Submission deals with the work of the CPS in general and Section 2 deals with the very serious implications of the CPS’s role in relation to the Channel 4 *Dispatches* programme “Undercover Mosque” broadcast in January 2007. The CPS’s apology is on http://www.cps.gov.uk/news/pressreleases/channel_4.html and repeated in the Appendix, together with the Press Release apologised for. Recommendations are shown in bold.

(2) The NSS is a human rights-focused organisation campaigning for equality for all, regardless of religion or belief (which, as the Committee will know, in legal terms, includes lack of belief). This involves seeking to ensure that no single religious group or individual belonging to a particular religious group is privileged above citizens of other religions or none, or that religious groups are not privileged above the non religious.

SECTION 1

MATTERS RELATING TO THE WORK OF THE CPS IN GENERAL

(3) *Even-handedness and Equality*

The NSS believes that this equality for all is of particular importance in the field of Justice and that all individuals, regardless of their religious affiliation or non-affiliation are afforded the same rights and protections. We also see equality for all under some threat in the field of Justice as a seemingly growing deference on the part of the CPS to religious perspectives can or could lead to these religious perspectives, sensitivities or attitudes being given quasi-legal status or even a parallel religious justice system.

(4) This consultation provides a particularly welcome and timely opportunity to reflect the views of the Society’s members and supporters, as well as some of the wider public who, unlike those represented by religious leaders, often do not have the opportunity to have their views heard.

(5) To the extent that the Justice System goes—or were to go—beyond the law in giving special weight to the perspectives, sensitivities or attitudes of any group or groups (for example religious groups), it risks (or would risk)—regardless of however well-meaning its motives—unwittingly discriminating against others. Were this to happen in a sustained way and taken to the extreme, it could alienate those being discriminated against. Such discrimination can occur actively or passively, as described below.

(6) *Especial care needed for the vulnerable and marginalised*

We are concerned that many institutional practices are based on consultations with representatives of so-called “faith communities”. While this is often done on the basis of being inclusive, ironically in practice this is very excluding or exclusionary. It ignores and therefore marginalizes the voices of those people who keep their faith in the private realm or who are of no faith at all. At the greatest disadvantage are those who have left a “faith community”, sometimes because of victimization and discrimination within that community. The CPS, in particular, must not ignore these latter voices.

(7) Non-believers have no pre-existing organized “community” and therefore do not have the same strength of voice of those who form part of a religious community. They can be adversely affected by demands made by religious groups, for example for special treatment, or for others to behave in ways that

they believe to be appropriate or acceptable. We are concerned that non-believers should be treated fairly and equitably in the development of policy and in practice by public bodies such as the CPS despite this inbuilt disadvantage. Non-believers are also at risk of harassment, victimization or discrimination on the basis of their lack of belief as people with religion. Indeed, those who have left a religion are a very high-risk group.

(8) We recommend that the CPS guards against assuming that faith leaders—nearly always older men—are necessarily representative of all those in their groups, and takes special steps to seek out the views of:

- (a) those people who keep their faith in the private realm or who are of no faith at all, especially those who have left a “faith community”;
- (b) those within faith communities that are vulnerable, such as women who may be susceptible to forced marriage, female genital mutilation, honour killings, or have their freedom of movement or association restricted;
- (c) homosexuals; and
- (d) young people.

(9) *Consultation*

The need to consider society as a whole also applies to CPS documents and policies. We quote from the CPS website section on Racist and religious crime—CPS prosecution policy⁵: “we have consulted with people from Black and minority ethnic communities and faith communities and we have taken their comments into account when writing this document. Their contributions have helped us to have a better understanding of the things that are important to them and that we need to know about when we deal with racist and religious crime.” We support the need to consult vulnerable groups, but a balance must be struck by other representative groups being consulted too.

(10) We recommend that the CPS undertakes a formal audit of who is affected by their policies and operations, not forgetting that Human Rights including Freedom of Expression should be also regarded as stakeholders. As well as Black and minority ethnic communities and faith communities, other groups reflecting wider society are also consulted and have their views taken into account, and are acknowledged publicly. We suggest, for example, Liberty, Justice, the Council of Ex-Muslims, and the National Secular Society. We made a similar representation in a meeting with the Director of Public Prosecutions in 2004.

(11) *Subjectivity*

Those in some religious groups, especially in religions and denominations where religion is held to be important to group identity, tend to perceive insult and offence much more strongly than others. It is a subjective matter which the CPS must attempt to codify into as an objective test as is possible under the law.

We invite the Committee to consider recommending the establishment of clearer guidance for the CPS so that those who are accused of causing some offence are not dealt with more harshly (and therefore unjustly) simply because the complainant may have taken more offence than the average reasonable person. One of the causes for the Channel 4 debacle referred to below appears to have arisen from ambiguous or inadequate guidance or interpreting the current guidance over-zealously.

(12) *Freedom of Expression—General Principles: Race and religion need to be treated differently*

The NSS of course supports the law, which protects people from incitement to hatred and discrimination on the grounds of their religion or belief, but we emphasise people, rather than belief. The belief itself, rather than the people who hold it, is sometimes erroneously thought to be legally protected.

(13) We welcome the clear differentiations on the racial and religious hatred sections of the CPS website between race and religion and about the importance of freedom of expression, but did not believe the differentiations were given sufficient attention in respect of other types of what is described in the CPS website as “religious crime”. It is essential that these distinctions are followed through in practice and training, but we do not have any way of verifying the extent to which this occurs.

(14) We recommend that greater emphasis be given to:

- (a) the differentiation between offences aggravated by race and religion, and
- (b) the importance of making due allowance for freedom of expression in respect of all religious offences, which will be a greater allowance than in cases concerning race.

(15) Where religious affiliation and racial or ethnic identity are conflated, this opens up a danger that criticism of religion or religious practices and attitudes (practices and attitudes which are often themselves discriminatory and hateful, and thus rightly criticised) might inappropriately result in prosecutions.

⁵ <http://www.cps.gov.uk/publications/prosecution/rrpbcbook.html>

- (16) We recommend that wherever appropriate in CPS practice, training and publications:
- (a) A clearer differentiation is made between offences concerned with race and those with religion,
 - (b) It is clearly stated that religious beliefs are not protected by law, and
 - (c) More emphasis is given to the need to protect freedom of expression (subject to—in the words of the CPS website—“the duty of the state to act proportionately in the interests of public safety, to prevent disorder and crime, and to protect the rights of others”).

(17) We recommend the appointment of a designated official to advocate for freedom of expression responsible direct to the Minister of Justice and to produce an annual report on successes, failures and concerns. We would have made this proposal even before the debacle over Channel 4 and the *Undercover Mosques* programme, which now makes such an appointment essential.

(18) *Freedom of Expression—Blasphemy and implications arising from its demise*

We note that the references to blasphemy on the CPS website were last updated in 2005⁶ and as of the date of this Submission do not reflect the abolition of the offence in May 2008. We recommend that the CPS website is updated to reflect the abolition of the blasphemy law.

(19) NSS stresses that even before the demise of the blasphemy law, the primary emphasis of what is described in the CPS website as “religious crime” is in place to protect the believer, not the belief. Now that blasphemy has been abolished this is unarguable. We recommend that CPS practice, training and publications make explicitly clear that “religious crime” is in place to protect the believer, not the belief.

This should reassure the public that Freedom of Speech—save for the provisos noted above—is protected in law and that the CPS, as a wing of the criminal justice system, is committed to upholding and defending those rights without fear or favour. Clear guidance in the areas we have recommended will ensure both that the CPS does not exceed its mandate and that religious groups are not misled into thinking their faith or belief itself is protected by prosecution.

SECTION 2

CHANNEL 4 UNDERCOVER MOSQUE PROGRAMME—POLICE AND CPS ACTIONS COMBINED TO UNDERMINE THE JUSTICE SYSTEM

(20) Perhaps the most disturbing and serious case in the history of the CPS is the inappropriate involvement of the Crown Prosecution Service in, at the very least, acquiescing to a West Midlands Police referral to OFCOM of a television documentary “*Dispatches: Undercover Mosque*” aired by Channel 4 in January 2007. The (very belated) joint apology by the CPS is on http://www.cps.gov.uk/news/pressreleases/channel_4.html.

It raises many important questions going to the very heart of the Justice System. We strongly recommend an ad hoc enquiry by the Committee into the Channel 4 *Undercover Mosques* debacle unless, as we would prefer, there is a public enquiry or a Royal Commission. As we imagine that the background will be well known we will confine ourselves to referring to relevant highlights and giving our detailed concerns and recommendations.

(21) An independent arbiter, OFCOM, completely rejected every complaint being backed by the CPS⁷, which it had advocated after acknowledging no (or no prosecutable) breach of the law had taken place. OFCOM had gone further to point out that “There appeared to be evidence that the complaints were part of a campaign.” The matter could not have been more high-profile (and therefore potentially hugely damaging) with dozens of articles appearing in the serious press criticising the authorities. (We can provide a list on request. Significantly, we only found one supportive article, and that was self-serving letter from the Police Authority, also available on request.)

(22) This underlines one of the most shocking aspects of this affair: that it simply cannot be dismissed as a one-off local difficulty that management accidentally overlooked. We observe that the list of those potentially responsible and accountable, whether by commission or omission would appear to extend far wider than those directly involved.

(23) We recommend that the broader questions arising from the Channel 4 debacle of accountability, procedures, checks, policy and even culture are thoroughly, independently and openly investigated. Only when remedial action is seen to have been taken will public trust in the CPS be restored.

⁶ <http://www.cps.gov.uk/publications/prosecution/rrpbcrbook.html> and
<http://www.cps.gov.uk/publications/prosecution/rrpbcrpol.html#06>

⁷ http://www.ofcom.org.uk/tv/obb/prog_cb/obb97/ issued 19 November 2007—item 4

(24) Given this level of independent scrutiny and rejection by OFCOM (in November 2007) and attendant publicity, we recommend that the Select Committee consider investigating why the joint apology was not issued until six months later, in May 2008. Although the reasons are the principal issue, the prompt withdrawal of the accusations would have spared the public purse the cost of the six-figure compensatory payment and presumably legal costs.

(25) *Press releases, media coverage and freedom of press questions*

To facilitate members of the Committee in considering this matter, the text of the joint CPS and Police Press Releases, both the apology and the Press Release apologised for are included in the Appendix.

(26) It is surprising that the apology is not displayed where most enquirers would look for it on the COS site, raising questions of openness. The Press release containing the apology was dated 15 May 2008. Yet despite it being the latest press release issued by the CPS (as at the date of this Submission), it did not appear on the prominent CPS webpage described as “Media Centre Find out what is happening in the Crown Prosecution Service (CPS) across the country. Your first port of call for news, information and press releases.”⁸ The Media Centre page did however feature a press release dated 8 October 2007 entitled “CPS praised in Race Report”.

(27) An article by Nick Cohen in the Observer on 18 May 2008 gives a revealing insight into public perceptions about the affair and makes uncomfortable reading <http://www.guardian.co.uk/commentisfree/2008/may/18/islam.religion>.

(28) Journalists and commentators have been increasingly intimidated into self-censorship in recent years over minority faith issues and the Dispatches debacle can only have intensified this. Quite apart from the important Human Rights implications, such restrictions to freedom of expression are counter-productive. They benefit religious extremists whose hate speech goes unchallenged and right-wing extremists, whose popularity is growing as an impotent reaction to this.

(29) *Suggested enquiry and terms of reference*

When taken together, the concerns set out above make a powerful case for an enquiry as described above, and with terms of reference as suggested below. Clearly, similar questions also apply to the Police and Police Authority, but are not included here as they do not form part of the Committee’s current remit:

- (a) What motivated the CPS to act in the way they did?
- (b) Did any senior official regionally or centrally query the way the case was being handled or give instructions about it? If so, who and in what terms? How was any query or instruction reacted to? Bearing in mind the exceptionally high profile of the case, should further enquiries or more specific instructions have been made and if so what instructions/enquiries and by whom?
- (c) Has there been an independent review to check that the film (including unscreened footage) does not contain *prima facie* evidence of offences that have not been followed up? If not, why not and could there be a further independent review of this?
- (d) To what extent was the need to protect freedom of expression considered, by whom, in what terms and who (if anyone) concluded it had been adequately safeguarded?
- (e) Is there any evidence (we are not asserting that there is) of:
 - (i) pressure from minority communities on the CPS at any level (or on the West Midlands Police or its Authority) that could have led to the circumstances leading to the joint Police/CPS apology, or
 - (ii) a corporate culture in the CPS that seeks to apply a non even-handed approach (ie a more lenient one) to minority communities? If so, could this have implications for the level of prosecutions over so-called “honour killings”, female genital mutilation, and forced marriages?
- (f) Is there any evidence that a misguided interpretation of community cohesion has taken priority over fundamental justice issues?
- (g) Was Police/CPS independence compromised, and if so why and how?
- (h) Did the CPS act properly, both in its internal operations and in the external statement(s) it made?
- (i) Have there been/will there be an appropriate review of individuals’ conduct in the CPS and of their corporate culture to prevent a recurrence?
- (j) Has any disciplinary action been taken in respect of the apology and matters leading up to it, and is any appropriate?

⁸ <http://www.cps.gov.uk/news/index.html> accessed 20 May 2008.

- (k) Is there any evidence of similar problems:
- (i) elsewhere in the region, or
 - (ii) elsewhere in the CPS?
- (l) Could/should CPS action be opened up to public interest complaints by groups, on a limited basis, perhaps with the permission of a senior law officer independent of the CPS?
- (m) What is to be learned from this damaging episode and what steps are necessary at every level and every aspect to prevent a recurrence?
- (n) If the lessons and steps arising from asking the questions set out in m) above suggest further enquiries or action are necessary outside the remit of the CPS, these should be stated.

(30) The Society places on record its willingness to provide any further information sought by the Committee and would welcome an opportunity to give further evidence in person or writing.

May 2008

Memorandum submitted by Nicola Padfield, Senior Lecturer, Fitzwilliam College, Cambridge

THE CROWN PROSECUTION SERVICE

1. I am a Senior Lecturer at the University of Cambridge, a Fellow of Fitzwilliam College, Cambridge and I also sit as a Recorder in the Crown Court. I am also the legal adviser to the Independent Hate Crime Scrutiny Panel, set up by Cambridgeshire CPS, which is composed of representatives of minority communities, in order to review CPS hate crime files.

2. The Crown Prosecution Service is still young. The first few years were marked by managerial and financial problems, and there can be no doubt that the Service has become hugely more professional in the last decade. Its website is particularly impressive: openly providing guidance in areas of law which Parliament has somewhat irresponsibly cloaked in fog (see Spencer, "The drafting of criminal legislation: need it be so impenetrable?" (2008) 67 *Cambridge Law Journal* 585). Here are some areas I would encourage the Committee to explore:

3. *The decision to charge.* I well understand why Glidewell's Review of the CPS in 1998 and Lord Justice Auld's Review of the Criminal Courts in 2001 recommended earlier involvement of the CPS and greater clarity in the relationship with the police, but I would encourage the Committee to re-read as well the report of the Royal Commission on Criminal Procedure (chaired by Sir Cyril Philips, 1981) which led to the creation of the CPS in the first place. Questions of accountability remain fundamental. Independence needs to be maintained at both area and national level. For example, confusion may be created by the growing role of CPS Direct, which was responsible for around 35% of all CPS pre-charge decisions in 2007–08. How does this fit with issues of local (area) accountability?

4. *The (continuing) decision to prosecute and plea bargaining.* Obviously, plea bargaining, in an informal sense, lies at the heart of our system, hence the extraordinarily large discount given for guilty pleas. But these negotiations remain largely invisible to the public eye. The creation of the CPS Inspectorate in 2000 has introduced a very useful "check" into CPS systems: perhaps the Committee will also be looking into the terms of reference of this body. Here, as elsewhere, improved efficiency must not "lead" over human rights and due process.

5. *Victims and Witness care.* The Government's determination to "rebalance" the system in favour of victims can exaggerate the role of the victim in the prosecution process. For example, are the targets on "direct communication with victims" sometimes or potentially distorting decision-making? Another area of concern: pre-trial witness interviewing, which clearly needs careful evaluation.

6. *Conditional cautions* are now an important alternative disposal. Early research into these (see Blakeborough and Pierpoint, Ministry of Justice Research Summary 7, 2007) confirmed the "potential uptariffing effects" of conditional cautions. I hope the Committee will explore the extraordinary growth in simple cautioning, Fixed Penalty Notices, Penalty Notices for Disorder etc, let alone "prosecutors' fines" in conditional cautions. Whilst some energy is currently being injected into developing more consistency in sentencing, this ignores the fact that many more people are being diverted from the formal court system. The Committee will find much food for thought in Chapter 3 of the annual Criminal Statistics: for example, a 40% cautioning rate even for indictable offences. What are the safeguards here? Has any work been done to

compare magistrates' guidelines on fines and on compensation with prosecutor's guidelines on conditional cautions? Are people being "set up to fail"? Anecdotally, I have heard that the level of prosecutors' fine often exceeds that which some defendants would be likely to receive in the magistrates' court? Has enough work been done assessing the impact of conditional cautions? Is it a good use of prosecutors' skills to involve them in this process? The continuing closure of small local benches of magistrates seems to me a great mistake: genuinely local and transparent due process should be encouraged. (I could also refer to the myriad civil protective orders such as ASBOs, SOPOS, and more recently, Serious Crime Prevention Orders in the Serious Crime Act 2007, and Violent Offender Orders in the Criminal Justice and Immigration Act 2008, which provide a maze of different and overlapping rules, which may sometimes appear as Parliamentary "knee-jerk" responses, and which are in urgent need of rationalisation/codification/consolidation).

7. *Advocacy issues.* The CPS is now establishing itself as a Service of "prosecuting advocates". I wonder whether enough work has been done on measuring advocacy quality, an important and difficult issue. Finding appropriate measures is not easy. The CPS is target driven: but the targets mentioned in the Annual Reports are not necessarily the most important. (I have long been concerned by the definition of "unsuccessful outcomes", for example). A review of the wider implications of the CPS becoming both decision maker and advocate is also needed: what are the due process implications? Are the wider implications for the independent criminal bar really welcome? Cutting costs in one area of the process have inevitable consequences for other parts.

8. *Sentencing.* Traditionally prosecutors have had little involvement in the sentencing system. Things have improved recently, as a result of the Court of Appeal's statements that counsel on both sides have a responsibility to make sure that the judge is aware of key guidance in this hopelessly complicated area. But the CPS Inspectorate recently called for a re-launch of the CPS "plea and sentence documentation scheme" in order to "raise awareness of what should be provided by the prosecution and the function it is intended to fulfill" (HMCPSI, November 2008). The Inspectorate was deeply critical of current practice. But I would go much further than this recommendation: serious research should be undertaken to explore whether there should be much greater involvement of prosecutors in the sentencing process (and indeed post-sentence, in early release decisions). An obvious comparison is with France: if the Committee can't watch an actual French court in action, they could see the film "*10 ème Chambre, Instants d'audience*" by Raymond Depardon on the reality of life inside a Paris court⁹, where the prosecutor is explicitly invited to propose a suitable sentence. Whilst the CPS may not currently be adequately funded to make realistic proposals, if they did, it would make defence pleas in mitigation more focused, and give the judge a clearer view of the options. Whilst judges might not think it is appropriate for them to take costs into account in individual sentencing decisions, prosecutors could be encouraged to propose more effective and less costly alternatives to imprisonment?

EFFECTIVENESS OF THE CROWN PROSECUTION SERVICE

9. Obviously, "effectiveness" depends on what one wants to effect. There remains much confusion on the aims of the process. Narrowing the justice gap is not only about convicting more guilty people, but about producing a fair and just (well funded) system. I cannot resist a rather obvious conclusion. Criminal law (substantive, procedural, sentencing) is far, far too complex in this country. The CPS would be rather more effective if it was working in a less complex framework. The latest example might be the Criminal Evidence (Witness Anonymity) Act 2008, so complex that the only beneficiaries will be lawyers (but maybe not the over-squeezed practitioner). Or the Department of Transport's proposed graduated penalties for speeding: one can imagine prosecutors being diverted from more "serious" crime by negotiations over contested speeding cases.

10. Another example: The Master of the Rolls explicitly agreed with Wall LJ's recent comment in *R (Noone) v Governor of Drake Hall Prison* [2008] EWCA Civ 1097: "I cannot, however, leave the case without expressing my sympathy both for the "despair" which the judge felt when considering the statutory provisions in the case, and for the view which he expressed in paragraph 2 of his judgment: "It is simply unacceptable in a society governed by the rule of law for it to be well nigh impossible to discern from statutory provisions what a sentence means in practice". The argument in this court lasted for the best part of a day, and the respondent's correct release date has only emerged in a careful reserved judgment". A fair system is inevitably costly: but Parliament is adding hugely to the cost by constantly tinkering with the law. Perhaps the Justice Committee can return to the important matter of codification; and if that is a step too far, to consolidation.

11. I end by stressing that this is a swift response highlighting what I consider to be some key issues. They are questions, not answers: I welcome the Committee's inquiry.

24 November 2008

⁹ See <http://dvdtoile.com/CritiqueDvd.php?dvd=18657>, available with American subtitles!

**Supplementary memorandum submitted by Nicola Padfield, Senior Lecturer,
Fitzwilliam College, Cambridge**

INQUIRY INTO THE CROWN PROSECUTION SERVICE

The Rt Hon Alun Michael asked me to illustrate my concern that “managerialist” targets can get in the way of “due process”. We discussed briefly the implications of the CPS becoming both decision maker and advocate, and the definition of “unsuccessful outcomes”. Perhaps I can develop the examples. At a PCMH there is often one CPS prosecutor dealing with all the cases in the list. He or she is unlikely to be the trial advocate, and is in a difficult position to make decisions (contrary to the system being set up for defence counsel in the graduated fee structure, which seeks to get trial counsel at the PCMH so that more issues can be resolved earlier). A different example: some CPS units tend not to brief out cases until late in the day (where, for example, no pleas have been forthcoming, or difficult issues have arisen). This means that the more difficult cases reach trial advocates rather late. More research could be done on whether the increased pressure on CPS reviewing lawyers to act as advocates may mean they have inadequate time to do the work of what was traditionally that of “instructing solicitors”. And I mentioned in my written evidence that targets on “direct communication with victims” could potentially distort decision-making (an example might be fatal driving accidents?). All areas for research, not ready answers.

I mentioned in oral evidence Judge Denyer’s article at [2008] Crim LR 784. A senior circuit judge, he discusses the problem that, when the parties fail to comply with pre-trial orders, there is often no appropriate sanction. He gives many examples of prosecution failures: on disclosure: *Phillips* [2007] EWCA Crim 1042; in drip feeding additional evidence: *Owens* [2006] EWCA Crim 2206, where approximately two weeks before the trial (and long after the 21 days which had been specified by the judge) the prosecution served further witness statements and exhibits which ultimately led to the disclosure of about 7,000 pages of unused material. Not surprisingly, the defence objected and wanted the evidence excluded. The judge refused. His refusal was not a successful ground of appeal. And then there are the huge numbers of late applications to admit bad character or hearsay. Whether these arise from a failure to take the Criminal Procedure Rules seriously, or because of other pressures, managerialist and/or budgetary, on CPS prosecutors needs, I think, to be explored.

Nicola Padfield
Senior Lecturer, Law Faculty, University of Cambridge
29 January 2009

Memorandum submitted by the Police Federation of England and Wales

**RESPONSE TO THE JUSTICE COMMITTEE PRESS NOTICE: CALL FOR EVIDENCE; THE
CROWN PROSECUTION SERVICE**

The Police Federation of England and Wales, established by statute is the representative body for over 140,000 police officers from the rank of Constable to Chief Inspector.

Please find below our comments to the questions asked in the above Consultation document.

QUESTION ONE

How the CPS contributes to, and fits into the Criminal Justice System-how does it relate to and share information with the police, courts and other services, how does it work with other prosecution agencies such as the Revenue and Customs Prosecution Office, what is its role as regards Anti-Social Behaviour Orders, is there an effective balance between holding it accountable and maintaining its independence, what is the role of the Attorney General?

Response

Having considered Question One we have no comment to make.

QUESTION TWO

How effectively does the CPS operate and serve its customers—how does it communicate with victims and witnesses, how does it relate to local communities, is it providing a timely and consistent service across the country, do the different staff functions support effective case management, is decision-making on charges or whether to prosecute effective, how is it managing key areas such as prosecuting rape and domestic violence?

Response

The primary and most repeated comment is around the time it actually takes to see a CPS lawyer. Most forces appear to have only the most rudimentary appointment systems which are generally ineffective if they exist at all. I have had representatives from several forces complaining to me of waiting several hours to see the CPS Lawyer. This is a daily rather than an occasional occurrence. When challenged by supervisors they have legitimately pointed out that they did not want to “lose their place in the queue”. Given that the CPS is often only situated at the main station in the BCU this can often involve considerable travelling especially in rural forces. This has the added knock on of reducing the most limited staffing levels to dangerous lows. The fact that many officers are away from their station and computer terminals also means it is difficult to put the waiting time to much constructive use.

There is a perception amongst many officers that, to use a current buzz phrase, many CPS are “risk averse” when it comes to charging decisions and much more so than Custody Sergeants previously were. This may be slightly unfair and I am open to the argument that CPS lawyers have a greater understanding of evidential requirements and tests as well as a greater understanding of what may succeed at court. Nevertheless the feeling persists, that while ever CPS have a target around reducing the number of “cracked cases” they will only pursue the most certain of cases. It is worth noting at this point that several representatives have stated their belief that CPS is much more willing to “risk” a charge when it is a police officer who is subject of it.

Linked to the above point around decision making I have received several complaints around consistency and perverse decisions. Officers have related to me when they have taken remarkably similar cases for decisions and received opposite outcomes. Again I am willing to concede that CPS are better trained at assessing evidence and for seeing flaws in cases so each case may have been correctly decided upon but the volume of these instances is high.

I am aware that much of this is written in a negative tone and I do not think that is a totally accurate picture as many officers in conversation point to good working relationships but it is almost self evident that if officers contact a staff association about something like this it will be to point out where something has gone wrong not when it has gone well.

Another point finally to consider is CPS Direct. In a small and simplistic survey most responses were very positive about this service saying that on the whole this service was far better than the one given in stations. There were a few who gave a differing view but predominantly it was suggested expanding this service at the expense of the station one. My obvious comment on this would be to say that the survey was neither deep nor wide enough to draw this conclusion but the majority of the responses pointed this way. The major criticisms of this service centred around logistical issues of getting both volume of evidence and certain types of evidence to the lawyer given the infrastructure limitations.

October 2008

Memorandum submitted by the Public and Commercial Services Union

JUSTICE COMMITTEE INQUIRY INTO THE CROWN PROSECUTION SERVICE

INTRODUCTION AND SUMMARY

1. The Public and Commercial Services Union (PCS) is the largest civil service trade union representing over 300,000 members working in most government departments, non-departmental public bodies, agencies and privatised areas.

2. PCS represents almost 3,000 members employed in the Crown Prosecution Service (CPS). We are therefore in a unique position to submit evidence as part of this inquiry as our members are employed by the organisation and understand its strengths and provide information on where it could improve, to serve the public and the criminal justice system better.

3. PCS welcome the committee’s inquiry as an opportunity to raise our concerns about the resourcing of the CPS and also respond to the committee’s terms of reference. We would also be happy to supplement this written submission with oral evidence or further written evidence.

4. This submission looks at:
 - How the CPS contributes to and fits into the Criminal Justice System and whether it is providing a timely and consistent service across the country.
 - How effectively the CPS operate and serves its customers—how does it communicate with victims and witnesses.
 - Whether the different staff functions support effective case management.
 - Whether decision-making on charges or whether to prosecute are effective.

How the CPS contributes and fits into the Criminal Justice System and its service across the country

5. The members we represent generally enjoy good working relationship with the various Police forces, Court Service staff, Probation Service, defence solicitors and witness service. Though the role of the latter has caused uncertainty and friction in the crown court due to the nature of the duties, which have traditionally be undertaken by crown court caseworkers.

6. Relationships can be strained, which we believe are avoidable, in workplaces where CPS and Police staff are co-located. Situations where this arises include Witness Care Units (WCUs), Integrated Prosecution Teams (IPT) and other locations both in Police and CPS estate premises.

7. PCS believe the strain is primarily due to under-resourcing of both the Police and CPS, which causes excessive workloads, however we believe the strain is also due to a lack of demarcation between staff's roles and duties.

8. This close working relationship also leads to excessive pressure on CPS staff from police officers for work to be done or decisions made quickly, sometimes inappropriately which has led to cases of workplace bullying in co-located sites. An audit we conducted using the management standards produced by the Health and Safety Executive (HSE) in 2007 showed that 25% of staff (including lawyers) working in IPT workplaces felt they had or were being bullied. This issue has sadly not been addressed by management, despite repeated representation from us.

9. We contend that this is unacceptable and would call on the CPS and the Police to provide adequate resourcing, clear roles and separate estate premises.

10. We also believe that the CPS should be an independent prosecuting body, with its own staff in its own offices, taking decisions of the appropriate charges to lay in criminal cases, and prosecuting criminal cases in the Courts.

11. In 2001 Sir Ian Glidewell made recommendations to co-locate CPS and Police staff for the sake of efficiency savings. External pressures for efficiency savings (generally the Police) have driven the London Criminal Justice Board to drive on with a change programme—IPTs which co-locate CPS staff in police stations. They then take on a greater proportion of case building work. We know from our members that this approach is creating problems for CPS staff, as far from having increased administrative budgets, CPS areas are working within a flat cash settlement, 3.5% year on year savings, plus job cuts.

ORGANISATION OF THE CPS

12. The CPS has 42 areas across England and Wales, aligned with the local police authorities. Each area is headed by a Chief Crown Prosecutor (CCP) who is responsible for the delivery of a prosecution service to his or her local community. A “virtual” 43rd area, CPS Direct (CPSD), is also headed by a CCP and provides out-of-hours charging decisions to the police. Three casework divisions, based in headquarters, deal with the prosecution of serious organised crime, terrorism and other specialised prosecution cases.

13. Each CCP is supported by an Area Business Manager (ABM), and their respective roles mirror, at a local level, the responsibilities of the Director of Public Prosecutions (DPP) and Chief Executive. Administrative support to areas is provided through a network of business centres.

14. A review of the CPS area organisation took place in 2007, which resulted in reforms to enhance the existing area structure. 41 of the 42 existing CPS areas were re-organised into 15 “groups” (CPS London was excluded).

15. The groups have been given a remit to “deliver measurable improvements across a range of functions”. The CPS areas within the group retain their internal structure and management (retaining their CCP and ABM) however each regional group is overseen by a group strategy board, chaired by a senior CCP, and supported by a senior ABM. The board consists of the other CCPs and ABMs within the group. The reform was designed to “improve the resilience and effectiveness of the Service and its capability to deliver a world class prosecution service and meet the challenges of the future”.

16. We feel however that the latest reform is simply a low cost attempt to regain central control lost a number of years ago when the CPS devolved from 13 regional areas (approximately mirroring the current Group jurisdictions). This places a middle tier of 15 group chairs (who also retain the management of their own area), between the local areas and CPS headquarters.

17. Additionally each regional group includes a group operations centre (GOC) which is tasked to deliver common services and a complex casework unit. These both have their own internal management structures, but the lead ABM and CCP provides ultimate governance.

18. The effectiveness of these regional groups, their operations centers and complex casework units is questionable at present, as they only became effective in April and in many cases their roles and responsibilities are still unclear. The work, systems and processes which are group chair led and GOC managed as opposed to those retained at an area or unit level are often a cause for confusion among the workforce.

LOCAL CRIMINAL JUSTICE BOARDS (LCJBs)

19. LCJBs bring together the chief officers of local criminal justice agencies to deliver the Public Service Agreement (PSA) targets in their area and to drive through criminal justice reforms.

20. All LCJBs have produced delivery plans to bring more offenders to justice, reduce ineffective trials and increase public confidence. Progress on the plans is reported to the National Criminal Justice Board (NCJB), the Attorney General, Solicitor General, DPP and CPS Chief Executive, along with the Home Secretary, Secretary of State for Justice and others who are also members of the NCJB

21. Although there is general knowledge of the existence of LCJBs the link and influence of the boards on operational and front-line work and the staff undertaking it (mainly caseworkers, associate prosecutors (lay advocates), administrators and managers) tends to be unclear.

22. Issues of governance have arisen; in particular in London in IPT pilot sites where CPS staff are working alongside Metropolitan Police staff having absorbed much of the duties previously undertaken by Police criminal justice units. There is a lack of clear guidance about what duties have been transferred and the workload involved has led to serious staffing issues, which have been exacerbated by budget cuts and introduction of other initiatives alongside IPT such as OBM.

23. It has also been unclear about the independence of the CPS when our members are working so closely alongside the Police. Public perception of CPS independence may be affected once they become more aware of the recent close working relationships between the Police and CPS. Even if the public are not concerned about the CPS decision making process being so close to Police, prosecutors may suggest that CPS is not as separated and independent in its decision making process as previously thought.

24. PCS also believe that the close working relationships LCJBs allow has created a situation where different parts of the criminal justice system start vying for the work done by their LCJB partners. The CPS chief operating officer recently informed PCS that some constabularies were actively seeking to take over the administrative work undertaken by PCS members in CPS, in a reversal of the IPT, where CPS staff have absorbed duties of their colleagues in the Metropolitan Police. We speculate that this is probably as a result of the Flanagan Report.

25. If this is realised then the future for a separate and independent CPS is bleak and we believe this would be a retrograde step back to the pre-CPS days of prosecution solicitors receiving their files directly from Police with limited decision making and input about charging.

How effectively the CPS operates and serves its customers

26. At the end of March 2008 the CPS employed a total of 8,351 people, 54 fewer than at the same time the previous year. This includes 2,913 prosecutors and 4,946 caseworkers and administrators. Over 91% of all staff are engaged in, or support, frontline prosecutions. The CPS has 945 prosecutors able to appear in the crown court and on cases in the higher courts and 419 associate prosecutors (formerly known as designated caseworkers) able to present cases in the magistrates' courts.

RESOURCING

27. While we agree to with the content and spirit of the CPS vision statement, PCS believe that the lack of resourcing makes the goals unrealistic as excessive pressure is being placed on staff, both at the front line and in local area, group and headquarters functions.

28. Our members' experience is that reactive and often punitive HR management practices regularly prevail over supportive and developmental management. We believe that managers are under increasing pressure trying to manage their staff effectively and deliver on targets that they often have little or no control over, while increasingly having to fire-fight, plus take on the work of their absent or overworked staff. In the 2008 "Help shape our future" staff survey less than four in 10 CPS managers felt they had the time to focus on managing.

29. These concerns about excessive stress are reflected in both the CPS 2008 biannual staff survey and the HSE work related stress audit which was conducted in late 2007.

2008 STAFF SURVEY

30. Most staff reported there are simply not enough staff to do the work. This year, in the latest bi-annual staff survey conducted by the CPS, with our support and endorsement only a quarter of the 5,000 respondents thought there were enough staff to get the job done and this fell to just 9% in London IPT sites, where CPS workers find themselves working in Police stations performing police administration duties on top of their own.

31. Other results from the 2008 *“Help shape our future”* staff survey, support our concerns that the CPS is facing a dangerous level of under resourcing and stress:

- Only 41% of staff felt comfortable with the pressure placed on them (against the government benchmark of 15%).
- Over half feel they have to work excessive hours to get tasks completed.
- Only one in five employees feel that the CPS does enough to reduce the risks to work related stress.
- Only 57% felt they had the right work/life balance (against the government benchmark of 46%).
- Only 57% of front line staff felt that the service they provided was good, due to lack of resources and excessive stress (dropping to 45% in London).
- Only 25% feel that the CPS is taking steps to reduce work related stress.

32. Self declaration questions on unpaid overtime and extra hours worked shows that for overtime, the extra hours staff worked would equate to between 38 and 55 extra staff being employed by the CPS. For hours of unpaid work, this would equate to between 109 and 169 additional staff for the CPS.

WORK RELATED STRESS

33. PCS recently carried out a stress audit on a wide range of our members across the department. In total we audited 250 members, using the HSE’s management standards for work related stress. The results were alarming and showed excessive stress levels across all root causes. The management standards include a toolkit questionnaire for measuring stress, which places the root causes of stress into five categories or “stressors”.

34. The results for the representative sample of 250 CPS staff showed that by HSE standards, there was “clear need for improvement” in control, management support and peer support and “urgent action” needed in job demands, relationships, role and change.

35. The results also show higher levels of work related stress in workplaces where our staff work regularly outside of the CPS office, eg in Police stations and court centres. Despite the clear evidence of excessive stress levels at work, we believe that the CPS has failed to address this issue. Requests by the union for a full audit of staff, a system for managing and reducing stress and an improved Occupational Health Service have been not been acted upon so far.

COST OF PRIVATE CONSULTANTS

36. Despite the resource cuts and pay restraint for civil and public servants, the CPS continues to spend vast sums of money on the private sector, with over £4.5 million being spent on consultant’s fees alone in the last financial year. Many of whom, we would argue are doing the work of civil servants at a cost of many times their salary or who provide little or no value to the service.

WITNESS CARE

37. PCS strongly believe that the CPS should have responsibility nationally for witness care, and be funded accordingly. The position across the country is mixed, with some CPS areas providing nearly all the WCU staff and others providing just a token presence. Across the department CPS staff make up only 30% of the staff in WCUs.

38. In the 2007–08 CPS annual report it acknowledged that since the introduction of WCUs, ineffective trials due to missing witnesses has fallen by 63% in the Crown Court and 14% in the Magistrates Court. Overall, attendance rates increased by 78% to 84%.

39. Where CPS provides WCU staff, PCS members send letters to witnesses asking for dates to avoid, speak to them over the phone if there are any problems or special needs and warn them about the failure to attend court. PCS members also help draft letters to victims in cases where there was an adverse outcome.

40. A PCS WCU survey conducted in 2006, along with the CPS staff attitudinal survey identified problems in WCUs linked to inadequate resources; such as long hours, stress and cultural issues between CPS and Police staff. They also identified other problems including inadequate IT, training and accommodation.

Staff functions and effective case management

41. Effective case management used to be seen as cradle to the grave file ownership for prosecutors and caseworkers alike. It instilled a greater personal responsibility towards the timely and effective preparation of the case for trial and we believe as a direct consequence of diminishing resources, CPS has sought to achieve greater efficiencies through initiatives that do not always complement each other.

42. Creating separate crown advocate units (that take crown court cases after the plea and case management hearing), case progression units (that liaise with the courts, lawyers and caseworkers on how far the case has been prepared) and now optimum business model “pods”, (a more resource intensive push for “pod staff” to get all trial files trial ready two weeks in advance of hearing), it can be seen that the emphasis has shifted away from file ownership.

43. Another cause of the change to OBM is that prosecutors have high in-house advocacy targets, so are rarely in the office to work on their own files. Crown advocates (in the crown court) also have a high in-house coverage target and can decide to return a case to the reviewing lawyer and caseworker, often with little time left before trial.

44. Lines of responsibility and accountability have become blurred, and the allocated reviewing lawyer’s decision may be reversed by the crown advocate, while communication of the crown advocate’s decision (maybe a letter to the victim about discontinuance) will still rest with the reviewing lawyer.

Effective decision-making on charges and whether to prosecute

45. Before charging a defendant and proceeding with a prosecution, crown prosecutors must first review each case against the code for crown prosecutors. The code sets out the principles the CPS applies when carrying out its work. The principles are whether:

- There is enough evidence to provide a realistic prospect of conviction against each defendant on each charge; and, if so.
- A prosecution is needed under the public interest.

CHARGING

46. Decisions on charging are generally seen as effective and the DPP has stated in the 2007–08 CPS annual report that as a result guilty plea rates have increased by 85% in the magistrates’ courts and 20% in the crown courts. PCS acknowledges that whilst effective, we have concerns at the efficiency of part of this delivery—CPS Direct.

47. Charging lawyers at CPSD on average, advise on less than four cases per working shift. While we fully support charging and believe it has been the driver behind narrowing the justice gap we do not agree with Sir Ronnie Flanagan’s recommendation to shift charging in all but the most serious of cases back to the police.

48. We fear that his antagonistic position exists because of the difference in targets of both the CPS and the Police. The target for the Police is around “detection rates” (they secure the charge and what comes after it including the trial is seen as an added burden) and the CPS targets to reduce attrition rates (by charging only evidentially strong cases).

49. We are also concerned by his recommendation (22b) that the Home Office and Attorney General consider alignment of both organisations’ objectives. We believe that this would not address the central problem, that the Police are not best suited to decide what evidence is required to prove a charge. This is the job for the CPS as an independent authority which was set up to prosecute criminal cases investigated by the Police in England and Wales.

CONCLUSION

50. We agree that partnership work should continue, however co-locating staff in Police stations, in an already stressed environment, does nothing to improve the effective processing and charging of cases and would request that the committee make representations to support our concerns. We also strongly believe that witness care needs to be delivered by CPS staff nationally and funded properly. This would improve the attendance rates and participation of witnesses.

51. PCS believe the CPS is generally working effectively, however this is at the expense of its staff who are excessively stressed and under-resourced. This submission details our concerns and we would hope the committee can take these up with Attorney General and the incoming DPP to ensure that our members are afforded the proper resources to deliver an effective service.

October 2008

Supplementary memorandum submitted by the Public and Commercial Services Union

**FURTHER WRITTEN SUBMISSION TO THE JUSTICE COMMITTEE INQUIRY ON THE
WORK OF THE CROWN PROSECUTION SERVICE**

1. This further written submission seeks to clarify and expand on some of the issues raised in our initial submission (October 2008) to the inquiry and expands on up some of the points made in live evidence by PCS and other witnesses on 3 February 2009. This further submission covers:

- How the CPS contributes to and fits into the Criminal Justice System and whether it is providing a timely and consistent service across the country.
- How effectively the CPS operate and serves its customers—how does it communicate with victims and witnesses.

HOW THE CPS CONTRIBUTES AND FITS INTO THE CRIMINAL JUSTICE SYSTEM AND ITS SERVICE ACROSS THE COUNTRY

Voluntary sector

2. While we recognise the undoubted good work done on many levels by the voluntary sector PCS feels that this has blurred the lines of role, responsibility and governance in respect of victim and witness care. In many parts of the country, this has caused concern and anxiety among CPS caseworkers and at times a degree of friction.

3. We believe this problem is exacerbated in many Crown Court centres by the lack of “one to one” court coverage by CPS caseworker, who can be expected to cover between two to four courts over the course of a session. This has been caused by under resourcing and we believe can only get worse as budgets are cut due to the comprehensive spending review settlements.

4. The work undertaken by Victim Support includes witness care in the Crown and Magistrates’ Courts. Witness care and support in the Crown Court was previously undertaken solely by Crown Court Caseworkers, formerly known as ‘Law Clerks’ (of whom PCS have sole recognition for consultation and collective bargaining purposes) and this is still a key role in a significant number of court centres.

5. The prosecution advocate (whether a CPS High Court Advocate or employed Barrister) has a key role in explaining the outcome of a case or consultation over the acceptance of a plea to a lesser charge or the offering of no evidence with reference to the pledge.

Integrated prosecution teams

6. PCS are still very concerned about adequate resourcing of the Integrated Prosecution Team (IPT) project. It is one of three issues still on the project risk register within the CPS.

7. We are aware that there has also been no involvement from the activity based costing team in the evaluation of the new working arrangements. We would therefore conclude that no proper measure of what extra work the CPS has taken from the Metropolitan Police has been undertaken and would recommend the committee pursue this with CPS management urgently.

8. Anecdotal evidence to support our view that co-location is placing an added and unbearable level of stress on our staff includes:

- Four PCS grades are presently on long term sick leave from IPT sites.
- Two experienced caseworkers have recently tendered their resignations, one specifically because of the increasing demands being placed on their unit.
- One member disclosed there were increasing tensions in their office, with a breakdown in working relationships between some lawyers and police officers.
- Rises in cases of work related stress, see para 26 for more details.

9. The work stress audits (using the Health and Safety Executive model) conducted at the initial IPT pilot sites revealed a need for management to take urgent action, however we have seen little evidence of this.

10. In a recent communication to staff in West Yorkshire, the Area Business Manager has confirmed the decision of the Area Board to relocate from police premises. A letter from the Chief Crown Prosecutor to the Chief Constable states that the co-location model cannot continue due to a lack of resources provided to CPS, which in itself has had considerable impact upon service delivery.

11. The economies of scale that exist in large CPS only offices enables operations to continue even if staff are absent due to annual leave, training and sickness. We strongly believe that the move to co-location across the whole of London needs to be seen in this context and not through management’s narrow focus of making efficiency savings by decreasing accommodation costs.

HOW EFFECTIVELY THE CPS OPERATES AND SERVES ITS CUSTOMERS

12. The points below look at our concerns in relation to how effective the CPS operates and serves its customers, this includes:

- Victims and witness concerns.
- Witness Care Units.
- Resourcing.
- Effects on Areas—resources and targets.
- CPS staff attitudinal survey 2008.
- Work related stress.
- Advocacy.
- Industrial relations.
- CPS Groups and Group Operation Centres, their remit and whether they are effective.
- Is the CPS an employer of choice, including equality concerns and whether the CPS is a world class service.

Victim/witness concerns

13. Some of the concerns expressed by Mind and Victim Support in their evidence session (3 February 2009) are also supported and shared by PCS, namely about the prosecutor's pledge. We concur that there is inconsistency across the country on how this is applied, which PCS see as a result of individual Area's autonomy on how they choose to operate.

14. The preparation and application for "special measures" is one of a number of functions that are being passed from Lawyers to Caseworkers. Again the autonomy enjoyed by each Area means that caseworkers in some Areas have already been responsible for preparing and submitting such applications, whereas others haven't.

15. The capacity for CPS to cater for victims and witness needs at court is limited by resources, for instance caseworkers in London and a number of other CPS Areas regularly have more than two or three court rooms to cover. As a consequence, there is little effective monitoring of how prosecutors exert a duty of care in relation to witnesses being cross examined, as there is not often a CPS caseworker in court to observe.

Witness Care Units (WCUs)

16. These are teams of a mixture of CPS and police civilian staff, who are responsible for ensuring victims and witnesses are warned to attend court in good time. Any necessary special measures are put in place and in the case of victims, are notified as a result of the case.

17. Although there are a small number of exceptions, we find that the majority of WCU's are staffed by a significantly higher ratio of police civilians and very occasionally officers on "light duties". As the job description of the CPS and police witness care officer is identical (despite our objections), the reality is that we have two sets of workers on significantly different terms and conditions of service doing the same job. This can cause tensions, which would be avoidable if a distinction between the CPS and police civilian staff roles were to be established, in the job descriptions and functions of the role.

18. In addition to operational issues this has also caused disharmony in relation to HR management practices of the respective staff, where our members, more often as the minority group, feel pressured to work to the same or similar terms and conditions as police colleagues. We consider this unjust, unfair and unsustainable.

Resourcing

19. Following a communication from the CPS finance director, we are deeply concerned about the following:

- 43 jobs have already been lost in CPS Headquarters.
- A further nine will be gone by April 2009, another ten by April 2010, and a further eight by April 2011. The overall headcount reduction by 2011 is therefore 70, or almost 11% of the HQ workforce (excluding the casework directorate).

20. With respect to future cuts, the finance directorate has stated that it needs further information from the Attorney General's office on whether and to what extent the CPS will have to contribute to further efficiency savings in addition to those mentioned above, within the same timeframe (ie by 2011).

Effects upon Areas—resources and targets

21. We do not as yet have any accurate data on the overall headcount reduction in Areas that have occurred as a consequence of budget reductions and so we are unsure what impact this is having on service delivery. We fully expect a further deterioration in the timeliness of the preparation and service of case papers and responses to Judge's orders. We would recommend the committee seeks further information on this to determine what reductions there have been in each CPS Area and what impact this is having on the service the CPS provides.

22. PCS notes that financial delegation has been withdrawn from most staff in London, with other Areas expecting to follow suit. Authorisation now has to be sought for any casework expenditure such as the payment of ordinary witness expenses, (including hotel accommodation and travel), interpreter expenses and expert witness expenses. In effect, introducing a new level of bureaucracy that is not resourced and will have a significant impact upon already demoralised and overworked staff.

CPS staff attitudinal survey 2008

23. Despite the results of the survey being published and widely available for some months we have seen no clear plans by the CPS on how to take the issues forward. These are the worst results in the ten year history of the bi-annual survey.

24. We have attempted to gain meaningful equalities and demographic data from the raw data of the survey, but have so far failed.

25. Below are some of the CPS results of notable concern to us. We have demonstrated how far they fall below the government benchmark target (ie from attitudinal surveys across the civil service).

- reaction to the amount of pressure placed on staff—26% below benchmark;
- recommendation of CPS as a great place to work—17% below benchmark;
- satisfaction on opportunities for personal development—15% below benchmark;
- satisfaction with physical working conditions—13% below benchmark;
- confidence to speak up and challenge decisions—13% below benchmark;
- treatment by the organisation (fairness and respect)—13% below benchmark;
- motivation by managers—12% below benchmark;
- feeling valued—12% below benchmark;
- sufficient staff to get the work done—10% below benchmark;
- effective leadership by senior managers—8% below benchmark;
- effective management of change—8% below benchmark;
- fair pay—8% below benchmark; and
- sense of personal accomplishment in the job—7% below benchmark.

Work related stress

26. A more detailed analysis of the results of our last work stress audit, using the Health and Safety Executive (HSE) management standards model, indicate that the root causes for the unprecedented high levels of work related stress within the organisation are caused by:

- Demands: Conflicting demands, unachievable deadlines, over-intensive working and unrealistic time pressures.
- Control: Lack of control over own work speed and style, insufficient variety of work and inflexible working practices and insufficient choice of duties.
- Support: Insufficient encouragement from management, lack of supportive feedback and a lack of support through emotionally demanding work.
- Relationships: Bullying at work prevalent and strained working relationships (internally and externally).
- Role: Unclear expectations, unclear roles and responsibilities, unclear goals and objectives and a lack of understanding of how role fits into wider organisation.
- Change: No opportunity to question managers on changes at work, lack of consultation and no clarity of how change will affect the job holder.

Advocacy

27. Additional pressure is also being placed on crown prosecutors and associate prosecutors through work rotas. Court deployments are often applied inflexibly and the effect is a long hours culture, as these staff have to find time to review and prepare files for court with little or no time spent in the office.

28. PCS believes that increased levels of court attendance should be matched with an increase in staffing numbers to ensure we give a better level of service to victims and witnesses.

Industrial relations

29. In general terms, the CPS group of PCS welcomes the positive steps taken in 2008 to secure better industrial relations. This included the development of the employee relations framework agreement, which set out guidance and best practice in how the respective parties engage, share information, consult and where appropriate negotiate changes to terms and conditions of service. However, Areas are often left to their own devices and different practices develop across the 42 Areas. We believe that a lack of central control has also let poor practices develop.

30. In addition, the development of the security in employment protocol agreement showed a positive commitment to staff about their ongoing employment and strengthened as far as possible the security of our jobs.

31. We hope that the positive way we have worked together to develop these agreements will form a firm basis for improved working relations on a local Area and workplace level.

CPS Groups and Group Operation Centres (GOCs)

32. Rather than bare the cost of placing a distinct and separate middle management tier between the 42 Area senior management teams of Chief Crown Prosecutors and Area Business Managers, management instead “upgraded” the roles in one identified lead Area within each Group.

33. In terms of governance this was perceived as a way of regaining some central control lost some time ago with minimal cost to the organisation (as the middle management tier would retain leadership of their own Areas). This was in addition to cutting costs for central service delivery (eg facilities management, procurement and health and safety).

Remit and effectiveness of the GOCs

34. As the GOCs become more established, issues have arisen over governance on local CPS Area HR management policies; such as flexible working hours, sickness absence reporting and even the management and interpretation of national HR policies.

35. The biggest concern to PCS in the GOC is that there is currently no recognised collective bargaining process (Whitley Council) in place to mirror and support the new Group structure. We are therefore left consulting and attempting to negotiate at Area level on policies and directives put in place at GOC level.

Is the CPS an employer of choice?

36. Of all staff, prosecutors and especially caseworkers in the frontline hold views that are generally the most negative about the organisation—in relation to resources, management, opportunities, fair and respectful treatment, change, pay and reward and stress. Only 26% of caseworkers would recommend the CPS as a great place to work.

Equality concerns

37. The CPS states that it is committed to working on diversity and equality issues in relation to the communities that it serves. The staff survey shows that just 32% feel it is safe to speak up and challenge the way things are done. We strongly believe this indicates there is much work to be done internally.

38. The last CPS equalities in employment report is dated 2005—2006, which in itself should be a cause for concern. Page 83 of the report reveals that of 40 equality complaints submitted, 23 were ongoing, eight were not upheld and just two were upheld (two were withdrawn and five were deemed not to disclose equality issues).

Is the CPS a world class service?

39. PCS believes in order for the CPS to become a world class service an urgent review of its funding is required. The present requirements to make efficiency savings will inevitably result in a deteriorating level of service, which in turn will impact negatively upon public confidence.

40. We believe it is a mistake to have a criminal justice system so heavily biased on the issue of policing and that there must be sufficient investment in staff in other justice agencies (CPS included). By way of illustration, Hackney borough (London) has 700 CID and Police Officers and 70 Police Community Support Officers to process over 10,000 arrested defendants, yet the CPS IPT unit was down to just three caseworkers, each with a caseload of over 100 Crown Court cases.

CONCLUSION

41. Our evidence demonstrates that the CPS urgently needs to review its funding in order to address many of the concerns we have regarding co-location, having enough staff to provide a proper service to victims and witnesses, reducing staff stress and dispensing justice effectively.

42. As we have outlined above many of our members are working in very stressed environments, however they feel if their concerns are addressed and adequate resources provided they would be working for an employer of choice. Our members are committed to working with CPS management to address these concerns so they can deliver an effective service to the public and make the CPS a world class service.

February 2009

Memorandum submitted by Revenue and Customs Prosecutions Office

REVENUE AND CUSTOMS PROSECUTION OFFICE SUBMISSION TO THE JUSTICE COMMITTEE INQUIRING INTO THE CROWN PROSECUTION SERVICE

1. This submission is to assist the Committee's consideration of how the Crown Prosecution Service (CPS) contributes to and fits into the Criminal Justice System, how it relates to and shares information and how it works with the Revenue and Customs Prosecutions Office (RCPO).

EXECUTIVE SUMMARY

2. RCPO is pleased to report that the relationship between the CPS, the public prosecuting agency and this, the specialist government prosecuting agency, is good. Both organisations are fully engaged in a variety of government initiatives, working and policy groups. An excellent example of this co-operation which has translated into an operational system is the Hermes Project. This created and thereafter introduced a new Human Resources (HR) database (Trent) and an integrated payroll system. The acquisition and implementation of the project was achieved within a joint project framework, the contributors were all members of the agencies that fall under the aegis of the Attorney General's Office. This was governed by a joint project board and combined project team with individual Departments taking the lead on specific elements.

3. Both organisations are continuing to work together on ongoing projects and within various working groups. One new project is the setting up of the "Prosecutors Action Zone" which will appear on the Legal Information Online Network (LION) site (a fuller description of the site follows later in the paper). The aim is to ensure the effective sharing of the best resources from each department in a logical framework. CPS and RCPO are leading respectively on the Disclosure and International Law areas of the site.

4. Additionally, RCPO is aware of many instances of individual lawyers from each organisation making direct approaches to colleagues in the other, for assistance or to seek a referral to individuals who, for example, hold an expertise with regard to a particular area of law or procedure. Both RCPO and CPS have particular areas of expertise and both organisations are generous to colleagues in other prosecuting agencies, willingly sharing this knowledge and expertise.

INTRODUCTION TO RCPO

5. The RCPO was established as an independent prosecuting authority in April 2005.

6. RCPO is a specialist prosecutor whose cases encompass income tax and value added tax (VAT) fraud, excise and duty fraud on oils, tobacco and alcohol, money laundering, strategic exports and drug smuggling. The cases that RCPO prosecute are investigated by either Her Majesty's Revenue and Customs (HMRC) or the Serious Organised Crime Agency (SOCA).

7. RCPO also deals with the restraint and confiscation of criminal assets, so that criminals do not benefit from the proceeds of crime and resources are removed from the criminal economy.

8. Prosecutions form the core of our operations. Prosecutions help to protect tax revenues, protect local communities from the harm done by drugs, sustain a strong economy and ensure that the UK is considered a good place to do business.

FACTUAL INFORMATION THAT THE COMMITTEE SHOULD BE AWARE OF HIGH LEVEL INTER-DEPARTMENTAL WORKING

9. Officials from the Law Officers Departments (LODs) are working together with officials from the Attorney General's Office to produce a draft of a protocol that will govern the Attorney's superintendence of the prosecution agencies. The recommendation for the protocol was made as a result of the review carried out into the role of the Attorney General's role to which the Directors of RCPO, CPS and the Serious Fraud Office (SFO) made a joint submission.

10. Both RCPO and CPS have been prominent in their support of the Attorney General's review of fraud. Both have provided personnel to the review and work together to good effect on various working groups charged with implementing the review.

BACK OFFICE JOINT WORKING

11. The Hermes Project is the introduction of a new HR database (Trent) and integrated payroll through shared working across CPS, Treasury Solicitors (T.Sols) and the SFO.

The LODs have worked together to share their expertise for the greater benefit of all involved. The project has delivered to timetable the elements of core Human Resources pay, absence and training, all underpinned by improved management reporting. The LODs have agreed at least 80% commonality of processes across departments in these areas. The LODs are now working on delivering the elements of Performance Management and employee and manager self service with the possibility of a Recruitment module.

The procurement has been achieved through a joint procurement exercise with the four LODs. The acquisition and implementation of the project has been achieved within a joint project framework governed by a joint project board and combined project team with individual Departments taking the lead on specific elements.

Confiscation and Restraint Joint Working

12. RCPO and CPS work well together on proceeds of crime issues. CPS has offered RCPO places on their training courses.

13. CPS chair a bi-monthly Proceeds of Crime Act (POCA) user group, at which RCPO together with SFO, Crown Office and the Department of Public Prosecutions in Northern Ireland (DPPNI) review recent cases and discuss issues of common concern.

14. RCPO and CPS are working together on a review of the panel of receivers and will continue to do so.

15. RCPO and CPS regularly discuss matters of common concern. For instance, RCPO invited CPS to a conference in order to review the basis of benefit calculations in drugs cases.

16. RCPO and CPS share case-specific information where cases overlap. This relates to both the prosecution of criminal cases and the management of cases which have a restraint and or confiscation element.

PROSECUTION OF CASES JOINT WORKING

17. Where both agencies may have an interest in prosecuting a matter the Prosecutors' Convention is invoked in order to decide which agency is best placed to either prosecute the matter or to lead in the prosecution of the matter. Each agency will also advise the other in cases where the specialist knowledge of one may assist the other. This is particularly so where cases involve offences of complex direct and indirect tax fraud/ money laundering. RCPO and the Criminal Taxes Unit of HMRC have provided advice and guidance to the CPS in relation to this work. The CPS guidance to lawyers regarding prosecuting firearms offences has proved invaluable to RCPO.

CONSENT WORK

18. If the CPS seek to prosecute for customs offences eg drug smuggling or VAT Fraud—then consent is often sought from the Director of RCPO who considers all such matters personally. Good and effective working relationships have been established between the two organisations. There is regular contact between them to ensure that all such cases progress smoothly and effectively to the benefit of all CJS stakeholders.

WORK REFERRED BY THE SERIOUS ORGANISED CRIME AGENCY (SOCA)

19. RCPO and CPS both prosecute cases that are investigated by SOCA. Cases are shared between them as per the joint guidance issued by the Director of RCPO and the Director of Public Prosecutions.

INSTANCES OF CO-OPERATION IN DEVISING AND DELIVERING JOINT TRAINING AND LEGAL GUIDANCE

20. Both agencies are fully involved in the setting up of the “Prosecutors Action Zone” which will appear on the Legal Information Online Network (LION) site. The site is an online network which provides shared information for lawyers across Government to access. Several government departments contribute to the site which has a team of dozens of authors and editors. The site is multifunctional, providing information in relation to policy and practice; there is a database of government lawyers and there is also access to an online database of contacts for government lawyers and legal trainees.

21. The aim of the zone is to combine and amalgamate the most useful information from each prosecuting department in various areas of law. This should ensure the effective sharing of the best resources from each department in a logical framework. This will enable all government lawyers, who are looking for assistance in an area with which they are unfamiliar, to be able to access specialised tried and tested advice and guidance upon which they can rely. CPS and RCPO are leading respectively on the Disclosure and International Law areas of the site.

22. Last year CPS ran a course for their Higher Court Advocates (HCAs) on which there were some spare places, which they offered to RCPO. This year, CPS has been offered a training day by KPMG, which they in turn offered RCPO places on.

23. Both agencies are currently working together in order to devise and deliver training on the law concerning firearms.

STAFF SECONDMENT

24. RCPO has welcomed a CPS lawyer on a six month secondment into their International and Policy and Advisory Division (IPAD), enabling the lawyer to pursue personal development and to facilitate greater mutual understanding of the areas of work and issues facing the two organisations.

RECOMMENDATIONS TO THE COMMITTEE

25. RCPO has no recommendations to make to the committee but confirm the view that there are good relations between these two complimentary prosecuting agencies, each working in their own specialist field.

David Green QC

Director

Revenue and Customs Prosecutions Office

November 2008

Memorandum submitted by RoadPeace

JUSTICE COMMITTEE CPS INQUIRY

ROADPEACE KEY POINTS

Role of CPS in criminal justice system related to motoring offences

1. The CPS, not the police, should make the charging decision on all serious motoring offences, ie those involving death or serious injury.

2. Joint training of CPS and Police is needed, as with other specialist areas and this should include the importance and accuracy of speed estimation, and the associated risks of aggressive and impaired driving (speeding, drink driving, running a red light, etc.)

3. Speeding and other motoring offences should be included in any anti social behaviour survey and in any CPS anti social behaviour policy.

4. The CPS' accountability should be improved with the monitoring of the prosecution and conviction rate of serious motoring offences with serious injury crashes monitored separately. This could be posted on a website for the public to see.

Effectiveness of CPS in improving level of satisfaction with road crash victims and liaising with local communities

5. The CPS should be responsible for informing the bereaved family of the charging decision, not the police as at present.

6. The CPS should extend adopt the policy of applying the Code for Victims to all those seriously injured in crashes where a driver is being prosecuted (the Code currently excludes all those injured in crashes).

7. The CPS should ensure that better information is provided to road crash victims regarding the criminal prosecution. RoadPeace is willing to assist the CPS with this.

8. CPS lead prosecutor on road deaths should be in contact with any local road victims group.

9. Consistency should be improved with standard procedures adopted (see suggested list) (*not printed*).

10. The CPS should take more chances with prosecution of serious motoring offences, as they have with rape charges.

11. The CPS should consider bad driving as one of its priorities, given the number of deaths and injuries involved in culpable crashes.

12. In addition to colouring fatal files, the CPS should colour code those motoring offences involving serious injury, and include a summary checklist for monitoring purposes.

INTRODUCTION

RoadPeace, the national charity for road crash victims, was established in 1993, after the founder's son was killed in a crash by a driver who had driven through a bank of red traffic lights and yet was only prosecuted for "Driving without due care and attention". RoadPeace's main campaigning concentrated on road death and serious injury being central to any charges brought, and therefore mentioned in them, and for these charges to be tried in Crown Courts. We have responded to numerous consultations on the prosecution of road death and injury, and also participated in the 2002 HMcpso review of the CPS' prosecution of fatal crashes.

RoadPeace is committed to road danger reduction and thus believes more should be done to reduce the threat posed by bad driving, including before casualties occur.

ROADPEACE DEDICATION

Our response is dedicated to two victims whose deaths we believe were not given proper priority by the CPS: Jon Chandler and Emma Wolsey.

Jon Chandler was one of the five people killed when the recovery van in which he was travelling (their vehicle had broken down and they were being transported back), ran into the back of a lorry going at 19 mph on a motorway in the middle of the night in August 2007. The lorry had been seen weaving between lanes and the driver driving with his elbows (what the CPS described as "This is not an uncommon practice with HGV drivers, but it is certainly not good practice"). The driver of the recovery van, who tested positive for drugs, was killed in the crash. The CPS explained their decision not to prosecute the lorry driver as "his speed was not disrupting the flow of traffic, and as there is no minimum speed limit prosecuting him for either dangerous or careless driving would not be feasible".

Emma Wolsey was killed a year ago this month when she correctly used a signalised pedestrian crossing at a roundabout but was hit by a young driver who had admitted smoking marijuana that day. Despite the protests of her family and the police, the CPS only charged the driver with Careless Driving. The District Judge later apologised to Emma's family stating that this should have been a Causing Death by Dangerous Driving prosecution.

CPS INQUIRY

Comment on the following areas was specifically requested by the Justice Committee:

1. Role of CPS in criminal justice system:
 - (a) How the CPS works with the Police.
 - (b) CPS and anti-social behaviour.
 - (c) CPS accountability.
2. Effectiveness of CPS:
 - (a) Communication with victims and witnesses.
 - (b) CPS and local communities.
 - (c) Timely and consistent service.

- (d) Effective case management and decision making.
- (e) Key area management (rape and domestic violence prosecution).

RoadPeace's response to these questions applies to the prosecution of bad driving offences and is based on our 15 years of working for and with road crash victims.

1. *Role of CPS*

(a) How the CPS works with the police

The CPS recently clarified to us that they are still dependent on the police choosing to pass them case files involving road death and injury for their advice; the police are not required to do so. We do not think this happens with other offences involving death and injury and ask that the CPS role be expanded so that they are required to review all motoring offences that involve death or serious injury. This is not limited to death or serious injury being mentioned in any offence as there is no dangerous or careless driving charge that mentions serious injury.

There is no joint training or joint reviews of the CPS and police regarding motoring offences. We believe it would be also useful if the CPS were better informed of the civil claim procedures as claims are affected by the criminal prosecution.

(b) Anti-social behaviour

RoadPeace does not believe motoring offences are treated properly as crime or anti-social behaviour. The definition of violent crime does not require physical injury yet dangerous driving, careless driving, drink driving, let alone speeding, are not considered as violent crimes.

The BCS survey reported speeding vehicles as the leading type of anti social behaviour reported by the public until it was decided to drop speeding vehicles as a possible answer.

(c) Accountability

RoadPeace has previously expressed concern about the lack of accountability with the CPS and prosecution of bad driving as the number of motoring offences involving fatal or serious injury was not previously monitored. It was not possible to know the number of fatal or serious injury crashes where a driver had been prosecuted or convicted as the casualty is not mentioned in all of the charges.

The Sentencing Advisory Panel's *Advice on Causing Death by Driving* included the findings from a 10 month survey by the CPS of the fatal crashes where a charge of Careless Driving was expected. It identified 66 cases but five of these were later dropped. Thus they expect less than 100 Causing Death by Careless Driving charges a year.

As with rape and other serious crime, there should be monitoring of both prosecution and conviction rates with serious motoring offences. It should also be possible to know how many cases were discontinued due to the lack of witnesses. It can take months before witness statement forms are posted to the witnesses and this should be done within a few days of the crash. We have previously suggested to the CPS and the Justice Committee that such key monitoring information is put on a website that the public can check.

2. *Effectiveness of CPS*

Our comments should be put in proper context. While the CPS have recently revised their Bad Driving Prosecution policy and this includes an improved service for bereaved families of culpable road crashes, our concern is that the improvements will not be implemented consistently and do not go far enough, especially when those seriously injured are involved. We are aware of cases where the CPS caseworkers were not aware that those seriously injured in crashes could make a Victim Personal Statement.

(a) Road crash victims

The CPS charging decision is conveyed to the family by the police FLO, not by the CPS. We believe the CPS should contact the family directly and inform them of their charging decision. We also think the meeting with the CPS and bereaved families should involve the police as there will inevitably be questions about the investigation. There is no consistent policy at present, at least not in implementation.

(b) Local communities

We believe it is rare for the CPS to attend community policing meetings or liaise with victim groups. In London, RoadPeace will soon introduce a six week pilot support programme for those newly bereaved in crashes in London. The CPS in London have agreed to participate in this programme and will present one of the key talks on criminal prosecution. But we are also aware that some of our local groups have had difficulty in contacting the CPS, and the latter have not been interested in speaking at local meetings.

(c) Timely and consistent service

We do not think victims of crashes receive a consistent service from the CPS. We have given an example above with the bereaved family meeting with the CPS. Another example is with the timing of the inquest vs the criminal trial. In some cases, the CPS do not request the trial be postponed until after the inquest, despite the CPS issuing guidance on this. In some areas, the CPS will attend an appeal, but not in others. The prosecutor can change at the last minute, including in fatal cases.

The CPS should adopt such standard practices as:

- Visit crash site in cases of serious motoring offences.
- Attend inquest of any crash where a driver may be prosecuted.
- Inform the bereaved family directly of their charging decision.
- Ensure the same prosecutor who meets the family prosecutes the case in court and also attends the appeal.

(d) Effective case management and decision making

We are concerned at the high chance of conviction required before the CPS will prosecute for Causing Death by Dangerous Driving and for Causing Death by Careless Driving while under the influence. The conviction rate is over 85%, which is much higher than required. We believe it is even higher where there is only injury or no injury involved.

In many cases, the bereaved families have argued for the CPS to charge Causing Death by Dangerous Driving instead of Careless Driving on the basis that former is still open to the jury when Careless Driving is charged. The CPS did not need to eliminate that option.

In the 2002 HMcpSI inspectorate review, the need to mark (colour) the fatal files so they stood out was highlighted. RoadPeace believes all motoring case files should be coloured according to the casualties severity involved. There is also the need for a summary cover sheet to assist with monitoring. This should note such key facts as the date the CPS was first notified of this case, when the file was sent for advice, if the CPS had attended the site, what charge the police were recommending, if supervision was requested, driver record, breathalyser/FIT test, etc.

There is also a problem with the lack of training. Not only is there no joint training with traffic police as mentioned above, but the CPS have informed us that they receive no training in road traffic injury prevention. Thus they are not informed of the associated risks of such behaviours as speeding, drink driving, use of a mobile phone. They do not know what efforts have been made to tackle bad driving. This is evident in their new Bad Driving Prosecution's policy effective dismissal of speeding with very little said about the lead factor in road death and injury. We believe training is also needed to tackle the confusion around intent. We have heard of cases where the CPS have told families that Dangerous Driving requires intent, which is not the case.

(e) Key area management

Bad driving is not a key area for the CPS despite over four times as many people dying in crashes than by homicide. There are no specialist courts, no area coordinators, no poster campaigns, no snapshot monitoring as with domestic violence.

Lastly, while the consideration of charges are beyond the scope of this enquiry, they will still affect the prosecution of culpable driving that has injured but not killed. Drink driving that permanently disables someone is still only charged as drink driving, unless there is separate proof of dangerous driving. Careless driving that leaves someone in a coma is still a non-custodial offence.

Amy Aeron-Thomas
Executive Director

May 2008

Memorandum submitted by the Senior Presiding Judge for England and Wales

RELATIONSHIP BETWEEN THE CPS AND THE JUDICIARY

1. The judiciary recognises that a strong relationship between it and the CPS can bring great opportunities for improvement to the efficiency of the Courts. However, liaison must remain within the boundaries set by the requirements of judicial impartiality and independence, the twin principles upon which the justice system hinges. It is also important that any liaison is even handed and does not interfere with the fair and impartial administration of justice, nor with the need to maintain an equally strong relationship with others who are interested in the criminal justice system, such as the defence community. For example, changes to rules of court are considered by a committee which includes representatives of all interested parties, including the CPS, legal professionals and victim support. The work of the committees is greatly enhanced by the contributions which are made by those who may have different yet valuable view points. Furthermore, the judiciary adopts a very cautious approach to liaison with the CPS on individual cases or classes of case; a Judge will never discuss any aspect of a case in the absence of the defendant's representative, save in cases in which an application concerning public interest immunity is brought. Subject to these considerations, since building effective relationships, at all levels, has been shown to have a positive impact on performance in the courts, the judiciary will consider all attempts at engagement which could yield positive results for the administration of justice.

2. The Lord Chief Justice and other members of the senior judiciary meet regularly with the Attorney General, as Minister responsible for the CPS, and the Director of Public Prosecutions. The purpose of such meetings is to discuss strategic issues and new policy initiatives in which the judiciary may be interested.

3. The Senior Presiding Judge for England and Wales, Lord Justice Leveson, has continued his predecessor's practice of holding monthly meetings with the Chief Executive of the CPS, Peter Lewis. This mirrors the established practice of meeting with other senior figures in the criminal justice system. Their relationship forms the apex of a formal system of engagement between the judiciary and CPS at all levels of the system. These meetings concentrate on more specific issues which affect the performance of the courts.

4. In November 2007, the Senior Presiding Judge wrote to all Resident Judges informing them of a new protocol asking them to hold routine liaison meetings between Resident Judges and Chief Crown Prosecutors. The Protocol, the operation of which will be reviewed if a quality assurance scheme for advocates is adopted by the CPS, does not seek to replace established meetings with court users' groups, typically including representatives from the CPS, judiciary, HMCS, the local Bar and solicitors, or informal meetings under the listing protocol. Local Criminal Justice Boards, which were established to ensure effective working across all criminal justice agencies, continue to operate.

5. In his letter to the Resident Judges the Senior Presiding Judge stated:

“These meetings are not intended to replace existing court users' meetings but are designed to deal with any specific judicial concerns which are directed to the CPS. These may include the standard and timeliness of case preparation, and/or the standard of advocacy being provided, by both counsel instructed by the CPS and HCAs. I hope that you will find them a practical and constructive way of both communicating positive information about what is going well, in addition to dealing with what I understand may be real problems, but currently being addressed by different Resident Judges in different ways.”

6. The protocol establishes a framework within which these meetings are to take place. It says that:

“The preferred approach to dealing with performance issues is for the local CPS Unit Head to maintain regular contact with the Court Manager at the Magistrates' or Crown Court and, if necessary, the Resident Judge. This regular contact will address immediate performance issues such as an essential component of case management not being adhered to, possible importing or exporting of cases, adjustments to diaries if Recorders cannot be found, linking cases where there is a common theme, general process issues or reacting to sudden unexpected events such as bad weather or flooding.

More formal communication lines need to be agreed between the senior local judiciary and senior CPS officials to deal with continuing or significant performance issues that cannot be resolved locally between the Unit Head and Court Manager.

Regular and structured meetings are proposed so that performance issues can be discussed and that the relationship between the local courts and CPS can effectively support the delivery of criminal justice performance.

This protocol is not intended to remove the need for regular meetings between all court users (including the bar and local law society) and should not be used for the purpose of discussing issues of wider significance which may impact on others (such as listing) or any individual cases (save specifically in relation to issues of CPS performance).”

7. The protocol was designed to provide a clear line for communication from local to national level. In broad terms, Resident Judges are invited to send minutes of meetings where they have raised concerns about the performance of the CPS to both their Presiding Judge (a senior Judge with administrative responsibilities for one of the 6 regional Circuits), and the Senior Presiding Judge. Presiding Judges are encouraged to meet their CPS Group Chair. If an issue cannot be resolved at a local level, the Senior Presiding Judge will then discuss the matter with the Chief Executive of the CPS.

8. The Senior Presiding Judge will also try to identify national trends—for example, whether the same CPS lawyer should see a case through from start to finish—so that he can discuss with the Chief Executive how best to implement new initiatives, or improve current practice.

9. It is important to emphasise that the protocol does not exist only to identify problems. There have been many examples where liaison meetings have helped to highlight best practice at a local level, which can then be disseminated nationally.

10. The judiciary is keen to maintain a constructive relationship with the CPS whilst bearing in mind the over-riding need to remain impartial and independent at all times. It views the creation of the protocol as an effective way to express its views about the way in which the CPS provides support to the courts. This relationship will be increasingly important as the number of CPS lawyers, and the complexity of work they take on, increases.

CPS LAWYERS AND APPOINTMENT TO THE BENCH

11. Eligibility for judicial appointment is governed by statute in relation to each judicial office. Originally this was couched generally in terms of having been a barrister (or in the case of some junior appointments a barrister or solicitor) for a specified minimum period—generally either ten or seven years. This approach was altered by the Courts and Legal Services Act 1990, which allowed solicitors to obtain rights of audience in the higher courts and changed the statutory eligibility requirements to reflect this. So for example, the qualification for appointment as a High Court Judge set out in section 10(3) of the Supreme Court Act 1981 was amended from being a barrister of at least ten years' standing to having a 10 year High Court qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990, or being a Circuit judge who has held that office for at least 2 years.

12. The eligibility requirements have been changed again by Part 2 of the Tribunals, Courts and Enforcement Act 2006, which reduced the statutory qualification periods to seven years where they had been ten, and to five where they had been seven, and introduced a new requirement that in order to count, a qualification period must be one in which the person concerned had, after qualifying (generally as a barrister or solicitor), gained experience in law. Section 52 of the Act sets out examples of what will constitute a 'law-related activity' which will satisfy the test of gaining experience in law.

13. None of this specifically refers to those lawyers who are employed by the CPS, either to include or exclude them. But being a barrister or solicitor employed as a lawyer by the CPS for the required period of time would certainly bring someone within the terms of the statutory eligibility requirements for judicial appointment.

14. In addition to the bare statutory requirements, however, other factors are taken into account in considering who is appointable to particular posts. Some of this will relate to the particular type of post under consideration; so, for example, a vacancy may be for a specialist family judge, or a chancery judge, and only those with that specific expertise will be selected. In addition, it has been the policy of successive Lord Chancellors that before being appointed to a permanent salaried post, from which they will not readily be able to be removed, or to return to practice if the appointment turns out to have been a mistake, candidates for appointment should generally have at least two years' experience of a part-time, fee-paid judicial appointment, such as Deputy District Judge or Recorder.

15. This policy is not applied inflexibly and there are examples of exceptions to it, but it has the strong support of the Judicial Executive Board as a sensible and pragmatic general approach. Its benefits include helping to ensure that there are sufficient candidates for fee-paid posts, which are a vital part of the judicial system, and, most importantly, allowing potential salaried judges to test the water and find out whether they will enjoy or be any good at being a judge, which is not a role that suits everyone, before committing themselves to permanent appointment. If it turns out that the role does not suit them, they can unobtrusively stop fee-paid sitting and carry on with their practice, without any adverse inference being drawn.

16. However, this requirement that, in the normal course of events, people aspiring to judicial office will first test their suitability by obtaining fee-paid experience, causes a difficulty for employed CPS lawyers. They are eligible and welcome to apply for fee-paid appointment as Deputy District Judges in the county courts, dealing with civil disputes, but they tend not to want to, as their expertise is in criminal law. They would therefore like to be able to be appointed as Recorders, sitting in the Crown Court and trying criminal cases. This view is supported by the Attorney General and the Director of Public Prosecutions, but poses significant issues which remain to be addressed.

17. It is a fundamental principle of common law, reinforced now by the Human Rights Act 1998, that parties are entitled to a fair trial before an independent and impartial tribunal. No one is permitted to be judge in his own cause. The requirement extends far beyond cases where a judge has shown actual bias against a particular party, to those cases where there may be an appearance of bias. The Courts of England and Wales have said many times that it:

“is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”¹⁰

The most effective guarantee for the litigant is not that a member of the Tribunal will be disqualified on the grounds of actual bias or on the basis of automatic disqualification, although these protections remain important. Rather, it is that the right to a fair trial arises where the court examines all of the circumstances and concludes that there was a real danger or possibility of bias. Would the reasonable person, in possession of all of the relevant facts of the case, think that the judge or jury member might have unfairly regarded the case of one of the parties appearing before the court?¹¹

18. The overwhelming majority of criminal prosecutions in England and Wales are conducted by the Crown Prosecution Service, and for a judge to be an employee of the CPS would breach the requirement that a case be heard by an independent and impartial tribunal. In *R v Abdroikof & Others*¹² the House of Lords considered the position of a CPS lawyer sitting on a jury. It held that:

“justice is not seen to be done if one discharging the very important neutral role of juror is a full-time, salaried, long-serving employee of the prosecutor.”¹³

There is a very strong likelihood that the reasonable man would sustain grave doubts as to whether an employee of the CPS could act impartially or without bias when sitting as a judge on matters in which the CPS was the relevant prosecuting authority. This view is supported by the jurisprudence of the European Court of Human Rights, which has held that the court must offer a guarantee to the defendant that is sufficient to exclude any legitimate doubt in respect of the impartiality of the court. Where an individual, having held office in the public prosecutor’s department subsequently sits in the same case as a judge, and his particular post in the prosecutor’s office may have led him or the department in which he worked to deal with a case now before him as a judge, the public are entitled to fear that the judge does not offer a sufficient guarantee of impartiality¹⁴.

19. The above-mentioned jurisprudence does not reflect in any way on the character of those individual CPA lawyers who may seek part time judicial appointment; they might well set aside any preference they had for the prosecution, or even be personally disposed to favour the defence, but it would remain the fact that their decisions would be open to allegations of bias and impartiality. The position of those barristers in private practice who prosecute on behalf of the CPS, and also sit as Recorders, is fundamentally different. They are self-employed, not employees of the CPS, and even if they regularly prosecute, their position once they are sitting as a Recorder is wholly independent of the CPS, in a way that a CPS employed lawyer could not be.

20. Not all prosecutions are conducted by the CPS; some are brought by other enforcing agencies such as the Health and Safety Executive, the Environment Agency and the Department for Environment, Food and Rural Affairs. CPS lawyers could sit in those cases as Recorders and one CPS Recorder has already been appointed on this basis. However, the volume of this work is small in comparison to the whole, and is not focused on a single court centre or circuit, making it impossible to justify additional appointments of this kind. Most courts cannot list enough non-CPS prosecution cases to provide work for a CPS Recorder.

21. It is true that in some cases, mainly civil cases, the judge will declare some slight prior knowledge of the issues or of a party, or witness, and will nevertheless carry on sitting, with the agreement of both sides. It has been suggested that this principle might perhaps form the basis of a ‘waiver’ scheme in which defendants in criminal trials would be invited to consent to being tried by a CPS Recorder. It seems highly unlikely that any scheme in which defendants were systematically invited to waive their Article 6 rights to a fair trial could be upheld by the Courts, and also very difficult to see what incentive defendants would have to waive their rights in this way. It would not increase the efficiency and effectiveness of the justice system if criminal trials were regularly aborted on the discovery by the defendant that the judge who was to try him was a CPS lawyer.

22. The view of the Judicial Executive Board is that those CPS lawyers who are keen to gain judicial experience should be encouraged to apply for the many fee-paid lawyer posts in the tribunal system, or as Deputy District Judges in the county courts. They can then still go on to salaried appointment in due course

¹⁰ As per Lord Hewart C.J in *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256 at page 259

¹¹ See the test as set out by Lord Goff in *R v Gough* [1993] AC 646 as applied in *Locobail (UK) Ltd v Bayfield Properties Ltd & Others (Conjoined Appeals)* 2000 Q.B. 451 and approved in *Re Medicaments & Related Classes of Goods (No 2)* 2000 All ER (D) 2425.

¹² *R v Abdroikof (Appellant) and Another, R v Abdroikof and Another (Appellant) and R v Williamson (Conjoined Appeals)* [2007] UKHL 37.

¹³ As per Lord Bingham at paragraph 27.

¹⁴ *Piersack v Belgium* [1983] 4 EHRR 169

if they are selected on merit. But the objections to their sitting as judges in criminal cases prosecuted by their employer are fundamental, and even were we to try to go along this path, we would risk an adverse decision of the ECHR in due course.

Rt Hon Lord Justice Leveson
Senior Presiding Judge for England and Wales

February 2009

Memorandum submitted by the Serious Fraud Office

**JUSTICE SELECT COMMITTEE INQUIRY INTO THE WORK OF THE CROWN
 PROSECUTION SERVICE: The Serious Fraud Office: A Comparative Model**

1. INTRODUCTION

1.1 The Serious Fraud Office (SFO) is an independent Government Department that investigates and prosecutes serious and complex fraud. The SFO, like the CPS, is an independent prosecutor, accountable to the Attorney General, who in turn is responsible to Parliament. Whilst the SFO shares the same prosecutorial duties and responsibilities as the CPS, its functions differ from the CPS crucially in four main aspects:

- Its scope, specialising solely in serious and complex fraud.
- Unlike the CPS, the SFO role is not limited to prosecutions: in effect the SFO can guide investigations.
- The integration of Investigators, Prosecutors and Accountants significantly enhances the skills required to perform complex serious fraud investigations and prosecutions well.
- The integration of professionals besides lawyers allows the SFO to proactively and collectively respond to serious fraud investigations in all types of business activity.

2. THE ROLE OF THE SFO WITHIN THE CRIMINAL JUSTICE SYSTEM

2.1 History and Nature of the SFO: Section 1(1) of the Criminal Justice Act 1987

The SFO, created under section 1(1) of the Criminal Justice Act 1987, is headed by a Director, who is appointed by and accountable to the Attorney General. The SFO was established following the recommendation in Fraud Trials and Committees Report (the “Roskill” report) published in 1986, where the need for a specialist, unified agency to detect, investigate and prosecute offences of serious fraud was identified. Since its inception, new agencies with investigative and prosecutorial powers in the field of commercial crime have emerged. The Office of Fair Trading (OFT) and the Financial Services Authority (FSA) target specific financial offences and also exercise regulatory powers. The CPS also prosecutes fraud offences. The main difference between these and the SFO’s functions is as follows:

- The SFO’s wide remit in the investigation and prosecution of serious fraud cases;
- The SFO’s use of a variety of professionals integrated within the organisation to concentrate on frauds that require in-depth and thorough analysis.

2.2 SFO’s Powers of Investigation Section 2: Criminal Justice Act 1987

Section 2 of the Criminal Justice Act 1987 (CJA 1987) confers the power to require a person to answer questions, provide information or produce documents in the course of the investigation. This power, until recently, applied uniquely to the SFO, namely the Director or staff authorised by the Director. Section 2 notices are not confined to an individual suspect or suspects of an investigation but also apply to banks, financial institutions, accountants and other agents or professionals who may in the course of their business hold documents or information relevant to a suspected fraud.

Section 2 powers may only be used for the purposes of an investigation of a suspected offence which appears on reasonable grounds to the Director to involve serious or complex fraud and where there is good reason to do so for the purpose of investigating the affairs (or any aspect of the affairs) of any person.

The CPS and the Revenue and Customs Prosecution Office (RCPO)¹⁵ now have equivalent investigatory powers under the Serious Organised Crime and Police Act 2005 (SOCPA 2005). Sections 60–70 of SOCPA replicate the powers set out in section 2 of the 1987 Act but only apply to the following limited categories of offences:

- “lifestyle” offences under the Proceeds of Crime Act 2002 in England and Scotland;
- sections 15–18 of the Terrorism Act 2000;
- section 170 of the Customs and Excise Management Act 1979 and section 72 of the Value Added Tax Act 1994;
- section 17 of the Theft Act 1968 (false accounting) or any offence at common law of cheating in relation to the public revenue, which is a qualifying offence;
- section 1 of the Criminal Attempts Act 1981 or offence in Scotland at common law of attempting to commit any offence specified in the Act; and
- section 1 of the Criminal Law Act 1977, or in Scotland at common law, of conspiracy to commit any offence specified in the Act.

The SFO’s investigative powers under section 2 apply to all SFO offences. Further, Section 59 of the Criminal Justice and Immigration Act 2008 which came into effect on 14th July 2008 extends the SFO’s powers under section 2 of the CJA 1987 to include the pre-investigative stage for offences relating to bribery and overseas corruption. There is no equivalent extending provision in respect of CPS and RCPO offences under the 2008 Act.

2.3 The SFO’s Relationship with other Prosecution Agencies

The SFO liaises with all relevant Departments including the other Law Officers Departments, the Serious Organised Crime Agency (SOCA), the Office of Fair Trading (OFT) and the Financial Services Authority (FSA) to consider and determine (policy) issues of related interest, such as Disclosure, Policy for the prosecution of companies and management of very high cost cases. This is in recognition of the need for a cross-cutting approach to address financial crime.

3.1 Review and Transformation/Conclusion

The De Grazia Report, published in June 2008, highlighted a number of areas for review in SFO working methodology and practices. The SFO has welcomed this analysis against USA comparators. The organisation is currently undertaking a high level strategic review. This will improve its operational delivery and develop an investigation and prosecution agency that is proactive, forward thinking and conducive to excellence.

Kathleen Harris

December 2008

Memorandum submitted by the Solicitor General

PROSECUTION SERVICES

I am writing to inform you of key decisions that the Attorney General and the Directors of her Departments have made as a result of the Law Officers’ Departments’ Strategy Programme. You are aware that our Strategic Board has been examining the Departments to ensure that we have prosecution, fraud and legal services which are effective for the future. The Attorney referred to this work in her Memorandum of Evidence to the Committee for your current Inquiry into the Work of the Crown Prosecution Service.

First, we have decided to bring together the Revenue and Customs Prosecution Office with the CPS in order to deliver enhanced prosecution services to the public. This will create a more flexible and resilient organisation with increased capability in specialist, complex casework. The new organisation will prosecute cases investigated by the police, SOCA, HMRC and UKBA and provide a single-interface for investigators.

Work on integration of the Departments will start now, building on the strengths of both CPS and RCPO. The merger will take place during 2009–10, with further consolidation in 2010–11. Legally, both CPS and RCPO will continue to exist, but for practical purposes we will bring them together under one banner. For a transitional period, David Green QC will lead an HMRC prosecution service within the new combined service, reporting directly to the Attorney General.

¹⁵ Section 60(1) confers the power to give disclosure notices on the Director of Public Prosecutions, the Director of the Revenue and Customs Prosecutions and the Lord Advocate. This power may be delegated to a prosecutor from the corresponding prosecution agency, the CPS, the RCPO and Prosecutor Fiscal.

Secondly, we will continue our work to improve the fraud landscape. This is a highly complex area and we must ensure that we are addressing the big issues. Both the Serious Fraud Office and the National Fraud Strategic Authority are committed to developing this, examining whether we have the right arrangements in place for the investigation and prosecution of serious fraud. We will examine this with other players across Government and the enforcement and regulation communities in the light of evidence and analysis.

Thirdly, the Law Officers' Departments have also decided in principle to develop shared corporate services. This is an opportunity to provide a more effective service as well as enhanced value for money.

We will now be establishing the next phase of our Strategy Programme to deliver the change and will continue close working CJS and other partners throughout this process.

The Attorney or I would be very happy to discuss further with you if that would be helpful. We will keep you informed of key next steps in the transition as they arise.

Vera Baird, QC MP

8 April 2009

Memorandum submitted by the Whitehall Prosecutors' Group

JUSTICE SELECT COMMITTEE INQUIRY INTO THE ROLE OF THE PROSECUTOR—WRITTEN MEMORANDUM ON BEHALF OF THE WHITEHALL PROSECUTORS' GROUP

1. On behalf of the Whitehall Prosecutors' Group ("WPG") I would like to thank the Justice Committee for the invitation to submit written evidence about our work for consideration as part of the Committee's Inquiry into the role of the prosecutor.

2. The WPG, as the name suggests, is a coming together of senior members of the various governmental prosecuting authorities for the purpose of sharing knowledge, discussing and co-ordinating action on issues of mutual concern and acting as a voice for our members. Please find enclosed: Appendix A, our terms of reference and Appendix B, a list of the organisations that are invited attend our meetings. We believe that one of our strengths lies in the diversity of the voices represented, from the large well-known prosecuting authorities such as the Revenue & Customs Prosecuting Office through to the smaller, more regulatory-focussed organisations.

3. We meet quarterly but communicate regularly by email between meetings. Recent agenda items that have generated a high level of interest and fruitful collaborative working have been: a "refreshing" of the Prosecutors' Convention, proposed changes to the Code for Crown Prosecutors, data security between government litigators and counsel at the independent Bar, and the Fraud Review and the development of Attorney General's guidelines on the Plea Discussions Framework in Cases of Serious or Complex Fraud.

4. Reporting to our quarterly meetings are four practitioner sub-groups, each specialising in a key aspect of prosecutorial work: confiscation and asset recovery; disclosure; international issues; and investigative powers. The sub-groups identify key developments in law and practice in their respective areas and support prosecutors in their day to day work by providing expertise, guidance and sign-posting on the prosecutors' section of the Legal Information Online Network ("LION") intranet site. WPG also receives regular updates from the Prosecutors' Training Steering Group about the training and development opportunities afforded by the Government Legal Service in conjunction with the National School of Government.

5. I hope that this information enhances the Committee's understanding of the co-operation and joint-working that is facilitated by the WPG in support of the valuable work of all of the organisations that prosecute on behalf of the government.

Susanna McGibbon
Chair

1 April 2009

APPENDIX A

WHITEHALL PROSECUTORS' GROUP: TERMS OF REFERENCE

To consider issues relating to prosecution work undertaken on behalf of government departments and other public bodies with a view to:

- (a) sharing knowledge, in particular in relation to legal and other developments affecting government prosecutors;
- (b) providing a forum for prosecuting lawyers where issues of mutual concern can be discussed;
- (c) acting as a co-ordinating body for its members on issues of concern; and

(d) where appropriate, acting as a voice for the non-CPS prosecuting community within Whitehall.

The Group will meet these aims through quarterly plenary meetings and through the dissemination of information to the members of the Group at other times. The Group will also establish standing sub-groups to consider particular issues in greater depth. These sub-groups will report back to the plenary meetings of the Group.

APPENDIX B

BODIES INVITED TO ATTEND MEETINGS OF THE WHITEHALL PROSECUTORS' GROUP

Attorney General's Office;
Her Majesty's Revenue & Customs;
Her Majesty's Treasury;
Department for Business, Enterprise & Regulatory Reform;
Department for Environment, Food and Rural Affairs;
Department for Transport;
Department for Work & Pensions;
Revenue & Customs Prosecutions Office;
Serious Fraud Office;
Treasury Solicitors Department;

Naval Prosecuting Authority;
Royal Air Force;

Crown Office and Procurator Fiscal Office;
National Assembly for Wales;

Bank of England;
Driver and Vehicle Licensing Agency;
Environment Agency;
Health and Safety Executive;
Maritime and Coastguard Agency;
National Health Service;
Office for Criminal Justice Reform;
Vehicle and Operator Services Agency;

Financial Services Authority;
Gambling Commission;
Healthcare Commission;
Information Commissioner's Office;
Office of the Rail Regulator;

Crown Prosecution Service (observer).

Memorandum submitted by Robin M White

1. I am a Senior Lecturer in Dundee Law School, and have undertaken research into criminal justice issues, with emphases on intra-UK comparisons. Prosecution institutions and "alternatives to prosecution". I am also a Justice of the Peace and member of the Scottish Justices Association Executive Committee.

2. I offer observations on:

- (a) how the Crown Prosecution Service (CPS) appears to have benefitted from increased similarity to the Crown Office and Procurator Fiscal Service (COPFS) and might further benefit;
- (a) implications of the considerable increase in use of certain "alternatives to prosecution", ie "conditional offers" and "decriminalisation" in recent years.

3. Appendix A outlines the Scottish prosecution system; Appendix B gives the legal authority for the role of the police in it; Appendix C lists articles produced by my research.

(a) SCOTTISH COMPARISONS

4. The Auld Report (*Review of the Criminal Courts of England and Wales* TSO, 2001, ch 10, para 44) concluded the CPS “[had] still to fulfil its proper role which ... should be closer to the more highly regarded Procurator Fiscal in Scotland ...”.

5. Four important differences between the Scottish and English prosecution systems are:

- (i) the role of the police;
- (ii) prosecutorial monopoly;
- (iii) professional prosecution of serious crime; and
- (iv) depoliticisation of Law Officers.

The role of the police

6. England has no tradition of public prosecution, but a strong tradition of private prosecution. This produced two particular effects. Firstly, as genuinely private prosecution was inefficient, when the modern police were created, they gradually took the function over and, acting as nominally private prosecutors, initiated most prosecutions. Secondly, the police employed solicitors to actually undertake prosecutions, making these solicitors “handmaidens to the police” (L. Zedner *Criminal Justice*, Oxford UP, 2004, pp 149–151). To a considerable extent, the recent history of prosecution in England and Wales has been an attempt to escape this relationship.

7. Police control of prosecution, though purely contingent, became regarded as normal, but the Philips Commission (*Report of the Royal Commission on Criminal Procedure*, Cmnd 8092, 1981) concluded the resulting variety and haphazardness produced a poor standard of prosecution. It therefore formulated the “Philips principle”, that is, that prosecutor should be independent of investigator (ie, police). This resulted the CPS. However, the Commission compromised the principle by recommending the police continue initiating prosecutions. This meant the CPS did not wholly escape being “handmaidens”. Consequential problems were visible in several reports on the CPS. Auld (*Review of the Criminal Courts of England and Wales* (TSO, 2001) specifically noted that most prosecution problems he identified were “due to the fact that the police, not the [CPS] initiate prosecutions” (ch 10, para 37) concluding CPS should be more like COPFS.

8. In Scotland the police have always been subordinate to the prosecutor, because public prosecution predated the police. The principle is enshrined in common law (*Smith v HMA* 1952 JC 66, *Boyle v HMA* 1976 JC 72), and reflected in statute (Police (Scotland) Act 1967, s 17(1)(b),(3) proviso, and Criminal Procedure (Scotland) Act 1995, s 12). Thus, the prosecutor:

- (i) as “master of the instance”, has always decided who to prosecute, on what charge and in which court;
- (ii) can require the police to carry out further investigations; and
- (iii) can obtain his or her own statements (“precognitions”) from witnesses, including police witnesses.

9. Auld produced “statutory charging” (Criminal Justice Act 2003, Part 4), whereby the CPS itself is prosecutor for some offences, and issues guidelines for prosecution of other offences.

10. Thus thought should be given to further police subordination.

Prosecutorial monopoly

11. In England and Wales, variety and haphazardness still exist, for perhaps 25% of all prosecutions are still undertaken by government agencies independently of the police, CPS, and each other, according to markedly different policies, sometimes only available from annual reports, if at all. These different policies remain a subject of considerable debate. Philips acknowledged the difficulty, but declined to deal with it, concluding the variety too great. However, the history of investigation and prosecution by one of the main remaining prosecution agencies, HM Customs and Excise Solicitor’s Office does not suggest that non-incorporation into CPS was justified (see eg Butterfield Enquiry (*Review of Criminal Investigations and Prosecutions Conducted by HM Customs and Excise by Mr Justice Butterfield*, HMCE, 2003), and it can be argued that HMCE’s difficulties flowed from failure to adopt the “Philips principle”. Recent Public Accounts Committee Reports in relation to HMCE’s successor (House of Commons Public Accounts Committee “*Revenue and Customs Prosecution Office*” Fifty-first Report of Session 2007–08, HC 601, 2008 and “*HMRC: Tackling the Hidden Economy*” Fifty-fifth Report of Session 2007–08, HC 712, 2008) re-iterate that difficulties remain.

12. In Scotland the Crown Office and Procurator Fiscal Service (COPFS) prosecutes the cases investigated by some fifty reporting agencies, including the Department of Work and Pensions, Health and Safety Executive, Department of Trade and Industry, HM Revenue and Customs, Serious Fraud Office, Television Licensing Authority, and local authorities.

13. Thus, thought should be given to extending the CPS remit, as “public prosecutor”, to prosecuting all crime.

Professional prosecutors of serious crime

14. In Scotland, prosecution of very serious crime (before the High Court of Justiciary), and approval of all prosecutions of serious crime, has always been undertaken by Advocates-Depute, appointed by the Lord Advocate for a period of years, traditionally from the Bar. There has thus always been a cadre of professional, albeit temporary, senior prosecutors. This feature is being re-inforced, as Advocates-Depute are now appointed from within COPFS, and for lengthier periods. Moreover, both current Law Officers are solicitors, appointed from within COPFS.

15. In England and Wales, prosecution of serious crime has been undertaken by barristers in private practice, on the ground of the need to preserve the independence of the Bar, and the possible susceptibility of professional prosecutors to “prosecution-mindedness”. Neither justification seems plausible. The existence of Advocates-Depute has never been argued to compromise the independence of the Scottish Bar, or taint prosecutions with “prosecution-mindedness”. Moreover, “prosecution-mindedness” would apply to all crime, thus argue against the existence of the CPS.

16. So it is not clear that any objection can be taken against CPS prosecutors undertaking the full range of prosecutions.

Depoliticisation of Law Officers

17. Inherent tensions in the office of Law Officer were discussed by this Committee recently (House of Commons Constitutional Affairs Committee *Constitutional Role of the Attorney General* Fifth Report of Session 2006–07, HC 306, 2007). Written evidence taken from the Lord Advocate did not fully disclose increasing depoliticisation. Both current Law Officers are career prosecutors, appointed from COPFS, rather than lawyer-politicians; neither is an MSP; and the Lord Advocate has served in both Liberal Democrat/Labour and SNP Executives.

18. It may be that this is a model for English Law Officers.

(ii) “ALTERNATIVES TO PROSECUTION”: “CONDITIONAL OFFERS” AND “DECRIMINALISATION”

19. “Alternatives to prosecution” include “Conditional Offers” and “Decriminalisation”. Both constitute “punishment without prosecution”, transferring considerable power from the courts. Both have expanded to become normal means of dealing with much crime. This represents the biggest change in the criminal process for a century or more, which may not be exhausted yet. Reasons for using them have expanded from coping with numerous minor regulatory offences by routinisation, to asserting that many “real crimes” (including assaults, breaches of the peace and thefts), simply do not justify a court appearance, and that alternatives may be more rehabilitative, anyway. The Scottish experience (where probably less than 25% of criminal cases are now dealt with by courts) is greater than the English so, given the expanding role of the CPS as “public prosecutor”, may be useful.

Nature of “conditional offers”

20. Conditional offers are highly institutionalised plea bargains, redefining the guilty plea to avoid recourse to the courts, thus transferring more power to prosecutors who, though party to the proceedings, become “surrogate judges”. For an existing criminal offence, an enforcement agency offers immunity from prosecution to an alleged offender, provided s/he accepts a specified penalty. There is no obligation to accept the offer, although it may be necessary to “opt-in”, or “opt-out”. To encourage acceptance, the penalty may be less than a court might impose, and no criminal record may result. If the offer is not taken up, prosecution may occur. Examples may be camouflaged as “fixed penalties”.

UK growth

21. UK growth of “conditional offers” commenced 50 years ago with mere, regulatory, parking offences, issued by traffic wardens, and requiring “opting-in” (Road Traffic and Roads Improvement Act 1960). They now apply to a wide range of road traffic offences, including endorseable ones, are backed by wheel-clamping, multiplied by 1.5 if unpaid, and require “opting-out” (Transport Act 1982).

English growth

22. Examples going beyond “regulatory”, to “real” crime, include police “on-the-spot-fines”, requiring “opting-out” (Criminal Justice and Police Act 2001) and conditional cautions, requiring CPS decision, and preserving “opting-in” (Criminal Justice Act 2003).

Scottish growth

23. Scotland has been more radical. “Fiscal fines” (Criminal Justice (Scotland) Act 1987) apply to all summary offences, and penalties have increased from £25, to a maximum of £300, with “opting-in” replaced by “opting-out”. Also, for all summary offences, there are now “fiscal compensation orders” up to £5,000, requiring “opting-out”, and “fiscal work orders” of 10–50 hours, requiring “opting-in” (Criminal Procedure (Scotland) Act 1995, amended by Criminal Procedure, Etc, (Reform) (Scotland) Act 2007). This may represent the future.

Doubts

24. Conditional offers may be cheap, and might rehabilitate, but come at a price:

- (i) presumption of innocence: “opting-out” constitutes “deeming guilt by silence”, for failure to reply timeously removes the chance of a court hearing, and accepts the penalty (and even “opting-in” is backed by encouragements to forego asserting innocence);
- (ii) due process: a party to the proceedings, whose principal function is not sentencing, and exercises wide discretion, as “surrogate judge” sentences an accused who may be unrepresented, nor have any clear opportunity to present a plea in mitigation;
- (iii) variety and haphazardness: guidelines for selection of cases for conditional offers (including repeat offers) may be non-statutory, vague, or even unpublished, re-creating the problem the Philips Commission sought to remove;
- (iv) accountability: individual decisions not taken in open court, so are not subject to public scrutiny, and Law Officers’ answerability to Parliament hardly meets the case.

Decriminalisation

25. “Decriminalisation” is a further step in “punishment without prosecution”. By sleight-of-hand, there is no criminal offence, so no possible prosecution, but a penalty is imposed, which is exacted by civil proceedings, thus avoiding all the protections of criminal procedure. This device includes “decriminalised” parking offences, but also “civil penalties” and the like in other areas of law, such as tax, immigration and environmental law, as well as ASBOs, etc.

26. There is doubt, at least in some cases, whether the law fulfils the requirements of Article 6 ECHR (right to a fair trial). In *International Transport Roth GmbH and others v Secretary of State for the Home Department* [2002] EWCA Civ 158, “carriers’ liability” penalties were found in breach of Article 6 and had to be changed.

Paradigm-shift

27. The rise of conditional offers and “decriminalisation” are part of a largely unremarked paradigm-shift in criminal justice. The orthodox view is that in a liberal-democratic state, the paramount concern is “due process” in open court for “it is better that ten guilty people go free than one innocent person be convicted”. Devices such as “conditional offers” and “decriminalisation”, no doubt sometimes assisting rehabilitation. However, they do indicate a shift to a managerial “crime control” view, where rapid, cheap processing of suspects is the paramount value; trials, or even guilty pleas, indicate failure of the system; and the ideal is avoidance of at least summary criminal proceedings altogether.

28. The Committee may wish to consider this paradigm-shift.

January 2009

APPENDIX A**THE SCOTTISH PROSECUTION MODEL****CROWN OFFICE AND PROCURATOR FISCAL SERVICE (“COPFS”)**

COPFS is the latest manifestation of a tradition of public prosecution predating the United Kingdom. It has, to all intents and purposes, a monopoly of initiating and carrying out prosecutions in Scotland. Since devolution, it has been a department of the Scottish Executive.

 THE LAW OFFICERS—LORD ADVOCATE AND SOLICITOR-GENERAL FOR SCOTLAND

The Lord Advocate is Ministerial Head of COPFS, with the Solicitor-General for Scotland as depute. Since devolution, both Law Officers are members of the Scottish Executive (Scotland Act 1998, s44((1)(c)) (the Lord Advocate being “of Cabinet rank”). Both are appointed by the Queen, on the recommendation of the First Minister, with the agreement of the Scottish Parliament (s48(1)), but the Parliament cannot remove the Lord Advocate as head of the criminal prosecution system (s29(2)). Neither Law Officer is required to be an MSP, but either may participate in proceedings of the Scottish Parliament, *ex officio*, though may decline to answer questions on the criminal prosecution system if contrary to the public interest (s27(1),(3)).

The Lord Advocate is responsible for the prosecution of all crime in Scotland, and all crime tried before a jury is prosecuted in the name of the Lord Advocate (cases being cited “*HM Advocate* [or *HMA*] v ...”). Both current Law Officers, unlike any of their predecessors, are solicitors, appointed from within COPFS, so are career prosecutors, not lawyer-politicians. Neither is an MSP and the Lord Advocate has served in both Liberal Democrat/Labour and SNP Executives.

ADVOCATES-DEPUTE

Normally, neither Lord Advocate nor the Solicitor-General prosecutes in person. Thus the most serious crime, tried before the High Court of Justiciary, has always been prosecuted by Advocates-Depute (“Crown counsel”). Advocates-Depute are also responsible for the preparation of all cases reported to Crown Office for prosecution by solemn procedure, including drafting the indictment, and producing the “precognition” (ie case file), as well as actually conducting prosecutions.

Advocates-Depute have traditionally been members of the Scottish Bar, holding part-time three year appointments from the Lord Advocate, and the office has been seen as a stepping stone to the Bench. However, Solicitor-Advocates from COPFS are now appointed, and the total has recently expanded to over thirty. Thus there is a career path as professional prosecutor of major crime.

CROWN AGENT

The Crown Agent is principal legal advisor to the Lord Advocate, and chief executive of COPFS, so is its civil service head. He has administrative control over procurators-fiscal, but cannot give directions in relation to prosecutions. The post is thus not equivalent to the Director of Public Prosecutions.

PROCURATORS-FISCAL

Procurators-Fiscal, currently some 400, are appointed by the Lord Advocate. They are organised in eleven Areas, based on police force boundaries, sub-divided into 48 Districts. Normally solicitors, a few are solicitor-advocates or advocates.

They have a monopoly of prosecution in Sheriff Courts and District Courts. Police report crime to them, and they “mark” and conduct cases for summary prosecution before Sheriff Court and District Court, and undertake initial preparation of cases for solemn proceedings, completed within Crown Office under the supervision of an Advocate-Depute. Summary cases are cited in the name of the District Procurator-Fiscal (eg “*Bott v ...*”). Procurators-Fiscal are thus career prosecutors for the normal run of crime.

APPENDIX B

LEGAL AUTHORITY FOR THE ROLE OF THE POLICE IN PROSECUTION IN SCOTLAND

Smith v HMA 1952 JC 66, *per* Lord Justice-Clerk Thomson at 71:

“When a crime is committed it is the responsibility of the Procurator-fiscal to investigate it. In actual practice much of the preliminary investigation is nowadays ... increasingly conducted by the police under the general supervision of the Fiscal ... However, the duty of the police is simply one of investigation under the supervision of the Procurator-fiscal and the results of the investigation are communicated to the Procurator-fiscal as the inquiries progress. It is for the Crown Office and not for the police to decide whether the results of the investigation justify prosecution. The two functions are quite distinct”.

Boyle v HMA 1976 JC 32, *per* Lord Cameron at 37:

“In Scotland the master of the instance in all prosecutions for the public interest is the Lord Advocate. It is for him to decide when and against whom to launch prosecution and upon what charges. It is for him to decide in which Court they shall be prosecuted. It is for him to decide what pleas of guilt he will accept and it is for him to decide when to withdraw or abandon proceedings”.

Police (Scotland) Act 1967:

Section 17: General functions and jurisdiction of constables.

(1) ... it shall be the duty of the constables of a police force—

... (b) where an offence has been committed ... [to] ...make such reports to the appropriate prosecutor, as may be necessary for the purpose of bringing the offender with all due speed to justice;

(3) ... in relation to the investigation of offences the chief constable shall comply with such lawful instructions as he may receive from the appropriate prosecutor.”

Criminal Procedure (Scotland) Act 1995, s 12

Section 12: Instructions by Lord Advocate as to reporting of offences.

“The Lord Advocate may, from time to time, issue instructions to a chief constable with regard to the reporting, for consideration of the question of prosecution, of offences alleged to have been committed within the area of such chief constable, and it shall be the duty of a chief constable to whom any such instruction is issued to secure compliance therewith.”

APPENDIX C

RELEVANT RECENT ARTICLES

The Career Path of Recent Scottish Law Officers 2006 *Scots Law Times* 144–147.

Investigators and Prosecutors, or Desperately Seeking Scotland: re-formulation of the “Philips principle” (2006) 69 *Modern Law Review* 143–182.

The Career Path of Recent Scottish Law Officers Revisited: Lord Advocate becomes solicitor, solicitor becomes Lord Advocate, and other surprises 2007 *Scots Law Times* 223–227.

Parking’s Fine: the enforceability of “private” parking schemes 2007 *Juridical Review* 1–25.

Out of Court and Out of Sight: How Often are “Alternatives to Prosecution” Used? (2008) 12 *Edinburgh Law Review* 481–486.

The Summary Criminal Procedure (Abolition) (Scotland) Act 2007? A Critical Look at Part 3 of the Criminal Proceedings, Etc (Reform) (Scotland) Act 2007 2008 *Juridical Review* 215–240.

“Decriminalisation: a pernicious hypocrisy?” (2009) 13 *Edinburgh Law Review* 112–116.