

Attorney General's Review of the Role of the CPS in relation to deaths in custody

A statement by the United Families and Friends Campaign

On 27th February 2002, members of the United Families and Friends Campaign, the coalition of relatives and friends of people who have died in custody, were invited to meet the Attorney General. This followed a private screening in December 2001 of the documentary *Injustice* at the Crown Prosecution Service and the announcement of a review of the role of the CPS in relation to deaths in custody. The purpose of the review is to *"establish whether current CPS practices are fully satisfactory as they are."* Families have been promised that it will also *"identify and implement those changes [that need to be made] with a view to making a positive contribution towards the level of public confidence in prosecution decision-making and processes in these difficult and sensitive cases."*¹

Background on CPS decision-making relating to custody deaths

The current review is not the first time that the decision-making processes of the Crown Prosecution Service relating to deaths in custody have been examined. The CPS was severely criticised in a report by Judge Gerald Butler QC published in August 1999². It examined the way the CPS decided not to prosecute police officers after the deaths of Richard O'Brien and Shiji Lapite and found that judicial review proceedings relating to both cases were dealt with "in a unsatisfactory manner by the CPS". Butler argued that he would have taken a 'less pessimistic' view of the prospects of securing convictions and warned that the CPS must prosecute officers when there is a case to answer:

*"If a prosecution is not brought when it should be, then the family and friends of the deceased will suffer a deep sense of grievance, accompanied by a loss of confidence in the criminal justice system. Further, there is plainly a powerful public interest in the prosecution of police officers who have committed an offence of such gravity."*³

The report also pointed out that a decision not to prosecute can very rarely be challenged and that when a prosecution is mounted, there are numerous opportunities for a trial to be halted if evidence is insufficient to secure a conviction. In the cases of Shiji Lapite and Richard O'Brien, Butler also highlighted the fact that they *"turned to a very large extent on the credibility of those involved."* He argued:

*"That credibility was tested at the inquests. In both of the cases, the jurors at the inquests saw and heard the witnesses. They returned verdicts of unlawful killing. I would have found it very persuasive had I been the person who had to decide whether or not prosecutions should be launched."*⁴

Whilst both deaths resulted in inquest verdicts of 'unlawful killing', they are not the only deaths to raise serious concerns about CPS decision-making. Gerald Butler pointed to another death featured in the *Injustice* documentary, that of Brian Douglas, where there were contrary opinions given by Queen's Counsel about the likelihood of successful prosecution. Butler expressed his concern to the Director of Public Prosecutions at the decision of Senior Treasury Counsel to still not prosecute, noting that *"I have been given an undertaking that*

¹ Letter from the Legal Secretariat to the Law Officers, 12th March 2002

² Inquiry into Crown Prosecution Service Decision-Making in Relation to Deaths in Custody and Related Matters, His Honour Gerald Butler QC, August 1999

³ Butler Inquiry, section 9.4, page 49

⁴ Butler Inquiry, section 8.7(i), page 42

*this case will receive full and careful re-consideration.*⁵ To date, no further action has been taken against the police officers.

A level playing field?

Despite the criticisms made in the Butler report, little has changed. Since the report, the Crown Prosecution Service decided not to prosecute the officers involved in the death of Christopher Alder in Hull, a decision reviewed after an inquest verdict of 'unlawful killing.' However in April 2001, the CPS again said there was 'insufficient evidence' to bring manslaughter charges. A CPS spokesperson said:

*"We are not proceeding with the manslaughter charges. The officers face other serious charges for which the maximum sentence is life imprisonment. It does not automatically follow that manslaughter charges must be brought after an unlawful killing verdict at an inquest. The burden of proof in a criminal court is greater."*⁶

Earlier, in December 2000, members of the United Families and Friends Campaign attended the annual Tom Sargant Memorial Lecture in Gray's Inn, where David Calvert-Smith QC, the Director of Public Prosecutions, was speaking. Forced to explain to family members why the CPS never prosecute police or prison officers, even when an inquest jury has reached an unlawful killing verdict, Calvert-Smith accused them of seeking a 'lower burden of proof'. In fact it is the CPS who are applying criteria to prosecutions of police and prison officers that are far more stringent than 'normal' members of the public

Moreover, the notion that there is 'insufficient' evidence to convince a jury to convict' is particularly hard to comprehend when an inquest jury have looked at the facts surrounding a death and reached a verdict of 'unlawful killing.' Such a verdict carries *exactly the same burden of proof* as a criminal court verdict (the statement made to the Press Association above is factually incorrect). English law on 'unlawful killing' is in fact fairly straightforward and in cases of deaths in custody relate specifically to 'involuntary manslaughter', which has two distinct sub-categories: "unlawful act/constructive" involuntary manslaughter and "gross negligence" involuntary manslaughter.

To secure a conviction for unlawful act/constructive manslaughter, it is necessary to prove that there was an unlawful or alternatively dangerous act that resulted in the death of another, which was committed intentionally by one or more persons if they act together in a joint enterprise. A defendant is guilty if he intentionally does an act that is unlawful and dangerous and that inadvertently causes death. It is not necessary to prove that a defendant knew that his act was dangerous or unlawful. A 'dangerous' act must be such that all 'sober and reasonable people' would inevitably recognise must subject the other person to at least the risk of some harm, even if not serious harm.

Securing a conviction for gross negligence involuntary manslaughter, meanwhile, requires the existence of a duty of care, the breach of that duty of care causing death and the jury finding that the conduct of the person who owed the duty to be such as to be described as "gross negligence."

Exactly the same rules form the basis for inquest juries' verdicts. When the jury considered the facts surrounding the death of Shiji Lapite, they would have been expected to consider whether the numerous injuries he sustained, including the crushing of his larynx, resulted from dangerous and potentially unlawful acts by the officers arresting him. When deciding whether Christopher Alder had been unlawfully killed, the inquest jury would have had to

⁵ Butler Inquiry, section 9.3, page 49

⁶ Press Association, 25 April 2001

consider whether he was owed a duty of care. The jury would also have had to consider whether the actions of the officers who left Christopher lying on the floor of the custody suite, ignoring his need for medical attention, constituted gross negligence.

Overruling inquest juries

It is astonishing that the CPS failed to bring involuntary manslaughter charges in both these instances and in the other deaths, especially where unlawful killing verdicts have been reached. Repeatedly, the CPS chooses to ignore the decisions of 'sober and reasonable' inquest juries whenever police or prison officers are involved. By doing so, the CPS also ignores its own *Code for Crown Prosecutors*, which states that "the more serious the offence, the more likely it is that a prosecution will be needed in the public interest."⁷ Furthermore it disregards the Code's acknowledgement that one public interest factor in favour of prosecution is whether "the defendant was in a position of authority or trust"⁸

Instead, the CPS overrules inquest verdicts, decides for itself what is or is not unlawful or in the public interest and effectively says, 'the jury got it wrong and we know best.'

We believe that the Director of Public Prosecutions' unwillingness to even allow a jury in a criminal court to examine the same evidence presented to an inquest shows an utter contempt for the involvement of the public in the legal process. Relatives also believe that the CPS are afraid that juries considering criminal charges may 'get it wrong' a second time, convict police officers and force the issue of police and prison brutality and indifference towards the care of detainees, particular black detainees, into the unwelcome spotlight of public debate.

As families facing an inquest have come to realise, a verdict of 'unlawful killing' is no guarantee of justice when that verdict can be ignored by a body that seems more interested in protecting state institutions than protecting the idea of 'equal treatment before the law.'

Our concerns about the Attorney General's Review

We are gravely concerned that the objectives of the review are so unclear. Setting up a review simply because there are 'perceptions' of problems with CPS decision-making looks like an attempt to 'manage' people's perceptions, not address the fundamental problems raised above from which they spring. We find it incomprehensible that in light of the strength of public feeling on these issues, the number of judicial reviews of CPS decisions and the criticisms raised by the Butler Inquiry, the Attorney General should *from the outset* refuse to even consider that cases may have to be reopened. He alone, as the senior law officer accountable to Parliament for the conduct of the CPS, is in a position to reopen individual cases and refusing to even consider that this may be necessary or desirable seems to relatives and friends to prejudge the outcome of the review. It also hints at an outcome that will make some minor recommendations about the procedures within the CPS' Central Casework Directorate without addressing the broader issues. This will far from satisfy the relatives and friends of those who have died and will certainly not lead to "a *positive contribution towards the level of public confidence in prosecution decision-making.*"

Furthermore, as those who attended the meeting with the Attorney General in February pointed out, CPS decision-making comes at the end of a long process that families believe is deeply flawed at every stage. The police carry out investigations and report to the CPS following a death in custody and we share the views expressed by Gerald Butler in the postscript to his report on CPS decision-making, where he says:

⁷ The Code for Crown Prosecutors, CPS, section 6.4

⁸ The Code for Crown Prosecutors, CPS, section 6.4 (d)

*“Under the Police and Criminal Evidence Act 1984, there is laid down a procedure under which it is the police who investigate and report to the CPS on a death in custody. I make no comment whatsoever on the standard or quality of the police reports that I have seen during my Inquiry. **In principle, however, I have always regarded this as a questionable procedure. Certainly, I am not alone in feeling uneasy about it.** It is no part of my Inquiry to make a recommendation on the matter and it would be wrong for me to do so. **But I regard this issue to be of such importance that I feel I ought to mention it so that those in a position to do so might give it their consideration.**”⁹*

What has been particularly frustrating has been the government’s piecemeal approach to the complex issues of deaths in custody. For example, despite the government’s ‘reforms’ of the system of police complaints that will lead to the creation of the Independent Police Complaints Commission in 2003, police officers will continue to investigate both themselves and the circumstances of a police custody death (albeit under nominal ‘civilian’ supervision). The United Families and Friends Campaign and others believe this fundamentally undermines the credibility of any investigation. The current review by the Attorney General, meanwhile, will focus solely in the CPS and exclude *“other questions which are relevant to deaths in custody in the wider sense.”* Is this series of unconnected policy initiatives **really** what ‘joined-up government’ means?

Families, friends and campaigners continue to demand an independent public inquiry, covering **all** the issues relating to deaths in custody, not simply for the sake of having an inquiry, but because it is the **only** effective way to avoid this confused and fragmented approach to public policy that damages public confidence further.

Fundamentally, though, we demand that the controversial cases of deaths in custody that the families involved in UFFC have been campaigning for be reopened as part of this process. Without such a commitment from the Attorney General, this review can only be seen as another attempt to silence families whose cries for justice are the only reason that this process was instigated in the first place.

These are our concerns. We call upon others who are being consulted as part of the current process to support them.

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⁹ Butler Inquiry, Postscript, section 12.1, page 55