



The Law Society

The Law Society Response to
The Attorney General's Review of
the Role and Practices of the
Crown Prosecution Service

June 2002

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The Law Society appreciates the opportunity to respond to the Attorney General's Review of the Role and Practices of the Crown Prosecution Service. The responses below are only to questions set by the Attorney General that fall within the remit of the Law Society.

The role of the Crown Prosecution Service in police investigations

- **What role do they envisage for the CPS at the investigation stage in death in custody cases?**
- **Where do consultees believe that the balance should be struck between separating the investigation process from prosecution decision-making, and ensuring that investigations are as thorough and proper as possible?**
- **How proactive do they expect the CPS to be in advising in the pre-charge phase and how do they see this affecting the role of the PCA and the new body that will replace it?**
- **At what stage or stages should the CPS be asked to advise on a death in custody case? Should the CPS draw any line as to the type of advice that they are prepared to provide? What and why?**
- **Would consultees feel more, or less, confident in the investigation and prosecution decision if the CPS were proactively advising during the investigation itself?**

Deaths in custody have exceptional public interest aspects. It is therefore vital that the investigation is thorough, objective and transparent beyond reproach. Accordingly, the Law Society supports close involvement of the CPS as an equal partner in the process from the beginning stages of the investigation. Protocols setting out best practice standards for the CPS and investigating bodies regarding when and how they are notified and how they share information and advice should be formulated. Protocols are advantageous in providing transparency and consistency of practice, as well as in establishing the boundaries and independence of each agency.

There is a trend for the CPS to be increasingly involved in investigations following the Glidewell recommendations and the Auld recommendations on charging. This involvement may benefit from agreed protocols. The developing balance between the role of the CPS and the police in investigations could be built upon in developing protocols for the relationship between the CPS and PCA (or replacement body) investigations. The Law Society supports the continuation of the existing categories of advice in which CPS would advise.

The advantage of separating the prosecution role in the investigation process from the prosecution decision-making process is twofold. Firstly, to ensure that there has been no personal involvement during the investigation that will influence any decisions. Secondly, public confidence and public interest issues in such cases are so sensitive that vigorous independence must be demonstrated. The decision-

making process of the CPS must ensure public confidence. Butler and the Home Affairs Committee have both raised the issue of public perception regarding bias in decision-making.

- **How relevant to prosecution decisions is the verdict of an inquest jury?**
- **What significance do consultees believe should be attached by the CPS to an inquest verdict of unlawful killing?**

The relevance of such a verdict to a criminal prosecution will vary from case to case, and there must be flexibility to allow for independence in balancing all the different public interest issues including likelihood of a successful conviction. However such a verdict should continue to trigger a re-consideration of evidence and avenues of investigation that may have emerged during the inquest. It is important that the verdict both carries and is seen to carry meaning.

- **To what extent are differences in the conduct of inquests and criminal trials relevant to the significance to be attached to the verdict? What do consultees consider those differences to be?**

We agree the differences between the two proceedings as set out in the consultation paper, although acknowledge this is not well understood by the public. The differences may become more comprehensible to the general public if corporate manslaughter becomes an offence and the Crown is not exempt. It is recommended that the Review considers the proposals for this offence, and considers the implications in its Review.

Credibility/reliability of witnesses

- **How do consultees consider that the CPS should approach the evidential test of whether there is sufficient evidence to prosecute, especially where there are material conflicts and/or weaknesses in the evidence?**

There are public interest and confidence issues arising from deaths in custody which need to be given weight. However, CPS are already accustomed to weighing evidence in which there are material conflicts or weaknesses, and probing evidence further where appropriate.

Scientific Evidence

- **Given that scientific evidence may be essential to establishing or excluding the criminal liability of an individual, what approach do consultees consider the CPS should take when considering and probing this kind of evidence?**

We oppose any practice of experts being pressured to resolve disagreements, and support the current practice as outlined in the paper. Experts disagree often for good and professional reasons. There is always a risk that such disagreements are resolved inappropriately. We believe that differences of expert opinion are a matter for the jury.

Representations by or on behalf of the bereaved

- **What is the proper role of bereaved families and those representing them in influencing the decision to prosecute?**

There is public interest justification for prosecuting cases of special sensitivity and this applies to deaths in custody. However beyond special regard for public interest there should be no difference in assessing the evidence and reliability unless it appears there has been some impropriety in which case further investigation should be required in any event. Bereaved families should be able to provide evidence to the investigators as they see fit, and are entitled to comprehensible reasons for decisions made. However they should have no say in whether a prosecution should be brought or not. It is inappropriate for victims and witnesses to make or influence legal decisions. CPS independence must be demonstrated as being independent from all parties.

The Law Society supports public funding for proper legal representation at inquests to further insure the involvement of families throughout proceedings. This may also assist in the clarification for families in their role in prosecution decision making. In addition, we acknowledge the bereaved family should be given fuller support. This role can be taken in part by the Witness Support Service or similar bodies.

Who Takes the Decision to Prosecute in Death in Custody Cases?

- **Do consultees have any observations on the definition adopted by the CPS?**
- **Should the set of cases covered by the special CPS decision-making procedures be extended to include more of the deaths recorded by the Home Office?**
- **Is it essential that the Butler arrangements are maintained, in your view, even if there were to be a significant increase in the number of cases considered by that route?**

Whilst we consider the definition satisfactory, we welcome the extension to include additional deaths recorded by the Home Office. Any death associated with any public body is a matter of public concern. We are not aware, nor does the paper give indication of a significant increase in the numbers as to be unnecessarily burdensome on the CPS and yet could have a considerable effect on the level of public confidence in public bodies.

We support the Butler arrangements. The consultation paper does not give any indication to the figures involved. However, public interest in the high standards of decision making in this particular category of cases warrants the investment and maintenance of the Butler arrangements.

- **What should be the role of counsel?**

We consider the current arrangements satisfactory.

- **To what extent, if at all, should the CPS take account of representations made by others as to the identity of counsel to be instructed to advise them?**

The CPS and Counsel who are instructed must be independent, expert and robust. Influence as to who is instructed will affect the perceived independence of the CPS decision-makers. We note, under current arrangements, only Counsel of the greatest expertise are instructed on these matters.

Accountability and Transparency

Consultees are asked to consider:

- **whether current CPS policy on giving reasons is satisfactory and if not, in what respect?**

We do not comment on the impact and experience of bereaved families on the reasons given, although any review should include consideration of any evaluation of the current Direct Communications with Victims Initiative pilots. We agree that there are conflicting public interests in how giving reasons is managed and believe the guidelines outlined in 5.20 achieve an appropriate balance.

- **how can the CPS best balance the need to ensure that their reasons can withstand the searching scrutiny of the Courts on judicial review, in the course of which the prosecutor may be expected to demonstrate by some contemporaneous document that he has considered any number of questions that the court may raise; the need to convey in direct and understandable language the broad basis for the decision; and the need to take account of the rights and interests of others whose reputations and interests may be affected by the nature of the reasons given?**

The CPS may wish to consult with defence practitioners who routinely conduct cases and maintain sufficient records to fulfil all these purposes. The CPS will need to demonstrate their independence from the influence of the interests and reputations of all parties who are part of any investigation or subject to any investigation, including within the CPS itself.

Reasoning behind the current evidential test

- **Should the evidential test be based on establishing a 'realistic prospect of conviction'?**

Criminal prosecutions are proceedings whereby the burden of proof is on the prosecution, with the aim of ascertaining guilt or innocence of an individual. In time it may also be extended to the culpability of a corporate or Crown body. Lowering the evidential test risks trial by media with significant implications for the individual suspected. Where there has been possible negligence then civil proceedings can be considered. It is not known what advantage there is in trying to change the nature of criminal proceedings in relation to these cases. If the circumstances warrant it, but there is insufficient evidence to charge, then a better route would be to consider a public inquiry. However if there has been effective and independent CPS involvement from the beginning of the proceedings then there should be less need for a further enquiry to ascertain the failings in the case, or for independence of the investigation to be further demonstrated.

- **Should there be different standards of evidential test for different types of case, depending upon the public interest involved in pursuing a matter to trial?**

It is not in any party or community's interest for cases that are highly likely to fail to be pursued. The CPS already make difficult decisions on public interest in certain types of cases according to political and social sensitivities at different times and will no doubt be able to weigh the difficult balances required in death in custody cases where the public interest and public confidence is so acute.

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