

THE ETHICS OF PROSECUTION

Avrom Sherr¹

Introduction

This article considers the codes of conduct of professionals carrying out prosecution work, and obedience to these codes. Such codes are referred to as the “legal ethics” of the respective professions. Three codes of conduct apply: The Code for Crown Prosecutors, the Solicitors Code of Conduct and the Code of Conduct for the Bar.

The system of prosecution may be thought only to initiate a process which goes on to adjudication in court, but the decision to prosecute is crucial to that initiation and has its own effects on the criminal justice system and on the individuals concerned, quite separate from the adjudication of guilt. The amount of discretion involved in the decision to prosecute is wide.

The Royal Commission on Criminal Procedure in 1981 criticised the previous prosecution arrangements on the basis of three standards: fairness, openness and accountability, and efficiency. It recommended the adoption of the higher evidential standards of “reasonable prospects” of a conviction for the new Crown Prosecution Service.² This would stop the “prosecution momentum”³ of the conveyor belt, and make active decisions. This test became the current test of “a realistic prospect of conviction”. Mansfield and Peay suggested that such a test required “prosecutors to possess qualities more akin to soothsayers than lawyers”. McConville et al suggest that the CPS utilize “the contradictory and malleable nature of the principles in the codes to further narrowly conceived objectives and, at its worst, adopting an uncritical support-the-police mandate”⁴ The operation of the codes of conduct is crucial in such an environment.

The Report of Sir Iain Glidewell on the Crown Prosecution Service considers the financing, management, organisation and competence of the service but not its ethical standards or the ethics of those who work within it.⁵ Although there may be some relationship between competence and ethics, a lawyer may be incompetent but ethical or unethical and competent. This study is intended to raise a new point arising out of observations and discussions with people working within the criminal justice system. The study represents work in progress covering a small sample of cases observed and follow-up research with lawyers involved in the conduct of criminal cases.⁶ In relation to issues of

¹ Woolf Professor of Legal Education, Institute of Advanced Legal Studies, University of London.

² See paragraph 9.2 of the Royal Commission Report on Criminal Procedure, Cmnd, 8092 of 1981

³ Mansfield, G. and Peay, J. (1987) *The Director of Public Prosecutions* (London and New York, Tavistock Publications)

⁴ McConville, M., Sanders, A and Leng, R. *The Case for the Prosecution* (1991 Routledge, London) p. 147. See also: Block, B., Corbett, C. and Peay, J “Ordered and Directed Acquittals in the Crown Court: A Time of Change?” [1993] Crim. L.R. 95-106 and Baldwin, J. “Understanding Judge Ordered and Directed Acquittals in the Crown Court” [1997] Crim. L.R. 536-555.

⁵ *The Review of the Crown Prosecution Service* (Chairman: Rt. Hon. Sir Iain Glidewell) Cm 3972.

⁶This article is based on a number of elements: preparation of a course of training in legal ethics for a group of prosecutors; a period of watching a number of criminal hearings and trials and advising on new conduct rules for the bar and the solicitor’s professions relating to these; acting as observer to an entire criminal

legal ethics covering an area as serious in its consequences as prosecution, one case which breaches those ethical principles⁷ is enough to support a considerable concern about the process of prosecution and therefore about major policy decisions currently being considered for the role of prosecutors. This includes, in particular, whether Crown Prosecutors should have rights of audience.

The article considers three related issues: the nature of the conduct regime, change in climate or culture of prosecution and specific observed breaches of the conduct code.

1. The Conduct Regime

There exist a number of different sets of conduct for prosecutors. The Solicitor's Code has its own set of specific ethical obligations for advocates in general and those who have obtained Higher Court advocacy rights in particular. The Barrister's Code with its recently amended Annex H deals with ethics in criminal cases. Each has general principles relating to ethics overall, specific principles relating to advocacy, specific principles relating to crime and criminal advocacy and specific principles relating to prosecution as opposed to defence work.

In addition to these principles which apply to all solicitors on the Roll of Solicitors⁸ and all Barristers in private or employed practice, there is also a Code for Crown Prosecutors. This seems to exist in three forms. A public Code for Crown Prosecutors is published and is freely open to the public.⁹ A second public document, the Explanatory Memorandum to the Code, is intended to provide further commentary.¹⁰ There also exists a much more detailed set of guidance for Crown Prosecutors, possibly called "National Casework Guidelines" relating to their work in general and in relation to specific offences, but which is not made public, and has not been made available.¹¹ It seems to exist, in four or five loose leaf files which are updated and amended fairly frequently.

The codes for Solicitors and Barristers are reinforced by a fairly complex structure of complaints mechanisms, policing, adjudicatory tribunals and powers of punishment. A similar separate regime does not appear to exist in relation to members of the Crown Prosecution Service and in relation to their own ethical code.

All conduct rules are mandatory on legal professionals and are based on ethical principles intended to be of benefit to clients and society.¹² They are not written as mere guidance,

process from beginning to end; and leading a team of researchers investigating the new pilot public defender system in Scotland.

⁷ See e.g. Z Barman *Searching for a Centre that Holds* in Featherstone, M *et al* (eds) *Globalisation* (London, Sage, 1995) and "The Ethical Imagination", Editorial by Economides and Webb in *Issues of Legal Ethics*, 1,1 1998.

⁸ Paragraph 4.01 of the *Solicitors' Code of Conduct* states, "A solicitor employed by a non-solicitor is subject to the same principles of professional conduct as a solicitor in private practice."

⁹ Now contained at the back of *The Blue Book, Stone's Justices Manual*.

¹⁰ Curiously this, unlike the Code itself, is published only in a form including both English and Welsh.

¹¹ The Explanatory Memorandum refers to "the Programme of National Casework Guidelines designed to assist Crown Prosecutors in cases which are complex or difficult".

¹² See e.g. Cranston, R. *Legal Ethics and Professional Responsibility* (Clarendon Press, Oxford, 1995) pps 1-6 and Luban, D. (ed) *The Good Lawyer: Lawyers Roles and Lawyers' Ethics* 1983, and for a discussion

and even a trivial breach of the rules is subject to punishment or marked against the professional's record. The code for Crown Prosecutors, although now seen as a public declaration of quality statement, is also a code of conduct in these terms.

The changes in the CPS Code over the last ten years may be compared with the consistency of approach to be found in the Solicitor and Bar's Codes of Conduct. The third version of the Code published in 1994 was completely different from its predecessors. Ashworth and Fionda¹³ noted the change of emphasis towards prosecution, particularly in relation to young defendants. And they queried the independence of the CPS in the light of politically inspired changes of policy. Hoyano et al¹⁴ were commissioned by the CPS to study the impact of the third revised code. Most prosecutors said they seldom consulted it as it was too basic. They used the CPS Prosecution Manual not the "Noddy's Guide". 33% of prosecutors thought the new code was intended to direct them to prosecute more cases, although some, including one branch Crown Prosecutor, thought it had raised the standard higher. Very few believed it had made any difference. One called it "New English Bible" rather than "King James's Version".

In particular, four items to which previous versions of the code said a Crown Prosecutor must have regard in evaluating the evidence, do not appear in version three, nor in the Explanatory Memorandum. These are:

- 5 iii "Does it appear that a witness is exaggerating, or his memory is faulty or that he is either hostile or friendly to the accused, or may be otherwise unreliable?"
- 5 v "Are there matters which might properly be put to a witness by the defence to attack his credibility?"
- 5 vi "What sort of impression is the witness likely to make? How is he likely to stand up to cross examination? Does he suffer from any physical or mental disability which is likely to affect his credibility?"
- 5 xii "Are the facts of the case such that the public would consider it oppressive to proceed against the accused?"

A Conduct Regime also includes the notion of discipline. The system of discipline in relation to breach of the CPS code is a little difficult to comprehend, or perhaps to believe. Crown Prosecutors who are solicitors or barristers may be in breach of their professional ethical code under those headings and therefore, in theory, a complaint against them could be made directly to their professional bodies. Although statistics appear not to be kept, relating to how many complaints are made against Crown Prosecutors, informal information from the Office of the Supervision of Solicitors suggests that few such complaints are entertained there. If a complaint came through it would normally be redirected to the Crown Prosecution Service itself, especially since most complaints are in the nature of "they should not have prosecuted me". There is intuitive information of a very small number of complaints coming from the CPS itself, having gone through their system before being forwarded to the Office of the Supervision of Solicitors.¹⁵

of such issues in the criminal context see Ashworth, A. *Ethics and Criminal Justice* in Cranston (op cit) pps. 145-151.

¹³ [1994] Crim L. R. 814

¹⁴ [1997] Crim L.R. 556

¹⁵ Telephone conversation with Stewart Waterson and Annie Reece at the OSS.

The CPS publishes a leaflet suggesting that complaints are answered within three days. This would not appear to provide sufficient opportunity for a considered, measured or adjudicated response and must therefore be treated with some caution.

It is not possible to obtain data on how many complaints are received annually under the CPS system or what the results of such complaints might be.¹⁶ This is in direct contrast to the full annual figures available from solicitors and the bar.¹⁷

Ashworth and Fionda¹⁸ agree. Apart from a few judicial review decisions¹⁹ the CPS is not openly accountable and the new Code, being less detailed and more vague, makes judicial review more difficult. Removing matters to the restricted Manuals makes the CPS less accountable and Ashworth and Fionda ask whether external review or audit would be better than periodic enquiries by the House of Commons Home Affairs Committee and the Audit Commission.

In summary, the CPS code has been manipulated and there does not appear to be a public, open system of discipline at all, as opposed to a system for complaints handling.

2 - Change In Culture, Approach And Ethical Standard

The traditional description of the position of the prosecutor as “a minister of justice” is to present a comparison between the prosecutor who is supposed to be open and fair and not partial and the defendant’s representatives who will be partial and one sided.²⁰ This also represents the position stated in both the Solicitors’ and Bar’s Codes of Conduct.

Paragraph 21.19 the Solicitors’ Code says,

“Whilst a solicitor prosecuting a criminal case must ensure that every material point is made which supports the prosecution, the evidence must be presented dispassionately and with scrupulous fairness.”

It goes on to lay out in some detail how this should be presented and how evidence should be given to the defence if it is not to be used by the prosecution but might assist the defence. Para. 21.19 sub paragraphs 1-3 cover the items 5.iii, 5.v and 5.xii of the first two versions of the CPS Code which has been removed from the current version:

¹⁶ Letter on file 29/4/98, from CPS stating such information does not currently exist.

¹⁷ Sherr and Webley, 1997 International Journal of the Legal Profession p 121. See also National Consumer Council Report, *The Solicitors Complaints Bureau - The Consumer's View* Ole Hansen, 1994.

¹⁸ *Op. Cit.* (1994)

¹⁹ See Osborne, P. *Judicial Fairness of Prosecutors' Discretion - The Ascent to full Revisionability* (1992)43 N.I. Legal Quarterly pps 179-197 and see also *Blomfield* [1997] 1 Cr. App. R. 135 and *Townsend* [1998] Crim. L.R. 126.

²⁰ See for example Compton J. in *R. v. Puddick* (1865) 4 F. & F. 497 at p.499, approved in *R. v. Banks* [1916] 2 K. B. 621; 12 Cr. App. R. 74 (Avory J. - “counsel for the prosecution throughout a case ought not to struggle for the verdict against the prisoner, but they ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice”, p. 76)

“Solicitor for prosecution

1. The prosecutor should state all relevant facts and should limit expressions of opinion to those fairly required to present the case. He or she should reveal any mitigating circumstances and should inform the court of its sentencing powers if invited to do so and whenever it appears to be under a misapprehension about those powers. See also paragraph 7.1(b)-(c) of the Advocacy Code (Annex 21A at p.353).
2. If a prosecutor obtains evidence which he or she does not intend to use but which may assist the defence, the prosecutor must supply particulars of statements made by those witnesses. If, however, the prosecutor knows of a credible witness who can speak to material facts which tend to show the accused to be innocent, he or she must either call that witness or make the statement available to the defence. Further, if the prosecutor knows, not of a credible witness, but a witness whom he or she does not accept as credible, the prosecutor should tell the defence about the witness so that they can call that person if they wish. The prosecutor must reveal to the defence factual evidence of which he or she has knowledge and which is inconsistent with that which he or she, as prosecutor, has presented or proposes to present to the court. See also paragraph 2.2 of the Advocacy Code at p.347.
3. The prosecutor must reveal all relevant cases and statutory provisions known to him or her whether it be for or against the prosecution’s case. This is so whether or not the prosecutor has been called upon to agree to point in question. See also 21.07 note. 3, p.336. and paragraph 2.2 of the Advocacy Code, at p.347.”

Similarly the Bar’s Code of Conduct Annex H has a set of principles relating to “responsibilities of prosecuting counsel”. In particular, items 11.1 and 11.2 state,

- “11.1 Prosecuting counsel should not attempt to obtain a conviction by all means at his command. He should not regard himself as appearing for a party. He should lay before the Court fairly and impartially the whole of the facts which comprise the case for the prosecution and should assist the Court on all matters of law applicable to the case.
- 11.2 Prosecuting counsel should bear in mind at all times whilst he is instructed that he is responsible for the presentation and general conduct of the case and that it is his duty to ensure that all relevant evidence is either presented by the prosecution or made available to the defence.”

The approach of the prosecutor is therefore not partisan. As a “Minister of Justice” the prosecutor sees both sides of the case, is able to weigh the facts dispassionately, is helpful to the defence in providing information which otherwise might not be available to them in revealing the truth and organising justice, presents the case clearly and dispassionately to the finder of the facts. The prosecutor does the job of prosecution by being open, fair, courteous and honest to the defence and the court. There is no triumph in winning, nor any sorrow in losing. It is the job of the Minister of Justice, the dispassionate advisor and advocate.

This position is clear from both the Bar and the Solicitors’ Codes of Conduct. Both have had more recent versions published than the Code for Crown Prosecutors of 1994. It is the

creed which is taught to new law students and lawyers.²¹ It is the ethics of prosecution which underlies the system of criminal justice in the Common Law world.

Observation of some criminal cases recently²² has presented clear evidence that this approach is still dear to the hearts of many advocates, and also some of those operating within the Crown Prosecution Service itself. But also noted was a major underlying change of attitude within the Crown Prosecution Service, and of some counsel prosecuting on their behalf, which throws these principles to the wind. On enquiry among those who work day to day in criminal defence these observations are echoed and fears compounded.

It would appear that the climate of competition, of relative case statistics, and of performance or quality indicators within the Crown Prosecution Service, had eaten away at the fundamental principles of the ethics of prosecution itself. This would have effects not only on innocent defendants, but also on prosecution witnesses who should never have been there and never been sacrificed at trial on the altar of some Crown Prosecutor's need for statistics, or a fashionable view of what might get a good press the next day.

It is clear that ingrained principles do not disappear for everyone overnight. Apparently, two counsel refused the case of Professor Cottingham before the CPS found somebody else to take it.²³ A number of the counsel for the prosecution in cases observed also clearly espoused the traditional approach. But there were cases where prosecution counsel, including Queen's Counsel in one case, toed a different line and a different approach. Not only the Crown Prosecution Service itself, but also the barristers who prosecuted for them, were involved in the prosecution process in a manner quite contrary to the spirit and the letter of the ethical code.

Any such approach, and any breach of the conduct code, even on the part of individual prosecutors, is wrong, cannot be ignored and needs to be corrected. If this is widespread, however, it would clearly reflect a change of culture which is designed and supported within the organisation itself, and has been brought in through the back door, and against the Codes of Conduct of both Solicitors and the Bar.

In summary, a major change away from the "Minister of Justice" approach to prosecution was noted. This change of approach seems quite contrary to the Codes of Conduct of both Solicitors and Bar and also appears to be contrary to the professed Code of Conduct of the Crown Prosecution Service. Such a change in attitude and approach, through the back door, would not be tolerated in relation to any other areas of professional ethics. In this particular context, the approach undermines the basis of the system of criminal justice, and can have massive effects on individuals caught up in the process.

3 - Individual Breaches Of Conduct Observed

A number of individual breaches of the Ethical Codes, which were considered to be serious, were also noted.

Discourtesy on the part of the prosecution to the defence was witnessed, misleading the defence and the court, withholding evidence or ignoring obvious sources of evidence

²¹ See ACLEC *First Report on Legal Education*, 1996 pps 17-18.

²² See footnote 6 above.

²³ Mears, M. *New Law Journal*, 24-4-98.

which would assist the defence case and which would have been essential in preparing the prosecution case according to the ethical rules.

Some items would appear to be comparatively minor but had serious consequences. One police officer sitting behind counsel at a pre-trial hearing about evidence requested by the defence, passed to a Crown Prosecutor and counsel information which was quite untrue and which misled the court. The item itself was minor. The police were being asked when they last visited a site to obtain documentary evidence. The police officer told the Crown Prosecutor who told counsel who told the court that the last visit had been approximately three months before the actual last visit. The police officer herself had made the subsequent visit and either did not remember correctly or misled the court. The effect of this small exchange was to prevent the prosecution being involved in obtaining evidence which would assist the defence, and undermine the prosecution case, whether or not it might uncover the truth.

In the same case the Crown Prosecutor did not enquire into obvious issues, which were a matter of record, relating to prosecution witnesses, or if they did, they did not pass that information over to the defence. Seemingly minor conduct breaches have potential catastrophic effects. Indeed, by misleading the court, by not assisting in any way with third party discovery, they hide evidence which would undermine their case. In doing so, innocent defendants can suffer until found 'not guilty'. But, not only does such misjudgement affect defendants, one cannot underestimate the effect of such bad, and unethical, decisions on witnesses involved in a frightening and completely unnecessary process before and in court. Although some forensic licence must be allowed and there is always some uncertainty as to what will happen in trial, clearly unethical decisions are being made about strategy, conduct and process of trial by prosecutors who seem not to be troubled by Codes of Conduct nor answerable or accountable to any disciplinary measures.

Such breaches are not simply technical. They can cause great pain to individuals concerned, waste public money and bring the system of prosecution and criminal justice into disrepute.

Behaviours witnessed would constitute, if carried out by a solicitor, breaches of the Solicitors Code, Rule 1a,d,e and f.²⁴ There were also breaches of the Solicitors' Code, paragraph 21.19 rule 1, rule 2 and a breach of the Barristers' Code Annex H rules 11.1 and 11.2.

Similarly there would have been breaches of the Crown Prosecutors Code version two paragraphs 5.ii, 5.iv, 5.v and 5.vi (set out above) which have been removed from version

²⁴ Rule 1 of The Solicitors' Code of Conduct, 1996 says "A solicitor shall not do anything in the course of practising as a solicitor, or permit another person to do anything on his or her behalf, which compromises or impairs or is likely to compromise or impair any of the following:

- (a) the solicitor's independence or integrity;
- (b) a person's freedom to instruct a solicitor of his or her choice;
- (c) the solicitor's duty to act in the best interests of the client;
- (d) the good repute of the solicitor or of the solicitors' profession;
- (e) the solicitor's proper standard of work;
- (f) the solicitor's duty to the Court"

three of the Code but which have not been changed and must be elsewhere since they are fundamental principles.²⁵

When such breaches occur there is no information on who detects them, who reports them, who polices them, who adjudicates them, where the figures are and why are they not published two years after the rather late creation of the internal CPS Inspectorate.

In summary, direct, detailed breaches of the Solicitors', the Bar's and the Crown Prosecutors' Code occur. They are not commented on by defence lawyers who seem to accept them as part of the normal scene. They are not what is taught to new and qualified lawyers. They are wrong and they can have considerable consequences.

Conclusion

A fair and open system of prosecution is crucial to the proper administration of justice, to the relationship between the individual and the state and to ensure that the guilty are found guilty and the innocent are left alone or found innocent. In a postmodern world presentation might be considered to be the same as reality. But the presentation of a vague Code giving Crown Prosecutors an easy ride, an internal complaints system without openness and accountability in explaining what happens with complaints, lack of publication of the real ethical rules which are now provided elsewhere for the Service in unpublished loose leaf files, all go against the very standards criticised by the Royal Commission. This is a public service performing an essential and major function and it should be open to scrutiny.

Neither does the Crown Prosecution Service appear to act fairly in terms of the ethical rules which are placed on them. Both the change in general culture and detailed breaches of the Codes have been considered. If the principles are wrong they must be changed. Until then they must be enforced. They are intended to safeguard not just the good name of the profession, but also the needs of clients, the public and other actors within the criminal justice and civil justice systems. They are certainly not there to be obeyed or disobeyed at the personal whim of the professionals concerned.

The new CPS approach does not result in any greater measure of success. Less than 60% of contested cases in the Crown Court ended in conviction in 1996. In 1978, before the CPS was thought of the figure was 50%²⁶, hardly the massive difference expected. So something else is occurring here. In some more public cases with a populist or "political" import one may detect a climate of "prosecution as punishment". This is surely "prosecution as persecution" in the words of Mansfield and Peay.²⁷

Under these circumstances one cannot see how it could be in the interests of justice to give members of the Crown Prosecution Service rights of audience in their own cases.²⁸ It

²⁵ See Para 3.2 of the Explanatory Memorandum to the code, "Some sections of the previous Code have been left out. This is because either they are no longer of relevance or they are better placed in other guidance which Crown Prosecutors receive; for example, because they are too detailed for a Code which explains the basic principles."

²⁶ McConville and Baldwin *Courts, Prosecution and Conviction* (Oxford, Clarendon Press, 1981, p6)

²⁷ *Op. Cit.*

²⁸ *Rights of Audience and Rights to Conduct Litigation in England and Wales: The Way Ahead* Lord Chancellor's Department June 1998 p.36. And see also the new Clause 47 in the Crime and Disorder Bill

cannot be correct to allow the partiality of this service, its internal performance indicators pressurising individuals towards particular approaches, also to carry out the independent role which the court needs as an essential part of making its decisions fairly and openly in the interests of society, in the interests of the state and in the interests of individuals. If they cannot carry out their current role ethically, how can they be expected, given more power and control over what gets to the court and what is said there, to suddenly behave in an ethically fair and responsible manner?

Prosecution, the decision to prosecute, needs the intermediary of an independent mind, of someone with detachment and balance, as Lord Chancellor Hailsham said in the House of Lords in 1972 “as an added safeguard of individual freedom since it involves that a second opinion is always brought to bear”.²⁹ The Benson Commission, Sir Patrick Mayhew, Lady Marre and the government White Papers on Legal Aid similarly all warn of the dangers inherent in not having the “detachment and balance” of an independent advocate as an essential component in fair and responsible prosecution.³⁰ The Prosecution Service needs to be more controlled and not given more power.

giving non-legal “suitable case worker” CPS staff leave to begin and progress criminal proceedings - Edward White, “Crime, disorder-and suitable caseworkers” 1998, 3rd April Sol. Journal.

²⁹ Quoted in Southwell, R. 1989 *The Crown Prosecution Service*, In *The Quality of Justice - The Bar’s Response* pps 146-162

³⁰ *Ibid* .