

## DISCRETIONARY FACTORS IN THE DECISION TO PROSECUTE

Memorandum by the Commonwealth Secretariat and a Discussion  
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During consultations with Governments on possible topics it emerged that discretionary factors in the decision to prosecute was a matter of wide interest and concern, and was of practical relevance.

2. In view of this interest, the Commonwealth Secretariat invited Professor John LI.J. Edwards (author of Law Officers of the Crown, published by Sweet & Maxwell in 1964) to produce a discussion paper on the topic. His paper highlights problem areas and draws in particular from experience in the United Kingdom. Professor Edwards' new book, The Attorney-General, Politics and the Public Interest, to be published shortly by Sweet & Maxwell will include this paper as one chapter. This paper thus also serves as a preview of a major publication.

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The factors that control the outcome of discretionary authority in the area of law enforcement and criminal prosecutions have been aptly described as exhibiting the quality of low visibility. Calls for the public disclosure of the reasons behind individual decisions is symptomatic of a growing unwillingness to accept unquestioningly the exercise of authority whether by government, statutory bodies or other public institutions. The model frequently invoked as epitomising openness and public accountability is the long established tradition of the judiciary in giving reasons in open court for their decisions. The nature of the adversary system supports judicial commitment to this ideal with its concern for identifying the legal issues before the trial commences and for confining the admissibility of evidence to what is relevant in accordance with well established rules. Far less certainty prevails in those other areas of the administration of justice that are concerned with the preliminary steps leading up to the actual trial of a criminal case.

2. These manifold steps include decisions by the police whether or not to charge a citizen, whether to issue a summons or to arrest a suspect to ensure his appearance before the court, whether to support or oppose a bail application, and, most importantly, whether and when to lay an information before a justice of the peace that sets the formal process of the criminal courts in motion. There may be some inexperienced police officers who believe that no discretion exists in the face of evidence that discloses the commission of a criminal offence. It is certainly not unknown to hear senior officers publicly claim that no discretion is exercisable by the police when confronted with otherwise unexplained circumstances pointing to an offence having taken place. In truth, however, neither the law nor the practice of police forces recognises an inflexible rule that requires a prosecution to be launched irrespective of the particular circumstances surrounding the crime, the victim and the perpetrator. Whether the question arises at the initial contact of the police with the crime or at the level of intervention by the Director of Public Prosecutions or a Law Officer of the Crown, the basic principle that applies is enshrined in the passage from Lord Shawcross' speech in the House of Commons in 1951 when he declared: "It has

never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should ... prosecute ... wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest. That is still the dominant consideration." In deciding whether or not to authorise a prosecution, Shawcross added, the Director's office must have regard to "the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations of public policy." These views continue to represent the proper theory of criminal prosecution.

3. Whilst the general principle is correctly expressed in Shawcross' dictum it would be unrealistic to equate in any exact sense the evaluation of the relevant factors at every level of the criminal process. Thus, the exercise of judgment by uniformed police officers on the street or by detectives in the interrogation room is likely to be somewhat circumscribed by the knowledge that their initial response will be reviewed by senior officers in the force. In difficult, important or highly sensitive cases this review will likely extend upwards to include the chief constable. In English constitutional law, as between the chief constable and the local prosecuting solicitor the solicitor-client characterisation of their respective roles means that the final decision whether or not to prosecute is firmly in the hands of the chief constable, or such subordinate officer to whom the delegated power is given to make decisions of this kind. If the recommendations of the recent Royal Commission on Criminal Procedure are adopted and translated into legislation the authority of the prosecuting solicitor will change dramatically but that struggle for supremacy is essentially concerned with the location of the final decision-making power. Our present concern is with identifying the considerations that guide those who have to make the decisions to prosecute or not to prosecute.

#### Discretion and the balancing of competing values

4. Only in very recent years has there been any serious public airing of the discretionary factors that are taken into account by prosecutors. We have now had revealed for public examination some inkling of the balancing of competing values that is the hallmark of discretionary power. The major initiative in opening the windows of disclosure is attributable to the present holder of the office of Director of Public Prosecutions. Since assuming office in 1977 Sir Thomas Hetherington, unlike his predecessors, has gone out of his way to explain in considerable detail how decisions are made in his department. National and regional newspapers, the radio and television media, and occasionally professional bodies and universities, have afforded the Director opportunities to convey a better understanding of the role of the public prosecutor and his relationship to the police forces and to the Attorney-General. The precedents set by Hetherington in England have been paralleled in other countries of which the United States, Canada, Australia, and New Zealand can be cited for individual examples of releasing prosecution guidelines for public scrutiny. Former Directors in charge of the Department of Public Prosecutions revealed as little as possible as to the operation of the institution and this approach was accepted as inevitable if the integrity of the system was to be maintained. The change of policy, instituted by the present Director, has now been in operation for sufficient years to demonstrate that the integrity of the Public Prosecutions' office can remain unimpaired notwithstanding the Director's determination to take the public into his confidence by frankly admitting his mistakes, when called for, but otherwise explaining repeatedly how complex and subjective is the process of reaching an impartial decision as to the enforcement of the criminal law.

5. In the main, the Director's remarks have been associated with the exercise of his "consent" powers or those conferred upon the Attorney-General but with respect to which the Director of Public Prosecutions would normally be involved in advising the Attorney. The focus for these "revelations" has usually depended on the current cause célèbre, so that the involvement of public figure or the contentious nature of prosecutions involving riots, obscenity, race relations, deaths in police custody, or corruption have all tended to figure prominently in the public discussion of the Director of Public Prosecutions' activities. The opportunity for a more dispassionate analysis of the Director's prosecutorial discretion arose in connection with the

appearance of Sir Thomas Hetherington before the Royal Commission on Criminal Procedure. Prior to doing so, Hetherington submitted a volume of written evidence which includes the most authoritative exposition of the factors underlying the decision to prosecute, as practised within the Department of Public Prosecutions. It would be a signal omission, however, when dealing with this subject, not to recognise the even earlier exposure of the inner workings of the office of Director of Public Prosecutions prepared by Mr. Peter Barnes, then an Assistant Director, and delivered to a conference on "The prosecution process" held at the University of Birmingham in 1975. Perhaps it was the cosy setting that prompted the latter to open his remarks by describing the view of the Department probably entertained by the police as being rather like "a sort of voracious Whitehall monster which demands to be fed an unending flow of files and, what is more, sometimes repays all their hard work and kindness by flatly refusing the fare it is offered".

6. The police are obligated to submit to the Director of Public Prosecutions full reports, including witness statements and material documents, in all consent cases that require the statutory approval of the Director, the Solicitor-General or the Attorney-General before criminal proceedings can be commenced. And, in accordance with the Prosecution of Offences Regulations, chief officers of police are also required to provide the Director's office with the same kind of information concerning those categories of offences that are specifically listed in the regulations or which the Director may direct to be the subject of reports to his office because of their individual importance or difficulty. In all, these statutory directives generate some 14,000 cases annually that flow into the Department of Public Prosecutions to be assessed by the relatively small establishment of 53 barristers and 17 solicitors who comprise its full time professional officers.

#### **Decision making in the Department of Public Prosecutions**

7. At the apex of this organisation, of course, is the Director, with Deputy Director immediately beneath him. The Department is divided into nine divisions, the responsibility for which is shared between two Principal Assistant Directors. Metropolitan London police cases occupy the attention of two of these divisions, the work of the Central office being separated from that of the Metropolitan divisions. Three other divisions take care of police cases that emanate from the rest of England and Wales, which is divided into three parts, east, west and south, for purposes of administrative orderliness and even distribution of case loads. The remaining divisions are designed to deal with specialised work that has expanded in recent years. One of these, the research division, handles requests for advice from police forces, coroners and magistrates' clerks as well as preparing submissions, for example, to the Law Commission, the Criminal Law Revision Committee, or to the Parliamentary Counsel on points that arise in draft Bills and which impinge upon the Director's functions. Another division, the fraud and bankruptcy division, concerns itself with major company frauds and the Director's responsibilities in connection with the making of criminal bankruptcy orders by the Crown Courts under the provisions of sections 39 to 41 of the Powers of Criminal Courts Act, 1973.

8. Finally, there are two divisions of the Department of Public Prosecutions entirely devoted to the handling of public complaints of alleged offences committed by police officers. Under section 49(3) of the Police Act, 1964 complaints made by a member of the public have to be reported to the Director of public Prosecutions unless the chief officer of police is satisfied that no criminal offence has been committed. The number of such reports has risen steadily since 1964 and shows no sign of diminishing. To gain a true appreciation of the significance of this development, in 1977 (the latest year for which statistics are available) the Director's office received 9,068 such complaints, which accounted for just over half the Department's total intake in terms of numbers of files received from every outside source. Not all of these complaints involved allegations of assaults, corruption or other serious crimes. On the contrary, the bulk of the complaints were concerned with relatively trivial matters such as careless driving and other minor infringements of the traffic laws. This burden on the Director's office is accepted as inevitable and involves a very special category of discretionary power in the area of criminal prosecutions, to which we shall return in due course.

9. Whatever the assigned responsibilities of each division may be it is headed by an Assistant Director. The remainder of the professional officers, who may be solicitors

or barristers, are distributed among the respective divisions according to the volume of work. The important thing to remember is that, by virtue of section 1(15) of the Prosecutions of Offences Act, 1908 "an Assistant Director of Public Prosecutions may do any act or thing which the Director of Public Prosecutions is required or authorised to do by or in pursuance of any Act of Parliament or otherwise". Consequently, in any discussion of the decision to prosecute it is necessary to bear in mind that the Director's direct involvement in the assessment of the varying factors involved will be truly exceptional and not the normal course of procedure. Speaking in the course of delivering the Upjohn Memorial Lecture in 1979, the present holder of the office of Director revealed that in the two and a half years during which he had been in office he had never been required to take any decision on whether to prosecute in a murder case. He added "...in all I have taken the decision to prosecute, or been concerned in consultations with the police and with counsel, in not more than 10 or 12 cases a year - usually when they are exceptionally sensitive because of the subject matter or because of the persons involved". The majority of cases brought to the attention of the Department of Public Prosecutions, either by way of mandatory edict, to obtain the formal consent of the Director or one of the Law Officers, or to be subject to the guiding discretion of the Director, will not proceed beyond the Assistant Director in charge of the appropriate division or the Principal Assistant Director responsible for co-ordinating the cluster of divisions assigned as his mandate within the Department.

10. The fullest description of the actual functioning of the decision-making process in the Department of Public Prosecutions is contained in the address given to the conference on "The Prosecution Process" by Mr. Peter Barnes, presently the Deputy Director of Public Prosecutions. Barnes emphasised the high level at which decisions to prosecute are taken in the office, decisions which, in his words, "should only be taken after a very careful consideration of all the available evidence, quite calmly and in the light of day because a wrong decision either way can have pretty disastrous consequences". He may well have had in mind the handling of the Confait case in 1972 and the strong criticism subsequently levelled against the professional staff in the Department of Public Prosecutions by Sir Henry Fisher, the former High Court judge, who was appointed by the Home Secretary to conduct a public inquiry into the affair. Three youths, aged 18, 15 and 14 years respectively, were convicted in 1972 of the killing of Maxwell Confait, a homosexual prostitute. They were freed three years later after a successful public campaign to prove their innocence. The entire case depended on confessions by the accused in which they admitted having gone to Confait's home for the purpose of stealing. The victim had been strangled and the three accused were said to have sprinkled paraffin about the home in order to destroy any fingerprints they may have left. At one conclusion of the trial, verdicts of murder, manslaughter by reason of diminished responsibility, and arson were returned by the jury. Leave to appeal against conviction was refused by the Court of Appeal but the case was referred back to the court three years later following the emergence of fresh pathological evidence. It informed the court that a substantial amount of time had elapsed between the setting fire to the house and the death of the victim. In direct contradiction to the confessions obtained by the police there was incontestable evidence that the three youths were elsewhere at the time of the fire. The prime suspect for the murder, a transvestite who lived at the same house as Confait, hanged himself in 1974. He gave evidence at the original trial about the time the fire had started.

11. Evidence adduced before the Fisher inquiry as to the handling of the papers in the Confait case indicated that the professional officer concerned in the Department of Public Prosecutions had treated the case as straightforward because of the independent nature of the respective confessions and their having been repeated in the presence of the youths' parents. He was not aware that there had been another suspect. Sir Norman Skelhorn, the then Director of Public Prosecutions, expressed doubts as to whether the discrepancies, revealed later, should have been spotted and regarded as important by the professional officer who first reviewed the file and whose recommendations were adopted by his superiors. This view was rejected in forthright terms by Sir Henry Fisher, the chairman of the departmental inquiry, who concluded: "It seems to me clear that it was (the professional officer's) duty to look for weaknesses or contradictions in the prosecution's case, and to see whether there were matters which should be further enquired into ... If (as he said) he did not notice anything which required further investigation or specific reference to counsel, then in my view he was at fault, though in extenuation it can be said that he was under great pressure of work. If (as the police say) his attention was drawn to them and he did

nothing, then his fault was greater". Before leaving the subject of his inquiry, Sir Henry Fisher turned his attention to the administrative practices then in force in the office of Director of Public Prosecutions. Noting that the Director had not seen fit to criticise his subordinate's handling of the Confait case, the chairman of the inquiry concluded that "the experienced and conscientious officer did as much as under prevailing practice was expected of him". Based on this assumption the procedures then in place were condemned as unsatisfactory. The lessons of that case are unlikely to be readily forgotten within the Department of Public Prosecutions.

12. Describing the present mode of administering the Department, it has been authoritatively explained that under no circumstances can a decision to prosecute be made by anyone below the rank of Assistant Director who, before obtaining that rank, will generally have served in the Department for something like seventeen years on average. All cases, in the first instance, are sent to the Assistant Director in charge of the particular geographical area where the crime occurred. Short, straightforward cases can be dealt with expeditiously by the Assistant Director reaching a decision himself and communicating at once with the chief constable giving any necessary advice regarding charges and evidence. In all other cases the files will be allocated between the senior legal assistants and legal assistants who constitute the backbone of the division concerned. The individual officer who takes charge of the police file will read the case in greater detail, eventually returning the file to the Assistant Director with a minute summarising the salient facts, identifying any legal or evidential problems and registering his opinion as to the proper disposition of the case. Depending on the seriousness, sensitiveness or difficulties of the case the resolution of the decision to prosecute will be made from among the senior echelons of the office, often after informal discussions that ensure the exercise of all the accumulated experience that is at the disposal of the Director. In addition, if the case is of a highly complex character, either to its facts or the legal issues involved, the Director may invoke the assistance of counsel. In London, this is likely to be one of the eight senior and ten junior Treasury Counsel who conduct all Crown prosecutions at the Central Criminal Court and the Inner London Crown Courts, or one of the Supplementary Counsel whose name is on the Attorney-General's list drawn from the various circuits. Normally, counsel are not instructed by the Director of Public Prosecutions until after committal for trial but this practice will be departed from if the circumstances warrant it and then the same counsel will likely take charge of the committal proceedings. Resort to the opinion of counsel, in the circumstances described above, means exactly that and no more. It does not entail the transfer of responsibility for making the prosecutorial decision from the Director of Treasury Counsel. As Sir Thomas Hetherington explained to the Royal Commission on Criminal Procedure, in the initial stages of a prosecution brought or taken over by the Director of Public Prosecutions he has complete control. It is entirely for the Director to decide against whom proceedings should be brought and on what charges. Once the case has been committed to the Crown Court, however, as Hetherington went on to elaborate, "the position is not so straightforward, since the view is taken that the final responsibility for the conduct of the trial rests with counsel instructed by me to appear for the Crown. The convention, though, is that where questions of substance arise, for example, the acceptance of a plea to a lesser offence than that charged in the indictment, counsel consults me before arriving at a final decision. It is rare that there is any fundamental disagreement between us, but should such a situation arise, the arrangement is that the matter would be referred to the Attorney-General".

13. At whatever level of authority the decision is ultimately taken to prosecute or not to prosecute, the evaluation process involves three separate but inter-related stages. It is possible to compress these exercises into two stages but the position will probably be made clearer if we adhere to the tripartite division of the assessment procedure. How separate the various stages are actually observed in practice may well be open to question, given the years of experience that most of the professional staff can draw upon in reaching their conclusions on the succession of files assigned for their attention. It may be stretching credulity to be asked to believe that each and every such review is conducted with an inflexible adherence to the cycle of analysis that is about to be described. However compressed may be the evaluation of the run of the mill cases that occupy most of the professional officer's time on a regular basis, the following analysis is necessary in order to identify the separate issues that must be resolved in reaching the eventual decision to prosecute or not to prosecute.

14. The first objective is to ensure that there are no insuperable legal or jurisdictional obstacles that could constitute a fatal flaw to the prosecution of a case. Was the

offence, for example, committed outside the jurisdiction of the courts? Have any pertinent time limits for prosecution already passed? Are there any definitional problems that require compliance and which are deficient in the evidence accumulated by the police? It is possible that some of these deficiencies can be rectified by further police investigation, and advice to this effect will be conveyed by letter or in person to the police force concerned. In the absence of such a possibility it stands to reason that it is pointless to pursue the merits of the case if the essential legal underpinnings are not in place.

#### **Sufficiency of the evidence: the fifty-one percent rule**

15. The second stage must next be addressed. It is concerned with the issue whether the evidence in the case is sufficient to justify instituting criminal proceedings. The present Director of Public Prosecutions has repeatedly sought to explain to all and sundry the criterion that applies throughout his Department, at whatever level of authority the operational decision is made. Different wording has been used on occasion to explain the governing test, some less felicitous than others, and we can begin by referring to the Director's written submission in 1978 to the Royal Commission on Criminal Procedure in which Hetherington stated: "The test normally used in the Department ... is whether or not there is a reasonable prospect of a conviction; whether, in other words, it seems rather more likely that there will be a conviction than an acquittal. We set an even higher standard if an acquittal would or might produce unfortunate consequences. For example, if a man who has been convicted of some offence is subsequently acquitted of having given perjured evidence at his trial, that acquittal may cast doubt on the original conviction. Likewise, an unsuccessful prosecution of an allegedly obscene book will, if the trial has attracted publicity, lead to a considerable increase in sales. In such cases we are hesitant to prosecute unless we think the prospects of a conviction are high. We also tend to adopt a somewhat higher standard if the trial is likely to be abnormally long and expensive and the offence is not especially grave".

16. On another occasion, this time in a Memorandum prepared in 1980 for the House of Commons Select Committee on Deaths in Police Custody the Director of Public Prosecutions confirmed that the standards applied in police complaint cases are the same as those invoked in all other cases reported to the Department. "The first consideration", the memo stated, is "whether the totality of the available evidence is of such quality that a reasonable jury (or magistrate, in respect of summary offences) is more likely than not to be satisfied beyond reasonable doubt that the accused is guilty of the offence charged. If so, the evidence is sufficient to justify proceedings. If it fails that test, we would not consider it proper to prosecute".

17. In thus delineating the standard of sufficiency the Director of Public Prosecutions was very conscious of the contrary school of thought that maintains it is incumbent upon the Crown to prosecute whenever there is a "bare prima facie case" and that to raise the minimum standard any higher is to "usurp the proper function of the courts". According to this view, in the absence of unassailable evidence that the prospective Crown witnesses are lying, it is not the function of the prosecutor to decide whether he believes a witness or not. Where the question is whether the prosecution's evidence is likely to be believed, it is argued, this is strictly a matter for the jury (or the magistrate in summary cases) and not the Director to decide. Hetherington's response to this argument is an outright rejection of its underlying thesis. The resolution of the sufficiency of evidence test, in the opinion of the present Director of Public Prosecutions, requires that proper attention be paid to the credibility of the witness since "the universal adoption of a prima facie case standard would not only clog up our already overburdened courts but inevitably result in an undue proportion of innocent men facing criminal charges".

18. The elucidation of the key passages in the above extracts from the Director's written submissions, viz., "the reasonable prospect of a conviction" and it is "more likely that there will be a conviction than an acquittal" resemble the difficulties in giving realistic meaning to the task imposed upon examining justices in deciding whether there is "sufficient evidence" to warrant committing the accused for trial, and upon a trial judge to explain to a jury the standard of "proof beyond a reasonable doubt" in a criminal case, or whether the evidence is sufficient to justify him in withdrawing the case from the jury and which is determined according to "whether or

not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty". It is not my intention to venture into a 'comparative analysis of the respective meanings accorded by the appellate courts to the various criteria mentioned above. These comparable situations are introduced in order to draw attention to the difficulties experienced in applying such nebulous standards, and the additional problem encountered by the Director in explaining to the general public how he and his staff approach the task of defining "sufficiency of evidence". In a no doubt sincere attempt to elucidate this piece of legalise, Hetherington has acquired for himself the immortal title of "Mr. Fifty-one per cent", a reference to his resort to mathematical percentages as a vehicle for simplifying the governing criterion. Formulated in these terms the question to be asked in contemplating a prosecution is this - is there a better than 50 per cent chance that a jury will find the accused guilty on the evidence that the prosecution are in a position to present? Hetherington's words of caution, uttered in another public lecture, that is not possible to evaluate evidence to a percentage degree of accuracy have been lost sight of in the public's preference for simple, uncomplicated metaphors. Talk of cases falling within the marginal 49 to 51 per cent category are equally unhelpful because of the false conception implicit in such language that the prosecutor's decision-making bears the stamp of scientific objective. Nothing could be more misleading inasmuch as it obscures the reality of the situation. An experienced Assistant Director disclaimed any ability on his part to offer a neat yardstick as to how to assess the prospects of a conviction or an acquittal. "All I can say" he frankly admitted "is that we do our best to call upon the experience that we have accumulated over the years, and that in itself is a strong reason for the high level at which our decisions are taken". The truth of the matter lies closer to recognising the subjective nature of the prosecutorial decision in individual cases, it being at least likely that a set of different answers would be forthcoming if the same set of files were to be given to a sample, of say, 20 or 50 professional officers all working in the Department of Public Prosecutions. With the restriction of the actual decision-making to the small coterie of senior staff of Assistant Directors and above, vagaries of subjectivity are probably kept to a minimum.

19. A special consideration that we should look at is the weight attached to an earlier police decision to charge, before the papers in the case have been submitted to the Director's office. This election by the police to go ahead may be necessary, for example, where there are substantial grounds for believing that the accused will leave the country, interfere with witnesses or commit further crimes. In these circumstances it is understandable that the police should wish not only to charge the suspected person but to strongly oppose bail. Other situations, however, arise when the Director's consent is refused on policy grounds notwithstanding the existence of ample evidence to support a prosecution, and it is obviously preferable if the issue of consent is first determined before a formal charge is laid by the police. Pre-emptive action of this kind by the police, it has been readily acknowledged, exerts pressure upon the Director of Public Prosecutions and his staff in sustaining the objective of a dispassionate decision. It is also understandable that a team of detectives who have worked laboriously and conscientiously for an extended period in solving a case should feel an acute sense of having been let down by the Director if approval to the bringing of criminal proceedings is not forthcoming. The police may be firmly convinced of the guilt of the suspect, but if the evidence is insufficient in terms of the probability of a conviction the policy of the Department of Public Prosecutions, as stated by its Director, is to oppose the initiation of a prosecution. Any substantiated indications that the Director of Public Prosecutions and the staff of the Department are prone to succumb to police pressures in making their decisions instead of adhering to the principle of fearless impartiality would surely contribute to the erosion of public confidence. It may be assumed that nowhere is this fact better appreciated than in the Office of the Director of Public Prosecutions itself.

#### **An evaluation of some recent controversial decisions**

20. Criticisms of particular decisions made by the Director have usually centred around cases that have already attracted public attention, in which cultural or political prejudices are readily given rein. In the early years of the office of Public Prosecutions the Director was to defer a public response to criticisms of his decisions until he prepared his annual report for Parliament. This avenue for defending the Department's actions as long since disappeared and it is doubtful whether in present

day conditions of accelerated communication public opinion would be satisfied to await a yearly accounting of the Director's work. What is evident is the readiness of Sir Thomas Hetherington to defend his record after the event by whatever media resources are placed at his disposal.

21. Some of the more notorious cases in recent times have centred on the narrow question of the sufficiency of evidence. In the Blair Peach case in 1979, for example, of the several situations where a suspect has died in police custody in suspicious circumstances, Hetherington has admitted that the reason why there was no prosecution against any particular officer was that it was impossible to tell which of any policemen committed the crime. In an interview with The Times, and referring expressly to the Blair Peach case, the Director stated: "I am not absolutely certain that he was hit on the head by a police officer, but I think it is probable that he was. There was no evidence as to which one, literally no evidence, and no evidence really as to what the weapon was, except that it was a blunt instrument. We don't have the evidence. What they did in fact was to remain silent, which they are entitled to do". This unusually frank disclosure of the thinking that contributed to the decision not to prosecute in that case should not be extended by inference to the 25 other cases involving complaints against a police officer or police officers that resulted from deaths in suspicious circumstances over a period of 10 years between 1970 and 1979. According to figures published by the Home Office in March 1980, a total of 274 people had died while in custody of the police during the same period. Forty-eight deaths, the highest total in any single year, occurred in 1978 during which the number of persons taken into custody was 1.25 million. The disparity in the respective totals mystified many people at the time, including the members of the House of Commons Select Committee. The explanation for the lower figure is that these cases represent those where a public complaint was registered and where the particular chief constable felt it incumbent upon him to submit the papers to the Director of Public Prosecutions under the test laid down in section 49 of the Police Act, 1964. The remainder would be cases in which either no complaint was received or the chief officer of the police was satisfied that no criminal offence could have been committed. Furthermore, the suspicious circumstances surrounding the deaths were not necessarily confined to deaths that took place while the victim was "in police custody", a phrase that can encompass a variety of situations ranging from an arrest in the home or on the street to the actual detention of the person concerned in a police station or in a hospital. Prominent among the cases generally referred to as having given rise to widespread public concern, in addition to Blair Peach, are those of James Kelly (1979) and Liddle Towers (1976), who died after release from custody. The continuous attention devoted to these cases in the press and in Parliament was reinforced by the remarkable fact that arising out of the 26 situations in which the deceased allegedly died at the hands of the police, in different parts of the country, not one prosecution had been instituted by the Director of Public Prosecutions. Questioned on this subject by the members of the House of Commons Select Committee, the Director stated that in each of the 26 cases the decision not to prosecute was based on the failure to surmount the first hurdle of meeting the sufficiency of evidence test. Sir Thomas Hetherington disclosed that he had personally considered three of the 26 deaths, presumably the most controversial cases, and that he had been fully satisfied in each case that there was no further witness that needed to be interrogated and that no further inquiries needed to be undertaken. In some of the cases the papers had been referred to outside counsel whose conclusions were the same as those eventually reached by the Director. Experience and statistics alike, however, confirm the fact that it is only in the very strongest of cases that a jury will convict a police officer of assault. The same pattern of a very high rate of police acquittals exists with respect to all types of indictable offences. Thus the overall acquittal rate in cases brought against police officers is 59%, compared with a national rate in trials on indictment against other citizens of about 17%. Like it or not, juries appear to view with a high degree of scepticism the testimony of prosecution witnesses who have a criminal record or whose background casts a shadow on their degree of credibility. Another statistic which requires some explanation is the remarkably low figure of cases, involving complaints of assault by the police, in which the Director has initiated prosecution of the police officer(s) concerned. In 1979, for example, which is the last full year for which results are available, the percentage of assault cases prosecuted was slightly in excess of two per cent. A partial explanation for this state of affairs is the demonstrated tendency on the part of chief constables, anxious to avoid public criticism that they have sought to protect their own, to send forward for the Director's consideration cases that do not have the semblance of sufficient evidence to

support a prosecution. Many of the circumstances involve nothing more than technical assaults. Even so the perception of different standards being applied is not such that it can be dismissed and there will be a constant need to explain the Director's policies in this regard.

22. Adherence to the same strict standards as to the quantum of evidence necessary to justify prosecution is confirmed by the attitude of the Director of Public Prosecutions in the Cowley Shop Stewards case in 1966, several years before the formulation of Hetherington's "51 per cent rule". Questions were asked in the House of Commons as to why criminal proceedings had not been brought against the stewards who had admittedly conducted a "kangaroo court" and expelled several workers for not taking part in an official strike. Quintin Hogg (as he then was) had earlier accused the Attorney-General of failing to prosecute for improper motives and Randolph Churchill had trotted out the ghosts of the Campbell affair in 1924 as a warning of the fate that might befall the Government because of the Attorney-General's decision not to prosecute. Sir Elwyn Jones, the then Attorney, explained that he had been consulted by the Director but that there was insufficient evidence to justify proceeding against any identified individual. Confirmation of this wholly non-political explanation for the decision became available years later when Mr. Peter Barnes in his Birmingham address, referring to circumstances that seem to match the Cowley case in 1966, stated: "We eventually managed to satisfy him that the evidence really was insufficient but I was left with no doubt whatsoever that the Attorney-General was anxious that there should be a prosecution if possible, although I had equally no doubt that such a prosecution would have been embarrassing to his Government from the political point of view".

23. The failure to institute major prosecutions arising out of the revelations contained in the Bingham Report to the alleged violations of the Rhodesia Oil Sanctions orders was explained by the Director of Public Prosecutions, in defense of the decision not to launch criminal proceedings against the international companies involved in circumventing the statutory prohibitions. According to Sir Thomas Hetherington the true explanation lay in the inability of the Crown to satisfy the 51 per cent standard. The Director had sought the advice of outside counsel, Mr. Michael Sherrard, QC, who concluded that, whatever the Bingham Report may have revealed about political and economic realities, the evidence it contained would not alone justify a prosecution. An investigation in search of the necessary evidence would take several years, involving uncooperative witnesses who were outside the purview of the British courts' jurisdiction. Even then, in Hetherington's judgment, there was insufficient likelihood of obtaining convictions. As with other high profile cases, it is often difficult to separate convincingly the evidentiary reasons for a negative decision as to prosecution and those other public interest considerations that tend to loom large in the decision-making process.

24. There are, of course, numerous instances in which the go-ahead signal is given by the Director of Public Prosecutions and the outcome is a spectacular failure, when judged in the narrowest terms of a conviction against an acquittal. The Jeremy Thorpe case will often come to mind in this kind of comparison, demonstrating as it does the unpredictability of juries or, if it is preferred, the fallibility of the judgments reached in the calm atmosphere of the Department of Public Prosecutions. Asked about the outcome of the Thorpe prosecution, Hetherington rejected any feelings of embarrassment and instead gave the verdict a sense of perspective by declaring that it would be stored away as evidence to guide his instinct when similar facts present themselves again for assessment. Asked whether given another chance he might have prosecuted on different charges, Hetherington insisted that the charges of conspiracy to murder were absolutely right on the evidence before him. More recently, speaking publicly on the legal dilemma concerning well-meaning doctors who deliberately accelerate the death of a patient, Sir Thomas Hetherington described as his most difficult prosecutorial decision the institution of a murder charge in 1981 against Dr. Leonard Arthur who admitted to taking steps to hasten the death of a mongoloid baby. If the prosecution had known in advance of the expert medical evidence to be produced by the defence "it might have changed the whole course of the trial. We might not have charged murder in the first place". The uncertainties of the criminal law had left no scope in which to bring a charge other than murder.

25. The Bristol Riot case, on the other hand, in retrospect appears to have been a genuine error of judgment on the part of the Director and he candidly admitted as

much after the original trial which produced eight acquittals and four jury disagreements. In a charge of riotous assembly, the legal requirement of establishing a common purpose among the various defendants illustrates the importance of the very first stage in the process leading up to a decision to prosecute. The jury's verdict at the original trial demonstrated the dangers of re-indicting those accused with respect to whom there had been jury disagreements, so that it came as no surprise to learn that the Director, after consultation with the Attorney-General, Crown Counsel and the chief constable of Avon and Somerset, had decided not to proceed with a second trial.

26. We turn next to the final stage in the process leading up to the ultimate determination whether to prosecute or not. That decision, it should be emphasised, is not sufficiently explained in terms of answering "Yes" or "No" to the question of prosecution. The decision may involve a choice between the following alternative dispositions: (a) to prosecute if no charge has yet been preferred by the police or other governmental authority; (b) to proceed with any charge(s) already laid; (c) to reduce (or increase) the offence already charged; (d) to charge any other person with the offence; (e) to ask the police to make further inquiries; (f) to discontinue further police investigations in favour of the decision not to prosecute for any offence. Having decided that the evidence is sufficient to justify criminal proceedings, the Director and his senior colleagues must then go on to consider whether the proveable facts and the whole of the surrounding circumstances are such that it is incumbent upon them, in the public interest, to institute a prosecution and with respect to what offence(s). This final decision is, without doubt, the most difficult of all since it involves a subjective attempt to determine what course of action will best reflect the interests of the community as a whole. No ready made yardsticks are available to solve the myriad circumstances recorded in the files submitted to the Director for his decisions. What is apt to be misleading is the impression conveyed in Sir Thomas Hetherington's written submission to the Phillips Commission and repeated in his public statements explaining how the Department functions. The description of the process as an orderly sequence of cumulative judgments, each separated from the other but each requiring an affirmative resolution in order to achieve the final judgment, ignores the impact that public interest considerations are bound to make in borderline cases. Rigid adherence to the separation of the evidentiary and public interest questions is a standard incapable of fulfilment and it is unhelpful to exaggerate the exclusive nature of the separate exercises.

#### **The boundaries of relevant public policy factors**

27. The boundaries of public policy factors that can properly be taken into account when making prosecutorial decisions are slowly becoming identified. This is a positive contribution towards public understanding and support for the substantial element of discretion that is involved in every such decision. Several of these factors are relatively non-contentious and can be described as exculpatory or mitigating in their possible impact. Staleness of the crime will likely influence the Director's eventual decision, it being stated that there is much hesitation to prosecute if three or more years have lapsed between the date of the offence and the probable date of trial. The gravity of the offence will naturally diminish the significance of the element of staleness and the same applies if the complexity of the case explains the prolonged police enquiries. A similar response will likely occur if the accused has contributed to the staleness by disappearing or covering his tracks. Lack of diligence on the part of the police, on the other hand, will tend to enhance the relevance of the time interval.

28. The youthfulness or advanced age of the accused will have to be taken into consideration in appropriate cases. In sexual cases, for example, high regard for the respective ages of the persons involved is generally regarded as a proper balancing of the values at stake. The consenting nature of the victim's participation and the issue of corruption will also bear heavily on the way in which discretion is exercised. In other cases, the younger the offender the greater must be the inclination to examine alternative possibilities such as a caution if the accused has no previous blemishes and, in addition, has a good home background and employment record. Against these positive qualities must be set the seriousness of the crime and the extent to which it has aroused public concern. With respect to a defendant who is of advanced age there must always be concern as to whether he is likely to be fit enough to stand trial. Apart from such a practical matter, there is general reluctance to prosecute anyone

who has passed his 70th birthday and is infirm, unless there is a real possibility that the offence will be repeated or, of course, that the offence is of such a grave character that a prosecution cannot be avoided.

29. Caution is called for when the mental condition of the accused is brought into the discussions preceding the decision to prosecute. Its relevance during court proceedings is unquestioned and the court has broad powers to authorise psychiatric examinations if called for in the particular case. No one can doubt either the importance of evidence of mental illness to the issue of criminal responsibility. What we are presently concerned with is the possible impact that evidence of mental instability should have in avoiding the subjection of the accused to a criminal trial. The initiative in this regard will usually come from the defendant's solicitor who may point to the dangers of a permanent worsening of his client's condition if the prosecution goes ahead. The possible spurious nature of any such claim can be met in part by ensuring an independent examination of the defendant's mental condition. The healthy scepticism that prevails in the Director's office in such matters is perhaps best captured in the view expressed by Mr. Peter Barnes that: "On the one hand it is somewhat distasteful to prosecute someone who is mentally subnormal but on the other hand that very subnormality or abnormality may itself increase the risk of an offence being repeated and so it may be necessary for us to prosecute in the hope that this may result in some form of effective treatment".

30. Perjury is an offence that the public might be forgiven for believing that it has become as much of a dead letter crime as, say, bigamy. In his evidence to the Royal Commission on Criminal Procedure, the Director of Public Prosecutions acknowledged that experience has shown that the modern tendency is for the judges to impose no more than a nominal penalty in cases of bigamy unless there are exceptional or aggravated circumstances. Faced with this reality very few prosecutions for bigamy are nowadays approved, the normal advice being to issue a caution against any repetition of the offence. With perjury, on the other hand, a far more serious view is taken of the crime and it is pertinent to note the principles that guide the Director in his approach to such cases. A clear distinction is drawn between alleged perjury by a witness and that sought to be laid at the door of the accused. In the case of the former, assuming there is sufficient corroboration as required by the Perjury Act, 1911 and a reasonable prospect of a conviction, the Director's office will sanction a prosecution if the perjured evidence goes to the heart of the issue before the original trial. On the contrary, should the evidence, whilst technically in breach of the Act, relate to a peripheral issue and the intent of the witness is more to protect his own skin than to prevent the course of justice, then it is most unlikely that a prosecution will be approved.

31. The position of a defendant who commits perjury is seen in a different light, especially if his effort is unsuccessful and a conviction has been registered in the case. In these circumstances, the Director's submission to the Commission stated: "... it is necessary to have regard to the punishment inflicted by the court and to assess whether a subsequent prosecution for perjury would be likely to result in any substantial increase of the sentence. It is also essential that the evidence should be so exceptionally strong that a conviction is virtually certain, because of the doubts which an acquittal would cast upon the verdict of guilty in the original case. Usually, although not necessarily, it is the emergence of some additional and compelling evidence, after the original trial, which removes the last trace of doubt. Even, however, where there is abundant evidence against a defendant who has unsuccessfully lied without involving others I would not normally think it right to prosecute unless there are aggravating factors". The imperative obligation to balance subordinate considerations one against the other is well illustrated in the further observation that the Director's office "will consider whether the lies necessarily involved an attack on the truthfulness (as opposed to recollection or ability to identify) of one or more prosecution witnesses; whether the lie was clearly planned before the hearing or arose on the spur of the moment during cross-examination; and the degree of persistence in maintaining the lie".

32. This kind of analysis of the conflicting considerations that must be taken into account when contemplating possible proceedings for perjury highlights the impracticality of ever laying down hard and fast rules that will confer a high degree of predictability as to the result of their application. The very nature of discretionary authority requires resistance to any attempt to develop rigid rules that cannot

encompass every possible contingency. Take another factor, that of public expense in maintaining a long drawn out trial. Any suggestion of imposing upon the police or the Director of Public Prosecutions a predetermined ceiling as to the costs than can be incurred in connection with different categories of prosecutions would be abhorrent to the principles of justice and law enforcement. At the same time, lack of any restraint in the face of predictable major expenditures in bringing accused persons to trial would likewise be regarded as irresponsible. Hence the careful balancing of costs against the purposes to be achieved through prosecution that must occupy the minds of the decision-makers in the Office of Public Prosecutions when the magnitude of the bill to be paid out of the public purse cannot be ignored.

33. As one illustration of this unusual factor reference can be made to the crop of potential defendants enmeshed in the Poulson affair. By mid-1974 the list of candidates for investigation and possible prosecution for corruption numbered around 300, most of whom were individuals in subordinate positions whose involvement was relatively trivial. In the event only the leading figures in the conspiracy were brought to trial. Commenting on the decision to single out the principal conspirators in this fashion, Sir Thomas Hetherington has stated: "It is not necessarily in the public interest to prosecute every minnow connected with an offence, provided the whales are tried ... In the Poulson case ... after the prosecution of John Poulson, Dan Smith, George Cunningham and other public servants there were still a number of leads which had not been investigated fully ... They were retired, old, and a lot more money would have to be spent. Was it really in the public interest to go ahead?". The Director of Public Prosecutions has frequently found himself the target of public criticism as a result of his authorising prosecutions that have involved enormous public costs and resulted in the acquittal of the accused. The implication, whether intended by the critics or not, is that it is acceptable to proceed if convictions are obtained, otherwise the ends do not justify the costs incurred. This is asking the impossible of the Director of Public Prosecutions and it is doubtful if there has been any serious criticism of the Director's judgment by those whose responsibility it is in government to guard against the extravagant use of public money.

34. Another amorphous factor that is difficult to pin down relates to the attitude of those who, directly or indirectly, can be said to have a special stake in the outcome of a prosecution. Mention has already been made of the indefinable relationship that occurs between the professional officers who have been in charge of the case up to the point where the papers are transmitted to the Director for decision. The imperceptible pressures engendered by this relationship cannot be dismissed, a senior member of the Director's office going so far as to admit the Department is reluctant to turn around a police decision to charge, unless the evidence is totally without substance. If there is some evidence to support the original police charge the tendency is to let the court make the decision not to commit for trial by soft-peddling the evidence in support of the charge. The attitude of victims and complainants may not exert as powerful an influence, there always being the possibility that the accusation was made in the heat of the moment or as to the last straw in a relationship that has been simmering in intensity for some time. A change of heart on the part of the complainant, be it a person (in a case of assault) or a company (in case of fraud) will be assessed in the light of the seriousness of the offence and the harm inflicted, as well as exploring any suspicion that the withdrawal was actuated by fear. Then there is the current mood of the local community, which may have given expression to its concerns as to the prevalence of the offence in its area, or as in the Bristol Riot case where the views expressed by the chief constable of Avon and Somerset as to the detrimental effects which a new trial would have on racial harmony in the city appears to have been a powerful factor in persuading the Attorney-General and the Director not to pursue charges against the remaining four defendants.

35. There remains the sensitive aspect of the position occupied in society by the defendant, and his or her previous character. At times, it may be difficult to separate these variables and it may even be more of a challenge to demonstrate that equality before the law has been adhered to in the decision to prosecute or not to prosecute, as the case may be. The circumstances surrounding the handling of the prosecution of Jeremy Thorpe, and in particular the delegation by the Attorney-General to the Director of Public Prosecutions of responsibility for making the decision in that case, have already been examined in detail in his work. Apropos our present concern, it can readily be imagined that Sir Thomas Hetherington was acutely conscious of the public position occupied by the suspect, and at the same time sensitive to the enormity of the

charge of conspiracy to murder and the penalty for such a crime. Questioned by The Times representatives in the course of a wide ranging interview on the Director's handling of prominent cases during his tenure of office, Hetherington was asked what his response would have been if Mr. Silkin had instructed him not to prosecute Jeremy Thorpe. The Attorney's instruction, the Director replied, would have been "most unconstitutional". In the event of his proving unsuccessful in persuading the Attorney to change such a hypothetical ruling, Hetherington declared that he would probably have resigned. "It was a basic", he said, "that I wouldn't have been able to carry out my duties thereafter".

36. The position of the Director becomes more vulnerable where he decides against prosecuting and the proposed charge involves a prominent public figure. Allegations of bias and of protecting "the Establishment" will surface quickly in this kind of situation, presenting the Director and the Attorney-General with the choice of riding the storm in silence or responding quickly in a way that is calculated to dispel uninformed criticism. A case in point was that involving Sir Peter Hayman, formerly the U.K. High Commissioner in Canada. In 1978 a packet containing obscene literature and other written material was found in a London bus. The subsequent police investigation revealed the existence of correspondence of an obscene nature, involving young children, between Hayman and a number of other persons. Altogether a total of seven men and two women were named in the report submitted by the Metropolitan London Police to the Director of Public Prosecutions, as possible defendants to charges under section 11 of the Post Office Act, 1953. A further report revealed that one of the nine men, not Sir Peter Hayman, was also carrying on correspondence with another person which indicated that the two shared an obsession about the systematic killing by sexual torture of young people and children. In view of the extreme nature of this latter material the Director decided to prosecute them for conspiring to contravene the 1953 Act.

37. There was no evidence that Hayman had ever sent or received material of this kind through the post. Simultaneously with these inquiries, the police investigation into the activities of the Paedophilic Information Exchange resulted in a separate trial for conspiracy to corrupt public morals, the defendants being involved in the management or organisation of the body concerned. Hayman did not fall within this group. With respect to the original group of nine persons, which did include Sir Peter Hayman, the Director advised against the bringing of criminal proceedings, the principal factors being stated to be, first, that the correspondence had been contained in sealed envelopes passing between adult individuals in a non-commercial context and, secondly, none of the material was unsolicited. The Attorney-General defended the Director's decision in a full statement to the Commons, saying that he was in agreement with the decision. Previously, before Hayman's name was disclosed to the Commons by a Labour back-bencher, the Attorney-General had appealed to the M.P. concerned to spare Sir Peter and his family public humiliation in naming him when the decision had been taken not to prosecute Hayman or any of the potential defendants. Subsequently, the Director explained that the public position occupied by Hayman had had nothing to do with his decision. It had been dictated by the fact that the spirit of the Post Office Act offence had not been infringed, given that it is no offence to possess indecent material and the recipients had not been unwilling victims of the obscene literature in the sense of being shocked and disgusted by the contents.

#### **Decisions not to institute proceedings - the need for restraint in public explanations**

38. This kind of explanation, in such detail, has come to be expected from the present Director. It should be noted, however, that there is a general reluctance to elaborate on the particular considerations that led to a decision not to institute proceedings in specific cases. Such reluctance is explained on two grounds. First, whilst it is reasonably safe to expound in abstract terms on the kind of discretionary factors, reviewed in this chapter, which enter into the decision-making process, there is a marked resistance to disclosing publicly the specific in-house policies that have been developed to guide the professional staff in their approach to certain kinds of offences. The explanation for this resistance, departed from so visibly in the Peter Hayman situation, is that "it would not be in the public interest to risk it becoming known that certain offences of medium or minor importance can in fact be committed with relative impunity". This remark, on the part of the present Deputy Director, contains more than a hint of exaggeration in its basic assumption that the incidence of

criminal activity is directly related to the level of prosecutorial activity. The fundamental questions implicit in this assumption have been addressed in the parallel context of law enforcement activity with little evidence to support the proposition that a strong statistical nexus exists between levels of police action and the levels of criminal activity. This conclusion, it is acknowledged, does not control the public's perception of how the criminal justice system functions and it is these perceptions that principally influence individual behaviour.

39. As for the other ground on which the Director and his colleagues studiously maintain a veil of silence in relation to specific cases, the explanation is principally dictated by the ethics of the Director's relationship to the police, the undisclosed witnesses and the defendant himself. Pressed by the Select Committee on Deaths in Police Custody to go beyond the Department's customary resort to explaining its decision in terms of the insufficiency of the evidence, Sir Thomas Hetherington drew no distinction between police complaint cases and other cases. To make public the grounds on which the evidence was judged to be insufficient to secure the likelihood of a conviction would, in the first place, breach the confidentiality of police reports and statements taken by the police from potential witnesses. Disclosure of the reasons for not believing prospective witnesses might require revealing the criminal record of those witnesses. The same reasons would apply to making public details about the defendant with the result that there would be a public "trial" of the potential defendant without his or her having all the safeguards that are an integral part of a criminal trial in open court. Much as a very substantial body of public opinion might savour the opportunity to engage vicariously in this kind of trial by the media, the Director's adherence to the contrary principles favouring non-disclosure is to be preferred. This choice is not as easy to make as might sometimes be supposed, and the present Director has confessed to the frustration that he has experienced in the more emotive cases, such as Blair Peach and James Kelly, in not being able, because of the principle of confidentiality, to answer publicly the bombardment of criticism to which he and his Department have been subjected.

40. In its Report the Select Committee recommended that the Director of Public Prosecutions should make it his normal practice to supply a complainant with at least a summary of the considerations which led him to decide against prosecution. It also proposed that the police investigation report be made available to the legal representatives of the deceased when appearing at the ensuing coroner's inquest. Both recommendations were rejected by the Director, a decision supported by the Attorney-General for the same grounds as those explained to the Select Committee as governing established practice. That indefinable concept, the public interest, might in exceptional circumstances deem it sufficiently imperative to enforce full public disclosure but it would have to be done after the most careful balancing of the conflicting principles at stake, and with the necessity of requiring the Attorney-General to defend before the House of Commons a decision that runs counter to the general practice faithfully observed by the Director of Public Prosecutions.

#### **Public disclosure of prosecutorial guidelines**

41. Most of what has been written in this paper will have equal application whatever the jurisdiction in which the decision to prosecute or not to prosecute has to be made. There are growing signs too of a disposition to follow the example set by Edward H. Levi, an outstanding Attorney-General of the United States who, during his term of office in 1977, embarked on a programme of formulating the principles upon which prosecutorial decisions should be made. In his prefatory note to the document setting forth such principles Attorney-General Levi stressed that the materials being circulated were not to be construed as Department of Justice "guidelines" and that they imposed no obligations on United States Attorneys, their Assistants, or other attorneys acting on behalf of the United States Government. Ascribing the most modest of objectives to this pioneering initiative Mr. Levi said that it was intended solely for use by government attorneys to the extent that the principles were found to be appropriate in discharging their responsibilities as Federal prosecutors. The Attorney-General's "materials" covered such topics as the decision to prosecute, the election of charges, plea negotiations and, a procedural feature that is peculiar to United States law, opposition nolo contendere pleas. Not surprisingly, there is much common ground between the relevant factors that are said to guide the Director of Public Prosecutions in England and Wales, and those expressed in the Levi documents

as the advisable guideposts within the Federal criminal justice system of the United States. News from Australia indicates the imminent release by the Federal Attorney-General of prosecution guidelines that, presumably, will govern the actions of all counsel and solicitors whose authority derives from the senior Law Officer of the Crown. None of these prosecutorial blueprints is in the nature of hard and fast rules. Within any such sets of guidelines, including those issued by the Attorney-General of England and Wales on the effects of jury vetting and disclosure, there is a considerable measure of discretion as to how the relevant criteria are to be applied in the particular circumstances.

42. This discretion, moreover, attaches to each of the documents that have been referred to, irrespective of whether they are described as "guidelines" or "appropriate considerations that are not to be regarded as departmental requirements", and whether they emanate from the office of the Attorney-General in London, Canberra or Washington. They do not, it is true, carry the force of a "practice direction" similar to those issued from time to time by the Lords Chief Justice after consultation with the Judges of the Queen's Bench and Family Divisions. These latter statements of practice have the same binding force as all other rules of procedure that derive their statutory authority from the Supreme Court of Judicature Acts. Nevertheless, since the Prosecution of Offences Act, 1879, section 2 ordains that the Attorney-General is the minister responsible for the actions of the Director of Public Prosecutions and can issue directives to his subordinate official with respect to any of his functions, it cannot be doubted that there exists a secure statutory basis for the Attorney-General's emerging forays into the setting of guidelines concerned with subjects within the Law Officers' prerogative authority. In this respect, the approach favoured by the Attorney-General of the United States in expressly disclaiming any mandatory component for the guidance afforded to the United States Attorneys would be highly inappropriate parallel to use in describing the modest incursions of the Attorney-General for England and Wales into the same field. At the same time it is interesting to note that, as the Federal Minister of Justice in charge of the United States Department of Justice, Attorney-General Levi attached no qualifications to the series of formal guidelines that he imposed upon the Federal Bureau of Investigation when executing his policy of bringing that agency back into the fold of ministerial control and accountability. This fascinating exercise must regrettably be left to others to recount, as we move on to describe the substantial restriction on the powers of the Attorney-General of England and Wales, and by derivation those of the Director of Public Prosecutions, in the matter of preferring an indictment without prior resort to a preliminary hearing. This powerful discretionary jurisdiction, frequently exercised in such Commonwealth countries as Canada, New Zealand, and Australia is not available in England.

#### **Preferring bills of indictment - British and Commonwealth differences**

43. Prior to 1933 the Attorney-General or the Solicitor-General exercised concurrent jurisdiction with a judge of the High Court in sanctioning the presentation of a voluntary bill of indictment by a private citizen. These restrictions on private accusations were introduced by the Vexatious Indictments Act, 1859 to counter the abuse and hardship incurred by those accused of crimes who had no right to appear before or to be heard by the grand jury before it decided whether or not to return a true bill. Proceedings to determine whether leave should be granted, by one of the Law Officers or by a High Court judge, was always ex parte and the grand jury's subsequent involvement of returning a true bill became a mere formality. Under the provisions of the Administration of Justice (Miscellaneous Provisions) Act, 1933 the grand jury was recognised as a useless anachronism and abolished. At the same time the discretionary power of the Attorney-General and the Solicitor-General to authorise the presentation of a bill of indictment, that would effectively bypass the procedure of a preliminary inquiry before examining justices, was likewise terminated.

44. The avenues remaining to a prosecutor who seeks to bring an accused person to trial by indictment are two fold. The first, and most regularly followed, is by way of committal to the Crown Court following either the taking of depositions as part of the preliminary hearing or by resort to the accelerated procedure which, since the coming into force of the Criminal Justice Act, 1967, section 1, allows a committal, in given circumstances, without consideration of the evidence. Briefly, the circumstances require that all the evidence be in the form of written statements or exhibits and that

no objection is voiced by the defendant or his lawyer to the effect that there is insufficient evidence to put the defendant on trial by jury for the offence(s) charged. What have come to be known as "section 1 committals" cannot be resorted to if the defendant is not legally represented. The second avenue open to a prosecutor is to circumvent the committal procedure altogether by way of seeking the leave of a High Court judge ex parte in accordance with the provisions contained in section 2(2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933 which states: "... no bill of indictment charging any person with an indictable offence shall be preferred unless either - (a) the person charged has been committed for trial for the offence; or (b) the bill is preferred ... by the direction or with the consent of a judge of the High Court or pursuant to an order made under section 9 of the Perjury Act 1911." These powers merely replicate the jurisdiction originally conferred on the High Court under the terms of the Vexatious Indictment Act, 1859. It is this procedure which the Director of Public Prosecutions, like any other private prosecutor, has to invoke when faced with unexpected obstacles that arise in the course of seeking a normal committal by the examining justices.

45. A prolonged preliminary hearing, for example, with little prospect of an expedited committal, may prompt drastic action by the Director as occurred in the Terence May case in 1981 when 15 black youths were charged with a variety of offences including murder, affray, and riotous assembly following the death of a motor cyclist in South London. The conduct of one counsel representing the defendants at the committal hearing was the subject of a formal complaint made by the Attorney-General to the Professional Conduct Committee of the Bar Council, a step that was later repeated at the conclusion of the actual trial. In another recent situation, involving the unexplained death of Barry Prosser, an inmate of Winson Green Prison, Birmingham, and the second refusal of the examination magistrate to commit the three accused prison officers to trial because of the insufficiency of the evidence presented by the Crown, the Director of Public Prosecutions changed his mind after first stating that the case was closed. After consultations with the Attorney-General, ex parte proceedings were begun that resulted in the Director obtaining leave from Stephen Brown J., for the presentation of a direct indictment against the prison officers concerned. At the subsequent trial in Leicester Crown Court all three accused were acquitted of murder. In yet another case, R. v. Raymond, that eventually found its way before the criminal Division of the Court of Appeal, it was said that the defendant "gave such unmistakable indications of an intention seriously to disrupt the committal proceedings as to make a mockery of them" that counsel for the Crown decided to abandon them and to seek leave to prefer a bill of indictment from a High Court judge. The principal ground of the appeal against conviction of the accused for theft of currency worth more than £2 million from the storerooms of Heathrow Airport was the failure of the judge, hearing the ex parte application, to afford the appellant an opportunity to be heard if he wished to do so. After carefully reviewing the entire history of preferring bills of indictment, Watkins L.J., speaking for the court, rejected the argument that the 1933 Act had conferred any such right or that the elimination of the roles formerly associated with the Law Officers required the High Court judge to conform to the audi alteram partem rule. In his concluding remarks Watkins L.J. said: "There can be no doubt that the defendant is becoming, if he has not already become, a practised disturber of court proceedings. In agreeing to receive and consider the written representations made by his solicitor on the defendant's behalf, Michael Davies J., probably paid him much more regard than he ever deserved."

46. By English standards, the legislation of many Commonwealth countries confer extraordinary powers upon the Attorney-General and his agents who are empowered to prefer an indictment irrespective of whether a preliminary inquiry has or has not been held or that such an inquiry has resulted in the accused being discharged. There is, for example under the Canadian Criminal Code, the parallel procedure whereby a private individual can seek leave to prefer a direct indictment from a judge of a Provincial Supreme Court or from the Attorney-General. In some circumstances the Attorney-General may elect to proceed by way of seeking leave from a superior court judge, notwithstanding his having jurisdiction in his own right to prefer an indictment. Electing to proceed by the former route might be explained by the desire of the Attorney-General not to risk further criticism in unilaterally re-activating a prosecution that failed to secure a committal by the examining justice. There is a similar sensitivity evident in the accepted judicial view that "If the Attorney-General has definitely refused to prefer, or to consent to the preferring of a charge, the

Court should hesitate to order or consent to the laying of the charge as to which his refusal has been made, and should refuse its order of consent when it is made to appear that the administration of justice is being prejudiced or jeopardised by the proper action of that officer who by custom, tradition and constitutional usage, as well as by law is charged with the administration of justice in the Province". It is by virtue of the co-equal jurisdiction conferred upon the court in preferring indictments, under the provisions of sections 505 and 507 of the Code, that in this instance a departure is justified from the fundamental proposition that the Attorney-General's prosecutorial discretion is not examinable by any court but is subject to review by the legislature, to whom the Attorney-General is answerable.

47. This principle of judicial deference to the Attorney-General in matters pertaining to the institution of criminal prosecutions makes it totally unrealistic to contemplate the adoption in Canada and other Commonwealth countries of the law that now prevails in England and Wales in which, as we have seen, the leave of a High Court Judge is the only route open to the Attorney-General, the Director of Public Prosecutions or any private person who seeks to present a bill of indictment as the most expeditious procedure for commencing trial on indictment. Until the Criminal Law Act, 1967, there was always the possibility that the Attorney-General could invoke his prerogative authority to file an ex officio information, the origins of which are traceable as far back as the reign of Edward I. The Divisional Court's condemnation in R. v. Labouchere (1890) of the laxity with which, in the early part of the nineteenth century, the normal process of presentment and indictment was by-passed, exerted a powerful restraint upon holders of the office of Attorney-General in resorting to their prerogative discretion of filing ex officio informations. The last recorded instance in which a criminal trial was launched in this manner was R. v. Mylius in 1911 when Sir Rufus Isaacs, as Attorney-General, without resort to a preliminary inquiry, filed an ex officio information charging the accused with criminal libel against King George V. This special privilege of the Attorney-General survived the legislative scythe that in the Administration of Justice (Miscellaneous Provisions) Act, 1938, section 12, abolished outlawry proceedings, the exhibiting of articles of peace in the High Court, and criminal informations "other than informations filed ex officio by His Majesty's Attorney-General". The Criminal Law Revision Committee in its Seventh Report, observing that the procedure had not been used since 1911, described the Attorney General's prerogative right as "plainly unnecessary" and recommended that it should be abolished. The final demise of the Attorney's ex officio information was effectuated in the Criminal Law Act, 1967, section 6(6) of which declared that "Any power to bring proceedings for an offence by criminal information in the High Court is hereby abolished". No voices in opposition to this move were raised during the passage of the Bill through Parliament. We must presume, therefore that the Law Officers, as well as past holders of those offices, were reconciled to the need to obtain the leave of a High Court judge procedure for bringing accused persons speedily to trial.

48. One interesting postscript, from Australia, is the confirmation by its High Court in Barton v. R. (1981) that ex officio informations (or ex officio indictments as they are there described) are alive and well in New South Wales in accordance with the powers conferred by the Westminster Parliament in the Australian Courts Act, 1828, section 5. This law was intended to confer upon the colonial counterparts the same prerogatives as those practised by the Attorney-General of England. Due note was taken in Barton of the abolition in 1967 of the English Attorney-General's former privilege of filing an ex officio information in the Queen's Bench Division of the High Court, but there was no disposition to urge that similar action be instituted in the Australian legislative bodies. The remarkable feature of the High Court's decision was the lengths to which a majority of the Justices were prepared to go in according the accused a fundamental right to have the prosecution present its case through a preliminary inquiry. No suggestion was made that the Attorney-General's decision to commence a prosecution was examinable by the courts. Rather, the approach was more indirect in its adoption of the position that "a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair". According to the majority of the justices of the High Court "It is for the Courts, not the Attorney-General, to decide in the last resort whether the justice of the case requires that a trial should proceed in the absence of committal proceedings. It is not for the courts to abdicate that function to the Attorney-General, let alone to Crown Prosecutors whom he may appoint ... If the courts were to abdicate the function there is the distinct possibility that the ex officio indictment, so recently awakened from its long slumber, would become an active

instrument, even in cases in which it has not been employed in the past, notwithstanding the criticism which has been directed to it and the assertions of commentators that it was appropriate for use of in a very limited category of cases". Reconciliation of the two principles adumbrated by the High Court of Australia is to be found in the unanimous assertion that, notwithstanding the non-reviewability of the Attorney-General's decision to launch the prosecution, the courts may postpone or stay the ensuing trial on indictment in circumstances where such action is necessary to prevent an abuse of process and ensure a fair trial for the accused person.

49. Stephen and Wilson J.J., refused to subscribe to the theory that a prima facie case of abuse of process would arise whenever the accused was denied the essential prerequisite of committal proceedings. The detriments associated with a preliminary hearing, they maintained, could be overcome by resort to speedier and less cumbersome forms of pre-trial discovery. In each jurisdiction, except New South Wales, it is possible for the committal to rest on written statements. And in four of the Australian States, Victoria, Queensland, Tasmania and Western Australia, what is tantamount to the English procedure of "section 1 committals" (under the Criminal Law Act, 1967) is already in place.

50. This attention to the Australian High Court's ruling in the Barton case is less important for the actual decision, that pertains to the unique character of New South Wales law, than the deeper issues it explores in connection with the court's role in examining the procedural discretion exercised by the Attorney-General. The Australian justices adhered closely to the constitutional separation of powers doctrine that impels the English courts likewise to reject any jurisdiction by way of reviewing the Attorney-General's decision to institute criminal proceedings, to enter a nolle prosequi, to seek an injunction to prevent the commission or repetition of a serious offence, or the Director's intervention to take over a private prosecution and to end the proceedings by offering no evidence. The same general principles govern the approach of the Canadian courts in declining to become too closely involved, except when required to do so by express statutory provision, in questions that will decide whether a prosecution should be commenced. When the ultimate function of the court is to determine the accused's guilt or innocence it is rightly concluded that the judges should not be seen to be associated with the initial step of allowing the prosecution to take place. The broad consistency of the judicial approach to this problem is departed from in dramatic fashion under present English law when the issue of approving the presentment of a bill of indictment, without resort to a committal hearing, is conferred exclusively upon a judge of the High Court.

51. This extraordinary jurisdiction is of moderate antiquity dating back to the Vexatious Indictment Act, 1859, and it is doubtful whether its exercise has been so frequently resorted to as in the turbulent years of recent memory. The elimination in 1933 of the former jurisdiction of the Law Officers to grant leave concurrently with a judge of the High Court may well have been dictated by the desire to provide safeguards against the abuses associated with the filing of ex officio informations in the eighteenth and nineteenth centuries. In remedying one possible ground of public dissatisfaction with the criminal process, Parliament may unwittingly have laid the foundations for a future conflict of purpose between the judiciary and the Law Officers of the Crown.